International Investment Law

The Sources of Rights and Obligations

Edited by Tarcisio Gazzini
and Eric De Brabandere

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PREFACE

In the last two decades, foreign investment law has moved from the periphery of international law, where it was a niche topic for a few specialists, to the main stage of the discipline. Indeed, in this relatively short span of time, the legal instruments for the protection of foreign investment have proliferated and the number of investment-related disputes exploded. These developments have attracted the attention of several scholars and the publication of important works, especially on the different standards of treatment foreign investors are entitled to, on the settlement of disputes through arbitration, and on the theoretical legal issues underpinning foreign investment law.

As far as the sources or rights and obligations in this field are concerned, many studies have been consecrated to specific sources, namely bilateral investment treaties and State contracts. So far, no systematic study on these sources and their interaction has been available. The purpose of this collection of papers is precisely to offer a contribution to filling this gap.

This book is not meant to engage in an analysis of the substance of international investment law. Rather, the idea underlying the book is to analyse and assess the sources of international investment law as such, *i.e.* to see how the general theory of the sources of international law is applicable in international investment law and how it has been used in practice, by both states and international investment tribunals charged with the settlement of disputes between States and foreign investors. Substantive rules will thus only be analysed and discussed to the extent that they form part of the discussion of the broader question of the sources of international investment law.

Our thanks go to all the participants in the joint Leiden University – VU University Amsterdam expert seminar for their insightful comments and questions.

The editors would like to thank the Netherlands Organisation for Scientific Research (NWO) for its financial support in the organisation of the expert seminar, through a three-year VENI research grant accorded to Dr. Eric De Brabandere. We would also like to thank Ms. Julia Lepeltak, student fellow at the Grotius Centre for International Legal Studies at Leiden University for editorial assistance.

Tarcisio Gazzini and Eric De Brabandere
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LIST OF ABBREVIATIONS

ASCM	Agreement on Subsidies and Countervailing Measures
ASEAN	Association of South-East Asian Nations
BIT	Bilateral Investment Treaty
CJEU	Court of Justice of the European Union
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement in Trades in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention)
IIA	International Investment Arbitration
ILC	International Law Commission
ITO	International Trade Organisation
MERCOSUR	Mercado Comun del Cono Sur - Southern Cone Common Market
MFN	Most-favoured-nation
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Justice
PTA	Preferential Trade Agreements
PTIA	Preferential Trade and Investment Agreements
REIO	Regional Economic Integration Organisation
RTA	Regional Trade Agreement
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
TRIM's	Trade Related Investment Measures
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

INTERNATIONAL INVESTMENT ARBITRATION CASES

Permanent Court of International Justice and International Court of Justice

Other

INTRODUCTION

Pierre d'Argent

The law of international investments is the hot topic of the day in our profession. Not only – let us not be naïve – because (big) money is involved, but also because it is the cauldron in which all the themes of contemporary politics are thrown together and stirred: sovereignty, globalisation, finance, trade, environment, development, human rights – through foreign investment operations, all are linked together or opposed to each other in various combinations. This book does not aim at weighting the pros and cons of investment operations in light of the preferences that those political realities reflect. Rather, in order to help thinking about the balance that must inevitably be struck between the values underlying such realities, it tries to identify "the sources of rights and obligations" of what undoubtedly today constitutes the emerging sub-discipline of international law known as "international investment law".

Referring to "the sources of rights and obligations" suggests that parties to investment operations are in the middle of a circle and that the relations between those parties are the result of a mixture of norms and rules coming from various "sources" at the outskirts of, or from within, that circle. Those "sources" form a web, which is all the tighter – so goes the intuition – since the "sources" are numerous, diverse and interconnected. It is one of the purposes of this book to investigate the complementarity between the "sources", their interaction and the coherence flowing from it. Prior to the analysis of such interconnection, there is however a need to identify clearly "the sources" of rights and obligations of parties to operations governed by international investment law. The contributions collected in this book, as its title suggests, primarily aim at helping the reader to get a better understanding of the various questions raised when dealing with the identification of sources of rights and obligations applicable to investment operations, knowing that the best way to find a right answer is to ask a good question.

This quest may sound modest or even belated. Despite (or perhaps, even if paradoxically, because of) the voluminous literature on the subject, it is however very timely to renew, with the benefit of the analysis of a vast practice, such classical methodological question in relation to that

specific field. The fundamental reason lawyers need a clear catalogue of applicable "sources" is that the rules conveyed by those "sources" contain within themselves ready-made choices between possible outcomes and between contradicting values. If this is true for any field of law, it is perhaps all the more crucial in relation to international investments, such operations being the result of interactions between a variety of heterogeneous actors that rely on (or trigger) sets of rules anchored in multiple legal orders or in sub-systems of such orders. The intrinsic complexity stemming from such normative mix deserves to be unravelled in an orderly way. One can certainly praise the editors of this book for having pursued their identification quest into the sources of international investment law with an acute sense of systematisation (see the table of contents) and for having relied for that purpose on the rich contributions of scholars who are among the most promising of their generation.

The identification quest *in* and *on* such law deserves to be put into perspective by a brief reflection on the very notion of "sources". When we ask ourselves "*what* are the sources of rights and obligations?" (be it of international investment law or of any law), we actually question the origin of those rights and obligations. *Where* do they come from? In that sense, identifying and tracing the origin are one and the same thing. This is precisely what the word "sources" actually conveys. The word is so often used in the abstract in legal academic-professional contexts that one forgets its primary meaning in common language and the image it brings with it. Though important, I do not want to refer here to the intellectual or methodological difference between "formal sources" and "material sources" of the law – the former being the processes by which binding rules come to exist in a given legal order, and the latter being the external, historical, sociological, economical or philosophical circumstances that explain the positive content of those rules. Rather, and quite simply, I want to refer to the geophysical meaning of the word "source": a source is a place where a stream of water originates, appears from the ground and comes to light. A source is a place. Going back to the geophysical meaning of the word "source" allows us to understand that "the sources" of (any) law are actually places where such law is made. And those places are inhabited by subjects who participate in the formation of the law, which, from there, flows and irrigates.

In that sense, "*what* law?" and "*who*'s law?" are one and the same question: any reflection on the "sources" of law is a reflection on its subjects. Not only on those who are subjected to it, who are, technically speaking, the "subjects" of the law, but on those who frame the law, who inspire it, draft it and participate in giving to the words it is made of their true

meaning, binding force and scope through various well known formal processes.

So, behind the questions of customary international investment law (Jean d'Aspremont) or the role played by general principles in that field (Stephan Schill), you can see emerging the figures of lonely professors, arbitrators and judges in their studies, pondering on what is called "practice" and trying to trace / phrase "custom" or "principles". Behind the question of multilateral treaties (see the contributions of Erik Denters and of Matthew Happold), you can see participants at intergovernmental conferences in some remote or famous city, having long working sessions interrupted by lunches and dinners, their minds concentrated on the results they were told to achieve, or distracted by headaches, sheer boredom or love affairs… Behind the question of bilateral investment treaties (Tarcisio Gazzini) are the figures of diplomats and civil servants in ministries, exchanging notes, heavily relying on "cut and paste", not because they would necessarily lack any imagination, but because they think this is the best way to produce legal certainty, which they quite naturally assimilate with consistency. Behind domestic legislation and unilateral acts (Makane Mbengue) stand high profile politicians determined to attract investors, to punish some or to find a way out of a debilitating financial crisis affecting their countries. Behind investment contracts (Patrick Dumberry) are hectic attorneys in glamorous firms, advising on Monday a huge corporation, and on Thursday the government of a poor State. While scholars hide behind the issue of whether "sources" are to be found in non-binding documents and legal doctrine (Tony Cole), each of us can only (too easily) imagine what kind of social mix is engaged in the production of arbitral and judicial decisions (Eric De Brabandere).

All this may sound too sociological. It is indeed the stuff novels or TV series, rather than decent legal scholarly work, are made off. There is no doubt about that, and this book does not embark on some vague anthropological enterprise blended with legal varnish – or vice versa. But it would be foolish not to see that the production of rights and obligations relating to investment operations occurs in certain places, where certain types of professionals act, and for that matter, exercise power by making choices between the values underlying the above-mentioned political realities. In short, international investments epitomise our epoch, which is all too often and too easily referred to as being postmodern: a network of sources form a web, rather than a pyramid, because a mix of actors are involved. The endeavour of this book is to try to make sense of such complexity.

CHAPTER ONE

INTERNATIONAL CUSTOMARY INVESTMENT LAW: STORY OF A PARADOX

Jean d'Aspremont[1]

Contents

[1] The author wishes to thank Yannick Radi, Eric De Brabandere, Jörg Kammerhofer and Robin Morris for their insightful remarks.

Introduction: Sources of Investment Law and the Battle for the Regulation of the Global Flux of Capital

If international law is the continuation of the battle of politics with more civilized means,[2] nowhere is such a finding more glaringly obvious than in international investment law. Indeed, international investment

[2] This has been one of the lessons learnt from recent decades of international critical thinking. See e.g. M. Koskenniemi, "What is International Law For?", in *International Law,* ed. M. Evans (Oxford: Oxford University Press, 2nd ed. 2006), p. 77.

law constitutes the stage of the pitted confrontation between liberal and communitarian approaches to the world economy. The former, usually embraced – albeit not necessarily – by capital-exporting States favouring a market-based system where investment, property rights and the rule of law are respected,[3] comes into view with the latter traditionally spearheaded – but not automatically – by capital-importing States geared towards economic decolonisation and the preservation of societal self-determination.[4] Put more simply, investment law is the shared surface upon which (and investment tribunals the arena where) the conflict about the level of protection we grant to foreign capital, and hence how we conceive (and organize) the flux of capitals in a globalized economy, is fought. This displacement of the abiding ideological wrangles in the area of investment protection results from the more general decision by the world's actors – conscious and less conscious –to legalize certain aspects of world politics in the 20th century.[5] Such legalization has been of various degrees[6] and some areas have been more affected than others. The protection of investment is certainly one of these areas where this legalization has flourished the most and has grown very elaborate – going as far as laying down systematic judicialization.

That investment law provides an umbrella under which the ideological battle for the regulation of the global flux of capital is very much truistic. The banality of such a finding should nonetheless not obfuscate the intricacy of the political dynamics at play behind the highly legalized regime of investment protection. Unearthing the forces infusing the application of rules of investment protection by judicial actors surely constitutes a fascinating – albeit daunting – endeavour. It is not certain, however, that it is to the deciphering of these political dynamics that international lawyers should, in the view of the author of this chapter,

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[3] S. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), p. 6.

[4] *Ibid. p.* 7; S. Schwebel, "The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law", 3 *Transnational Dispute Management* 2 (2006).

[5] See K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter, D. Snidal, "The Concept of Legalization", 54 *International Organisation* (2000), p. 401–419.

[6] A. Spain, "Integration Matters: Rethinking the Architecture of International Dispute Resolution", 32 *University of Pennsylvania Journal of International Law* (2010); See the tables provided by Abbott, Keohane, Moravcsik, Slaughter, Snidal, see above note 5, esp. p. 416. See also E. De Brabandere, "Non-State Actors and the Proliferation and Individualization of International Dispute Settlement" in: *The Ashgate Research Companion to Non-State Actors*, ed. B. Reinalda (Farnham: Ashgate, 2011), p. 347–359.

devote their attention and – limited – expertise. To the international lawyer, more interesting are the scholarly doctrines and theories by which the legal regime of investment protection is being shaped, irrespective of the substantive ideological agenda behind their use *in concreto*.

Among the instruments through which investment protection is being developed and shaped, the doctrine of sources occupies centre stage. Indeed, the doctrine of the sources of investment law leads one to the ascertainment of the rules of the global investment protection regime. The doctrine of sources is also the linchpin of any adjudicatory exercise of public authority and the formation of a perception of immanent intelligibility and neutrality in the reasoning of international investment tribunals, without which the investment enforcement system would lack the legitimacy and authority necessary to its viability. It is even reasonable to argue that, the doctrine of sources is the central piece of the legalization of the investment protection regime. In its absence, legalization – and hence judicialization – would be irremediably compromised.

Whilst central to the viability of the international investment protection regime, the doctrine of sources of investment law has – somewhat paradoxically – been the object of limited attention and theoretical reflection in the literature.[7] Indeed, investment lawyers have perpetuated the doctrine elaborated in the mainstream theories of public international law which they have mechanically and uncritically transposed to the protection of investment. As a result, the scholarship on international investment law has remained bereft of theoretical reflection on the sources of investment law. In that sense, the volume in which this chapter appears has the potential to reverse the current dearth of theoretical reflection on the matter.

There are probably a string of different reasons explaining the reluctance of investment lawyers to investigate the theoretical foundations of their doctrine of sources. Investment lawyers, mostly all practitioners as a matter of fact, have hardly felt the need to do so. Any investigation into the foundations of the sources of investment law may have seemed overly arcane to such practitioners, to whom the doctrine of sources of investment law may seem to work properly and an invitation to explore its theoretical foundations appears to be a purely academic whim. Whatever its origins, this anti-theory posture of investment lawyers may explain why

[7] See the literature mentioned in section 3.1 and 3.2 below.

the doctrine of sources has, at times, been deemed an issue of secondary importance in investment law. Following the ambition of this volume, this chapter is premised on the idea that international investment law has now reached a stage in its development where the doctrine of sources can no longer be left in limbo and needs to be critically explored. Indeed, it is argued that the multiplicity of bilateral investment treaties (hereafter BITs) and the highly judicialized character of the investment protection regime make it now essential that investment law rest on solid bases in terms of sources. As was said, this is essential in terms both of the ascertainment of the rules of investment protection and the authority and legitimacy of international investment tribunals. This can also be conducive to greater consistency in judicial practice.

This chapter focuses on customary international law and examines the role played by it in the development of primary rules of international investment law. This chapter does not discuss the role played by international customary law in the creation, interpretation and development of systemic (secondary) rules applied by investment law-applying authorities.[8]

After a few words on the early phase of the development of international investment law and the search for a customary international protection of aliens (1), this chapter shows how the maturity of investment protection has been achieved through treatification and a move away from customary law (2). It then turns to the paradox of the theory of the sources of investment law and demonstrates how the completion of treatification through BITs generated a new return to customary international law (3). It then ventures into a few general critical remarks about customary international law from the standpoint of the theory of the sources of international law (4). After such general considerations, it expounds on the limits and perils of the theory of international customary investment law (5) and envisages alternative routes for the multilateralization of the investment protection regime (6). The chapter ends with a few remarks on the central challenge of the theory of the sources of investment law and the need to preserve the authority and efficacy of the investment protection regime short of customary international law (7).

[8] For some insights on this question see R. Hofmann and C. J. Tams (eds.), *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration*? (Baden Baden: Nomos 2011).

1. *The Early Phase of Development of International Investment Law: The Search for a Customary International Protection of Aliens*

The first rules protective of foreign investment which were ascertained by experts and international lawyers as customary international law were those protecting aliens abroad (1.1.) as well as those prescribing standards of compensation (1.2).[9]

1.1. *Origins: The Protection of Aliens Abroad*

It is commonly argued in the literature that the investment protection regime finds its roots in the international protection of aliens abroad,[10] the application of which gave rise to international litigation which – as is well-known – proved instrumental in the elaboration of a mechanism of State responsibility,[11] first seen in the form of diplomatic protection. The protection of aliens found in international law allegedly took the form of an 'international minimum standard' of behaviour[12] to which aliens abroad were purportedly entitled. It will come as no surprise that, at that time, aliens falling under such protection were first and foremost investors.[13] It is true that these rules on the protection of aliens were not limited to the protection of their property against unlawful expropriation but also enshrined standards for the treatment of aliens regarding their life and security.[14] Yet, they also benefited investors and provided some elementary protection to the international flow of capital.

Whilst it is commonly argued that the international minimum standards came to constitute, in the late 19th century and early 20th century,

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[9] For a general historical overview of the development of investment protection see A. Newcombe and L. Paradell, *Law and Practice of Investment Law – Standards of Treatment* (The Hague: Kluwer Law International, 2009), p. 1–73.

[10] H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden: A.W. Sijthoff, 1949); E. Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Pub, 1915).

[11] See generally the first report Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur, A/CN.4/96, *Yearbook of the International Law Commission*, 1956, vol. II.

[12] See also E. Borchard, "The Minimum Standard of Treatment of Aliens", 38 *Michigan Law Review* (1940), p. 445; see also Newcombe and Paradell, see above note 9, p. 11–13.

[13] C. Leben, "La Théorie du contrat d'Etat et l'évolution du droit international des investissements", 302 *Collected Courses* (2003), p. 126.

[14] Schill, see above note 3, p. 25; H. Roth, see above note 10, p. 127; Borchard, see above note 10.

a customary international rule also benefiting foreign investment, the content of the protection so offered to aliens remained in limbo and the object of incommensurable controversy, thereby putting into question the customary status commonly attributed to that rule. Indeed, capital-importing States opposed any international standard that would depart from the treatment reserved to nationals. The opposition of capital-importing States to the idea of an international minimum standard found its expression in the – famous – so-called *Calvo Doctrine* according to which no State should be required to offer more protection to foreign investors than that offered to its own nationals, as long as there was no discrimination against the foreign investor, or infringement of any international legal rule.[15] Proponents of this national treatment were bolstered by the Russian revolution and the decrees of nationalization adopted by the Bolchevik governments which drew no distinction between Russian nationals' and foreign-owned property. Although that instrument never entered into force, an expression of that position is also found in the famous 1933 Convention on the Rights and Duties of States signed at the Seventh Pan-American Conference (the so-called Montevideo Convention).[16] At the other end of the spectrum, capital-exporting States contended that national treatment was insufficient. To them, the treatment that a State would reserve to its own citizens could be far lower than that generally expected by capital-exporting States.[17] This controversy about the content of the international minimum standard came to a head in the framework of the League of Nations' codification enterprise which, in 1930, failed to codify the law on responsibility for the treatment of aliens.

The serious divergences in the content of the protection to which aliens abroad were entitled did not seem sufficient to thwart the belief in a customary protection of aliens abroad, including that of the foreign investor. In fact, notwithstanding the profound disagreements between capital-exporting States and capital-importing States international investment

[15] See A. V. Freeman, "Recent Aspects of the Calvo Doctrine and the Challenge to International Law", 40 *AJIL* (1946), p. 131; see also W. D. Verwey and N. J. Schrijver, "The Taking of Foreign Property Under International Law: A New Legal Perspective", 15 *Netherlands Yearbook of International Law* (1984), p. 3–96; Newcombe and Paradell, see above note 9, p. 13–14.

[16] See article 9 of the Convention on the Rights and Duties of States signed at the Seventh Pan-American Conference (Montevideo Convention, 1933) 70 *AJIL* (1970), p. 445.

[17] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Oxford: Hart, 2008), p. 7–11. On the reasons for offering a better treatment to non-nationals, see ECHR, *James & Others v. UK*, Judgment of 21 February 1986, para. 63.

lawyers never balked at affirming the customary character of the international minimum standards which foreign investors were entitled to, as were all aliens abroad. The uncharted waters in which the elementary protection of foreign capital through the international minimum standard was left never constituted, in the eyes of investment lawyers, an obstacle to the affirmation of a customary international minimum standard. In the absence of any prospect of regulating foreign investment through conventions between capital-exporting and capital-importing States, customary international law was elevated to the natural medium by virtue of which the protection of capital would be elaborated. Customary international law was not only considered the natural source of the law of investment protection. It was also seen as being able to withstand the wide-ranging dissonance echoed on the world stage as to which protection foreign investors ought to be offered.

The history of the development of investment protection is thus also the story of the development of a *divergence-proof customary regime* resting on an extremely minimalistic threshold of convergence in terms of practice and *opinio juris*. But, in the pre-1945 history of investment law, there is more than a conception of custom that falls short of a converging general practice and *opinio juris*. The reconstruction of the investment protection of that time under the banner of customary international law also betrays a conception of *indeterminacy-proof customary law*, the idea that some indeterminate standards can grow into a customary rule. The best illustration of this probably lies in the finding of the famous 1926 *Neer* case, which constitutes the expression of customary international law.[18] It is accordingly fair to say that the conception of sources of international investment law that emerges from the pre-1945 era of investment protection bespeaks a very permissive and loose concept of customary law.

1.2. *The Development of Standards of Compensation*

Interestingly, the same discrepancy between the practice and the invention by scholars of a customary international law of investment protection repeated itself in connection with the development of standards of

[18] "The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency". V. L. F. H. Neer and P. E. Neer, *United States v. Mexico*, Opinion, October 15, 1926, UNRIAA, vol. IV, pp. 61–62.

compensation. Indeed, standards of compensation were elaborated under the name of customary international law. In particular, it is well-known that investment lawyers were prompt to see in the so-called Hull formula[19] an expression of customary international law. The counter-balancing Mexican position – reasserting the traditional position of capital-importing States that the only treatment an alien was entitled to was the treatment reserved to nationals, and according to which the aggrieved investor can only claim national treatment before national courts – was not deemed a serious impediment to the existence of such a customary rule. Under the name of customary international law, the views of capital-exporting States were thus said to have prevailed in the pre-1945 world order,[20] irrespective of the absence of any acquiescence by capital-importing States.[21]

It did not come as a surprise that the distrust in the international community as to the standards of treatment afforded to foreign investment persisted after the Second World War. Even though Resolution 1803 on Permanent Sovereignty over Natural Resources of 14 December 1962[22] can be read as a tentative compromise between the positions of capital-exporting and capital-importing countries by not excluding

[19] See the 1938 exchange of notes between the US Secretary of State, Cordell Hull and the Mexican Minister of Foreign Affairs in connection to the expropriation of agrarian land and oil fields owned by American citizens in Mexico in the 1920s and 1930s, reproduced in Hackworth, *Digest of International Law*, vol. III, pp. 655 et seq (1942).

[20] See e.g. S. Hindelang, "Bilateral Investment Treaties, Custom and a Healthy Investment Climate – the Question of Whether BITS Influence Customary International Law Revisited", 5 *Journal of World Investment & Trade* (2004), p. 789.

