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W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law

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Abstract

Few international legal fields have seen an increase in literature over the past decade as steep as international investment law. This reflects the growing interest in practice and academia in what is probably not only the most dynamic area of international law but also one with significant impact on domestic law and policy-making. What is striking, apart from the sheer enormity of writing, however, is the changes the discourse on international investment law has undergone. Focus, topics, conceptual and methodological approaches, authorship, and audiences of the present literature differ significantly from that of the turn of the millennium. This reflects both an evolution in the law itself and changes in the professional, political, and institutional practices and communities involved. The literature on international investment law thus is a reflection of the sociological dimension of a discipline that until recently was the province of a small group of specialists and now is rapidly moving mainstream.

1 International Investment Law as a Specialized Field

Over the past decade, we have witnessed a veritable boom of literature on various international legal aspects relating to the protection of foreign investments. This boom follows the unprecedented increase in practical importance of this area of international law and dispute settlement. From its inception in 1987, when the first investor–state dispute was filed under a bilateral investment treaty (BIT),¹ practice has

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¹ *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, 30 ILM (1991) 577.

grown to almost 400 such disputes to date.² Likewise, international treaties in the area have proliferated, above all after the end of the Cold War. Since the first BIT that was concluded between Germany and Pakistan in 1959,³ numbers have risen to now more than 2,700 such treaties in addition to the Energy Charter Treaty, a sectoral investment treaty,⁴ and approximately 300 investment chapters in bilateral or regional free trade agreements,⁵ including the North-American Free Trade Agreement (NAFTA).⁶

Initially, the literature connected to the rise of this phenomenon consisted mainly of law journal articles in general, as well as specialized arbitration and investment law journals.⁷ Some of those had a lasting impact on the debates in the field.⁸ Since 2004, we have also seen a significant increase in hard- and soft-cover books in the field, including monographs, handbooks, commentaries, edited volumes, collected essays, conference proceedings, and, since 2009, a specialized yearbook.⁹ Just like investment treaties and investor–state arbitration earlier on, the literature on international investment law is proliferating. This not only reflects the immense interest in international investment law and the professional and academic opportunities it offers, but also circumscribes what has to be understood as the emergence of a new specialized field.

Yet, international investment law not only gives rise to enthusiasm as an area of international law that appears to work rather effectively in combining public international law rules with private enforcement in investor–state arbitrations;¹⁰ it also

² See United Nations Conference on Trade and Development (UNCTAD), 'Latest Developments in Investor–State Dispute Settlement', *IIA Issues Note No. 1* (2010), at 1–2, available at: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf (recording an aggregate of 390 treaty-based investment disputes by the end of 2010).

³ Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, signed 25 November 1959, entry into force 28 April 1962.

⁴ Energy Charter Treaty (ECT), Annex I to the Final Act of the European Energy Charter Conference, 17 Dec 1994, 34 ILM (1995) 373. See in depth T.W. Wälde (ed.), *The Energy Charter Treaty – An East-West Gateway for Investment and Trade* (1996); C. Ribeiro, *Investment Arbitration and the Energy Charter Treaty* (2006); G. Coop and C. Ribeiro (eds), *Investment Protection and the Energy Charter Treaty* (2008); T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (2011).

⁵ See UNCTAD, *World Investment Report 2010 – Investing in a Low-Carbon Economy* (2010), at 81, available at: http://www.unctad.org/en/docs/wir2010_en.pdf (recording an aggregate of 2,750 BITs by the end of 2009 as well as 295 investment agreements other than BITs). In 1989, by contrast, there were fewer than 400 such treaties; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998), at 9.

⁶ North-American Free Trade Agreement (NAFTA), signed 17 Dec. 1992, entry into force 1 Jan 1994, 32 ILM (1993) 289 and 605. See on NAFTA's investment chapter in depth M.N. Kinnear, A.K. Bjorklund, and J.F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (2006).

⁷ These are principally the *Journal of International Arbitration* (since 1984), *Arbitration International* (since 1985), *ICSID Review-Foreign Investment Law Journal* (since 1986), the *Journal of World Investment and Trade* (since 2000, called *Journal of World Investment* for Vol. 1–4), *Transnational Dispute Management* (since 2004), and the *Journal on International Dispute Settlement* (since 2010).

⁸ For example Paulsson, 'Arbitration Without Privilege', 10 *ICSID Rev. For Inv LJ* (1995) 232; Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia J Int'l L* (1998) 639; Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 *British Yrbk Int'l L* (2003) 151.

⁹ K. Sauvank (ed.), *Yearbook of International Investment Law & Policy*.

¹⁰ See, e.g., Wälde, 'Improving the Mechanisms for Treaty Negotiation and Investment Disputes', 1 *Yrbk Int'l Inv L & Policy* (2008–2009) 505, at 506 (describing this development 'as an unmitigated success').

causes bewilderment and apprehension among international and domestic public lawyers about the increasing specialization and autonomization of the discipline, which may have negative impacts on domestic law- and policy-making.¹¹ They are reflected in the process of contestation we can currently witness in both state practice and literature concerning international investment law.

What is more striking than the sheer enormity of writing, therefore, is the changes that have taken place in the discourse and the dynamic it displays. Focus, topics, conceptual and methodological approaches, authorship, and audience of the present literature differ significantly from what we saw roughly ten years ago before the field in its present form emerged. While most of the literature today represents mainstream international investment law, which focuses on how the law is applied in investment dispute settlement and which is the product of specific professional perspectives and biases, the prevailing discourse and the underlying professional practices are also the object of critical observation from various external perspectives. The development of the discourse on international investment law therefore reflects both an evolution in the law itself, and changes in the professional, political, and institutional practices involved.

The literature on international investment law, in consequence, is a reflection of the sociological composition of the field itself.¹² At first, the community of international investment lawyers consisted of a small group of specialists; meanwhile, however, the field is rapidly evolving towards becoming a core topic of international economic law and international law more generally. Whereas Martti Koskenniemi, in the 2006 Fragmentation Report, still described international investment law as an area of 'exotic and highly specialized knowledges', and contrasted it with simply 'specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", [and] "European law"',¹³ it now grasps interest and attention from international lawyers more generally. The different perspectives from the outside of international investment law, however, also cause irritations and a sense of fragmentation within the investment law community. In consequence, both an understanding of the functioning of, and debates within, international investment law and an understanding of its outside perceptions are key for a constructive and open discourse that can transcend the boundaries of the respective disciplines.

Against this background, it is timely to provide an overview of the literature and the debates both within and about international investment law. The focus of the present literature review is primarily on the monographic literature, which regularly provides a more comprehensive account of the field than isolated journal articles. Similarly, the present article will not cover monographs dealing with specific, mainly

¹¹ Cf. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, International Law Commission, 13 Apr 2006, UN Doc A/CN.4/L.682, at paras 1–15.

¹² Sociological approaches to analysing international investment law and international economic law more generally are still rare. But see Hirsch, 'The Sociology of International Economic Law', 19 *EJIL* (2008) 277.

¹³ Koskenniemi, *supra* note 11, at para. 8.

doctrinal topics that are primarily relevant for specialists.¹⁴ Its aim is rather to provide an overview of the larger debates that take place in respect of international investment law, both within the community of investment law specialists and beyond. These debates are best understood as reactions to the evolution of international investment law and as a function of the different epistemic communities, with their specific professional perspectives, that have taken an interest in international investment law.

Section 2 focuses on the change in perspective resulting from the development of international investment law from a law governing exclusively inter-state relations to a law focusing on the relations between investors and states. Section 3 shows that this focus on the individual not only is a watershed in legal terms, but also influenced the social composition of the discipline and its literature. The investor–state focus brought together public international lawyers and lawyers with a background in international commercial arbitration. These groups have influenced the mainstream perspectives in the literature on international investment law so far. Section 4 turns to the process of contestation by various actors, including states, academics, and non-governmental organizations, that has arisen concurrently with the mounting number of investment arbitrations. This process, often designated as the ‘legitimacy crisis’ of international investment law, has not only increased awareness of the impact of international investment law on domestic regulatory autonomy and democratic self-determination, but also given rise to approaches in scholarship that see investment law against a public law background that differs in important regards from mainstream approaches. Section 5, finally, concludes by addressing future challenges for the discourse on investment law and makes some suggestions about where the booming literature should move.

2 The Emergence of International Investment Law

The literature on international investment law has not only increased over the past decade simply by number, it has also evolved in respect of authorship, topics, conceptual and methodological approaches, and audience addressed. These developments result primarily from transformations in the social reality of investor–state relations, in the applicable law and modes of dispute settlement, and in the professional communities for which international investment law has become relevant in the course of that evolution. As a result, today international investment law and the literature on it are different from about a decade ago. This section summarizes the changes in paradigm that international investment law has undergone since 1990, and then

¹⁴ See, e.g., S. Ripinsky with K. Williams, *Damages in International Investment Law* (2008); I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008); I. Marboe, *Calculation of Compensation and Damages in International Investment Law* (2009); M. Sasson, *Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International and Municipal Law* (2010); J.O. Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (2011).

discusses how these developments left their marks in the first writings that can be understood as heralding the advent of mainstream international investment law.

A The Changing Face of International Investment Law: From Inter-State to Investor-State

Prior to the end of the Cold War, foreign investment was still a relatively marginal phenomenon. Today, by contrast, it has established itself as a significant factor in transborder economic activity.¹⁵ At the same time, the international political discourse about foreign investment has changed significantly. In the 1970s and 1980s, all but industrial Western countries challenged the protection of property against expropriations under customary international law in their attempts to establish a New International Economic Order in the UN General Assembly;¹⁶ meanwhile, by contrast, fundamental ideological differences about the desirability of property protection under international law have largely disappeared, above all in intergovernmental discourse.¹⁷ Moreover, the international law protecting foreign investment is no longer primarily enshrined in customary international law, supplemented by investor–state contracts,¹⁸ but in international investment treaties that lay down a typical set of rather vaguely formulated standards of investment protection, including national and most-favoured-nation treatment, fair and equitable treatment, and protection against expropriation without compensation.¹⁹ In order to attract foreign investment, investment treaties now span a large number of investment flows not only between North and South, East and West, but also between developed countries and between developing countries.²⁰ Likewise, investment flows are becoming increasingly multi-directional, flowing not only from developed into developing countries, but also in the reverse direction. Today, foreign investment flows and investment treaties have become a truly global phenomenon that is part and parcel of the process of economic globalization.

