THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS AND INVESTMENT TREATY ARBITRATION: A LIMITED RELATIONSHIP

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Abstract The UNIDROIT Principles of International Commercial Contracts have appeared in a small but steady trickle of investment treaty arbitrations over the last decade. This article considers the use of the Principles by investment tribunals on questions of both domestic law and international law. It suggests that reference to the Principles can play an important legitimating role on questions of domestic law, but that this should not replace reference to the applicable law. On questions of international law, reference to the Principles may be justified by resort to the general principles of law. However, the article contends that there is only a limited role for the UNIDROIT Principles where the primary and secondary rules of investment protection are already found in treaties and custom. In addition, while general principles have historically been drawn from domestic private law, there is increasing recognition that general principles of public law are more relevant to investment arbitration. Given this, arbitrators resolving questions of international law must be cautious in references to the UNIDROIT Principles, a quintessentially private law instrument.

Keywords: defence of necessity, general principles of law, investment treaty arbitration, PICC, primary and secondary rules, UNIDROIT.

I. INTRODUCTION

First developed in 1994, the UNIDROIT Principles of International Commercial Contracts are 'a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing legal systems of the world, without the intervention of states or governments'.[1] In a relatively short

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[1] Partial Award in ICC Case No 7110, June 1995, cited in CN Brower and J Sharpe, 'The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective' (2004) 45 VaJIL 199, 201.

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period of time, they have seen a degree of success in serving as a reference point for courts and arbitral tribunals resolving contractual disputes around the world. Reflecting their favourable reception, the Principles have twice been revised by a Working Group at UNIDROIT, in 2004 and 2010.

Despite this success in other fields of law, references to the UNIDROIT Principles in public international law are scant, with only isolated appearances in the decisions of international courts and tribunals.[2] In contrast to this general silence, though, the Principles have featured relatively frequently in one field of public international law: investment treaty arbitration. In 2002, former ICSID Deputy Secretary-General Antonio Parra observed that claimants had cited the UNIDROIT Principles in two ICSID arbitrations.[3] Subsequently, one prominent arbitrator observed in 2004 that '[d]isputes arising out of bilateral or multilateral investment treaties may … prove fertile ground for the application of the UNIDROIT Principles'.[4] This prediction has proved accurate, at least to some degree: references to the UNIDROIT Principles can be found on average in two investment treaty awards per year since 2003. While these figures only represent a small proportion of the now-extensive investment treaty case-law as a whole, and are similarly minor in comparison to use of the Principles by domestic courts and international commercial arbitral tribunals,[5] they nevertheless represent a body of references significant enough to warrant closer examination.

Relations between the UNIDROIT Principles and international investment law have already been the object of academic attention in various ways. Studies have considered UNIDROIT's efforts to codify contract law into a single instrument, and the lessons that might be drawn from this for proposals to reform investment law,[6] or to codify it into a 'soft law' instrument or a single, binding multilateral

[2] The Principles have been cited by: the United Nations Compensation Commission, *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Instalment of Claims by Governments and International Organizations (Category 'F' Claims)*, S/AC.26/1997/6, 18 December 1997; the Eritrea-Ethiopia Claims Commission, Final Award: Eritrea's Damages Claims, 17 August 2009 [37] and Final Award: Ethiopia's Damages Claims, 17 August 2009 [37]; the Iran-US Claims Tribunal, Cases Nos A15 (IV) and A24, Award No 602-A15(IV)/A24-FT, Iran v USA, 2 July 2014 [288] (see also the Joint Separate Opinion of Judges Mir-Hossein Abedian, Hamid Reza Nizbakht Fini and Jamal Seifi in the same case at [11]); an arbitration against an international organization, *Polis Fondi Immobiliari di Banche Popolare SGRpA v International Fund for Agricultural Development* (UNCITRAL, PCA Case No 2010-8), Award, 17 December 2010; and the *Abyei* arbitration, *Sudan v Sudan People's Liberation Movement*, Memorial of the Sudan People's Liberation Movement, 18 December 2008 [670] <www.pca-cpa.org/SPLM%20Memorialf6c6.pdf?fil_id=1146>. No references can be found in other international courts and tribunals, including the International Court of Justice, the World Trade Organisation, the International Criminal Court, the International Criminal Tribunals for Rwanda and the former Yugoslavia, the International Tribunal for the Law of the Sea, the European Court of Human Rights and the Inter-American Court and Commission on Human Rights.

[3] Cited in Brower and Sharpe (n 1) 211.

[4] ibid.

[5] See the UNILEX database at <unilex.info>, which (as of July 2015) finds reference to the Principles in more than 400 domestic court cases or international commercial arbitrations.

[6] J Karton, 'Reform of Investor-State Dispute Settlement: Lessons from International Uniform Law' (2014) 11(1) TDM.

treaty.[7] Others have considered the use in international arbitration of soft law instruments similar to the UNIDROIT Principles, such as the IBA Guidelines on Taking Evidence in International Arbitration.[8]

However, until recently, there had been no study of the direct use of the UNIDROIT Principles by investment treaty tribunals. One work on the sources of international investment law noted only that the Principles had been cited in four cases (as of mid-2011), without further discussion.[9] Although the Principles' appearance in a 2011 investment treaty award garnered some critical attention,[10] discussions of their role in investment treaty arbitration had typically been contained to sections or footnotes of works focussing on broader or different questions.[11] But the variety of references to the Principles over the last decade, combined with the fact that they continue to be cited in parties' filings in currently pending cases,[12] suggest that more detailed consideration is needed of this potentially additional source of rights and obligations in investment law.

In three recent publications, scholars have begun to provide this consideration. Two shorter articles, by Reinisch and Bernardini, provide an initial descriptive survey of references to the Principles in investment treaty case-law.[13] In a longer article, Cordero-Moss and Behn make a normative case for reference to the Principles on questions of both domestic and international law.[14] After reviewing arbitrators' legal authority to apply the

[7] A Bjorklund and A Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012).

[8] L Newman and M Radine (eds), *Soft Law in International Arbitration* (JurisNet 2014); G Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity' (2010) 1 JIDS 283.

[9] T Cole, 'Non-Binding Documents and Literature' in T Gazzini and E de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Martinus Nijhoff 2012) 304.

[10] A Steingruber, '*El Paso v Argentine Republic*: UNIDROIT Principles of International Commercial Contracts as a Reflection of "General Principles of Law Recognized by Civilized Nations" in the Context of an Investment Treaty Claim' (2013) 18 ULR 509; S Schill, 'General Principles of Law and International Investment Law' in Gazzini and de Brabandere (n 9) 156.

[11] W ben Hamida, 'Les Principes d'UNIDROIT et l'Arbitrage Transnational: L'expansion des Principes d'UNIDROIT aux Arbitrages opposant des États ou des Organisations Internationales à des Personnes Privées' (2012) 4 JDI (Clunet); MJ Bonell, 'International Investment Contracts and General Contract Law: A Place for the UNIDROIT Principles of International Commercial Contracts?' (2012) 17 ULR 141; M Scherer, 'The Use of the PICC in Arbitration' in S Vogenauer and J Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2009).

[12] For references in pleadings in three cases over the last two years alone, see *Highbury International AVV v Venezuela* (ICSID Case No ARB/14/10), Request for Arbitration, 10 March 2014 [56]; *Gennady Mykhailenko v Belarus*, Notice of Intent to Submit Dispute to Arbitration, 2 August 2013 [186]; *Guaracachi America Inc v Bolivia* (UNCITRAL), Claimants' Reply Memorial, 21 January 2013 [172].

[13] A Reinisch, 'The Relevance of the UNIDROIT Principles of International Commercial Contracts in International Investment Arbitration' (2014) 19 ULR 609; P Bernardini, 'UNIDROIT Principles and International Investment Arbitration' (2014) 19 ULR 561.

[14] G Cordero-Moss and D Behn, 'The Relevance of the UNIDROIT Principles in Investment Arbitration' (2014) 19 ULR 570.

UNIDROIT Principles, Cordero-Moss and Behn contend that investment arbitrators can validly refer to the Principles to confirm prior findings of domestic law, but should not do so to replace an examination of domestic law. With respect to questions of international law, the authors observe that the Principles have similarly been used to confirm tribunals' findings, and they discuss the potential for greater reference to the UNIDROIT Principles as a manifestation of the third source of international law, general principles of law.

Building on Cordero-Moss and Behn's analysis, this article presents a more sceptical normative view of use of the UNIDROIT Principles in investment treaty arbitration. In Section II, the article briefly agrees with these authors that reference to the Principles can confirm but should not override domestic law, while also suggesting that the Principles can be particularly helpful where the host State fails to appear (a circumstance not unknown in investment treaty arbitration). In Section III, however, although acknowledging that reference to the Principles may be justified on questions of international law by resort to general principles of law, the article contends that the Principles have only a limited role where the primary and secondary rules of investment protection are already found in treaties and custom. When the Principles can be relied on, tribunals must ensure that they are drawing appropriate comparisons, using the Principles' secondary rules only to interpret the secondary rules of international law, rather than differently-structured primary rules. In addition, while general principles have historically been drawn from domestic private law, there is increasing recognition that general principles of *public* law are more relevant to investment arbitration. Given this, Section III suggests that reference to the UNIDROIT Principles—a quintessentially private law instrument—will not necessarily be useful on questions of international law in this area.

