International Journal of Law and Legal Jurisprudence Studies : ISSN:2348-8212

The Potential for Fragmentation in International Investment Law

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Abstract

The paper advances the paradoxical thesis that international investment law is developing towards a multilateral system of investment protection on the basis of bilateral treaties. Despite the infinite fragmentation of substantive investment law, coupled with arbitration as a decentralized dispute and compliance mechanism, one can observe convergence rather than divergence in this field of international law. Unlike genuinely bilateral treaties, BITs do not stand isolated in governing the relation between two States; they rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching legal framework for international investments based on uniform principles with little room for insular deviation. The paper therefore argues that BITs in their entirety function largely and increasingly analogously to a truly multilateral system. Elements of this thesis are the inclusion of most-favored-nation clauses, the possibilities of treaty-shopping through corporate structuring and the contribution of investor-State dispute settlement through the intensive use of precedent and other genuinely multilateral approaches to treaty interpretation.

I. Introduction

Every conceptual approach to international investment law has to confront the question of whether we are confronted, in this context, with a unitary – ar at least rather unitary - legal framework for an international or even global investment space, or whether the view of an international investment order or *one* international investment law as a separate discipline of international law is merely a generalization with little explanatory content or, at best, an aspiration *de lege ferenda*. In slightly different terms, the question is whether it is proper to speak of the existence of a system of international investment law and investment protection or whether there is only an aggregate of unconnected, disorderly and fragmented bilateral treaties.[1]

The approach to understand international investment law as part of an international and comparative public law discipline shares this concern. For this reason, it is necessary to consider the question of whether international investment law is a fragmented aggregate of individual, primarily bilateral, treaty relations or whether it is, despite this apparent fragmentation, possible and feasible to speak of the existence of a public international economic order that is not only backed by the multilateral

[1] This article is an extremely condensed an simplified version of my PhD thesis at the Johann Wolfgang Goethe-Universität Frankfurt/Main. The entire thesis will appear as SCHILL, *The Multilateralization of International Investment Law* (Cambridge University Press – forthcoming).

international trade law and international monetary law regimes, but also encompasses a uniform legal framework that regulates international investment relations.

In a sense, a characterization of the international investment order in terms of the distinction between bilateralism and multilateralism is a preliminary question to any attempt to conceptualize and theorize international investment law. It seems, however, particularly crucial to the approach to understand international investment law as a special branch of international and comparative law because the approach to confront issues of interpretation and operation of investment treaties by means of a comparative public law approach and methodology that feads the understanding of general principles of public law requires the existence of a general, or multilateral, legal order for international investment relations. It requires a certain degree of unity on the level of the governing international law. A substantive fragmentation of international investment law into bilateral relations would, by contrast, doom such a project from the start. An essential question of the project is therefore to understand this field of international cooperation in terms of bilateralism and multilateralism. We thus have to ask whether investment treaties are instruments of bilateralism or elements of an evolving multilateral system of investment protection on the basis of bilateral treaties.

At the outset, the development of international investment law on the basis of bilateral treaties contrasts significantly with the emergence of multilateral institutions in other areas of international economic law, in particular international trade law and international monetary law. While multilateralism dominated international relations in these fields through the establishment of the GATT/WTO and the IMF, several approaches to establish a multilateral investment treay have failed.[2] Instead, international investment law is enshrined in currently over 2,500 bilateral, regional and sectoral investment treaties (collectively BITs).[3] Furthermore, its compliance and dispute settlement mechanism does not rely on a uniform dispute settlement body, but rests on *ad*

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2 See VANDEVELDE, *A Brief History of International Investment Agreements*, 12 U. C. Davis J. Int'l L & Pol'y 157 (2005); DATTU, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 Fordham Int'l L. J. 275 (2000).

3 UNCTAD, *Developments in International Investment Agreements in 2005*, pp. 2 *et seq.* (2006), available at http://www.unctad.org/en/docs/webiteiia20067_en.pdf.

hoc arbitration panels with limited State oversight nor institutional mechanisms that ensure consistency and predictability in the decision-making process of arbitral tribunals.

This development suggests a chaotic and unsystematic aggregate of the law governing international investment relations. Rather than constituting a consistent and coherent system of law, one would expect an extreme divergence and fragmentation in this area of international cooperation. In fact, the fragmentation into bilateral treaties would make it impossible to understand this area of law as a system of law or perceive it as part of an overarching order for international economic relations. Instead, differentiated, preferential and discriminatory standards should be the result of bilateral treaty-making. Likewise, investment treaties would not establish uniform standards for the treatment of foreign investors by national administrations, the judiciary and the legislative. As a consequence, it would be impossible to develop theories and doctrines of the principles governing international investment relations.

However, what one can observe is a convergence, not a divergence in structure, scope and content of existing investment treaties. Unlike genuinely bilateral treaties, BITs do not stand isolated in governing the relation between two States; they rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching regime for international investments. Likewise, the existing inconsistent decisions are not only relatively rare in number, but also arise more from diverging views about the proper application of standard investor's rights and international law more generally rather than from the multitude and divergence of the underlying treaty regimes. This paper therefore argues that BITs in their entirety function largely and increasingly analogously to a truly multilateral system. Instead of being prone to almost infinite fragmentation, international investment protection is developing into a uniform governing structure for foreign investment based on uniform principles with little room for insular deviation. Paradoxically, international investment law is therefore multilateralizing on the basis of bilateral treaties.

The argument is not that bilateral investment treaties are wholly equivalent to a multilateral *treaty*; the argument is rather that the existing investment treaties, whether bilateral, regional or sectoral, can be understood as part of a treaty-overarching legal

framework that backs up an international investment space that is part of the developing global market economy. The argument is also not that there is complete uniformity, but that there is enough convergence in order to be able to speak of international investment law as an existing international law discipline which is made up of uniform investment law principles, which is implemented through rather uniform institutional mechanisms and which follows rather uniform rationales. Insular deviation and differences between bilateral treaties are thus built into the thesis advanced.

In order to advance this thesis, the paper addresses a number of aspects that support that investment treaties and the principles of investment protection they contain follow multilateral rationales in their conclusion and application, even though they are enshrined in bilateral treaties. After revisiting the potential for fragmentation in international investment law, the paper considers the harmonizing effect of most-favored-nation clauses on international investment law, addresses possibilities of investors to shop for the investment treaty that best meets their needs, and, finally, discusses which contribution investor-State dispute settlement as a compliance mechanism makes towards the progressive multilateralization of international investment law. In particular, arbitral tribunals employ several interpretative strategies that follow multilateral rather than bilateral rationales and make intensive use of arbitral precedent, thus creating unity rather than fragmentation.

