

Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds.),
General Principles of Law and International Investment Arbitration,
Brill Nijhoff, Leiden, Boston: 2018

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Although all the sources of international law, as reflected in Art. 38 of the Statute of the International Court of Justice (ICJ), enjoy equal legal force, in practice treaty and customary law are clearly predominant. As for the “the general principles of law recognized by civilized nations” – leaving aside the historical reasons behind such a wording, their popularity seems to match only their vagueness. In terms of normative meaning, “[a]s is well known, the notion of general principles of law is an irksome issue in international law. The question whether that label indicates only general principles of law coming from *in foro domestic* or also principles directly arising in the sphere of international law is a sort of *cause célèbre* in the theory of international law.”¹ Application thereof is even more problematic. “Whilst it is difficult to find decisions of international tribunals expressly based upon general principles, such principles often play a significant role as part of the legal reasoning in decisions.”² As a result, general principles of law have been “demoted” to a subsidiary³ source of international law.⁴ In the Marxist-Leninist tradition of international law it is even argued that general principles should not be confused with specific norms, but rather express *values, interests and guiding ideas*.⁵

If all that was not complicated enough, additional challenges arise in the field of international investment law (IIL). IIL is a relatively new and yet exponentially expanding area of international law.⁶ This relates directly to the current legitimacy crisis of investment arbitration.⁷ General principles bring a promise of confirming,

¹ A. Gattini, A. Tanzi, F. Fontanelli, *Under the Hood of Investment Arbitration: General Principles of Law*, in: A. Gattini, A. Tanzi, F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill Nijhoff, Leiden, Boston: 2018, p. 2.

² I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, Martinus Nijhoff Publishers, The Hague: 1998, p. 23.

³ P.-M. Dupuy, *Droit international public* (8th ed.), Dalloz, Paris: 2006, p. 343.

⁴ C. Rousseau, *Principes Généraux du Droit International Public*, A. Pedone, Paris: 1944, p. 895.

⁵ C.E. Pino Canales et al., *Temas de derecho internacional público*, La Habana 2009, p. 37.

⁶ J. Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in: J.E. Viñuales, J. Pauwelyn, Z. Douglas (eds.), *The Foundations of International Investment Law*, Oxford University Press, Oxford: 2014.

⁷ See e.g. S.D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) Fordham Law Review 1521 (2005).

correcting, or even filling the body of IIL, mostly procedural norms but occasionally also substantive ones, and vesting it with greater legitimacy.^{8,9} They can do so when an investment treaty in question does not explicitly contract out of general principles.¹⁰

Accordingly three editors, being conscious of how ambitious the task is, invited an impressive line-up of IIL experts to investigate the relationship between investment law and arbitration and international law, from the perspective of general principles of law. The volume consists of two parts dealing with procedural (Part A) and substantive (Part B) law. Both parts are constructed so that they mirror one another. Hence, we start with general principles of law and arbitral procedure (Section I)/substantive standards (Section III), followed by selected procedural principles of investment arbitration (Section II)/principles of investment law (Section IV). The esthetical rigour of this framework takes us only so far. A closer inspection of the principles instantly raises questions about distinguishing between the procedural and substantive implications. This is reflected in the introductory chapter.¹¹ Starting with a neat structure, we quickly notice numerous interdependencies/overlaps between the various parts. As a result, even for such renowned editors the volume seems to have been extremely challenging to synthesize in an ordered manner, which may explain why it does not end with some general conclusions. In turn this makes it harder to present an overview of the entire volume within the limited scope of this review. Hence, I refer to just several chapters of the book.

Starting with general principles of law and arbitral procedure, Zeno Crespi Reghizzi reminds us of the all-too-easily overlooked point that – despite the almost automatic reliance by investment tribunals on secondary rules as embodied in the International Law Commission (ILC) *Draft articles on Responsibility of States for Internationally Wrongful Acts* and the Permanent Court of International Justice (PCIJ) judgment in *Factory at Chorzów* – the actual grounds for doing so are questionable.¹² On one hand, the ILC draft was designed for proceedings between equal subjects of law. On the other hand, certain rules on inter-State responsibility – including the principles of full reparation – have been derived from private law concepts, which again do not necessarily fit the characteristics of investment arbitration (namely legitimate public policy concerns). Hence one may ask: If the customary international law on inter-state responsibility does not apply directly to ISDS claims, what should guide a tribunal in determining the proper damages for violation of an investor's substantive rights, and in particular how should the damages be quantified? According to Reghizzi, this should be done in light of the object and purpose of the treaty and general principles of law (the latter allegedly

⁸ E.-U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford University Press, Oxford: 2012, pp. 131-135.