[21] For some doubts on the customary character of customary international law before the Second World War see P. Juillard, "L'évolution des sources du droit des investissements", 250 *Collected Courses* (1994/VI), p. 76. According to Juillard, the only protection that could have existed in customary international law was the protection of goods and not of capitals. For a similar challenge to the prevailing idea that the pre-1945 practice manifested the existence of customary rules in terms of a standard of compensation, see Schill, see above note 3, p. 28 (Schill talks about the "shaky foundations of the standards of customary international law with regard to the protection of aliens and their property"). It is interesting to note that the arbitral tribunal in *CME Czech Republic BV v. Czech Republic* also seemed to recognize that the Hull formula never secured consensus until the last decades of the 20th century. See *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497.

[22] 2 ILM 223 (1963). See generally Schill, see above note 3, p. 37–38; see S. Schwebel, "The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources", 49 *American Bar Association Journal* (1963), p. 463; K. Gess, "Permanent Sovereignty over Natural Resources", 13 *ICLQ* (1964), p. 398; Subedi, see above note 17, p. 21–23; R. Dolzer, "Permanent Sovereignty over Natural Resources and Economic Decolonization", 7 *Human Rights Law Journal* (1986), p. 217.

"appropriate compensation",[23] UN General Assembly Resolution 1301 of 1 May 1974 on the Declaration on the Establishment of the New International Economic Order[24] incontrovertibly backed away from the idea of an obligation to provide compensation for the expropriation of foreigners and did away with the obligation to pay compensation,[25] a position that was later repeated by General Assembly Resolution 3281 of 12 December 1974 on the Charter of Economic Rights and Duties of States.[26]

It is not at all unreasonable to claim that there was a very strong opposition that lingered in the 1960s and 1970s to developing (and socialist countries continued to bar) the emergence of a minimal consensus necessary for a customary international regime of protection of investments. And even if there could have been customary international rules back then, the uncompromising 1974 UN General Assembly resolutions must be read as having ditched the little customary international law that existed at that time. It is surely not the very evasive and non-normative 1962 resolution that could be said to contain the seeds of a customary international investment protection regime.[27]

However, despite the very strong anti-customary signals, the pre-1945 story repeated itself after the Second World War. Customary international law kept the same lustre among international investment lawyers, and particularly among arbitral tribunals which gave very little weight to these

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[23] "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication".

[24] See J. Bhagwati, *The New International Economic Order* (Cambridge: MIT Press, 1978); J. Hart, *The New International Economic Order* (New York: St. Martin's Press, 1983); T. Wälde, "A Requiem for the New International Economic Order", in *Liber Amicorum Ignaz-Seidl Hohenveldern*, ed. Gerhard Hafner et al. (The Hague: Kluwer Law International, 1988), p. 771; Subedi, see above note 17, p. 23–27; C. Broer and J. Tepe, "The Charter of Economic Rights and Duties of States: A Reflection or Rejection of International Law", 9 *The International Lawyer* (1975), p. 295.

[25] A/RES/S-6/3201.

[26] See generally Newcombe and Paradell, see above note 9, p. 31–33.

[27] Juillard, see above note 21, p. 78 et seq. ; M. Porterfield, "An International Common Law of Investor Rights?", 27 *University of Pennsylvania Journal of International Economic Law* (2006), p. 79 and C. H. Brower, "Structure, Legitimacy, and NAFTA's Investment Chapter", 36 *Vanderbilt Journal of Transnational Law* (2003), p. 66.

UN GA resolutions defiant of the Western capital-protective vision.[28] Only the International Court of Justice in the *Barcelona Traction*[29] case and the arbitrator in the *Texaco v. Libya*[30] award remained lucid and clear-sighted about the state of the law of investment protection in the post-1945 period.

2. *The Maturity of Investment Protection: Treatification and the Move Away from Customary Protection*

The end of the 1980s and the beginning of the 1990s can be seen as a milestone in the development of international investment law. Following the ground-breaking 1985 award in the *Southern Pacific Properties* (*Middle East*) *Limited v. Egypt*[31] case and the 1990 award in *Asian Agricultural Products Ltd* (*AAPL*) *v. Sri Lanka,*[32] recourse to adjudication in the area of investment protection on the basis of clauses providing investor–State arbitration with unqualified State consent increased. This growing resort to adjudication in investment law gave more prominence to the treaty regime already in place while simultaneously prodding States towards greater treatification. In that sense, the beginning of treatification cannot be formally identified as a post-1990 phenomenon. It is however in the 1990s that it proved to be more tangible and consequential.

The following sections describe the early stage of the treatification of investment protection (2.1.) whilst also recalling the few mishaps that

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[28] For an overview of the practice of arbitral tribunal of that time see Schill, see above note 3, p. 38; P. Norton, "A Law of the Future or a Law of the Past?", 85 *AJIL* (1991), p. 474.

[29] ICJ, *Barcelona Traction Lights and Power Co., Ltd* (Belgium v. Spain), 5 February, 1970 ICJ Rep. 4, para. 46–47: "Considering the important developments of the last half-century, the growth of foreign investments and the expansion of the international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of States have proliferated, it may at first sight appear surprising that the evolution of law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts shows that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests. It is essentially bilateral relations which have been concerned, relations in which the rights of both the State exercising diplomatic protection and the State in respect of which protection is sought have had to be safeguarded. Here as elsewhere, a body of rules could only have developed with the consent of those concerned. The difficulties encountered have been reflected in the evolution of the law on the subject".

[30] *Texaco Overseas Petroleum Co v Libya*, Award 29 January 1977, 53 ILR 389 and 17 ILM 3 (1978) para. 85–87.

[31] *Southern Pacific Properties* (*Middle East*) *Limited v. Egypt*, Decision on Jurisdiction, 27 November 1985, 3 ICSID Rep 112.

[32] *Asian Agricultural Products Ltd* (*AAPL*) *v. Sri Lanka*, Final Award, 27 June 1990.

accompanied it, especially in its multilateral expression, which led to the development of the investment protection regime by virtue of bilateral treaties (2.2.).

2.1. *The Move Away from Customary International Law and Early Treatification*

Despite international investment lawyers perpetuating the myth of a customary international law protection of investment, international actors and policy-makers grew wary of the inconclusiveness and indefiniteness of the foreign investment protection regime. First, the absence of consensus on the world plane as to the type and level of investment protection spawned a lot of uncertainty and undermined the authority of the international regime of investment protection. Second, the standards that had allegedly emerged fell short of providing sufficient substantive guidance and were beset by a lack of normativity[33] – a finding which in itself traditionally sufficed to prevent the emergence of customary international law.[34] At best, the standards offered, provided that there were any, were increasingly deemed too minimalistic, especially since interferences with property rights have grown more intricate and indirect.[35] All in all, the customary international law of investment protection which investment lawyers strove to devise before the First World War gradually proved incapable of meeting the needs of the multinational companies and the business sector.[36] The evasive, minimalistic character as well as the uncertain normative status of the international investment protection regime which exist at the time may not be the only reason international actors and policy-makers initiated a move away from customary international law. It does not seem unreasonable to mention that, as a result of decolonisation and the correlative universalization of the multilateral policy-making fora, capital-exporting States realized that they were losing control of the formation of customary international law.[37] If there had

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[33] R. Dolzer and A. von Walter, "Fair and Equitable Treatment – Lines of Jurisprudence on Customary Law", in *Investment Treaty Law: Current Issues* vol. II, ed. F. Ortino, L. Liberti, A. Sheppard, H. Warner (London, BIICL, 2007), p. 99; Schill, see above note 3, p. 28.

[34] Cfr infra 5.1.

[35] A. van Aaken, "Perils of Success? The Case of International Investment Protection", 9 *European Business Organisation Law Review* (2008), p. 5.

[36] Schill, see above note 3, p. 24, p. 28.

[37] Juillard, see above note 21, p. 84.

been no consensus on the exact standards of protection that ought to be offered to foreign investors, there was at least, in the second half of the 20th century, an emerging consensus at the international level, especially on the part of capital-exporting States over the need to establish a protection framework based on treaty law.[38]

It is true that attempts to establish a multilateral regime of investment protection were not unheard of. The investment provisions in the unsuccessful Havana Charter of 1948[39] or the stillborn 1967 OECD Draft Convention on the Protection of Foreign Property[40] already spoke of a desire for treatification. The limited multilateralization of the procedural framework of enforcement mechanisms achieved with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[41] had been more successful, as had the establishment of a multilateral insurance framework for foreign investment projects[42] by virtue of the Convention Establishing the Multilateral Investment Guarantee Agency of 11 October 1985.[43] The pre-1990 period also witnessed the conclusion – sometimes systematic, as illustrated by the practice of the United States until 1966 – of Treaties of friendship, commerce and navigation aimed at establishing commercial and political relations between the contracting States, including rules on protection from expropriation, full protection and security, and fair and equitable treatment.[44] The scope and the degree of this push for multilateral substantive rules of investment protection, however, clearly surpassed the post-Second World War treatification. Never had the need for a move away from customary international law been felt so acutely.

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[38] B. Kishoiyian, "The Utility of Bilateral Investment Treaties in the formulation of Customary International law", 14 *Journal of International Law and Business* (1994), p. 372–373 ; Schill, see above note 3, p. 61 ; Dolzer and von Walter, see above note 33, p. 99.

[39] Schill, see above note 3, p. 32–35; Newcombe and Paradell, see above note 9, p. 19–20.

[40] Schill, see above note 3, p. 35–40; Newcombe and Paradell, see above note 9, p. 33–34.

[41] 575 UNTS 159.

[42] See M. D. Rowat, "Multilateral Approaches to Improving the Investment Climate of Developing Countries", 33 *Harvard International Law Journal* (1992), p. 103.

[43] 1508 UNTS 99.

[44] It must be noted that the Treaties of FCN concluded by the United States were generally more protective of investment than average FCN Treaties. See generally K. J. Vandevelde, "US Bilateral Investment Treaties: The Second Wave", 14 *Michigan Journal of International Law* 621 (1993); K. J. Vandevelde, "A Brief History of International Investment Agreements", 12 *UC Davis Journal of International Law and Policy* (2005), p. 157; Schill, see above note 3, p. 29–30; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 17; Juillard, see above note 21, p. 111 et seq.

2.2. *The Failure of Multilateral Law-Making and the Proliferation of BITs*

Despite a growing consensus on the need to move away from customary international law and the treatification of investment protection turning into a priority on the agendas of many actors, the persistence of ideological rifts – albeit in a somewhat readjusted configuration – in international society about the level of protection to be granted to movements of capital continued to impede the quest for the establishment of a multilateral regime of protection. Indeed, the 1990s led to the rapid failure of the introduction of investment protection into the GATT/WTO,[45] quickly followed by the failure of the OECD Multilateral Agreement on Investment (MAI).[46]

It is an uncontested fact that the repeated failures to multilateralize investment protection triggered a general move towards bilateral treatification.[47] Confronted with the impossibility of putting in place a multilateral investment protection regime, States pursued that objective through other channels and engaged in an all-out conclusion of BITs. The era of modern BITs was famously ignited by Germany, thanks to an agreement with Pakistan.[48] But it was in the 1990s that the multiplication of BITs took an unbridled step. The conclusion of BITs was not a phenomenon restricted to capital-exporting States. Even developing countries started to conclude BITs among themselves.[49] There is indeed little doubt that bilateral treaties were meant to pursue the same objective as the endeavours to create a multilateral framework of investment protection. And that network was judicialized with the more systematic inclusion of provisions for investor–State arbitration.[50] Multilateratization through BITs was

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[45] Schill, see above note 3, p. 50–53 and 58–60; Subedi, see above note 17, p. 37–39.

[46] Schill, see above note 3, p. 53–58; Subedi, see above note 17, p. 39–41.

[47] Schill, see above note 3, p. 24; E. Chalamish, "The Future of Bilateral Investment Treaties: A De Facto Multilateral Agreement", 34 *Brooklyn Journal of International Law* (2008–2009), p. 303; A. Newcombe and L. Paradell, see above note 9, p. 41–44.

[48] Dolzer and Schreuer, see above note 44, p. 18; Newcombe and Paradell, see above note 9, p. 42.

[49] Schill, see above note 3, p. 362 ff; R. Dolzer and C. Schreuer, see above note 44, p. 16.

[50] It has been reported that the first BIT that expressly incorporates provisions for investor–state arbitration was the 1968 BIT concluded between Indonesia and the Netherlands. The 1969 BIT between Chad and Italy appears to be the first one providing for investor–state arbitration with unqualified state consent. See Newcombe and Paradell, see above note 9, p. 44–45. The validity of such a unilateral arbitration clause was upheld in the famous 1985 award in *Southern Pacific Properties* (*Middle East*) *Limited v. Egypt* (*Decision on Jurisdiction, 27 November 1985*) 3 ICSID Rep 112. In *Asian Agricultural Products Ltd* (*AAPL*) *v. Sri Lanka* (Final Award 27 June 1990), the arbitral tribunal established under an investor–state arbitration provision of the 1980 Sri Lanka–United Kingdom BIT issued the first ICSID award based on such an arbitration clause.

clearly on the agenda.[51] It is accordingly no surprise than in a few decades BITs mushroomed and came to create a ubiquitous web of bilateral conventional relations for the protection of investment.[52]

Experts have convincingly shown that there is no fundamental contradiction between the pursuit of the practice of BITs and multilateralization,[53] and that BITs can be seen as the real building blocks of a multilateral international legal regime on the protection of investment.[54] Indeed, the Most-Favoured-Nation (hereafter MFN) clauses included in all BITs multilateralized substantive investment protection and participated in the creation of a uniform regime for the protection of investment.[55] As a result, it is no exaggeration to claim that, by the turn of the century, and by virtue of the several thousand BITs, a fully-fledged multilateral regime of investment protection had been constructed. In that sense, BITs came to constitute another path to the multilateralization of investment law.[56]

3. *The Completion of Treatification and the Ensuing Return to Customary International Law*

With a few thousand BITs in place and the systematization of the incorporation of provisions for investor–State arbitration,[57] States and other international actors put in place a web of substantive rules for the protection of foreign capital. Following the multilateralization of investment protection through a web of BITs, one could have expected that customary international law be further put at bay. In other words, it could have been reasonably anticipated that the BITs-based treatification of investment protection would toll the death knell for the need for (and the interest in) customary international law in international investment protection.[58] With a few

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[51] On the BIT practice of the US see e.g. Vandevelde, see above note 44, p. 625.

[52] van Aaken, see above note 35, p. 9 et seq.

[53] Schill, see above note 3, p. 63.

[54] *Ibid., p.* 64.

[55] *Ibid., p.* 366.

[56] For a challenge of that idea see P. Muchlinski, "Corporations and the Uses of Law: International Investment Arbitration as a 'Multilateral Legal Order", *Onati Socio-Legal Series*, v. 1, n. 4 (2011).

[57] For a useful stocktaking see UNCTAD, "Bilateral-Investment Treaties 1995–2006: Trends in Investment Rulemaking", UNCTAD/ITE/IIT/2006/5 (2007).

[58] See OECD, Indirect Expropriation and The Right to Regulate in International Investment Law (2004) at 2 (arguing that the proliferation of treaties has largely deprived the debate about customary international law of significance for the foreign investor). In the same sense see S. Schill, "Multilateralizing Investment Treaties Through Most-Favored-Nations Clauses", 27 *Berkeley J. Int'l L.* (2009), p. 496–569; See also Chalamish, see above note 47.

thousand BITs in force, the quest for customary international law that had dominated the century seemed doomed to become anachronistic and solely of academic interest.[59]

Yet, the exact opposite occurred. As soon as treatification of investment protection neared completion, the need felt by investment lawyers for a return to customary law abruptly came back to the fore. It is as if the proliferation of BITs spawned a new craving for customary international law. Put differently, the story of the sources of investment law in last quarter of the 20th century is the ironical story of treatification, originally conceived as a move away from custom, generating its antithesis, that is, a return to custom.[60]

It is this new return to customary international law that followed the proliferation of BITs in the last decades of the 20th century which the following section will now seek to depict (3.1.). That will be followed by a brief overview of the rules that have traditionally been elevated to customary international law (3.2.), as well as a sketch of the main reasons which have led experts and scholars to embrace this quest for the customary status of the basic rules of the investment protection regime (3.3.).

3.1. *The Mushrooming of BITs and the Revival of Customary Investment Law: The Story of a Paradox*

It must be acknowledged from the outset that a few BITs make express reference to customary international law when determining the applicable law.[61] It also happens that the BITs refer to customary international law for interpretative purposes.[62] Yet, these references to customary international law remain extremely limited and do not suffice to explain the

[59] Dolzer and Schreuer, see above note 44, p. 16.

[60] Some of the proponents of this return to customary investment law acknowledge that this is not without irony. See e.g. P. Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law", 28 *Penn State International Law Review* (2010), p. 676 ("[t]he number of BITs is now so overwhelming and their scope so comprehensive that a new debate has recently arisen in doctrine about the impact of these treaties on the existence of custom in the field of international investment law. It has been recently argued in doctrine that these BITs represent the "new" custom in this field. For some writers, the content of both custom and BITs is now simply just the same"); See also J. Alvarez, "A BIT on Custom", 42 *NYU Journal of International Law and Politics* (2009), p. 74.

[61] See e.g. The famous Canada-Peru BIT, article 5(1) or the Model BIT adopted by Norway (article 5) or Canada (article 5) US Model Bit (article 5.1) (2004). For other examples, see Dumberry, see above note 60, p. 698–699.

[62] See the Korea-Singapore FTA, article 20.2(5).

return to customary international law. This return in the theory of the sources of investment law manifested itself differently, in particular through the idea that it is inconceivable that so many BITs were concluded which enshrined very similar standards of protection without these standards being elevated to the status of customary rules of investment law. This is why the return to custom primarily materializes in the attribution of custom-generative effects to the few thousand BITs in place.[63] This customary international law generated by BITs has, in turn, been seen as complementing (and uniformizing the interpretation of) BITs themselves.[64]

This custom-generative effect attributed to BITs has enjoyed very strong support in the literature.[65] Needless to say, however, there have been significant differences between its supporters. Some have been careful not to endorse a holistic approach to custom and have preferred a rule-by-rule approach.[66] Although the elation provoked by this return to custom has primarily been felt in the literature, the case law similarly shows some – albeit more limited – attachment to that idea,[67] as is illustrated by the famous awards in *CME v. Czech Republic*[68] and *Mondev v. United States.*[69] Unsurprisingly, counsel involved in such proceedings also commonly resort to the argument of customary investment law, neither of the party

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[63] T. Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* (2007), p. 701–704. It is true that BITs often share a lot of common substantive features (Dumberry, see above note 60, p. 679 and p. 695–696; van Aaken, see above note 35, p. 6.

[64] Gazzini, see above note 63, p. 710; Hindelang, see above note 20, p. 789; See also *Amoco Int. Finance Corp v. Islamic Republic of Iran et al, Iran-US.CT.*, 14 July 1987, 83 ILR (1990) 500, para. 112. On the idea of lacunae see also P. Dumberry, see above note 60, p. 697. On the idea of 'Cross-fertilization' see also Dumberry, see above note 60, p. 694.

[65] S. Schwebel, "Investor-State Dispute and the Development of International Law: the Influence of Bilateral Investment Treaties on Customary International Law", 98 *ASIL Proceedings* (2004), p. 27 and 29–30; I. A. Larid, "A Community of Destiny – The Barcelona Traction Case and the Development of Shareholder Rights to Bring Investment Claims", in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. T. Weiler (Cameron May, 2005), p. 95–96; S. Hindelang, see above note 20, p. 789; A. F. Lowenfeld, *International Economic Law*, 2d ed. (Oxford: Oxford University Press, 2008), p. 584; A. Lowenfeld, "Investment Agreements and International Law", 42 *Columbia Journal of Transnational Law* (2003), p. 123; Alvarez, see above note 60, p. 17; Chalamish, see above note 47, esp. p. 341–345.

[66] Dumberry, see above note 60, p. 675, see also Gazzini, see above note 63, p. 704.

[67] In *Tecmed v. Mexico*, the tribunal resorted to customary international law to clarify the concept of indirect expropriation. See *Técnicas Medioambientales Tecmed, S.A. v Mexico*, 29 May 2003, ICSID, para. 116.

[68] *CME v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras 497–498.

[69] *Mondev v. United States*, paras 117–125.

represented in arbitral proceedings – be it the investor or the host State – demonstrating a greater inclination to do so than the other.[70]

It is important to highlight, however, that this embrace of customary international investment law has not secured unanimity among investment lawyers. Among many critics,[71] Professor Sornarajah, for instance, famously defended that "it would be difficult to show that there was free consent on the part of all the developing States to the creation of any customary international law".[72] This specific objection is perhaps not as cogent as it may seem, simply because it is a fact that developing countries nowadays conclude BITs among themselves. Sornarajah also contended that if there was customary international law, developing States would constitute persistent objectors,[73] an argument that was raised in the 2007 case of *BG Group v. Argentina.*[74] In the same vein, Cai Congyan contended that almost all Chinese internationalists have rejected the idea that BITs now constitute customary international law.[75] The argument of Andrew Guzman according to which there simply cannot be any *opinio juris* but solely a pursuit of legal interest is probably more controversial.[76]

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[70] I owe this argument to interesting exchanges with Hege Elisabeth Kjos. This use of customary international law by counsel is a phenomenon which I have further examined elsewhere and which I have attributed to the need for creative argument. See J. d'Aspremont, *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011), especially chapter 5.

[71] Kishoiyian, see above note 38, p. 327. Cai Congyan, "International Investment Treaties and the Formation, Application and Transformation of Customary International Law Rules", 7 *Chinese Journal of International Law* (2008), p. 659–679; Juillard, see above note 21, p. 130; P. Muchlinski, "Policy Issues", in *The Oxford Handbook of International Investment Law, ed.*. P. Muchlinski, F. Ortino and C. Schreuer (Oxford: Oxford University Press, 2008), p. 17.

[72] M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2004), p. 213.

[73] *Ibid.* For a rejection of that argument see P. Dumberry, "The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?", 23 *Leiden Journal of International Law* (2010), p. 379–400.

[74] *BG Group v. Argentina*, UNCITRAL, Award, 24 December 2007 or in the NAFTA Chapter 11 *Grand River Enterprises Six Nations Ltd et al v. United States*, Counter-memorial of the United States, 22December 2008, at 129.

[75] Congyan, see above note 71, p. 664.

[76] T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", 38 *Virginia Journal of International Law* (1998), p. 687. See the criticism of that approach by Cai Congyan, see above note 71, p. 665. For another criticism of Guzman see Alvarez, see above note 60, p. 39 et seq. See also the objections of Hindelang, see above note 20, p. 789.

