Reviewing the Use of “Soft Law” in Investment Arbitration

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“[T]he soft law argument is not a very good argument indeed, not before a court, and not elsewhere either . . . [N]ot only do we not need soft law, we don’t even want it either. Soft law . . . serves no identifiable purpose . . . is, actually, detrimental . . . And it misleads in that it suggests that law can come in varying shades: harder and softer.”

Jan Klabbers¹

“For those who perform the specialized jobs of international judge or arbitrator and for those who entrust their lives and treasure to them, soft law should be off-bounds.”

Michael Reisman²

José E. Alvarez³

I. Introduction

Everything about “soft law” is controversial. International lawyers disagree about whether it is merely a “smokescreen” best used by politicians or whether it is an inevitable recourse all adjudicators need given international law’s “infinite variety.”⁴ Some have seen soft law as a fundamental threat to the rule of law,⁵ while others argue that it advances the rule of law by recognizing the complexity of its modern day sources.⁶ At the same time, there is little

³ Herbert and Rose Rubin Professor of International Law, NYU School of Law. This essay is an extended version of a presentation made at conference jointly organized by Sciences Po and the Center on International Arbitration at NYU in Paris, on May 23, 2018. The author is grateful to the organizers of that conference and participants for comments, as well as the able research assistance of Raymundo Treves, NYU LLM 2018. Of course, all remaining errors are the author’s own.
⁴ Klabbers, The Undesirability, supra note 1, at 386 and 391 (citing to Judge Baxter’s reference to the “infinite variety” of international law).
⁵ See, most famously, Prosper Weil, Towards Relative Normativity in International Law?, 77 AJIL 413 (1983).
agreement on what exactly “soft law” is, about whether it is a useful or accurate label, and, as the quotations from Klabbers and Reisman above suggest, about whether participants in investor-state dispute settlement (ISDS) – litigants or arbitrators – should resort to it. Despite these fundamental disagreements, there is considerable evidence that, like it or not, publicly available ISDS rulings refer to what most commentators would consider to be soft law, and that in some cases, these references matter to the outcome. This essay considers what we mean by soft law, surveys its use (and possible misuse) in ISDS, and addresses how the resort to soft law relates to perceptions that the investment treaty regime or ISDS suffers from a legitimacy deficit or crisis.

II. Defining Soft Law

The controversy over soft law begins with defining it. Back in 2000, Christine Chinkin summarized six definitions adopted by scholars. Soft law were norms (1) that have been articulated in non-binding form (e.g., a treaty provision that states that parties “should” (not “must”) do X); (2) that contain only vague or imprecise obligations; (3) that emanate from institutions or entities that lack law-making authority; (4) that originate from or are directed at non-state actors; (5) whose violation does not trigger the legal responsibility of states under the rules of state responsibility (that is, whose breach does not constitute an “internationally wrongful act”); or (6) that elicit only voluntary adherence. As this list suggests, soft law is most

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7 See, e.g., Marc Jacob & Stephan W. Schill, Going Soft: Towards a New Age of Soft Law in International Law?, 8 WORLD ARB. & MEDIATION REV. 1 (2014). See also discussion infra at Part IV.
8 Christine Chinkin, Normative Development in the International Legal System, in COMMITMENT AND COMPLIANCE 21, 30 (Dinah Shelton ed., 2000). A more succinct version of this list is suggested by Abbott and Snidal who argue that soft law describes cases where the extent of obligation, of precision, or of delegated authority to enact law has been weakened (or all three) has been weakened. Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 INT’L ORG. 421, 422 (2000).
often defined in contradistinction to the sources of “international obligation” contained in Article 38 of the Statute of the International Court of Justice.9

Article 38 is treated in leading treatises and casebooks as affirming the three exclusive sources of international law, namely treaties, custom, and general principles, along with the two favored evidentiary tools to interpret them, namely the views of eminent publicists and judicial opinions. The typical international law student is taught, in accordance with Article 38, that international law consists only of norms issued by and directed at the two accepted international legal actors, namely states and inter-state organizations delegated with authority by their state members to take legally binding action (such as the UN Security Council). In accordance with the third and fourth definitions above, soft law emerges, by contrast, from processes that involve neither of those legal persons and/or norms that purport to directly affect non-state actors. State centricity – and its absence – forms one binary between hard and soft law.10 The other definitions above suggest a second distinction: soft law, unlike the sources in Article 38(1)(a-c), are either not legally binding11 or blur the binding/non-binding binary altogether.12

Gabrielle Kaufmann-Kohler’s widely cited article on the use of soft law in arbitration adopts a number of Chinkin’s enumerated definitions. Kaufmann-Kohler suggests that soft law norms are those that cannot be enforced through public force even if they emanate from state

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9 Statute of the I.C.J. art. 38.
10 For an argument that the involvement of private actors as the makers and/or targets of soft law contributes to the increasingly blurred boundaries between public and private international law, see Richard Collins & María Mercedes Albornoz, On the Dwindling Divide between the Public and Private: The Role of Soft Law Instruments in Global Governance, in Linkages and Boundaries in Private and Public International Law 105 (Verónica Ruiz Abou-Nigm et al. eds., 2018).
11 See, e.g., definitions (5) and (6) in Chinkin’s list above. See also José E. Alvarez, The Impact of International Organizations on International Law 1-17 (2017) (enumerating the “positivist” assumptions that underlie art. 38 sources and their impact on each of the three sources) [hereinafter ALVAREZ, THE IMPACT].
12 See, e.g., definitions (1), (2), and (3) from Chinkin’s list above.
actors. She also includes within “soft law”, norms whose contents are too vague to be applied or that are not justiciable, such as “soft” treaties (or provisions within them) that are too imprecise to be applied or that do not anticipate enforcement through a cause of action in court. Soft law, in other words, entails soft enforcement. At the same time, Kaufmann-Kohler goes beyond Chinkin’s enumerated definitions in suggesting that soft law is different from mere political or moral claims because it is typically enforced in ways not involving judicial action, namely reputational concerns, social conformity, convenience or preference for stability/predictability. She also rejects the idea of a firm dichotomy between law and non-law. Kaufmann-Kohler sees both hard and soft law as existing on a sliding scale in terms of normative strength.

Others have attempted more parsimonious definitions. Andrew Guzman and Timothy Meyer, define soft law as “[n]onbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.” Marc Jacob and Stephan Schill suggest, even more simply, that soft law encompass “[n]on-mandatory or discretionary legal techniques that can nevertheless impact decision-makers.”

All of these definitions of soft law have problematic aspects. Some of the six definitions on Chinkin’s list are, on the one hand, over inclusive. They spread the term “soft law” too widely to embrace too much territory. It seems odd and misleading, for example, to suggest that

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14 *Id.*
15 *Id.* at 284-85.
16 *Id.* at 285.
18 Jacob & Schill, supra note X, at 3.
parts of a legally binding treaty, such as the UN Charter, are “soft law” because, for example, its Article 55 only requires the UN to “promote” human rights, a term that, within definitions (1) and (2), is non-binding, vague, and imprecise.¹⁹ As is clear from the human rights revolution that has resulted from the inclusion of this hortatory injunction to promote an undefined concept (human rights), Article 55 has been deployed, both within the organization and outside it, as a tool to push for action, including legally binding action. Most international lawyers would probably resist any effort to demote this part of the UN Charter (or any of its provisions) to soft law. Many rules embodied in the traditional three sources of Article 38 are vague or imprecise. Even the strictest adherent to the exclusivity of Article 38 sources would be most reluctant to suggest, for example, that Article 39-42 of the UN Charter, which permits the Council to take action in response to (among other things) a “threat to the international peace” is only soft law because that vague threat is left to the Council to define and deploy without benefit of judicial enforcement.²⁰ Nor would most international lawyers dare to suggest that requirements in international investment agreements (IIAs) to extend fair and equitable treatment (FET) establish mere soft pseudo-obligations – despite the notorious slipperiness of FET as a legal term of art.

The expansiveness of the six soft law definitions enumerated by Chinkin, if applied cumulatively, does not just undermine positive Article 38 sources, it threatens to make every normative command from whatever source part of the lawyer’s toolbox. This expansiveness results in large part from the tendency to define soft law by the qualities that it lacks compared to positivist hard law. Soft law is identified as not state-centric, not coercively enforced, not precise, and so on – without saying what soft law is. The six definitions do not enumerate soft

¹⁹ U.N. Charter art. 55.
²⁰ U.N. Charter arts. 39-42. For an enumeration of the various legal determinations undertaken by the UN Security Council using the threat to the international peace rubric, see, e.g., Alvarez, The Impact, supra note X, at 53-141.
law’s distinctive qualities. They do not, either individually or cumulatively, tell us how soft law differs from other prescriptions that are also not binding by their own terms or are vague, emanate from non-lawmakers, directed at non-state actors, fail to trigger state responsibility, or presume only voluntary compliance. All of these characteristics describe, for instance, the edicts of the Catholic Church (including the Pope’s encyclicals) or the Bible’s Ten Commandments, yet it is unlikely that defenders of soft law would suggest that these encompass rules that lawyers should use to explain to clients what the law might require of them.

On the other hand, at least some of the partly over-lapping definitions of soft law enumerated by Chinkin can be criticized for taking too seriously the positivist assumptions of the ICJ’s Article 38. To the extent soft law is only defined in contradistinction to Article 38 sources this ignores the possibility that Article 38 is merely a choice of law clause for a particular international court that was designed to issue binding rulings only with respect to inter-state disputes. As Onuma Yasuaki has argued, Western international lawyers are to blame for elevating the significance of this choice of law clause by treating it as the alpha and omega of a system of rules designed for and by states.21 He and others have suggested that restricting the contents of international law to the three sources in Article 38 fails to take account of developments that have emerged since either the establishment of the Permanent Court of International Justice or the ICJ, including the rise and legal impact of international organizations, hybrid public-private entities, and many other non-state actors; the proliferation of international

adjudicative mechanisms (including ISDS); and other more subtle changes in international legal processes, such as the rise of “managerial” treaties capable of evolving over time.22

Characterizing such modern developments as “soft law” is not the only alternative for those who believe Article 38 is painfully out of date. Contemporary international legal processes have inspired rival frameworks. Indeed, some would suggest that the attempt to distinguish “hard” from “soft” law itself continues to treat Article 38 as the alpha and omega of a system of hard rules – an outdated idea that has been overtaken by events. To those who study “Global Administrative Law” (GAL) or “International Public Law”, international lawyers must concern themselves with all sources of authority and not only those that are deemed to be “binding” under Article 38.23 Others prefer the label “informal law” (or IN-Law) to identify standards that “steer behavior or determine the freedom of actors” but that dispense with the formalities linked to state sanctioned sources of obligation.24

Problems also emerge with respect to Kaufmann-Kohler’s approach to soft law. Like many of the definitions enumerated by Chinkin, her categorization of soft law threatens to relegate a considerable portion of traditional Article 38 sources to the “soft” category. After all, a great many parts of treaties, including IIAs, contain “shoulds” and not “shall”s” (particularly, but not only, in their preambles) or encompass only vaguely defined investor guarantees (from

22 See, e.g., id at 202-03. See also ALVAREZ, THE IMPACT, supra note X, 18-52. See also, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 316-331 (2005) (describing “managerial treaties”).
23 Benedict Kingsbury et al., The Emergence of Global Administrative Law, 68 LAW & CONTEMP. PROB. 15 (2005); THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS (Armin von Bogdandy et al. eds., 2010).
24 Joost Pauwelyn, Informal International Lawmaking: Framing the Concept and Research Questions, in INFORMAL INTERNATIONAL LAWMAKING 13, 15-16 (Joost Pauwelyn et al. eds., 2012) (identifying IN-Law as the product of output, process, and/or actor “informality”). As Pauwelyn acknowledges, this borrows a concept from political science. See, e.g., Charles Lipson, Why Are International Agreements Informal?, 45 In’l. Org. 495 (1991). There would appear to be considerable overlap between IN-Law and what most commentators would identify as “soft law”. But note that under Pauwelyn’s view, purely private efforts at norm-setting, not involving any part of government, would not be included in IN-Law. Pauwelyn, supra note 24, at 19 and 21 (citing in support Bogdandy, Dann, and Goldmann’s interest in the exercise of “international public authority”).
FET to bans on “arbitrary” treatment) or equally imprecise defenses for use by respondent states (from enabling measures to protect “essential security” or to advance a “public purpose”). Further, since some early BITs, as well as a few “third generation” IIAs, restrict the availability of access to ISDS or do not include it at all, even some investment treaties may not be subject to the adjudicative enforcement mechanisms that Kaufmann-Kohler associates with hard law.\(^{25}\) Recent proposed IIAs by Brazil, for example, rely on diplomatic enforcement, mediation, or other non-binding mechanisms to secure compliance.\(^{26}\) While such treaties mark a departure from most contemporary IIAs, this is not unusual in other treaty regimes. For centuries, treaties have often failed to contain within their terms provisions anticipating causes of action in any court, national or international. Even the “hard” sources of international law most often rely on the reputational or other “soft” techniques of compliance that Kaufmann-Kohler appears to associate with soft law.\(^{27}\)

But Kaufmann-Kohler, along with Jacob and Schill and Guzman and Meyer, go beyond the six definitions enumerated by Chinkin in one sense: all attempt to say something about what soft law is – and not only what it is not. These authors suggest that soft law consists of a delimited set of techniques, rules, or instruments that have some kind of legal impact and that therefore distinguishes them from mere usage, comity, moral edits, or political injunctions.\(^{28}\) But it is not clear what, in the views of Jacob and Schill, qualifies as “legal impact” that can

\(^{25}\) See, e.g., Taking Stock of IIA Reform, IIA ISSUES NOTE NO. 1 (UNCTAD), Mar. 2016, at 5-6 (describing the new IIAs being proposed by Brazil, India, Indonesia, and Egypt).

\(^{26}\) See, e.g., Michelle Ratton Sanchez Badin & Fabio Morosini, Navigating between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs), in RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 218 (Fabio Morosini & Michelle Ratron Sanchez Badin eds., 2018).

\(^{27}\) See, e.g., ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS (2008); RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES (2013).