¹⁵ UNCTAD, *World Investment Report 2010 – Investing in a Low-Carbon Economy* (2010), at 2, available at: http://www.unctad.org/en/docs/wir2010_en.pdf; on the history of international investment law see Vandevelde, 'A Brief History of International Investment Agreements', 12 *UC Davis J L & Policy* (2005) 157; A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (2009), at 1–73.

¹⁶ See R. Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (1985), at 24–34.

¹⁷ See Wälde, 'A Requiem for the "New International Economic Order" – The Rise and Fall of Paradigms in International Economic Law and a Post-mortem with Timeless Significance', in G. Hafner and G. Loibl (eds), *Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (1998), at 771.

¹⁸ The protection of foreign investment by contract, and the possibility of subjecting contracts to international law, was an important debate in the pre-BIT era. See the analysis of that debate in Voss, *supra* note 14, at 15–50.

¹⁹ Juillard, 'L'Évolution des sources du droit des investissements', 250 *RdC* (1994) 9, at 75 ff; Salacuse, 'The Treatification of International Investment Law', 13 *L & Business Rev of the Americas* (2007) 155.

²⁰ See UNCTAD, *South–South Cooperation in International Investment Arrangements* (2005), available at: http://www.unctad.org/en/docs/iteiit20053_en.pdf. Whether these treaties actually have the effect of attracting foreign investment, however, is an as of now unresolved issue. See, e.g., the various contributions in K.P. Sauvant and L. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (2009), at 109–457.

In view of the now widespread positive attitude of governments and international organizations, including the Organization for Economic Cooperation and Development (OECD), the International Monetary Fund, and the United Nations Conference on Trade and Development (UNCTAD), towards foreign investment, large-scale expropriations and nationalizations virtually have disappeared as instruments of policy-making.²¹ Instead, investment treaties increasingly give rise to complaints of foreign investors about more indirect measures and breaches of vague standards such as fair and equitable treatment. Most importantly, investment disputes are no longer principally settled at the inter-state level by means of diplomatic protection but in investor–state arbitrations that the investor him- or herself can initiate under most modern investment treaties. This empowerment of private investors under international law in a system of ‘arbitration without privity’²² constitutes a ‘change in paradigm in international investment law’²³ that is responsible for generating a growing amount of case load and arbitral decisions. It is these decisions that, as non-binding precedent, influence the interpretation and application of investment treaties by later arbitral tribunals. Together, they create a body of investment law that concretizes and further develops the law applicable to and by investment treaty tribunals.²⁴

Even though there is a recent trend among states to recalibrate investment treaties in reaction to interpretations by investment treaty tribunals that were considered overly restrictive of state sovereignty,²⁵ and thereby to restrict the impact of arbitral tribunals, the introduction of investor–state arbitration, together with the fact that most awards resulting from such arbitrations become public,²⁶ has led to a shift in focus in investment law from inter-state treaty-making to investor–state dispute settlement. Investment treaty arbitration has not only transformed tribunals into important actors in the field, but also led to the emergence of a specialized investment treaty arbitration bar. Although a significant number of public international lawyers are involved in the practice of investment treaty arbitration, most members of this specialized bar have a background in commercial arbitration.

Finally, over the past decade international investment law has gained increasing importance for domestic law and policy-making. Although questions relating to the

²¹ Minor, ‘The Demise of Expropriation as an Instrument of LDC Policy, 1980–1992’, 25 *J Int’l Bus Stud* (1994) 177. More recently, however, expropriations and nationalizations reappear as an instrument of policy-making in some Latin-American countries, such as Bolivia and Venezuela.

²² Paulsson, *supra* note 8.

²³ Schreuer, ‘Paradigmenwechsel im Internationalen Investitionsrecht’, in W. Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende* (2002), at 237. It is controversial, however, whether an investor by having recourse to investor–state arbitration enforces individual rights granted to him or her under international law or whether the rights and obligations in investment treaties remain inter-state obligations. Foundational for this discussion is Douglas, *supra* note 8.

²⁴ See S. Schill, *The Multilateralization of International Investment Law* (2009), at 278–361.

²⁵ See also *infra* sect 4A.

²⁶ Although some investment treaty decisions and awards are also published in hard copy, *inter alia*, in the ICSID Reports, the ICSID Review, International Legal Materials, and others, they are most easily and most quickly available online via the Investment Treaty Arbitration website, available at: <http://ita.law.uvic.ca> or the Investment claims website, available at: <http://www.investmentclaims.com>.

protection of foreign investments, mostly in connection with expropriations, have occasionally played a role before 1990 in domestic courts,²⁷ international investment law initially had remained a field with only marginal impact on the domestic level. Nowadays, by contrast, it significantly affects domestic administration, legislation, and dispute settlement in domestic courts, because many state measures potentially have an impact on foreign investors who, in turn, can challenge such measures in investment treaty arbitration. As a consequence, investment treaties and investment treaty arbitration exercise significant pressure on states to adapt their domestic (public) law to investment treaty standards. This development, ultimately, is responsible for lawyers specializing in domestic public law taking an interest in international investment law.

B Emerging Literature: The View of the 1990s

The developments in international investment law also reflect in the literature that was available in the 1990s. This literature is mainly focused on topics reflecting the ideational state of the law prior to 1990. Thus, M. Sornarajah's monograph on *The International Law of Foreign Investment*, first published in 1994,²⁸ still embeds investment law into the struggle between capital-exporting and capital-importing countries. Writing from a developing-country perspective, he presents international investment law principally as a reflection of power in North–South relations. This power struggle, in his view, has led to the rejection of multilateral investment protection treaties by developing countries as a group, and the increasing conclusion of BITs towards the end of the Cold War and beyond.²⁹

Furthermore, Sornarajah discusses investment treaties as one topic amongst others, together with the extensively discussed state of customary international law on expropriation, contractual devices for foreign investment protection, or the regulation of multinational enterprises by a code of conduct under discussion in the UN in the late 1970s and 1980s. Questions of investment dispute settlement, by contrast, play a relatively smaller role in the book.³⁰ At the time, investment law was firmly embedded in an inter-state framework and was still as much a topic of international power politics and hegemony as of general international (economic) law.

Still, three monographs that were published during the second half of the 1990s appear paradigmatic in indicating the changes in international investment law and foreshadowed, at least retrospectively, the path mainstream literature has taken since. First, in 1995, Rudolf Dolzer and Margrete Stevens published the first mono-

²⁷ See M. Sornarajah, *The Pursuit of Nationalized Property* (1986), at 242–301.

²⁸ M. Sornarajah, *The International Law on Foreign Investment* (1st edn, 1994; 2nd edn, 2004; 3rd edn, 2010).

²⁹ Guzman, *supra* note 8, at 666–680 (for whom competition among developing countries in signing BITs resulted in a race to the bottom in terms of imposing restrictions on sovereignty) is of the same opinion.

³⁰ Although the most recent edition discusses the relevant jurisprudence of investment treaty tribunals, that discussion still plays, compared to competing works, a less prominent role.

graph dedicated to providing a systematic overview of BIT practice worldwide.³¹ Unlike a few earlier authors,³² Dolzer and Stevens did not review BIT practice in relation to a specific country, nor did they present their monograph as a collection of country reports. Instead, their approach was to provide an overview of BIT practice as it related to all the provisions found in a typical BIT. This work laid the foundation for perceiving investment treaties not as isolated instances of bilateral treaty-making but as an emerging international practice giving rise to common standards of investment protection.³³ The book by Dolzer and Stevens, thus, is at the origin of seeing investment treaty law as a uniform discipline in international law.

Secondly, in 1998, Charles N. Brower and Jason D. Brueschke published a monograph on the jurisprudence of the Iran–United States Claims Tribunal,³⁴ providing a detailed analysis of the various procedural and substantive issues arising in the disputes settled by the Tribunal. Although their work focused on a specific institution to resolve foreign investment disputes that resembled the pre-World War II inter-state claims commission more than modern investment tribunals, it is indicative of later developments in the literature on international law in at least three regards: First, it was written by two authors directly engaged in the practice of the institution itself;³⁵ secondly, it focused principally on the jurisprudence of the Tribunal and understood it as a reflection of general international law – its task was accordingly to show the contribution of the Tribunal’s jurisprudence to public international law more generally; and, thirdly, it discussed the Tribunal’s treatment of procedural issues, including appointment, challenge, and powers of arbitrators, evidentiary issues, and provisional measures, as questions of an emerging common law of international arbitration (both public and private).³⁶ With its dual direction of addressing the Tribunal’s influence on public international law and international arbitration, the book already endorsed the ‘twin influences’³⁷ of arbitration procedure and public international law on modern international investment law.³⁸

Finally, in 2001, Christoph Schreuer published an article-by-article commentary on the ICSID Convention that drew together in a single volume a series of articles that

³¹ R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995).

³² See, e.g., M. Banz, *Völkerrechtlicher Eigentumsschutz durch Investitionsschutzabkommen – insbesondere die Praxis der Bundesrepublik Deutschland seit 1959* (1988); H. Frick, *Bilateraler Investitionsschutz in Entwicklungsländern* (1975); more recently see also K. Vandeveld, *U.S. International Investment Agreements* (2009); W. Shan and N. Gallagher, *Chinese Investment Treaties – Policy and Practice* (2009).

³³ See Shihata, ‘Preface’, in Dolzer and Stevens, *supra* note 31, at p. v.

³⁴ C.N. Brower and J.D. Brueschke, *The Iran–United States Claims Tribunal* (1998).

³⁵ Charles N. Brower is a US-appointed Judge at the Tribunal; Jason D. Brueschke is a former legal assistant at the Tribunal.

³⁶ Cf. now C. Brown, *A Common Law of International Adjudication* (2007).

³⁷ C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration – Substantive Principles* (2007), at para. 1.15.