II. The Potential for Fragmentation in International Investment Law

Many observers of international investment law stress the existence of conflicting and inconsistent decisions produced by investment tribunals[4] and thus echo the more general debate that considers the proliferation of dispute settlement mechanisms as one central factor for the fragmentation of international law, a debate which has ensued in the wake of the interpretative conflict that emerged between the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia concerning the attribution

[4] See only FRANCK, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521 (2005).

of actions of paramilitary groups to a State.[5] In fact, seemingly inconsistent decisions in investment treaty arbitration have occurred with respect to many aspects of international investment protection, including the interpretation of standard element of investment treaties such as most-favored-nation clauses or "umbrella clauses" that accord treaty protection to investor-State contracts and similar undertakings of host States.

A. Multiplicity of Sources, Multiplicity of Proceedings

The potential for inconsistent and conflicting decisions in investment treaty arbitration, or more generally incoherence in the law governing international investment relations, is indeed abundant. Its causes are twofold and concern the substantive as well as the procedural law. Concerning substance, the fragmentation of sources of international investment law plays a significant role in disaggregating coherence. Due to the large number of BITs, one and the same State measure might be assessed differently under two existing investment treaties depending on the nationality of the investor affected. Different treaties might also contain different standards of investment protection, therefore resulting in differentiated protection of various foreign investors.

Inconsistent decisions can also result from the possibility of having multiple proceedings relating to an identical set of facts that can arise from independent claims by shareholders at different levels of a corporate structure.[6] Such a constellation led, for example, to conflicting decisions by two different tribunals in *CME v. Czech Republic* and *Lauder v. Czech Republic*.[7] Here, measures of the Czech Republic against a locally incorporated media company resulted in proceedings before two investment tribunals under two different BITs, one initiated by CME, the direct shareholder of the locally incorporated company, the other by Mr. Lauder, the controlling shareholder of CME. While the Tribunal in *CME* found that the Respondent's measures violated several provisions of the Dutch-Czech BIT and ordered it to pay in damages of ca. US$ 270

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5 PEMMARAJU SREENIVASA RAO, *Multiple International Judicial Forums*, 25 Mich. J. Int'l L. 929, 956-957 (2004). See further KOSKENNIEMI, *Fragmentation of International Law* (2007).

6 This results from the broad definition of "investor" and "investment" which accords standing to shareholders at various levels. See SCHREUER, *Shareholder Protection in International Investment Law*, in: DUPUY/FASSBENDER/SHAW/SOMMERMANN (eds.), Common Values in International Law, Essays in Honour of Christian Tomuschat, p. 601 (2006).

7 See KÜHN, *How to Avoid Conflicting Awards – The Lauder and CME Cases*, 5 J. World Inv. & Trade 7 (2004).

million,[8] the Tribunal in *Lauder* only found a minor breach of the U.S.-Czech BIT, but did not award damages due to remoteness.[9]

B. Fragmentation and *ad hoc* Arbitration as a Dispute Settlement Mechanism

Certainly, the institutional design of dispute settlement under investment treaties based on *ad hoc* arbitration is a threat to consistent decision-making in itself. Arbitral tribunals coexist without hierarchy and are not subject to appeals or any other form of external control by a supervisory body that could ensure consistency in the decision-making process.[10] Furthermore, investment treaty arbitration also lacks a concept of *de iure stare decisis* that could operate in producing consistent decisions.[11] On the contrary, arbitral tribunals are free to adopt rulings that deviate from prior decisions by other tribunals.

Inconsistencies in investment treaty arbitration can result from differing assessment of law and facts by different tribunals. Two tribunals may, for example, agree on the elements of necessity in international law, but disagree on whether the prevailing circumstances actually qualify as a state of necessity. Conversely, tribunals may disagree on the correct interpretation of the same provision in the same BIT. The Tribunals in *CMS v. Argentina* and *LG&E v. Argentina*, for example, reached different conclusions in applying the U.S.-Argentine BIT because they assumed a different legal relationship between necessity under customary international law and a specific emergency clause in the treaty and distributed the burden of proof for limiting elements differently.[12]

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8 *CME Czech Republic B.V. v. The Czech Republic*, Partial Award of Sept. 13, 2001; Final Award of March 14, 2003 [all investment treaty awards are available at http://ita.law.uvic.ca].

9 *Lauder v. Czech Republic*, Final Award of Sept. 3, 2001, para. 235.

10 See BROCHES, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev.–For. Inv. L. J. 321 (1991).

11 See only Art. 1136(1) NAFTA; Article 53(1) ICSID Convention (both providing for the binding effect of awards between the parties to the proceeding only). Investment tribunals accept the lack of a rule of *de iure stare decisis*, see KAUFMANN-KÖHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arb. Int'l 357 (2007).

12 See SCHILL, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. Int'l Arb. 265 (2007).

Inconsistencies may also stem from conflicting views of tribunals concerning the construction of comparable treaty provisions in different treaties. While the Tribunal in *SGS v. Philippines*, for example, accepted that a provision in the Swiss-Filipino BIT constituted an umbrella clause and allowed the investor to bring contractual claims under the BIT, the Tribunal in *SGS v. Pakistan* denied such an effect to a similar provision in the Swiss-Pakistani BIT.[13] Similarly, the interpretation of the scope of MFN clauses has resulted in diverging awards.[14]

In sum, the sources for inconsistent decisions are numerous. The multiplicity of sources, the multiplicity of proceedings and the significant potential for inconsistent interpretations resulting from it should lead to a large degree of fragmentation of international investment law. In addition, the institutional structure of investor-State dispute settlement as *ad hoc* arbitration without significant external and internal control mechanisms should ensure that the contracting State parties to a BIT remain in control of the future of their bilateral treaty relations without being affected by the operation or interpretation of unrelated third-party BITs. At the same time, the inexistence of any hierarchy among investment tribunals and the lack of external control mechanisms, above all a standing appeals facility, aggravate the development of a uniform and consistent jurisprudence in the realm of international investment law. In essence, the potential for inconsistencies in investment treaty arbitration is therefore an expression of bilateralism in international investment relations.

