Introduction

Why compare? Not only is comparison a mode of thinking,[1] 'central to all legal analysis',[2] but it 'has always been a major technique in the development of law'.[3] In legal systems in general, and international investment law in particular, comparisons are consistently being made; the phenomenon is far from new. Why then does it need to be scrutinised? There are two main reasons for doing so. First, it seems that when comparisons are made, they are often done implicitly without spelling out their rationale and/or their systemic implications. Second, although investment treaty arbitration has become the most common method for settling investor–state disputes, nonetheless it has been harshly criticised by some authors because of its alleged legitimacy crisis.[4] This book explores whether a wider use of analogies can undermine or rather foster the legitimacy of investment treaty arbitration.

Under most investment treaties, states have agreed to give arbitrators comprehensive jurisdiction over what are essentially regulatory

[1] G. Swanson, 'Frameworks for Comparative Research: Structural Anthropology and the Theory of Action', in I. Vallier (ed.), *Comparative Methods in Sociology* (Berkeley: University of California Press, 1971), pp. 141–202, at 145 (stating that 'Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research'), quoted by J.H. Merryman, 'The Loneliness of the Comparative Lawyer', in J.H. Merryman (ed.), *The Loneliness of the Comparative Lawyer And Other Essays in Foreign and Comparative Law* (The Hague/London/Boston: Kluwer Law International, 1999), p. 2.

[2] V. Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', *American Journal of Comparative Law* 46 (1998), 43, 45.

[3] D. Barak-Erez, 'The Institutional Aspects of Comparative Law', *Columbia Journal European Law* 15 (2008–2009), 477, 478.

[4] See, for example, S.D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', *Fordham Law Review* 73 (2005), 1521–1625, at 1571 (noting that 'decisions about public issues with economic and political consequences are resolved in private before different sets of individuals who can and do come to conflicting decisions on the same points of law – and no single body has the capacity to resolve these inconsistencies').

disputes. Some scholars and practitioners have expressed concern regarding the magnitude of decision-making power allocated to investment treaty tribunals. Many of the recent arbitral awards have determined the boundary between two conflicting values: the legitimate sphere for state regulation in the pursuit of public goods, on the one hand, and the protection of foreign investments from state interference, on the other. Can comparative reasoning help adjudicators in interpreting and applying broad and open-ended investment treaty provisions? Can the use of analogies contribute to the current debate over the legitimacy of investor–state arbitration, facilitating the consideration of the commonweal in the same? How should comparisons be made? What are the limits, if any, of comparative approaches to investment treaty law and arbitration?

Comparative or analogic reasoning is a technique of legal reasoning based on similarities/differences between cases or rules (either within investment law or outside the formal rules of investment law, such as human rights). Comparative or analogic reasoning, that is, borrowing from cases or rules belonging to other jurisdictions, should follow certain methodological criteria. For instance, before borrowing cases, the arbitrators may well investigate whether the system they would like to refer to is truly comparable. The gist of the argument is that while analogies are at the core of legal reasoning, hermeneutical rules, that is, the rules of construction or interpretation, as discussed *inter alia*, in the comparative law literature, help select the available comparators.

Against this background, this book aims at scrutinising the role that comparative reasoning plays in international investment law and arbitration and identifying a method for drawing sound analogies. This investigation is of the utmost theoretical and practical relevance for investment law scholars and practitioners. It can also attract comparative lawyers' interests, proposing international investment law as a new frontier of investigation for comparative law.

The underlying hypothesis of this book is that comparative reasoning may play an important role in 'legitimising' investment treaty arbitration. A theoretical discussion of the role of comparative reasoning in international investment law and arbitration will contribute to the existing literature on investment law and other values in that it offers practical tools to solve policy-related dilemmas. For instance, in the current arbitrations concerning plain packaging of tobacco

products,[5] it will be interesting to see whether the arbitrators will refer to national or regional or even international law cases concerning analogous issues.