³⁸ See also Caron, ‘The Nature of the Iran–United States Claims Tribunal and the Evolving Structure of International Dispute Resolution’, 84 *AJIL* (1990) 104.

had appeared in the ICSID Review during the 1990s.³⁹ His commentary, in 2010 published in the second edition,⁴⁰ has rightly become the authoritative reference work on the Convention. His commentary is not only important because the ICSID Convention is the most frequently used procedural framework for conducting investment treaty arbitrations. Instead, Schreuer's commentary, the first edition of which still mainly discussed contract-based ICSID arbitrations, illustrates how the transition from contract-based to investment treaty-based ICSID arbitration took place without any significant ruptures in the professional dealing with such arbitrations.

While the first ICSID tribunal in an investment treaty arbitration had no doubt about embedding its activity firmly into public international law,⁴¹ the professionals who later became active in the then emerging field came from the same type of law firms that had dealt with the earlier contract-based ICSID arbitrations and other international commercial arbitrations between private parties. They were commercial arbitration specialists rather than public international lawyers.⁴² The emergence of investment treaty arbitration in consequence somewhat disconnected international investment law from public international law. Although the substantive law remained rooted in treaties under public international law and could build on the customary international law on the protection of aliens, the combination with a dispute settlement mechanism, which had operated before predominantly in a commercial context,⁴³ made international investment law natural terrain for lawyers experienced in commercial arbitration.⁴⁴ Finally, the format of a commentary indicates the need for more systematic treatment of the procedural issues at stake than journal articles or practice handbooks could provide. Schreuer's work, in that sense, illustrates a move from an oral to a written culture in which, due to the multiplication of actors in the field, knowledge is no longer exclusively contained in the practices of a profession as was the case with commercial arbitration, but is codified.

3 International Investment Law Mainstream

A decade ago, international investment law as we see it today, that is the law of international investment treaties and investment treaty arbitration, was in an embryonic state. It was not yet born as an independent discipline. Instead, most of the existing

³⁹ C. Schreuer, *The ICSID Convention – A Commentary* (2001).

⁴⁰ C. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, *The ICSID Convention: A Commentary* (2nd edn, 2010).

⁴¹ See *AAPL v. Sri Lanka*, *supra* note 1, at paras 38 ff.

⁴² Cf. Brower, 'W(h)ither International Commercial Arbitration', 24 *Arb Int'l* (2008) 181, at 191.

⁴³ Certainly, arbitration has been an important mechanism to settle state-to-state disputes under international law. See Brower, 'The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law', 18 *Duke J Comp. Int'l L* (2008) 259, at 265–291; Grey and Kingsbury, 'Developments in Dispute Settlement: Inter-State Arbitration Since 1945', 63 *British Yrbk Int'l L* (1992) 97. Yet, those arbitrations were much fewer in number than and often conducted by very different professionals from international commercial arbitrations.

⁴⁴ See Brower, *supra* note 42, at 191–194.

writing dealing with the public international law framework for foreign investment protection focused strongly on political debates at the inter-state level and portrayed a field that was part of international politics rather than international law.⁴⁵ The doctrinal writings, by contrast, were mostly limited to the means of investment protection relevant before the advent of investment treaties and investment treaty arbitration, such as the protection of foreign investment under customary international law, investor–state contracts, and contract-based arbitration.⁴⁶ Notwithstanding, Dolzer and Stevens, Brower and Brueschke, and Schreuer laid the foundations for the literature on international investment law that appeared to emerge in 2004, a few years after the first investment treaty arbitrations had been concluded. This literature was characterized by the dual influence of commercial arbitration and public international law perspectives. Its main theme, however, is that of internal convergence and defragmentation.

A *The Consolidation of International Investment Law Mainstream*

Today's mainstream international investment law literature, which focuses primarily on the law applied by investment treaty tribunals, has formed since 2004. By then, investment treaty arbitration already had produced a fair number of decisions, mostly under Chapter 11 of NAFTA; and it was predictable, in particular following the Argentine financial crisis in 2001–2002, that many more investment treaty arbitrations were coming. The literature reacted to this rise in practical importance of investment treaty arbitration by concentrating primarily on discussing the case law of arbitral tribunals. At first, much of the literature appeared in the form of conference proceedings, including those resulting from the semi-annual conferences of the Investment Treaty Forum established, equally in 2004, by the British Institute of International and Comparative Law,⁴⁷ and collected works with contributions by specialists who practised investment arbitration, but had a strong academic interest.⁴⁸

While initially the group of investment lawyers was still comparatively small, interest in the field picked up quickly over the ensuing years. Thus, only a few years

⁴⁵ This holds true above all in respect of the literature dealing with the impact of the New International Economic Order on customary international law, as well as the literature dealing with the political struggle about regulating multinational enterprises. On the former see, e.g., Dolzer, *supra* note 16; on the latter see C.D. Wallace, *Foreign Direct Investment and the Multinational Enterprise – A Bibliography* (1988).

⁴⁶ See *supra* note 18.

⁴⁷ British Institute of International and Comparative Law, *Investment Treaty Law – Current Issues* (Vols 1–3, 2006–2009).

⁴⁸ See T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (2004); N. Horn (ed.), *Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects* (2004); T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005); later also R. Hofmann and C.J. Tams (eds), *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (2007); T. Weiler (ed.), *Investment Treaty Arbitration and International Law* (2008), vol. 1, i; I.A. Laird and T. Weiler (eds), *Investment Treaty Arbitration and International Law* (2009–2010), vols. 2–3; P. Muchlinski, F. Ortino, and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008); K.P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (2008); Sauvant and Sachs, *supra* note 20; C.A. Rogers and R. Alford (eds), *The Future of Investment Arbitration* (2009); R. Hofmann and C.J. Tams (eds), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration* (2011).

later, starting in 2007 with McLachlan, Shore, and Weiniger,⁴⁹ followed by Dolzer and Schreuer⁵⁰ and Dugan, Wallace, Rubins, and Sabahi in 2008,⁵¹ Newcombe and Paradell in 2009,⁵² and Salacuse⁵³ as well as Vandeveldel⁵⁴ in 2010, several textbook-style monographs were published that covered international investment law as a whole.⁵⁵ As circumscribed by this literature, international investment law was no longer the broader perspective still taken by Sornarajah, but the substantive and procedural aspects of the law applicable to and within investor–state arbitration under international investment treaties. Today’s mainstream literature thus narrowed its focus on investment treaty law, but also deepened its analysis in that regard by addressing not only more diverse issues of substantive law,⁵⁶ such as fair and equitable treatment, national, and most-favoured-nation treatment, but also questions of arbitral jurisdiction and procedure.⁵⁷ This discourse, and the growing literature, not only responded to a need in dispute settlement to structure and classify the decisions by arbitral tribunals. It also fulfilled the important function of developing a prevailing opinion on how international treaties, which had hardly found application in practical dispute settlement, should be interpreted and applied.

2004 also marks the year when the Hague Academy of International Law chose international investment law as the topic for the annual research seminar of its Centre for Studies and Research.⁵⁸ This epitomized the renewed academic and teaching interest in the discipline, which equally was caused by its increased practical importance; it also foreshadowed the subsequent increase in courses taught on international investment law in law schools around the world, mostly as post-graduate courses, and the growing number of PhD students writing on investment law topics. This development not only illustrates the attention investment law draws among academics, but also attests to the fact that investment law has become a viable option for a career path in private practice.

Along with the increased demand for teaching, several monographs appeared that were either specially written, or had their origin in teaching material. The approaches of these books differ. Bishop, Crawford, and Reisman presented a classical book with cases and material typically used in teaching in US law schools.⁵⁹ It is as heavy as it

⁴⁹ C. McLachlan, L. Shore, and M. Weiniger, *International Investment Arbitration. Substantive Principles* (2007).

⁵⁰ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008).

⁵¹ C. F. Dugan *et al.*, *Investor-State Arbitration* (2008).

⁵² Newcombe and Paradell, *supra* note 15.

⁵³ J.W. Salacuse, *The Law of International Investment Treaties* (2010).

⁵⁴ K. Vandeveldel, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010).

⁵⁵ In addition, monographs on more specific topics, in particular the meaning of specific investor rights, also appeared starting in the mid-2000s. See *supra* note 14.

⁵⁶ This is the primary focus of McLachlan, Shore, and Weiniger, *supra* note 49; Dolzer and Schreuer, *supra* note 50; Newcombe and Paradell, *supra* note 15; A. Reinisch (ed.), *Standards of Investment Protection* (2008).

⁵⁷ Cf Dugan *et al.*, *supra* note 51 (who, while also covering the substantive law applicable in investor–state arbitrations, take a procedural approach); C. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010).

⁵⁸ Resulting in the publication of P. Kahn and T.W. Wälde (eds), *Les Aspects Nouveaux de Droit des Investissements Internationaux/New Aspects of International Investment Law* (2007).

⁵⁹ D. Bishop, J. Crawford, and M. Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary* (2005).

is comprehensive and allows students to be exposed first hand to the most important policy material and cases. The perspective they take is one firmly embedded in public international law. Subedi, by contrast, organized his book mostly around shorter sections raising issues and problems and addressing investment law and policy perspectives.⁶⁰ This approach seems useful to stimulate class discussions, in particular on policy issues. Yet, the structure, at times, is confusing, for example when the standard content of investment treaties, including the notions of investor and investment, or national and most-favoured-nation treatment, are discussed in the chapter on customary international law;⁶¹ furthermore, the discussion of connected issues, such as the interpretation of most-favoured-nation clauses, is dispersed throughout the book.⁶² The book by Dugan, Wallace, Rubins, and Sabahi, finally, was developed from teaching material, but has matured into a complete treatise.⁶³ The book's approach to international investment law is from the perspective of investor–state arbitration; hence procedural and jurisdictional topics are treated before the substantive law. Unlike Subedi's book, it contains longer reprints of many primary sources, above all texts from arbitral decisions, investment treaties, and other international legal sources. While both Dugan, Wallace, Rubins, and Sabahi and Bishop, Crawford, and Reisman are recommendable teaching material, the most digestible book, in particular in countries where students are not accustomed to extensive reading, remains Dolzer and Schreuer.⁶⁴

Despite its growth in the mid-2000s, the community of international investment lawyers initially remained rather close-knit and did not drift apart. Responsible for this was not only a common focus on the jurisprudence of investment treaty tribunals, but also the means of communication that played a role in allowing exchange and in transmitting information. Published literature, by far, was not the only form of professional and academic exchange. Apart from an increasing number of conferences on international investment law, which are frequented by many of those involved in investment arbitration, and which sometimes give the feeling of family reunions, the field became heavily influenced by electronic means of communication. Much of the new developments in international investment law and arbitration are transmitted through online newsletters, above all *Investment Treaty News*⁶⁵ and *Investment Arbitration Reporter*.⁶⁶ At the vanguard of electronic media, however, was the listserv OAGEMID (an acronym for oil, gas, energy, mining, and investment disputes), run by the late Professor Thomas W. Wälde at Dundee University. Originally set up as a discussion group for PhD students, it was opened to outsiders on a subscription basis

⁶⁰ S.P. Subedi, *International Investment Law: Reconciling Policy and Principle* (2008).