\(^{28}\) See, e.g., Jacob & Schill, supra note 7, at 4.
serve to distinguish, for example, a papal encyclical from a genuine soft law instrument. Jacob and Schill’s definition above has a circular quality: what precisely is a non-mandatory or discretionary “legal” technique? Is a recognizably “legal” norm or rule one that satisfies the qualities associated with “public law” or the “rule of law”? Is everything that is, for example, promulgated publically and therefore transparent, that has been subjected to due deliberation, is accompanied by a rationale, and has been open to wider consultation beyond those charged with making a decision, soft law?29 By that standard, many of the edicts issued by private organizations – from directives issued by an international NGO to its members or guidelines from the headquarters of a transnational corporation to its contractors in a global supply chain – would qualify as soft law. Further, what do Jacob and Schill mean when they require an impact on “decision-makers”? The actions of NGOs and MNCs often impact on government actors (if that is what is meant by “decision-makers”). Climate change abatement techniques adopted by Apple and applied to its contractors and suppliers in its global supply chain may indeed have an impact on what a government chooses to do in terms of regulating climate change, for example, but why exactly should Apple’s (or any other company’s) business standards be elevated to the status of international soft law?30 And if we try to salvage a definition of soft law that includes the actions of private actors by requiring that these have “substantial impact,” this characterization would tend to privilege the world’s richest corporations (like Apple) – an

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29 These are, for example, the “rule of law” qualities recommended by GAL scholars. For their application to investment arbitration, see Benedict Kingsbury & Stephan Schill, Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, in EL NUEVO DERECHO ADMINISTRATIVO GLOBAL EN AMÉRICA LATINA 221 (Benedict Kingsbury et al. eds., 2009).

30 For discussion of such climate change efforts by private businesses, see Richard Stewart & Fabrizio Cafaggi, Meeting the Climate Change Challenge through Global Supply Chains (forthcoming MONTH, YEAR) (draft on file with author).
outcome that would not satisfy those who resort to soft law as an antidote to the hegemonic aspects of contemporary international law.

Doubtlessly aware of these difficulties, Guzman and Meyer suggest that soft law has a legal impact insofar as it can be used to supplement the two evidentiary tools spelled out in Article 38(1)(d) (the views of publicists and judicial opinions). Soft law, in their view, is first, a norm or rule that can be used to interpret or inform the understanding of binding legal rules.\(^{31}\) Second, soft law has a legal impact insofar as it is comparable to a “contractual promise” that changes what parties are entitled to expect.\(^{32}\)

While both of these formulations provide more clarity, continued ambiguities exist. Consider Guzman’s and Meyer’s first causal gateway to soft law. Are they suggesting that international law’s binding legal rules remain unchanged from those in Article 38 otherwise and that soft law is merely the equivalent of the teaching of publicists or judicial opinions, that is, only an additional kind of subsidiary evidence of what real hard law means? While this may provide a useful update on what Article 38(1)(d) should mean in the modern world, it is only a modest addendum that does not fully explain the many ways soft law is being used by international adjudicators, including in investor-state disputes. On this view, an investor-arbitrator who relies only on soft law for a legal conclusion is on a tenuous ground unless he or she connects soft law directly to the interpretation of a binding treaty, rule of custom, or general principle of law.

\(^{31}\) Guzman & Meyer, supra note X, at 174.

\(^{32}\) Id. at 180-181. Jacob and Schill also imply that this is what they mean by legal impact. They contend that a focus on traditional art. 38 sources provides an incomplete picture of the bases of international investment law since soft law captures “legally relevant information that expresses expectations of actors and stakeholders in the field.” Jacob & Schill, supra note 7, at 3.
Guzman’s and Meyer’s second causal gateway – the contractual promise analogy – also leaves some questions unanswered. Does soft law only emerge when it is shown that someone has relied, to his or her detriment, on a promise or is there a third legal gateway for soft law, namely based simply on a promise that is made without demonstration of detrimental reliance? This is not an academic quibble insofar as, for example, the ICJ has suggested that a mere oral promise by a state may be sufficient to establish a legal obligation even without proof that this promise has generated reliance by others.33 Further, is the issuance of a “promise” or the creation of “expectations” limited to the actions of states inter-se? To the extent that it is, this definition of soft law is more state-centric than some ISDS arbitrators appear to assume since, as the next section illustrates, they seem to treat guidelines issued by private bar associations, for example, as soft law.

Providing a definitive, generally applicable definition for soft law, among the welter on offer, lies beyond the scope of this short essay.34 What is clear is that those attempting to engage in serious analysis of the use of soft law in ISDS need to have one. Depending on the definition used, the extent to which soft law appears in ISDS rulings varies considerably. If one deploys Kaufmann-Kohler’s definition of soft law, for instance, an investor-state arbitrator that cites to global human rights treaties such as CEDAW, the ICCPR, or ICESCR, would be relying on “soft law” since none of those treaties provides for, or ensures, by its terms, legally binding enforcement in a court, national or international. (States that permit their own national courts to

33 Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 267 (Dec. 20) (noting that it is the intention of a state that makes a unilateral statement, not the reaction from other states, that determines whether such a unilateral statement is binding).
enforce such treaties do so under their own national law; these treaties only anticipate the issuance of views by committees of experts to examine states’ periodic human rights reports and where a state has ratified the relevant optional protocol, in response to individual complaints.)

Similarly, those who adopt either Kaufmann-Kohler’s definition of soft law or the second definition in Chinkin’s list – soft law as consisting of vague or imprecise norms – could plausibly treat a defense raised to an investor claim by a respondent state based on any of the state’s obligations under the ICESCR as a soft law defense for two reasons: (1) because ICESCR rights (such as the right to an “adequate standard of living”) are notoriously imprecise and (2) because that treaty ambiguously requires states only “to take steps . . . to the maximum of its available resources, with a view to achieving progressively . . .” the obligations contained in that treaty.

But insistence that human rights obligations contained in legally binding treaties are only soft law would draw the same objections as efforts to demote the legal status of other provisions in treaties like the UN Charter. Defenders of Article 38 sources would argue, with considerable justice, that a treaty ratified by a state, no matter how ambiguous its terms or how weak its enforcement, is hard law and that suggesting otherwise undermines all of international law.

For purposes of analytical clarity, this essay adopts a version of the simpler definition of soft law proposed by Guzman and Meyer. For our limited purposes – to reexamine its use in ISDS – it suffices to identify “soft law” as a non-legally binding norm that has some legal impact because it can be used to interpret or inform our understanding of otherwise binding legal rules (whether or not these are included in the ICJ’s Statute at Article 38) or because its constitutes a

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35 See, e.g., International Covenant on Civil and Political Rights arts. 28-45, Dec. 12, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICESCR Committee was established by ECOSOC pursuant to its authority to supervise implementation of that treaty under Part IV of ICESCR. See Economic and Social Council Res. 1985/17 (May 28, 1985).

representation made by a relevant international actor (particularly but not only states) that in turn elicits legitimate expectations by another relevant actor (including individuals and other private parties within states).\textsuperscript{37} This means that soft law includes rules that are neither as one of the three sources of international law defined in Article 38(1)(a-c) nor one of the two authorized subsidiary means to interpret those sources in Article 38(1)(d). On this view, soft law – which is not limited to scholarly views or judicial opinions – can be used to interpret, for example, national law, as well as a clause in the traditional Article 38 sources or any other rules to which the arbitrating parties have agreed.\textsuperscript{38} In accordance with Guzman’s and Meyer’s notion of contractual promises, soft law can be, in addition, the product of a process involving non-state actors, such as a bar association, that generates expectations of compliance by relevant actors.

While this working definition does not answer all questions about the meaning and import of soft law raised above, it makes it a bit easier to tell when a particular ISDS ruling is relying on soft law. Under this definition, soft law is used in ISDS, for example, when arbitrators cite to non-binding principles issued by an international organization or professional associations (whether these are designated as “declarations,” “recommendations,” “guidelines,” or “codes of conduct”), and even if these norms are not backed by the consent of states and emerge from and address non-state actors (such as the non-state participants involved in ISDS).

But those trying to empirically quantify the extent soft law is cited in investor-state decisions face hurdles beyond agreeing to a definition of what they are looking for. While this

\textsuperscript{37} This adopts the perspective, evident in some contemporary international law casebooks, of including as relevant “actors” or “participants” non-state actors and other entities that cannot be considered formal “international legal persons” licensed to themselves create international legal obligations between themselves (namely states and inter-state organizations). \textit{See, e.g.}, Jeffrey L. Dunoff et al., \textit{International Law Norms, Actors, Process} 101 and 105 (4th ed. 2015).

\textsuperscript{38} \textit{See, e.g.}, Schill, \textit{Sources}, supra note 6, at 1107-10 (enumerating instances in which ISDS tribunals have turned to foreign or comparative law and not only to attempt to draw from this “general principles of law”).
author, and others, have attempted to quantify the numbers of publicly available investor-state rulings that rely on human rights or trade law by looking for mentions of relevant terms within the texts of publicly available awards, comparable word searches for “soft law” in that caselaw would not yield useful results. Investor-state arbitrators, along with other adjudicators, are likely to avoid using a term that has had such a checkered and ill-defined trajectory. For these reasons those looking to verify the extent to which soft law is being use in ISDS would need to look instead for references to particular instruments, like the IBA Guidelines on the Taking of Evidence. But given the vast number of potential soft law instruments in existence, determining how many of them are cited in ISDS is an arduous task. A further complication is that, as is explained in the next section, citation in the course of an ISDS ruling to what may appear to be soft law, such as a reference to those IBA Guidelines, may not constitute, in the context of a particular dispute, actual reliance on soft law – not if, for example, the parties in that case have previously agreed through their arbitration agreement or otherwise that such Guidelines are applicable law. If that has occurred, the relevant Guideline is being used as hard law full stop – but determining that this is the case may require an arduous search through the underlying pleadings if this is not evident from the text of the arbitral ruling.

But if the precise extent soft law is being used in ISDS is harder to establish than is, for example, resort to WTO law or European human rights law, no one doubts that reliance on standards that satisfy the working definition of soft law adopted here presumptively trigger

Klabber’s objection at the beginning of this essay. To its critics, soft law should not be relevant in places like tribunals that are charged only with passing on state responsibility for acts in breach of binding law. The problem with soft law, according to Klabbers and fellow positivist fellow travelers, is precisely that it emanates from sources outside of states, not based on their contractual consent, and not backed by the formal principles of state responsibility that make states responsible for internationally wrongful breaches (whether or not any court or other forum capable of issuing a binding ruling to that effect exists).

Reisman, in the article from which the quotation at the start of this essay was taken, objects to the use of soft law in the arbitration context for an analogous reason. He objects to its use in arbitration because it violates the consent of the arbitrating parties. While Reisman accepts the idea that those who make the law may usefully draw on soft law – thereby suggesting that soft law can sometimes be useful – he draws the line at its use in adjudication. Arbitrators should not use soft law, he says, (1) because such reliance violates the parties’ agreement to apply only the law and not decide the dispute *ex aequo et bono*, (2) because its use undermines the reasons national courts are obligated to enforce arbitral awards, and (3) because an arbitration is not the polycentric, information-rich process in which a legislator operates but is a constrained process that needs to respect specific party consent and an adversarial ethic that requires that only material that is agreed to by the litigants can be considered by the adjudicator.

Soft law is also said not to merit the legitimating label of “law” because it purports to be more or less legally authoritative along an unpredictable spectrum that disables lawyers from

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giving meaningful guidance to their clients. Soft law is “oxymoronic”, on this view, because it blurs the distinction between black letter law (lex lata) and progressive development (lex ferenda). Article 38 directs international adjudicators to rely only on treaties, custom, or general principles and use only the views of scholars and judicial opinions to interpret those sources for a reason. It purposely delimits what lawyers are permitted to use to distinguish the practice of law – and the rule of law – from the complex advice on offer from politicians, religious leaders, or other non-lawyers. To scholars like Klabbers, the delimited Article 38 sources protect the “simplifying rigor” of the law. Soft law is an undesirable, “self-defeating” innovation that gives up on the rigorous simplicity of the rule of law to embrace the “law of the jungle” whereby lawyers can no longer operate as credible go-betweens “between our values and our actions.”

Defenders of the use of soft law in ISDS turn to pragmatism. Wälde contends, for example, that investor-state arbitrators need to issue legitimate decisions on the basis of treaties that are “inherently ambiguous, in need of interpretation and without settled interpretative jurisprudence.” All the stakeholders involved in ISDS are searching, argues Wälde, “almost desperately for anything that appears to give an international authority to their arguments” and they often latch onto a non-legally binding standard that “promises to confer some legitimacy.” Wälde states that he has

42 See, e.g., Klabbers, The Undesirability, supra note 1.
43 But as discussed at text and supra note 14, some international lawyers and arbitrators, such as Gabrielle Kaufmann-Kohler, believe that both hard and soft law exist along a spectrum of normative authority.
44 See, e.g., Klabbers, The Undesirability, supra note 1, at 387 (citing to Weil).
45 Id. at 387.
47 Id.
not encountered as yet a dispute where reference to international standards – beyond the safe ground of legally binding international law – has not been made. . . [I]nternational tribunals will rarely if ever reject reference to international standards . . . Going against an international standard outright with an award that becomes public will expose the tribunal to criticism – from the losing parties, but also the interested public opinion. That is something arbitral tribunals who are under pressure to place themselves into a presumed “mainstream” are . . . anxious to avoid. A competent counsel can therefore no longer . . . neglect relevant instruments of soft-law, either those that advance one’s party’s position or those that are adduced by the opponent.48

As this suggests, soft law’s defenders begin with the demonstrable fact – considered in the next section – that investment tribunals regularly cite to soft law. As Wälde states, the rudimentary nature of international investment law – the fact that key standards like “FET” have not required concrete application and explication in adjudicative settings until fairly recently – drives all ISDS stakeholders to anything that might fill the interpretative gaps. This need for legal gap-fillers especially applies to investor-state arbitrators who operate under the standing principle that under no circumstances should they issue a ruling of non-liquet nor otherwise suggest that the law does not provide an answer to resolve a dispute.49

There is considerable evidence that ISDS litigants are very much aware that they need to help arbitrators fill these gaps and that they turn to soft law for this purpose. Although more empirical work is needed, it appears that in most cases investor-state arbitrators cite to soft law in response to the litigating parties’ references to it.50 If citations to soft law do not often emerge through sua sponte action by arbitrators, this removes much of the sting of Reisman’s criticism

48 Id. at 6.
49 See, e.g., Prosper Weil, “The Court Cannot Conclude Definitely” . . . Non Liquet Revisited, 36 COLUM. J. TRANSNAT’L L. 109, 10 (“The view prevailing among writers is that there is no room for non liquet in international adjudication because there are no lacunae in international law.”) See also Bing Bing Jia, The Issue of Non Liquet in Recent Advisory Proceedings of the ICJ, in NORTHEAST PERSPECTIVES ON INTERNATIONAL LAW 77 (Seokwoo Lee & Hee Eun Lee eds., 2013).
50 This appears to be the case, for example, when it comes to citations to European human rights law by ISDS tribunals. See ALVAREZ, THE BOUNDARIES, supra note 39, at 49.
above – at least to the extent that his objection is to citations to soft law that are not consensual.