However, the use of analogies requires the elaboration of a sound methodology to contribute to the further development of the field in a manner compatible with public international law. While other authors have clarified *what* kind of analogies are drawn, *why* and *who* makes them,[6] the time is ripe for further investigation on *how* analogies are drawn and whether there is a suitable and reliable method for drawing them. As Cassese puts it, 'comparative lawyers establish a transnational legal discourse and act as merchants of law'. According to this paradigm, analogies are '"goods" or "merchandise" imported from the outside into a different legal order'.[7] Are there rules to govern this 'market'? Should such rules exist? How should interpretation by comparison be governed? Determining a clear methodology for drawing sound analogies can help scholars, practitioners and arbitrators to reach sound awards.

Both private and public law are often used as the relevant benchmarks for the analysis of international investment law, as the traditional distinction between public and private law is becoming blurred and investor–state arbitration itself presents hybrid features. This may have repercussions on many practical issues, such as the choice of legal orders. However, at both the macro- and micro-levels, analogies based on public international law sources should be preferred to a private law paradigm because international investment arbitration is a creature of public international law. This does not exclude public law sources provided that they are embodied in international law in the form of general principles of law or constitute evidence of state practice. In this

[5] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, ICSID Case No. ARB/10/7 Request for Arbitration, 19 February 2010; *Philip Morris Asia Limited* v. *The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12, Notice of Arbitration, 21 November 2011.

[6] J.E. Alvarez, 'Beware: Boundary Crossing', in T. Kahana and A. Scolnicov (eds.), *Boundaries of Rights, Boundaries of State* (*forthcoming* 2015); S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010); A. Roberts, 'Clash of Paradigms: Actors and Analogies shaping the Investment Treaty System', *American Journal of International Law* 107 (2013), 45–94.

[7] S. Cassese, 'Beyond Legal Comparison', *Annuario di diritto comparato e di studi legislativi* (2012), 387, 388.

context, awareness of sound comparative methods helps in identifying state practice and general principles of law. In this respect, adopting principled hermeneutics may enhance the perceived legitimacy of the system.

Although the use of comparative legal reasoning in international investment law and arbitration seems to offer concrete solutions to emerging conceptual dilemmas – such as the definition of investment, the notion of legitimate expectations and others – and is forcefully presented by reputed scholars, one may question whether a more critical approach to the use of comparative reasoning should be adopted. It is often assumed that comparative reasoning is a neutral process, but this is not always the case. For instance, the *Lauder* case[8] and the *CME* case[9] – which were parallel proceedings over the same underlying dispute – had different outcomes because different bilateral investment treaties (BITs) governed the substantive law, and the arbitral tribunals weighted the comparative method differently. While the *Lauder* Tribunal referred to a human rights case for establishing the expropriation standards,[10] the other tribunal did not. Unsurprisingly, the two tribunals came to opposite decisions. In fact, depending on the selected perspective, comparisons may have completely different outcomes. Furthermore, textual differences need to be taken into account, as interpretation cannot be used to transpose obligations from one field to another or to create new obligations. The major risk consists in adopting an ideology of free decision-making. The inadvertent use of analogies may determine the abuse of the same and ultimately lead to undesirable outcomes. Arbitrators risk acting as 'bricoleurs' rather than as 'engineers' of legal norms. 'As engineers, they would sort through the concepts and assemble them into a constitutional design that made sense according to some overarching conceptual scheme. As bricoleurs, though, they . . . use the first thing that happens to fit the immediate problem they are facing.'[11]

[8] *Ronald S. Lauder* v. *Czech Republic*, Final Award, 3 September 2001, available at http://italaw.com/documents/LauderAward.pdf.

[9] *CME Czech Republic B.V.* v. *Czech Republic*, Final Award, 14 March 2003, available at http://italaw.com/documents/CME-2003-Final_001.pdf.

[10] *Ronald S. Lauder* v. *Czech Republic*, Final Award, para. 200.