⁹ M. Menkes, *Book Review: Ernst-Ulrich Petersmann, International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishing: 2012, 32 *Polish Yearbook of International Law* 417 (2012).

¹⁰ Gattini, Tanzi, Fontanelli, *supra* note 1, pp. 3-4.

¹¹ *Ibidem*.

¹² Z.C. Reghizzi, *General Rules and Principles on State Responsibility and Damages in Investment Arbitration: Some Critical Issues*, in: Fontanelli, Tanzi, Gattini (eds.), *supra* note 1.

including principles of domestic administrative law governing compensation to private actors, and the European and American systems of human rights protection). The chapter does not explore these offered solutions, which would be particularly interesting in terms of the normative basis to consider regional human rights property protection standards as a universal ISDS benchmark. However, it does show how seemingly the most fundamental notions become vague upon closer inspection. For example, what is the fair market value in the case of an unlawfully expropriated investment, the value of which appreciated from the time of the expropriation to the moment of the tribunal's decision? Or what is the quantum of damages in case of a violation of the fair and equitable treatment standard: the actual loss, loss of profits, or something else? Are general principles, and even more so valuation methods,¹³ tools which bring scientific certainty to the process, or rather argumentative methods harnessed in support of economic assumptions? Reghizzi does not impose any definite conclusions and his paper is limited to two specific case studies, but it certainly prods one to reconsider some intuitive assumptions.

A more systemic approach with respect to the procedural principles of investment arbitration is offered by August Reinisch, who analyses the distinction between jurisdiction and admissibility.¹⁴ Both notions (as well as competence) sound familiar to the lawyer's ear, with all their resemblance to a general-universal principle of law. Yet, "[t]here remains an underlying uneasiness with the elusive concepts of jurisdiction and admissibility."¹⁵ As a result, investment tribunals *tend to avoid the questions as much as possible*.¹⁶ This reluctance to differentiate between ICSID terms of jurisdiction and competence led a leading commentator to conclude that "[i]n practical terms, the distinction is of little consequence. (...) The two terms are frequently used interchangeably."¹⁷ Arguably the most articulate passage – and certainly the most renowned – was that contained in the *Hochtief v. Argentina* award, whereby "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."¹⁸ Numerous investment awards can be quoted where this distinction is either supported or discarded. And yet as Reinisch shows, the distinction can have great, if not decisive, importance for an investment claim. We are invited to consider the consequences in terms of waiting-period requirements, of the most favoured nation clause, of mass claims, or with respect to compliance with domestic law and corruption

¹³ M. Menkes, *I. Marboe, Calculation of Compensation and Damages in International Investment Law* (2nd ed.). Review, 33(7) Journal of International Banking Law & Regulation 274 (2018).

¹⁴ A. Reinisch, *Jurisdiction and Admissibility in International Investment Law*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

¹⁵ *Ibidem*, p. 150.

¹⁶ V. Heiskanen, *Menage a trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 29(1) ICSID Review 231 (2014).

¹⁷ C.H. Schreuer, *The ICSID Convention. A Commentary*, Cambridge University Press, Cambridge: 2001, p. 532.

¹⁸ *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October, 2011, para. 90.

defences. Ultimately, Reinisch juxtaposes these observations against general characteristics of different approaches to the issue of jurisdiction in civil law and common law systems, which leads him to some broader questions concerning the failure to exercise jurisdiction and denial of justice on one hand, and considerations like the integrity of the investment arbitration system in favour of finding a claim – within the tribunal's jurisdiction – as inadmissible on the other.

Compared to Reinisch, a reverse approach is taken by Christina Binder with respect to unjust enrichment as a general principle of law in investment arbitration. She starts with general observations on unjust enrichment, then offers a limited comparative analysis of two civil-law and two common-law jurisdictions to eventually narrow the analysis down to international law, and further to investment arbitration.¹⁹ This reverse framing of the paper – influenced by the underlying publication²⁰ – may justify the unease which readers are left with. The general introduction to the topic consists of a comprehensive analysis of unjust enrichment under general international and domestic law; it is clear that this part could have been longer and it was limited mainly by editorial guidelines. Against this thorough background, the overview of areas of application of unjust enrichments in investment arbitration (including a political crisis, state succession, expropriation, and unjust enrichment as a defence) lacks a similar specificity. The author points out that the principle sometimes has sometimes been accepted and sometimes not, but without an actual analysis concerning which investment law substantive provisions it interacts with. Expropriation? This seems excluded due to its subsidiarity feature and is not an independent ground for seeking such a remedy.²¹ Fair and equitable treatment?²² Something else? In the end one feels that the overview does not allow for any generalisations. In light of the scarcity of case law and jurisprudence dealing with this topic, this may be a disappointing, albeit entirely justified, conclusion.