⁶¹ *Ibid.*, at 58–63, 68–74.

⁶² *Ibid.*, at 68–71, 101, 149–150, 175–176.

⁶³ Cf. Dugan *et al.*, *supra* note 51.

⁶⁴ Dolzer and Schreuer, *supra* note 50.

⁶⁵ Available at: <http://www.iisd.org/itn>. This newsletter has been provided for free by the International Institute for Sustainable Development, a Canadian non-governmental organization (NGO) since 2001.

⁶⁶ Available at: <http://www.iareporter.com>. IAREporter has existed since May 2008 and is run by Luke Peterson, who founded and ran *Investment Treaty News*, *supra* note 65, before. IAREporter is a subscription-based service.

in 2004 and quickly grew to include virtually everybody in the community of investment lawyers.

With almost daily discussions on developments in arbitral jurisprudence, investment treaty-making, advocacy, investment policy, matters relating to commercial arbitration, but also investment community gossip, OGEMID created a community sense among lawyers who often enough had never met in person. It thereby helped to forge the emergence of one global discourse on investment law that helped to avoid internal fragmentation. This discourse is not only transnational in nature, and not dissected along lines of national interest, but also operates in one dominating language. As was the case with most investment treaty arbitrations, English became the *lingua franca* of international investment law.⁶⁷ At the same time, this also narrowed the receptiveness of the field to academic publications in languages other than English. Even though several high quality academic studies appeared, *inter alia*, in German and French,⁶⁸ these were not integrated much into the international discourse.

OGEMID also helped break up traditional structures in professional and academic discourse coined by hierarchy, seniority, provenance, and education. In an electronic forum, discourse is much more disconnected from such factors, which play a role in attributing importance to arguments in discourse among real people. For José Alvarez, the listserv was thus proof of a 'democratization' of Oscar Schachter's 'invisible college'.⁶⁹ Being a subscription-based forum, however, OGEMID also helped to foster the isolation, or external fragmentation, of international investment law in relation to other disciplines which, even though they were not barred entry, did not participate in the discourse. OGEMID paradigmatically represented the consolidation of international investment law, but also the thresholds that isolate it from outside discourses. It is against this background that one has to appreciate Koskenniemi's characterization of international investment law as 'highly specialized' and 'exotic'.⁷⁰

B Public International Law v. Commercial Arbitration Approaches

The rise of investment treaty arbitration not only expanded the group of those active in the field, it also brought in practitioners who did not have a background in public international law, but in international commercial arbitration. This resulted from the

⁶⁷ There are, however, also a number of arbitrations, mostly against Latin American countries, that are conducted in Spanish; even fewer arbitrations take place in French.

⁶⁸ See, e.g., S. Manciaux, *Investissements étrangers et arbitrage entre états et ressortissants d'autres états: trente années d'activité du CIRDI* (2004); W. Ben Hamida, *L'arbitrage transnational unilatéral: réflexions sur une procédure réservée à l'initiative d'une personne privée contre une personne publique* (2007); U. Kriebaum, *Eigentumschutz im Völkerrecht: Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* (2008); S. Robert-Cuendet, *Droits de l'investisseur étranger et protection de l'environnement: contribution à l'analyse de l'expropriation indirecte* (2010); L. Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen: Zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investitionsschiedsverfahren* (2010); M. Perkams, *Internationale Investitionsschutzabkommen im Spannungsfeld zwischen effektivem Investitionsschutz und staatlichem Gemeinwohl* (2011).

⁶⁹ Alvarez, 'The Democratization of the Invisible College', ASIL IL.Post (8 Nov. 2007), available at: <http://www.asil.org/ilpost/president/pres071108.html>.

⁷⁰ See Koskenniemi, *supra* note 11, at para. 8.

fact that the procedural law applicable to investment treaty arbitrations was either the same as that applicable to commercial arbitrations, as in the case of investment arbitrations under UNCITRAL Arbitration Rules, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules), or the Rules of the International Chamber of Commerce (ICC Rules), or modelled on commercial arbitration procedure, as in the case of ICSID arbitrations. In a sense, investment treaty arbitration thus had the effect of commercializing international investment law also from a sociological perspective. In fact, with rising numbers of disputes, the centre of gravity increasingly moved to the commercial arbitration bar.

Accordingly, international investment law is less characterized by the much discussed common law–civil law divide,⁷¹ but by a division of epistemic communities along different lines, namely those joining the field from private commercial law and arbitration, and those coming from public international law and inter-state dispute settlement.⁷² While this combination is often fruitful for resolving factually and legally complex disputes under investment treaties, it also results in a veritable culture clash that can also be traced, albeit that it is seldom laid out explicitly, in the literature on international investment law. Private commercial and public international lawyers often have different perspectives on and different philosophies about the role of law, the state, and the function of dispute resolution. Also, their audiences and conceptual approaches are often different. Whereas public international lawyers embed international investment law firmly in general international law and approach the topic against that background, commercial arbitration lawyers focus on dispute settlement and see investment treaty arbitration as a subset of international (commercial) arbitration.⁷³ Furthermore, they write primarily for arbitration practitioners⁷⁴ and often take a much more pragmatic and less principled stance on questions of the applicable public international law. The writing of public international lawyers, by contrast, is often less developed on the procedural issues connected to conducting complex and fact-intensive investment disputes and often enough less sensitive to understanding the underlying business concerns.

⁷¹ See Cremades, 'Overcoming the Clash of Legal Cultures in International Arbitration: The Role of Interactive Arbitrators', 14 *Arb Int'l* (1998) 157; Elsing and Townsend, 'Bridging the Common Law–Civil Law Divide in Arbitration', 18 *Arb Int'l* (2002) 59; Kern, 'Internationale Schiedsverfahren zwischen Civil Law und Common Law', 109 *ZVglRWiss* (2010) 78.

⁷² Thus the description of the ethos of private commercial and public international lawyers in the text is deliberately stereotypical in order to squeeze out the essence of how the different communities perceive arbitration and its function. Reality, of course, is more complex and nuanced. The mindsets, however, are quite similar to the different perceptions of dispute settlement under the old GATT system and under the WTO Dispute Settlement Understanding. See Weiler, 'The Rule of Lawyers and the Ethos of Diplomats', 35 *J World Trade* (2001) 191, at 194–197.

⁷³ Legum, 'Investment Treaty Arbitration's Contribution to International Commercial Arbitration', 60 *Dispute Resolution J* (2005) 71, at 73; Bjorklund, 'Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working', 59 *Hastings LJ* (2007) 241, at 251.

⁷⁴ As clearly expressed in the subtitle of N. Rubins and N. S. Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (2005).

Certainly, the classification into public international law and commercial arbitration approaches is no more than a blueprint or archetype. In practice, most investment lawyers are experts in both public international law and arbitration procedure. Moreover, the professional background or formation will not coin every individual in the same way, and not all individuals with the same background think alike. Yet, formation, professional background, and experience will often facilitate a certain mindset or style that is in line with either the public international law or the commercial arbitration archetype. This shows, for example, in the different sources arbitrators with a commercial arbitration background and those with a public international lawyer's background make reference to in the awards,⁷⁵ in the reasoning they choose and the methods of interpretations they prefer,⁷⁶ and in their respective understanding of the role of arbitrators and dispute settlement.⁷⁷

Although commercial arbitrators dominate the practice in international investment law, public international lawyers represent an important group in the community. Several of them joined the field from international dispute settlement practice, in particular at the International Court of Justice and the Iran–United States Claims Tribunal; others were professors of public international law. Considerable parts of international law mainstream thus moved into international investment law, motivated by a unique combination of cutting-edge development in international law and attractive sources of income. This was primarily a result of the governing law of investment treaty arbitrations being public international law. This influence of investment arbitration also reflected heavily in the literature, with monographs on substantive investment law being written mostly by public international law scholars.

Some public international lawyers even came to be perceived first and foremost as investment lawyers. The *Festschrift* for Christoph Schreuer attests to how the identity of an international scholar can be forged by international investment law.⁷⁸ This book is not a typical *Festschrift* as it focuses exclusively on one defined discipline – international investment law – and is not only a tribute to an academic by other academics, but a collective contribution of academics and seasoned practitioners on international investment law and arbitration. The same mix of public international lawyers and commercial arbitration practitioners is reflected in most collective works in the field, including the *Oxford Handbook of International Investment Law*, which is the product of the Committee on the International Law on Foreign Investment convened under the auspices of the International Law Association.⁷⁹ Both monographs

⁷⁵ Tribunals presided over by public international lawyers, e.g., appear to make reference more frequently to decisions by the ICJ or the PCIJ than tribunals presided over by commercial arbitrators.

⁷⁶ See, e.g., Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in C. Binder *et al.* (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (2009) 724; Paulsson, 'Avoiding Unintended Consequences', in Sauvant (ed.), *supra* note 48, at 262–263.

⁷⁷ Cf Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator', 23 *Leiden J Int'l L* (2010) 401.

⁷⁸ Binder *et al.* (eds), *supra* note 76.

⁷⁹ Muchlinski, Ortino, and Schreuer, *supra* note 48.

assemble high-quality analyses of the various procedural and substantive law issues relevant to international investment law.