III. The Standardization of International Investment Treaties

The bilateral form of investment treaties suggests that the treaties differ significantly in content and structure and rather resemble *quid pro quo* bargains than uniform instruments governing international investment relations. However, international investment treaties generally conform to an archetype, converge in their wording and have developed a

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13 See, for example, GILL/GEARING/BIRT, *Contractual Claims and Bilateral Investment Treaties*, 21 J. Int'l Arb. 397 (2004).

14 See, for example, FAYA RODRIGUEZ, *The Most-Favored-Nation Clause in International Investment Agreements*, 25 J. Int'l Arb. 89 (2008).

surprisingly uniform structure, scope and content.[15] Almost all investment treaties provide for national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security, contain prohibitions on direct and indirect expropriation and grant the free transfer of capital. Finally, most investment treaties allow investors to initiate arbitration proceedings against the host State for violating the respective treaty.[16] These similarities are particularly striking as one of reasons why ordering international relations on a bilateral basis is preferable to multilateral ordering is the flexibility bilateral treaties offer to respond to specific needs and particularities.[17]

A. The Entrenchment of BITs in Multilateral Processes

In fact, the convergence of BITs is a the product of international planning by capital-exporting States. The similarities of BITs result from various processes on the international level that embed bilateral treaties within a multilateral framework and reflect an interest of States in establishing uniform investment rules. First, the convergence of treaty texts of many capital-exporting countries can be traced back to national model treaties that serve as a basis for the negotiation of BITs. Many countries, including Germany, the Netherlands, the United Kingdom, the United States, France and Canada, use model BITs that are updated and refined on a regular basis.[18] Although divergences between these model treaties and the BITs concluded on their basis occasionally occur, in general there is a close resemblance between the model draft and the final treaty.[19]

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15 See for an older empirical study KHALIL, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID Rev.–For. Inv. L. J. 339 (1992).

16 For general accounts of investment treaties and their content see DOLZER/STEVENS, *Bilateral Investment Treaties* (1995); LOWENFELD, *International Economic Law*, pp. 474 *et seq.* (2002); SORNARAJAH, *The International Law of Foreign Investment*, pp. 315 *et seq.* (2nd ed. 2004); SACERDOTI, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 Recueil des Cours 251 (1997).

17 *Cf.* RIXEN/ROHLFING, *The Political Economy of Bilateralism and Multilateralism: Institutional Choice in Trade and Taxation*, MPRA Paper No. 325 (Oct. 2006), available at http://mpra.ub.uni-muenchen.de/325.

18 Various model BITs of Austria, Denmark, Germany, Hong Kong, the Netherlands, Switzerland, the United States, and the United Kingdom, are reprinted in DOLZER/STEVENS (*supra* note 16), pp. 165 *et seq.*

19 See VANDEVELDE, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157, 170 (2005).

Secondly, the convergence among the various national model treaties is based on their common historic pedigree. They have not been developed independently by the different capital-exporting countries, but go back to concerted efforts in the 1950s and 1960s to establish a multilateral investment treaty. In particular, the 1967 OECD Draft Convention on the Protection of Foreign Property had, although it never resulted in a binding instrument, a harmonizing effect for the BIT programs of the capital-exporting countries involved and often translated directly into the formulation of their respective model treaties.[20] Consequently, the use of model treaties did not only serve the purpose of facilitating the negotiations about the content of a BIT and thus of reducing their drafting and negotiation costs,[21] but aimed at ensuring a certain level of uniformity in investment treaty negotiation and conclusion.

The link between BITs and other multilateral developments can also be illustrated concerning the Forth Lomé Convention between EC Member States and 68 developing countries from the African, Caribbean and Pacific region. The Convention did not only affirm the importance of concluding investment treaties between the contracting parties,[22] but also determined some of the content of these agreements[23] and thus ensured their homogeneity.

B. Bilateralism, Hegemony and Fragmentation

Possibly, the content of BITs could be solely a function of the hegemonic behavior of developed capital-exporting countries vis-à-vis their capital-importing counterparts.[24] If this was the case, the apparent convergence of international investment treaties would merely conceal that BITs in fact endorsed preferential benefits of stronger

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20 See, for example, SINCLAIR, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 Arb. Int'l 411 (2004) (concerning the development of umbrella clauses).

21 BATTIGALLI/MAGGI, *Rigidity, Discretion, and the Costs of Writing Contracts*, 92 Am. Econ. Rev. 798 (2002); BROUSSEAU/GLACHANT, *The Economics of Contracts and the Renewal of Economics*, in: BROUSSEAU/GLACHANT (eds.), *The Economics of Contracts* (2002).

22 See Art. 260(1) of the Forth ACP-EEC Convention (Lomé Convention, signed Dec. 15, 1989), 29 ILM 809 (1990).

23 Annex LIII of the Joint Declaration on Part Three, Title III, Chapter 3, Section 2, 29 ILM 802 (1990).

24 In this sense CHIMNI, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. 1, 7 *et seq.* (2004); BENVENISTI/DOWNS, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, IILJ Working Paper 2007/6 (Global Administrative Law Series), pp. 11 *et seq.* (2007).

vis-à-vis weaker capital-exporting States. It would be likely that stronger capital-exporting States seek specific benefits in BITs in relations to other competing capital-exporters, just as States in the inter-war period have used their negotiating power in bilateral economic relations to ensure advantages over competing powers by concluding protectionist regimes with weaker States.[25]

However, investment treaties are grounded on notions of equality and non-discrimination, reflected above all in the principles of national and most-favored-nation treatment. In addition, they apply the same standards to capital-importing and capital-exporting countries. Although this left capital-exporting countries initially largely unaffected due to the primarily unidirectional flows of capital from developed into developing countries, the directions of these flows are becoming increasingly bidirectional. Similarly, the expanding number of South-South BITs,[26] concluded between developing countries, which endorse the same standard terms, suggests that the content of investment treaties is increasingly considered as constituting an appropriate balance between investment protection and State sovereignty.[27] Certainly, hegemonic elements were at play when developed States switched from multilateral to bilateral negotiation settings, with different relative negotiation powers at play. Yet, this hegemonic element did not result in preferential or discriminatory investment protection standards. Instead, investment treaties are based on notions of non-discrimination subjecting all States, including capital-exporting States, to the same standards of investment protection.