II. USE OF THE PRINCIPLES ON QUESTIONS OF DOMESTIC LAW

It is now well recognized that, despite the international law context of investment treaty disputes, tribunals will often need to apply domestic law. This law will largely define issues including, for instance, the nationality of the investor and the existence and scope of the rights comprising the investment in the host State.[15] Indeed, the frequently unavoidable role of domestic law marks out investment treaty arbitration from other fields of public international law, and, at first glance, might provide an ideal setting

[15] See eg A Newcombe and L Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer 2009) 92–5; C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 69–70, 182–4; M Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Municipal Law* (Kluwer 2010) xxviii–xxx.

for reference to the UNIDROIT Principles when tribunals are faced with issues of domestic contract law, in particular.

However, as this section contends, the appropriateness of reference to the UNIDROIT Principles will depend on whether the tribunal is simply adding weight to an interpretation of domestic law reached by other means, or whether the tribunal instead treats the Principles as an authority for the content of domestic law. While the former use is welcome in investment treaty arbitration, the latter use threatens both the arbitral framework and the legitimacy of tribunals.

A. Use to Confirm Interpretations of Domestic Law

Recent surveys of case law have described situations in which the UNIDROIT Principles have been used to confirm an interpretation of a relevant domestic law.[16] In *AHC v Democratic Republic of the Congo*, for instance, the tribunal drew on the UNIDROIT Principles to confirm that its view of Congolese law (on whether contracts were required to be in writing) was internationally acceptable.[17] Conversely, in *Chevron v Ecuador*, the tribunal cited the Principles to show that the State's proposed interpretation of its own domestic law was not in conformity with international standards and was therefore 'unusual', with the tribunal instead supporting the investor's proposed interpretation.[18]

As commentators have suggested, this kind of supplemental or confirmatory use of the UNIDROIT Principles 'may be particularly useful in assisting the tribunal in legitimizing their interpretation and conclusions about national law'.[19] Part of the standard justification given for the existence of investment treaties is that, in return for encouraging foreign investment and economic development, they provide an international constraint on sovereign State conduct, with a binding dispute resolution mechanism to enforce the constraint. In the absence of such treaties, the justification goes, foreign investors would be at the mercy of the host State's domestic law, which could potentially provide legal cover to interfere with them.[20] The problem, however, is that foreign investors cannot escape the application of domestic law entirely, as

[16] Cordero-Moss and Behn (n 14) 596–604; Reinisch (n 13) 612–15.

[17] *African Holding Company of America, Inc v Democratic Republic of the Congo* (ICSID Case No ARB/05/21), Decision on Jurisdictional Objections and Admissibility, 29 July 2008 [31], [32], [35]. See also Cordero-Moss and Behn (n 14) 598; Reinisch (n 13) 613 and Bernardini (n 13) 564.

[18] *Chevron Corporation v Ecuador* (UNCITRAL), Partial Award on the Merits, 30 March 2010 [474], [489].

[19] Cordero-Moss and Behn (n 14) 596. Kurtz similarly refers to such use of external norms, in particular in investment treaty arbitration, as 'a strategy of legitimation': J Kurtz, 'The Paradoxical Treatment of the ILC Articles on State Responsibility in Investor-State Arbitration' (2010) 25 ICSID Review 200, 201.

[20] J Salacuse and N Sullivan, 'Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 HarvILJ 67.

explained above. An opportunity therefore arguably exists for States to manipulate their domestic law on such issues to the detriment of foreign investors.

When investment tribunals come to apply domestic law in the course of an arbitration, then, they brush up against a sensitive point of interaction between two legal systems. Any tool that arbitrators can draw on to demonstrate that the domestic law which they are applying is not idiosyncratic, parochial or biased will therefore be welcome.[21] Observers of the use of the UNIDROIT Principles by domestic courts and in commercial arbitration have noted the 'educational purpose'[22] for which the Principles are often cited, 'underscor[ing] the compatibility of the applicable national law with international legal precepts'.[23] The UNIDROIT Principles can serve in a similar capacity in investment arbitration, and they appear to have done so already in several cases.

B. Use as Applicable Law on Questions Governed by Domestic Law

Arbitral tribunals convened to hear investment treaty disputes may also, on occasion, be asked to resolve parallel disputes under other instruments, often an investment contract.[24] When the parties have chosen (implicitly or explicitly) the UNIDROIT Principles as the applicable law governing this other instrument, it is uncontroversial that the tribunal should apply the Principles to resolve the dispute. This use of the Principles was shown in *Lemire v Ukraine*, where the investor alleged breaches of an earlier settlement agreement between himself and Ukraine, alongside breaches of the US–Ukraine bilateral investment treaty (BIT). In ruling on the breaches of the settlement agreement, the tribunal determined that the parties intended it to be governed by the UNIDROIT Principles, and it went on to apply the Principles and reject the investor's claims.[25]

However, perhaps more often, host State law will be the governing law of the investment contract, settlement agreement, or other instrument relevant to the investment. Furthermore, as explained above, host State law also necessarily governs other aspects of the investment, for instance including the property rights comprising it. In this situation, while (as the previous section explained) a tribunal might validly draw on the Principles in a confirmatory role, it is contended that reference to the Principles that *displaces* reference to the governing host State law is unjustifiable.[26]

[21] Of course, the UNIDROIT Principles themselves have been accused of Western bias: Vogenauer and Kleinheisterkamp (n 11) 10.

[22] P Mayer, cited in Brower and Sharpe (n 1) 216.

[23] ibid 214.

[24] See eg *Duke Energy Electroquil Partners v Ecuador* (ICSID Case No ARB/04/19), Award, 18 August 2008.

[25] *Joseph Lemire v Ukraine* (ICSID Case No ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010, ch VI. See the more extensive descriptions of this use of the Principles in Cordero-Moss and Behn (n 14) 582–4, Reinisch (n 13) 610–11 and Bernardini (n 13) 564–5.

[26] See similarly Cordero-Moss and Behn (n 14) 605.

An illustration of such unjustifiable reliance can be found in *Eureko v Poland*.[27] One issue arising in this case was whether the investor could raise certain claims concerning breach of a bilateral investment treaty (BIT) after having concluded a settlement agreement and waiver with Poland. Eureko argued that, because Poland had allegedly failed to perform an obligation in the settlement agreement, a general 'exception of non-performance' applied (*exceptio non adimpleti contractus*), and Eureko was therefore not bound by its own obligations, including the waiver.[28] Citing, 'for example', Article 7.1.3 of the UNIDROIT Principles, the tribunal held that the exception of non-performance only applied to 'cases of simultaneous or conditional performance'.[29] It considered that Poland's obligation was conditional on Eureko's waiver, rather than the reverse, and so the exception could not apply.[30] This meant that the investor's waiver remained in place, and the tribunal had no jurisdiction over the waived claims concerning the breach of the BIT.[31]

It is curious, however, that the tribunal did not examine the scope of the exception under the settlement agreement's governing law, this being Polish law.[32] If this law interpreted the exception differently, the tribunal's conclusion could well have been different, meaning that the investor would have been permitted to bring a larger range of claims and potentially obtain additional compensation. But the tribunal did not appear to consider that Polish law might apply to this point.[33] It noted that it would address the exception of non-performance '[w]ithout deciding whether [it] is a maxim of interpretation or a rule of international law'.[34]

Even if Polish law interprets the exception of non-performance in the same way as formulated in the UNIDROIT Principles, it nevertheless remains important for tribunals to refer to the actual governing law, at least to the extent possible, to resolve a question of domestic law. For one thing, failure to apply the applicable law can lead to annulment of an arbitral award.[35] But alongside this, tribunals have strong reasons to take care when applying domestic law. One of the major criticisms currently plaguing investment tribunals stems from their perceived continual disregard for domestic policy

[27] cf Reinisch (n 13) 616.

[28] *Eureko BV v Poland* (ad hoc arbitration), Partial Award, 19 August 2005 [167].

[29] ibid [177]–[178].

[30] The agreement expressed the mutual waivers to be a 'condition precedent' of the other obligations in the agreement: ibid [161], [170].

[31] ibid [184].

[32] See ibid [53]. cf Cordero-Moss and Behn (n 14) 589–90, assuming that international law, not domestic law, governed the applicability of the exception, and criticizing the tribunal for failing to prove that the UNIDROIT Principles reflect general principles of law (on which, see the discussion in Section III(A) below).

[33] Indeed, both the dissenting arbitrator and others have criticized the (majority) tribunal's general treatment of Polish law throughout the award: Z Douglas, 'Nothing If Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) 22 ArbIntl 27.

[34] *Eureko* (n 28) [177].

[35] Cordero-Moss and Behn (n 14) 573–4. See also HE Kjos, *Applicable Law in Investor–State Arbitration: The Interplay Between National and International Law* (OUP 2013) 56–7.