C *Internal Defragmentation: Convergence in Investment Arbitration*

Already a few years after investment treaty arbitration had established itself as a specialized form of dispute settlement one of the main problems that troubled the internal discourse on international investment was the phenomenon of inconsistent decisions and parallel proceedings. It arose after two arbitral tribunals constituted under two different BITs heard different disputes relating to the same facts, an investment in the telecommunications sector in the Czech Republic. One set of proceedings was brought by the investor itself, the other by its shareholder. Even though the applicable BITs were virtually identical, the two tribunals came up with different results, one holding the respondent state liable for approximately US\$ 270 million in damages, one finding no compensable wrongdoing.⁸⁰ Similarly, inconsistencies in arbitral jurisprudence also developed with regard to the interpretation of identical or essentially comparable clauses in different BITs⁸¹ or of the same rule of customary international law by different tribunals.⁸²

While these developments were a rather natural consequence of the applicable law being enshrined in bilateral treaties and their interpretation and application by one-off arbitral tribunals, the problem of inconsistencies developed into the most important single theme in the internal discourse on investment law. For the public international lawyer, the greatest concern was the impact different interpretations either of the same law or of essentially similar treaty terms had both for general international law and for international investment law as a system, as it compromised the idea that investment law could be predictable and stable and constituted a legal system with an ordering function at all.

From a commercial arbitration perspective, the topic was equally novel as inconsistencies became apparent much more easily in investment arbitration as compared to commercial arbitration. After all, the awards and decisions in investor–state disputes regularly become public,⁸³ whereas commercial arbitration decisions regularly remain confidential. Moreover, it was difficult to explain such inconsistencies by differences in the applicable law. Unlike in commercial arbitrations that are rooted in a domestic legal system, the international law of investment treaties appeared too uniform to justify such different outcomes.

The monographs on international investment law that had been published since 2007 all dealt with the theme of fragmentation as it emerged from these inconsistent

⁸⁰ Compare *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 Sept. 2001, Final Award, 14 Mar 2003, with *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 Sept. 2001.

⁸¹ Compare *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 Aug. 2003, at paras 163–174 with *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 Jan. 2004, at paras 113–129.

⁸² See generally Schill, *supra* note 24, at 282–287 and 339–355.

⁸³ See *supra* note 26.

arbitral decisions. Almost paradoxically, however, mainstream international investment law literature did not perceive inconsistent arbitral awards as a fundamental problem, nor did it view it as an obstacle to the doctrinal reconstruction of substantive and procedural investment law. Instead, convergence in arbitral jurisprudence is the main theme of the numerous textbooks dealing with international investment law, even though the substantive law is enshrined in a myriad of bilateral treaties and implemented by one-off arbitral tribunals.

This phenomenon can be studied, for example, in the particularly comprehensive treatise by Newcombe and Paradell on *The Law and Practice of International Investment Treaties*. One of the strengths of this book is its comprehensive historical introduction that traces meticulously the development of substantive investment law and the forms of investment dispute settlement. Furthermore, Newcombe and Paradell go much further than repeating the jurisprudence of investment tribunals but provide a detailed structure for how the different standards of treatment should be analysed. This structure is a welcome blueprint for analytically clear reasoning in investment arbitration. Finally, the authors regularly embed the discussion of the substantive standards in a broader public international law framework, explaining not only the investment treaty practice more generally, but also the customary international background, if any,⁸⁴ as well as connections to how similar problems are dealt with in other specialized international legal regimes; for example how national treatment is viewed and interpreted in the WTO context.⁸⁵ In their view, even though 'IIA texts differ in many important respects, . . . they are also remarkably similar in structure and content'.⁸⁶

Convergence is also the main theme of McLachlan, Shore, and Weiniger's *International Investment Arbitration*. In a typical common-law approach, they focus primarily on the jurisprudence of investment treaty tribunals and understand it as an expression of 'the principles which apply in the application of the general standards found in investment treaties'.⁸⁷ While their approach, as the title suggests, seems to come primarily from a commercial arbitration perspective, the book is firmly grounded in public international law. In fact, McLachlan, Shore, and Weiniger 'see[k] to marry the twin influences in this field of both arbitration and public international law. It brings together guidance from the applicable general international law with the specific consideration of the concepts in arbitral awards in order, by close analysis, to elucidate the meaning and application of those key common terms'.⁸⁸ The analysis they deliver, however, is not primarily descriptive. Instead most awards are discussed critically and assessed against their public international law background, including the law of sources and principles of treaty interpretation. On this basis, they expound a principled approach to resolving problems in investment treaty arbitration that gives rise to a 'common law of investment protection, with a substantially shared understanding of

⁸⁴ See e.g., Newcombe and Paradell, *supra* note 15, at 235–253.

⁸⁵ *Ibid.*, at 170–174.

⁸⁶ *Ibid.*, at 1.

⁸⁷ McLachlan, Shore, and Weiniger, *supra* note 49, at para. 1.33.

⁸⁸ *Ibid.*, at para. 1.15.

its general tenets'.⁸⁹ With this purpose, McLachlan, Shore, and Weiniger manage to deliver a convincing account that general principles of investment law exist despite the occurrence of inconsistent decisions on a number of questions.

The existence of principles of international investment law is also a central claim of Dolzer and Schreuer's monograph,⁹⁰ written by two public international law veterans in the field. Like the other works discussed, its principal approach is to understand the substantive law primarily as a function of the practice of arbitral tribunals and the way they have concretized the often vague standards of international investment law. Unlike other monographs, Dolzer and Schreuer only rarely provide commentary on some of the inconsistent and hence controversial interpretations of standard investors rights.⁹¹ In choosing to give an objective account of existing conflict in investment jurisprudence, the book remains in the tradition of a treatise that attempts to describe, order, structure, and classify rather than develop an independent normative theory of the principles of international investment law. This objectivity, as well as its brevity, is the strength of Dolzer and Schreuer and has made this book one of the most cited by investment tribunals and domestic courts, including for example the German Constitutional Court.⁹² Jeswald Salacuse, finally, also argues for the emergence of international investment law as a unified system, couching his analysis into an approach inspired by regime theory, which he borrows from international relations scholarship.⁹³

Convergence, however, is not only a recurrent theme in the literature on substantive investment law. It is also what arbitral tribunals should strive for, and largely achieve, in interpreting and applying the procedural law applicable to investment arbitrations. This is all the more surprising as investment claims can be brought in many different arbitral fora. Uniformity and convergence thus are, beyond all technicality of a book on procedural law written for investment arbitration practitioners, the themes of Zachary Douglas' *The International Law of Investment Claims*. By analysing the decisions of investment treaty tribunals on matters of jurisdiction and admissibility, this work contributes greatly to a better understanding and a consistent application of the often very vague rules governing questions of jurisdiction and procedure in investment treaty arbitration. These provisions, as Douglas points out, are 'small in number and general in prescription in the texts of investment treaties'.⁹⁴

While Douglas views investment treaty tribunals as entrusted to develop these rules on an 'ad hoc and incremental basis', tribunals do not enjoy 'carte blanche', but must develop the procedural law so that 'the rules [are] fair and just and the system for the resolution of investment disputes [is] internally coherent and sustainable for the

⁸⁹ *Ibid.*, at para. 1.50.

⁹⁰ Dolzer and Schreuer, *supra* note 50.

⁹¹ This practice of not siding with any of the competing lines of jurisprudences may also be due to fears that such statements may either result in challenges in arbitrations in which the authors are involved as arbitrators or negatively affect future appointments; see *infra* note 102.

⁹² BVerfGE 123, 267, at 420–421 (Lisbon judgment).

⁹³ J.W. Salacuse, *The Law of International Investment Treaties* (2010).

⁹⁴ Z. Douglas, *The International Law of Investment Claims* (2009), at p. xxiii.

duration of the treaty'.⁹⁵ Douglas thus develops in 13 chapters a total of 54 'rules' answering problems of jurisdiction and admissibility of investment claims. Even though one does not have to agree with every single rule Douglas suggests,⁹⁶ and tribunals will certainly continue to struggle to settle on a uniform application of procedural norms, what emerges is no less than the perspective of a common law of investment arbitration despite the one-off nature of arbitration and the existence of multiple arbitral rules.

As paradoxical as it may seem, international investment law is therefore emerging as a field characterized by convergence rather than fragmentation. This convergence has, as I have argued in *The Multilateralization of International Investment Law*,⁹⁷ the effect that international investment treaties as a whole function largely in an equivalent way to a multilateral system of law, even though the governing law is enshrined in bilateral treaties applied and interpreted by one-off arbitral tribunals. The process of multilateralization does not just build on the conviction of arbitrators that they are acting within the confines of one legal discipline. Instead, the multilateralization of international investment law finds support in the substance and structure of investment treaty-making most importantly in the close textual resemblance of different BITs, the negotiation of these treaties based on model treaties, and the entrenchment of bilateral treaty-making in multilateral processes, in particular the coordination of foreign investment policies by the most important capital-exporting countries within the OECD and elsewhere.⁹⁸ Furthermore, most-favoured-nation clauses in investment treaties have a significant effect in levelling differences in investment treaty protection.⁹⁹ Broad possibilities for treaty-shopping, finally, also have the effect of raising investment protection in a given host state to a uniform level.¹⁰⁰ Substantive investment law and the institutional framework in which investment treaties are negotiated therefore contain nuclei of a multilateral order for international investment relations, even though truly multilateral investment treaties that grant the same level of substantive investment protection worldwide have not been accepted by the majority of states, capital-importing or capital-exporting.¹⁰¹

In conclusion, from an internal point of view, fragmentation of international investment law is not perceived as a problem. Instead, the community of international investment lawyers is sufficiently close-knit and held together by common institutions despite the sometimes different approaches of those with a public international law background and those with a commercial arbitration background. One concern that exists irrespective of the professional socialization of writers on international investment law, however, is that much of the writing is done by authors who themselves are

⁹⁵ *Ibid.*

⁹⁶ See, e.g., on my disagreement with Douglas' Rule 43 Schill, *supra* note 24, at 173–193.

⁹⁷ See *ibid.*

⁹⁸ See on the standardization of treaty texts and the entrenchment of bilateral treaty-making in multilateral processes *ibid.*, at 65–120.

⁹⁹ See *ibid.*, at 121–196.

¹⁰⁰ See *ibid.*, at 197–240.