After all, if the parties to an arbitration acquiesce or even encourage the use of soft law through their pleadings, they have surely consented to arbitrators addressing soft law, even if they disagree over whether it should be found determinative or even relevant. Further, if we assume that one does not cite to sources that do not matter, ISDS litigants as well as arbitrators acting in the adversarial mode that Reisman defends apparently think that soft law is indeed potentially relevant and not useless in investment law.\textsuperscript{51}

The pragmatic defenders of soft law contend that while soft law admittedly makes the ascertainment of law more difficult, this complexity is not, as Klabbers insinuates, the product of bad lawyering. Many ISDS rulings would simply not make sense without considering the contribution of soft law to their rationales and sometimes to the results reached. This reality creates an ever-rising ratchet for all ISDS participants. Today, there is a strong case to be made that an international investment lawyer who does not examine soft law would be doing a disservice to her client. In other words, as Wälde implies, a lawyer who tried to adhere to Klabbers’ advice and ignore this type of “irrelevant” non-law could be accused of malpractice by their investor or respondent state client. Arbitrators are not immune from this dynamic. Investor-state arbitrators cite to soft law because, once litigants rely on it, arbitrators see it as their duty to respond to the arguments presented to them. An arbitrator who fails to respond to the adversaries’ respective arguments threatens the very purpose of the adversarial process: to

\textsuperscript{51} D. Brian King & Rahim Moloo, \textit{International Arbitrators as Lawmakers}, 46 NYU J. INT’L L. & POL. 875, 883 (2014). This is not to suggest that references to soft law are invariably or more often than not deemed relevant by investor-state arbitrators even when one of the parties relies on it. Investor-state arbitrators often reject, for example, the relevance of European human rights law. \textit{See} \textit{Alvarez, The Boundaries}, supra note 39, at 275-302 (Table I).
enable an impartial (third party) to react to the arguments presented by all litigants and non-party participants – with a keen eye to respecting the equality of the parties.

More controversially, Wälde defends arbitrators’ \textit{sua sponte} resort to soft law. He contends that it would not be improper for an ISDS tribunal to turn to soft law in response to general NGO or other third party criticisms of investment law or ISDS itself even if such references are not raised in any briefs filed in the case at hand. More work needs to be done to examine whether and to what extent contemporary ISDS rulings rely on soft law as a tool to respond to the broader legitimacy complaints directed against the investment regime and not solely to address the arguments raised by those involved in litigating a particular dispute. One suspects that to the extent soft law emerges from \textit{ex officio} references made by arbitrators acting on their own, reactions to that will fall along predictable common law/civil law lines in accord with different views about the propriety or scope of the principle of \textit{iura novit curia}. Criticisms of the fact that arbitrators reach for authorities on their own are likely to overtake concerns about whether those references were to soft law as such.\textsuperscript{52}

Given the rising use of prior ISDS caselaw as the leading source of authority cited within investor-state rulings, the role of soft law in that caselaw matters and has implications for the legitimacy of international investment law (and not only ISDS). As Schill has argued, the jurisprudence produced by ISDS tribunals is increasingly treated, by litigants and arbitrators alike, as international investment law.\textsuperscript{53} Even those litigants and arbitrators who attempt to distinguish particular lines of investor-state rulings recognize the potential significance or power

\textsuperscript{52} See generally \textit{IURA NOVIT CURIA IN INTERNATIONAL ARBITRATION} (Franco Ferrari & Giuditta Cordero-Moss eds., 2018). \textit{But see} Reisman, \textit{supra} note 2.

\textsuperscript{53} Schill, \textit{Sources}, \textit{supra} note 6, at 1105 (“To put it differently, to understand IIL means knowing the practice of investment treaty tribunals.”)
of those rulings by doing so. As is suggested by the contents of contemporary investment law
casebooks – which increasingly resemble the contents of common law casebooks – it is probably
not an exaggeration to say that ISDS tribunals define what that law is.54 The “international
standards” to which Wälde refers emerge, in short, not solely from soft law issued by non-state
actors but from the fact that these are incorporated into arbitral rulings that are, in turn, relied
upon by subsequent tribunals. Arbitral rulings produce relevant international standards, while
themselves evincing the very spectrum of normativity that is so troubling to scholars like
Klabbers. After all, it is not only the soft law to which they are referring that exists along a
spectrum of authoritativeness. The rulings themselves are part of that spectrum as jurisprudence
constante – that is, they are not legally binding on non-parties to the earlier arbitration but not
legally irrelevant either.

III. An Overview of Soft Law in Use in ISDS

Jacob and Schill contend that the use of soft law has varied over time. They argue that it
has emerged during three historical stages: first, to build the regime as the first BITs developed;
second, to consolidate and elaborate its rules in the 1990s as IIAs proliferated and the first wave
of investor claims began; and third, to respond to contemporary demands for the “re-balancing”
and “reconfiguration” of the regime.55 Whether or not this historical analysis provides a useful
simplification of history, it provides a useful take-off point for enumerating the types of soft law
instruments that have come to be used in ISDS (and not only by those drafting and negotiating
IIAs).

54 For evidence of the extent of arbitral reliance on prior arbitral rulings, see Jeffrey P. Commission, Precedent in
Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence, 24 J. INT’L ARB. 192 (2007); Ole
55 Jacob & Schill, supra note 7, at 8-15.
The list of soft law instruments within Jacob and Schill’s first category would include proposals for draft multilateral conventions that were never successfully concluded, such as the Draft “Abs-Shawcross” Convention on Investment Abroad and the proposed Convention on the International Responsibility of States for Injuries to Aliens. These draft treaties inspired the drafters of early BITs, and have been cited in connection with the interpretation of IIAs ever since, particularly to assist in the interpretation of investor guarantees such as FET, relevant standards under customary international law, and protections in the course of expropriation. Instruments in that first category would also include General Assembly resolutions such as the controversial 1974 Charter of Economic Rights and Duties of States, along with its 1973 and 1962 efforts to explain what states are permitted to do on the basis of their “Permanent Sovereignty over Natural Resources”. It would also include the World Bank’s Guidelines on the Treatment of Foreign Direct Investment. All of these instruments have been cited in the

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56 Id. at 8. See also Draft Convention on Investments Abroad (Abs-Shawcross Convention), reprinted in 5 INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM 395 (UNCTAD ed., 2000).
60 G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States (Dec. 12, 1974); G.A. Res. 3171 (XXVIII), Permanent Sovereignty over Natural Resources (Dec. 17, 1973); G.A. Res. 1803 (XVII), Permanent Sovereignty over Natural Resources (Dec. 14, 1962). See, e.g., SEDCO v. Iran, Interlocutory Award, 10 Iran-U.S. Cl. Rep. 180 (1986); Texaco Overseas Petroleum Company v. Libya, Award on the Merits, 17 ILM 1 (1978). Notably, these rulings and others rendered by the Iran-U.S. Claims Tribunals, along with citations to the underlying G.A. resolutions (which of course are non-binding under the UN Charter) have made their way into ISDS rulings, particularly in connection with interpreting IIA guarantees on expropriations or their cross-references to international law. Note that even those tribunals that have rejected the relevance of some G.A. resolutions, such as the Charter of Economic Rights and Duties of States, have deemed relevant other resolutions, such as the G.A. Res. 1803 (XVII).
61 See, e.g., Stephan W. Schill, The OECD Guidelines for Multinational Enterprises and International Investment Agreements: Converging Universes, in 40 YEARS OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 63 (Nicola Bonucci & Catherine Kessedjian eds., 2018); Guidelines on the Treatment of Foreign Direct Investment, reprinted in 7 ICSID REVIEW – FOREIGN INVESTMENT L. J. 297 (1992). The Guidelines, which have served to inspire the contents of a number of national laws, may come into play in ISDS tribunals, for example, to assist or
caselaw of ad hoc tribunals, such as the Iran-U.S. Claims Tribunal, and in turn by ISDS tribunals, particularly in connection with finding or interpreting applicable customary international law.  

Perhaps the largest body of soft law in use in ISDS are those in Jacob’s and Schill’s second category, namely for purposes of what they call regime “consolidation” and “elaboration.” These include procedural tools to manage investor-state arbitrations such as the IBA Rules on the Taking of Evidence in International Arbitration (initially adopted in 1999 and updated in 2010), the IBA Guidelines on Conflicts of Interest in International Arbitration (2004 and updated 2014), the ILA’s Hague Principles on Ethical Standards for Counsel Appearing before International Court and Tribunals (2010), the IBA Guidelines on Party Representation in International Arbitration (2013), the ICC Commission Report on Controlling Time and Costs in Arbitration (2012), the ICC’s Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (2017), the UNCITRAL’s Model Law reinforce the interpretation of laws that provide, for example, “appropriate compensation” such a taking occur. See generally, Jacob & Schill, supra note 7, at 10.

62 See, e.g., Alvarez, A BIT on Custom, supra note 59.


64 IBA Guidelines on Conflicts of Interest in International Arbitration (2014), reprinted in id. at 363.


(2006), as well as institutional rules issued by a number of arbitral bodies such as the LCIA’s Rules, the AAA/ABA Code, and the ICC’s Rules.

These instruments provide guidance on the drafting of arbitration clauses or suggest best practices for organizing or conducting proceedings, for regulating the ethics of arbitrators and party representatives, for deciding on rules for transparency or disclosure of documents, for presenting evidence, and even for the drafting of awards. These instruments can and have been used both before and after an investor-state claim is brought. According to surveys, the IBA Guidelines on Conflicts of Interest, for example, are not only cited by litigants and tribunals in the course of challenges to arbitrators but are used by ISDS participants when selecting arbitrators, by prospective arbitrator candidates when disclosing conflicts, and by national courts charged with enforcing an award (as where enforcement is challenged on the basis that an arbitrator was subject to a conflict of interest). Of course, some of these procedurally oriented soft law instruments are more popular than others. According to surveys of the use of these tools in arbitration generally, the IBA Rules on the Taking of Evidence appear to be the most used, while the IBA Guidelines on Conflicts of Interest come in second. But the IBA evidence rules appear to be less cited in ISDS, along with the IBA Guidelines on Party Representation.

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71 Indeed, the Guidelines are, on their face, intended to be used by prospective arbitrators needing guidance on what types of things to disclose.
Although most soft law instruments addressing matters of procedure were designed for use in commercial arbitration, the hybrid nature of ISDS – which borrows procedures used in commercial arbitration – has enabled their cross-over use in investment disputes. The fact that these instruments have had a prior history in commercial arbitration also explains why these have generated the most scholarly attention in both forms of arbitration.\(^{74}\) That attention has also inspired some widely accepted distinctions. Since many of these instruments anticipate application in the course of an arbitration to the extent the arbitrating parties agree, to the extent that the litigating parties explicitly accept them as applicable, those rules become contractually binding. As Kaufmann-Kohler suggests, in such cases their application by investor-state arbitrators should probably not be treated as a resort to soft law.\(^{75}\) One might say the same thing with respect to procedural rules that the parties implicitly accept when they agree on a particular arbitral institution that is bound by particular rules. Parties that accede to ICC Arbitration, for example, have consented to the use of the ICC’s Rules. One suspects that soft law’s critics like Reisman would not find this objectionable. The same conclusion seems warranted when, for example, UNCITRAL’s Model Law has been incorporated into national law and the parties in an investor-state dispute have agreed to have that law be applied to the resolution of their case.\(^{76}\)

Analytical clarity on when, for example, an arbitration relies on the UNCITRAL Model law as mere persuasive “soft law” authority as opposed to reliance based on the rule’s


\(^{76}\) See, e.g., *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* art. 42, Mar. 18, 1965, T.I.A.S. 6,090, 575 U.N.T.S. 159 [hereinafter ICSID Convention] (“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”)
incorporation as binding national law seems essential for objective consideration of the soft law phenomenon – even if this distinction is not always explicitly addressed in the text of an award. This means that unless one goes beyond the text of awards to explore the underlying briefs, there is a serious risk of overstating the use of soft law in ISDS. In *Methanex v. U.S.* and *Grand River Enterprises Six Nations v. U.S.*, for example, the IBA Guidelines on Taking of Evidence were applied presumably as hard not soft law because the respective parties had agreed on their application.\(^77\) In *Churchill Mining v. Indonesia* and *Canadian Cattlemen for Fair Trade v. US*, by contrast, the same Guidelines were used as guidance even where the parties had not agreed to their use.\(^78\)

Consider, as another example, the resort to the IBA Guidelines on Conflicts of Interest being made in the course of a proliferating number of challenges to investor-state arbitrators.\(^79\) These Guidelines’ traffic light system indicates increasing concern for arbitral independence based on examples that are color coded from green to orange to red. The Guidelines provide practical fact-based examples that suggest when it is appropriate for a person to refuse a proffered appointment, when a situation warrants at least disclosure, and when a case does not give rise to a conflict that warrants either of those actions. Although originally designed to be of use to persons needing guidance on precisely those issues – and in particular when to disclose information to relevant parties – the Guidelines have also proven useful, as noted, to those choosing an arbitrator as well as arbitrators faced with deciding a conflict and even to national courts that need to decide whether to enforce an arbitral award allegedly tainted with a conflicted

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Despite initial coolness to these Guidelines by a number of arbitral institutions, resort to them is increasingly common in both ISDS and commercial arbitrations. Under one survey between July 1, 2004and August 1, 2009, the ICC referenced at least one article of these guidelines in 106 of the 187 challenges to arbitrators considered in that period. Note that it is also possible to incorporate the IBA Guidelines into an IIA – as does the CETA Agreement, for example.

ISDS tribunals, principally those under ICSID, have disagreed with respect to the weight (if any) to be given to the IBA Guidelines on Conflicts of Interest. Resistance stems from the fact that the ICSID Convention contains a somewhat dated standard under Article 57 indicating that an arbitrator is only disqualified if the facts indicate a “manifest lack of the qualities required of arbitrators.” Under the UNCITRAL Rules, by contrast, the question is whether circumstances exist that likely give rise to “justifiable doubts” as to the arbitrator’s impartiality or independence. Since the IBA Guidelines on Conflicts also adopt the “justifiable doubts” standard, they are of questionable relevance to ICSID tribunals.