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concerns.[36] Many writers have questioned the standards of review and degree of deference that investment arbitrators have applied to host State preferences,[37] drawing on models of subsidiarity[38] and judicial review to urge a more sensitive approach. Arbitrators' engagement with questions of domestic law raises the same legitimacy questions. Domestic law is a natural expression of State sovereignty,[39] and the terms of this engagement will have significant ramifications for the reception of an award in the domestic polity.[40] Rather than displacing domestic law with an external, non-binding instrument such as the UNIDROIT Principles, tribunals must actively seek a solution in domestic law in the first instance, or risk further inflaming the present 'backlash' against the investment treaty regime.[41]

The *Eureko* tribunal was assisted by numerous experts on Polish law,[42] and could surely have obtained further information on the exception of non-performance as implemented in Polish contract law. Reference to the UNIDROIT Principles could certainly have been made in a supplementary fashion, if the tribunal was concerned to demonstrate that it was not rejecting the investor's claims via an idiosyncratic Polish legal principle. But, as explained, this reference must remain subsidiary to an assessment under the relevant governing law.[43]

A more appropriate approach to this issue is demonstrated by the case of *PSEG v Turkey*. There, the State had contended that the main investment contract did not qualify as an investment but was merely an agreement to negotiate further, since it omitted some essential commercial terms.[44] In

[36] J Alvarez, 'The Public International Law Regime Governing International Investment' (2009) 344 RdC 193, 246–52; S Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 JIEL 1037.

[37] See eg G van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007); A von Staden, 'Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2012) 10 ICON 1023; C Henckels, 'Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration' (2013) 4 JIDS 197; A Roberts, 'The Next Battleground: Standards of Review in Investment Treaty Arbitration' (2011) 16 ICCA Congress Series 170; W Burke-White and A von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 YaleJIL 283.

[38] For a similar view in relation to the ICJ, see A Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 ChineseJIL 301, 318.

[39] Mills suggests that States might validly exercise this sovereignty by deliberately enacting domestic laws that attract (or repel) foreign investment, in competition with other States. On this view, the arbitral imposition of a harmonized law (such as the UNIDROIT Principles) would amount to a monopolistic failure of the 'law market': A Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 JIEL 469, 480.

[40] R Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 NYULRev 2029, 2093; B Klafter, 'International Commercial Arbitration as Appellate Review: NAFTA's Chapter 11, Exhaustion of Local Remedies and Res Judicata' (2006) 12 UCDavisJIntlL&Pol'y 409, 409–10, 437.

[41] M Waibel *et al.* (eds), *The Backlash against Investment Arbitration* (Kluwer 2010).

[42] See *Eureko* (n 28) [21], [23].

[43] Scherer (n 11) 95.

[44] *PSEG Global Inc v Turkey* (ICSID Case No ARB/02/5), Decision on Jurisdiction, 4 June 2004 [67].

response, the claimants cited the UNIDROIT Principles, arguing that a full agreement was not necessary, as long as the parties had the intention of forming a contract and had committed themselves to negotiate the remaining terms.[45] However, the tribunal ignored this appeal to the UNIDROIT Principles, and instead rightly applied Turkish law to resolve the question of the existence and validity of the contract[46]—which was, after all, governed by Turkish law.[47] The claimants' reference to the UNIDROIT Principles may well have supported its case, but when a question of domestic law can be answered by reference to the domestic law itself, a tribunal must do so, rather than relying on the Principles.[48]

Commentators have, nevertheless, recognized a legitimate role for the UNIDROIT Principles in arbitration generally where the substantive content of the applicable law is 'impossible or excessively burdensome' to ascertain.[49] In these situations, tribunals may well be justified in turning to the readily-available UNIDROIT Principles to substitute for domestic contract law. Such situations may not be likely to arise frequently today, given the global spread of technology and the online publication of laws and commentaries. But investment treaty arbitration may again provide a particularly apposite context for this use of the UNIDROIT Principles. This stems from the acknowledgement that a reasonable proportion of investment treaty cases are brought against lower income countries.[50] These countries may not have the same financial capacity or political commitment to pursue publication and transparency as richer and more developed States, increasing the likelihood that ascertaining the contents of their domestic law will be 'impossible or excessively burdensome'. On top of this, based on existing investor–State case-law, lower income countries appear to be more likely to fail to appear in their own defence, creating additional difficulties for the tribunal in locating primary and secondary texts on the host State law.[51] Such a situation arose in *Goetz v Burundi*,[52] pushing the tribunal to apply French and

[45] ibid [75]. Art 2.14 of the 1994 UNIDROIT Principles provides: 'If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations … does not prevent a contract from coming into existence.' This provision is now in art 2.1.14 of the 2010 Principles.

[46] *PSEG* (n 44) [85], [89], [104].

[47] Although not explicitly stated, the claimant, respondent and tribunal all proceeded on this basis: see eg ibid [67], [71], [77], [85].

[48] Scherer (n 11) 95. See similarly *Ioannis Kardassopoulos v Georgia* (ICSID Case No ARB/05/18), Award, 3 March 2010 [288], [339], where the tribunal agreed with the State's argument, but without supporting the State's reliance on the UNIDROIT Principles.

[49] Scherer (n 11) 95.

[50] One 2007 study suggested that 36.5 per cent of respondents in investor–State arbitration were lower-middle-income or low-income countries: S Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 NCLRev 32.

[51] Assuming that the host State itself is more likely to have information about its own law than a foreign investor.

[52] *Antoine Goetz v Burundi* (ICSID Case No ARB/95/3), Award, 10 February 1999 [53].

Belgian law in the absence of any information on Burundian law.[53] Other lower-income States, including Moldova[54] and Tajikistan,[55] have similarly failed to appear in investment treaty proceedings. These problems of limited capacity and non-appearance compound each other, with the result that investment treaty arbitration could represent a particularly relevant context for tribunals' reliance on the UNIDROIT Principles in these specific circumstances.

III. USE OF THE PRINCIPLES ON QUESTIONS OF INTERNATIONAL LAW

Section II considered the use of the UNIDROIT Principles on questions governed by domestic host State law, suggesting that such use was permissible, and perhaps even encouraged, when undertaken in order to confirm an interpretation of domestic law, but is usually impermissible when done to displace analysis under the governing host State law. This section, by contrast, examines the potential role of the Principles in investment treaty arbitration on questions of international law.

The issues here can be framed by considering a case-law example. In *PSEG v Turkey*, also discussed above, the State relied on the UNIDROIT Principles in the course of interpreting the obligation of fair and equitable treatment (FET) in a BIT. Citing the Principles, Turkey contended that there was no general obligation on negotiating parties to reach any binding agreement, and therefore that its failure to reach agreement with the investor—despite long negotiations—did not constitute any FET breach.[56] However, the tribunal ignored this reference to the Principles, instead interpreting the FET standard largely by reference to previous BIT jurisprudence,[57] and finding a breach for other reasons.[58] Was this a mistake by the *PSEG* tribunal? Could the arbitrators usefully and legitimately have drawn on the UNIDROIT Principles to give content to the FET standard?

A. The UNIDROIT Principles as 'General Principles of Law'

Arbitrators in investment treaty disputes cannot, of course, apply *any* instrument that they feel is relevant to resolve a question of international law before them. They are constrained in various ways, most notably by the obligation to apply only the accepted sources of international law set out in Article 38(1) of the ICJ Statute. The UNIDROIT Principles are clearly not a treaty, since they are a privately-drafted statement of rules that is not binding on any State.[59] Moreover, an argument that the Principles represent customary international law would be unlikely to succeed. Setting aside the 'subsidiary means' of

[53] ibid [101]. [54] *Iurii Bogdanov v Moldova* (SCC), Arbitral Award, 22 September 2005.
[55] *Al-Bahloul v Tajikistan* (SCC Case No V 064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009.
[56] *PSEG Global Inc v Turkey* (ICSID Case No ARB/02/5), Award, 19 January 2007 [237].
[57] ibid [240]. [58] ibid [246].
[59] MJ Bonell, *An International Restatement of Contract Law* (Transnational Publishers 2005) ch 1.

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reference to judicial decisions and academic writings,[60] this leaves general principles of law under Article 38(1)(c). If the UNIDROIT Principles can be cast as a collection of general principles of law, this would provide an investment treaty tribunal with the authority that it needs to apply the Principles on questions of international law.

The predominant view, amongst the various tribunals and commentators that have considered the issue, appears to be that the Principles do reflect general principles of law.[61] However, Cordero-Moss and Behn make the important observation that the Principles are not merely a 'lowest common denominator' collection of *only* those rules that are uniformly applied throughout domestic legal systems, but also offer compromise solutions in areas of disagreement between States. The authors suggest that 'some (but not all) of the [UNIDROIT Principles] would qualify as general principles of law',[62] and that tribunals must verify whether the specific rule in question is recognized widely enough, via a 'careful comparative analysis of national legal systems',[63] before applying it. Nevertheless, while the presence of a particular rule in the UNIDROIT Principles should not automatically mean that the rule is a general principle of law, it provides a strong starting point for a tribunal to assist its search for general principles.