[11] The metaphor is borrowed from Lévi-Strauss, cited by M. Tushnet, 'The Possibilities of Comparative Law', *Yale Law Journal* 108 (1998–1999), 1225, 1286.

As investment law scholars, arbitrators and practitioners often recur to analogies, it seems crucial to map the current dimension of the phenomenon and to propose a more critical use of the comparative method. Since the use of analogies in investment treaty law and arbitration can shape the development of the field, this book aims to fill a lacuna in legal studies focusing on the methodology for drawing sound analogies. By furthering the judicial dialogue among international courts and tribunals, comparative reasoning may help insert non-economic considerations into investment treaty arbitration and has the potential for ultimately promoting the humanisation of international (investment) law. At the same time, this book highlights that only by knowing the merits and limits of the comparative method can adjudicators and practitioners make appropriate use of it.

This book examines the use of comparative legal reasoning in international investment law and arbitration in a comprehensive and analytical fashion, drawing on international law and comparative law literature as well as legal theory. At the same time, it has lines of continuity with the available literature that can be placed in five broad categories: (1) literature on international investment law;[12] (2) literature on international investment law and other values;[13] (3) literature on

[12] See, for example, M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010); J.W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010); C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century* (Oxford: Oxford University Press, 2009); C. Dugan, N. Rubins, D. Wallace, B. Sabahi, *Investor–State Arbitration* (Oxford: Oxford University Press, 2008); A. Reinisch, *Standards of Investment Protection* (Oxford: Oxford University Press, 2008); R. Dolzer and C. Schreuer, *Principles of International Investment Law*, 2nd ed. (Oxford: Oxford University Press, 2012).

[13] See, for instance, T. Treves, F. Seatzu, S. Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns* (London: Routledge, 2014); F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge: Cambridge University Press, 2013); L. Cotula, *Human Rights, Natural Resources and Investment Law in a Globalised World* (London: Routledge, 2013); O. De Schutter, J. Swinnen, J. Wouters (eds.), *Foreign Direct Investment and Human Development* (London: Routledge, 2012); P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009); S. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart Publishing, 2008); G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007); K. Tienhaara, *The Expropriation of Environmental Governance* (Cambridge: Cambridge University Press, 2009); S.F. Puvimanasinghe, *Foreign Investment, Human Rights and the Environment* (Leiden: Martinus Nijhoff, 2007).

multinational corporations and the law;[14] (4) comparative law scholarship;[15] and (5) legal theory.[16]

This book differs from and complements the available literature in several ways. First, by presenting a complete and systematic framework of the use of analogies in international investment law and arbitration, it maps and structures the debate.[17] Second, it relies on a public international law approach, while other scholars have relied mainly on a public law approach.[18] Third, this book does not draw merely on international (investment) law or public law sources, but it relies also on comparative law and legal theory.[19] Therefore, on the one hand, this book contributes

[14] See, for instance, S. Picciotto, *Regulating Global Corporate Capitalism* (Cambridge: Cambridge University Press, 2011); P. Muchlinski, *Multinational Enterprises and the Law*, 2nd ed. (Oxford: Oxford University Press, 2007).

[15] See, for example, M. Bogdan, *Concise Introduction to Comparative Law* (Amsterdam: Europa Law Publishing, 2013); P.G. Monateri (ed.), *Methods of Comparative Law* (Cheltenham: Edward Elgar, 2012); M. Bussani and U. Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge: Cambridge University Press, 2012); M. Adams, J. Bomhoff (eds.), *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012); W. Butler, O.V. Kresin and I.S. Shemshuchenko, *Foundations of Comparative Law: Methods and Typologies* (London: Wildy, Simmonds & Hill Publishing, 2011); E. Örücü, *The Enigma of Comparative Law* (Leiden: Martinus Nijhoff, 2004); M. Reimann and R. Zimmerman (eds.), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006); J. Smits, *Elgar Encyclopedia of Comparative Law*, 2nd ed. (Cheltenham, UK: Edward Elgar, 2012); M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Oxford/Portland: Hart Publishing, 2004); K. Zweigert and H. Kotz, *Introduction to Comparative Law*, 3rd ed. (Oxford: Oxford University Press, 1998); O. Kahn-Freund, *Comparative Law as an Academic Subject* (Oxford: Clarendon Press, 1965).