¹⁰¹ See *ibid.*, at 23–64.

involved in investment treaty arbitrations. Although this ensures the practical relevance of the topics addressed, and accounts for the sensitivity for current concerns and the richness of practical insights, it also constitutes a potential obstacle for independent and clear positioning as conflicts between academic analysis, political appraisal, professional interests, and arbitral independence are undoubtedly numerous. Thus, many writers are either limited by rules of professional ethics in taking a stance on certain issues, or at least exercise prudence in making more principled statements, which may cast their independence and impartiality in actual proceedings into doubt,¹⁰² or may negatively affect future appointments. From the perspective of scholarship, this compromises the doctrinal development of international investment law.

4 Contestations and Scholarly Responses: Public Law Approaches to International Investment Law

The increasing practical importance of international investment law and investment treaty arbitration was not viewed positively by all those involved and affected. Instead, starting early after the first arbitral awards were handed down, critical voices arose because of the interpretations of those treaties by arbitral tribunals. Criticism not only occurred in political discourse and state practice, but also gained momentum in academic writing, most notably with several authors pointing out, and criticizing, the considerable governance impact of investment treaties and investment arbitration on domestic law- and policy-making. This has given rise to a vivid debate about a ‘legitimacy’ crisis in international investment law. To a large extent this debate is connected to the influx of yet another group into international investment law, namely lawyers with a background in, or affinity to, public law. Several of them are engaged in a project of fundamental contestation of international investment law. Others merely aim at drawing on public law to enhance the legitimacy of international investment law or use the language of public law to explain its functioning. Their common perspective is to understand investment law and arbitration not solely as a dispute settlement mechanism but as a form of global governance.

A *The Legitimacy Crisis in International Investment Law*

The process of contestation of international investment law was first and foremost a process of negative reactions of states and NGOs to decisions by arbitral tribunals

¹⁰² See, e.g., the disclaimer in Dugan *et al.*, *supra* note 51, at p. xvii (stating that ‘not all of the statements made represent precisely the opinions of all of us. More importantly, the material presented does not necessarily reflect the views of the law firms with which we are affiliated, or the views of the clients of those firms’). Cf. also the decision on a challenge based on an opinion expressed by one of the arbitrators in scholarly writing on a topic that claimants considered crucial to the arbitration at hand: *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant’s Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 Aug. 2010, at paras 20–59.

that were considered to interpret investment treaties as overly restrictive of state sovereignty or that had resulted in seemingly excessive damages awards.¹⁰³ Independent of the problem of inconsistent decisions delivered in investment treaty arbitration, the concern most worrying for states and NGOs was whether investment treaties and investment arbitration left sufficient leeway to act in the public interest and to pursue self-determined national policies. The cases relating to the Argentine economic crisis,¹⁰⁴ but also several NAFTA disputes in which investors challenged what the respondent state argued to be legitimate regulatory action to protect the public interest, such as the protection of public health, the environment, or labour standards,¹⁰⁵ raised the concern about how much 'regulatory space' investment treaties left.

As a result of these cases, and fuelled by critical policy work of NGOs,¹⁰⁶ a backlash against investment arbitration was quickly noticeable in state practice.¹⁰⁷ In particular the United States showed adverse reactions to some of the broad interpretations of investors' rights, especially once it had realized that NAFTA could turn against it.¹⁰⁸ This had had direct influence on the remodelled 2004 US Model BIT, and subsequent investment treaties the US concluded, which included stricter language, *inter alia*, on the concept of indirect expropriation and the fair and equitable treatment standard.¹⁰⁹ Some capital-importing countries were even more radical, either by withdrawing from the ICSID Convention, like Bolivia and Ecuador,¹¹⁰ or by terminating investment treaties.¹¹¹ But also other countries, including Norway, South Africa, and Australia, are reconsidering their investment

¹⁰³ Cf., e.g., *CME v. Czech Republic*, *supra* note 80, Final Award, 14 Mar. 2003 (resulting in a damages award of approx. US\$ 353 million).

¹⁰⁴ See, e.g., Di Rosa, 'The Recent Wave of Arbitrations Against Argentina under Bilateral Investment Treaties: Background and Principal Legal Issues', 36 *U Miami Inter-Am L Rev* (2004) 41.

¹⁰⁵ *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998; *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug. 2000; *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005.

¹⁰⁶ Particularly active in the field is the International Institute for Sustainable Development: see <http://www.iisd.org>.

¹⁰⁷ See M. Waibel *et al.* (eds), *The Backlash Against Investment Arbitration* (2010).

¹⁰⁸ See also Aguilar Alvarez and Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11', 28 *Yale J Int'l L* (2003) 365.

¹⁰⁹ See, e.g., Vandeveld, 'A Comparison of the 2004 and 1994 U.S. Model BITs: Rebalancing Investor and Host Country Interests', 1 *Yrbk Int'l Investment L & Policy* (2008/2009) 283.

¹¹⁰ Bolivia withdrew from the ICSID Convention as of 3 Nov. 2007. See 'Bolivia Denounces ICSID Convention', 46 *ILM* (2007) 973. On 6 July 2009, the World Bank received a written notice of denunciation from the ICSID Convention from Ecuador: Press Release, International Centre for Settlement of Investment Disputes, 12 July 2009, available at: <http://icsid.worldbank.org/ICSID> (under Publications > News Releases).

¹¹¹ Venezuela, e.g., terminated its BIT with the Netherlands in Apr. 2008: see L.E. Peterson (ed.), *Investment Arbitration Reporter* (16 May 2008), available at: <http://www.iareporter.com/Archive/IAR-05-16-08.pdf>. In Aug. 2009, the Russian Federation ended the provisional application of the ECT. See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009, at paras 36–40.

treaty policies.¹¹² The backlash may receive further support from the European Union (EU) which, having been granted an exclusive competence concerning foreign direct investment under the Lisbon Treaty,¹¹³ is currently reviewing its foreign investment policy in light of criticism the system has received.¹¹⁴ Furthermore, the new competence puts the future of independent foreign investment policies of the Member States, as well as the continued application of investment treaties already concluded by the Member States, into question.¹¹⁵

The negative reactions of states to some investment treaty awards have fuelled a considerable amount of literature intimating that international investment law may be in a veritable ‘legitimacy crisis’.¹¹⁶ The current backlash in state practice and the issue of the system’s legitimacy in the literature are above all due to the insight that international investment treaties are not just political treaties signalling a state’s good will to promote and protect foreign investment, but obligations under international law that are implemented by a powerful enforcement mechanism in the form of investment treaty arbitration. Furthermore, arbitration not only has the effect of settling disputes but also of concretizing and further developing investment law in a treaty-overarching manner. Investment treaty arbitration, in other words, functions as a mechanism of global governance that has, compared to the earlier inter-state system, a more immediate impact on domestic law- and policy-making. Yet, in state practice, by and large, the current process is not one of fundamental contestation, as was the debate about the establishment of a New International Economic Order. Rather, it is a process of recalibration or fine-tuning of investment treaty obligations, in which states express concern about the shrinking of domestic policy space caused by

¹¹² See Muchlinski, ‘Trends in International Investment Agreements, 2008/2009: Review of the Model Bilateral Investment Treaties of Norway, South Africa and the United States’, 2 *Yrbk Int’l Investment L & Policy* (2009/2010) 35. Just in Apr. 2011, Australia announced that it will discontinue including investor–state dispute settlement provisions in future investment treaties. See Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, at 14, available at: <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

¹¹³ Arts 207(1) and 3(1)(e) Treaty on the Functioning of the European Union. On the unsettled scope of this competence see Shan and Zhang, ‘The Treaty of Lisbon: Half Way Toward a Common Investment Policy’, 21 *EJIL* (2010) 1049, at 1057–1065.

¹¹⁴ See Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 7 July 2010, Towards a comprehensive European international investment policy, COM(2010)343 final, available at: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf.

¹¹⁵ See Eilmansberger, ‘Bilateral Investment Treaties and EU Law’, 46 *CMLRev* (2009) 383; Wehland, ‘Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?’, 58 *ICLQ* (2009) 297; Burgstaller, ‘European Law and Investment Treaties’, 26 *J Int’l Arb* (2009) 181; Dimopoulos, ‘The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law’, 48 *CMLRev* (2011) 63; see further M. Bungenberg, J. Griebel, and S. Hindelang (eds), *International Investment Law and EU Law* (2011).

¹¹⁶ See Sornarajah, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in Sauviant (ed.), *supra* note 48, at 39, 39–45; see also Brower and Schill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’, 9 *Chicago J Int’l L* (2009) 471, at 473 (with further references).

the application of vague standards of investment protection by international arbitrators who exercise significant interpretative powers.¹¹⁷

B The Advent of Domestic Public Law Approaches

The transition from a North–South to a public–private perspective¹¹⁸ is also reflected in the literature where the dominant concern became, on the one hand, the appropriate balance between investors’ rights and state powers and, on the other, the question of who can strike that balance, states or arbitral tribunals. Major impulses in this respect, however, did not come primarily from within mainstream international investment law, but from scholarship that understood international investment law as a form of public law. This scholarship underscored the functional equivalence of international investment law and domestic public law, namely to enshrine rights of private actors and thereby to restrict government action; it also drew analogies between investment treaty arbitration and the adjudication of public law disputes in domestic administrative or constitutional courts.¹¹⁹

Initially, public law approaches looked at international investment law predominantly through a domestic public law lens. They were fundamentally critical of international investment law and investor–state arbitration, and perceived it as a threat to domestic constitutional values and processes. The resulting scholarship was undoubtedly triggered by the NAFTA arbitrations against Canada and the United States, but it criticized international investment law as a whole. In fact, the principal proponents of this perspective are the Canadian scholars Gus Van Harten and David Schneiderman. Both of them can be credited with first realizing the governance aspects of international investment law and its significant impact on domestic public law.

Van Harten was the first to argue that investment treaty arbitration was not commercial arbitration but ‘a mechanism of adjudicative review in public law’,¹²⁰ because the state’s consent to arbitration was an act under public law and the subject-matter of the disputes concerned ‘the state’s relationships with individuals who are subject to the exercise of public authority by the state’.¹²¹ Yet, according to Van Harten, the institutional structure of arbitration as a review mechanism is ill-suited to a system that performs public law adjudicatory functions. He argues that ‘the lack of security of tenure of arbitrators in a one-sided system of state liability, in which only investors bring the claims and only states pay damages for breach of the treaties, makes the adjudicator dependent on prospective claimants and thus biased, in an objective

¹¹⁷ See Alvarez, ‘Why are We ‘Re-calibrating’ our Investment Treaties?’, 4 *World Arbitration & Mediation Review* (2010) 143.