B. General Principles and Primary and Secondary Rules in Investment Treaty Arbitration

Even if the Principles do constitute general principles of law, it still does not necessarily follow that they can be used as authority on all questions of international law in an investment arbitration. This will depend, it is suggested, on whether the tribunal is confronted with interpreting and applying a primary rule or a secondary rule of international law.[64] Although there is no express hierarchy amongst the three major sources of international law in Article 38(1),[65] it is commonly acknowledged that resort to general

[60] Art 38(1)(d).

[61] See eg *Lemire* (n 25) [109]–[111]; *Chevron* (n 18) [382]; *El Paso v Argentina* (ICSID Case No ARB/03/15), Award, 31 October 2011 [623]; Reinisch (n 13) 622; Bernardini (n 13) 569; T Waelde, '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* (OUP 2009) 775; VV Veeder, 'MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*' (1998) 3 ULR 217, 218. cf Steingruber (n 10) 531 and A Sinclair, 'Using the UNIDROIT Principles of International Commercial Contracts in International Commercial Arbitration' (2003) 6 IALR 65, 71.

[62] Cordero-Moss and Behn (n 14) 586.

[63] ibid 588. The authors suggest that the Principles' Official Commentary could assist with this task: ibid 608.

[64] For a general overview of primary and secondary rules in international law, see eg J Combacau and D Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 NYIL 81.

[65] J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 22; A Pellet, 'Article 38' in A Zimmerman *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012) 841.

principles is intended only in a subsidiary sense, either as background to treaty interpretation under VCLT Article 31(3)(c),[66] or when rules of treaty or custom are insufficient and leave a gap or *lacuna* to be filled.[67] In a typical investment treaty dispute, the primary rules setting out the substance of the State's obligations to the investor will be found in the relevant investment treaty. Customary international law may also set out pertinent primary rules, for instance via an implicit or explicit connection between the treaty's FET standard and the customary international law minimum standard of treatment.[68] Applying the regular tools of treaty interpretation, and the regular rules governing the identification of customary international law, it might be thought that no such gap or uncertainty exists in the primary rules of investment protection. This would leave little need for reference to general principles in relation to primary rules.

By contrast, investment treaties typically do *not* specify secondary rules, such as the rules that govern the consequences of a breach of the treaty and the compensation to be paid. Tribunals have acknowledged that the content of these secondary rules must come from one of the other sources of international law—customary international law or general principles of law.[69] If the UNIDROIT Principles encapsulate general principles of law, then, tribunals could validly refer to them to fill the treaty or customary gap in specification of secondary rules.

C. Use of the UNIDROIT Principles in relation to Secondary Rules

Indeed, several cases have used the UNIDROIT Principles for precisely this purpose—to clarify and provide content to a secondary rule, particularly rules of damages.[70] These cases can be separated into two categories. The first category covers cases that employed a reference to general principles of law, in the form of the UNIDROIT Principles, to confirm a prior finding made by reference to customary international law. The second category, meanwhile, covers cases where the reference to the UNIDROIT Principles, as general

[66] C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 279; G Gaja, 'General Principles of Law' in R Wolfrum (ed), *Max Planck Encyclopaedia of International Law* (OUP) section D [22]; Pellet (n 65) 851; T Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 JWIT 103, 108.

[67] Pellet (n 65) 844, 850; H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans 1927) 34; F Fontanelli, 'The Invocation of the Exception of Non-Performance: A Case-Study on the Role and Application of General Principles of International Law of Contractual Origin' (2012) 1 CJICL 119, 124–5.

[68] See eg NAFTA Free Trade Commission, Chapter 11 Interpretation (31 July 2001) 6 ICSID Rep 567, linking NAFTA's FET standard to the customary international law standard.

[69] See eg *ADC Affiliate Ltd v Hungary* (ICSID Case No ARB/03/16), Award of the Tribunal, 2 October 2006 [483].

[70] See C McLachlan, L Shore and M Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2007) 335–7 on reference to private law solutions for questions of damages, via the general principles of law.

principles of law, was the sole source of authority for the secondary rule at issue. As will be seen, while the first category's confirmatory use is acceptable to lend further authority to the tribunal's view (similar to the use on domestic law questions, described in Section II above), the second category's direct use of the Principles as authority often sits uneasily with the subsidiary role of general principles in international law.

1. *Use to confirm finding of customary international law*

Several authors have observed the confirmatory use of the UNIDROIT Principles on a question of damages in *Talsud v Mexico*.[71] In that case, after finding that customary international law recognized the possibility of damages awards for lost profits and loss of opportunity, the *Talsud* tribunal further supported its position with a reference to the Principles.[72] Just as on questions of domestic law, discussed in Section II, such confirmatory use of the Principles with regard to the secondary rules of international law can be commended as enhancing the tribunal's reasoning.[73]

2. *Use as sole authority*

However, in other cases the UNIDROIT Principles have been relied on, as general principles of law, much more clearly as the main authority for a secondary rule. These have included rules on damages (including interest calculations), estoppel, the existence of a dispute, and treaty interpretation.[74] These uses must be treated with some caution. General principles are, of course, *general* in nature,[75] and any particular general principle may need to be balanced against others before a solution can be reached. In addition, since reference to general principles is intended to fill gaps in treaty or custom (either by providing a rule or providing background to interpret an unclear treaty rule), reliance on the UNIDROIT Principles as authority is particularly misplaced when no gaps or uncertainties exist.

As seen from the cases analysed below, arbitrators have sometimes gone wrong in citing the Principles as authority for secondary rules. In particular, while the use on damages might represent permissible efforts to fill gaps in treaty or customary rules, reference to the Principles on estoppel, on the

[71] Bernardini (n 13) 569; Reinisch (n 13) 616–17; Cordero-Moss and Behn (n 14) 591–3.

[72] *Talsud SA v Mexico* (ICSID Case No ARB(AF)/04/3), Award, 16 June 2010 [13–81]–[13–92]. On loss of opportunity, see also the use of the Principles in *Joseph Lemire v Ukraine* (ICSID Case No ARB/06/18), Award, 28 March 2011 [251]–[252].

[73] Pellet (n 65) 853: general principles 'serve as a confirming element in the persuasiveness of legal reasoning'.

[74] On the existence of a dispute and estoppel as secondary rules, see OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 EJIL 301, 311. On the rules of treaty interpretation as secondary rules, see J Pauwelyn, *Conflict of Norms in Public International Law* (CUP 2003) 149.

[75] Pellet (n 65) 837.

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existence of a dispute and on treaty interpretation is questionable when clearer international law sources are available.

a) Damages and interest

Given the notorious uncertainty of customary international law rules on damages,[76] and the lack of specification in investment treaties, resort to general principles (including the UNIDROIT Principles) might seem particularly useful on questions of damages. Indeed, the cases of *Petrobart v Kyrgyzstan* and *AIG v Kazakhstan* demonstrate well the potential in this area.

In the 2005 case of *Petrobart*, the tribunal found several violations of the Energy Charter Treaty by Kyrgyzstan, stemming originally from the breach of a contract by a Kyrgyz State entity, and the investor was awarded compensation. Petrobart requested interest on this amount, calculated in accordance with the UNIDROIT Principles, which contains a detailed rule on interest in Article 7.4.9. The State, meanwhile, argued that interest—if payable at all— should be determined according to the default judgment rate in Kyrgyz law.[77] However, the tribunal agreed with Petrobart. It noted that the investor's claim was 'based on the [Energy Charter] Treaty and is therefore a claim under international law'.[78] Because of this, the tribunal said, the applicable interest rate should be 'based on international rather than national rules', and the investor's suggested reference to the UNIDROIT Principles was deemed appropriate.[79]

The tribunal's indication that it relied on the UNIDROIT Principles because they represented international rules does not fully explain the reference. It is doubtful that the very specific rule on interest contained in Article 7.4.9 of the Principles is a general principle of law.[80] According to one analysis, the *Petrobart* tribunal applied the UNIDROIT Principles because 'the case arose from a breach of the commercial contract between the parties but the Contract did not state the level of interest payable in case of a dispute'.[81] While the dispute's origins clearly lay in a breach of contract, however, the tribunal ultimately found a breach of a treaty. Given that the applicable law on questions of damages was international law, the tribunal could well have ignored any interest rate specified in the contract anyway. Alternatively, one

[76] CN Brower and M Ottolenghi, 'Damages in Investor-State Arbitration' (2007) 4(6) TDM; S Ripinsky with K Williams, *Damages in International Investment Law* (BIICL 2008) 45, noting that international law on damages is 'far from settled'; C Gray, *Judicial Remedies in International Law* (OUP 1990) 5.

[77] *Petrobart Ltd v Kyrgyzstan* (SCC Case No 126/2003), Arbitral Award, 29 March 2005, 88.

[78] The tribunal also recognized that Art 26(6) of the ECT directed it to apply international law: ibid 64.

[79] See P Nevill, 'Awards of Interest by International Courts and Tribunals' (2007) 78 BYBIL 255, 287.

[80] Cordero-Moss and Behn (n 14) 588.

[81] BIICL, 'Case Summary: Petrobart Limited v The Kyrgyz Republic' <www.biicl.org/files/3912_2005_petrobart_v_kyrgyz_republic.pdf> 9.