The reason for the convergence of BITs is arguably that uniform and universal rules are in principle in the interest of all States. The hypothesis is that uniform rules in international investment relations are not only beneficial for developed countries as a group, but are in the interest of every single participant. Such an explanation for the convergence of investment treaties would repose on the crucial role uniform rules have

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25 See KINDLEBERGER, *Commercial Policy Between the Wars*, in: MATHIAS/POLLARD (eds.), The *Cambridge Economic History of Europe, Vol. VIII*, p. 161 (1989).

26 UNCTAD, *South-South Cooperation in International Investment Arrangements*, available at http://www.unctad.org/en/docs/iteiit20053_en.pdf.

27 SCHILL, *Tearing Down the Great Wall – The New Generation Investment Treaties of the People's Republic of China*, 15 Cardozo J. Int'l & Comp. L. 73, 114 *et seq.* (2007).

for the creation of a level-playing field that enables investment flows in a global economy to wherever capital is most effectively allocated. Uniform standards are particularly salient as they are the prerequisite for competition in a global market. From this point of view, establishing uniform rules is in the long-term interests of all States and explains why bilateral investment treaties are so similar and can be seen as a substitute for a single multilateral investment treaty.

IV. Multilateralization through Most-Favored-Nation Clauses

The interest of States in creating uniform rules for investment protection also surfaces in the BITs themselves. An express basis for the multilateralization of investment relations are most-favored-nation ("MFN") clauses incorporated in almost every treaty. With some variations, these clauses are reciprocal, unconditional and indeterminate.[28] They require to "treat investments and activities associated with investments in its own territory . . . on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country."[29] MFN clauses break with general international law and the bilateralist rationale that permits differential treatment of different States and their nationals.[30] They oblige the State granting MFN treatment to extend to the beneficiary State any more favorable treatment accorded to third States[31] and thus require non-discrimination between the beneficiary and any third State.

Although MFN clauses constitute inter-State obligations, they extend MFN treatment directly to covered investors in the context of investment treaties. An investor covered by a BIT which includes an MFN clause (the so-called basic treaty) can therefore invoke the benefits granted to third-party nationals by another BIT of the host State and have them applied to its relationship with the host State. Consequently, MFN clauses multilateralize the bilateral inter-State treaty relationships and harmonize the protection of foreign investments in a specific host State. The prevent States from shielding

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28 See ACCONCI, *The Most Favoured Nation Treatment and the International Law on Foreign Investment*, 2(5) TDM 2005, pp. 6 *et seq.*

29 Art. 3(c) of the BIT between Australia and the People's Republic of China of 11 July 1988.

30 USTOR, *Most-Favoured-Nation Clause*, in: BERNHARDT/MACALISTER-SMITH (eds.), *Encyclopedia of Public International Law*, vol. III, p. 468 (1997).

31 See USTOR (supra note 30), p. 468 (1997).

bilateral bargains from multilateralization and therefore disable them to make specific concessions to nationals from specific States. They clauses prevent States from making exclusive or preferential promises and lock States into a framework of multilateralism that is adverse to bilateral alliances.

A. The Multilateralization of Substantive Investment Protection

The application of MFN clauses to import more favorable substantive conditions from third-country BITs is largely uncontested. Several tribunals held that MFN treatment would apply to incorporating more favorable substantive investment protection from third-party BITs. Already in the first known investment treaty dispute the Tribunal in *Asian Agricultural Products v. Sri Lanka* accepted the general proposition that an investor covered by the basic treaty could rely on more favorable substantive conditions granted in another host State BIT.[32] The extension of substantive rights by means of an MFN clause was also accepted in the NAFTA case *Pope & Talbot Inc. v. Canada* with respect to potentially differing standards of fair and equitable treatment.[33] Likewise in *MTD v. Chile* concerning the import of more favorable provisions from third-party BITs concerning the obligation to grant necessary operating permits.[34]

B. The Multilateralization of Access and Scope of Investor-State Arbitration

Yet, the operation of MFN clauses is not limited to substantive investor's rights. In arbitral practice, the MFN clause has also been interpreted so as to encompass more favorable conditions concerning the dispute settlement mechanism under BITs. In *Maffezini v. Spain*, for example, the Tribunal held that, by means of the MFN clause, the Claimant was not bound by a waiting period contained in the basic treaty, but could rely on more favorable conditions in Spain's third-party BITs that allowed initiating investor-State arbitration more quickly.[35]

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32 *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, Final Award of June 27, 1990, para. 54.

33 *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 of 10 April 2001, para. 117. See also *Pope & Talbot v. Canada*, Award of May 31, 2002, para. 12.

34 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, Award of May 25, 2004, paras. 100 *et seq.*, 197 *et seq.*

35 *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction of Jan. 25, 2000, paras. 38.

While the application of MFN clauses to questions concerning the admissibility of investor-State claims has been uniformly accepted in arbitral jurisprudence,[36] it is contentious whether MFN clauses can also broaden the jurisdiction of a tribunal.[37] The Tribunal in *Plama v. Bulgaria* declined such a request.[38] While the arbitration clause in the basic treaty only allowed *ad hoc* arbitration concerning the amount of compensation for expropriation, other host State BITs provided for more comprehensive investor-State arbitration. The Tribunal held, however, that in order to benefit from the broader consent in subsequent BITs, the MFN clause needed to encompass investor-State dispute settlement explicitly. It emphasized that "the reference must be such that the parties' intention to import the arbitration provision of the other agreement is clear and unambiguous."[39]

However, it is questionable whether the argument for the restrictive view on the scope of application of MFN clauses is sustainable. The main reason for being skeptical in this respect is that the provisions on investor-State dispute settlement are arguably the

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36 *See AWG Group Ltd. v The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of August 3, 2006, para. 52; *Suez, Sociedad General de Aguas de Barcelona, S.A. (AGBAR) and Vivendi Universal, S.A. v. The Argentine Republic*, Decision on Jurisdiction of August 3, 2006, paras. 52 *et seq.*; *Suez, Sociedad General de Aguas de Barcelona, S.A. (AGBAR) and Interaguas Servicios Integrales del Agua, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006, para. 52; *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005, paras. 24 *et seq.*; *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction of Aug. 3, 2004, paras. 32 *et seq.*; *Camuzzi International S.A. v. The Argentine Republic*, Decision on Objections to Jurisdiction of 11 May 2005, para. 121; *National Grid PLC v. The Argentine Republic*, Decision on Jurisdiction of June 20, 2006, paras. 53 *et seq.*

37 See on this debate ACCONCI (*supra* note 28), pp. 19 *et seq.*; DOLZER/MYERS, *After* Tecmed*: Most-Favoured-Nation Clauses in International Investment Protection Agreements*, 19 ICSID Rev.–For. Inv. L. J. 49 (2004); FIETTA, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?*, 8 Int'l Arb. L. Rev. 131 (2005); FREYER/HERLIHY, *Most-Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How 'Favoured' is 'Most-Favoured'?*, 20 ICSID Rev.–For. Inv. L. J. 58 (2005); HOUDE/PAGANI, *Most-Favoured-Nation Treatment in International Investment Law*, OECD, International Investment Law: A Changing Landscape (2005); HSU, *MFN and Dispute Settlement – When the Twain Meet*, 7 J. World Inv. & Trade 25 (2006); KURTZ, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 6 J. World Inv. & Trade 861 (2004); TEITELBAUM, *Who's Afraid of Maffezini? Recent Developments in the Interpretation of Most Favored Nation Clauses*, 22 J. Int'l Arb. 225 (2005).