A few investment arbitral tribunals have also expressed some reservations, as is exemplified by *Generation Ukraine Inc* v. *Ukraine,*[77] *United Parcel Service v. Canada,*[78] *ADF Group Inc v. United States*[79] and *Sempra Energy International v. Argentine Republic.*[80] Some misgivings have also occasionally been voiced by States in their submissions in international judicial proceedings.[81] Yet, these objections or reservations have not been sufficient to frustrate the overarching sympathy enjoyed by customary international law, and the theory of the sources of international investment law has remained dominated by a faith in the existence and usefulness of a solid body of customary investment law.

3.2. *Candidates for Customary Status in Investment Law*

If one takes a rule-by-rule approach and refrains from mechanically equating BITs with customary international law,[82] the question of identifying those rules of the international investment protection regime that qualify for customary status turns very thorny and delicate. The following paragraphs briefly mention a few of the usual suspects which have been discussed in the literature.

a) *International Minimum Standard:* The Calvo Doctrine, the Russian Revolution and the Mexican objection have not been deemed sufficient to prevent the emergence of a customary minimum standard,[83] and

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[77] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9. Award, 16 September 2003, 44 ILM 404 (2005), para. 11.3 ("It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law").

[78] *United Parcel Service v. Canada*, para. 97 (rejecting that BITs have generated customary international law).

[79] *ADF Group Inc v. United States*, Award, 9 January 2003, ICSID, para. 183.

[80] ICSID Case No. ARB/02/16, Decision on Annulment of 29 June 2010, paras. 186–209; see also *CMS Gas Transmission Company v. Argentia*, ICSID Case No. ARB 01/08, Decision on Annulment of 25 September 2007, paras. 129–135.

[81] See the Statement by Mexico, Mexico's Article 1128 Submission Concerning *Loewen Corporate Restructuring*, 2 July 2002, in the *Loewen* case, para. 39; US Response to Canada and Mexico's Article 1128 Submission, *Loewen* case, 19 July 2002, para. 3; United States' Rejoinder Memorial in the *Glamis Gold* case, paras 142 et seq.; Canada's Counter-Memorial, 20 October 2008, *Chemtura Corporation v. Canada* (UNCITRAL), paras 269–273.

[82] Dumberry, see above note 60, p. 675, see also Gazzini, see above note 63, p. 704.

[83] Dolzer and Schreuer, see above note 44, p. 13; Hindelang, see above note 20, p. 789. See also Dumberry, see above note 73, p. 384; Dumberry, see above note 60, p. 680; L. Reed, J. Paulson and N. Blackaby, *A Guide to ICSID Arbitration* (The Hague: Kluwer Law International, 2004), p. 48; I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2006), p. 61–62.

international investment tribunals have, in the great majority, considered that the international minimum standard, as expressed by the *Neer* formula, constitutes customary international law,[84] although its evolutive character has occasionally been recognized, as in *Pope and Talbot Inc. v. Canada*[85] and *ADF Group v. United States*.[86]

b) *Fair and Equitable Treatment:* Never has the question of the state of customary international law been more controversial than in connection with fair and equitable treatment. Despite its extremely low normative density – recognized in *Saluka Investments BV v. The Czech Republic*[87] – it has been argued that fair and equitable treatment constitutes customary international law.[88] Yet, the questions quickly arose whether its content ought to be informed by the international minimum standard. This was the view famously defended by the Free Trade Commission in its interpretation of Article 1105 of NAFTA.[89]

c) *Protection against* (*and Conditions for*) *Expropriation:* The protection against expropriation as well as some of the conditions under which expropriation is admissible are often deemed to constitute customary

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[84] *Mondev International Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 42 ILM 85 (2003), para. 121; *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, 43 ILM 967 (2004), para. 91; *Glamis Gold Ltd v. United States*, Award, 8 June 2009, UNCITRAL, para. 626–627. See Free Trade Commission, *Note of Interpretation of Certain Chapter 11 Provisions of July 31, 2001*; OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), p. 8.

[85] *Pope and Talbot Inc. v. Canada*, 31 May 2002, paras 59 et seq.

[86] *ADF Group v. United States*, ICSID No. ARB(AF)/00/1, Award, 9 January 2003, para. 173.

[87] *Saluka Investments BV v. The Czech Republic*, Partial Award, UNCITRAL, 17 March 2006, paras 282–284 ("such general standards represents principles that cannot be reduced to precise statements of rules.... [They] are susceptible of specification through judicial practice and do in fact have sufficient legal content to allow the case to be decided on the basis of law").

[88] Subedi, see above note 17, p. 63; Schwebel, see above note 65, p. 27–30; Tudor, see above note 83, p. 74 et seq.; Dumberry, see above note 73, p. 384; Gazzini, see above note 63, p. 704.

[89] For a criticism of the Free Trade Commission interpretation see *Pope & Talbot v. Canada*, Award in Respect of Damages, 31 May 2002, para 61; See also the criticism by Jennings, Second Opinion, *Methanex v. United States*, 6 September 2001, For the opposite view that IMS and FET are autonomous parameters see Gazzini, see above note 63, p. 699.

international law both in the literature[90] and the case law.[91] That position was also endorsed by the OECD.[92]

d) *Standards of Compensation:* The question whether the abovementioned Hull formula constitutes customary international law has attracted much attention in international legal scholarship.[93] The exact standard of compensation remaining subject to variations was recognized by the arbitral tribunal in *CME Czech Republic BV v. Czech Republic*.[94] That does not seem however to suffice to prevent that norm's accession to customary status.

e) *Denial of Justice:* It has sometimes been argued that the denial of justice was prohibited by customary international law.[95] The question remains extremely controversial.

f) *Due Process:* Due process has also been included in the candidates for customary status. As with the prohibition of denial of justice – with which it partly overlaps – its customary status is the object of

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[90] Subedi, see above note 17, p. 74; C. Maclachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007), p. 16.

[91] *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9. Award, 16 September 2003, 44 ILM 404 (2005), para. 11.3 ("It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law"). The insights provided by the International Court of Justice on the concept of arbitrariness in its judgment in the famous *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*) are sometimes presented as shedding light on the concept as it is understood in customary international law. It is argued here that it is far from certain that the Court elaborated on anything other than the meaning of that notion under the FCN treaty between Italy and the United States. See ICJ, *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), 20 July 1989, ICJ Rep. 1989, esp. paras 120–130. For remarks on this case see F. A. Mann, "Foreign Investment in the International Court of Justice: the ELSI Case", 86 *American Journal of International Law* (1992), p. 92; S. D. Murphy, "The ELSI Case: An Investment Dispute at the International Court of Justice", 16 *Yale Journal of International Law* (1991), p. 391; K. J. Hamrock, "The ELSI Case: Toward an International Definition of 'Arbitrary Conduct'", 27 *Texas International Law Journal* (1992), p. 837.

[92] OECD, "Indirect Expropriation and the Right to Regulate in International Investment Law", 2004, p. 3

[93] See Subedi, see above note 17, p. 80; Gazzini, see above note 63, p. 714; Dumberry, see above note 73, p. 314.

[94] *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 497.

[95] OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), 40; J. Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), p. 59–67; Dumberry, see above note 73, p. 384.

much controversy.[96] Even more contested is the customary status of the legal standing of shareholders before Arbitral Tribunals.[97]

3.3. *Customary International Investment Law: Perceived Benefits*

Needless to say, the success of the return to customary international law in the theory of the sources of investment law is the direct upshot of the perceived benefits that are attributed to customary international law. Indeed, it is often seen as providing a "comfort zone" within which legal problems are toned down or reduced in size. The following paragraphs intend to provide a brief overview of the benefits of customary international law. Its perceived convenience will be critically evaluated in the next section.

The effects which customary law and treaty law – whose existence side-by-side is not mutually exclusive – can have upon each other are well known. They were the very object of the discussion in the famous *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) case before the International Court of Justice.[98] It is of no avail to repeat it all here. It suffices to say that it is uncontested that treaty law can codify existing customary international law and endow it with the formalistic virtues that it usually lacks. By the same token, treaty law can also be conducive to the formation of customary rules. Conversely, customary international law is said to provide an interpretative yardstick for the interpretation of the conventional law in which it originates. This is what can be called the "reverberating effect" of customary international law.[99]

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[96] Dissenting opinion of Judge Asente, *Asian Agriculture Products Ltd* (*AAPL*) *v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, 4 ICSID Report 242 (1997); OECD, Fair and Equitable Treatment Standard in International Investment Law, *Working Papers on International Investment*, No. 2004/3 (2004), 40. See also Dumberry, see above note 73, p. 385.

[97] For a rejection see P. Dumberry, "The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallized?", 18 *Michigan Journal of International Law* (2010), p. 353.

[98] This was the crux of the decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), 27 June 1986, ICJ Rep 1986, paras 174 ff.

[99] This has proved controversial. See the famous dissenting opinion by Judge Jennings appended to the decision of the ICJ in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America), 27 June 1986, ICJ Rep 1986, 528, esp. 529–534.

In the particular context of investment protection, customary international law has the same effects. Yet, in connection with the regime of investment protection, these effects are credited with the following specific advantages:

a) *Lacuna-Filling Effect:* Customary international law is primarily said to be a lacuna-filling instrument for BITs which are sometimes too hastily drafted and leave too many questions unanswered.[100] This is also the position defended by the arbitral tribunal in *Amoco Int. Finance Corp v. Islamic Republic of Iran.*[101] This is a clear manifestation of the reverberating effect of customary international law on treaty law. This lacuna-filling effect is not without paradox as it presupposes that the primary norm (treaty) can be streamlined or substantiated by the norm derived from it (custom).

b) *Interpretation-Harmonizing Effect:* In the context of investment protection, customary international law is also often understood as providing a uniform platform of interpretation for all the individual BITs when subjected to interpretations by arbitral tribunals applying them. In that sense, customary international law is seen as instrumental in the converging interpretations of each individual BIT by each individual arbitral tribunal.[102]

c) *Denunciation-Annihilating Effect:* Confronted with the denunciation of BITs by some capital-importing countries – as exemplified by the case of Ecuador[103] – investment lawyers may be tempted to see in customary international law a barrier protecting the investment protection regime

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[100] Gazzini, see above note 63, p. 710; On the idea of lacunae see also Dumberry, see above note 60, p. 697. He also defends the Idea of "Cross-fertilization", *Ibid.*, p. 694.

[101] See also *Amoco Int. Finance Corp v. Islamic Republic of Iran et al*, Iran-US.CT., 14 July 1987, 83 ILR (1990) 500, para. 112.

[102] Gazzini, see above note 63, p. 710. For a thought-provoking and well-informed attempt to formalize the interpretative role of customary international law see M. Paparinskis, "Investment Treaty Interpretation and Customary Invesment Law: Preliminary Remarks", in *Evolution in Investment Treaty Law and Arbitration*, ed. Chester Brown and Kate Miles (Cambridge University Press 2011).

[103] On Ecuador's denunciation of its BITs see S. D Franck, "Occidental Exploration and Production Co. v. Republic of Ecuador", 99 *American Journal of International Law* (2005), p. 675; Comp. with Bolivia's submission of a notice of withdrawal from the ICSID Convention on 2 May 2007 (see article 71 of the ICSID Convention). On this issue see generally A. Tzanakopoulos, "Denunciation of the ICSID Convention under the General International Law of Treaties", in *International Investment Law and General International Law: From Clinical Isolation to Systemic Integration?*, ed. Rainer Hofmann and Christian J. Tams (Baden Baden: Nomos 2011), p. 75–93.

from completely unravelling, for the State terminating BITs it has contracted would remain bound by the existing customary investment protection regime.

d) *Multilateralizing Effect*: The abovementioned idea that BITs have laid down the backbone of a multilateral international legal regime of investment protection[104] has not convinced everyone.[105] Indeed, numerous experts still believe that the investment protection regime achieved by virtue of BITs cannot be of a truly multilateral character, for BITs are treaties of a purely contractual nature.[106] Customary international law, in this sense, is the only tool that allows the multilateralization of a regime which otherwise would be of a solely contractual nature. It constitutes the only realistic route to ensuring the true multilateralization of the investment protection regime.

e) *Legitimizing and Formalizing the de facto* Stare Decisis *and* Jurisprudence Constante: Probably, the paramount advantage of customary international law is the adjudicative neutrality and immanent intelligibility which it provides to decisions of arbitral tribunals which commonly refer to other arbitral decisions. That tendency is undeniable and is discussed below[107] as well as in other chapters of this volume.[108] So construed, customary international law helps to formalize the *jurisprudence constante* of international tribunals. More precisely, customary international law endows the *de facto stare decisis* and *jurisprudence constante* witnessed in the practice of international arbitral tribunals with greater legitimacy and authority, and helps to shroud the practice of precedents in a source-based rationality, thereby giving the impression of a minimized choice in law-application and maximized predictability.[109]

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104 Schill, see above note 3, p. 64.

105 See Muchlinski, see above note 56.

106 I owe this argument to insightful discussions with Dr. Catherine Brölmann.

107 Cfr infra 5.2 and 6.

108 See the chapter by Eric De Brabandere in this volume.

109 Customary international law is advocated as one of the ways to formalize *jurisprudence constante* by M. Paparinskis, "Sources of Law and Arbitral Interpretations of Pari Materia Investment Protection Rules", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835., p. 20–26 (talking about 'the most persuasive model for conceptualizing the developments [of jurisprudence constante]'. See also A. K. Bjorklund, "Investment Treaty Arbitral Decisions as Jurisprudence Constante", *UC Davis Legal Studies Research Paper* No. 158, p. 278.

4. *Customary International Law: General Remarks*

In this section, I venture into a few critical remarks about the mainstream theory of customary international law where the theory of custom is often geared towards the formalization of the making of unwritten rules (4.1.). Some general considerations on the various reasons behind the success of the theory of customary international law are also formulated (4.2.).[110]

4.1. *General Observations about the Pipedream of Formal Unwritten Law*

As a source of international law, customary international law encapsulates those rules which are ascertained without any written instrument. The conceptualization of customary international law in mainstream scholarship has always rested on non-formal ascertainment.[111] Indeed, in the mainstream theory of the sources of international law, the ascertainment of customary international law is considered *process-based*.[112] More specifically, according to traditional views, customary international rules are identified on the basis of a *bottom-up crystallization process* that necessitates concurring and consistent behaviour by a significant number of States accompanied by their belief (or intent) that such a process corresponds with an obligatory command of international law.[113] The possible contradictions associated with this widespread two-element conceptualization of customary international law are well-known.[114] It is not necessary to revert to them here. It seems more important to emphasize here that neither the behaviour of States nor their beliefs can be

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[110] This section is informed by my earlier work. See d'Aspremont, see above note 70.

[111] On the discussion about customary international law in the League of Nations' Committee of Jurists during the drafting of the Statute of the PCIJ see P. Haggenmacher, "La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale", 90 *Revue générale de droit international public* (1986), p. 18–32. See also T. Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: Asser Press 2010).

[112] For a classical example see Dailler and Pellet, *Droit international Public,* 6th Ed., (LGDJ, 1999) p. 318 et seq. On the various conceptualizations of customary international law as a process see the remarks of R. Kolb, "Selected Problems in the Theory of Customary International Law", 50 *Netherlands International Law Review* (2003), p. 119–150.

[113] On the emergence of the subjective element in the theory of custom in the 19th century see P. Guggenheim, "Contribution à l'Histoire des Sources du Droit des Gens", 94 *Collected Courses* (1958), 1–84, p. 36–59. A. D'Amato, *The Concept of Custom in International Law* (New York: Cornell University Press, 1971), p. 44–50.

[114] See the famous contradiction highlighted by Sørensen, "Principes de droit international public", 101 *Collected Courses* (1960-III), 1–254, p. 50. In the same sense see D'Amato, see above note 113, p. 7. On this paradox see the comments by Kolb, see above note 112, p. 137 et seq.

captured or identified by formal criteria.[115] As a result, the ascertainment of customary international law does not hinge on any standardized pedigree. Like other process-based models of law-identification, custom-identification eschews formal ascertainment and follows a fundamentally non-formal ascertainment pattern.[116] This is why custom-identification has often been deemed an "art"[117] and why some authors have been loth to qualify customary law as a proper "source" of international law.[118]

The non-formal character of the ascertainment of customary international law has given rise to some severe predicaments which are very illustrative of the difficulties associated with the non-formal nature of law-ascertainment.[119] Not only does this nature, as has been demonstrated by scholars affiliated with deconstructivism and critical legal studies,[120] bring about a constant move in law-ascertainment between State conduct (*apologism*) and normative beliefs (*utopianism*), but, above all, the process-based elements of custom have failed to provide a reliable

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[115] In the same vein see M. Koskenniemi, *From Apology to Utopia* (Cambridge, New York, 2005), p. 388. See also S. Zamora, "Is There Customary International Economic Law?", 32 *German Yearbook of International Law* (1989), p. 38; For a classical example of the difficulty to capture the practice see ICJ, Case concerning the *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, ICJ Rep. 2009, para. 141. On the particular difficulty in establishing the practice of abstention see PCIJ, *Lotus*, Series A, No. 10 (1927), p. 28 or ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, ICJ Rep. (1986) paras 188 et seq.

[116] M. H. Mendelson, "The Formation of Customary International Law", 272 *Collected Courses* (1998), p. 172; G. Buzzini, "La Théorie des sources face au droit international général", 106 *Revue générale de droit international public* (2002), p. 581; this also is what leads R. Kolb to contend that article 38 does not lay down an entirely formal system of sources. See R. Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public : Théorie et Philosophie du droit international Law* (Brussels: Bruylant, 2003), p. 51.

[117] M. W. Janis, *An Introduction to International Law* (Boston: Little Brown and Co., 1993), p. 44.

[118] See the discussion in H. Thirlway*, International Customary Law and Codification* (Leiden: Sijthoff, 1972), p. 25–30. See also the remarks by Condorelli, 'Custom', in *International Law: Achievements and Prospects*, ed. M. Bedjaoui (The Hague: Martinus Nijhoff, 1991), p. 186.

[119] See B. Stern, "La Coutume au Coeur du droit international, quelques réflexions", in *Mélanges Reuter: le droit international : unité et diversité,* ed. Daniel Bardonnet (Paris: Pedone, 1981), p. 479. See also G. Abi-Saab, "La Coutume dans tous ses Etats", in *Essays in honor of Roberto Ago*, vol. I, (Milano: A. Giuffrè, 1987), p. 58; J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems", 15 *EJIL* (2004), p. 523–553 or A. Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford: Oxford University Press, 2008), p. 51 and 70 et seq.

[120] This has been insightfully demonstrated by M. Koskenniemi: Koskenniemi, see above note 115, p. 437–438 (He argues that the doctrine of custom is indeterminate because of its circular character which stems from it assumption of behaviour as evidence of *opinio juris* and the latter as evidence of the custom-making behaviour).

yardstick for distinguishing between law and non-law.[121] The non-formal character of custom ascertainment accordingly condemns such rules to dangerous indeterminacy, at least as long as they have not been certified by a law-applying authority.[122] During that period of uncertainty, customary international rules *often lack normative character* and, hence, their authority is gravely weakened.

4.2. *The Comfort Zone of Customary International Law: General Considerations*

If, despite such predicaments, customary international law has always proved so popular among international lawyers it is for the comfort zone that it can generate. The comfort zone which customary international law allows primarily derives from the pedigree with which it can endow norms (a), as well as the immanent rationality with which it shrouds adjudicatory reasoning (b). It also proves very convenient for States as it often offers them an easy way out in situations where non-compliance is the only politically viable option (c). A few words must be said about each of these perceived virtues of customary law.

a) *Ready-Made Pedigree of Rules*

In the mainstream conception of international law, a norm is a rule of law to the extent that it can be ascertained through its pedigree.[123] It is through the elaborate theory of the sources that pedigrees of international rules have been defined. This means that the pedigree will usually be found in the sources of international law. Compared to other sources of international law, customary law has the advantage of providing a ready-made pedigree for rules. There is no need to ground the rule in a formal

[121] P.-M. Dupuy, "Théorie des sources et coutume en droit international contemporain", in *Le Droit international dans un monde en mutation: liber amicorum en hommage au Professeur Eduardo Jimenez de Arechaga* (Montevideo: Fundación de Cultura Universitaria, 1994), p. 61. See also the very radical criticism by P. Kelly, "The Twilight of Customary International Law", 40 *Virginia Journal Int'l L.* (2000); See Zamora, see above note 115, p. 38.

[122] This indeterminacy and the correlative leeway of judges have led some scholars to call for the abandonment of custom as a source of customary international law. See N. C. H. Dunbar, "The Myth of Customary International Law", 8 *Australian Yearbook of International Law* (1983), p. 1. See also the remarks of D. Carreau, *Droit International*, 8th ed. (Pedone, 2004), p. 263; For a criticism of this position see contra J. Tasioulas, "Opinio Juris and the Genesis of Custom: A Solution to the 'Paradox'", 26 *Australian Yearbook of International Law* (2007), p. 199.

[123] See generally d'Aspremont, see above note 70.

instrument the legal nature of which needs to be established. If the rules cannot be found in a treaty, customary international law offers the best alternative pedigree for them. In that sense, customary law constitutes the fall-back option in terms of law-ascertainment. It is a source of convenience to which one will resort where the pedigree of a norm is uncertain.

b) *Immanent Rationality and Predictability of Judicial Reasoning*

There is another – equally fundamental – reason why international lawyers are always prompt to take refuge in customary international law. They always feel uneasy about law-making by international tribunals. Contrary to domestic tribunals, international tribunals operate without the supervision of any central judicial body. This means that, once jurisdiction has been established, those tribunals will operate without much supervision and will be exerting a large power of appreciation. If unbridled, this power of appreciation can go as far as to elevate judges into law-making authorities. The advantage of custom is precisely that it allegedly endows the exercise of discretion by judges with some rationality by providing a pedigree to the rules applied by judges. It contributes to the emergence of a sense of greater adjudicative neutrality in international legal argument and international legal adjudication, and at the same time satisfies the obsession of international lawyers – especially those educated in the European continental tradition – with foreseeing and constraining the leeway of arbitrators. Such a feeling of immanent rationality is fundamentally conducive to the legitimacy of international tribunals as well as that of their decisions. It simultaneously conveys a feeling of predictability in adjudication, thereby further comforting international actors and buttressing their faith in the regulatory system provided by international law.

c) *Easy Escape Route for Non-Compliance*

Customary international law can eventually be the trump card in situations where non-compliance has become the only option. In cases where a State deems it to be in its interest to flout a rule rather than to abide by it, it can make use of the hazy contours of customary law to convince other actors that its behaviour did not contradict any positive rule of international law. In that sense, customary international law reduces the cost of non-compliance, as it gives States the ability to contest or challenge the existence of any legal constraint *in casu*.