[16] See, for example, A. Larry and E. Sherwin, *Demystifying Legal Reasoning* (Cambridge: Cambridge University Press, 2008); L.L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (Cambridge: Cambridge University Press, 2005); C.R. Sunstein, 'On Analogical Reasoning', *Harvard Law Review* 106 (1993), 741.

[17] There are very few, albeit excellent, contributions concerning the linkage between comparative law and international investment law. Apart from an edited volume, other contributions to the topic under discussion are in the form of long articles or book chapters. See Schill, *International Investment Law and Comparative Public Law*; See Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System'; V. Vadi, 'Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration', *Denver Journal of International Law and Policy* 39 (2010), 67–100; M. Paparinskis, 'Analogies and Other Regimes of International Law', in Z. Douglas, J. Pauwelyn and J.E. Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014).

[18] See, for example, S. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach', *Virginia Journal of International Law* 52 (2011), 57–102.

[19] In the process of borrowing concepts and categories from comparative law, inevitably such concepts will have lost some of their initial meaning from their source discipline.

to the existing investment law scholarship by going beyond purely functionalist approaches. While constant reference will be made to the relevant awards, the theoretical framework provided by the book may be of help to both practitioners and scholars alike who are interested in the legitimacy of international investment law and arbitration. On the other hand, it complements comparative law literature transposing the current debate on the methodology of analogic reasoning from traditional fields of study to international investment law. Therefore, the book presents some elements of cross-disciplinary analysis. This is a novelty as most investment law scholars have relied only on investment law sources, while comparative law scholars have not paid much attention to the selected topic. Finally, this book does not merely describe what kinds of analogies are made, but it also investigates whether a sound methodology exists and/or should be adopted and provides the reader with a complete analytical framework of the issues involved. Therefore, such theoretical framework may be of help to both practitioners and scholars alike.

This book is written by an international law scholar and primarily for international lawyers. While the use of comparative reasoning in international law may be studied from a variety of different perspectives and institutional settings,[20] this book adopts an 'internal' approach with respect to international investment law and arbitration. Given the wealth of arbitral decisions that have been handed down in recent years, an analysis and critical assessment of this emerging field of study is necessary. Looking at the use of analogies in international investment law and arbitration allows a reflection on this emerging area of international law.

In order to make the analysis relevant to different audiences, the language will deliberately be kept technical, but efforts will be taken to achieve clarity and cohesion. As a result, this study will be of relevance for a wide audience, including but not limited to international scholars, investment law arbitrators and practitioners, state officials, as well as comparative law experts and other interested audiences.

Chapter plan

The book will proceed as follows. Part I of the book (which constitutes its *pars generalis*) sets the scene and introduces the main theoretical

The author, however, has tried to be fair to the original context of comparative law, highlighting its main features and dilemmas in a comprehensive fashion.

[20] See, for example, M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013).

and practical questions posed by the topic. Chapter 1 scrutinises some essential features of comparative law, comparative reasoning and the comparative method. Only by knowing the merits and limits of the comparative method can interpreters and adjudicators make an appropriate use of it. Chapter 2 examines the main features of international investment law and arbitration. Chapter 3 focuses on the use of comparative reasoning and international investment law. Brief reference will be made to comparative investment law (i.e. the study of national laws governing foreign direct investment and how comparative studies can influence treaty-making practices); comparative arbitration law (i.e. the use of comparisons in international arbitration); legal doctrine (i.e. how legal scholars discussing international investment law and arbitration refer to national and other regional and international legal systems); and judicial borrowing or cross-judging (i.e. how investment arbitral tribunals borrow concepts from the jurisprudence of other international, regional and national courts and tribunals). The analysis then highlights the role played by comparative reasoning in the process of treaty interpretation and the consideration of the various sources of international law such as customary law and general principles of law.