38 See *Plama Consortium Ltd. v. Bulgaria*, Decision on Jurisdiction of Feb. 8, 2005, para. 183 *et seq.*

39 *Id.*, para. 200; *see also id.*, para. 218. Likewise, *Salini Costruttori S.p.A and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction of Nov. 15 2004, paras. 102 *et seq.*; *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, Award of April 21, 2006, paras. 159-208; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award of Sept 13, 2006, paras. 81 *et seq.*

most important rights accorded to foreign investors, because they effectively allow enforcing compliance with the host State's obligations under an international investment treaty.[40] It would, thus, appear to be surprising if States that agree to MFN treatment for foreign investors would exclude the most important right, i.e., the right to initiate investment arbitration from the scope of application. Accordingly, s recent decisions has accepted that MFN clauses can also apply to incorporating broader consent to investor-State arbitration in third-party BITs.[41]

What remains, independent of which line of argument will prevail in future cases, is that MFN clauses have a significant effect for the multilateralization of bilateral investment relations. They level the inter-State relations between the host State and various home States that have entered into bilateral investment agreements and push the system of international investment protection further towards multilateralism. Overall, MFN provisions in BITs have the effect of reducing leeway for specificities in bilateral investment relations and consequently undermine the understanding of BITs as an expression of *quid pro quo* bargains. MFN clauses thus form part of the ongoing process of a multilateralization of international investment relations and constitute a counter-development to the apparent fragmentation of international investment law.

V. Corporate Nationality and Treaty-Shopping

Unlike genuine multilateral treaty regimes, the scope of application of BITs is restricted *ratione personae* to investors that have the nationality of the other contracting Party. Inclusion into and exclusion from the treaties' protection therefore depends on the bond of nationality between the investor and its home State providing a strong counterargument against the thesis that the BIT regime develops towards a multilateral system that imposes uniform and universal obligations upon States.

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40 *Cf. Gas Natural v. Argentina* (*supra* note 36), para. 49.

41 *RosInvestCo UK Ltd. v. The Russian Federation*, Award on Jurisdiction of Oct. 2007, paras. 124-139; *cf.* also *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar*, Final Award of March 31, 2003, para. 83.

A. Nationality as the Gateway to Investment Protection

Nationality as the decisive factor for inclusion or exclusion of a specific investor from the protection offered by a BIT is, however, becoming an increasingly elusive criterion as States have difficulties in limiting the protection of BITs to a specific bilateral relationship. The reason for this stems mainly from the broad definition of investor that does not only comprise natural persons,[42] but also covers corporate investors. While the nationality of natural persons is relatively stable and not subject to easy and frequent changes, corporate structures can change their nationality quickly and at little cost by migrating to another jurisdiction or by setting up a corporate subsidiary there. This effectively allows investors to change their nationality for purposes of investment protection, by hiding behind the corporate veil and structuring their investment so that they are covered by the investment treaty they prefer. This involves a large potential for "treaty shopping", a fact that undermines understanding investment treaties as expressions of bilateral bargains, because an investor can opt into almost any BIT regime it chooses. The interplay between investment protection, corporate law and corporate structuring, thus has a profound influence on the multilateralization of international investment law.

Above all, arbitral tribunals have so far declined to take a look behind the corporate veil in order to determine the nationality of corporate investors and instead, investment treaties hinge on either the place of incorporation or the corporate *siège social*.[43] Instead, they have accepted to view corporate vehicles as investors and accorded them protection under "their" home State BIT, even though the controlling shareholders might be covered by a different or no investment treaty with the host State at all.

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[42] International law does, however, require that a sufficiently "genuine link" between the individual and the State granting nationality exists in order for the foreign nationality to be recognized by other countries. See *Nottebohm Case*, I.C.J. Reports 1955, pp. 4, 20 *et seq.*

[43] The control theory, by contrast, that determines the corporate nationality according to the nationality of the controlling shareholders is rather exceptional. See DOLZER/STEVENS (*supra* note 16), pp. 34 *et seq.*

B. Changing Corporate Nationality: Hiding Behind the Corporate Veil

Arbitral jurisprudence has accepted such treaty-shopping in a number of different situations. In *Aguas del Tunari v. Bolivia*,[44] the Tribunal accepted that an investment that was originally not protected by an investment treaty, because the investor's home State had not entered into a BIT with the host State, could be brought under BIT protection by changing the corporate structure and interposing an entity that was covered by an investment treaty.[45]

Likewise, arbitral jurisprudence has accepted that dual nationals can hide behind the corporate veil of a company incorporated in the State of one of their nationalities. In *Champion Trading v. Egypt*, the Tribunal accepted that dual nationals who are denied standing under Art. 25(2)(a) ICSID Convention could bring claims when structuring their investment through a company incorporated in one of their States of nationality.[46]

Finally, in *Tokios Tokelés v. Ukraine* the Tribunal even accepted that nationals from the host State could, by means of corporate structuring, hide behind a corporate structure incorporated in another jurisdiction and thus bring their investment under the protection of the BIT with the company's home State.[47] While the Respondent urged the Tribunal because "find[ing] jurisdiction in the case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government",[48] the Tribunal's majority concluded that the definition of investor in the BIT also comprised such constellations of reinvestments.[49]

The possibility of corporate structuring shows above all that ordering international investment relations on a truly bilateral basis with rights and benefits only accruing to

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44 *Aguas del Tunari, S.A. v. Republic of Bolivia,* Decision on Respondent's Objections to Jurisdiction of Oct. 21, 2005.