5. *Limits and Perils of the Theory of International Customary Investment Law*

In this section, I argue that, in the context of investment protection, the comfort zone offered by customary international law is however short-lived and more limited than is often believed. Indeed, focusing on international investment law, I contend that the source of convenience offered by customary international law is not without cost and some conceptual inconsistencies. In particular, I seek to lay bare the internal deficiencies of the theory of customary investment law and the way in which the traditional theory of customary international law has been distorted when applied to investment law (5.1.). Then I intend to take a step back and reflect, at some distance, on the perils which this turn to customary international law brings about (5.2.).

5.1. *Conceptual Deficiencies of the Theory of Customary Investment Law*

Three main conceptual deficiencies beset the mainstream theory of customary investment law. I briefly discuss each of them here.

a) *Building Custom on Non-Normative Standards*

In the mainstream theory of the sources of investment law, custom has been grounded in quicksand. Indeed, most authors sympathetic to the idea of customary investment law have failed to realize that many prescriptions which they claim to be customary rules are not sufficiently normative to have the potential to crystallize into customary international law.[124] A large number of directives or standards which are deemed to have crystallized into customary international law – as is illustrated by the minimum standard of treatment – are highly imprecise and vague.[125] This is particularly astounding as scholars defending the use of customary international law have always professed to embrace a traditional conception of customary law. Yet, many of them seem to have neglected the basic foundations of the theory of custom as it has been devised and supplemented by the International Court of Justice, and in particular the requirement of the normative character of the standard the customary status of which is invoked. It is well-known that, in the *North Sea*

[124] In the same sense see Juillard, see above note 21, p. 131.
[125] Porterfield, see above note 27, p. 79; Brower, see above note 27, p. 66.

Continental Shelf case, the Court assessed the customary character of the equidistance principle enshrined in Article 6 of the 1958 Convention on the Continental Shelf. On this occasion it asserted that the norm at stake had first to be of a "fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". The Court drew on the idea that any conventional rule must contain a directive for it be able one day to crystallize into a customary international rule. Taking mainly into account the profound indeterminacy of the concept of 'special circumstances' which determines the qualification of the equidistance principle, the Court deemed that the principle of equidistance enshrined in the 1958 Convention was not normative. Because the principle of equidistance did not provide for a given course of behaviour to be adopted by the parties, the Court concluded that it could not crystallize or generate a rule of customary international law.[126] Likewise, in the famous *Asylum* case, the Court asserted that "[t]he facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy … and in the officia1 views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions…, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law…".

I am of the opinion that many candidates for customary status in investment law which have been mentioned above[127] do not provide for clear standards of behaviour and suffer from strong normative weakness. They fail to meet the minimum threshold in terms of normative content that is necessary for such norms possibly to constitute (or give rise to) a customary rule. In the eyes of many authors, this, however, has not seemed to bar their qualification for customary status.

b) *Conflating Practice and* Opinio Juris

The conceptual deficiencies of the mainstream theory of customary investment law are not limited to custom resting on clay feet. It is not only

[126] ICJ Rec. 1969, para 72. For a analysis of this aspect of the case see J. d'Aspremont, "Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice", *Belgian Review of International Law* (2003), p. 518. See also A. Boyle and C. Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), p. 221.

[127] Cfr supra 3.2.

that authors hastily throw themselves into the arms of custom despite the very weak normative content of the standards concerned. It is also that they misapply the existing mainstream theory, associating BITs with State practice.[128] The norms enshrined in BITs as such cannot themselves be practice. It is only the behaviour to which they lead which could be practice *sensu stricto*. However, as is well known, the practice spawned by a convention often comes with a deficient *opinio juris*.[129] Such confusion is also rife in the general theory of customary international law and the practice of international tribunals.[130] These conflations between practice and *opinio juris* further weaken the theory of customary investment law.

c) *Attributing Customary Status to Architectural, Institutional and Technical Norms*

As is particularly exemplified by the claim that customary international law prescribes legal standing for shareholders before international tribunals,[131] international investment lawyers do not balk at attributing customary status to standards which are of an architectural, institutional or technical nature, i.e. those standards the existence of which is dependent on there being a system. Again, this is not unheard of in the general theory of the sources of international law.[132] Yet, it is interesting to note that the same inclination to endow technical, architectural or institutional norms with customary status is similarly witnessed in the theory of the sources of investment law, thereby further undermining the theory of customary investment law.

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[128] See e.g. Dumberry, see above note 60, p. 685. For an example of association of declaration of States with State practice see *Glamis Gold Ltd v. United States*, Award, 8 June 2009, UNCITRAL, para. 602.

[129] R.R. Baxter, "Treaties and Custom", 129 *Collected Courses* (1970), p. 64.

[130] A good illustration of that confusion is the methodology used by the ICRC in its study on customary international law. See the critique of Boyle and Chinkin, see above note 138, p. 36. See also the critique expressed by J. B. Bellinger and W. J. Haynes, "A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study", 46 *ILM* (2007), also available at http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf. See the reaction of J.-M Henckaerts, "Customary international humanitarian law – a response to US comments", 89 *International Review of the Red Cross* 473 (2007).

[131] On this debate see Dumberry, see above note 97, p. 353.

[132] See Eritrea-Ethiopia Claims Commission, Partial award, Prisoners of War, Ethiopia's Claim 4, 1st July 2003, § 52. See the remarks of P. d'Argent and J. d'Aspremont, "La Commission des réclamations Erythrée – Ethiopie: un premier bilan", 54 *Annuaire français de droit international* (2008), p. 347–396.

5.2. *The Cost of Customary Investment Law*

Despite all its benefits, resorting to customary international investment law is not without hazards. I mention here only the fallout of the use of customary international law which is relevant for international investment law. Mention is made of the cost of customary investment law in terms of the authority of law (a), the rule of law in investment protection (b) and the legitimacy of international investment tribunals (c). It is also argued here that resort to customary international law can reinforce the perception of an imperialistic agenda behind investment law (d).

a) *Weakening the Normativity and Authority of International Investment Law*

As was explained above, customary investment law comes with a high price in terms of normative character investment rules. Indeed, in the absence of these elementary formal standards of identification,[133] actors are less able to anticipate – and thus adapt to – the effects (or lack thereof) produced by the rule in question.[134] Likewise, law-applying authorities are at pains to explain the applicable law to the cases submitted to them, which in turn will further diminish the ability of actors to anticipate the effects (or lack thereof) of the rule concerned. As a matter of consequence, customary rules fall short of generating any change in the behaviour of their addressees,[135] thereby generating greater difficulty in distinguishing between law and non-law, weakening the normative character of international legal rules. Preserving the normativity of investment law is not only of doctrinal importance as it fundamentally bears upon the ability of international law to fulfil most of the functions assigned to it.[136]

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[133] In the same vein see H.L.A. Hart, *The Concept of Law*, (Oxford: Oxford University Press, 1997, 2nd ed.), p. 124. Hart borrows from J.L. Austin the speech-act theory and Austin's claims regarding the performative function of language, a notion that can be understood in Hart's view by recognizing that "given a background of rules or conventions which provide that if a person says certain words then certain other rules shall be brought into operation, this determines the function, or in a broad sense, the meaning of the words in question". See H.L.A. Hart, "Jhering's Heaven of Concepts and Modern Analytical Jurisprudence", repr. in *Hart's collected Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), p. 274–6.

[134] This was a concern expressed by the arbitrators in *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2 June 2010, para. 100.

[135] J. Hathaway, "American Defender of Democratic Legitimacy", 11 *EJIL* (2000), p. 128–129.

[136] D. Lefkowitz, "The Sources of International Law: Some Philosophical Reflections", in *The Philosophy of International Law*, ed. S. Besson and J. Tasioulas

Indeed, many of the functions that can be assigned to international law[137] – and to investment law in particular – presuppose that it retains sufficient meaning to be capable of instructing the actors subjected to it. Moreover normativity ought to be supported if international investment law is to retain some *authority*.[138]

Leaving aside the formalization brought about by the codification of custom, only the institutionalization of the custom-making process allows the preservation of the normative character of customary international law. Such an institutionalization of customary international law would probably entail the recognition of a rule-making role bestowed upon judges whose functions are classically exclusively evidentiary,[139] thereby elevating international – and to a lesser extent domestic[140] – judges into a law-making organ of the international community.[141] While international lawyers are usually ready to recognize the role of international courts

(Oxford: Oxford University Press, 2010), p. 195. For a review of some of the most important functions that international law can play see D. M. Johnston, "Functionalism in the Theory of International Law", 26 *Canadian Yearbook of International Law* (1988), esp. p. 25.

[137] In that sense my argument also departs from that of Prosper Weil (see P. Weil, "Towards Relative Normativity in International Law", 77 *American Journal of International Law* (1983), esp. 420–421 and bears some limited resemblance to that of M. Koskenniemi (Koskenniemi, see above note 2, 57. For a rebutal of the idea that Koskenniemi expresses a total disinterest for the question of the functions of international law see J. Beckett, "Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL", 16 *EJIL* (2005), p. 213.

[138] In the same sense see G. M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993), p. 21. Although he phrased it in terms of effectiveness, A. Orakhelashvili seems to be of the same opinion. See Orakhelashvili, see above note 119, p. 51. S. Besson is more reserved as to the impact of sources of international law on the authority of international legal rules – a debate she phrases in terms of 'normativity'. She however recognizes that validity – a debate she phrases in terms of 'legality' – is an important part of the legitimacy of international law. See S. Besson, "Theorizing the Sources of International Law", in *The Philosophy of International Law*, ed. S. Besson and J. Tasioulas (Oxford: Oxford University Press, 2010), p. 174 and 180. Although contending that formal law-identification is insufficient to ensure the authority of international law, J. Brunnée and S. J. Toope argue that the distinction between law and non-law is fundamental to preserving it. See J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (Cambridge: Cambridge University Press, 2010), p. 46.

[139] On the custom-generating role of courts see generally, Onuf, see above note 124, p. 21–22.

[140] See however the argument of R. Falk, according to which domestic courts are in a better position to ascertain customary law for they can more authoritatively capture State practice. See R. Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse: Syracuse University Press, 1964), p. 19–20.

[141] See Kelsen, in C. Leben, *Hans Kelsen, Ecrits français de droit international* (Paris: PUF, 2001), p. 77. See also the recognition of that law-making role by Lyndel V. Prott, *The Latent Power of Culture and the International Judge* (Abingdon: Professional Books, 1979), p. 77–78.

and tribunals in the progressive development of primary rules of international law, the idea that courts and tribunals are expressly endowed with custom-making power is not yet accepted. [142] This is why customary investment law, unless it undergoes a radical formalization in the form of necessary written commitments,[143] will long continue to constitute one of best illustrations of the cost associated with non-formal law-ascertainment in terms of the normative character of the rules concerned.[144]

b) *Impairing the International Rule of Law in Investment Law*

It is contended here that customary investment law does not come without impairing the sustainability of the rule of law in the legal system concerned.[145] It can be argued that customary investment law does away with one of the indispensable conditions for ensuring that the framework

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[142] This is one of the reasons Kelsen rejected the subjective element in the theory of customary law, for he contended that *opinio juris* is a fiction to disguise law-creating powers of judges. See Kelsen, "Théorie du droit international coutumier", *Revue générale de la théorie du droit* (1939), p. 253–74. For another classical rejection of the law-making power of international judges see G. Fitzmaurice, "Judicial Innovation – Its Uses and Its Perils", in *Essays in Honour of Lord McNair*, ed. R. Y. Jennings (London: Stevens,1965), p. 24 and G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rules of Law", 92 *Collected Courses* (1957 II), p. 1–227; See also D. Akande, "Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court", 68 *British Yearbook of International Law* 165 (1997), p. 213–215. See *contra* the famous position of H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press 1933), p. 319–320. On the more specific question of law-making by International Criminal Tribunals see S. Darcy and J. Powderly ed., *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2011) and in particular the contribution of F. Raimondo, "General Principles of Law, Judicial Creativity and the Development of International Criminal Law", in *Judicial Creativity at the International Criminal Tribunals*, ed. S. Darcy and J. Powderly (New York: Oxford University Press), p. 45–59.

[143] A radical formalization has been put forward by D'Amato through the concept of *articulation* which ought to replace the two-element doctrine by an objective validator that will usually take the form of a written statement. While D'Amato's approach undoubtedly offers a useful model for formalizing custom-ascertainment, it has failed to generate consensus. See e.g. the criticisms of that understanding in Thirlway, *see above note 118, p.* 51–54. Some measured support for D'Amato's theories is provided by Onuf, see above note 124, p. 18.

[144] On the normative deficiencies of custom see the remarks of A. Somek, "Defective Law", *University of Iowa Legal Studies Research Paper* No. 10–33 (2010) available at http://www.ssrn.org/abstract=1678156.

[145] On the Rule of Law in international law see generally Société française pour le droit international, *L'Etat de droit en droit international: Colloque de Bruxelles* (Paris: Pedone, 2007). On the various meanings of the rule of law in the context of international law see A. Nollkaemper, "The Internationalized Rule of Law", 1 *Hague Journal on the Rule of Law* (2009), p. 74–78.

within which rules are ascertained through formal procedure lives up to the rule of law.[146] Indeed, for law to be a substitute for unbridled arbitrary power – especially in the context of investment protection- clear law-ascertaining criteria are required.[147] This is not the case for customary investment law. Customary investment law permits a high degree of subjectivity in the identification of the applicable law,[148] thereby allowing addressees of rules more easily to manipulate the rules.[149]

c) *Impairing the Legitimacy of Adjudicatory Powers of Courts and Tribunals*

It is commonplace for States and other international actors not to be ready to entrust international investment tribunals with express law-making powers.[150] Yet, the use of customary international law does precisely that. Indeed, customary international law helps to perpetuate the illusion of the strictly cognitivistic task of judges. It should therefore be no surprise to note that States have grown more wary about the powers of international investment tribunals. Indeed, more BITs and FTAs enshrine provisions that retain the ultimate competence regarding interpretation for States, as in the NAFTA regime. The same is true with the WTO (see article IX(2) of the WTO Agreement.[151] And it is no coincidence that the US changed its model BIT to make it more precise, for this can also be understood as a way to restrict the leeway of judges.[152] The foregoing shows why the return to customary international law can be detrimental to the acceptance of the public authority exercised by international investment tribunals. In other words, it could usher in a retreat from the judicialization of

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146 This point is irrespective of who is entitled to the rule of law. See the argument by J. Waldron according to whom States are not entitled to the rule of law. J. Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?", *NYU Public Law and Legal Theory Research Paper Series*, 09-01 (2009), p. 2. See the reaction of Somek, see above note 156, p. 5.

147 N. Onuf, "The Constitution of International Society", 5 *EJIL* (1995), p. 1–19, esp. p. 13; F. Schauer, "Formalism", 97 *Yale Law Journal* (1998), p. 509; A. L. Paulus, "International Law After Postmodernism", 14 *Leiden Journal of International Law* (2001), p. 748; Cheng, see above note 126, p. 206; Lefkowitz, see above note 148, p. 195; See also the introductory remarks of H. Charlesworth, "Human Rights and the Rule of Law After Conflict", in *The Hart-Fuller Debate Fifty Years On*, ed. P. Cane (Oxford: Hart, 2010), p. 44.

148 See generally J. Raz, "The Rule of Law and its Virtue", in J. Raz (ed.), *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979), p. 215–216.

149 In the same vein see Danilenko, see above note 150, p. 16–17. See also J. Hathaway, see above note 147, p. 128–129.

150 Waldron, see above note 158.

151 On this issue see van Aaken, see above note 35, p. 22.

152 Ibid., p. 25.

investment protection. In this context, it is thus not surprising that some authors have tried to formalize the use of customary international law and endow it with the trappings of some immanently rational judicial process.[153] Whether such attempts have been sufficient is yet to be evaluated.

d) *Reinforcing the Perception of an Imperialistic Agenda Behind Investment Law*

Although this may not be generally perceived, the resort to customary investment law – and especially to those allegedly customary standards developed in the first half of the 20th century – can be associated with a new – veiled – form of economic colonization. First, because it brings about the generalization of standards developed by the lawyers, politicians and economists of capital-exporting countries and their application to capital-importing countries. Customary international law can thus spawn an idea among developing States of a new capital-exporting States' hegemony.[154] Second, customary international law may also be felt to be a necessary legal framework for the market to function and freely allow the flux of capital. In that sense, it could be seen by those that are at the left end of the political spectrum as exclusively serving global market forces, for the global market needs uniform standards.[155] Albeit partly ill-founded and surely overblown, these perceptions are inevitable consequences of the return to customary investment law.

6. *Alternative Routes for the Multilateralization and Uniformization of the Investment Protection Regime?*

As has been explained above,[156] the return to customary investment law has proved particularly enticing for investment lawyers for its lacuna-filling, interpretation-harmonizing, denunciation-annihilating and multilateralizing effects and, above all, its ability to legitimize and formalize

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153 See e.g. Paparinskis, see above note 102.

154 Congyan, see above note 71, p. 673.

155 This was an argument heard during the negotiations about the MAI, for instance among NGOs. See e.g. L'Observatoire de la Mondialisation, "Lumière sur l'AMI : le test de Dracula", *L'Esprit Frappeur* (1998), p. 77.

156 Cfr. supra 3.3.

the de facto *stare decisis* and *jurisprudence constante*. Leaving aside the solution which it allegedly offers to the denunciation of investment protection treaties, it is argued here that the other benefits associated with customary investment law could be well secured without necessarily going down the road of customary law. The same outcome could be achieved through simpler mechanisms.[157] Mention is made here of two of them, in particular: the principle of systemic integration (6.1.) and the doctrine of precedent (6.2.).

6.1. *Article 31.3(c) and the Principle of Systemic Integration*

The principles of interpretation of international treaties contained in the Vienna Convention on the Law of Treaties provide for an interpretation of treaties that takes into account "any relevant rules of international law applicable in relations between the parties".[158] When the provision was included in the Convention, it echoed the previous teaching of some scholars[159] as well as the position of the *Institut de droit international*.[160] It also furthered the somewhat redundant and circular definition of the concept of treaty provided by the Convention.[161] The principle of systemic integration enshrined in the Vienna Convention is premised on the *fiction* that, despite international lawmaking being fragmented and decentralized, any new rule is made in the awareness of other existing rules. In that sense, the principle of systemic integration presupposes the formal unity of the legal system.[162] The principle of systemic integration prescribes that

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157 In the same vein see Schill, see above note 3, p. 372–373.

158 Article 31(3)(c).

159 A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 466; See also P. Verzijl, "Georges Pinson case", (1927–8) AD No. 292, cited by C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", 54 *International and Comparative Law Quarterly* (2005), p. 279.

160 *Annuaire de l'Institut de droit international*, 1956, 364–5. See also http://www.idi-iil.org/.

161 Art. 2(1) (a).

162 See P. Sands, "Treaty, Custom and the Cross-Fertilization of International Law", 1 *Yale Human Rights and Development Law Journal* (1998), p. 95; see also Combacau et S. Sur, *Droit international public* 5 Paris (Montchrestien, 2001), p. 175. On the unity of the legal system see generally H. Kelsen, "Les rapports de système entre le droit interne et le droit international public", 14 *Collected Courses* (1926-IV), p. 264 (who argues that the unity of the system rests on the same principle of validity on which all the constitutive elements of the system rest). Comp. P.-M. Dupuy, "L'unité de l'ordre juridique international, Cours général de droit international public", 297 *Collected Course* (2002), p. 9–490.

a treaty be interpreted by reference to its "normative environment", which includes all sources of international law. That means that when several norms bear on a single issue they should, to the greatest extent possible, be interpreted so as to give rise to a single set of compatible obligations. Its application is undoubtedly delicate. It presupposes that the status of the "normative environment" of the norm be clarified, and, in particular, that the status rule to which it is referred be established. It is only after the scope and the applicability of this other rule of international law are defined that it can be taken into account in the interpretation of the rule being interpreted.[163]

Whatever these difficulties,[164] it is argued here that the principle of systemic integration enshrined in article 31.3(c) of the Vienna Convention on the Law of Treaties already provides judges with a sweeping power to harmonize without unnecessary and costly inroads into the murky theory of customary investment law.[165] It is less certain, however, that it allows and justifies the common resort to precedents by international investment.[166]

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[163] The difficulty in applying the principle of systemic integration has been magnified by international judges themselves. It is particularly important to note that the use of that principle made by the International Court of Justice has not helped to clarify what "taken into account" really means. In what probably constitutes one of the most questionable decisions of the International Court of Justice from the standpoint of legal logic, the principle of systemic integration was expressly relied upon for the very first time in its decision in the *Oil Platform* case. On that occasion, the Court resorted to article 31 (3) (c) to apply general rules of international law, including rules pertaining to the use of force, to examine whether the measures taken by the United States were necessary under the Treaty of Navigation and Commerce on the basis of which the Court had jurisdiction. In that particular case, the principle of systemic integration allowed the Court to extend its jurisdiction *ratione materiae* in order to judge the behaviour of the United States in the light of rules for which the Court, strictly speaking, had no jurisdiction. See ICJ, *Oil Platform*, decision of 6 November 2003, ICJ Reports, 2003, para. 78. The more reasonable use of article 31 (3) (c) in *Djibouti v. France* has done little to expunge this suspect use of that provision in the *Oil Platform* case. See ICJ Reports, 1999, para. 113–114

[164] I have examined them in further details in J. d'Aspremont, "Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order", in *Unity or Fragmentation of International Law: The Role of International and National Tribunals*, ed. A. Nollkaemper and O. K. Fauchald (Oxford: Hart, 2011).

[165] van Aaken, see above note 35, p. 18.

[166] Paparinskis, see above note 109, p. 12–15. See also Y. Radi, "Realizing Human Rights in Investment Treaty Arbitration from the Inside: a Perspective from Within the International Investment Law 'Toolbox'", (on file with the author).