In Perenco Ecuador v. Ecuador, a PCA ruling, the arbitrators applied the IBA Guidelines only because the parties had so agreed. In ConocoPhilips v. Venezuela, Abaclat v. Argentina,
and *Urbaser v. Argentina*, while those IBA Guidelines were mentioned, the arbitrators refused to apply them because they deemed themselves bound by the ostensibly different challenge standards incorporated in the ICSID Convention.87 In *Fribica de Vidrios v. Venezuela, Highbury International v. Venezuela, Abaclat v. Argentina* (Decision to Disqualify a Majority of the Tribunal), *Blue Bank International v. Venezuela, Burlington Resources v. Ecuador, Tidewater v. Venezuela*, and *Alpha Prjektholding v. Ukraine*, by contrast, the tribunals found the same IBA Guidelines “useful” or “relevant” even if those arbitrators were only strictly bound by the ICSID Convention’s challenge standards.88 And in *Caratube International v. Kazakhstan, Participaciones Inversiones v. Gabon, Universal Compression v. Venezuela, and Nations Energy v. Panama* the arbitrators in those ICSID cases found those IBA Guidelines to be only “indicative.”89

As these rulings demonstrate, receptivity to the Guidelines on Conflicts of Interest – and to other soft law instruments – differs among investor-state tribunals. The repeated visitations of the IBA Guidelines on Conflicts of Interest in the course of ISDS has not led to “leveling the playing field” among competing forums for hearing investor-state claims or to “harmonizing the

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87 ConocoPhilips v. Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, ¶ 59 (Feb. 27, 2012); Urbaser v. Argentina, ICSID Case No. ARB/07/26, Decision on Respondent’s Proposal to Disqualify Professor Campbell McLachlan, ¶ 37 (Aug. 12, 2010); Abaclat v. Argentina, ICSID Case ARB/07/5, PCA Case No. IR 2011/1, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent’s Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan van den Berg Dated September 15, 2011, ¶¶ 50-65 (Dec. 19, 2011) (discussing the standard required by ICSID Convention art. 57 without reference to the IBA Guidelines); id., Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 78 (Feb. 4, 2014) (noting that IBA Guidelines and other soft law instruments “may serve as useful references”, but deciding that the ICSID Convention is the governing standard for disqualifications).

88 See *supra* notes XX and accompanying texts.

89 Caratube International Oil Company and Devincci Salah Hourani v. Kazakhstan, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, ¶ 59 (Mar. 20, 2014); Participaciones Inversiones Portuarias SARL v. Gabon, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, ¶ 24 (Nov. 12, 2009); Universal Compression International Holdings v. Venezuela, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, ¶ 74 (May 20, 2011); Nations Energy Corp. v. Panama, ICSID Case No. ARB/06/19, Annulment Proceeding, Decisión sober la Propuesta de Recusación del Dr. Stanimir A. Alexandrov, ¶ 57 (Sept. 7, 2011).
applicable rules” among them. Some skepticism therefore seems warranted about the claim, sometimes made by soft law’s advocates, that resort to it can serve to make investment law’s jurisprudence more constante.\textsuperscript{90}

At the same time, there is evidence, based on surveys of relevant participants, that soft law instruments on, for example, the taking of evidence are being applied in practice by both commercial and ISDS tribunals even without party agreement and without explicit citation. This deployment of soft law quietly made and for the most part unrecognized, may indeed be harmonizing how investor-state disputes are being arbitrated. And yet, this use of soft law, if made sua sponte by arbitrators, may be, from the point of view of soft law’s critics, unwarranted. Further study is needed to determine how often this occurs – and whether it extends beyond procedural rulings on the taking of evidence. What seems clear is that reliance on only those soft law instruments that are explicitly mentioned in publicly available ISDS rulings, risks understating (as well as overstating) the use of soft law.

Jacob and Schill’s third tier of soft law – involving references designed to “re-balance” or “reconfigure” investment law in response to its critics – are suggested by the texts of “third generation” IIAs.\textsuperscript{91} In accordance with, for example, contemporary UNCTAD advice to include clauses that promote “sustainable development” or to lessen the intrusion on “domestic policy space” by acknowledging the rights (and perhaps the duties) of states to regulate in the public interest, some contemporary IIAs contain explicit references to soft law instruments dealing with, for example, the environment, the right to development, or “internationally recognized labor rights” (apart from binding ILO labor conventions that a state has accepted).\textsuperscript{92} Some third

\textsuperscript{90} See, e.g., Jacob & Schill, supra note X, at 11-12.

\textsuperscript{91} Id. at 13-15.

\textsuperscript{92} Among the many relevant UNCTAD reports, see, e.g., UNCTAD, WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, U.N. Sales No. E.12.II.D.3 (2012), UNCTAD, WORLD INVESTMENT
generation IIAs, or at least Model Agreements adopted by states for future negotiations, have followed the example of, for example, the International Institute for Sustainable Development’s Model International Agreement on Investment for Sustainable Development, which affirms, in its preamble, the goal to affirm “the progressive development of international law and policy . . . as seen in such international instruments as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy; the OECD Guidelines for Multilateral Enterprises; and the United Nations’ Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.”

Others have incorporated soft law standards (such as those promulgated by the ILO), into new derogation clauses in IIAs, other treaty provisions aimed at preserving government’s capacity to regulate, or clauses specifically directing foreign investors to observe labor rights. The incorporation by reference of soft law instruments, including those embracing “corporate social responsibility”, as well as a multitude of presumptively soft instruments that purport to elucidate a number of other concepts, such as the right of “self-determination”, the “right to development” or to “sustainable development”, or the need to respect “good governance” or the “rule of law”, threaten to complicate the efforts of those seeking to measure the use or impact of soft law in ISDS. While many such references occur only within the preambles of IIAs, soft law incorporations by reference blur the

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See generally INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP, supra note X.
definitional lines between hard and soft law. A soft law instrument used by an arbitral tribunal to interpret an IIA’s object and purpose or to inform its understanding of the deference owed a state’s regulatory decisions under FET because that instrument is mentioned in the text of an IIA might not be seen as a turn to soft law.

When IIAs identify specific soft law instruments in their texts – even if they do not go as far as to require compliance with them by either states or investors (and perforce, when they do) – resort to these texts by either the litigants or arbitrators may not trigger objection even by soft law’s harshest critics. Such references in IIAs could legitimately, as Jacob and Schill suggest, shape or condition the understanding of the meaning of any investor guarantees beyond FET, including umbrella clauses or requirements to provide national treatment. They are, after all, part of a treaty’s plain meaning within the terms of the VCLT’s Article 31(1). But many so-called third generation IIAs are not so clear. Recent U.S. BITs, for example, urge the contracting parties not to derogate in their national laws from “internationally recognized labor rights.” Are such labor rights only those “recognized” under customary international law or treaties that duly ratified by the particular BIT parties or does such a reference in a treaty license consideration of non-binding ILO declarations, for example? Similarly, is an IIA preamble’s reference to the contracting parties’ respective rights to “pursue economic philosophies suited to

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97 For discussion of IIA provisions that impose direct obligations on investors to comply with labor standards including soft law norms, see Prislan & Zandvliet, supra note X, at 417-421 (discussing, inter alia, art. 14(4) of the Investment Agreement for the COMESA Common Investment Area (2007) which provides that “[i]nvestors and investments shall act in accordance with the fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998”). See also IISD Model International Investment Agreement, supra note 93, art. 14.
98 Jacob & Schill, supra note X, at 17.
99 See, e.g., Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Uru.-U.S., art. 13, ¶ 1, Nov. 4, 2005, S. TREATY DOC. 109–9; see also, id., preamble.
their *development goals* and their *right to regulate activities to realize their national policy objectives*\(^\text{100}\) permission, consistent with accepted rules of treaty interpretation, to consider the substantial number of soft law instruments that might be relevant to those three extremely vague goals? If not, precisely how are arbitrators expected to determine the object and purpose of such a treaty?

As yet we do not appear to have many concrete examples of how ISDS tribunals will interpret such re-balancing clauses in IIAs. This is not surprising insofar as most investment claims are still being brought under older IIAs.\(^\text{101}\) This is bound to change as new investor claims are filed under these third generation agreements. Mention of soft law instruments in the course of ISDS is, for this reason alone, bound to rise over time. Of course, even at present, we do not lack examples of ISDS tribunals which have, even in the absence of national laws or IIA clauses incorporating comparable substantive soft law standards, presumed that such soft law norms were both relevant and possibly binding.\(^\text{102}\)

But a survey of the use of soft law by ISDS tribunals would be incomplete without mentioning more contentious examples of soft law deployed in the course of investor-state disputes. How should one define (1) references to international law produced under distinct treaty regimes (such as under regional treaties for human rights, the covered agreements

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\(^{101}\) See, e.g., Investor-State Dispute Settlement: Review of Developments in 2017, IIA ISSUES NO. 2 (UNCTAD), (June 2018).

\(^{102}\) See discussion *infra* of the awards in Urbaser v. Argentina and Philip Morris v. Uruguay. Another example is Phoenix Action v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009). In that case, the tribunal observed, albeit by way of obiter dictum, that “nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments in pursuance of torture or genocide or in support of slavery or trafficking of human organs.” *Id.* at ¶ 78. While hard art. 38 sources of law impose obligations on non-state actors not to engage in slave trade, war crimes, or genocide, it is harder to point to widely accepted international sources of law affirming the same for acts of torture or trafficking in human organs not connected to state action.
governed by the WTO’s DSU, or to ILO Conventions); (2) reliance on alleged general principles of law or principles of public law such as “proportionality” or the “margin of appreciation”; and (3) the ever rising reliance on prior ISDS arbitral rulings? For reasons noted below, it is not clear whether any of these three satisfy the definition of soft law adopted here.

The law produced under distinct international legal regimes, such as rulings issued by the European Court of Human Rights (ECtHR), is of course binding for the parties to such rulings and creates expectations of compliance for other states parties to the ECHR. But in the absence of its incorporation as applicable law as part of IIA or as part of the applicable law under the relevant arbitration rules, regional human rights law is not necessarily applicable law to the parties to an investment dispute – which, after all, include a private party and a state. Yet, according to one study, undertaken by the author of this essay, approximately twenty percent of publicly available ISDS rulings contain a reference to the caselaw of the ECtHR. That study indicates that a considerable number of those ISDS rulings do not involve as a respondent state a party to the underlying European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR); indeed, most of those references do not include any discussion by the arbitrator suggesting why European human rights law might be applicable law. Others, including this author, have also examined the extent ISDS rulings have relied on the

103 See, e.g., Rantsev v. Cyprus and Russia, 2010-I Eur. Ct. H.R. 65, 110 (reiterating that judgments, beyond deciding individual cases, more generally safeguard and develop the rights under the European Convention and thus contribute to States’ compliance with their obligations under the European Convention). The precedential value of judgments beyond art. 46 of the European Convention is also recognized by States, see Explanatory Report to Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ¶ 27 (noting that the interpretative effects of advisory opinions would be analogous to judgments). For an example of the effect of judgments beyond art. 46 in a domestic setting, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court of Germany], Oct. 14, 2004, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, ¶¶ 38-39 (English translation available on the Court’s website: https://www.bundesverfassungsgericht.de).

104 ALVAREZ, THE BOUNDARIES, supra note 39, at 42.

105 Id. at 82 and 110.
jurisprudence produced under the WTO’s Dispute Settlement Understanding (DSU). It appears that in those rulings as well, the reasons why trade law might be applicable law, if addressed at all, vary. ISDS tribunals that cite to either European human rights law or WTO law rarely clarify whether they are doing so because the respondent state in the case is also a party to those respective treaty regimes and such treaty references are therefore applicable hard law under relevant rules of treaty interpretation (including as relevant law’ among the parties under the VCLT’s Article 31(3)(c)), or because those treaty obligations are otherwise applicable under the rules governing the disputes (as where an IIA for example incorporates that law); or, as the definition of soft law adopted here would require, only because those rules, although not binding, should be seen as having a legal impact. Perhaps as a result of these ambiguities, the literature on human rights/trade “boundary crossings” does not characterize these as resorts to soft law.

As is suggested by Philip Morris v. Uruguay, a ruling that is discussed below, comparable ambiguities exist with respect to ISDS tribunals that draw on alleged “general principles” such as “proportionality” or the “margin of appreciation” without any real effort to undertake the comparative law exercise that most positivist scholars require to find and apply this third Article 38 source of obligation. Does reliance on such deference principles constitute an attempt to apply a genuine (if poorly evidenced) general principle of law or an effort to use soft law to achieve Jacob and Schill’s “re-balancing”?

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106 Id. at 125-199; Gabrielle Marceau et al., The WTO’s Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation, 47 J. WORLD TRADE 481 (2013).
108 See, e.g., ALVAREZ, THE BOUNDARIES, supra note 39, at 110.
109 Indeed, the most disputed point with respect to trade law citations in ISDS is whether these references suggest that investment and trade law are “converging.” Compare, e.g., Roger P. Alford, The Convergence of International Trade and Investment Arbitration, 12 SANTA CLARA J. INT’L L. 35 (2014); ALVAREZ, THE BOUNDARIES, supra note 39, at 125-199; Jürgen Kurtz, The WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS (2016).
Finally, what is one to make of the fact that the most commonly cited authorities in ISDS rulings are prior ISDS rulings? The popularity of this source of authority is rising, as the number of such public rulings increases and as more ISDS arbitrators appear to agree with the views of Gabrielle Kaufmann-Kohler who has famously suggested that ISDS arbitrator have a “duty” to consider relevant prior rulings and to develop jurisprudence constante. Prior ISDS rulings satisfy a number of the definitions of soft law canvassed at the outset of this essay.