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of the key architects of the UNIDROIT Principles has cited *Petrobart* as an instance where the Principles were drawn on to interpret and supplement an unsophisticated domestic law (thus placing the case more as an example for Section II(A) above).[82] However, there was no suggestion in the award itself that Kyrgyz law was not developed enough to contain principles on interest rates.

The answer probably lies instead in the general principle of law (or even customary rule) that tribunals enjoy a large degree of discretion in determining damages generally, and—in particular—whether to award interest and what rate to use.[83] The *Petrobart* tribunal's reference to the UNIDROIT Principles may be best explained simply as an exercise of this discretion, drawing on whatever 'international' rule on interest was readily available to it.[84]

A second instance of reliance on the UNIDROIT Principles on a question of damages is found in the October 2003 award of the tribunal in *AIG v Kazakhstan*. While reviewing the existence of a duty to mitigate losses in a range of legal systems, the tribunal noted that it was also present in international instruments, 'for instance … the UNIDROIT Principles',[85] seemingly accepting mitigation as a general principle of law. However, the tribunal ultimately concluded that the rule should not apply in investment treaty arbitration. It reasoned that, once an expropriation had been found, it would be inappropriate to require the injured investor to mitigate its losses: this would 'only encourage Governments to breach with impunity solemn provisions of an international treaty and weaken the protection of foreign investors'.[86] Whether or not the tribunal's conclusion was correct,[87] the UNIDROIT reference served as authority for a general principle of law on a question that finds little clear support in treaty or custom.[88]

b) Estoppel

In other areas, though, resort to general principles of law appears less well-founded. The use of the UNIDROIT Principles in relation to estoppel in *Lemire v Ukraine* provides one example of this. The case included a dissenting opinion

[82] Bonell (n 11) 145.

[83] See *Azurix Corp v Argentina* (ICSID Case No ARB/01/12), Decision on the Application for Annulment of the Argentine Republic [317]–[320].

[84] For a more recent similar use of art 7.4.9 of the Principles, see *Energoalians SARL v Moldova* (UNCITRAL), Award, 23 October 2013 [419].

[85] *AIG Capital Partners Inc v Kazakhstan* (ICSID Case No ARB/01/6), Award, 7 October 2003 [10.6.4(1)].

[86] ibid [10.6.4(5)(a)].

[87] Most subsequent case law would suggest that mitigation does apply in investment arbitration: see eg *EDF International SA v Argentina* (ICSID Case No ARB/03/23), Award, 11 June 2012 [1302] (curiously citing *AIG* on this point).

[88] Ripinsky (n 76) 319–22. cf Cordero-Moss and Behn, who cite *Petrobart* as an instance of corroboration of national law on mitigation, rather than international law: (n 14) 597.

from arbitrator Jürgen Voss, who referred to the UNIDROIT Principles to support several of his findings relating to the concept of estoppel, framed in Article 1.8 of the Principles as a prohibition on 'inconsistent behaviour'. According to the dissenter, the claimant had acted inconsistently in various respects, for instance by complaining about a particular practice of the State which benefited his competitors while he had also benefited from the practice.[89] For arbitrator Voss, this conduct prevented the investor's BIT claim from succeeding.

The dissenter did not explain the legal basis for relying on the UNIDROIT Principles. The *Lemire* tribunal had already jointly determined (albeit in a different context) in an earlier decision that the Principles constituted 'rules of international law',[90] meaning that the dissenter may have felt comfortable resorting to the Principles as authority for applying the general principle of estoppel. However, this is not an ideal choice, given that the basic applicability of estoppel in international law is well confirmed by other more traditional sources.[91]

c) Existence of dispute

Similarly, one case has involved questionable use of the Principles in determining the existence of a 'dispute' under the USA–Democratic Republic of Congo BIT. In the ICSID case *AHC v Democratic Republic of the Congo*, the tribunal's jurisdiction depended on whether the dispute between the parties had arisen during the 1990s, when the State had originally failed to pay the claimant for certain construction work, or only in 2004–05, when the State first officially declared that it would not pay the contractual debts at all.[92]

The parties cited a range of materials on the question of a dispute, including ICSID and PCIJ case law.[93] However, to resolve the question, the tribunal ultimately turned solely to the UNIDROIT Principles. It observed that the dispute essentially concerned the non-payment of a contractual debt. It then cited the situation of non-performance in Article 7.1.1 of the Principles, which, the tribunal noted, included late performance. This meant that the dispute arose at the time of the non-payment—during the 1990s—and, as a result, the tribunal declined jurisdiction.[94]

[89] *Joseph Lemire v Ukraine* (ICSID Case No ARB/06/18), Dissenting Opinion of Arbitrator Dr. Jürgen Voss, 1 March 2011 [91]–[93], [159]–[161], [226].

[90] *Lemire* (n 25) [106]–[111].

[91] See *Fisheries Case (United Kingdom v Norway)*, Judgment of 18 December 1951 [1952] ICJ Rep 116; Crawford (n 65) 234; R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 18.

[92] See Reinisch (n 13) 613–14 for further background on this case.

[93] *African Holding Company* (n 17) [111]–[114].

[94] ibid [121]. This general approach was cited with approval, but no further analysis, by the tribunal in *Pac Rim Cayman LLC v El Salvador* (ICSID Case No ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012 [2.93].

In a dissenting opinion, one arbitrator placed much more reliance on prior ICSID case law in interpreting the BIT. Notably, though, the dissenter did not question the majority's use of the UNIDROIT Principles. Indeed, he cited other provisions of the Principles, relating to the right to cure non-performance and the possibility of allowing additional time, which suggested to him that mere non-performance did not yet amount to a 'dispute'.[95]

Both the majority and the dissenter in *AHC v DRC*, then drew on the UNIDROIT Principles to resolve a substantive question of international law—namely, whether the tribunal had jurisdiction *ratione temporis* over the claimant's BIT claim at ICSID. As others have observed, however,[96] neither the majority nor the dissent gave much explanation of their reliance on the UNIDROIT Principles. Even if the Principles fall within the applicable law, they should not be the analytical starting point, in light of the gap-filling role of general principles, when more traditional sources are relevant and available, such as the VCLT's rules of treaty interpretation assisted by ICSID and PCIJ case law. Furthermore, the provisions of the Principles cited by the tribunal actually say nothing about when a dispute arises, instead focusing on whether breach ('non-performance') has occurred, and the resulting consequences. As a background tool of treaty interpretation, the Principles were of limited benefit regarding the particular question facing the *AHC* tribunal.

AHC v DRC also demonstrates that reference to the Principles is not a panacea. While the majority arbitrators and the dissenter both relied on the Principles, they came to opposite conclusions, suggesting that the Principles do not always offer an obvious solution to a problem. Again, this may simply reflect the *general* nature of general principles—if there is already a more specific rule in treaty or custom, reference to a general principle is unlikely to provide any direct resolution of the problem at hand.

d) Rules of treaty interpretation

The dissenting opinion in the *Lemire* case, already mentioned, included a further reference to the UNIDROIT Principles—but, oddly, on a point of treaty interpretation.[97] In particular, the dissenter drew on subsequent practice of the United States in interpreting the FET standard in the 1996 US–Ukraine BIT.[98] Of course, VCLT Article 31(3)(b) permits reference to subsequent practice when interpreting a treaty. But arbitrator Voss did not frame his argument on subsequent practice in the VCLT's terms. Instead, he relied on Article 4.1(2) of the UNIDROIT Principles, which provides that a contract

[95] *African Holding Company of America, Inc v Democratic Republic of the Congo* (ICSID Case No ARB/05/21), Dissenting Opinion, 14 July 2008 [20]. [96] ben Hamida (n 11) [35].

[97] In a similar vein, in its inter-State claim against Cuba under the Italy–Cuba BIT, Italy cited the UNIDROIT Principles to confirm the role of good faith in treaty interpretation. The tribunal briefly noted this reference to the Principles, but did not comment any further on it. *Italy v Cuba* (ad hoc), Preliminary Award, 15 March 2005 [37]. [98] *Lemire*, Dissenting Opinion (n 89) [143].

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shall be interpreted according to the meaning that reasonable persons would give to it where the common intention of the parties cannot be established. In addition, the dissenter cited Article 4.3(c), which directs a contractual interpreter to consider subsequent conduct of the parties.[99]

Although the *Lemire* dissenter labelled this argument only a 'subsidiary' one,[100] the use of the UNIDROIT Principles on this issue is clearly indefensible. If the general principles of law are designed to fill *lacunae* in treaty or customary rules, there is no justification for reference to general principles on the rules of treaty interpretation. These are clearly well-established both in custom and in the Vienna Convention, leaving no reason to draw from the UNIDROIT Principles as general principles of law.