6.2. *The Normative Value of Precedents* (Jurisprudence Constante)

It is uncontested both in the literature[167] and the case law[168] that there is no formal rule of *stare decisis* before international adjudicatory bodies,[169] especially when they belong to separate sub-systems as in international investment law. The absence of *stare decisis* is all but inevitable. Indeed, each tribunal is granted only the power to adjudicate within the closed order created by the BIT concerned. The absence of *stare decisis*, in that sense, simply is the consequence of the divide between the sub-legal orders created by each BIT.

It is well known, however, that the formal absence of *stare decisis* in the international investment protection system has not prevented the emergence of a *de facto stare decisis* and *jurisprudence constante* in the practice of international investment tribunals.[170] Indeed, an accretion of decisions which refer to and rely on one another is witnessed in the case law, and the practice of international investment tribunals shows a much generalized use of *jurisprudence constante* and cross-references.[171] Examples are aplenty and very few tribunals have ventured to rule out the relevance of

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[167] See more particularly the chapter by Eric De Brabandere in this volume; see also the remarks by A. K. Bjorklund, see above note 109, p. 265; for an overview see C. Schreuer and M. Weiniger, "A Doctrine of Precedent?", in *The Oxford Handbook of International Investment Law*, ed. P. Muchlinski, F. Ortino and C. Schreuer (Oxford: Oxford University Press, 2008), p. 1189 ff.

[168] North American Free Trade Commission, US-Can-Mex, Art. 1136, 17 December 1992, 32 ILM 605 (1993). See also the famous rejection of *stare decisis* in *AES Corp v. Argentina*, ICSID, Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 30. See also *Chevron Corporations* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits, 30 March 2010, para. 163; RosInvestCo *UK Ltd. v Federation of Russia,* SCC V 079/2005, Award on Jurisdiction, November 2008, paras 49, 136–137; *Wintershall Aktiengesellschaft v Argentina,* ICSID Case no ARB/04/14, Award, December 8, 2008, paras 178–184, 194; *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on jurisdiction, 12 July 2006.

[169] See also Article 53 (1) of the ICSID Convention: "The award shall be binding on the parties" which is traditionally construed as a rejection of *stare decisis*.

[170] On that question in general see M. Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996).

[171] See Schreuer: "In actual fact, tribunal in investment disputes, including ICSID tribunals, rely on previous decisions of other tribunals whenever they can" (C. Shreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", 3 *Transnational Dispute Management* (2006), p. 14). See also M. Paparinskis who talks about "Implicit premise of the mutual normative relevance of all the arbitral pronouncement", see above note 109, p. 4. See also Schill, see above note 3, Chapter VII.C.; see also G. Kaufmann-Kholer, "Arbitral Precedent: Dream, Necessity or Excuse", 23 *Arbitration international* (2007), p. 368. See also the remarks of Eric De Brabandere in his chapter in this volume.

other tribunals' decisions[172] which incrementally gained persuasive authority through subsequent references by other tribunals. In particular, the case law of investment tribunals is most often used by others for interpretative purposes.[173] It is true that the relevance of previous decisions by other tribunals is often assumed but rarely demonstrated.[174] Likewise, some tribunals follow the precedents set by others out of a sense of alleged duty[175] whilst other do so discretionarily.[176] It is also noteworthy that this cross-reliance between tribunals is not completely harmonious and is subject to variations,[177] as is illustrated by the fluctuating endorsement of the famous *Maffezini* jurisprudence and the inclusion of dispute settlement mechanisms in the scope of the MFN clause.[178] However, notwithstanding the varying and fluctuating motives behind this practice of the tribunals' inclination to cite one another,[179] the development of a

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[172] See e.g. *SGS Société Générale de Surveillance v. Republic of the Philippines. ICSID* Case N° ARB/02/6, and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, at para. 97; see also the reservations expressed by Brigitte Stern in *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, 2 June 2010, para. 100.

[173] See the comprehensive study of ICSID decisions by Ole Kristian Fauchald: Ole Kristian Fauchald, "The Legal Reasoning of ICSID Tribunals – an Empirical Analysis", 19 *EJIL* (2008), p. 335.

[174] Paparinskis, see above note 109, p. 11.

[175] Such a duty to follow precedents is sometimes espoused in the case law: *Saipem S.p.A. v Bangladesh*, ICSID Case no ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, para 67; *Victor Pey Casado and President Allende Foundation v Republic of Chile,* ICSID Case no ARB/98/2, Award, May 8, 2008, para 119.

[176] For traditional examples of *jurisprudence constante* short of any duty to follow precedents see *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Cases no ARB/02/6 and ARB/04/08, Decision of the Tribunal on Objections to Jurisdiction, January 29, 2004, para 97; *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, paras. 30–32; *Liberian Eastern Timber Corporation* (*LETCO*) *v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award of 31 March 1986; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 72.

[177] See also the chapter by Eric De Brabandere in this volume.

[178] See Chalamish, see above note 47, p. 329–334. For examples of tribunals following the Maffezini principle see *Siemens A.G. v. Argentine Republic*, ICSID, No. ARB/-2/8, Decision On Jurisdiction, 3 August 2003; *Camuzzi International SA v. Argentine Republic*, ICSID, No. ARB/03/7, 11 May 2005, *Gas Natural SDG S.A. v. Argentine Republic*, ICSID No. ARB/03/10, 17 June 2005. For a rejection of this understanding of the scope of the MFN clause see *Salani Costruttori SpA v. Hashemite Kingdom of Jordan*, ICSID, No. ARB 02/13, 29 November 2004; *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID, No. ARB/03/24, 8 February 2005.

[179] Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration", 30 *Fordham International Law Journal* (2006), p. 356; Kaufmann-Kholer, see above note 183, p. 368. See also the remarks of Eric De Brabandere in his chapter in this volume.

jurisprudence constante in the case law of arbitral tribunal is undeniable and constitutes a remarkable feature of the contemporary investment protection regime.

This use of precedent by international investment tribunals has already been the subject of wide-ranging empirical and systemic studies,[180] and it would be of no avail to expound on it here. It suffices here to point out that legal scholars have felt a need not to leave this practice unsystematized and unregulated. This is why attempts to formalize and systematize this tendency of investment arbitrators to refer to one another have been undertaken by scholars.[181] Customary international law has been precisely one of the conceptual tools to endow the *jurisprudence constante* with some rationality and generate predictability. In that sense, customary international law is seen as helping to shroud the practice of precedents in a source-based rationality, thereby giving the impression of a minimized choice in law-application and maximized predictability.[182]

The argument which I wish to make here is that resort to customary international investment law is superfluous. I argue that the phenomenon of cross-referencing between investment tribunals does not need to be justified or explained by a detour to customary investment law. *Jurisprudence constante* is a self-explanatory and self-sufficient phenomenon. It does not need to be "authorized" or "validated" by any secondary rule of the international investment system, and especially not by the theory of the sources of investment law. This tendency of investment tribunals to rely on one another is no different from the informal and factual influence of international law on domestic law or regional law on international law.[183] The similarity with the cross-fertilization found between separate regimes is not entirely surprising. Whatever the regime of which a judge is an agent, there is a natural loyalty among judges who inevitably

[180] For an empirical overview of the use of *stare decisis* in the case law of the ICSID arbitral tribunal see Fauchald, see above note, 185, esp. p. 333 et seq. (arguing that there is a tendency among ICSID tribunals to contribute to a homogenous development of the methodology of international law). For another empirical study of precedents in investment arbitration see J.P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence", 24 *Journal of International Arbitration* (2007), p. 129.

[181] see e.g. Paparinskis, see above note 109; Bjorklund, see above note 109, p. 273 et s.

[182] Customary international law is advocated as one of the ways to formalize *jurisprudence constante* by Paparinskis, see above note 109. p. 20–26 (talking about 'the most persuasive model for conceptualizing the developments [of jurisprudence constante]'. See also Bjorklund, see above note 109, p. 278.

[183] see d'Aspremont, see above note 176.

rely on one another across the boundaries of the legal system in which they are instituted. This judicial fraternity is the result of the constant and abiding quest by judges for the preservation of the authority of their pronouncements. It is a self-explanatory fact which is not in need of external validation.

If one still feels the need to explain and validate the practice of *jurisprudence constante*, the multilateral character of the investment protection regime provides, in my view, a sufficient basis. In that sense, I concur with Stephen Schill for whom such a *jurisprudence constante* can be satisfactorily explained by the multilateralization of investment law.[184] If we understand international investment law as a system based on uniform standards and rationales – a feature certainly reinforced by virtues of MFN clauses – the cross-referencing by tribunals is an inextricable factual phenomenon which ought not to be clarified through the lens of customary international law.[185]

In the light of the foregoing, I contend that the resort to customary international law to explain and validate *jurisprudence constante* is first an entirely vain endeavour. Besides being pointless, it is also, as was argued above,[186] highly conceptually deficient and brings about severe distortions of the theory of customary international law. And, last but not least, constructions informed by customary international law come at a price in terms of the normativity and authority of investment law as well as the legitimacy of investment tribunals.

7. *Concluding Remarks: Preserving the Authority and Efficacy of the Investment Protection Regime Short of Customary International Law*

The judicialization of investment protection has been one of the greatest achievements of the investment protection regime in recent decades. That success, however, remains contingent on several societal parameters. In particular, the current system's success and viability are deeply dependent on the preservation of the considerable powers conferred upon investment tribunals, which are themselves dependent on their ability to

[184] Schill, see above note 3, p. 26; For a criticism of this position see Paparinskis, see above note 109, p. 26–27.

[185] Schill, see above note 3, p. 372

[186] Cfr supra 5.

preserve their authority. The preservation of the authority of arbitral tribunals is what makes the question of the theory of the sources of investment law so cardinal. In other words, the crux of the theory of the sources of investment law is precisely the preservation of the legitimacy of the cross-referencing practice of investment tribunals.[187] Theories of sources are necessarily conducive to ensuring the legitimacy and authority of judicial decisions.

It is against this backdrop that this chapter has challenged the idea that customary international law constitutes the adequate route when it comes to ensuring the validity and legitimacy of *jurisprudence constante* as well as the harmonization of investment law. Preserving the authority of the judge – and hence the authority of the entire investment protection architecture – is better assured by virtue of multilateralization through BITs than on the basis of illusive and judge-made customary standards of protection.

This – somewhat provocative – finding is surely not arrived at without shedding some light on another irony permeating the whole theory of customary law. Indeed, it does not seem unreasonable to claim that the general theory of customary international law necessarily calls for the existence of a judicial mechanism able to ascertain rules of a customary character.[188] Short of such judicial machinery, customary international law is bound to remain a galactic creation deprived of authority and beset by indeterminacy. At the same time, as this chapter has shown in the particular context of investment protection, customary international law has the potential to undermine the authority of those judicial authorities effectively applying it. In that sense, customary international law, when being part of the applicable law of judicial bodies, corrupts the very institution which it needs to rely on to constitute a viable source of law. This theoretical irony surely contributes to unearthing further the – well-known and often-discussed – inconsistencies of the theory of customary international law. These few concluding remarks surely are not the place to engage with such uncontested flaws. Yet, nowhere are they more glaring than in the theory of the sources of investment law.

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[187] Bjorklund, see above note 109, p. 274; Paparinskis, see above note 109, p. 31.

[188] This is one of the argument I made in d'Aspremont, *see above note 70,* especially chapter 7.

CHAPTER TWO

PREFERENTIAL TRADE AND INVESTMENT TREATIES

Erik Denters

Contents

Introduction

Current international investment law is rooted in the international minimum standard, a principle of traditional international law.[1] Among the standard rights of aliens that were recognized are, *inter alia:* the right to receive due process, the right to be free from denial of justice and abusive treatment by public authorities, and the right to the enjoyment of property unless taken for a public purpose. In 1926, the General Claims Commission explained in *Neer* v *United Mexican States* when treatment of an alien would be substandard: "an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency".[2] Increasing international investment flows

[1] According to Emmerich De Vattel the obligation of states to protect the right of aliens was a natural right (*The Law of Nations, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns,* 5th Edition) E. (1839), Book II (Of A Nation Considered in Her Relation to Other States), Chapter VIII (Rules Respecting Foreigners).

[2] *United States* (*L.F. Neer*) *v. United Mexican States*, Award rendered on 15 October 1927, 21 AJIL (1927), p. 555.

during the first half of the 20th century stirred similar claims for the treatment of international investors. While challenged in a number of developing States by the adoption of the national treatment standard, the international minimum standard and its offspring – 'fair and equitable treatment' and 'full protection and security' – have currently been accepted in numerous Bilateral Investment Treaties (BITs). Against this backdrop the protection of investors as the primary incentive for promoting foreign investments can be explained. Accordingly, the Indian model BIT[3] stipulates in its preamble that the 'encouragement and reciprocal protection under international agreement of such investment will be conducive to the stimulation of individual business initiative and will increase prosperity in both States'. The German model states that 'the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations', and the US model recognizes that 'agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties'. BITs may generally be summarized as instruments that attempt to promote prosperity and economic development through the protection of investors and investments.

Considering that the objective of BITs is the promotion of investment flows between parties to the treaty, the question is whether the current legal approach is adequate. This chapter argues that the system of BITs falls short on a number of accounts. Firstly, traditional BITs are an anachronism in a globalized environment where trade and investment are closely intertwined. Bilateral or regional trade *and* investment treaties respond more adequately to what is needed to attract investments by also opening trade channels for the investor. Secondly, the overwhelming majority[4] of BITs do not offer market access or national treatment provisions in the pre-establishment phase,[5] whereas research suggests that

[3] Model BITs are available at http://italaw.com/investmenttreaties.htm (last accessed 13 December 2011).

[4] With some notable exceptions by which the right of establishment is already stipulated in the BIT. See e.g. Art. 3 of the US model BIT: "Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory." The Canadian model BIT has identical wording.

[5] And thus restricts admission rights subject to domestic law. See Art. 2 of the French Model: "Each Contracting Party shall promote and admit on its territory and in its maritime area, in accordance with its legislation and with the provisions of this Agreement, investments made by nationals or companies of the other Contracting Party".

liberal admission and establishment rules highly contribute to FDI.[6] Thirdly, on the legal front, BITs are highly problematic as they are a source of unjustifiable discriminatory treatment of service providers that invest in a foreign country. There are compelling claims that BITs providing for different levels of protection for service suppliers, violate the most-favoured-nation (MFN) principle of the General Agreement on Trade in Services (GATS).

Trade and Investment Complementarity

International trade and investment liberalization are complementary activities in the sense that both activities are mutually reinforcing rather than competing.[7] Foreign investors consume and produce goods and services and, generally, a liberalized trading system opening up markets will contribute to a positive investment climate. For foreign investors, a liberalized trading environment is important as manufacturers of industrial goods operate differently compared with a few decades ago. Goods are no longer manufactured from the ground in a single production facility. Instead, investors manufacturing complex industrial goods have moved from vertical to horizontal supply chains. Horizontal supply chains refer to manufacturing where parts of end-products are imported and assembled in the host country.[8] Suppliers may be foreign branches of the investor or contracted foreign suppliers. Accordingly, a car manufacturer depends on supplies from different jurisdictions: gear boxes, dashboard layouts, navigation equipment and other parts are produced by different specialized manufacturers that may be located outside the host country.[9] Another example is the Apple iPhone that is designed in the US and put

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[6] Axel Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy, "Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box", Kiel Working Paper No. 1647 September 2010.

[7] See e.g. James R. Markusen, "Trade versus Investment Liberalization", *NBER Working Paper* No. 6231, October 1997.

[8] Sandor Boyson, Lisa H. Harrington, Thomas M. Corsi, *In Real Time: Managing the New Supply Chain* (Praeger Publishers, 2004). This process may also be called offshoring, meaning shifting manufacturing or services abroad. See OECD, "Offshoring and employment", Chapter 1, Defining Offshoring, 2007.

[9] John Sutton, "The Auto-component Supply Chain in China and India -A Benchmarking Study", *London School of Economics and Political Science*, 2004. http://sticerd.lse.ac.uk/dps/ei/ei34.pdf (11May 2011) London School of Economics and Political Science. Sutton explains how cross-border supplies chains have developed in the 1990s in the car industry. Other examples concern computer and laptops. Components (motherboard, processor, memory, hard disk, casing etc.) are produced by manufactures located in different countries. For the

together by Foxconn, a Taiwanese company with production facilities in Chengdu, China. For the assembly line components are imported from South Korea, Italy, Japan and the United States. The final product will then be sold on the world markets. For investors, liberalized trade flows to and from the host country are therefore fundamental for a decision to invest. Liberalized markets offer the opportunity to reap the benefits of scale economies. Investing in a country that is a member of the World Trade Organisation (WTO) or has joined a regional trade agreement would provide this opportunity.[10]

The relationship may not always be complementary. There is a competitive correlation between trade and investment when high tariff walls need to be circumvented by investments. A State maintaining steep import charges may therefore be 'rewarded' by FDI if it fails to liberalize trade in particular areas. This 'reward' may be detrimental to neighbouring countries that have opened their market in the spirit of trade liberalization. In April 2011 Foxconn considered investments in Brazil in order to bypass protectionist tariffs. Foxconn negotiated an agreement with the Brazilian authorities early in 2011 as "Brazil has one of the steepest import-tariff regimes in South America".[11] Another example is the effort to circumvent trade protectionism through anti-dumping duties by setting up assembly lines in the State threatening to impose such duties.[12]

Despite the economic nexus between trade and investment, a coherent structure of trade and investment arrangements is non-existent in the domain of international economic law.[13] The limited connectivity is a far cry from the integrated system of trade and investment which was introduced in the stillborn International Trade Organisation (ITO).[14] The ITO addressed the desire to liberalize both trade and investment flows; its

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expansion of size see the index of outsourcing published by TPI, an Information Services Group company advising companies on sourcing strategies. http://www.tpi.net/. The trend in outsourcing appears to be shifting according to the Economist, "The Trouble with Outsourcing", 30 July 2011, p. 58.

[10] WTO, "Trade and Foreign Direct Investment", 9 October 1996.

[11] http://www.reuters.com/article/2011/04/12/brazil-foxconn-idUSL3E7FC2IR20110412?pageNumber=1.

[12] "China Bends to U.S. Complaint on Solar Panels but Plans Retaliation". The New York Times, 21 November 2011. At http://www.nytimes.com/2011/11/22/business/global/china-bends-to-us-complaint-on-solar-panels-but-also-plans-retaliation.html.

[13] Stefan D Amarsinha and Julian Kokott, "Multilateral Investment Rules Revisited", in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino, and Christoph Schreuer (Oxford: Oxford University Press, 2008), p. 120.

[14] The Havana Charter of 1947 appears at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf.

purposes stipulated the promotion of national and international action to increase "the production, consumption and exchange of goods, and thus to contribute to a balanced and expanding world economy" and to "encourage the international flow of capital for productive investment." Art. 12 of the Havana Charters called on member States "to provide reasonable opportunities for investments acceptable to them and adequate security for existing and future investments, and to give due regard to the desirability of avoiding discrimination as between foreign investments". Thereby, the ITO addressed market access, protection and non-discrimination. The interplay between trade and investment as envisaged in the ITO finds no like in the current system.

Since the creation of the GATT, the relationship between trade and investment has been recognized. As explained by the World Trade Organisation in a Press Release just after its establishment, considering the relationship between trade and investment, "Foreign Direct Investment can be a source not just of capital, but also of new technology and other intangibles such as organisational and managerial skills, and marketing networks. It can also boost trade, economic growth and employment in host countries by providing a stimulus to the production of locally produced inputs, as well as to competition, innovation, savings and capital formation. Furthermore, FDI gives the investor a stake in the future economic development of the host country. In short, it is a key element for promoting growth and progress in developing countries".[15] In this vein the WTO made some attempts to incorporate investment regulation into its legal framework at the Fourth Ministerial Meeting in Doha in 2001, recognizing "the case for a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment, particularly foreign direct investment, that will contribute to the expansion of trade, and the need for enhanced technical assistance and capacity building in this area". However, after the confrontational meeting at Cancun between developed and developing countries, this plan was taken off the agenda. Weiss identifies a number of reasons.[16] Firstly, developing countries argued that the implementation of WTO agreements already placed a considerable burden on them and negotiating a multilateral investment

[15] WTO Press Release (PRESS/57), "Trade and foreign direct investment" (1996). http://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

[16] Friedl Weiss, "Trade and Investment", in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino and Christoph Schreuer (Oxford: Oxford University Press, 2006), p.184–192.

agreement would not be appropriate under these conditions. Secondly, a number of key developing countries argued that investment policies must continue to be national policies and it would be undesirable to bring this policy under the WTO umbrella. Moreover, there was no necessity to replace the BITs framework by a WTO arrangement. Thirdly, investment law should be considered from a developmental perspective, and therefor UNCTAD would be a more appropriate forum for negotiations. Fourthly, there was a fear from developing countries that a WTO framework would interfere with the already imposed domestic policies on the admission of investments. A one-size-fits-all approach would be incompatible with this *a la carte* approach. Finally, developing countries, while recognizing the need to attract investments, felt a strong desire to restrict foreign direct investments (FDI) in order to protect their own industries.

The feelings against a WTO investment regime also appear to reflect the general discontent of developing countries with the WTO framework. These members, fearing loss of control over negotiations, may have considered that the final result would be a take-it-or leave-it dictate, keeping in mind the disillusionment of many developing countries after the Uruguay Round.[17] Another practical problem of the WTO in this context is the principle of the single undertaking.[18] Any new controversial agenda item of a WTO trade round would further jeopardize the chances of a successful conclusion and should therefore be carefully considered. It is highly unlikely that in the near future the WTO will resume its activities on establishing a global framework for the promotion and protection of investments.

Market Access under GATS, Protection under BITs

Some WTO provisions touch upon investment issues and are merely peripheral to trade regulations. The Agreement on Trade Related Investment Measures (TRIMS) provides that no WTO member shall apply investment measures that are incompatible with Arts III (national treatment) and XI (prohibition of quantitative restrictions) of the GATT. To this

[17] For a number of reasons according to *The Guardian*. http://www.guardian.co.uk/global-development/poverty-matters/2011/nov/14/wto-fails-developing-countries.