Arbitral precedent is only res judicata and does not, of course, produce stare decisis effects. As is the case with soft law, an arbitral ruling has no binding effect on non-parties to it and therefore “violation” of it by others, including arbitrators in other cases that disagree with it, does not constitute an internationally wrongful act. Like soft law, such rulings stem from the actions of some non-state actors (namely arbitrators who may or may not echo the arguments of the investor claimants before them). Investor-state arbitrators, like soft law generators generally, have not been given law-making power over litigants or certainly non-litigants before them. As is true of soft law, the authority of such rulings varies with a number of imprecise factors – including the reputation of the arbitrators and whether one believes the underling fact/law applications are relevant to the current dispute. At the same time, prior arbitral rulings in the hands of subsequent litigants and arbitrators are not comparable to mere political or moral edits. They clearly have “legal impact” and may “create expectations about future conduct”, consistent with other forms of soft law, particularly if one thinks, as many arbitrators do, that it is a fundamental rule of law that “like cases should be decided alike”. Indeed, as some scholars

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110 See Commission, supra note 54.
111 See, e.g., Commission, supra note 54; Saipem v. Bangladesh, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, ¶ 67 (Mar. 21, 2007) (stating that since they operate without the benefit of a single treaty or a single court, investor-state arbitrators have a duty to “seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law.”)
suggest, states’ efforts to make all or most ISDS rulings public suggest that they too aspire to the
development of consistent investment jurisprudence over time.\footnote{112}

And yet, since Article 38 anticipates that “judicial opinions” (including presumably
arbitral rulings) can be used to interpret the “real” sources of international law, in what way does
the increasing resort to prior ISDS rulings violate the positivist terms of Article 38? The most
compelling reason to include arbitral caselaw as a species of soft law is that, as Schill has argued,
the weight given to ISDS rulings far exceeds that of the mere “subsidiary” authorities anticipated
in Article 38(1)(d).\footnote{113} As he indicates, “[t]ribunal decisions, while de jure non-binding beyond
the individual case, de facto determine how investment treaties are interpreted and investment
disputes decided.”\footnote{114} To suggest, consistent with the \textit{ejusdem generis} canon of interpretation,
that investor-state arbitrators give the same weight to the views of publicists as they do to prior
ISDS rulings on point – as might be suggested by the way “judicial opinions” are paired with the
views of publicists and treated in Article 38(1)(d) – seems to downplay their real world
importance. Prior arbitral rulings, cited far more often and with far greater import than any other
kind of authority, are today’s investment law.\footnote{115} Though many have explained why this is the
case, for our purposes here it is sufficient to note that the arbitral process itself, including its
reliance on the fair application of the adversarial process, along with its stakeholders’ demands
for thorough reason-giving, explain why arbitral precedents hold such appeal.\footnote{116}

IV. Two Case Examples: Urbaser and Philip Morris

\footnote{112 See, e.g., King & Moloo, supra note X, at 889.}
\footnote{113 Schill, Sources, supra note X, at 12.}
\footnote{114 Id.}
\footnote{115 Id. at 9-12. See also Commission, supra note X; Faucauld, supra note X.}
\footnote{116 For an in-depth view, see Armin von Bogdandy & Ingo Venzke, \textit{The Spell of Precedents: Lawmaking by}
\textit{International Courts and Tribunals}, in \textit{The Oxford Handbook of International Adjudication} 503 (Cesare
P.R. Romano et al eds., 2014).}
Reliance on soft law was on full display in the much-discussed final ruling issued in Urbaser v. Argentina. Urbaser involved a claim against Argentina by a concessionaire for water and sewage services to be provided in Buenos Aires alleging various violations under the Argentine-Spain BIT of 1991. Urbaser’s concessionaire, Aguas Del Gran Buenos Aires (AGBA) claimed that it had been subjected to many obstructions by local provincial authorities which prevented them from operating efficiently and profitably. It claimed that these difficulties were further exacerbated by the “emergency” measures proclaimed by Argentina in response to its crisis of 2001-2002. AGBA contended that as a result of these actions by Argentina its investment had lost 2/3 of its value even prior to the collapse of negotiations with the government, which ended with the termination of its concession in 2006. It claimed violations of the national treatment, FET, and expropriation provisions of the BIT.

Argentina responded that AGBA’s deficient management was responsible for its difficulties and its lost value. It also argued that AGBA had not undertaken the minimal investment needed to operate. Argentina also filed a counterclaim contending that the claimants owed it a considerable sum for failing to undertake the necessary investment to fulfill its commitments to the province, “including its obligations under international law based on the human right to water.” Citing to a number of prior ICSID rulings which had declined jurisdiction over counterclaims filed by respondent states, the claimants responded that the tribunal lacked jurisdiction to consider Argentina’s counterclaim because that claim, among other things, did not

117 Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia and Argentina, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016) [hereinafter Urbaser].
118 Id. at ¶ 36.
have the close connection to claimant’s principal claims as required under the ICSID Convention and the applicable BIT.\textsuperscript{119}

The tribunal dismissed nearly all of AGBA’s claims and awarded the investor zero damages, finding that while Argentina had indeed violated the BIT’s FET provision in not renegotiating its concession in a transparent fashion, AGBA’s losses were caused by its own actions and not those of Argentina.\textsuperscript{120} In a move that surprised many, however, the tribunal upheld jurisdiction to consider the merits of Argentina’s counterclaim for damages, even while denying it on the merits.\textsuperscript{121} Commentators have seen the ruling on Argentina’s counterclaim as “groundbreaking” and marking “a watershed moment in international law more broadly because it potentially heralds a sea change in the relationship between corporations and human rights.”\textsuperscript{122}

For our purposes here, it is important to recognize the extent to which the Urbaser tribunal’s rationales for its treatment of Argentina’s counterclaim engaged in radical and unprecedented legal leaps of judgment grounded in soft law authorities. Although the Urbaser tribunal’s ruling on Argentina’s counterclaim is not a model of clarity, the arbitrators appeared to make four critical legal findings.

They found, first, that the principle that corporations, because they are not subjects of international law, cannot bear responsibilities under international law was no longer correct. The tribunal rejected that assertion by the claimants and affirmed that international law now accepts corporate social responsibility “as a standard of crucial importance for companies operating in the field of international commerce.”\textsuperscript{123} The tribunal affirmed that private parties can indeed

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.} at ¶¶ 1117-34.
  \item \textsuperscript{120} \textit{Id.} at ¶¶ 845-847 and ¶ 1234.
  \item \textsuperscript{121} \textit{Id.} at ¶¶ 1206-1220 and ¶ 1234. See also discussion \textit{infra} at text and notes XX.
  \item \textsuperscript{122} \textit{See, e.g.,} Tatiana Sainati & David Attanasio, \textit{Urbaser v. Argentine Republic}, 111 AJIL 744, 748-749 (2017).
  \item \textsuperscript{123} Urbaser, \textit{supra} note X, at ¶¶ 1194-95.
\end{itemize}
owe human rights responsibilities. \textsuperscript{124} Second, the Urbaser tribunal found that the human right to water and sanitation is “recognized today as part of human rights.” \textsuperscript{125} Third, it affirmed that the human right to clean water entails distinct obligations on the part of states and private parties like the claimants. The arbitrators explained that states owe to all individuals under their jurisdiction an obligation to enforce the human right to water, that is, an obligation to perform by supplying individuals access to water and sewage services. \textsuperscript{126} Private parties knowledgeable in the field of provision of water and sanitation services, by contrast, were found not to owe this obligation to individuals in the absence of a contract or similar legal concession requiring this, in which case the concessionaire’s obligation would arise as a matter of domestic, not international, law. \textsuperscript{127} But the tribunal suggested that private parties owe a complementary obligation “not to engage in activity aimed at destroying” everyone’s human right to dignity and adequate housing and living conditions human rights. \textsuperscript{128} Finally, the tribunal contended that international law has not been shown to impose a duty of reparation for the violation of the human right to water; the human right to water, according to the tribunal, imposes an obligation on the state to supply clean water but does not establish a right to compensation to individuals who are denied clean water. \textsuperscript{129}

These four significant findings are, on their face, grounded almost entirely on soft law authorities. For the first proposition that multinational corporations owe human rights international law obligations, the tribunal relies substantially on the Universal Declaration of

\begin{footnotes}
\footnote{Id. at ¶ 1193 and ¶¶ 1196-1198.}
\footnote{Id. at ¶ 1205.}
\footnote{Id. at ¶¶ 1209-10.}
\footnote{Id. at ¶ 1210. But the Urbaser tribunal distinguishes human rights obligations that impose a duty to abstain – such as the obligation to abstain from torture considered in Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). It suggests such duties apply equally to states and private parties. Urbaser, supra note X, at ¶ 1210 and n.446. The Tribunal suggests that the human right to water – which assures the “physical access to sufficient, safe and acceptable water”—does not impose a comparably affirmative obligation on private parties. Id. at ¶¶ 1210-11.}
\footnote{Id. at ¶ 1199.}
\footnote{Id. at ¶ 1220.}
\end{footnotes}
Human Rights.\textsuperscript{130} Notably, the tribunal does not use the Universal Declaration as a take-off point for exploring whether customary international law or any other Article 38 sanctioned source supports this conclusion. Indeed, the tribunal does not even mention the argument, made by some scholars, that the Universal Declaration in whole or in part may have come to reflect customary international law. The tribunal simply assumes that the various rights contained in the Universal Declaration – which, of course, are affirmed merely as a “standard of achievement” with no clause requiring implementation\textsuperscript{131} – are hard law obligations and that they obligate at least to some extent non-state actors. It presumes that the simple affirmation that human rights ought to be enjoyed by “everyone” provides support for the entirely different conclusion that all the rights in the Declaration obligate not only states but “everyone,” including private parties.\textsuperscript{132}

The tribunal also contends that the Universal Declaration, although drafted by state representatives, was intended to address multinational companies because its Article 30 provides that “[n]othing in this Declaration may be interpreted as implying for any States, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”\textsuperscript{133} The tribunal finds further support for the conclusion that multinational corporations are subject to international law in UN documents supporting the existence of corporate social responsibility, including John Ruggie’s “Guiding Principles on Business and Human Rights”\textsuperscript{134} and the International Labour Office’s “Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy.”\textsuperscript{135}

\textsuperscript{130} Id. at ¶ 1196.
\textsuperscript{132} Id. art. 30. The tribunal accordingly cites, with approval, Louis Henkin’s famous statement that the Declaration applies to “[e]very individual and every organ of the society” and excludes “no one, no company, no cyberspace.” Urbaser, supra note X, at ¶ 1196 n.435.
\textsuperscript{133} Id. at ¶ 1196. The tribunal also cites in support the comparable provision in the ICESCR, namely its art. 5(1). Id. at ¶ 1197. The tribunal does not mention any negotiating history in either treaty in support of its interpretations.
\textsuperscript{134} Id. at ¶ 1195 n.434.
\textsuperscript{135} Id. at ¶ 1198.
the proposition that the applicable BIT needs to be read “in harmony with other rules of international law of which it forms part, including those relating to human rights” because of the “principle of systemic integration” proclaimed by the International Law Commission in its report on ways to address the “fragmentation” of international law.136

The tribunal’s second conclusion, finding that the right to clean water is a human right, relies on language from a General Assembly resolution as well as the views of the UN Committee on Economic, Social and Cultural Rights, both of which embrace the right to water as one of the essential guarantees that states are obligated to undertake by way of satisfying the ICESCR’s clause indicating that everyone enjoys a right to an “adequate standing of living.”137

The tribunal’s third conclusion – delineating distinct obligations for states versus private parties at least with respect to complying with the obligations entailed by the right to clean water – appears to rely, at least implicitly, on the soft law instruments previously cited at least to the extent that those instruments do not clearly impose on private parties the same type of obligation as is imposed on states. The only source of hard law cited in support for this third conclusion seems to be Article 5(1) of the ICESCR which provides that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provide in the present Covenant.”138

Finally, the tribunal’s conclusion that “there does not exist a claim for compensation in case of lack of such performance” seems to be based, at least implicitly, on the absence of any

136 Id. at ¶ 1200 n.437 (citing approvingly to Tulip Real Estate v. Turkey, ICSID/ARB/11/28, Decision on Annulment (Dec. 30, 2015), which relied on that ILC report).
137 Id. at ¶ 1197.
138 Id.
provision in the soft law instruments that it cites indicating that reparation in the form of monetary compensation is owed for violation of the right to clean water.\textsuperscript{139}

While close examination of the merits of the Urbaser tribunal’s human rights findings lies beyond the scope of this essay, at least a preliminary assessment of those issues seem essential to evaluating its use of soft law. Human rights experts, including many who would in principle support greater reliance on human rights in the course of the interpretation of IIAs, familiar with the long arduous struggle to recognize hard law obligations on multinational enterprises, would be surprised by the Urbaser tribunal’s conclusions in response to Argentina’s counterclaim. They would certainly be (pleasantly) surprised to discover that, at least according to this tribunal, their long struggle to make corporations responsible under international law is now over and they can rest assured that international law now recognizes that private businesses owe distinct human rights obligations, including an obligation to refrain from interfering with states’ obligations to supply clean water.

The Urbaser tribunal’s reliance on instruments like the “Guiding Principles on Business and Human Rights” and the ILO’s Tripartite Declaration ignores the texts of these instruments as well as their negotiating history.\textsuperscript{140} These instruments do not purport to impose legal obligations on multinational corporations. On the contrary, both respond to earlier controversial efforts to do just that. Ruggie’s Guiding Principles are a compromise whereby multinational enterprises are strongly encouraged to “respect” human rights because “it is the basic expectation society has of

\textsuperscript{139} Id. at ¶ 1220.

business” but this needs to be contrasted with the legal “duty” states have to “protect against
human rights abuses.”141 In so stating, Ruggie was careful to avoid earlier UN attempts to
impose international legal obligations on such companies, notably the UN’s “Norms on the
responsibilities of transnational corporations and other business enterprises with regard to human
rights.”142 Other soft law instruments on corporate social responsibility, including the ILO’s
Tripartite Declaration, reflect the same effort to distinguish the legal obligation of states to abide
by human rights from merely encouraging corporate players to respect them.143

The Urbaser tribunal’s remarkable conclusion that “at this juncture, it is therefore to be
admitted that the human right for everyone’s dignity and its right for adequate housing and living
conditions are complemented by an obligation on all parts, public and private parties, not to
engage in activity aimed at destroying such rights,”144 however desirable as a matter of social
policy, is highly contestable as a matter of general international law absent express language in
either a hard or soft law instrument so providing. As even those who aspire to hold multinational
enterprises directly responsible for violations of international law would recognize, few human
rights treaties purport to impose their obligations directly on state actors;145 at most, they compel

141 See, e.g., John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and
Transnational Corporations and Other Business Enterprises), Protect, Respect and Remedy: A Framework
142 UN Comm’n on Human Rights, Sub-comm’n on the Promotion and Protection of Human Rights, Norms on the
Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN
143 See, e.g., Dunoff et al., supra note X, at 179-189 (describing the evolution of soft law instruments as well as
corporate attempts at self-regulation such as codes of conduct). Thus, the ILO Secretary General describes the
Tripartite Declaration as the typical soft law instrument, namely as a tool to provide “guidance on how enterprises
can contribute . . . to the realization of decent work” and as “recommendations rooted in international labour
standards.” See What is the ILO MNE Declaration?, INT’L LABOUR ORG., http://www.ilo.org/empent/areas/mne-
144 Urbaser, supra note X, at ¶ 1199.
145 Thus, even the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against
Women arts. 1 and 3, June 9, 1994, 27 U.S.T. 3301, which proclaims the rights of women to be free from violence
“in both the public and private spheres” and defines the covered acts to be “perpetrated or condoned by the state or
its agents regardless of where it occurs.” Id. at art. 2(c).
their state parties to secure the human rights contained in them by providing individuals with an effective remedy when private parties engage in action (e.g., extrajudicial killings). Further, as noted above, the relevant soft law instruments do not as such indicate that businesses are required not to interfere with the states’ human rights obligations and that doing so would violate international law – although such interference may well violate a state’s national laws. Further, unless one agrees with those scholars who want to expand the discretion accorded treaty interpreters under Article 31(3)(c) of the VCLT, the Urbaser tribunal’s reliance on the alleged principle of systematic integration seems to be using that presumptively soft law principle to turn to soft law instruments to re-interpret the ICESCR – a double resort to soft law that many would consider (quite apart of the misreading of the soft law instruments being cited) to be itself a departure from the traditional rules of treaty interpretation.