45 *Ibid.*, paras. 67 *et seq.*

46 See *Champion Trading Company Ameritrade International, Inc., James T. Wahba, John B. Wahba and Timothy T. Wahba v. Arab Republic of Egypt,* Decision on Jurisdiction of Oct. 21, 2003, paras. 3.4.1 ff.; similarly, *Wena Hotels Limited. v. Arab Republic of Egypt*, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999, 41 ILM 881, 888 *et seq.* (2002).

47 *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction of April 29, 2004, paras. 21 *et seq.* See on the case also BURGSTALLER, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 J. World Inv. & Trade 857 (2006).

48 *Tokios Tokeles v. Ukraine* (*supra* note 47), para. 22.

49 *Ibid.*, para. 36.

nationals of one specific home State is an increasingly illusionary undertaking, since the nationality of corporate investors has become as fungible as capital in global markets. Corporate structuring multilateralizes investment treaties because virtually any investor from virtually any country is capable of opting into virtually any BIT regime.

Similarly, access and exit from the BIT regime resembles a multilateral treaty regime. On the one hand, access to investment protection in a specific host State can thus become operative through a single BIT. On the other, corporate structuring restricts selective exits from investment protection in relations to specific States. Instead, exit from international investment protection is only possible if a host State terminates all of its investment treaties as investors can always bring their investment under the protection of a different BIT simply by restructuring through a corporate intermediary covered by a different BIT. In sum, multi-jurisdictional structuring therefore shows that bilateralism as an ordering paradigm for international investment relations is unfeasible, because investors can virtually opt for the BIT regime they prefer. Although the possibility of treaty-shopping per se suggests that there are relevant differences between investment treaties, treaty shopping also shows that a treaty-overarching regime or system of international investment law develops independently of the actual uniformity of the content of bilateral investment treaties and independent from the inclusion of most-favored-nation clauses.

VI. Multilateralization Through Investment Treaty Arbitration

The multilateralization of international investment law is further effectuated by the introduction of investor-State arbitration as a mechanism for settling disputes under BITs. By granting investors the right to initiate arbitration and thus enforce host State compliance with the treaties, any leeway for inter-State negotiations about the consequences of BIT breaches after a dispute has arisen is virtually abolished. This excludes bilateral post-breach bargaining and ensures that investment treaties are enforced independent of the relative power relations between host and home State. Apart from its compliance function, investor-State arbitration also empowers tribunals to function as law-makers for the entire investment treaty regime.

A. Investment Treaty Arbitration as a Compliance Mechanism

Traditional international law allowed States to flexibly negotiate around the consequences of breaches of international obligations, if this was in their interest and was achievable in view of their bargaining power.[50] Inevitably, this flexibility could lead to contortions in the competition between investors depending on their national origin. Access to investor-State arbitration, by contrast, ensures that investors are able to enforce investment treaties against States independently of their home State's relative power.[51] This does not only consolidate international investment law as a functioning legal regime, but also ensures that the general and uniform principles that investment treaties create are implemented without contortions in the enforcement stage. Investor-State arbitration thus restricts bilateralism in the enforcement of investment treaty obligations by removing the power of States to defect from their treaty obligations based on bargaining with the investor's home State.

In addition to that, the ICSID Convention which governs most BIT disputes constitutes a multilateral convention. Consequently, it subjects investor-State disputes, independent of the governing investment treaty, to the same procedural rules and imposes equal transactions costs on dispute settlement and enforcement of investment treaty obligations. This adds to the idea that investment treaties form the basis of an international economic order for the global economy that is based on market mechanisms and equal competition among investors from different home States, enabling investment flows to go wherever capital is allocated most efficiently. Multilateral rules for investment arbitration respond to this objective by creating a level-playing field for the settlement of disputes and the enforcement of substantive investment protection.

Furthermore, the multilateral rules in the ICSID Convention on the recognition and enforcement of investment treaty awards respond to the necessity of implementing an

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50 See, for example, the practice of lump-sum agreements in settling claims for the violation of alien property LILLICH/WESTON, *International Claims: Their Settlement by Lump-Sum Agreements* (1975); WESTON/BEDERMAN/LILLICH, *International Claims: Their Settlement by Lump-Sum Agreements 1975-1995* (1999).

51 *Cf.* SHIHATA, *Towards a Greater Depoliticization of Investment Disputes – The Role of ICSID and MIGA*, 1 ICSID Rev.–For. Inv. L. J. 1 (1986). On investor-State arbitration as a compliance mechanism see SCHILL, *Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration*, 7 J. World Inv. & Trade 653, 681 - 683 (2006).

arbitral award effectively across several jurisdictions. It provides for the recognition of arbitral awards in all of the Member States of the ICSID Convention and thereby transforms the effect of an award rendered pursuant to the rules of a specific BIT into an obligation that has to be complied with by all member States of the Convention.[52] This disables respondent States from resisting the award's enforcement in its own territory by enabling investors to enforce it against assets of the host States in a third States, for example bank accounts held in third States. By automatically recognizing ICSID awards as final and binding decision in all Member States jurisdictions, the ISCID Convention elevates the enforcement of awards from the bilateral to the multilateral level.

B. Investment Treaty Arbitration as Investment Law-Making

Investor-State arbitration does, however, not only contribute to the multilateralization of international investment law because of its function as a compliance mechanism. It also multilateralizes investment law because investment treaty arbitration assumes a significant norm-generative function.[53] This mainly results from two factors: the institutional structure of investment treaty arbitration and the vagueness of the substantive provisions of investment treaties.

Investor rights such as fair and equitable treatment, full protection and security, indirect expropriation or national treatment leave a wide margin of discretion to arbitral tribunals. In fact, these standard investor rights can rather be understood as "general clauses" that delegate substantial rule-making power to judicial bodies.[54] Consequently, arbitral tribunals emerge as the essential law-makers in international investment law when transforming the broad principles into more precise rules that affect States' executives, legislatives and judiciaries in their respective activities.

The power-shift from States to tribunals becomes all the more visible in view of the restrictive possibilities that States have in influencing the direction of investment

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52 See Art. 54 ICSID Convention.