3. *Conclusions*

In several other cases the parties' efforts to rely on the UNIDROIT Principles in their damages submissions have been passed over by the tribunal, even while the tribunal agreed with the point made. One explanation for this is that the tribunal simply saw no *lacuna* or uncertainty in secondary rules that needed filling by reference to general principles. In *SGS v Paraguay*, for instance, the claimant argued that interest should begin to accrue from the time that certain payments, not paid by the State, were originally due to the claimant. To support this contention, the claimant cited both the ILC Articles and the UNIDROIT Principles.[101] The tribunal agreed with the contention,[102] citing the ILC Articles—but not the UNIDROIT Principles.[103] The tribunal may have viewed a UNIDROIT reference as unnecessary given that the more traditional source of the ILC Articles (reflecting custom) already confirmed the point. Similar arguably deliberate failures to engage with claimants' secondary rule submissions drawing on the UNIDROIT Principles can be found in *Robert Azinian v Mexico*,[104] *LLC AMTO v Ukraine*,[105] *Azurix v Argentina*,[106] *Mobil v Canada*[107] and *Guaracachi v Bolivia*.[108]

Nevertheless, this section demonstrates that there may be a limited role for reference to the UNIDROIT Principles as authority for secondary rules of

[99] ibid [142]–[143].
[100] *Lemire*, Dissenting Opinion (n 89) [144].
[101] *SGS Société Générale de Surveillance SA v Paraguay* (ICSID Case No ARB/07/29), Award, 10 February 2012 [171].
[102] cf the *Petrobart* tribunal's reference to the Principles to choose an interest rate, in the absence of a clear rule: see Section III(C)(2)(a) above.
[103] *SGS* (n 101) [184].
[104] *Robert Azinian v Mexico* (ICSID Case No ARB(AF)/97/2), Claimants Memorial, 27 January 1998.
[105] *LLC AMTO v Ukraine* (SCC Case No 080/2005), Final Award, 26 March 2008 [34].
[106] *Azurix* (n 83) [298].
[107] *Mobil Investments Canada Inc v Canada* (ICSID Case No ARB(AF)/07/4), Decision on Liability and Principles of Quantum, 22 May 2012 [422].
[108] *Guaracachi* (n 12) [172]; cf *Guaracachi America Inc v Bolivia* (UNCITRAL), Award, 31 January 2014.

international law where other sources are inconclusive, as for instance on questions of damages.

D. El Paso v Argentina*: The UNIDROIT Principles and Confusion of Primary and Secondary Rules*

The discussion so far has suggested that tribunals may justifiably rely on general principles of law to interpret or ground a secondary rule in some circumstances. This assumes, however, that the rule in question is indeed a secondary rule, and not a primary rule. In *El Paso v Argentina*, the tribunal appeared to confuse the two kinds of rule, leading to a questionable reliance on the UNIDROIT Principles. Indeed, while other scholars have treated the case as an instance of their use to confirm a finding of customary international law (like the *Talsud* case discussed in Section III(C)(1) above),[109] the tribunal's misunderstanding of primary and secondary rules undermines this analysis.

El Paso v Argentina represents another case in the long series of investment treaty claims against Argentina arising out of its financial crisis in the early 2000s. As is well known, most of these cases have involved controversy over the application of the defence of necessity, said by Argentina to justify the emergency measures taken by the State that were central to most of the foreign investors' claims.

Some of the controversy over the defence of necessity in the Argentina cases has arisen because of the presence of two seemingly similar rules, one found in Article XI of the US–Argentina bilateral investment treaty,[110] and one found in customary international law (usually[111] taken to be codified in Article 25 of the ILC Draft Articles on State Responsibility).[112] The two rules have an important difference. Article XI sets out a *primary* rule, defining the conditions under

[109] Reinisch (n 13) 617 and Cordero-Moss and Behn (n 14) 595.

[110] Art XI reads: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'

[111] cf R Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility' (2012) 106 AJIL 447.

[112] Art 25 reads as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
>
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
>
> (a) the international obligation in question excludes the possibility of invoking necessity; or
>
> (b) the State has contributed to the situation of necessity.

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which a State will be responsible for breach of the treaty. Article 25, meanwhile, is a *secondary* rule, defining the consequences of a breach of the treaty. This should mean that the customary defence only becomes relevant once the treaty rule has been found not satisfied.[113] Several of the tribunals ruling on investor claims against Argentina have been criticized—and, in some cases, have seen their awards annulled by ad hoc annulment committees at ICSID—for failing to appreciate this difference between the two rules.[114]

The major issue in relation to the defence of necessity in *El Paso*, a case brought under the US–Argentina BIT, was whether Argentina could invoke the defence despite having (arguably) contributed to creating the crisis through its deliberate choice of economic policies. ILC Article 25 resolves this issue, by providing that 'necessity may not be invoked … if … the State has contributed to the situation of necessity'.[115] However, Article XI is silent on the matter. At the outset, the scope of the two rules on the question of contribution should not necessarily be expected to be the same. Treaty parties might well provide for a primary rule on necessity in a specific area that is more flexible, or more easily satisfied by States, than the general secondary rule on necessity found in custom.[116]

Unlike many of the earlier tribunals, the *El Paso* tribunal did acknowledge that Article XI was a *lex specialis*, and that it should be analysed first before turning, if relevant, to the customary defence.[117] The tribunal also effectively acknowledged that Article XI set out a primary rule while the customary defence constituted a secondary rule.[118] Quoting the *CMS* annulment decision, the tribunal held that 'if [Article XI] applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations'.[119] Despite this, the remainder of the tribunal's analysis seemed to ignore this distinction. The tribunal reasoned that, even if Article XI was a stand-alone treaty rule, concepts from customary international law could be used to interpret the treaty text. The tribunal then observed that ILC Article 25 expressly provided for the 'no-contribution' rule, and it concluded that the treaty rule should be

[113] J Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis' (2010) 59 ICLQ 325; Sloane (n 111).

[114] *CMS Gas Transmission Company v Argentina* (ICSID Case No ARB/01/8), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007 (finding errors in the *CMS* tribunal's reasoning on this point while not annulling the award); *Sempra Energy International v Argentina* (ICSID Case No ARB/02/16), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010; *Enron Creditors Recovery Corp v Argentina* (ICSID Case No ARB/01/3), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010.

[115] Art 25(2)(b). [116] Kurtz (n 113); Sloane (n 111) 451. [117] *El Paso* (n 61) [552].

[118] Though without using the language of primary and secondary rules.

[119] *El Paso* (n 61) [553].

interpreted in the same way.[120] It added that other parts of the ILC Draft Articles, on *force majeure* (Article 23) and distress (Article 24), also applied a 'no-contribution' rule.[121]

As with the earlier Argentina cases, this analysis overlooks that Article XI is not a secondary rule of the same kind as the customary defence. Since the ILC Draft Articles relate solely to secondary rules,[122] references to Article 25 (or, indeed, Articles 23 or 24) do not necessarily avail in interpreting a primary rule found in a treaty,[123] particularly where the treaty text is silent on the matter.[124] Indeed, although the tribunal cited *Continental Casualty v Argentina* in support of the 'no-contribution' interpretation of Article XI,[125] that case explicitly noted that the customary law position on this issue could not control the treaty clause's interpretation.[126]

Notably, this same confusion of primary and secondary rules appeared to infect the *El Paso* tribunal's use of the UNIDROIT Principles as well. After finding that the customary defence contained the 'no-contribution' rule, and (erroneously) using this to interpret the treaty provision, the tribunal then considered whether the 'no-contribution' rule constituted a general principle of law which could also be used to interpret the treaty.[127] To answer this, the tribunal consulted the UNIDROIT Principles' provisions on *force majeure*, exclusion clauses and hardship.[128]

The first two of these rules are contained in Chapter 7 of the Principles, entitled 'Non-Performance'.[129] They regulate the parties' obligations once a contractual breach has been found—by excusing the breach (in the case of *force majeure*), or by excluding the wrongdoer's liability for the breach (in the case of exclusion clauses).[130] In this sense, these are secondary rules,[131] ones that do not necessarily assist in interpreting a primary rule on non-precluded measures. These rules could, perhaps, be used to confirm the existence of a general principle of law holding that a situation of necessity

[120] ibid [617]–[618]. The tribunal also referred to comments from the ICJ interpreting the customary defence in the *Gabcikovo-Nagymaros* case.

[121] ibid [620].

[122] See eg J Kurtz, 'Delineating Primary and Secondary Rules on Necessity at International Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 234–5.

[123] ibid 253: 'An adjudicator that characterizes the treaty exception as a "primary" norm cannot simply draw on the ILC Articles as guidance in an interpretative task.'

[124] See Kurtz (n 113) 343, criticizing the *CMS, Sempra* and *Enron* tribunals for importing the 'no contribution' rule from the customary defence into the treaty provision when 'there is no reflection within the treaty text of such a limiter'.

[125] *El Paso* (n 61) [619].

[126] *Continental Casualty Company v Argentina* (ICSID Case No ARB/03/9), Award, 5 September 2008 [234].

[127] By means of VCLT art 31(3)(c): *El Paso* (n 61) [624].

[128] ibid [623].

[129] See art 7(1)(6) and 7(1)(7) of the UNIDROIT Principles 2010. The tribunal cited the 2004 edition, but these clauses have not changed in the latest 2010 edition.

[130] cf the view that exclusion clauses are really duty-defining clauses that determine the scope of primary obligations: see B Coote, *Exception Clauses* (Sweet & Maxwell 1964) 17–18.