That tribunal’s effort to draw from the Universal Declaration’s and the ICESCR’s respective derogation clauses the proposition that corporations owe certain international obligations is also highly contestable. Such derogation clauses, familiar to ILO lawyers among others, attempt to ensure that the minimalist protections assured to individuals by human rights or labor rights treaties – which of course have to appeal to the lowest common denominator. By their terms, these derogation clauses do not preclude states’ efforts to impose greater obligations on any party, public or private. These clauses also indicate that the treaties’ minimalist language should not be read as giving any party, public or private, an implicit treaty right to undermine those rights. Those clauses do not purport to impose the treaty’s obligations – which are otherwise indicated to be obligations imposed on the state parties under the ICESCR’s Article 2

on private parties. Such an interpretation appears to be a considerable departure from the normal rules of treaty interpretation which, of course, anticipate that treaties only obligate parties to them and that imposition of obligations on any third party need to be explicit.\textsuperscript{148} The drafters of the ICESCR – and the current state parties to the ICESCR – would probably be surprised to find that, according to the Urbaser tribunal, they have ratified a treaty that \textit{sub silentio} (and without any discussion in the negotiating history) imposes obligations on private companies to refrain from certain actions. Of course, if that had been the case, the stakes for many of the pitched battles over corporate social responsibility that have occurred since widespread ratification of the ICESCR – including Ruggie’s efforts – would have been considerably lower. Moreover, if the tribunal’s extraordinary (and ahistorical) re-interpretation of the relevant law were correct, one would have expected the abundant soft law instruments that have emerged since the conclusion of widely ratified ICESCR to affirm that corporations owe such obligations as a matter of hard law and build additional corporate responsibility ideas atop that premise by way of \textit{lege ferenda}. Instead, it would appear that the tribunal built its conclusion that corporations owe such responsibilities through a revisionist interpretation of both hard and soft law that transforms the aspirations of human rights advocates into hard law.

The Urbaser tribunal’s rationales for denying the merits of Argentina’s counterclaim also present difficulties. The nature of the obligations that the ICESCR imposes on its state parties under its Article 2 are notoriously slippery and have been the subject of a number of efforts to clarify them. Article 2 of the ICESCR requires states to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights

\textsuperscript{148} \textit{Compare} ICESCR, \textit{supra} note X, at art. 2 (imposing duties on states) to Vienna Convention on the Law of the Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 (treaties do not impose duties on third party states without their consent) and \textit{id.} at art. 35 (treaties do not impose duties on third party states unless the parties to it so intend and the third party states expressly accept such obligations) [hereinafter VCLT].
recognized in the present Covenant by all appropriate means . . .”149 The Economic, Social and Cultural Rights Committee has famously stated that despite the extraordinary discretion accorded to states by its terms, Article 2 imposes distinct duties on states to respect, protect, and fulfill the rights contained in the ICESCR.150 With respect to the analogous right to food, the Committee has suggested that this entails state obligations: to respect existing access to adequate food and not to take measures to prevent such access, to protect adequate access by ensuring that enterprises or individuals do not prevent such access, and to fulfill the need for adequate food by strengthening access to it and utilizing resources to ensure food security. 151

Although the Urbaser tribunal relies on the ICESCR Committee’s views for other purposes, it ignores its respect-protect-fulfill rubric for understanding the nature of that treaty’s obligations. The tribunal simply states that Argentina has a duty to supply water and sewage services and private parties like AGBA only have a duty not to obstruct those services (unless national law or a contract imposes greater obligations on companies like AGBA). This oversimplifies the nature of the ICESCR’s obligations on states, at least as seen by that treaty’s authorized treaty interpreter. It ignores, for example, the possibility that Argentina’s ICESCR obligations include the responsibility to “protect” individuals from the actions of AGBA and what that says about AGBA’s ostensible obligation not to obstruct access to clean water. Accordingly, the Urbaser tribunal’s first reason for denying Argentina’s counterclaim on the merits – namely its conclusion that the concession accorded to AGBA did not explicitly require it to supply clean water – does not say nearly enough about the obligations of Argentina or about AGBA’s legitimate expectations under the ICESCR. Does Argentina’s failure to require AGBA

149 ICESCR, supra note X, at art. 2(1).
151 Id. at ¶ 15.
to supply clean water, combined with Argentina’s other actions with respect to the underlying contract and its renegotiation, implicate Argentina’s own responsibilities to respect, protect, and fulfill the right to water under the ICESCR? We do not know because the tribunal says nothing about them. A more fulsome discussion of states’ obligations to “protect” the right to clean water would have raised intriguing questions, particularly about whether Argentina’s own failings under the ICESCR suggest a lack of clean hands in bringing this counterclaim. Alternatively, consideration of Argentina’s duty to protect the rights of its citizens – if well known to experienced concessionaire’s like AGBA – arguably makes a case for including a requirement to supply clean water as an implicit clause of any state contract that is consistent with the terms of the ICESCR.

The Urbaser tribunal’s second reason for denying the counterclaim – its apparent conclusion that the violation of the right to water does not trigger monetary reparation152 – is troubling. To be sure, the tribunal’s sparse discussion of the point, limited to a short paragraph, suggests that any failings here are Argentina’s fault for failing to take its own counterclaim seriously enough to discuss the matter of damages at more length.153 The tribunal simply indicates that Argentina did not state any legal ground for a claim for damages on its counterclaim and draws from this the general conclusion that this is because international law does not impose such an obligation.154 But a tribunal that otherwise seems acutely aware of soft law instruments would presumably also be aware of the ILC’s Articles of State Responsibility,

152 Urbaser, supra note X, at ¶ 1220.
153 Id.
154 Id.
including its listing of traditional remedies for all internationally wrongful acts (at Articles 28-39) as well as its rule on *lex specialis* (Article 55).\(^{155}\)

The Articles of State Responsibility, now widely assumed to affirm customary international law, indicate that forms of reparation, including damages, are presumptively permissible remedies for any and all violations of international law.\(^{156}\) Although the ICESCR does not state that a breach of its terms permits a claim for damages, few treaties do that; they rely on customary rules of state responsibility to provide remedies for breach. The Urbaser tribunal does not identify precisely why a violation of the right to clean water (which, as noted, it derives from the ICESCR), if proven, excludes the possibility of damages. Although the ICESCR’s text only anticipates “enforcement” of its terms through the issuance of non-binding views by its committee, this is not usually taken as suggesting international law does not permit other remedies for human rights obligations. Nor is there anything intrinsic to the right to clean water to suggest why damages for breaching it are inappropriate or are not permitted under international law. It seems absurd – and a deviation from the delimited contours of *lex specialis* remedies – to claim that the ICESCR silently intends to exclude the typical claim for monetary reparation that international wrongful acts normally entail. Of course, both the ECtHR and the Inter-American Court of Human Rights have ordered states to pay damages to those who have suffered harm as a result of human rights violations.

Perhaps if Argentina had taken its own counterclaim more seriously and explained the nature and quantity of the damages owed to it under the counterclaim, the tribunal would have done more than dismiss the prospect of damages in such a cursory fashion. As written, the

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\(^{156}\) *Id.* at arts. 34-36.
Urbaser tribunal’s view on the prospect of damages is strikingly unclear. On its face, the tribunal did not confine its dicta on the propriety of damages for human rights to the facts of the case before it. To the extent the tribunal is suggesting that no damages are owed even if Argentina failed in its duties to respect, protect, or fulfill its peoples’ rights to clean water, that conclusion is, for reasons presented above, unwarranted and probably wrong. Such a conclusion would also arguably go beyond what was presented to the Urbaser tribunal by way of facts and probably exceeds its jurisdiction in any case. Perhaps the tribunal was intended to suggest that the right to clean water does not authorize monetary compensation \textit{against a private party only in the context of an ICSID counterclaim}. That more limited proposition is probably correct insofar as the ICESCR does not impose human rights on private parties and perforce does not require them to pay compensation for violations of that treaty. But since the tribunal concludes that the ICESCR imposes some direct obligations on enterprises – namely the duty not to obstruct the right to water – the contention that no compensation can arise for violation of that ostensible duty on third parties that interfere with the right to clean water requires more explanation.\textsuperscript{157}

In the end, the Urbaser tribunal appears to conclude affirmatively that violations of human rights in general do not authorize damages. In doing so the tribunal disserves the human rights that it seemingly defends. To this extent, that tribunal’s recourse to the soft law of human rights elucidates one danger associated with “boundary crossings” by ISDS tribunals – namely

\textsuperscript{157}See, e.g., Rep. of the Special Rapporteur on Extreme Poverty and Human Rights, ¶ 71, UN Doc. A/71/367 (Aug. 26, 2016) (noting, in the context of a case where the UN was alleged to have been complicit in the violation of the right to clean water for the people of Haiti, that the provision of remedies for wrongdoing is “essential to human rights law” and includes “forms of compensation” for those injured).
the risk that an inexpert group of arbitrators can get the law borrowed from another treaty regime wrong.\textsuperscript{158}

As is suggested by the Urbaser tribunal’s citation to other “human rights friendly” ISDS rulings, such as Tulip Real Estate v. Turkey (which used ECHR law to elucidate the scope of ICSID annulment),\textsuperscript{159} the Urbaser tribunal illustrates the appeal of human rights as a tool to legitimize ISDS. The ruling, despite its flaws, may become the “watershed” ruling that some commentators hope it to be. Like it or not, the Urbaser ruling has become a precedent for the “universal” status of a human right to water, for the proposition that this right is relevant to the interpretation of an IIA and investment law as a whole, and for findings that corporate entities, and not only states, owe legally binding obligations with respect to that right – but also for the conclusion that states and private parties may both avoid compensation for injuries suffered by those who are denied access to clean water.\textsuperscript{160} These conclusions – now part of the most powerful form of soft law in use in ISDS, namely a prior arbitral decision – cannot be wholly relegated to interesting “dicta” even if some of the four findings issued by the tribunal were in that form. The tribunal’s four findings, after all, were the basis for denying Argentina’s counterclaim. They were also, in all likelihood, essential to the court’s ruling on the merits of the claim as a whole. It is hard to ignore the possibility that the Urbaser tribunal’s evident

\textsuperscript{158} See, e.g., ALVAREZ, THE BOUNDARIES, supra note X, at 228-247 (discussing the risk that arbitrators who rely on human rights or trade law to resolve investment disputes ignore or miscomprehend the respective “rational designs” of the treaty regimes being imported into an IIA interpretation).

\textsuperscript{159} Tulip Real Estate and Development Netherlands v. Turkey, ICSID Case No. ARB/11/28, Decision on Annulment, (Dec. 30, 2015).

\textsuperscript{160} For one example of Urbaser’s potential impact, see Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, Partial Dissenting Opinion Professor Philippe Sands, QC, ¶ 10 (Nov. 30, 2017) (citing Urbaser for the proposition that even though an ILO Convention does not impose direct obligations on a private foreign investor this does not mean “that it is without significance or legal effects for them.”) Sands dissented from the majority ruling in favor of the investor because in his view the measure of damages should have been reduced to the extent the claimant’s breach of its “social license” contributed to the unrest that adversely affected the profitability of its mining enterprise. Id. at ¶¶ 3-6.
solicitude for Argentina’s counterclaim explains the ultimate disposition of this case. In the end this is the rare case in which arbitrators find that a BIT was violated but that the violation did not result in any compensation for the investors\textsuperscript{161} – such is the not so “soft” power of soft law.

Urbaser is a good example of Jacob and Schill’s third tier: soft law used as a tool to “re-balance” the interests of investors and respondent states under IIAs. Another such example is another high profile ISDS ruling, Philip Morris v. Uruguay. This dispute, one of a number of challenges to tobacco control measures before national and international forums, addressed a complaint brought by Philip Morris, a Swiss company, and its wholly owned Uruguayan subsidiary, Abal, against Uruguay under the Swiss-Uruguayan BIT of 1991\textsuperscript{162}. The claimants argued that Uruguay had violated that BIT’s Article 3(1) (barring impairment of the use and enjoyment of investments), 3(2) (guaranteeing fair and equitable treatment and prohibiting denials of justice), 5 (providing for compensation in case of expropriation), and/or 11 (granting observance of commitments), by preventing tobacco manufacturers from marketing more than one variant of cigarette per brand family (through a “Single Presentation Requirement” or “SPR”), by increasing the size of graphic health warnings appearing on the front and back of cigarette packs to 80\% thereby leaving only 20 \% for trademarks and other information (the “80/80 regulation”), and by the treatment accorded claimants in Uruguayan courts. Philip Morris argued that the SPR adversely impacted the value of its subsidiary and that the 80/80 regulation wrongfully limited Abal’s right to use its legally protected trademarks (which it argued was a form of protected investment).\textsuperscript{163} The investors further argued that two Uruguayan courts, the Supreme Court of Justice and the Tribunal de lo Contencioso Administrativo (TCA), denied

\begin{footnotesize}
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\item \textsuperscript{161} Urbaser, \textit{supra} note X, at ¶ 1234.
\item \textsuperscript{162} Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016) (hereinafter Philip Morris).
\item \textsuperscript{163} \textit{Id.} at ¶¶ 10-11.
\end{itemize}
\end{footnotesize}
justice to them insofar as the two rendered unreviewable, contradictory rulings and because the TCA had ignored certain proffered evidence.\textsuperscript{164}

Uruguay defended its actions as non-discriminatory measures taken to protect public health consistent with its international commitments, particularly the WHO Framework Convention on Tobacco Control (FCTC). It argued that it adopted the SPR to mitigate the adverse effects of misleading marketing campaigns that had in the past implied, for example, that certain brand variants were “safer”; it argued similarly that its 80/80 regulation was intended to increase consumer awareness of the health risks of smoking.\textsuperscript{165}

By majority vote, the three person ICSID tribunal, consisting of Chair Piero Bernardini, Gary Born, and James Crawford, dismissed all the investors’ claims and awarded Uruguay $7 million to cover part of its costs in the litigation.\textsuperscript{166} Arbitrator Born, concurring with much of the award, dissented on two aspects. He would have upheld the claim for denial of justice based on the “contradictory” actions of the two Uruguayan courts as well as the claim that the SPR was a manifestly arbitrary and disproportionate measure in violation of the BIT’s FET provision.\textsuperscript{167}

As with the Urbaser tribunal, references to soft law (apart from the perennial reliance on prior arbitral caselaw) were critical to the findings of both the majority and the concurring/dissenting opinion filed by Gary Born. In this case, however, the most important soft law references made were to guidelines issued under the Framework Convention on Tobacco Control (FCTC) and not to human rights instruments. The heart of Uruguay’s defense to the

\begin{itemize}
\item \textsuperscript{164} Id. at ¶ 483.
\item \textsuperscript{165} Id. at ¶ 13.
\item \textsuperscript{166} Id. at ¶ 590.
\item \textsuperscript{167} Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, Concurring and Dissenting Opinion of Gary Born, ¶¶ 4-5 (July 8, 2016) (hereinafter Born opinion).
\end{itemize}
investors’ claim relied on a few provisions in the FCTC. The FCTC provides in relevant part, that parties should be guided by the principle that every person should be informed of the health consequences of tobacco use (Article 4(1)) and, to this end, each party should adopt tobacco product packaging and labelling regulations that would prevent the “false, misleading, deceptive” promotion of tobacco products or would “likely . . . create an erroneous impression” about its characteristics, health effects, or hazards (Article 11(1)(a); also Article 13(4)).168 With respect to packaging, the FCTC specifically directed state parties to adopt measures to ensure health warnings on cigarette packs that, among other things, were 50% or more of the principal display areas but no less than 30% of those areas (Article 11(1)).169 The FCTC did not say anything about banning the selling or promotion of different brands of cigarettes as such and it did not explicitly authorize warnings of the size contemplated by Uruguay’s 80/80 regulation.