53 See PAULSSON, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3 TDM (Dec. 2006).

54 *Cf.* TEUBNER, *Standards und Direktiven in Generalklauseln: Möglichkeiten und Grenzen der empirischen Sozialforschung bei der Präzisierung der Gute-Sitte-Klauseln im Privatrecht*, pp. 60 *et seq.* (1971); critical on the delegation of such law-making functions to tribunals PORTERFIELD, *An International Common Law of Investor Rights?*, 27 U. Pa. J. Int'l Econ. L. 79 (2006).

jurisprudence. Limited possibilities in influencing the appointment of arbitrators, the arbitral process and the enforcement of arbitral awards essentially leave little leeway to counterbalance the authority that investment tribunals exercise. Similarly, the power to react to what States might perceive as mistaken jurisprudential developments through the modification of treaties is limited, as treaty adjustments require consent of all States concerned.

Investor-State arbitration is, however, not only a threat to State sovereignty and to the legitimacy of this form of dispute settlement. The norm-generative function of investment arbitration also adds to the multilateralization of international investment law. It helps to resolve uncertainty about the vagueness of many standard investor's rights and to "fill gaps" in investment treaties. This enables States to enter into long-lasting and stable investment relations that are not obstructed by continuous bilateral bargaining every time the broad principles have to be concretized for specific areas of State conduct. Investor-State arbitration thereby responds to the need to solve uncertainty and ambiguity in international investment relations, to stabilize them over time, and to adapt them to changing realities.[55] Most notably, the function of concretizing existing and generating new investment law is not limited to a specific investment treaty that governs a dispute submitted to arbitration, but affects the interpretation of investment treaties in general.

VII. Multilateralization Through Interpretation and Use of Sources

Tendencies to a multilateralization of international investment law are also visible in the practice of arbitral tribunals, above all in the way they interpret and construe investment treaties. Most notably, tribunals do not interpret and construe BITs according to methods characteristic for the interpretation of bilateral treaties, but employ rationales that suggest the existence of an overarching body of international investment law that has merely found its expression in bilateral treaties. Namely, the frequent use of references to prior arbitral awards and third-party investment treaties is significant in this respect. In

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55 *Cf.* RIXEN, *Why Bilateralism? Cooperation in International Double Taxation Avoidance*, Paper Delivered at the Second Open Graduate Student Conference, International University Bremen, Oct. 22 – 24, 2005, p. 21, available at http://www.gsa.iu-bremen.de/data/Rixen.pdf.

doing so, investment tribunals translate the similarities of bilateral treaties into multilateral reality beyond the existing elements of multilateralism.

A. Interpretation *in pari materii*

Tribunals frequently use, "cross-treaty interpretation" or "interpretation *in pari materii*", i. e. reference to third-party treaties that are not binding upon the parties involved in an investment dispute[56], in order to interpret and apply the governing treaty. This has the effect of creating uniformity in treaty interpretation and also embeds BITs in a treaty-overarching framework. Even though the third-party treaties do not become sources of law properly speaking, they nevertheless inform the interpretation of the governing treaty in question. This has a multilateralizing effect as the strict emphasis on the bilateral relationship in treaty interpretation is abandoned. Instead, investment treaties are treated as if they emanate from a single source and constitute a body of investment law principles that is applicable rather independently from the governing treaty.

The validity of this method of BIT interpretation was already recognized in *Asian Agricultural Products v. Sri Lanka* where the Tribunal considered it "proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration".[57] Subsequently, this approach played a role in various decisions. In *Maffezini v. Spain*, for example, the Tribunal took into account the general BIT practice of the contracting State parties in interpreting an MFN clause.[58] In *Plama v. Bulgaria*, the Tribunal drew an *argumentum e contrario* from third-country treaties in order to support a narrow interpretation of an MFN clause. Similarly, many other cases of interpretation *in pari materii* can be observed.[59] This suggests that arbitral tribunals perceive that BIT practice in general forms part of the sources of international investment law that can be used for guidance in interpreting a specific investment treaty.

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56 D. P. O'CONNELL, *International Law*, vol. I, p. 260 (2nd ed. 1970).

57 *Asian Agricultural Products v. Sri Lanka* (*supra* note 32), para. 40.

58 *Maffezini v. Spain* (*supra* note 35), paras. 52 *et seq.*

59 See further *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on Annulment of July 3, 2002, para. 55; *Aguas del Tunari v. Bolivia* (*supra* note 44), paras. 289-314.; *Suez and Vivendi Universal v. Argentina*, (*supra* note 36), 2006 para. 58; *L.E.S.I.–DIPENTA v. République algérienne démocratique et populaire*, Award of Jan. 10, 2005, para. 25(ii); *Salini v. Jordan* (*supra* note 39), para. 116; *Tokios Tokeles v. Ukraine* (*supra* note 47), paras. 34 *et seq.*; *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award of Jan. 26, 2006, Separate Opinion by Prof. Wälde, para. 106.

B. The Use of Precedent

Investment tribunals also use arbitral precedent in an extensive way. Far from constituting a subsidiary source of international law as envisaged by Art. 38(1)(d) ICJ-Statute, precedent has become both quantitatively as well as qualitatively the premier determinant for the outcome of investor-State disputes. Even though arbitral precedent is considered to be non-binding, it has a considerable *de facto* force to the extent that divergences in investment jurisprudence become rather rare. Notably, even in cases of conflicting decisions, tribunals employ various strategies to uphold consistency in investment treaty arbitration. These strategies include the distinction of cases based on differences in the underlying facts and differences in the wording of the governing BITs,[60] concealing dissent[61] and reconciling seemingly conflicting decisions based on conflict rules about principles and exceptions.[62] System-consistency is thus clearly a concern that influences and drives investment treaty jurisprudence. Comparable to the use of cross-treaty interpretation, the use of precedent reinforces the view that investment law is based on a uniform order that overarches individual bilateral treaties. It also creates intra-system communication and consistency and secures that differences in jurisprudence are addressed and dealt with. Again, inconsistent decisions exist, but they are not so pervasive as to invalidate the observation of predominant consistency in the jurisprudence of investment tribunals.

References to ICSID decisions can be found in nearly all of the more recent ICSID decisions on jurisdiction and awards on the merits. A recent quantitative citation analysis, for example, concluded that "citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate."[63] Although tribunals regularly emphasize the non-binding nature of precedent, they nevertheless primarily turn

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60 *Salini v. Jordan* (*supra* note 39), paras 102 *et seq.*

61 See, for example, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, Decision on Liability of Oct. 3, 2006 (where the tribunal repeatedly cited *CMS v. Argentina* in support of its interpretation of fair and equitable treatment or the application of the umbrella clause, *ibid.*, paras. 125, 128, 171, but failed to mention that this decision reached a contrary result concerning the necessity defense, *ibid.*, paras. 204-266).