[131] On *force majeure* as a secondary rule, see F Paddeu, 'A Genealogy of *Force Majeure* in International Law' (2012) 82 BYBIL 381, 396.

can preclude wrongfulness as long as the wrongdoer has not contributed to the situation. But to use the UNIDROIT secondary rules to interpret a differently-worded primary rule—one not about preclusion of wrongfulness but about the existence of wrongfulness—is to fall once again into the trap of primary/secondary rule confusion for which the Argentina tribunals have been so extensively criticized.

The UNIDROIT Principles' rule on hardship, also cited by the *El Paso* tribunal, has a different structure. Unlike *force majeure* or an exclusion clause, it does not assume prior non-performance or breach of an obligation.[132] Under the Principles, when one party experiences hardship,[133] that party is not entitled to withhold performance.[134] However, it may request renegotiation of the contract,[135] and the other party must constructively engage in the renegotiations.[136] In this sense, the hardship rule is a primary rule, effectively placing an obligation on the wronged party in certain circumstances. But Article XI of the US–Argentina BIT, by contrast, does not impose any obligations on the (allegedly) wronged investor. Instead, it confirms that conduct of the State, when taken in certain circumstances, does not amount to a breach of the BIT. From this point of view, the Principles' hardship rule seems like a strange candidate for building a general principle that would be relevant to the interpretation of Article XI.

El Paso v Argentina, then, represents a misuse of the UNIDROIT Principles as background to treaty interpretation, stemming from confusion over primary and secondary rules.

E. Use of the UNIDROIT Principles in relation to Primary Rules

The role of the UNIDROIT Principles in serving as authority for secondary rules of international law was discussed above in Section III(C). Setting aside cases such as *El Paso* in which a primary rule was treated as a secondary rule, what scope might there be for the UNIDROIT Principles to serve as authority for primary rules of international law in investment treaty arbitration?

1. Suez v Argentina*: A false start*

The case that comes closest to demonstrating conscious use of the UNIDROIT Principles to interpret a primary rule of international law—namely, the FET obligation in the France–Argentina BIT—is *Suez v Argentina*. The tribunal majority in this case had concluded that Argentine provincial authorities violated FET when (amongst other conduct) they coerced the renegotiation of

[132] See UNIDROIT Principles 2010, Official Commentary to art 7.4.1 [1]: 'Hardship … does not in principle give rise to a right to damages.'
[133] For instance, because the cost of performance has radically and unforeseeably increased.
[134] Art 6.2.3(2).
[135] Art 6.2.3(1).
[136] UNIDROIT Principles 2010, Official Commentary to art 6.2.3 [5].

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a long-term concession contract during the country's financial crisis.[137] In a separate opinion, arbitrator Pedro Nikken took issue with this finding. As part of a larger analysis, Nikken observed that the UNIDROIT Principles, 'the international standard for such contracts', imposed an obligation to renegotiate in times of hardship or changed circumstances.[138] This suggested for arbitrator Nikken that the renegotiation was not coerced and did not breach the FET standard.[139]

While Judge Nikken's reference to the Principles in *Suez* was not a decisive element of his reasoning, it shows up a larger difference between his opinion and the majority on this point. The majority construed Argentina's conduct as regulatory or governmental conduct, done outside the normal contracting frame. The majority cited numerous decrees and resolutions taken under governmental authority,[140] and held that the State's actions 'differ[ed] significantly from the various revisions or renegotiation processes provided by the Concession's legal framework', and from previous renegotiations that had been undertaken within contractual limits.[141] Judge Nikken, meanwhile, appeared to construe Argentina's conduct in purely commercial terms, examining the parties' obligations under the contract. But BITs and the FET standard do not, without more, control ordinary commercial or contractual decisions of States, instead applying only to governmental or regulatory conduct.[142] In this sense, Nikken's reference to the UNIDROIT Principles was self-defeating: the reference demonstrated that he treated Argentina's conduct as merely contractual rather than governmental, but as soon as this conclusion had been reached, there was no conduct to which the BIT could apply, and the claim inevitably failed. Therefore, it appears that the UNIDROIT reference in Nikken's separate opinion was ultimately made not in order to interpret the FET primary rule, or even to confirm a previously-reached interpretation of it, but in order to conclude that the rule did not even apply.

2. *The private law origins of general principles*

In the absence of any actual examples of use of the UNIDROIT Principles to interpret primary rules, what hypothetical role might the Principles play in

[137] *Suez, Sociedad General de Aguas de Barcelona SA v Argentina* (ICSID Case No ARB/03/17), Decision on Liability, 30 July 2010 [223].

[138] *Suez, Sociedad General de Aguas de Barcelona SA v Argentina* (ICSID Case No ARB/03/17), Separate Opinion of Arbitrator Pedro Nikken, 30 July 2010 [48].

[139] cf Cordero-Moss and Behn, who treat Nikken's reference to the Principles as confirming a finding of domestic law: (n 14) 603–4.

[140] *Suez*, Decision on Liability (n 137) [222].

[141] ibid [221].

[142] While commercial conduct is clearly attributable to States, it is doubtful whether even commercial State conduct in breach of a contract would, by itself, breach a treaty: McLachlan, Shore and Weiniger (n 70) 103. Commercial conduct in conformity with a contract, then, is even further from the conduct targeted by investment treaties.

this respect? The answer to this depends firstly on consideration of the connection between the general principles of law and primary rules of international law. It was suggested in Section III(B) that the general principles of law are not likely to play a significant role in interpreting or providing content for primary rules in investment treaty disputes, because these rules are already sufficiently defined in treaty or custom, leaving no gap or uncertainty to be remedied. One 2008 survey provides support for this, identifying use of general principles by investment tribunals only in relation to secondary rules.[143] This minimal role in fact reflects the use of general principles in wider public international law, where they are invoked by international courts and tribunals mostly within the domain of secondary rules, including rules of evidence, procedure and jurisdiction.[144]

Certainly, many have argued that the primary rules of investment treaties are actually highly open-textured, with much uncertainty remaining over their meaning even after a faithful application of the rules of treaty interpretation.[145] In this context, general principles could provide a much-needed background against which these treaties can be interpreted. However, there is a second feature of the general principles that goes some way to explaining their insignificance to date in investment law. Historically, general principles have been understood most often as principles of private law applied in domestic legal systems, where those principles can be adapted to relations between States.[146] Coming from private law, the principles thus assume a relation of equality between the two parties, whether two individuals or two States. It is now well recognized, though, that investment law does not display this equal relation.[147] The primary rules of investment treaties establish the obligations of States towards private parties. Investment treaty disputes are more akin to systems of human rights law or administrative law, where claimants are always private entities and States are always respondents, than to the classic private law areas of tort or contract.[148] For this reason, it might not be expected that general principles will be useful to the essentially public law context of an investment treaty's primary rules.

[143] Fauchald (n 74) 312.
[144] Crawford (n 65) 36.
[145] Z Douglas, *The International Law of Investment Claims* (CUP 2009) xxii; van Harten (n 37) 82.
[146] Crawford (n 65) 35; Lauterpacht (n 67) 299.
[147] This is true at least in terms of the substance of the dispute. The procedure of dispute resolution adopted, however—arbitration—is classically private in approach. The implications of these competing approaches within investment law have been investigated by eg A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45 and Mills (n 39).
[148] G van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121; S Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

3. Public law principles in investment law

But, despite their historical focus, general principles of law need not necessarily be restricted to principles of private law.[149] In recent years, tribunals and scholars alike have acknowledged the potential for general principles of *public* law to play a greater role in the primary rules of investment treaty arbitration. One proponent of this view, Stephan Schill, has contended that investment treaty standards should be interpreted by reference to public law principles taken from comparative studies of domestic (and other international) legal regimes.[150]

Indeed, it is telling that, where tribunals and authors *have* drawn from general principles of law to interpret the primary rules of investment protection, the principles referred to have had a distinct public law focus. In *Total v Argentina*, for instance, the tribunal engaged in a comparative domestic administrative law exercise in the course of establishing a general principle to interpret the FET guarantee in the France–Argentina BIT.[151] One leading textbook makes reference to human rights law and the newly-emerging concept of global administrative law in defining the general principles of law that are said to give content to the FET standard.[152] Other authors flag the role of general principles in defining FET, and then proceed to cite principles that characteristically apply only to the State in a public law setting, such as non-discrimination, due process, legal stability, and freedom from regulatory harassment.[153]

4. Primary rules of private law in a public law setting?

This all suggests that the UNIDROIT Principles are precisely the wrong sort of instrument from which to draw 'primary rule' general principles of law for application in an investment treaty dispute. The UNIDROIT Principles are a set of principles of contract law, optimized for commercial arrangements between private parties. While they do envisage the possibility of application to investor–State contracts,[154] this means application only in respect of

[149] For one recent example, see the remark suggesting that legal professional privilege (a principle not restricted to private law litigants) may be a general principle of law in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Dissenting Opinion of Judge Greenwood, 3 March 2014 <www.icj-cij.org/docket/files/156/18084.pdf> [12].

[150] Schill (n 148). Somewhat surprisingly, Schill (n 10) 156 has cited the *El Paso* tribunal's references to the UNIDROIT Principles as an example of such comparative analysis—despite the lack of any public law context to the tribunal's references, as pointed out above.