Uruguay’s defense of its two challenged tobacco control measures relied specifically on hortatory guidelines adopted under the authority of the FCTC to assist the parties in complying with the Convention.170 Uruguay argued, for example, that its 80/80 regulation was justified under para. 12 of the guidelines issued under Article 11 of the FCTC because those guidelines referred to “evidence that the effectiveness of health warnings and messages increases with their size.”171 It argued that its SPR regulation was consistent with guidelines that urged states to restrict as many packing design features as possible, and urged the consideration of “measures to restrict or prohibit the use of logos, colours, brand images or promotional information on

169 Id. at art. 11.
170 Philip Morris, supra note X, at ¶¶ 85-95 (describing the “international regulatory framework”).
packaging other than brand names and product names displayed in a standard colour and font style (plain packages).”¹⁷² That guideline justified these restrictions on the basis that “[t]his may increase the noticeability and effectiveness of health warnings and messages, prevent the package from detracting attention from them, and address industry package design techniques that may suggest that some products are less harmful than others.”¹⁷³

Also important to Uruguay’s defense of its measures was the support its actions had received from the international public health community. This support was made manifest in the case by amicus briefs submitted in the dispute by WHO (joined by the FCTC’s Commission) and PAHO, as well as findings issued by the International Tobacco Control Policy Evaluation Project (ITC), an international research collaboration involving 23 countries. The mixed fact/law contentions presented by the two amicus as well as the data presented by the ITC were extensively cited by the tribunal majority to support their critical findings that Uruguay’s challenged measures were not arbitrary and unnecessary (and therefore in violation of the BIT) but were on the contrary, proportionate measures adopted in good faith that were potentially “effective means to protecting public health.”¹⁷⁴ In the end, the tribunal majority’s view essentially adopted the conclusions reached by the WHO, the FCTC Commission, and PAHO in their amicus briefs.¹⁷⁵ The majority used the soft FCTC guidelines as well as the interpretation of these as provided by the public health experts to support its conclusion that the BIT’s FET clause

¹⁷² Philip Morris, supra note X, at ¶ 46.
¹⁷³ Id.
¹⁷⁴ See, e.g., Philip Morris, supra note X, at ¶¶ 142, 306; see also id. at ¶¶ 388-435.
¹⁷⁵ See, e.g., id. at ¶ 391 (noting that the WHO/FCTC amicus submission concludes that the “Uruguayan measures in question are effective measures of protecting public health” and the PAHO submission indicates, similarly, that these measures “are a reasonable and responsible response to the deceptive advertising, marketing and promotion strategies employed by the tobacco industry . . .”). See Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Written Submission (Amicus Curiae Brief) by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat (Jan. 28, 2015).
was not violated because whether or not the challenged measures actually had negative effects on
tobacco use, it was reasonable for Uruguay to believe that they might. The tribunal majority
also justified its conclusion as reflecting the proper level of deference owed to states under the
“margin of appreciation” as applied under the jurisprudence of the ECtHR.177

Born’s separate concurring and dissenting opinion also drew on soft law to some extent. Born
dissented from the majority’s view that the SPR requirement is a proportionate, necessary
measure that complies with FET precisely because, in his view, despite the level of regulatory
detail contained in them, there was nothing in the FCTC guidelines to suggest that “a single
presentation requirement was mandated or contemplated by the Convention’s drafters.”178 Born
was therefore not suggesting that those soft guidelines were irrelevant. On the contrary he relies
on their silence with respect to the SPR requirement adopted by Uruguay as indicating that the
burden of proof was on Uruguay to show that these regulations were necessary.

Born also parts ways with the majority when it comes to relying on the ECtHR’s
principle of margin of appreciation. For Born, that principle, whether or not considered soft law,
is “based on the specific language of the ECHR and its Protocols and . . . is not transferable to
the specific terms of Article 3(2) of the BIT or to customary international law more
generally.”179 But here too, Born was not entirely immune to the charms of soft law. When it
comes to explaining what the FET clause demands of states, Born relied not on the margin of
appreciation but on the principle of proportionality.180 That principle is itself an arguable soft

176 Philip Morris, supra note X, at ¶ 409.
177 See id. at ¶ 399.
178 Born Opinion, supra note X, at ¶ 100.
179 Id. at ¶ 138.
180 Id. at ¶¶ 136 and 139 n.145.
law notion whose status as an Article 38 sanctioned genuine general principle of law has been
contested.\footnote{See, e.g., N. Jansen Calamita, The Principle of Proportionality and the Problem of Indeterminacy in International Investment Treaties, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2013-14 157 (Andrea K. Bjorklund ed., 2015). But note that neither the majority in Philip Morris nor Gary Born, in his separate opinion, used the term “soft law” to describe these authorities.}

V. The Pros and Cons of Soft Law

As is evident from the survey of the uses of soft law in Parts III and IV, there are many gateways for its deployment by litigants and arbitrators in the course of an investor-state dispute. Soft law instruments complement (or help fill gaps in) the applicable arbitration rules by providing guidance with respect to virtually every procedural question that may arise in the course of establishing and conducting an investor-state arbitration – from selecting or challenging arbitrators to establishing the ways evidence ought to be presented by parties or experts. Soft law instruments also have been deemed relevant substantively, that is, to elucidate the interpretation or application of substantive investment rights (from FET to those ensuring compensation for expropriation), as well as to interpret applicable government defenses (such as claims that regulations were “reasonable” or were taken in good faith to respond to legitimate “public order” or other “public” purposes).

References to soft law instruments may be triggered by explicit references to them in IIAs, including in their preambles. They may also emerge more subtly, as where an IIA preamble merely affirms the contracting parties’ desire for “sustainable” development or expresses respect for the “police power” of states. Such preamble references might be seen as a license to examine soft law instruments that explain these vague terms. Legitimate public purposes – not usually enumerated within or defined by first generation IIAs – might be given
content by, for example, lists in the WTO covered agreements (such as the GATT’s Article XX),
resort to the ILO’s declarations of “fundamental” labor rights, or through recourse to guidelines
issued by international organizations, like the World Bank (which may spell out when an
environmental risk assessment is needed and identify “best practices” for conducting one).
Arbitrators who are urged by the litigants to consider whether certain actions by a state violated
the “legitimate expectations” of the parties; otherwise undermined legal security; were
unpredictable, arbitrary, insufficiently transparent; or were in breach of the principles of due
process might sometimes find it useful to draw from relevant soft law instruments that address
any of these things or that generally purport to explain the “principle of legality”. As Schill,
Tams, and Hofmann point out, “rule of law” principles – including the alleged principle of
proportionality that was applied by Born in Philip Morris – might be drawn from UN definitions
of the rule of law, as found in reports of the Secretary-General or hortatory General Assembly
resolutions, or the caselaw of regional human rights courts addressing the rights to an “effective
remedy” or “fair trial”. 182

The right to be heard or the right to present evidence and what it means is addressed, for
example, by the IBA Rules on the Taking of Evidence. The right to equality of arms is arguably
given some content by the IBA Guidelines on Party Representation. The right to an independent,
impartial tribunal is rendered less abstract by the IBA Guidelines on Conflicts of Interest –
which, as noted in part III, may be deemed relevant even when a binding treaty suggests
otherwise (such as the ICSID Convention). And soft law that purports to address the rule of law
or the meaning of due process may even appear relevant to an ISCID annulment tribunal or a

182 Schill et al., International Investment Law and Development: Friends or Foes?, in INTERNATIONAL INVESTMENT
LAW AND DEVELOPMENT: BRIDGING THE GAP, supra note X, at 3, 31 (discussing the detailed rule of law parameters
enumerated in a Secretary-General Report of 2012).
national court charged with enforcing an investor-state award, even under the limited grounds for review contained in the ICSID or New York Conventions.\textsuperscript{183}

Soft law can serve other functions as well. The UNCITRAL Model Law might be said to achieve a key goal of the investment treaty system as a whole and ISDS in particular, namely to secure coordination or network effects critical to predictability and securing the “stable expectations” that some investment treaty preambles identify as a core object and purpose.\textsuperscript{184} Prior arbitral caselaw, arguably a form of soft law, is crucial to determining more precisely the meaning of standard IIA guarantees, from FET to the concept of an “indirect” taking. Soft law principles are used both to develop and to rely on jurisprudence constante.\textsuperscript{185} And no one denies that soft law – whether in the hands of UNCTAD or an NGO like IISD – is a ready tool to suggest by way of lege ferenda, ways forward to evolve ostensibly more “progressive” IIAs that re-calibrate the balance between investor and state rights.

Given these diverse uses it is not a surprise that the use of soft law is often seen in a positive light by investment law commentators – at least by those who do not object to soft law on principle. The arguments in favor of its use echo those made long ago by political scientists in favor of “informal law”.\textsuperscript{186}

Soft law makes concluding IIAs easier. Soft law instruments are easier to negotiate and conclude precisely because the stakes are lower since they are not formally binding; they permit gaps in the law to be filled more easily. This in turn smooths the way for the proliferation of IIAs – and for using them to re-calibrate the treaty regime over time. After all, IIAs are easier

\textsuperscript{183} See, e.g., Tulip Real Estate v. Turkey, supra note X.
\textsuperscript{185} See generally Kaufmann-Kohler, supra note X. Thus, ISDS arbitrators’ references to their need to adhere to precedent if possible and treat like cases alike might be regarded as allusions to soft law principles.
\textsuperscript{186} See, e.g., Lipson, supra note 24.
to conclude if negotiators need not attempt to define vague terms or to fill in all relevant procedural gaps *ex ante*. It is simpler, after all, to include a reference to “sustainable development” or the need to respect the “right to regulate” and allow litigants and arbitrators to advance interpretations for them *ex post*, once a concrete claim needs to be resolved.

Soft law is also said to enhance the benefits of ISDS. Using soft law to fill in the text of an IIA in the course of adjudicating a particular claim enables the definition of imprecise terms in an IIA to be resolved only as the need arises and in terms of particular facts and not in the abstract. If arbitrators adhere to the canon of judicial minimalism in terms of interpretation and opine on matters only as necessary to resolve the dispute and to do so narrowly, reliance on soft law encourages the law to be filled in a more piecemeal, iterative, and “experimentalist” fashion better suited to the shifting demands of the regime’s stakeholders. Soft law – and relatively soft development through *jurisprudence constante* – enables the investment regime to adapt its rules to changing needs (such as the rise of global supply chains) and to do so only as the need for adaptation arises. It also enables arbitrators to “do justice” rather than have the constraints of outdated law impose the terms of justice on them.

And for arbitrators who see their role less as discrete dispute-settlers and more as lawmakers charged with harmonizing and development consistent international investment law, soft law has other attractions. Resort to respected IBA guidelines or universally appealing UN definitions of what sustainable development or the rule of law demands encourages cross-

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fertilization across international law’s many silos and promotes the de-fragmentation of international investment law.

Finally, soft law ostensibly remedies some of the alleged legitimacy deficits of the investment regime. The use of soft law provides one answer to those who claim that IIAs and ISDS are “undemocratic” or less than fully transparent. To the extent soft law emanates, as it often does, from the international community as a whole (as is true of standards emanating from the UN system of organizations), professional/trade associations (as do IBA guidelines), or NGOs or academics (as is true of numerous corporate responsibility standards), resort to it broadens the spectrum of participants in the international investment regime beyond a narrow community of repeat players. Soft law, on this view, is more democratic than either IIAs, which are perceived to be negotiated by elites beyond closed doors, or the usual participants within ISDS, who are often portrayed as a select few plagued by inherent conflicts of interest. Some soft law instruments, such as those produced by organizations with universal membership, also win favor among ISDS’s critics because they are the product of more “equitable” processes across North/South lines than at least first generation BITs. While the latter have been seen by many as imposing unwanted rules on members of the Global South desperate for capital and lacking power to change the terms of what is offered to them, the former are associated with forums where all states enjoy an equal vote.

188 See, e.g., Wälde, supra note X, at 7-16 (presenting a favorable view of how the involvement of distinct departments within governments, international organizations, technical or professional associations, MNCs, and NGOs in the development of soft law enhances their legitimacy and in turn the legitimacy of ISDS). See also Schill, Sources, supra note X, at 1114 (concluding that the use of soft law is “a way to embed IIL [international investment law] in an open dialogue with a variety of different actors and constituencies whose activities bear on international investment relations.”)


But virtually every argument made in favor of the use of soft law in ISDS has a dark side. The “cons” of soft law, inspired by positivist objections to it, are embedded in its “pros”.

Since only a small number of investment disputes lead to arbitration, the contents of IIAs matter greatly to how foreign investors and regulating states are treated. Neither investors subject to the “obsoleting bargain” struck with host states nor host states, subject to the political power of multinational corporations whose economic strength may excel their own, can trust that the rules of the game will be resolved by investor-state dispute settlement. Reliance on soft law adjudication *ex post* to fill in the contours of IIAs undermines the premise of IIAs to begin with: namely the need for certain, stable rules backed by something other than the ephemeral promises of a host state in its national laws. Relying on soft law instruments to soften the contents of IIAs runs contrary to the need states and investors have for textually clear rules laid out in advance because foreign investments involve sunk costs that need predictability. Clear IIA rules are most useful to the vast majority of investors, including small ones, who may never bring a claim but trust a treaty to provide relatively clear ground rules. The defense that post-dispute reliance on soft law expedites the conclusion of IIAs ignores these concerns. What good is an expeditious BIT negotiation subject to soft law “evolution” over time if foreign investors cannot predict whether, under an IIA’s express terms, retroactive tax laws are consistent with FET or investors can secure, through MFN, the substantive benefits assured by their host states’ prior BITs?