[18] The single undertaking requires WTO members to accept or reject the outcome of multiple negotiations in a single package, rather than select among them. For a critical review and alternative solutions see Craig Van Grasstek and Pierre Sauvé, "The Consistency of WTO Rules: Can the Single Undertaking be Squared, with Variable Geometry?", *Journal of International Economic Law* 9(4) (2006), p. 837–864.

end TRIMS appends an illustrative list of measures that are deemed to be incompatible with these provisions. Other agreements touching upon investment issues are the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), The Agreement on Government Procurement (GPA) and the Agreement on Subsidies and Countervailing Measures (ASCM).[19]

A more significant agreement concerning investments is GATS which creates rules on market access for services and "for all practical purposes constitutes a multilateral agreement on investment",[20] albeit with limitations. Art. XVI(1) of GATS stipulates that "[e]ach Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule". A GATS schedule is based on a 'positive list' that indicates which market sectors are open for services and suppliers. The schedules refine the methods by which services can be produced or consumed by the introduction of various 'Modes'. Mode 3 provides the gateway for investment in services, whereby parties commit to offer market access (In GATS terminology: 'commercial presence in the territory of any other Member') to service suppliers provided that members have accepted this as is shown in their schedules.

Virtually all activities by a foreign service supplier that is offered market access under GATS are deemed to be covered by rules of international investment protection as well. However, not all foreign investors may be considered foreign service suppliers. Activities of a foreign investor that are strictly confined to the manufacturing of goods are beyond the GATS purview, provided the investor is not in maintenance and repair of equipment, distribution, sales or other forms of providing services.[21] An example will illustrate the nexus between GATS and BITs: according to the GATS schedules of China, a Dutch service supplier may in China be engaged in environmental services, such as sewage services or solid waste disposal services, in a joint venture with a Chinese company.[22]

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[19] For an overview of relevant WTO understanding and agreements see Weiss, see above note 16, p.192–206. Also Micheal Gestrin and Alan Rugman, "Rules for Foreign Direct Investment at the WTO: Building on Regional Trade Agreements", in *The World Trade Organisation Legal, Economic and Political Analysis*, ed. Appleton, A.E., Plummer, M.G. (Springer, 2005) p. 314–323.

[20] Mitsuo Matsushita, Thomas J. Schoenbaum, and Petros C. Mavroidis, *The World Trade Organisation Law, Practice, and Policy* (Oxford: Oxford University Press, 2002), p. 531.

[21] The WTO publishes a 'Services Sectoral Classification List' on its Services Database Website. http://tsdb.wto.org/default.aspx.

[22] Both The Netherlands and China are WTO members.

The relevant schedule[23] allows the Dutch supplier to bring in management, capital, patents and other economic assets. At the same time, the investment made by the Dutch service supplier is protected under the BIT that China has concluded with the Netherlands. The BIT defines as an investment "every kind of asset invested by investors of one Contracting Party in the territory of the other Contracting Party, and in particularly, though not exclusively, includes: … shares, debentures, stock and any other kind of participation in companies; … intellectual property rights, in particularly copyrights, patents, trade-marks, trade-names, technological process, know-how and goodwill". The BIT also stipulates that investors would enjoy fair and equitable treatment and be protected against "any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors". Accordingly, the Chinese GATS Schedule and the BIT create a dual arrangement for investors: market access under GATS and protection under the BIT. Clearly, this arrangement is attractive for a Dutch investor but would be discriminatory for similar investors domiciled in a State that is a member of the WTO but has not concluded a BIT with China.

The Problem with BITs

While BITs offer flexibility and an *à la carte* approach in treaty negotiations, there are considerable drawbacks as BITs are a source of discriminatory treatment. Firstly, foreign investors may enjoy varying degrees of protection depending on the presence of a BIT with the home State. Each BIT provides a distinctive set of protective clauses and avenues for legal recourse. Some investors may even forsake any form of protection under BITs, as their home State has not concluded an agreement with the host State. The ensuing discriminatory treatment of foreign investors may amount to unjustifiable discrimination or a governmental barrier to competition, and thereby a restriction on the freedom to compete.[24]

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[23] The sectors include "ENVIRONMENTAL SERVICES (excluding environmental quality monitoring and pollution source inspection) A. Sewage Services (CPC 9401) B. Solid Waste Disposal Services (CPC 9402) C. Cleaning Services of Exhaust Gases (CPC 9404) D. Noise Abatement Services (CPC 9405) E. Nature and Landscape Protection Services (CPC 9406) F. Other Environmental Protection Services (CPC 9409) G. Sanitation Services (CPC 9403)". The commercial presence (mode 3) allows that "Foreign services suppliers engaged in environmental services are permitted to provide services only in the form of joint ventures, with foreign majority ownership permitted".

[24] Distortion of competition may arise not only from the behaviour of commercial parties, but also by the behaviour of states. On the complementarity of trade, investment and

Discriminatory treatment of foreign investors may in itself constitute violation of the fair and equitable treatment standards[25] under customary international law.[26] The situation may become even more complex when the position of domestic investors is considered: how will they be treated in comparison with foreign investors that may be protected by a BIT, or foreign investors which are not protected by a BIT? Lesser protected investors may suffer from a disadvantageous position in a competitive environment.

Discriminatory treatment of foreign investors that rely on protection under a BIT is *prima facie* ironed out by the MFN clause that is common in BITs. This holds true when the MFN clause is formulated broadly or generally, and does not explicitly restrict the applicability of MFN treatment to specific provisions of the BIT. The MFN clause would allow an investor in a dispute with the host State to invoke clauses of another BIT, concluded by the same State, in order to obtain more favourable substantive treatment. As a general rule, therefore, all investors protected by a BIT that holds an MFN clause enjoy non-discriminatory protection offered by the most generous protective clauses in any BIT concluded by the host State. To some extend MFN clauses have indeed given investors more favourable substantive treatment, but when it comes to applying MFN treatment in jurisdictional issues, and in particular the scope of the subject matter in arbitral clauses, equal treatment claims appear to be less successful. The deficient functioning of the MFN clause in jurisdictional matters cannot

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competition see Bartók, C. and S. Miroudot (2008), "The Interaction amongst Trade, Investment and Competition Policies", *OECD Trade Policy Working Papers*, No. 60, OECD Publishing. http://dx.doi.org/10.1787/241467172568.

[25] There may be different understandings of the scope of fair and equitable treatment. According to UNCTAD, "[f]rom the perspective of the investor, the fair and equitable component provides a fixed reference point, a definite standard that will not vary according to external considerations, because its content turns on what is fair and reasonable in the circumstances. The fair and equitable standard will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances. Simultaneously, national and MFN treatment, as contingent standards, protect each beneficiary of these standards by ensuring equality or non-discrimination for that beneficiary vis-à-vis other investments." See also UNCTAD (ed.), "Fair and Equitable Treatment", *UNCTAD Series on Issues in International Investment Agreements*, 1999, p. 16; and Ioana Tudor, *The Fair and Equitable Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), p. 83–84.

[26] However, it seems unlikely that the fair and equitable treatment standard as applied in BITs is part of customary international law. For an overview of opinions see Marcela Klein Bronfman, "Fair and equitable treatment standard in International investment law", *Max Planck Yearbook of United Nations Law*, Volume 10, 2006, p. 609–680. See also *OECD Working Papers on International Investment*, Number 2004/3. See also the contribution by Jean d'Aspremont to this volume.

be easily disregarded, as review by international tribunals of administrative behaviour towards investors constitutes a core element of BITs. Julie Maupin has explored jurisdictional clauses in a selected number of BITs and the rate of success when claimants invoke MFN treatment in order to expand the span of subject matter to be considered by international tribunals.[27] For example, in BIT A the subject matter before tribunals was restricted to the amount or method of compensation in cases of expropriation, whereas in BIT B, concluded by the same host State, the subject matter would also allow for review of fair and equitable treatment and full protection and security. Maupin finds that in seven out of eight awards the tribunals have rejected MFN application so as to allow for expansion of subject matter, but she also underscores that within tribunals there is no consensus on this approach. Scholars also strongly disagree on the reach of MFN clauses in jurisdictional matters.[28] In conclusion, therefore, MFN may offer non-discriminatory treatment of foreign investors, but considerable limitations exist. Generally, the MFN clause will only operate to the extend that BITs are compatible; MFN cannot lead to the creation of new substantial rights enforceable before international tribunals or 'regime change'.[29] Moreover, domestic investors and foreign investors not protected by BITs may face outright discriminatory treatment and do not have access to an international tribunal unless some other avenue for access to an international tribunal is accepted by the host State.

The EU may be considered as an example where discriminatory treatment of foreign investors has been addressed after the conclusion of the Lisbon Treaty. Art. 207 makes FDI part of the common commercial policy, based on uniform principles. The legal protection of foreign and domestic investors is likely to become subject to such principles. This may incite the EU to impose obligations upon its members aimed at removing actual as well as potential distortions of competition for foreign and domestic investors. Accordingly, to the extent that BITs of EU members appreciably

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[27] Julie A. Maupin, "MFN-based Jurisdiction in Investor–State Arbitration: is there any Hope for a Consistent Approach?", 14 *Journal of International Economic Law* No. 1 (2011), p. 157–190.

[28] For opposing views of two scholars see Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails", 2(1) *Journal of International Dispute Settlement* (2011), p. 97–113, Stephan W. Schill, "Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas", 2(1) *Journal of International Dispute Settlement* (2011), p. 353–371

[29] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), p. 191.

distort competition[30] within the EU, measures may be taken to iron out such distortions.[31]

Secondly, GATS, as argued above, sets rules for services and foreign services suppliers, and *de facto* for investors. The differential treatment of investors incited by BITs may in light of the GATS be considered a prohibited discriminatory treatment. Art. II of GATS reads:

> "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

The language clearly defines a wide range of measures – '*any* measure' – that may be covered under this provision.[32] Article I:3 states that measures by Members will include 'any measure taken by central, regional or local governments and authorities, as well as non-governmental bodies in the exercise of powers delegated [by those governments and authorities]'. Article XXVIII (a) defines 'measure' as 'any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form.' In addition, 'the obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination.'[33] It will therefore be hard to deny that the conclusion of a BIT, which must be approved by statutory law in most States, constitutes a 'measure'. Ortino concludes, after applying the three tier test[34] of Art. II, that BITs may represent a breach of the MFN clause in the GATS, as service suppliers established in WTO members that have not

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[30] The concepts of 'appreciable' and 'actual as well as potential' distorsions were developed in two judgments by the Court of Justice of the European Union. Judgment of the Court of 5 October 2000. Federal Republic of Germany v European Parliament and Council of the European Union. Directive 98/43/EC – Advertising and sponsorship of tobacco products – Legal basis – Article 100a of the EC Treaty (now, after amendment, Article 95 EC) Case C-376/98. Judgment of the Court of 11 June 1991. – Commission of the European Communities v Council of the European Communities. – Directive on waste from the titanium dioxide industry – Legal basis. – Case C-300/89.

[31] Catherine Barnhard, *The Substantive Law of the EU, The Four Freedoms* (Oxford: Oxford University Press, 2010) p. 610.

[32] The Panel on EC—Bananas III defined the scope of application of the GATS generously: "no measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."

[33] Appellate Body Report on EC—Bananas III, paras. 231–234.

[34] Analysing what is a 'measure', what is a 'like service' and what is 'less favourable treatment'? Federico Ortino, 'The principle of non-discrimination and its exceptions in GATS:

concluded a BIT are discriminated against. In addition, Art. VI (2) of GATS is relevant.

> "Each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services …"

The creation of an arbitral tribunal and procedures for the purpose of review of administrative decisions must be considered to be 'measure' under Article II. Discriminatory access to a tribunal such as ICSID tribunals (depending on the existence of a BIT) constitutes a conflict with Art. VI (2). A caveat on the applicability of Art. VI (2) is that its subtitle refers to 'Domestic Regulation', thereby *prima facie* excluding international tribunals such as tribunals established under the ICSID Convention. However, BIT clauses may be incorporated or implemented in domestic law. Indeed, BITs must operate on the domestic level in order to provide legal protection to investors and investments.

It is only with reluctance that a sweeping conclusion on the incompatibility of more than 2800 BITs with GATS MFN obligations can be accepted. The question whether States have ever anticipated or perceived a potential conflict between BITs and the MFN clause, or why they have not bothered to prevent conflicts, remains unanswered.

Finally, litigation between host countries and investors may easily lead to inconsistent jurisprudence.[35] The reference to ICSID tribunals composed by arbitrators which may hold divergent views on fundamental concepts[36] may create uncertainty and increase litigation costs. Although undesirable, such divergence may be justifiable when based on distinctive BITs. Each BIT may have unique wording, context and may be interpreted in conjunction with additional documents.[37] An investor may decide to take a 'long shot' even if previous awards on similar cases would offer little justification for a lengthy and costly procedure. Schill finds that the variety of sources and different contexts of even identical BIT clauses may easily

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Selected legal issues', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979481 2006, 20–25.

[35] See also the contribution by Eric De Brabandere to this volume.

[36] For a conspicuous example see Micheal Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E", 20 *Leiden Journal of International Law* (2007) p. 637–648.

[37] As explained in Art. 31 of the Vienna Convention on the Law of Treaties.

lead to incoherent decisions of ad hoc tribunals, making investment arbitration an adventurous exercise.[38]

Shifting from BITs to PTIAs – Intra Market Arrangements

The number of BITs has grown to 2,807 in 2010 with the potential of an increase up to 18,528 BITs, if each of the 193 States[39] were to conclude a BIT. Simultaneously, there has been a substantial increase in Preferential Trade Agreements (PTAs). 505 PTAs, counting goods and services notifications separately, have been notified to the GATT/WTO.[40] Of these, 367 PTAs were notified under Article XXIV of the GATT 1947 or GATT 1994; 36 under the Enabling Clause; and 102 under Article V of the GATS. At that same date, 313 agreements were in force. Of this list 77 PTAs have been recorded as including investment protection and market access clauses; these may be called Preferential Trade and Investment Treaties (PTIAs). The list is likely not to be complete as it excludes unnotified investment protocols that were concluded subsequently to trade agreements. Contrary to the BITs the PTIAs may be multilateral, although most PTIAs are bilateral.

PTIAs may appear under different names to underline a special relationship: Regional Trade Agreements, Economic Partnership Agreements, Trade Promotion Agreements, Free Trade Agreements, Economic Unions, Custom Unions or Common Markets. Treaties may reflect variable levels of trade liberalization: agreements may address market access for goods only, and not for services. Other agreements may open up markets for both goods and services. The most advanced treaties take a thoroughly integrated approach towards both trade in goods and services and investment; for most of these economic activities market access for both trade and investment is offered. Accordingly, investment clauses in PTIAs may go beyond the arrangements in traditional BITs. Both include investment protection clauses, but PTIAs may also contain right of admission and establishment clauses.

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[38] Schill, see above note 28, p. 285–287.

[39] Number of states according to UN data. http://www.un.org/en/members. The calculation would be: State 1 conclude 192 BITs, State 2 concludes 191 Bits and so forth.

[40] The database can be accessed at http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx.

Five multilateral PTIAs can be identified as having considerable GDP coverage:[41] NAFTA (The North American Free Trade Agreement), MERCOSUR (Mercado Comun del Cono Sur – Southern Cone Common Market), EU (European Union), ASEAN (Association of South-East Asian Nations) and SADC (Southern African Development Community). These PTIAs all include clauses on investment liberalization and protection applicable between members. In addition, energy specific investments are liberalized and protected under the Energy Charter Treaty.[42] However, the ECT falls somewhat outside the traditional PTIA system, as it is limited to one type of investment and concerns only trade and investment liberalization of energy. The most developed provisions on investment liberalization can be found in NAFTA and the EU; ASEAN and MERCOSUR are making progress towards liberalization, albeit with mixed results. These agreements offer market access, pre-establishment rights and rules on investment protection. NAFTA, in its Chapter 11, provides for national treatment for both investors and investments by stipulating "treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[43] The EU contemplates primary and secondary establishment rights for companies: the right to set and manage new undertakings and the right to set up agencies, branches or subsidiaries of any Member State established in the territory of any Member State.[44] The ASEAN concluded in 2009 the ASEAN Comprehensive Investment Agreement which offers national treatment in market access similar to that of NAFTA.[45]

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41 All G-20 countries, being the systemically important industrialized and developing economies and representing almost 90% of the world's GDP, take part in these five RTIAs or are closely connected with these multilateral RTIAs through bilateral RTIAs, with the notable exceptions of Russia and Saudi Arabia. For information on the G-20 including information on size see The G-20 Information Centre of the University of Toronto, at http://www.g20.utoronto.ca.

42 See in this respect, the contribution by Matthew Happold to this volume.

43 Article 1102: National Treatment: 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

44 Art. 49 TFEU.

45 The agreement is the result of a consolidation and revision of two ASEAN Investment Agreements: the 1987 ASEAN Agreement for the Promotion and Protection of Investments

MERCOSUR concluded the Colonia Protocol for the Promotion and Reciprocal Protection of Investments in 1994, providing for the admission of investments in its territory in a way that is no less favourable than that accorded to its own investors or investments of third States. However, parties failed to ratify this agreement.[46] Finally, SADC also includes investment clauses but leaves market access to domestic jurisdiction.[47]

In sum, effective agreements pledging intra-market access and protection are NAFTA, the EU and ASEAN. The ASEAN-agreement is from a more recent date (2009) and is, awaiting ratification, waiting for its entry into force. The MERCOSUR agreement was adopted in 1993 but has not entered into force.

PTIAs – Extra-Market Access Agreements

Of these five PTIAs, the EU is most advanced in the process of creating a common policy on the admission and protection of foreign investments, that is investments from non-EU investors. Clauses on FDI have been inserted in its Articles on Common Commercial Policy, by amendment of the treaty in late 2009.[48] Articles 206 and 207 stipulate that the Union "shall contribute to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign

(known as the Investment Guarantee Agreement "ASEAN IGA'), and the 1998 Framework Agreement on the ASEAN Investment Area (commonly known as the "AIA Agreement'), as well as its related Protocols. Article 5 provides for National treatment.

"1. Each Member State shall accord to investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. "Each Member State shall accord to investments of investors of any other Member State treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the admission, establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments."

[46] Art. 2 provides that "Each Contracting Party shall promote investments of investors of the other Contracting Parties and shall admit these investments in its territory in a way that is no less favorable than that accorded to its own investors or investments of third States, taking into account the right of each Party to maintain limited exceptions [as listed in the Annex to this Protocol] for a transitory period of time. (exceptions to national treatment in tax matters)".

[47] SADC Protocol on Finance and Investment, Annex 1 "Art. 2 Promotion and Admission of Investments 1. Each State Party shall promote investments in its territory, and admit such investments in accordance with its laws and regulations."

[48] The Treaty of Lisbon entered into force on 1 December 2009.

direct investment"; it shall develop common commercial policy "based on uniform principles, particularly with regard to … foreign direct investment …". Thereby, the competence to conclude investment treaties has been shifted to the community level and, accordingly, the competence of EU members to conclude BITs without the EU's prior consent has ceased to exist.[49] This means that the EU is required to draft a model agreement on investment relations with third countries. Particularly problematic is the division of powers between the EU and its members concerning FDI, portfolio investments and capital movements under Arts 64 and 65 TFEU. It is as yet unclear how the EU will give shape to its policy on investment.

MERCOSUR parties in 1994 adopted the Protocol on Promotion and Protection of Investments Coming from non-MERCOSUR State Parties,[50] thereby agreeing on a common policy on extra-market access. Its preamble underscores the need for a common policy in order to reconcile "the general legal principles to be applied by each of the State Parties to investments coming from non-MERCOSUR States so as not to create differentiated conditions that would distort the flow of investments". The protocol has not been ratified by any of the MERCOSUR parties.

ASEAN parties jointly have concluded or are in the process of concluding PTIAs ("Comprehensive Economic Partnership Agreements") with China, India, Japan and other regional partners, making ASEAN a potentially formidable single economic market. These agreements are a prelude to investment agreements. The ASEAN–China Investment Agreement, signed on 15 August 2009, progressively liberalizes investment regimes and provides for protection of investments. In both MERCOSUR and ASEAN the member States are party to extra-market access agreements; the institutions as legal persons are not considered to be bound as their representative bodies did not sign the treaties.[51]

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[49] For comments see Wenhua Shan and Sheng Zhang, "The Treaty of Lisbon: Half Way Toward a Common Investment Policy", 4 *European Journal of International Law* (2011), p. 1049–1073. Christoph Hermann, "The Treaty of Lisbon Expands the EU's External Trade and Investment Powers", *ASIL Insights*, September 21, 2010. Nikos Lavranos, "New Developments in the Interaction Between International Investment Law and EU law", 9 *The Law and the Practice of International Courts and Tribunals* (2010), p. 409–441.

[50] English text available at http://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=79.

[51] Notwithstanding, the legal personality of ASEAN is provided for under Article 3 of the ASEAN Charter, which states that, "ASEAN, as an intergovernmental organisation, is hereby conferred legal personality". MERCOSUR gained international legal personality by the Protocol of Ouro Preto (17 December 1994). The Protocol provides that MERCOSUR shall

Market Access Rights: Admission and Establishment

A closer look at the investment paragraphs in the PTIAs reveals that investment clauses go beyond the usual arrangements in BITs, in that a right to market access may be included. Market access may take different shapes.[52] The most restrictive is the controlled entry model, leaving the decision to allow admission and entry to the discretion of local authorities, which must decide in accordance with domestic law. On the other side of the spectrum is the full-liberalization model which offers a liberalized system. A full-liberalization model is unlikely to be applied without conditions as specific market sectors may be excluded or categories of investors may be banned. In this respect different terminologies are used: right to admission and right to establishment. The difference may depend on the level or intensity of the proposed investment. The right of admission deals only with the right of entry, i.e. the conditions for admission, whereas the right of establishment deals with the way the investor develops its activities over the duration of the investment. In the same vein a distinction is made between a permanent right of market access and a right to permanent establishment. Market access rights will allow investment activities without setting up a permanent business presence, whereas a permanent establishment would be a fully-fledged investment, including a representative office and production facilities.

It is however unclear to what extent PTIAs and State practice have adopted this approach. A distinction could be made based on the intention of the investor: he may need an investor's right for the purpose of trading, not requiring an establishment or only a small-sized establishment, or for the purpose of producing goods or services, requiring a substantial establishment. Another distinction would be portfolio investments and foreign direct investment. Portfolio investments could be realized without setting up an establishment. It is likely that investment may take different shapes and practice may show that each investment activity has distinctive features. Moreover, trade-related or portfolio investments

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have a legal personality of international law and authorizes its Council "To negotiate and sign agreements in the name of MERCOSUR with third countries, groups of countries and international Organizations".