Part II, the *pars specialis* of the book, investigates the use of analogies in investment treaty arbitration. Chapter 4 considers the use of micro-comparisons (i.e. analogies dealing with specific institutions or specific problems) in investment treaty arbitration. For instance, the chapter will consider whether and, if so, how given concepts such as proportionality and reasonableness can (or have) migrate(d) from domestic legal systems to international investment arbitration. The use of comparative surveys as a legitimating factor of policy measures and as evidence of state practice is also considered. Extensive reference will be made to the jurisprudence of the relevant arbitral tribunals.

Chapter 5 examines the use of macro-comparisons (i.e. analogies between entire legal systems) in relation to international investment law and arbitration. Given its hybrid features, investment treaty law and arbitration has been analogised to different systems of law.[21] First, given the fact that under most investment treaties, states have agreed to give arbitrators comprehensive jurisdiction over what are essentially regulatory disputes, such an investment review has been compared to a

[21] Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System', 45.

sort of administrative review.[22] Second, it has been argued that access to investor–state arbitration shares many characteristics of the direct right of action before human rights courts.[23] Third, because of the procedural rules which govern it, investor–state arbitration has been analogised to commercial arbitration. Finally, arbitral tribunals have been analogised to other public international law tribunals.

Chapters 4 and 5 scrutinise and critically assess the merits and limits of such comparative endeavours and conclude that international investment law is part of international law. Therefore, it is submitted that the best analogue is not that of national courts (whose selection might be arbitrary) or commercial arbitration (which is seldom concerned with public law aspects); rather, the most appropriate framework is given by public international law. Therefore, the use of micro-comparisons should be governed by the traditional interpretative tools available to international law scholars. Comparative reasoning plays an important role in the ascertainment of general principles of law and state practice as evidence of customary international law. It also helps with interpreting international law.

Chapter 6 concludes by examining how comparative reasoning can (and does) contribute to the development of international investment law, highlighting the pros and cons of using analogies in the field and identifying methods for drawing sound analogies. The aim is to make explicit what is often implicit in the jurisprudence of arbitral tribunals; to map the ways analogies are made in the literature and in the awards; and to identify some methodological problems along the way. This chapter maps an ongoing phenomenon and identifies possible methodological tools which may help adjudicators and practitioners. On the one hand, analogies can supplement fragmentary or contradictory materials so as to ensure systemic unity and consistency. Moreover, comparative reasoning

[22] G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law', *European Journal of International Law* 17 (2006), 121; Van Harten, *Investment Treaty Arbitration and Public Law*; S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional Law and Administrative Law in the BIT Generation* (Portland: Hart Publishing, 2009); D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Premise* (Oxford: Oxford University Press, 2008).

[23] See G. Bastid Burdeau, 'Nouvelles perspectives pour l'arbitrage dans le contentieux economique intéressant l'Etat', *Revue de l'Arbitrage* 1 (1995), 16; C. Reiner and C. Schreuer, 'Human Rights and International Investment Arbitration', in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2008), pp. 82–96.

may play an important role in 'legitimising' investment treaty arbitration. On the other hand, methodology matters, and uncritical use of analogies may lead to undesirable outcomes. At both the macro- and micro-levels, the public international law paradigm should be preferred to a private law paradigm because international investment arbitration is a creature of public international law. This does not exclude public law sources provided that they are embodied in international law in the form of general principles of law or constitute evidence of state practice. Adopting a principled hermeneutics and comparative reasoning may enhance the perceived legitimacy of the system. The conclusions will then sum up the key findings of the study.