Arduous *ex ante* treaty negotiations to establish hard law may be preferable than open-ended delegations of authority to party-selected arbitrators to use soft law to alter the rules over time, especially if those arbitrators are perceived, rightly or wrongly, to be biased, incompetent, ethically conflicted or all three. To the extent investor-state arbitrators are seen as able and willing to select freely from a plethora of soft law options, that surfeit of discretion does not
respond to the many rule of law critiques of ISDS. It does not respond to those who believe that arbitrators “make the law up as they go along” or exercise their discretion in less than impartial fashion. Adding soft law to the mix of sources that ISDS arbitrators can apply may, on the contrary, exacerbate concerns that these adjudicators are only too ready to act for political or ideological reasons, such as to advance investors’ interests or, on the contrary, to please respondent states if either of those options is better seen as helping to keep the system alive. And as positivist critics like Klabbers like to point out, the soft normativity of soft law adds yet another layer of discretion that contributes to the “crumbling of the entire legal system.”

The contention that resort to soft law renders the investment treaty or ISDS more “democratic” also has a dual edge. A leading legitimacy critique of ISDS is that it privatizes the settling of public law disputes by turning to the techniques used for commercial arbitrations between private parties. The complaint is that ISDS is an inappropriate mechanism to resolve significant issues of public policy that impact more than the litigants involved in investor-state disputes. Resort to the procedural rules devised for commercial arbitration – such as those produced by the IBA – evinces a tin ear to this concern. Indeed, encouraging reliance on rules laid out by professional associations for their own benefit may aggravate the perception that ISDS remains in the grip of a small cadre of business professionals and arbitration experts. It certainly does not respond to those who claim that ISDS puts a figleaf of respectability on forms

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191 Klabbers, The Undesirability, supra note X, at 391.
192 See, e.g., Van Harten, supra note X.
193 Thus, even Schill, who largely defends the turn to soft law, acknowledges that its use can “bypass, or undermine, the traditional modes of international lawmakers” and that resort to soft law developed by “technocratic expert groups that may share a common professional bias . . . can raise questions about representativeness and procedural propriety.” Schill, Sources, supra note X, at 1112.
of self-dealing that threaten public values or to those who question, from the outset, the power of “experts” in the making of international law.

Resort to soft law produced by more public and global institutions like the UN or the ILO does not necessarily enhance the democratic legitimacy of the investment treaty regime or ISDS. Global processes within UN system institutions, according to prominent ISDS critics, replicate the standards favored by Western governments to enhance their own interests. Such concerns are not limited to those from the Global South. At present in the United States, treaties like the NAFTA and its reliance on ISDS draw the ire of both Trump supporters on the right as well as liberal supporters of Elizabeth Warren on the left. Both see ISDS as “undemocratic” in large part because it does not respond to or involve core constituents within the United States. Comparable tensions have emerged elsewhere, as suggested by populist/nationalist resistance to liberal international institutions, from the UN to the WTO. Arguments that international investment law is “more democratic” because it relies on rules from such institutions – rules imposed from elsewhere (or nowhere) and developed by global elites – does not mollify such critics.

VI. Conclusion

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194 See, e.g., Sornarajah, supra note X.
196 See, e.g., Wälde, supra note X, at 15-16 (noting that when it comes to international standards, the situation of developing countries is the “most pathetic” since such soft law (such as high-quality labor standards) “works almost everywhere against developing countries”).
Despite the long-standing uncertainties associated with the concept of soft law, forms of it are clearly being used in investor-state arbitrations. Much more work needs to be done to determine its prevalence, the reasons for its appeal, and whether resort to it is increasing. Such work will require considerable empirical sophistication but not only that. It will require more in-depth consideration of what exactly soft law is and more importantly, when exactly it is being deployed inconsistently with the traditional rules of treaty interpretation, Article 38 sources, or in other ways that provoke controversy.

It is not always clear when soft law is being used in the ways suggested by the preliminary definition adopted in Part II above. As this author has suggested with respect to the use of European human rights law by investor-state arbitrators, ISDS tribunals may be turning to such references not as applications of “soft law” but as just another form of analogy endemic to legal reasoning.\textsuperscript{198} When soft law is referred as just something to learn from, questions about whether soft law is being wrongly “applied as applicable law” may miss the mark. When an ISDS tribunal refers to a soft law instrument in the same way as it refers to the David Ricardo’s theory of comparative advantage by way of providing a rationale for its interpretation of the law, is that really a departure from the rule of law calling for condemnation or merely a conscientious tribunal trying to provide a reasoned opinion? Is either resort really an objectionable departure from the principle of \textit{iura novit curia} even if the arbitrators reached for these analogies on their own?

Nor is it clear, notwithstanding the discussion at Part IV, that the Urbaser tribunal’s turn to the ICESCR Committee’s views constitutes resort to soft law consistent with the definition of

\textsuperscript{198} \textsc{Alvarez, The Boundaries, supra note X, at 244-245. See generally Valentina Vadi, Analogies in International Investment Law and Arbitration (2016).}
soft law adopted here. While it is true that the Urbaser tribunal grounded its finding that there
exists a right to clean water on the non-binding views of that Committee, the ICESCR authorizes
ECOSOC to review compliance with that treaty and ECOSOC duly established the Committee to
fulfill that function.199 While the Committee’s views are not legally binding as such, to the
extent those views are not repudiated by the parties to the ICESCR it is not far-fetched to see
those views as affirming the parties’ *de facto* subsequent interpretation of the ICESCR. It is not
clear that the Urbaser tribunal’s turn to the ICESCR Committee is all that different from giving
effect to an interpretation issued by the state parties to an IIA where an IIA provides for the
issuance of such views. Is arbitral consideration of a NAFTA Commission Interpretation a
legitimate use of the VCLT – which authorizes consideration of a treaty parties’ subsequent
interpretations – different only because such Commission Interpretations are binding under the
NAFTA?200 This would not appear to be a relevant distinction as far as the ICJ is concerned.
ICJ judges, as far back as 1962, have opined that Charter interpretations made by the UN
General Assembly, even in non-binding resolutions, could be treated as relevant subsequent
practice for purposes of Charter interpretation.201

In other instances, as where an IIA preamble or other text refers to a soft law instrument,
reference or reliance on that instrument seems both inevitable and consistent with the VCLT’s
demand to give effect to a treaty’s “plain meaning”.202 And in yet other cases – such as the
Philip Morris tribunal’s resort to the guidelines issued by the FCTC or that body’s reliance on the

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199 ICESCR, *supra* note X, at arts. 16-22.

200 *Compare* VCLT, *supra* note X, at art. 31(3)(b) (permitting consideration of the parties’ subsequent interpretation)
binding Commission interpretations).

201 Certain Expenses of United Nations, Advisory Opinion, 1962 I.C.J. 149, 160-162 and 165. See also José E.
Alvarez, *International Organizations as Law-Makers* 79-80, 87-88 (2005) (noting other instances of
reliance on organizational practice).

202 VCLT, *supra* note X, at art. 31(1).
views expressed by global experts on public health (as discussed in Part IV), it may be hard to distinguish resort to soft law from reliance on forms of expert evidence that address a mixed question of fact and law. In the Philip Morris case, the amicus of the WHO/FCTC and PAHO, as well as the guidelines of the FCTC, were used principally to support findings that certain tobacco measures reduce the use of tobacco by consumers.203

Alternatively, we might see cases like Philip Morris not as resorting to soft law but as deploying the tools of GAL. From a GAL perspective, the Philip Morris tribunal was arguably not extracting soft law or de facto expert testimony from the amicus briefs filed by the WHO/FCTC Commission or PAHO in that case. It was, in effect, deferring (as would a national court with respect to a domestic agency) to the “administrative” law findings of global agencies charged with resolving issues of public health.

Whether we frame “resorts to soft law” instead as “boundary crossings” into distinct treaty regimes, deployment of different types of evidence, or applications of GAL matters. The questions that emerge with respect to each of these distinct frameworks differ. If Urbaser’s resort to human rights is a boundary crossing, an important question is whether that tribunal respected the “rational design” of the respective treaty regimes, that is, whether that tribunal respected the remedial schemes of the BIT in that case versus those contemplated under human rights in general and the ICESCR in particular. Did that tribunal get the law relevant to the human right to clean water right? Did it delineate the applicable obligations and remedies in each treaty regime properly?204

204 See generally ALVAREZ, THE BOUNDARIES, supra note X.
If the Philip Morris tribunal’s consideration of the FCTC guidelines is alternatively seen as involving an evidentiary matter, we might inquire as to the proper weight to be accorded such evidence – a matter that is routinely ignored in the relevant arbitration rules. Or we might ask whether that tribunal should have treated the amicus briefs in that case as the equivalent of expert evidence that should have been subjected to cross-examination or whether it was proper for the arbitrators simply to take judicial notice of their contents.\(^{205}\) But if we see the Philip Morris tribunal’s turn to the amicus of the WHO/FCTC and PAHO as occasions for deferring to global health agencies, we might ask about where an ISDS tribunal gets the authority to defer to an international organization and about the proper level of such deference as a matter of “global administrative law”. We might ask whether the WHO, the FCTC Commission, or PAHO is owed the same “margin of appreciation” that the Philip Morris majority indicated was appropriate for states. And if that is an important question, should we see the applicable level of deference owed to relevant global agencies itself as a “soft law” principle?

To the extent we continue to see the examples canvassed in Parts III and IV as involving the use of soft law, caution is needed with respect to the assumption that the use of soft law instruments or principles benefits ISDS or helps to answer the investment treaty regime’s legitimacy deficits. Jacob and Schill are correct that soft law is now being used to “re-calibrate” IIAs in ways that are more favorable to respondent states. The Urbaser and Philip Morris cases described in Part IV provide evidence that the use of soft law within ISDS might be used to improve the prospects for respondent states. But it is not inevitable that the turn to soft law in either IIAs or in the course of dispute settlement will “re-balance” the investment regime in favor of states. As this author has shown with respect to the use of European human rights

\(^{205}\) See generally Alvarez, Use of Experts, supra note X.
law by ISDS arbitrators, if that is an example of the use of soft law, that recourse often benefits foreign investors.\textsuperscript{206} The same can be said of soft law instruments designed to benefit particular groups, such as indigenous peoples, particularly if they are investor claimants.\textsuperscript{207} Similarly, to the extent ISDS tribunals resort to WTO caselaw as a form of soft law, that source need not always provide solace to respondent states.\textsuperscript{208} Those trying to re-balance third generation IIAs by incorporating references to soft law instruments directly or by implication need to be aware that, given the creativity of ISDS litigants, soft law might be used in unexpected ways – including to benefit investors. Soft law instruments may need to be accompanied by a label: “warning: may not produce ‘progressive’ results.”

More generally, it is important to recognize that virtually all of the purported benefits of soft law have a flip side. There is a certain inconsistency in the claim that soft law instruments enhance consistency by filling gaps in hard law with rules of greater precision and that they also enable interpretative flexibility.\textsuperscript{209} Different soft law instruments do different things and their impact varies with the case/facts at hand.

At times resort to soft law can produce more inconsistent ISDS rulings, particularly if tribunals disagree over which soft law instruments are most relevant. Reliance on those soft law instruments that are particularly popular, such as some IBA products, may produce forms of

\textsuperscript{206} \textit{Alvarez, The Boundaries}, supra note X, at 49 (noting the number of instances in which investor claimants rely on ECHR law) and at 209-210 (discussing the commonalities between investor guarantees and certain human rights in the ECHR).

\textsuperscript{207} For one example, see Grand River Enterprises Six Nations v. U.S., UNCITRAL, Amicus Brief Submission of the Office of the National Chief of the Assembly of First Nations (Jan. 19, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0383_0.pdf (citing to UN declarations on the right of indigenous peoples in a case involving First Nations’ defense of its efforts to sell Seneca brand cigarettes).

\textsuperscript{208} \textit{See, e.g., Alvarez, The Boundaries}, supra note X, at 143-150 (discussing the complex role of references to WTO law in Methanex v. U.S.).

\textsuperscript{209} \textit{See, e.g., Collins & Albornoz, supra} note X, at 110 (discussing eight uses of soft law and concluding that it enhances the flexibility of international law).
“legalitis” that reduce the appeal of arbitration as an adaptable system of dispute resolution. Resort to rules produced by professional associations, such as the IBA, can fuel critiques of ISDS as an incestuous system designed for the benefit of a small clique of repeat players. To the extent some forms of soft law are seen as *lex mercatoria* favored by MNCs, the “West”, or “the market”, its use may also perpetuate views that the investment regime and ISDS favors an ideologically skewed application of international law. The same resort to soft law that experimentalists praise for enhancing the flexibility or adaptability of the law can be seen, precisely because it introduces greater uncertainty, as undermining the rule of law and/or the expectations of the investment regime’s stakeholders. Soft law deployed *ex post* by arbitrators to fill legal gaps in IIAs can fuel fears of “elitist” global actors bypassing legitimate national legislatures. That non-state actors may be involved not only in the *ex post* use of soft law but in making it is not an unalloyed good. That aspect may not appeal to those who are suspicious of the power or accountability of non-state actors such as NGOs or MNCs.

As is the case with hard international law, soft law instruments are diverse in form, origin, and content. Generalizations about the alleged benefits or detriments of soft law should not ignore that fact. Addressing “soft law” as if it were one thing or a single phenomenon substitutes caricature for nuance. It is difficult to say that the recourse to soft law within IIAs will redound to the benefit of states or that its use by investor-state arbitrators will do the same.

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210 See, e.g., Hodges, *supra* note X, at 206.
211 For those who think that a government should always have an input on all instruments that directly or indirectly “regulate” its nationals, it may be symptomatic that the soft law instrument that appears to be most in arbitration, the IBA Rules on the Taking of Evidence in International Commercial Arbitration, had “no government input at all.” See Kaufmann-Kohler, *supra* note X, at 289.
212 For one attempt to enumerate the diverse kinds of soft law, see Dinah Shelton, *Soft Law, in The Routledge Handbook of International Law* 68 (David Armstrong ed., 2009).
It is impossible to say whether its use in general will benefit or hurt the legitimacy of ISDS.

What is clear is that at times, despite its name, soft law is anything but “soft” in actual effect.