The *Nemo auditur propriam turpitudinem allegans* theme of the above chapter is also analysed by Attila Tanzi in relation to the good faith principle,²³ which “can be considered as a constitutional principle of international law, possibly on a par with any legal system.”²⁴ Tanzi's fast narrative guides us from one major topic to another.

¹⁹ Ch. Binder, *Unjust Enrichment as a General Principle of Law in Investment Arbitration*, in: Gattin, Tanzi, Fontanelli, *supra* note 1.

²⁰ C. Schreuer, C. Binder, *Unjust Enrichment*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2017.

²¹ “How hopelessly open to manipulation a general concept of unjustified enrichment is, detached from specific prescriptions determining its application, is aptly illustrated by its use in the controversy over compensation for expropriated foreign property” (C.H. Schreuer, *Unjustified Enrichment in International Law*, 22(2) *The American Journal of Comparative Law* 281 (1974), p. 284).

²² A.T. Vohryzek-Griest, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID*, 31 *Loyola of Los Angeles International and Comparative Law Review* 501 (2009).

²³ A. Tanzi, *The Relevance of the Foreign Investor's Good Faith*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

²⁴ *Ibidem*, p. 193.

The first perspective is good faith and investment legality. As famously stated in *Plama v. Bulgaria*, even if the investment treaty in question does not explicitly require conformity with domestic or international law, such a requirement may be deduced from domestic law.²⁵ As a result, an illegal investment – stemming from bad faith – can be found to fall outside the *ratione materiae* competence of an investment tribunal (such a claim is procedurally abusive and/or substantively unworthy of protection). However Tanzi casts doubts as to the correctness of such an interpretation, acknowledging that it leads to the otherwise problematic issue of sanctions for a lack of good faith on the part of an investor. This brings him to the heart of the issue of an investor's good faith as an element of reciprocity towards the host state. Tanzi identifies an emerging case law which illustrates several potential consequences of a lack of good faith: lack of jurisdiction *ratione materiae*; inadmissibility of the claim (under the doctrines of *ordre public international*, clean hands, estoppel, abuse of rights/process, *en injuria jus non oritur*); rejection of a claim on merits; or an adjusted calculation of damages and/or reallocation of costs. Although the author warns against generalisations in this respect, an attempt is made to find some overarching trends depending on whether the lack of good faith can be found in the (pre-)investment or post-investment phase. Good faith – and the lack thereof – leads us to the requirements of the “clean hands” doctrine. Upon noting “at the outset (...) that the notion has not established itself with certainty as a general principle of international litigation,”²⁶ Tanzi indicates the uncertainties surrounding outright bad faith or illegal acts and, as possible defence in this respect, the principle of estoppel. Against this background Tanzi considers the all-or-nothing dilemma (whether a lack of good faith bars any claim or rather influences the quantum of damages) and traces international standards that may be considered as a good-faith normative benchmark for investors. All this leads Tanzi to conclude that while the precise content and scope of the good faith principle as a rule of conduct seems blurred – whether with respect to jurisdiction or admissibility – its function should first and foremost be considered as an interpretative principle. “Rather than an entry-point for arbitrariness, good faith should be considered as a framework of fairness, equity and reasonableness for the proper administration of justice.”²⁷ The composition of this micro-treatise on good faith is certainly most fascinating. Each part addresses a separate matter characterised by utter normative ambiguity. The meticulous structure of analysis is matched with bibliographic guidelines that seem to beg for a fully-fledged analysis. Although he does not develop these separate elements, Tanzi manages to trace certain overarching goals.

The last section of the book tackles principles of investment law, including the noteworthy analysis of police powers by Catherine Titi.²⁸ A renewed interest in police

²⁵ *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008 para. 138.

²⁶ Tanzi, *supra* note 23, p. 207.

²⁷ *Ibidem*, p. 193.