[52] For a debate see Ignacio Gómez-Palacio and Peter Muchlinski, "Admission and Establishment", in *The Oxford Handbook of International Investment Law*, ed. Peter Muchlinski, Federico Ortino and Christoph Schreuer (Oxford: Oxford University Press, 2006), p. 229–256.

may easily develop into a more substantive establishment in a short period of time, depending on market conditions.

Establishment rights create the strongest rights for investors. The distinction between admission rights and establishment rights cannot clearly be discerned under GATS. Mode 3 determines that a service may be supplied "by a service supplier of one Member, through commercial presence in the territory of any other Member". In Mexico-Telecoms the Panel stressed that commercial presence required 'the presence of the service supplier within the territory where the service is supplied' and this presence refers to 'any type of business or professional establishment'.[53] However, there may be a distinctive approach in the schedules of individual members that resembles the admission/establishment approach. Accordingly, members may in their schedules accept obligations on establishment rights, but they may also impose some confines on commercial presence, such as limitations on local ownership.

Concluding Observations on the Future of PTIAs

BITs create a highly fragmented and uncertain legal environment. Bringing market access and protection of investments under the scope of more broadly defined PTIAs creates considerable advantages. Firstly, the objective of promoting investment will be better served in an environment where trade and investment are recognized and treated as mutually reenforcing. Modern business practices demonstrate that investors need markets that can be reached by liberalized trade channels.

Secondly, due to a large volume of BITs a highly fragmented system of investment protection has been created in which legal uncertainty is omnipresent. Multilateral PTIAs contribute to defragmentation as there will be a single intra-PTIA investment regime. In addition, PTIAs as legal entities or members of the PTIAs jointly may decide to conclude single investment treaties with non-members. With regard to the ten ASEAN member States, each of the members has concluded an identically phrased investment agreement with China, subject to the ASEAN Partnership Agreement. The 2009 ASEAN–China Investment Agreement replaces earlier distinct BITs concluded between China and individual ASEAN parties. In the case of the EU, the total number of 1200 BITs concluded between EU members and third countries will be substantially reduced once the EU

[53] Panel Report on Mexico—Telecoms, WT/DS204/R, 2 April 2004, paras. 7.30–7.31.

exercises its exclusive competence effectively. The questions how and when the individual members need withdraw the BITs concluded with third States are still subject to debate.[54]

Thirdly, moving from BITs to PTIAs would improve legal consistency. Whereas BITs are alien to the structure of the WTO, PTIAs are tolerated as exceptions to MFN. Art. V GATS provides that the agreement shall not prevent any of its Members from being a party to or entering into a preferential agreement further liberalizing trade in services, provided that such agreement has substantial sectoral coverage and provides for the absence or elimination of substantially all discrimination.[55] This provision is designed to allow for more advanced market access for service suppliers of PTIA members. For the purpose of trade in services this provision clearly allows for an MFN exception. It is as yet unclear whether the MFN exception would also apply to the legal protection of service suppliers or investors. *In casu* the question may be raised whether fair and equitable treatment offered to investors established in a PTIA member would amount to more favourable treatment, and therefore constitute a violation of Art. II GATS. Alternatively, the question would be: is fair and equitable treatment in a PTIA covered by the MFN exceptions under Art. V GATS?

Finally, the rise of PTIAs is the result of two converging forces that join trade and investment regimes. Firstly, States are driven towards regionalism because of the weaknesses and deficiencies of the world trading system and the failure in the WTO to achieve progress in the Doha round. A rational reaction is that if trade liberalization cannot be achieved globally then regionalism must be the answer.[56] Secondly, States take advantage of regional arrangements by moving away from a highly fragmented investment regime to a regional approach. This includes the adoption of intra- and extra-investment regimes. The EU and ASEAN have taken some major steps towards adopting investment arrangements with third States.

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[54] See report of the Committee on International Trade of the European Parliament, "Report on the Future European International Investment Policy" (2010/2203(INI)), 22 March 2011. Lavranos, see above note 49, p. 409–441.

[55] The elimination of discrimination within a preferential agreement refers to the requirement to offer full national treatment to foreign service suppliers, in "respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers". This is explained in Art. V (1b).

[56] Fred Bergsten, "Plan B for World Trade", *Financial Times*, August 15, 2006. Rafael Leal-Arcas, *International Trade and Investment Law* (Cheltenham: Edward Elgar Publishing, 2011), p. 78.

CHAPTER THREE

THE ENERGY CHARTER TREATY

Matthew Happold and Thomas Roe*

Contents

Introduction

In contrast to the thousands of bilateral investment treaties, there are relatively few multilateral investment agreements. One of most widely ratified is the Energy Charter Treaty ('ECT').[1] It opened for signature on 17 December 1994, came in force on 16 April 1998, and now has some 47 parties (46 States and the European Union). Although it applies to only one, albeit very important, sector of the economy – the energy sector – the ECT has a potentially global reach, its States parties stretching from Ireland in the west to Japan and Russia in the east.[2] It is by no means a merely regional treaty. Moreover, the ECT is more than an international investment agreement: it also covers trade, transit and the environment. However, it is an extremely complex instrument and one that is, moreover, perhaps not always as well-drafted or coherent as it might be.

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[1] Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Conference, opened for signature in Lisbon on 17 December 1994 and corrected by the Protocol of Correction of 2 August 1996, 2080 UNTS 100, 34 ILM 360.

[2] Russia has not ratified the ECT and terminated provisional application of the Treaty with effect from 18 October 2009. But it remains bound to apply the Treaty for twenty years in respect of all investments made before termination: Art 45(3)(b) ECT.

The obligations which Contracting Parties undertake towards Investors of other Contracting Parties and their Investments[3] are set out in Part III of the ECT ('investment promotion and protection') and the provisions for the settlement of investor–State disputes appear in Article 26 in Part V ('dispute settlement'). Article 26 provides for the submission of disputes to arbitration: to ICSID (under the ICSID Convention or the Additional Facility Rules), the Arbitration Institute of the Stockholm Chamber of Commerce, or ad hoc arbitration under the UNCITRAL Arbitration Rules.[4] In such cases, the tribunal 'shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.'[5]

1. *The Applicable Law*

Article 26(1) refers specifically to '[d]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III'. However, in order properly to comprehend Contracting Parties' investment obligations it is necessary to look beyond Part III of the ECT; to examine not only other provisions of the Treaty itself but also other aspects of the Final Act of the European Energy Charter Treaty, of which the ECT is itself Annex I.

In particular, the Final Act includes a number of Understandings in respect of the ECT, both as a whole and with respect to specific provisions. These were adopted by all the signatories to the Final Act[6] and, as such, they represent interpretations of the ECT and several of its provisions agreed by all the signatories to the Treaty at the time of its adoption. Although not part of the ECT, they are agreements 'relating to the treaty … made between all of the parties in connection with the conclusion of the treaty' and form part of the Treaty's context for the purpose of interpreting its provisions.[7]

The Final Act also includes a number of Declarations, one made by all the signatory States and the others by particular signatories or groups of signatories. As Article 46 of the ECT provides that no reservations can be made to the Treaty, Declarations cannot be viewed as excluding or modifying the

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[3] The initial capitals signify, as they do in the Treaty (in the English version), that these are defined terms.

[4] Article 26(2)(d) and 26(4) ECT.

[5] Article 26(6) ECT.

[6] See the chapeau to Section IV of the Final Act.

[7] Article 31(2)(a), Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) ('VCLT').

legal effect of the provisions referred to in their application to the State or States making them.[8] Rather, as their name suggests, they are interpretative declarations.[9] In practice, disputes regarding the legal effect of Declarations are likely to be uncommon. Australia, Canada and the USA, all of which made Declarations, are not parties to the ECT, and of the remaining declarations, only one has any implications for foreign investors.[10]

Article 26(6) also provides for the application of 'applicable rules and principles of international law'. What this might mean has arisen as an issue particularly in the EU context. The ECT is unusual in that the EU (as successor to the European Communities) is a Contracting Party. From the EU perspective, the ECT is a 'mixed agreement'; that is, an agreement parts of which fall within the EU's competence and parts of which fall within the competences of the EU member States. This distinguishes it from the numerous BITs entered into by individual member States. Questions remain, however, about how provisions of the ECT apply in the intra-EU context and the extent to which they are affected by EU law.

In *AES Summit Generation Ltd v Hungary*,[11] the applicants complained about acts of the Hungarian government, taken after Hungary's entry into the EU in 2004, allegedly to ensure its compliance with EU rules on State aid following an investigation by the European Commission. The European Commission filed written submissions as a non-disputing party.[12] In its award, an ICSID tribunal concluded that the law applicable to the proceedings was the ECT, together with the applicable rules and principles of international law.[13] In particular, in interpreting the ECT, the general rules of treaty interpretation codified in Articles 31 and 32 of the VCLT were to be applied.[14] As regards the relevance of EU law, the tribunal stated that:

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[8] See Article 2(1)(d) VCLT (definition of a treaty reservation).

[9] An interpretative declaration is 'a unilateral declaration, however phrased or made, made by a State or by an international organisation whereby that State or that organisation purports to clarify the meaning or scope attributed by the declarant to the treaty or to certain of its provisions': International Law Commission, Third Report on reservations to Treaties by Mr Alain Pellet, Special Rapporteur, UN Doc. A/CN.4/491/Add.4, para. 361.

[10] The Declaration made by the European Communities and their member States with respect to Article 25 (economic integration agreements).

[11] *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Republic of Hungary*, ICSID Case No. ARB/07/22.

[12] The Commission has not been willing to publish its submissions. Reports, however, indicate that the Commission was restricted to a general discussion of the relationship between the ECT and EU law; see L. Peterson, "ICSID Tribunal will Permit European Commission to File Legal Brief in Energy Charter Treaty Arbitration", (2008) 16(1) *Investment Arbitration Reporter*, 11 December 2008.

[13] *AES Summit Generation Ltd and AES-Tisza Erömü Kft v Republic of Hungary,* ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.4.

[14] *Ibid*, para. 7.6.5.

> the Community competition law regime … has a dual nature: on the one hand, it is an international law regime, on the other hand, once introduced in the national legal orders, it is part of these legal orders. It is common ground that in an international arbitration, national laws are to be considered as facts.[15]

In the case of any conflict between the ECT and EU law, the tribunal held, Article 16 of the ECT was to be applied.[16] Article 16 (relation with other agreements) provides that:

> Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,
>
> (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and
> (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty,
>
> where any such provision is more favourable to the Investor or Investment.

Article 16 would appear designed to avoid disputes as to whether one such agreement has displaced the other by application of the principles *lex posterior derogate priori* or *lex specialis derogate generali*. Instead, each treaty continues to apply equally, unaffected by the other and an investor can seek to rely on the substantive or procedural provisions of either.

However, the tribunal did not consider the dispute before it concerned a conflict between provisions of EU law and the ECT.[17]

> Rather, the dispute is about the conformity or non-conformity of Hungary's acts and measures with the ECT. Therefore, it is the behaviour of the state (the introduction by Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the Treaty. The question of whether Hungary was, may have been, or may have felt obliged under EC law to act as it did, is only an element to be considered by this Tribunal when determining the 'rationality,' 'reasonableness,' 'arbitrariness' and 'transparency' of the reintroduction of administrative pricing and the Price Decrees.[18]

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[15] *Ibid*, para. 7.6.6.
[16] *Ibid*, para. 7.6.7.
[17] *Ibid*, para. 7.6.8.
[18] *Ibid,* para. 7.6.9.

In the event, the majority of the tribunal did not consider that in introducing the Price Decrees, Hungary had been motivated by the European Commission's State aid investigation.[19]

The award in *AES* is, of course, not binding on future ECT arbitral tribunals but on the question of the applicability of EU law to investor-State disputes under Article 26 of the ECT its conclusions are, it is submitted, largely correct.

2. *Jurisdiction and Admissibility*

Before any arbitral tribunal can determine the merits of a dispute, it needs to determine whether the claim is one over which the tribunal has jurisdiction and whether it is admissible. In the ECT context, the issue of jurisdiction comprises the question whether the dispute is one in respect of which the respondent State, by becoming a party to the Treaty, has given its consent to arbitration; that is, whether the tribunal has jurisdiction over the subject matter of the dispute (jurisdiction *ratione materiae*), jurisdiction to determine the claim between the particular parties (jurisdiction *ratione personae*), and jurisdiction in light of the dates on which the relevant events took place (jurisdiction *ratione temporis*). The answers to the latter two questions are made more complex, in the case of the ECT, by Article 45 which allows for the provisional application of the Treaty. Moreover, Article 17 ECT contains a 'denial of advantages' provision, the categorisation of which, either as going to jurisdiction or admissibility, is disputed.[20]

Article 26(1) of the ECT provides that the Treaty's investor-State dispute settlement provisions apply to:

> Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former which concerns an alleged breach of an obligation of the former under Part III …

Whether a dispute concerns an 'Investment' has two aspects: first, given that the ECT only concerns itself with the energy sector, whether the subject matter of the alleged investment falls within the scope of the Treaty; and, secondly, whether it falls within the definition of 'Investment' as set out in the Treaty.

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[19] *Ibid*, para. 10.3.18.

[20] The issue was discussed in *Plama Consortium v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, paras 146–71.

Article 1(6) ECT provides that: '"Investment" refers to any investment associated with an Economic Activity in the Energy Sector'. Article 1(5) defines 'Economic Activity in the Energy Sector' as:

> An economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

Article 1(4) provides that 'Energy Products and Materials' are those listed in Annex EM of the Treaty. Put briefly, the combined effect of Annexes EM and NI is that investments associated with an economic activity concerning the exploration, extraction, etc. of nuclear fuels, coal, natural and coal gas, petroleum and petroleum products and electrical energy are within the scope of the Treaty, but investments associated with an economic activity concerning oils used for purposes other than energy, e.g. paints, perfumes, etc. are not. An illustrative list of forms of 'Economic Activity in the Energy Area' is given in the second of the ECT's Understandings.

However, no explanation is given as to what the term 'associated' might mean. This issue was addressed by a Stockholm Chamber of Commerce arbitral tribunal in *AMTO v Ukraine*.[21] The tribunal had to decide whether the ownership of shares in a contractor carrying out 'electrical installation, repairs and technical reconstruction or upgrading' at a nuclear power plant was an 'investment associated with an Economic Activity in the Energy Sector'. The tribunal held that:

> The interpretation of the words 'associated with' involves a question of degree, and refers primarily to the factual rather than the legal association between the alleged investment and an Economic Activity in the Energy Sector. A mere contractual relationship with an energy producer is insufficient to attract ECT protection where the subject matter of the contract has no functional relationship with the energy sector… The associated activity of any alleged investment must be energy related, without itself needing to satisfy the definition in Article 1(5) of an Economic Activity in the Energy Sector.[22]

As the services provided by the claimant company related to the production of energy and had been provided through multiple contracts over a substantial period of time, the tribunal held that the claimant's investment qualified as one 'associated with an Economic Activity in the Energy Sector'.

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[21] *AMTO v Ukraine,* Stockholm Chamber of Commerce, Award, 30 March 2008.
[22] *Ibid*, para. 42.

This, however, leaves open the question of what constitutes an investment. Article 1(6) ECT provides that: '"Investment" means every kind of asset, owned or controlled directly or indirectly by an Investor'. An illustrative list follows. As for what constitutes being 'owned or controlled directly or indirectly', the third Understanding to the ECT provides that:

> For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's
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> (a) financial interest, including equity interest, in the Investment;
> (b) ability to exercise substantial influence over the management and operation of the Investment; and
> (c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.
>
> Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.

The Understanding makes clear that persons protected by the ECT include investors who hold their investments through a series of shareholdings.[23] Indeed, given that 'shares, stock, or other forms of equity participation in a company or business enterprise' are included in the illustrative list in Article 1(6), the ECT would also seem to allow a minority shareholder to advance a claim in respect of a company incorporated in the host State, towards which the host State has allegedly behaved in breach of Part III of the Treaty.

What is not made clear, however, is how widely the drafters of the ECT intended the definition of 'Investment' to be drawn. The expression 'every kind of asset' is very wide. In *Petrobart Ltd v Kyrgyz Republic*,[24] an SCC tribunal took a corresponding view of the concept. The dispute arose out of the failure of a Kyrgyz State-owned enterprise to pay for deliveries of gas condensate by the claimant. The tribunal admitted that the contract 'did not involve any transfer of money or property as capital in a business in the Kyrgyz Republic but was a sales contract.'[25] However, Article 1(6)(f) ECT defined as Investments 'any right conferred by law or contract … to

[23] See *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, paras 121–4.
[24] *Petrobart Ltd v Kyrgyz Republic,* SCC Tribunal, Award, 23 March 2005.
[25] *Ibid*, p. 69.

undertake any Economic Activity in the Energy Sector', whilst Article 1(5) included as an 'Economic Activity in the Energy Sector' 'an economic activity concerning the … sale of Energy Materials or Product', which included gas condensate. In consequence, for the tribunal:

> A right conferred by contract to undertake an economic activity concerning the sale of gas condensate is an investment according to the Treaty. This also includes the right to be paid for such a sale. The Arbitral Tribunal thus concludes on this point that Petrobart was an investor having an investment in the Kyrgyz Republic.[26]

The tribunal's decision must, however, be viewed as problematic, in the first place because it ascertains the meaning of 'Investment' under the ECT simply by reference to the list at Article 1(6)(a)-(f) without reference to the wider context. As the tribunal in *Romak SA v Uzbekistan* stated with reference to the Switzerland-Uzbekistan BIT, 'The term "investment" has a meaning in itself that cannot be ignored'.[27] Indeed, the final two paragraphs of Article 1(6) ECT use the words 'Investment' (the capital letter denoting its status as a defined term) and 'investment' interchangeably. Moreover, the third ECT Understanding, with its references to the 'management and operation of the Investment' and the Investor's ability to exercise 'influence over' the 'managing body' of the Investment, seems predicated on the establishment by the Investor of some sort of presence in the host State and thus argues strongly against an Investment's consisting of nothing more than 'any right, property or interest in money or money's worth'.[28] What instead is required, it is submitted, is a broader consideration of the term in the context of international investment arbitration generally, and, in particular, of what has become known (rather inaccurately) as the '*Salini* test'.[29]

Lending additional support to this conclusion is the requirement that an Investment must be made in the Area of a Contracting State. 'Area' is defined in Article 1(10) ECT:

> 'Area' means with respect to a state that is a Contracting Party:
>
> (a) the territory under its sovereignty, it being understood that territory includes land, internal waters and the territorial sea; and

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[26] *Ibid*, p. 72.

[27] *Romak SA v Uzbekistan,* SCC Tribunal, Award, 29 November 2009, para. 180.

[28] *Plama Consortium v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 125.

[29] See *Salini Costruttori and Italstrade v Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52. For further discussion, see Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), p. 189–202.

(b) subject to and in accordance with the international law of the sea: the sea, sea-bed and its subsoil with regard to which that Contracting Party exercises sovereign rights and jurisdiction.

The notion of making an Investment 'in' a particular territory is consistent with the commitment of resources and sharing of risk for a certain duration.

As regards jurisdiction *ratione personae*, Article 1(7) defines what is meant by an 'Investor of a Contracting Party':

'Investor' means:

(a) with respect to a Contracting Party:
  (i) a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party in accordance with its applicable law;
  (ii) a company or other organization organized in accordance with the law applicable in that Contracting Party;

The wording of Article 1(7)(a)(i) would seem to cater for situations when the Investor is a natural person having the nationality of a Contracting State to the ECT and of a State which is not a party to the Treaty. As it permits a natural person who is merely permanently and lawfully resident in the territory of a Contracting Party (that is, whatever his or her nationality) to be treated, for the purposes of Article 26, as a national of that Contracting Party, it is difficult to see why a person holding the nationality of one Contracting Party should be disqualified from bringing a claim on the ground that her or she is also a national of a State not party to the ECT.[30] The ECT, however, says nothing about situations where an Investor has the nationality of the respondent State and of another ECT Contracting Party, so resort would need to be had to customary international law, which provides that it is the claimant's dominant nationality which is determinative.[31]

As for Contracting Parties, the relevant issue is when they became bound by the ECT. The temporal limitations on the right to arbitrate under Article 26 are set out in the definition of 'Investment' in Article 1(6), which provides that:

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[30] See *Olguín* v. *Paraguay,* ICSID Case No. ARB/98/5, Award, 26 July 2001, paras 61–2.

[31] See *Case No. A/18* (1984) 5 Iran-US Cl. Trib. Rep. 251 (Full Tribunal, Iran-US Claims Tribunal). It should be noted, however, that Article 25 of the ICSID Convention imposes its own criteria and prohibits claims by dual nationals against both their States of nationality.

> the term 'Investment' includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the 'Effective Date') provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.

Entry into force is dealt with in Article 44 of the Treaty. The ECT entered into force on the 90th day after the deposit of the 30th instrument of ratification, which fell on 16 April 1998, for all States and Regional Economic Integration Organisations which had ratified it up to that point. For States which ratified the Treaty later, it entered into force 90 days after ratification.

Matters are potentially complicated, however, by the Treaty's provisions on provisional application. Article 45 ECT provides that:

> (1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
> (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.
> (b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).
> ...
> (3)(a) Any signatory may terminate its provisional application of this Treaty by written notification to the Depository of its intention not to become a Contracting Party to the Treaty. Termination of provisional application for any signatory shall take effect upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository.
> (b) In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).

The ECT was signed on 17 December 1994. Australia, Iceland and Norway made declarations under Article 45(2) upon signature and have

not deposited instruments of ratification, so the investment-protection aspects of the Treaty have no application to them or their Investors. However, Belarus and Russia, which have not ratified the Treaty, signed without indicating an inability to accept provisional application. Moreover, as regards all States which have ratified the Treaty, considerable periods elapsed between signature and ratification. And on 20 August 2009 Russia gave notice under Article 45(3)(a) of its intention not to become a Contracting Party and terminating its provisional application of the Treaty.