[151] *Total SA v Argentina* (ICSID Case No ARB/04/1), Decision on Liability, 27 December 2010 [128]–[130].

[152] McLachlan, Shore and Weiniger (n 70) 205, 261.

[153] Gazzini (n 66) 118; Dolzer and Schreuer (n 91) 18.

[154] Official Commentary to the 2010 Principles, 4. See also Bonell's analysis of the Principles' role in long-term investor–State contracts: (n 11).

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ordinary contract disputes between the investor and the State.[155] The Principles are not designed to regulate disputes about the exercise of sovereign powers, or disputes where the parties sit in an unequal 'private vs public' relationship, as in the typical investment treaty dispute.[156] The primary rules that they contain, such as the hardship rule drawn on by the *El Paso* tribunal, assume two freely-bargaining, self-interested parties, lacking the multitude of background stakeholders and interests that must be balanced by a State in its governmental decision-making. The *El Paso* tribunal itself recognized that the general principles are those domestic law principles which '*after adaptation* … are suitable for application on the level of public international law'.[157] But it did not appear to undertake any such 'adaptation' to take account of the dispute's public law context.

F. Private Law Analogies, Secondary Rules and the UNIDROIT Principles

This 'private law' feature of the UNIDROIT Principles may have further consequences. Despite what was suggested earlier, reliance on the UNIDROIT Principles might not be appropriate even for *secondary* rules, including the rule on preclusion of wrongfulness at issue in *El Paso v Argentina*. The situations in which private parties may be excused from performing their obligations are not necessarily the same as those for sovereigns. Instead of drawing on the UNIDROIT Principles' view of exceptional release from obligations, a more relevant comparison might be any discernible general principles of public law derived perhaps from domestic constitutional law on emergency powers of States,[158] or from domestic administrative law relating to the (non-)protection of legitimate expectations when national security is at stake.[159]

This could apply to other secondary rules as well, such as damages rules. For instance, other factors apart from the claimant's actual loss might be relevant to the determination of compensation ordered against a State. Both domestic and international public law systems of liability often contemplate much more limited damages awards for injury caused by regulatory conduct than for injury caused by a private entity.[160] Some have recently argued that

[155] Scherer (n 11) 102. Indeed, as Steingruber (n 10) 527 points out, there may often be no contract between the investor and the host State of an investment.

[156] 'There is much more at stake here [in investment disputes] than simple questions of the construction of commercial agreements': V Lowe, 'Regulation or Expropriation?' (2002) 55 CLP 447, 466. See also Bernardini (n 13) 563.

[157] *El Paso* (n 61) [622] (emphasis added).

[158] Schill (n 10) 170.

[159] For an example of this in UK law, see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *R v Prime Minister, ex p Wheeler* [2008] EWHC 1409 (Admin).

[160] See eg A van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in Schill (n 148); I Marboe, 'State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests' in Schill (n 148).

investment tribunals can, and should, take account of overriding host State interests such as human rights obligations when assessing damages.[161] Similarly, the financial effect of an award on a respondent State's budget has been identified as a relevant factor in considerations of damages in international law.[162] These views stand in some tension with the bold assertion of the UNIDROIT Principles that an 'aggrieved party is entitled to *full* compensation for harm sustained'.[163]

Therefore, the situations in which tribunals can appropriately consult the UNIDROIT Principles even in relation to a secondary rule may be quite limited.[164] What results from the analysis of Sections III(B) and (C) is that resort to the UNIDROIT Principles (as general principles of law), firstly, can only be appropriate when there is a *lacuna* of clear principles in the relevant treaty or in custom. Secondly, given the 'private law' nature of the Principles, references to them can only be justifiable in relation to the *most* general of the general principles (such as good faith, or the principle that breach of obligations entails reparations), to avoid being caught by structurally inappropriate comparisons. However, these principles are stated at such a high level of abstraction that they will rarely assist to resolve a dispute, meaning that a reference to the UNIDROIT Principles to support them adds little beyond brief confirmation.

IV. CONCLUSION

The hybrid nature of investment treaty arbitration carries many intriguing consequences, one of which is that tribunals are called upon to apply both private (domestic) law and public (international) law. The classic disputes of public international law, meanwhile, are not likely to involve contract law,

[161] M Devaney, 'Leave It to the Valuation Experts? The Remedies Stage of Investment Treaty Arbitration and the Balancing of Public and Private Interests' (Society of International Economic Law, 3rd Biennial Global Conference, WP No 2012-06, July 2012) <ssrn.com/abstract=2087777>; D Desierto, 'Human Rights and Investment in Economic Emergencies: Conflict of Treaties, Interpretation, Valuation Decisions' (Society of International Economic Law, 3rd Biennial Global Conference, WP No 2012/47, July 2012) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2101795>.

[162] *CME Czech Republic BV v Czech Republic* (UNCITRAL), Separate Opinion of Ian Brownlie, 14 March 2003 [31], citing the work of Schachter.

[163] Art 7.4.2(1) (emphasis added). This position is even stricter than some domestic private law systems, where damages can be adjusted in some circumstances: UNIDROIT Principles 2010, Official Commentary to Article 7.4.2 [1].

[164] *AIG v Kazakhstan* may have recognized this as well, albeit pointing in a different, 'investor-friendly' direction compared to the 'State-friendly' discussion here. As noted earlier, the *AIG* tribunal held that the UNIDROIT Principles' position on mitigation of damages was not applicable in investment treaty arbitration. For the tribunal, it was important that States be held to the full consequences of their treaty commitments, including any unmitigated loss suffered by investors: (n 85) [10.6.4(5)(a)]. The tribunal's reasons for this view were left unclear, but they are possibly attributable to an appreciation of the public (international) law context of investment disputes, compared to ordinary private law disputes.

and may not even relate to issues of commerce. Because of this, it is perhaps both appropriate and unsurprising that investment tribunals stand almost alone amongst international adjudicators in their reference to the UNIDROIT Principles, a collection of private law rules of contract designed for commercial disputes.[165] But, as this article has contended, even within investment law the Principles must be kept in their proper domain. They will find most relevance as a confirmatory tool on questions of domestic law, in situations where domestic law is unavailable, and on certain secondary rules of international law. Beyond this, even where their status as general principles of law has been demonstrated, reference to the UNIDROIT Principles is unlikely to be justifiable.

In light of this, what might be driving the growing number of references made to date in investment treaty case-law? While awards are often published, parties' pleadings are rarely made available. It is therefore usually difficult to know whether arbitrators' references to the Principles followed prompts by the parties in pleadings, or were done *sua sponte*. But the background of the arbitrators themselves may be a relevant factor. In Section II(B) above, the tribunal majority's use of the UNIDROIT Principles in *Eureko v Poland* was criticized on the grounds that it ignored Polish law. A strong dissent was issued in that case by Poland's nominated arbitrator. The dissenter, Polish academic Professor Jerzy Rajski, did not appear to disagree with the majority's jurisdictional finding (in favour of Poland) that relied on the UNIDROIT Principles, as discussed above. This is somewhat surprising, since one of the dissenter's major criticisms of the majority's view of the merits was that it had ignored the specificities of Polish law.[166]

However, the tribunal's apparently unanimous references to the Principles may well be explained by the fact that Professor Rajski was an original member of the Working Group established to draft the first version of the UNIDROIT Principles. Although necessarily difficult to determine without further evidence (perhaps from the parties' pleadings or the transcripts of the hearings), there is some support for this 'personal' explanation for the dissemination of the Principles throughout the rulings of international tribunals. In particular, two other cases discussed in this article, *AIG v Kazakhstan* and *El Paso v Argentina*, included Piero Bernardini on the tribunal, who also participated in drafting the 1994 Principles.[167] Others have observed the role of personal connections in encouraging the global spread of

[165] R Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 94.

[166] *Eureko BV v Poland* (ad hoc arbitration), Dissenting Opinion, 19 August 2005 [5].

[167] Steingruber (n 10) 529 hints at Bernardini's role in this respect, and Bernardini himself makes the general observation at (n 13) 563. A similar phenomenon can be observed in the references to the Principles made by the United Nations Compensation Commission and Iran-US Claims Tribunal (n 2), in which UNIDROIT participants such as Michael Joachim Bonell, Herbert Kronke and Charles Brower were involved.

legal concepts and norms,[168] and the appearance of the UNIDROIT Principles in investment treaty awards may, at least to some degree, be another example of this.

As noted in the Introduction, though, claimants themselves continue to cite the Principles in their submissions to investment treaty tribunals, and the references now preserved in the case law may well beget others in future.[169] There is undoubtedly scope to promote the use of the Principles in investment law, as this article has contended, but this must be done without ignoring distinctions between primary and secondary rules and the place of general principles in international law.

[168] C McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 OJLS 499; F Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 TexasIntlLJ 547, 552; M Hirsch, 'The Sociology of International Investment Law' in Z Douglas, J Pauwelyn and J Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014); Kurtz (n 113) 348–9; Karton (n 6) 19; Reinisch (n 13) 622.

[169] Bernardini (n 13) 569.

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