62 *Plama v. Bulgaria*, (*supra* note 38), para. 217 *et seq.*

63 COMMISSION, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, 24 J. Int'l Arb. 129, 148 (2007).

to earlier decisions for guidance.[64] The Tribunal in *El Paso v. Argentina*, for example, stated that it would "follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent."[65] The way the parties to disputes rely on precedent therefore suggests the emergence of expectations that tribunals will decide cases not by abstractly interpreting the governing BIT, but by embedding it into the preexisting structure and content of the discourse among investment treaty awards.[66]

The material influence of precedent becomes apparent, for example, in the NAFTA award in *Waste Management v. Mexico*, where the Tribunal extensively described earlier investment awards regarding fair and equitable treatment in order to extrapolate a case-sensitive definition of this standard. The importance of precedent is ever more imposing, as the Tribunal did not critically analyze earlier decisions and their arguments, but merely endorsed their holdings, similar in style to the common law system of *stare decisis*. The Tribunal thus defined the standard of fair and equitable treatment by recurring to earlier NAFTA decisions:

> "Taken together, the *S. D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[67]

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64 See also KAUFMANN-KÖHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 Arb. Int'l 357 (2007).

65 *El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction of April 27, 2006, para. 39. See also *AES v. Argentina* (*supra* note 11), para. 18.

66 *Cf.* on the emergence of expectations in the reference to, application of and justified departure from precedent Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 4 October 1996, p. 14; see also *Saipem S.p.A. v. The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 67; *Thunderbird Gaming v. Mexico* (*supra* note 59), paras. 16, 129-130.

67 *Waste Management, Inc. v. The United Mexican States*, Award of Apr. 30, 2004, para. 98.

What primarily mattered for the Tribunal in the application of fair and equitable treatment was the application of the facts of the case to the standard developed from earlier NAFTA decisions, not the interpretation of the treaty text.[68] Similar developments can be traced with respect to almost all standards of investment protection.

The contribution investment jurisprudence makes towards a multilateralization of international investment law is most apparent when juxtaposing the emerging common law of investment arbitration with the traditional view of the effects of bilateral treaties and bilateralist methods of treaty interpretation. From a bilateralist perspective making use of precedent in cross-treaty cases and referring to third-parties treaties as an interpretative aid would be seen as a violation of the *inter partes* effect of international treaties, since the third-party treaty is indirectly accorded normative weight. Clearly, if third-party treaties are used as an interpretative aid, this can amount to either creating new or reducing existing obligations under investment treaties. Likewise, the extensive reliance on precedent could be opposed to as a violation of the traditional doctrine of sources of international law because precedent is not applied as a subsidiary source of international law, but rather as the primary framework of reference in investment treaty arbitration. It can, however, be reconciled with the principles of treaty interpretation, if one assumes that the regime established by the aggregate of 2,500 BITs form part of "any relevant rules of international law applicable in the relations between the parties" in the sense of Art. 31(3)(c) of the Vienna Convention on the Law of Treaties.

VIII. Conclusion

Most international treaties order the relations between two States only. They create mutual rights and obligations and coordinate State behavior on a bilateral basis. While allowing for flexible solutions depending on the specific situation and interests of the States involved, bilateralism also inhibits the emergence of an international community. It puts the State, its sovereignty and its consent to the creation of international law center stage and secures the precedence of State interests over interests outside or beyond its realm. This fortification of the State coined the traditional understanding of international

[68] *Ibid.*, paras. 99 *et seq.*

law as it developed throughout the 19th and most of the 20th century. It characterized its doctrine of sources by strictly focusing on State consent, it denied international law subjectivity to non-State actors, and *de facto* coupled the enforcement of international law to a favorable distribution of power in a non-hierarchical order.[69]

Multilateralism, by contrast, assumes the existence and legitimacy of interests of an international community beyond the interests of States. It orders inter-State relations on the basis of general principles that establish a general framework for the interactions among States and their citizens. It aspires towards universal validity and application and views States as being embedded within the structure of an international community. Following World War II, multilateralism as an ordering paradigm for international relations became increasingly important in a number of fields, in particular international human rights, international security and international trade. It left a significant imprint on the structure and nature of international law by recognizing the limitations of State sovereignty in view of interests and values of an international community. The recognition of *jus cogens*, the development of international criminal law, or the increasing importance of humanitarian interventions, are just a few examples that illustrate this development.

Typically, multilateralism is implemented on the basis of multilateral treaties that "serve as the vehicle *par excellence* of community interest".[70] They base relations of States on general non-discriminatory principles and thereby create legal institutions around which the expectations and conduct of States and their citizens can evolve. However, multilateralism can also develop and be implemented on the basis of bilateral treaties. In the realm of international investment protection, bilateral rather than multilateral treaties are creating the institutions necessary for the development and stabilization of a global economy. Similar to multilateral treaties, BITs order international investment relations on the basis of general principles that are relatively uniform across the myriad number of bilateral treaty relationships. They do not constitute *quid pro quo* bargains, but establish a uniform legal framework that stabilizes

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69 SIMMA, *From Bilateralism to Community Interest in International Law,* 250 Recueil des Cours 217, 230 *et seq.* (1994).

70 *Id.*, at 323.

and structures the economic activity of foreign investors and requires host States to conform their behavior to rule of law standards that enable market forces to unfold.

Along these lines, this paper has argued that international investment law is evolving towards a multilateral system based on bilateral treaties. This understanding impacts practical questions of BIT interpretation that should conform to multilateral rather than bilateral rationales and provides a justification for the heavy use of precedent. More importantly, however, the understanding of investment protection as a multilateral system forms the basis for other theoretical projects concerning the function of investment treaties in a global economy. It is the precondition for understanding the BIT regime as a uniform body or system of law and, thus, forms the theoretic basis for projects embedding investment treaties into the global administrative law project[71] or advancing the thesis that international investment law is in a process of evolving constitutionalization.[72] Either approaches can be viewed as part of an approach to understand international investment law through a comparative public law lens.

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71 *Cf.* VAN HARTEN/LOUGHLIN, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 Eur. J. Int'l L. 121 (2006).

72 See SCHNEIDERMAN, *Investment Rules and the Rule of Law*, 8 Constellations 521, 523 *et seq.* (2001); BEHRENS, *Towards the Constitutionalization of International Investment Protection*, 45 Archiv des Völkerrechts 153 (2007).