²⁸ C. Titi, *Police Powers Doctrine and International Investment Law*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

powers can be recently observed in, for instance, the highly mediated disputes concerning tobacco regulation. In *Philip Morris v Uruguay*, the arbitral tribunal unanimously rejected the claim that the challenged measures amounted to expropriation, referring explicitly to the State's police powers. Although some have criticised this judgment,²⁹ "[t]here can be no doubt that the doctrine (*sic!*) of the police powers is now an integral part of investment law."³⁰ One would thus be tempted to acknowledge police powers as a well-established element of international investment law, but what does the doctrine denote in terms of sources of public international law? Titi decides to trace the normative grounds of police powers in international investment law as a possible counter-balance to expropriation claims. Unlike other parts, where general principles of (international) law are analysed through the lens of investment law (the trickle-down of general principles), here "[t]he broad cast of existing arbitral interpretations does not allow the assumption that the police powers doctrine will be treated as reflective of customary international law, or as a general principle of law."³¹ As a result one may speculate about whether we are witnessing a reverse phenomenon from investment to general international law (a normative trickle-up). By casting the arbitral perception of the police powers doctrine – both in investment case law and in the evolutive approach in investment treaties – against the background of different theories of expropriation (the Hull formula, the Sole Effect Doctrine and Proportionality), Titi is able to cautiously signal a self-contradictory trend. On one hand, tribunals rely upon the police powers doctrine as if it was firmly grounded, while on the other hand the latest investment treaties enshrine the police powers doctrine in the text. Hence, "if the police powers doctrine is a general principle of international law, introducing such provisions may have been otiose (...) at least to the extent that they apply to the expropriation standard."³² Interestingly, she notes that the latest approach seems to aim for a middle ground between the absolute defence of the *sole effect* and the previously unrestricted application of the police powers doctrine. In the end, Titi raises even more puzzling issues, such as whether police powers are primary or secondary norms; and if the latter, whether they preclude responsibility or wrongfulness.³³

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Both the entire book and the substantive issues it tackles can be best characterised as elusive. General principles of law seem omnipresent in the international law discourse, and yet it is very difficult to identify their actual normative content, or even draw a

²⁹ P. Ranjan, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9(1) Asian Journal of International Law 98 (2019).

³⁰ A. Pellet, *Police Powers or the State's Right to Regulate*, in: M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Wolters Kluwer, Alphen aan den Rijn: 2016, p. 461.

³¹ Titi, *supra* note 28, p. 341.

³² *Ibidem*, p. 339.

³³ Although some argue that general principles, as a subsidiary source of law, fall outside the primary-secondary dichotomy, A. Cassese, *Diritto internazionale*, Il Mulino, Bologna: 2006, p. 271.

firm line between them and customary law.^{34, 35} Arguably this may be explained by the reticence on the part of states to invoke such principles out of a fear of excessive restriction of state sovereignty.³⁶ As a result, the ICJ judge Giorgio Gaja observed that “general principles are only vague and are of little use should one intend to apply what is common to a large number of legal systems.”³⁷ The majority of general principles of law play an auxiliary role for the interpretation and application of substantive norms,³⁸ which is not to say that they can play only a marginal role in international litigation and arbitration.

Going through subsequent chapters of this volume one repeatedly goes from doubt as to whether it is actually a research-worthy topic; to disbelief that so few analyses have been dedicated to the issue; to scepticism about another topic. One must acknowledge that it is a heterogenous book, whether in terms of research scope or depth of analysis, and certainly one that escapes from any easy encapsulation. At the same time, it is a must-read both for anyone considering international investment law as sub-field of the public (international) legal system and those interested in other areas of public international law, all of whom may wonder why no one has tackled this challenge earlier. Having said that, considerations of general principles of international investment law are a work-in-progress rather than the final word, and one may rightly ask if we are witnessing the treaty-capture of general principles of law. Or is the current situation yet another case of *instant formulation* of general principles, as in the 1980s with respect to human rights?³⁹

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³⁴ Dupuy, *supra* note 3, p. 351.

³⁵ A. Tanzi, *Introduzione al diritto internazionale contemporaneo* (5th ed.), Wolters Kluwer 2016, p. 112.

³⁶ Cassese, *supra* note 33, p. 270.

³⁷ G. Gaja, *General Principles of Law*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2013.

³⁸ Tanzi, *supra* note 35, p. 114.

³⁹ G. Ziccardi Capaldo, *Diritto globale. Il nuovo diritto internazionale*, Giuffrè, Milano: 2010, pp. 75-77, 87-102.

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