¹¹⁸ See Shan, ‘From “North South Divide” to “Private-Public Debate”: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law’, 27 *Northwestern J Int’l L & Bus* (2007) 631.

¹¹⁹ Foundational in this respect is *International Thunderbird Gaming Corp v United Mexican States*, UNCITRAL/NAFTA, Arbitral Award, 26 Jan. 2006, Separate Opinion by Thomas Wälde, at paras 12–13. See also Schill, ‘International Investment Law and Comparative Public Law – An Introduction’, in S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010), at 3.

¹²⁰ G. Van Harten, *Investment Treaty Arbitration and Public Law* (2007), at 45.

¹²¹ *Ibid.*

sense, against respondent governments'.¹²² This, in his view, is not in conformity with the 'basic hallmarks of judicial accountability, openness, and independence'.¹²³ He accordingly suggested that arbitration should be replaced by an international investment court with tenured judges whose decision-making, Van Harten argues, would be more balanced in aiming to reconcile investors' rights and state regulation in the public interest.¹²⁴ While arbitration may be acceptable in a commercial context, where deficits in the governing law or dispute settlement affect only the parties to the dispute, it is not acceptable, in Van Harten's view, in the public law context, where the legality of a state's exercise of public power is reviewed under standards crafted by international arbitrators who are appointed by the disputing parties and have no genuine legitimacy.

Schneiderman, a constitutional law scholar, equally presented a critical study of the international investment regime, focusing particularly on the strictures that investment protection imposed on democratic choice. Like Van Harten, Schneiderman highlights the public law dimensions of international investment law, but goes further in pointing out the constitutional implications of the discipline. He observes that 'patterns of protection codified in the investment rules regime resemble national constitution patterns, . . . more specifically . . . patterns of protection observable within US constitutional law'.¹²⁵ For Schneiderman, the strong protection of foreign investors 'destabilize[s] the functioning of democratic processes, represented by other constitutional rules'.¹²⁶ Therefore, he suggested redirecting substantive international investment towards a stronger focus on protection against discrimination, instead of implementing standards of treatment that go beyond national treatment, and on strengthening investment insurance as an alternative instrument for protection against political risk.¹²⁷

Schneiderman's and Van Harten's work aims at reforming substantive investment law and investor–state arbitration. More recently, both of them even advocate a return to domestic law and domestic courts in the foreign investment context.¹²⁸ The core of the public law criticism, notably by Van Harten, is a mismatch between the private model of dispute settlement and its public law implications. While one can disagree with his premises and the concepts he basis his argument on,¹²⁹ as well as the conclusions he draws from them,¹³⁰ Van Harten's important contribution is to view international investment law through a different lens, namely that of a public law

¹²² *Ibid.*, at 5.

¹²³ *Ibid.*

¹²⁴ See *ibid.*, at 180–184.

¹²⁵ D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008), at 223.

¹²⁶ *Ibid.*, at 225.

¹²⁷ *Ibid.*, at 230–237.

¹²⁸ Public Statement on the International Investment Regime, 31 Aug. 2010, available at: http://www.osgoode.yorku.ca/public_statement/documents/Public%20Statement.pdf.

¹²⁹ See Alvarez, 'Book Review of Investment Treaty Arbitration and Public Law', 102 *AJIL* (2008) 909, at 911–915.

¹³⁰ See Brower and Schill, *supra* note 116, at 489–495.

scholar who realized that investment treaty arbitration was more than dispute settlement, but implicated the exercise of governmental powers more generally and thus affected domestic public law significantly. Neither a commercial arbitration perspective nor classical public international law was sufficiently able to grasp that aspect of international investment law. The change in paradigm occasioned by the works of Van Harten and Schneiderman also put the legitimacy question of international investment law centre-stage.

The internal discourse in international investment law perceived this critique largely as an outside perspective that did injustice to the concern of investment treaty arbitration and investment law to provide a neutral, independent, and impartial forum for the resolution of disputes between foreign investors and a host state outside the latter's own courts. Yet, mainstream international investment law only occasionally produced publications criticizing Van Harten's critique and defending the legitimacy of the system,¹³¹ so that judging by the numbers, voices critical of international investment may appear to be the predominant view. This lenience of mainstream investment law can prove problematic when new epistemic communities, such as EU lawyers at present, take an interest in international investment law and, from consulting the literature, get a distorted view about the general thinking of investment lawyers.

C Towards an International Public Law Perspective

Not all public law approaches to international investment law, however, demand radical institutional reform or a recrafting of the substance of international investment treaties. While authors subscribing to a public law approach generally share the concern that pure commercial arbitration or public international law perspectives are not sufficiently sensitive to the governance impact of international investment law, they do not fundamentally question the current system.

Santiago Montt's book *State Liability in Investment Treaty Arbitration* is a fine example of this approach. Synthesizing global administrative law and global constitutional law,¹³² Montt understands international investment law as a 'new form of global public law'¹³³ with constitutional and administrative law implications in restricting government actions for the benefit of foreign investors. For Montt, the sum of international investment treaties constitutes a 'virtual network' that constrains governments in ways that are comparable to domestic constitutions. This virtual network, Montt argues, has 'the functional status of *higher lawmaking*' that transcends ordinary politics and that involves 'elements of direct effect, supremacy, and judicial review' because of the direct access of foreign investors to arbitration and the powers of those arbitral tribunals to review the legality of government measures.¹³⁴ Structurally, the

¹³¹ So far this has been done only in some contributions to collected works, including some contributions in Waibel *et al.* (eds), *supra* note 107.

¹³² S. Montt, *State Liability in Investment Treaty Arbitration – Global Constitutional and Administrative Law in the BIT Generation* (2009), at 12.

¹³³ *Ibid.*, at 5.

¹³⁴ *Ibid.*, at 13–15 (emphasis in the original).

relationship between tribunals and states, in consequence, resembles that of the distribution of power between the judicial and political branches of government at the domestic level.¹³⁵ The uniformity of arbitral jurisprudence, in turn, is the expression not only of a ‘common legal practice’,¹³⁶ but a form of ‘constitutional jurisprudence’.¹³⁷

Unlike the internal investment arbitration discourse, Montt also provides a justification for such a common practice. In his view, the uniformity of investment treaties was not a coincidence. Instead, states intentionally adopted similar, if not identical, treaties that were deliberately broadly formulated because they anticipated that future investment jurisprudence, not just on the treaty in question, but on BITs more generally, would concretize the vague standards and therefore increase the predictability of investors’ rights. As Montt argues, ‘[b]ecause the resolution of cases depends on jurisprudential developments among international arbitral tribunals, the ultimate pay-off from BITs depends not so much on the text of treaties already concluded, but on the interpretations adopted among the collection of awards that we are just beginning to see’.¹³⁸

Finally, Montt also comments on why an arbitral mechanism was chosen instead of a permanent investment court or an appeals facility.¹³⁹ In his view, permanent institutions would pose the danger of developing the vague standards of investment law in a direction that was not in line with the expectation of states. Vagueness of the substantive law coupled with a one-off arbitral mechanism, in other words, reduced the risk of unwanted jurisprudential developments that were either too onerous or too lenient on state conduct. Montt thereby provides a strong argument that not only empirically explains why bilateral investment treaties are so similar, and why consequently arbitral jurisprudence has given convergent rather than divergent results, but also that arbitral jurisprudence should produce coherent interpretations of the standard investors’ rights.

The challenge for international investment law, in consequence, is not institutional change, as suggested *inter alia* by Van Harten, but an interpretation of investment treaties by arbitral tribunals that finds a proper balance between the interests of investors and that of host states. In order to find this appropriate balance, Montt suggests having recourse to comparative public law in order to develop a benchmark for the interpretation of the vague standards of investment protection.¹⁴⁰ This approach, he argues, can be used to develop maximum standards of protection. Montt’s normative claim is that one cannot assume that states, by entering into investment treaties, intended to impose standards of investment protection that were more onerous than the restrictions on government action in states with a developed administrative and

¹³⁵ *Ibid.*, at 15.

¹³⁶ *Ibid.*, at 2, 105–106.

¹³⁷ *Ibid.*, at 84.

¹³⁸ *Ibid.*, at 109.

¹³⁹ *Ibid.*, at 155–159. See also Sauvart, *supra* note 48.

¹⁴⁰ Montt spells out this approach in detail for fair and equitable treatment and the concept of expropriations. See Montt, *supra* note 132, Chs 4–6.

constitutional system. Montt calls this link between the content of international investment treaties and comparative public law the ‘updated Calvo Clause’,¹⁴¹ playing on the political claim forwarded by Latin American countries under the Calvo Doctrine that international law should not grant more protection to foreigners than national treatment under domestic law.¹⁴² While Montt’s ‘updated Calvo Clause’ acknowledges that the domestic law of the host state cannot be the benchmark for providing protection to foreign investors, he claims that international investment treaties also cannot be entirely detached from domestic law.

Strikingly, Montt’s view of international investment law is much more positive than that of Van Harten and Schneiderman. Unlike the latter, Montt has a truly international perspective and is not concerned about the domestic public law values of his home country, Chile. For him, investment treaties and arbitral jurisprudence are not a threat to domestic law, but an ‘instrument of global governance and expansion of the rule of law’,¹⁴³ provided the treaties are interpreted as imposing at a maximum the principles of public law found in developed countries. In so doing, investment treaties can positively influence the domestic laws of developing countries and increase the rule of law not only for foreign investors, but more generally.¹⁴⁴

Montt accordingly perceives international investment law as a form of international public law. His approach is thus in line with a broader movement in international investment law that stresses the constructive potential of public law thinking to address the legitimacy concerns in investment law by reconceptualizing international investment law and its dispute settlement institutions from the inside and expanding public law thinking into investment law, rather than demanding a return to domestic public law. Such a constructive approach is advocated, *inter alia*, in *International Investment Law and Comparative Public Law*, which I edited.¹⁴⁵ Investment treaty arbitration, in other words, does not need to be perceived as alien to public law, but can be understood as a prolongation of public law at the international level. Such a public law approach thus translates into a call that international investment law increasingly should draw on more sophisticated public law concepts that have developed in domestic legal orders or in other internationalized public law systems, such as the European Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, and the WTO. An appropriate method for rethinking international investment law in this perspective is making use of comparative public law. This method, which also starts to resonate in investment treaty practice,¹⁴⁶ can

¹⁴¹ *Ibid.*

¹⁴² On the Calvo Doctrine see D. R. Shea, *The Calvo Clause* (1955).

¹⁴³ Montt, *supra* note 132, at 75.

¹⁴⁴ *Ibid.*

¹⁴⁵ See the contributions in Schill (ed.), *supra* note 119.

¹⁴⁶ On recourse to proportionality analysis in the practice of arbitral tribunals see Kingsbury and Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality’, in Schill (ed.), *supra* note 119, at 75. For a recent example of drawing on comparative law for the interpretation of fair and equitable treatment see *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 Dec. 2010, at paras 111, 112, 128–134.

strengthen the outcome-legitimacy of investment treaty arbitration, *inter alia* by helping to develop a jurisprudence that strikes an appropriate balance between the public interest and private investors' rights.

Similar views stressing the governance function of international investment law and arbitration now also come to the fore in public international law scholarship. The focus in this context, however, is slightly different: the emphasis here is not on (domestic) regulatory space but on the interaction between international investment law, general public international law, and other specialized international legal regimes, such as environmental law or human rights, and the concern about legal fragmentation. The book edited by Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann on *Human Rights in International Investment Law and Arbitration* is the first monographic publication that endorses this perspective by exploring in 24 contributions the relationship between investment law and human rights. The contributions, while pointing out certain tensions, stress the many commonalities of the effect of both fields to restrict government action for the benefit of private individuals.

Thus, instead of viewing investment law and human rights primarily as protecting opposite interests, the book understands both disciplines as part of the same endeavour, namely aiding the administration of justice in a global community. Even more, both human rights and investment law make use of similar interpretative techniques to avoid conflicts with other international legal obligations and domestic constitutional values, most importantly by having recourse to proportionality analysis and balancing. Accordingly, investment law and human rights law, the book suggests, have constitutional dimensions in a system of multilevel constitutionalism. Petersmann's conclusion is therefore radically different from Schneiderman's. For Petersmann, '[r]ather than undermining constitutional democracy, IEL [i.e., international economic law] and multilevel judicial protection of rule of law are preconditions for individual and democratic self-governance in the globally interdependent, worldwide division of labour among states and citizens with diverse self-interests and preferences'.¹⁴⁷

International public law approaches react to the challenges international investment law is facing, because it increasingly functions as a mechanism of global governance that goes far beyond dispute settlement and that has a more immediate impact on domestic law- and policy-making than any other international legal regime. International public law thinking thus helps to counter concerns about fragmentation arising out of the specialization of international investment law in two directions: first, in relation to other international legal regimes by stressing the commonality that exists between them and international investment law; and, secondly, in relation to domestic public law by drawing on the methods and solutions more sophisticated domestic public law systems have developed to resolve the tension between private rights and public interests. International public law approaches thus fill a blindspot that both commercial arbitration and traditional public international law approaches leave.

¹⁴⁷ Petersmann, 'Introduction and Summary: "Administration of Justice" in International Investment Law and Adjudication?', in P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), at 3, 42.

5 Future Challenges

International investment law not only exists in practice, but has become an important topic for scholarly reflection and a subject of teaching in law schools around the world. It has established itself as a specific discipline of international law that is at par with other specialized areas, such as WTO law, human rights, or environmental law. It is no longer an esoteric topic open to only a few specialists, but has reached the mainstream of international law and may even have repercussions on the further development of general international law.¹⁴⁸ Currently, the most important debates in international investment law centre on questions about the nature and function of international investment law and investment treaty arbitration as well as the problem of inconsistencies and regulatory space. The discourse in this context develops against the background of the different epistemic communities engaged in international investment law, namely public international law, commercial arbitration, and public law approaches, both domestic and international. In fact, most of the big topics crystallized because public international lawyers and public law approaches stressed the governance impact of international investment law and challenged the typical commercial arbitration perspective that investment arbitration was exclusively an instrument of dispute resolution. This change in perspective brought questions to the fore about the legitimacy of a system in which arbitral tribunals concretize and develop international investment law with global importance.

While international investment law has become a specialized sphere that has its own institutions and special discourses that are not always immediately accessible to outsiders, mainstream discourse on investment law does not present too many concerns about the negative sides of specialization and autonomization. Instead, the internal discourse on investment law appears rather receptive to outside views. It is not hermetically sealed in relation to either public international or domestic law. In fact, investment law itself is a discipline that may be more open than other areas of international law in permitting different conceptual and methodological approaches. The increasing literature on international investment law and the diversity of approaches thus had its salutary effects in avoiding the dangers of specialization that Oscar Schachter had already warned of, namely that the findings and judgments of the specialists in their fields of expertise are virtually unchallenged and largely unexamined by those outside those particular fields'.¹⁴⁹

Yet, the literature on international investment law faces considerable challenges itself: Above all, we are already facing a veritable literature flood that often either

¹⁴⁸ Cf. J. Bering *et al.*, *General Public International Law and International Investment Law – A Research Sketch on Selected Issues* (2011), at 43–71, available at: <http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf>.

¹⁴⁹ Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern U L Rev* (1977) 217, at 221.

reproduces the present discourse or presents ideas without connecting to existing internal or external debates. Although the increasing interest in investment law is to be welcomed, the consequence may be that publications either go entirely unnoticed – some rightly, some wrongly – or lead to side discourses that fragment the discipline itself. There is, for example, an undeniable danger that the increased academic interest, including but not limited to PhD research, and available funding in the field produces literature that does not further, but mainly reproduces, the present discourse. This is partly due to the difficulties connected with assessing the relevance of research questions and methodology in a field that requires a solid grasp of a cross-section of rather diverse and complex legal areas, including private international law, public international law, commercial arbitration, and domestic public law. Furthermore, the perceived need, especially for academics, to publish or perish is an adverse incentive to engage in long-term observations of the discipline. Likewise, more and more conferences on international investment law, both academic and practice-oriented, involve the firm commitment to publish conference proceedings or other monographs without leaving room for the conclusion that no further, or no immediate, publication is needed. Overall, this adds to a flood of literature that is not focused primarily on quality.

Notwithstanding this, there is still ample room for innovative scholarship in international investment law. Of particular value would be monographs that work with comparative and interdisciplinary methods. Such approaches are able to bring outside legal and other scientific expertise into international investment law; they can show to what extent investment law conforms to, or diverges from, the architecture of general or special international law; by which economic and political interests it is influenced; and whether it operates satisfactorily in serving the competing interests involved. Both cross-regime analyses and comparative law approaches thus have significant potential. Similarly, the legal history of international investment law, in particular the practice of investment dispute settlement during the nineteenth century and the first half of the twentieth century, is still not sufficiently explored.¹⁵⁰ Finally, making use of social science methodology, including empirical¹⁵¹ and economic analysis,¹⁵² promises to shed light on many aspects of international investment law that still remain in the dark.

Furthermore, we still lack doctrine in a significant number of areas that can help structure the interpretation and application of many of the central provisions in

¹⁵⁰ Modern historical analysis is limited to specific issues of investment law. See, e.g., J. Paulsson, *Denial of Justice in International Law* (2005).

¹⁵¹ See Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', 86 *N Carolina L Rev* (2007) 1; Franck, 'Empiricism and International Law: Insights for Investment Treaty Dispute Resolution', 48 *Virginia J Int'l L* (2008) 767; Franck, 'Development and Outcomes of Investment Treaty Arbitration', 50 *Harvard Int'l LJ* (2009) 436.

¹⁵² See, e.g., van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis', 12 *J Int'l Economic L* (2009) 507. But see also the work on whether investment treaties have an effect in attracting foreign investment in Sauvants and Sachs (eds), *supra* note 20, at 109–457.

investment treaties independently of the growing number of cases.¹⁵³ While it was still easily manageable to keep up with the case law on all issues relevant for international investment law a few years ago, this becomes more and more difficult the more the number of decisions grows. Doctrine could make a significant contribution to managing this task, and thus prevent the internal fragmentation of international investment law. Yet, doctrine in international investment law cannot content itself with merely describing past jurisprudence, but has to be pro-active in seeking to develop solutions for yet unresolved legal issues that may come up in investment treaty arbitration some time in the future.¹⁵⁴ Ultimately, this will require a deeper analysis of the underlying legal principles and their normative explanations and justifications without losing touch with the need for application in practice.

Finally, we need a certain re-politicization of international investment law, meaning a discourse about the different political preferences of those engaged in practice and scholarship. Currently, most authors engage little in debating the economic, political, and ideational assumptions they make about the relationship between the state and individual economic actors, or, more generally, between the state and the economic system in a globalized world. Instead, what we see more often is that authors merely declare a preference for certain jurisprudence over other on seemingly technical grounds, although that legal preference is driven by more fundamental political preferences about the desirability of international investment law, the relationship between states and investors, and the function of investment treaty arbitration. What we need much more instead is a value discourse, in which the different underlying role models of the state–market relationship are discussed and laid out openly. This may be the most important step in helping to alleviate what appears as legal fragmentation but which in essence reflects different conceptions about the nature of international investment law and its place and objective in the process of globalization.

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¹⁵³ Specialized monographs are only just starting to appear. See *supra* note 14. Furthermore, the OECD and above all UNCTAD are producing high-quality publications keeping up to date with empirical data on awards and treaty negotiation, arbitral jurisprudence, investment law doctrine, and investment policy. See the publications of UNCTAD's Investment and Enterprise Division, available at: <http://www.unctad.org/Templates/StartPage.asp?intItemID=2983&lang=1>, and of the OECD relating to International Investment, available at: http://www.oecd.org/departement/0,3355,en_2649_34863_1_1_1_1_1,00.html.

¹⁵⁴ A good example is Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration', 101 *AJIL* (1997) 711.

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