Provisional application under the ECT has been considered in three cases: in *Petrobart Ltd v Kyrgyz Republic*,[32] *Kardassopoulos v Georgia*,[33] and *Yukos Universal Ltd v Russian Federation*, *Hulley Enterprises Ltd v Russian Federation* and *Veteran Petroleum Ltd v Russian Federation*.[34] In *Petrobart* the issue was whether the ECT continued to apply provisionally to Gibraltar, following its entry into force for the United Kingdom. On signing the Treaty, the UK had declared that the Treaty's provisional application should extend to Gibraltar. However, although the UK specified in its instrument of ratification that it was ratifying the Treaty in its own respect and in respect of two other territories for whose international relations it was responsible, it did not mention Gibraltar. On these facts, the tribunal took the view that the ECT continued to apply provisionally to Gibraltar. This conclusion, however, ignored the fact that provisional application is a regime which applies 'pending the [ECT's] entry into force'.[35] The Treaty having entered into force for the UK, that regime should have been regarded as spent so far as the UK was concerned.

At issue in *Kardassopoulos* was the mismatch in wording between Article 1(6) and Article 45 of the ECT. Article 1(6) states that the Treaty only applies to matters affecting Investments after the 'Effective Date', which is defined as 'the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made'. Georgia argued that 'entry into force' was to be interpreted in the sense of what happened after the deposit of instruments of ratification under

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[32] *Petrobart Ltd v Kyrgyz Replublic,* SCC Tribunal, Award, 23 March 2005.

[33] *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007.

[34] Interim Awards on Jurisdiction and Admissibility, PCA Case No AA 228, 30 November 2009. These three arbitrations were managed in parallel and three virtually identical Awards on Jurisdiction and Admissibility made. They are referred to here simply as the *Yukos* cases and references are to the Award in *Yukos Universal Ltd v. Russian Federation*.

[35] Article 45(1) ECT.

Article 44, with provisional application being simply 'aspirational in character'.[36] The tribunal disagreed.

> [T]he language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so, and [Effective Date] … is to be interpreted as meaning the date on which the ECT became provisionally applicable for Georgia and Greece.[37]

The tribunal in *Kardassopoulos* also examined the meaning of the concluding words of Article 45(1), qualifying the obligation to apply the ECT provisionally, 'to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.' This was also the issue in the *Yukos* cases. Russia accepted that the principle of provisional application was not 'inconsistent with its constitution, laws or regulations' but argued that the tribunal lacked jurisdiction because provisional application of the particular substantive provisions of the ECT on which the claims were based was. The claimants argued that the qualification in Article 45(1) could only be relied upon by a host State if it had made a declaration under Article 45(2)(a) or had made some other form of prior declaration to similar effect. The tribunal disagreed with both contentions. Application of the qualification was not dependent 'on the mandatory making of a declaration under Article 45(2)'.[38] However,

> by signing the ECT the Russian Federation agreed that the Treaty *as a whole* would be applied provisionally pending its entry into force unless *the principle* of provisional application itself were inconsistent 'with its constitution, law or regulations'.[39]

However, the correctness of the tribunal's conclusion that the ECT must be applied provisionally as a whole or not at all[40] might be thought doubtful. For the tribunal, what was key was the use of the adjective 'such' in Article 45(1).[41] This view ignores the provision's earlier use of the phrase 'to the extent that', which might be thought to support a different conclusion.

Finally, Article 17, which appears in Part III of the ECT, provides that:

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[36] *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 209.

[37] *Ibid*, para. 223.

[38] *Yukos Universal Limited v the Russian Federation,* PCA Case No AA 227, Interim Awards on Jurisdiction and Admissibility, 30 November 2009, para. 262.

[39] *Ibid*, para 301 (emphasis in original).

[40] *Ibid*, para. 308.

[41] *Ibid*, para. 304.

> Each Contracting Party reserves the right to deny the advantages of this Part to:
>
> (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or
> (2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:
> (a) does not maintain a diplomatic relationship; or
> (b) adopts or maintains measures that:
> (i) prohibit transactions with Investors of that state; or
> (ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.

The term 'substantial business activities' in Article 17(1) was described by the tribunal in *AMTO* as meaning:

> 'of substance, and not merely of form'. It does not mean 'large', and the materiality not the magnitude of the business activity is the decisive question.[42]

'Business activities', in this context, might be thought to be activities such as buying, selling, contracting, etc. and not activities such as filing returns and holding meetings which are required merely because of the legal entity's existence.[43]

Article 17 does not provide, however, that in the cases mentioned in paragraphs (1) and (2), the advantages of Part III ECT do not accrue to the claimant but, rather, that each Contracting Party 'reserves the right to deny them'. This led the tribunal in *Plama Consortium v Bulgaria* to conclude that: 'a Contracting State must exercise its right before applying to an Investor and be seen to have done so.'[44] As to how the right ought to be exercised:

> The exercise would necessarily be associated with publicity or other notice so as to become reasonably available to investors and their advisers. To this end, a general declaration in a Contracting State's official gazette could suffice; or a statutory provision in a Contracting State's investment or other laws; or even an exchange of letters with a particular investor or class of investors.[45]

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[42] *AMTO v Ukraine,* Stockholm Chamber of Commerce, Award, 30 March 2008, para. 69.

[43] See S. Jagusch and A. Sinclair, "Denial of Advantages under Article 17(1)" in *Investment Protection and the Energy Charter Treaty*, ed. G. Coop and C. Ribeiro (Huntington: Juris Publishing, 2008), at p. 23.

[44] *Plama Consortium v Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 157.

[45] *Ibid*, para. 157.

The tribunal further held that, given the purposes of the ECT, such exercise of the right under Article 17(1) ought to have only prospective effect.[46] The reasoning of the *Plama* tribunal was adopted by the tribunal in the *Yukos* cases.[47]

It may, however, be doubted whether the *Plama* tribunal's reasoning was altogether sound. It rests heavily on a distinction supposedly drawn by the Treaty's framers between the right to deny a party the advantages of Part III and the exercise of that right. From this distinction the tribunals read into Article 17 a mechanism for exercising the right, which the framers themselves omitted to provide for, and a rule, again unstated, that such exercise should only be prospective in nature. Yet the ordinary meaning of 'Each Contracting Party reserves the right to deny the advantages of this Part to … 'is surely simpler: that a Contracting Party need not, in favour of an entity or Investment of a type mentioned in paragraphs (1) or (2) afford any of the advantages otherwise conferred on Investors and their Investments by Part III. Accordingly, if it takes the point, a Contracting Party has an answer to any claim by an entity or Investment mentioned in paragraphs (1) or (2). 'Reserves the right to deny' is merely a more elaborate way of saying 'may deny'.

In addition, the decisions of the *Plama* and *Yukos* tribunals on Article 17(1) not only make the exercise of the right conferred by Article 17(1) dependent on prior and public notification but have the same consequences for Article 17(2), which is also includes the crucial wording 'reserves the right to deny'. It is not impossible that the Contracting Parties intended this significant constraint on the effectiveness of diplomatic and sanctions-based steps which they might wish to take against non-Parties, but it must be open to serious doubt. The better view, therefore, it is submitted, is that Article 17 itself constitutes notice to any would-be Investor that, if matters are structured so as to fall within paragraphs (1) or (2), it cannot count on enjoying the advantages of Part III of the ECT.

3. *International Responsibility*

A Contracting Party is only liable for breach of a provision of Part III of the ECT if it is responsible in law for the conduct constituting a breach.

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[46] *Ibid*, para. 161.

[47] *Yukos Universal Limited v the Russian Federation,* PCA Case No AA 227, Interim Awards on Jurisdiction and Admissibility, 30 November 2009, para. 456.

The general international law rules on State responsibility are customary in nature but have been codified by the International Law Commission.[48] No attempt will be made to reprise them here. However, Articles 22 and 23 of the ECT make particular provision as to State responsibility under the treaty. Article 22 covers privileged (State) enterprises, and Article 23 the observance of the Treaty by sub-national authorities, that is, regional or local governments and authorities. However, the provisions simply replicate the customary law rules on attribution as set out, in particular, in Articles 4, 5 and 8 of the ILC articles on State Responsibility. And to the extent that Article 23 includes a primary rule of obligation, requiring a State's national authorities to take reasonable measures to prevent the non-observance of the treaty by a local or regional authority, it is not obvious that the rule is of much relevance in the context of investor-state disputes, not least because Article 23 falls within Part IV of the ECT and Article 26 permits only recourse against breach of obligations under Part III.

In addition, however, unlike most investment protection treaties, the ECT includes among its parties not only States, including all of the Members of the EU, but also the EU itself, an international organisation. Questions can therefore arise whether conduct complained of by a claimant should be attributed to the EU alone, or to one or more of its Member States, or to both. Here also the ILC has produced draft articles – Draft articles on the responsibility of international organisations[49]—although their customary status is less certain.

The European Communities (as they then were) were able to become parties to the ECT because the ECT defines 'Contracting Party' as 'a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty'.[50] A Regional Economic Integration Organisation (REIO) is:

> An organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of these matters.[51]

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[48] International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, GA res. 567/3 (12 December 2001), Annex.

[49] Draft articles on the responsibility of international organisations, International Law Commission, Report on the work of its sixty-third session (26 April-3 June and 4 July-12 August 2011), GAOR 66th session, Suppl. No. 10 (A/66/10).

[50] Article 1(2) ECT.

[51] Article 1(3) ECT.

The EC were (and the EU is) a REIO and, to date, the only REIO party to the ECT.

The basis on which the Communities were competent, as a matter of Community law to enter into the ECT may be discerned from the Communities' Decision to do so, which sets out the various legal bases for the Decision.[52] However, this is of little assistance in discerning, in respect of any matter about which an Investor might complain, who is to be held responsible to the Investor under the ECT. The ECT contains no obligation for a REIO to make a declaration specifying the matters governed by the treaty in respect of which competence has been transferred to the REIO by its member states. This is unsurprising given the numerous ways in which an act of the Communities might adversely affect Investors and their Investments.[53]

However, as a Contracting Party which does not consent unconditionally to arbitration where an Investor has previously submitted a dispute to the Contracting Party's own courts or administrative tribunals, or in accordance with any applicable previously agreed dispute settlement procedure,[54] the EC published a Statement of relevant 'policies, practices and conditions in this regard',[55] which addresses issues of international responsibility. The Statement provides, in relevant part, that:

> The European Communities are a regional economic integration organisation within the meaning of the Energy Charter Treaty. The Communities exercise the competences conferred on them by their member states through autonomous decision-making and judicial institutions.
>
> The European Communities and their member states have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of the obligations contained therein, in accordance with their respective competences.
>
> The Communities and the member states will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the

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[52] 98/181/EC, ECSC, Euratom: Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Treaty Protocol on energy efficiency and related environmental aspects, OJ L 069, 09/03/1998, p. 1.

[53] For a typologically of such ways, see T. Eilmansberger, "Bilateral Investment Treaties and EU Law", (2009) 48 *CMLR*, p. 383.

[54] See Article 26(3)(b)(i) and Annex ID ECT.

[55] Article 26(3)(b)(ii) ECT.

> request of the Investor, the Communities and the member states concerned will make such determination within a period of 30 days.[56]

It might be thought that the EU or the relevant Member State, having made and communicated any such determination, would be estopped from resiling from it and claiming in any consequent proceedings that it was the incorrect respondent.[57] However, there is no requirement in the ECT that a claimant seek such a declaration. Nor, even were a claimant were to seek and receive one, would it appear to be bound by the EU and the member States' identification of the proper respondent to the claim. A footnote to the Statement acknowledges that any determination by the Communities and the member States is not binding on the Investor, who may initiate proceedings against both or (it is suggested) either.

Nor is it correct to say, as the Statement does, that the EU and its member States are only internationally responsible for the fulfilment of the obligations contained in the ECT 'in accordance with their respective competences'. Insofar as this suggests that international responsibility derives from their competences under EU law, it is plainly wrong. It is the ECT which sets out the obligations which Contracting Parties to it assume, and the Treaty or (to the extent that it is silent) customary international law (as 'applicable rules and principles of international law'[58]) which set out the rules for determining when conduct constituting a breach of those obligations is attributable to one – or more – Contracting Parties.

4. *Substantive Law*

The substantial provisions of Part III of the ECT can be covered fairly briefly. The ECT, as with successive investment protection treaties, incorporates standards whose general import, though not always whose precise meaning, is well understood from earlier treaties and from the practice of States and arbitral tribunals concerning them. A detailed exegesis of the provisions would therefore simply duplicate work undertaken elsewhere,

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[56] Statement submitted by the European Communities to the Secretariat of the Energy Charter Treaty pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ L 336, 23.12.1994, p.115 (footnotes omitted).

[57] See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), p. 141–9. See also Article 11, ILC Articles on State Responsibility; and draft article 8, ILC Draft articles on the responsibility of international organisations.

[58] Article 26(6) ECT.

and only a summary will be provided here, focusing on Part III's more exceptional provisions.

Part III is entitled 'Investment Protection and Promotion'. Investment promotion and investment protection are, of course, different things: the former is concerned with permitting, attracting and facilitating foreign investment; the latter, with the way in which an investment, once made, must be treated. The ECT makes quite different provision for promotion and protection. The former[59] are in the realm of 'soft law', whilst the latter impose legal obligations.

So far as the protection of investments is concerned, Article 10(1) imposes five distinct obligations upon Contracting Parties: fair and equitable treatment; most constant protection and security; no unreasonable or discriminatory measures; no treatment less favourable than that required by international law, including treaty obligations; and observance of obligations (the 'umbrella clause'). Nothing will be said about the first three and the last obligations.[60] All appear in numerous other investment treaties, are frequently invoked by investors and are the subject of considerable arbitral jurisprudence.

As regards the fourth obligation, however, some discussion is necessary to elucidate its content. The penultimate sentence of Article 10(1) provides that: 'In no case shall Investments be accorded treatment less favourable than that required by international law, including treaty obligations.' At first glance, the provision has a very wide scope. The term 'international law', given that it includes (but is not exhausted by) 'treaty obligations', would appear to encompass rules of international law whatever their source. However, the Understanding with respect to Articles 26 and 27 of the ECT states that:

> The reference to treaty obligations in the penultimate sentence of Article 10(1) does not include decisions taken by international organisations, even if they are legally binding, or treaties which entered into force before 1 January 1970.

This would seem to make clear that, for example, EU regulations or directives are not encompassed by the provisions, and neither are any treaties which entered into before the beginning of 1970, which rather restricts the provision's scope.

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[59] Article 10(2), (3), (5), (6) and (9)(a) ECT.

[60] For further information, see T. Roe and M. Happold, *Settlement of Investment Disputes under the Energy Charter Treaty* (Cambridge University Press, 2011), pp. 107–17 and 120–127, and the works cited there.

In addition, it is uncertain whether the provision catches treaty obligations which themselves would not otherwise give rise to an individual cause of action on the part of an investor. It has been argued elsewhere that, under certain other investment treaties containing similar provisions, breaches of the WTO Agreement might give rise to claims by adversely affected investors, in spite of the fact that under the WTO Dispute Settlement Understanding it is for the affected person's State to take action and compensation is not available for affected private persons.[61] Whether or not this argument is correct as regards other investment treaties, it is debatable whether it holds for the ECT. The application of GATT-inconsistent trade-related measures to existing Investments is, for the purposes of Article 26 of the ECT, expressly stipulated to constitute a breach of Part III of the Treaty: that is, it may found an individual cause of action. Consequently, it might be thought that this specific inclusion should lead, by application of the maxim *inclusio unius est exclusio alterius*, to the conclusion that other provisions of GATT 1994 cannot be so relied on. And, if this is the case, why should the provisions of other treaties which do not, of themselves, give rise to a right of private action be any more capable of being relied on by an Investor? The best answer may be that the words 'including treaty obligations' would be largely otiose if they referred only to obligations whose breach was already actionable by the Investor. But the matter is not at all clear.

Even if an expansive view of the provision is taken, however, it would seem implicit that its effects are limited to treaty obligations owed by the host state to the Investor or to the Investor's state: an Investor should not be able to benefit under this provision from obligations undertaken by the host state to some third state (though, of course, if Investors of a third state are treated more favourably than the claimant investor might constitute a breach of the MFN clause in Article 10(7)). In any case, the scope of the provision would appear to be limited by Article 26, which requires that any complaint be related to an Investment. This would seem to exclude, for example, most complaints under human rights treaties.[62] In consequence, it may be that, in practical terms, the penultimate sentence of Article 10(1) adds little to the MFN clause in Article 10(7).

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[61] G. Verhoosel, "The use of Investor-State Arbitration under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law", (2003) 6 *JIEL*, p. 493.

[62] See, e.g., *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184 at 203.

Article 10(7) contains obligations of national treatment and most favoured nation ('MFN') treatment. Again, there is no reason to believe that these concepts as they appear in the ECT ought to receive any different treatment from when they appear in other investment treaties.[63] However, Article 10(10) qualifies the effects of Article 10(7) (and Article 10(3)) as regards intellectual property rights, providing that:

> Notwithstanding any other provision of this Article, the treatment described in paragraphs (3) and (7) shall not apply to the protection of Intellectual Property; instead, the treatment shall be as specified in the corresponding provisions of the applicable international agreements for the protection of Intellectual Property rights to which the respective Contracting Parties are parties.

'Intellectual Property' is defined in Article 1(12) ECT as including 'copyrights and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and the protection of undisclosed information.' The provision seems to remove the level of protection granted to intellectual property rights from the ambit of Article 10(7). However, it does not seem to preclude the use of Article 26 to determine complaints that the respondent state has failed to accord to the claimant the treatment specified in the 'corresponding provisions of the applicable international agreements' under the penultimate sentence of Article 10(1).

Article 10(12) requires the provision of effective means for the assertion of claims and the enforcement of rights. It provides that:

> Each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to Investments, investment agreements, and investment authorizations.

This provision plainly overlaps to a significant extent with Article 1(1)'s obligation to accord fair and equitable treatment, one of whose elements is an obligation to avoid denying justice to the claimant. However, it is rather more specific in its terms. Article 10(12) was directly considered by the tribunal in *AMTO*, which stated that:

> The fundamental criteria of an 'effective means' for the assertion of claims and the enforcement of rights within the meaning of Article 10(12) is [sic] law and the rule of law. There must be legislation for the recognition and enforcement of property and contractual rights. This legislation must be made in

[63] For further information, see Roe and Happold, see above note 60, pp. 127–30 and the works cited there.

> accordance with the constitution, and be publicly available. An effective means of the assertion of claims and the enforcement of rights also requires secondary rules of procedure so that the principles and objectives of the legislation can be translated by the investor into effective action in the domestic tribunals. … Article 10(12) requires a State not only to ensure legislation and rules are promulgated to recognise and enforce property and contractual rights, but also that the quality of the legislation meets minimum international standards. … Accordingly, Article 10(12) is not only a rule of law standard, but also a qualitative standard.[64]

Article 10(11) provides that:

> For the purposes of Article 26, the application by a Contracting Party of a trade-related investment measure as described in Article 5(1) and (2) to an Investment of an Investor of another Contracting Party existing at the time of such application shall, subject to Article 5(3) and (4), be considered a breach of an obligation of the former Contracting Party under this Part.

Article 5(1) and (2) describe trade-related measures which are inconsistent with relevant provisions of the GATT (or, by virtue of the Amendment to the Trade-Related Provisions of the Energy Charter Treaty, the WTO). Thus the effect of Article 10(11) is, in practice, to translate the obligations created by these provisions into obligations owed to, and enforceable by, Investors under the ECT. This is important insofar as the obligations which Article 10(11) imports into Part III, in turn permitting their vindication by the mechanisms provided Investors under Article 26, are not enforceable by private persons under the WTO's dispute settlement procedures,[65] which can only be accessed by Members, or considered to have direct effect in national legal orders.[66]

As most ECT Contracting Parties are now also WTO Members, in most cases it means that Investors can rely on the WTO Agreement on Trade-Related Investment Measures ('TRIMs'), which considerably develops Articles III (National Treatment) and XI (General Elimination of Qualitative Restrictions) of the GATT, in particular by providing an illustrative list of trade-related investment measures which are inconsistent with those to provisions. Indeed, the list in the Annex to the TRIMS

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[64] See above note 21, para 87.

[65] See Articles XXII and XXIII, General Agreement on Tariffs and Trade, and the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, reproduced in World Trade Organisation, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999).

[66] Including in EU law: see P. Hilpold, *Die EU im GATT/WTO-System* (Innsbruck University Press, 3rd ed., 2009).

Agreement is reproduced in Article 5(2) of the ECT, which defines as incompatible with Articles III and XI GATT:

> … any investment measure which is mandatory or enforceable under domestic law or under any administrative ruling, or compliance with which is necessary to obtain an advantage, and which requires:
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
> (b) that an enterprise's purchase or use of imported products be limited to an amount related to the volume or value of local products that it exports;
> or which restricts:
> (c) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
> (d) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
> (e) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

It can be seen that such measures can, and frequently are, conditions imposed on persons wishing to make an investment, as well as for obtaining advantages (for example subsidies) once an investment has been made.[67] However, Article 10(1) specifically restricts the scope of Article 5 to 'the application by a Contracting Party of a trade-related investment measure … to an Investment of an Investor of another Contracting Party existing at the time of such application'. In addition, for a trade-related investment measure to be inconsistent with the provisions of Articles III or XI GATT it must be related to trade in goods.[68]

The remainder of Part III may be covered summarily. Article 11 is a key personnel clause. Article 12 requires the non-discriminatory payment of compensation for losses caused by war or other armed conflict, state of national emergency, civil disturbance or other similar event. Article 13,

[67] Although Article 5(3) permits the use of such measures as conditions of eligibility for export promotion, foreign aid, government procurement or preferential tariffs or quota programmes.

[68] See Article 1 (Coverage), WTO Agreement on Trade-Related Investment Measures.

mirroring provisions in many other treaties, prohibits nationalisation, expropriation or measures having similar effect except where such nationalisation, etc. is for a purpose which is in the public interest, not discriminatory, carried out under due process of law and accompanied by the payment of prompt, adequate and effective compensation.[69] In practice, this is an important and frequently-pleaded type of provision. Article 13, however, displays no unusual features requiring specific elucidation.[70] Finally, Article 14 makes detailed provision requiring the free transfer of funds in and out of the host State.

Article 21 covers taxation. Tax regimes and levels of taxation are major concerns of investors, as they have direct and obvious effects on the profitability of their investments. The ECT, however, includes a major 'carve out' for taxation measures, taking them largely outside the scope of the protections accorded by the Treaty. Article 21 appears in Part IV of the Treaty. It will be recalled that, under Article 26, Investors can only bring claims for breach of obligations in Part III. However, Article 21 affects Investors' rights under Article 26 because it serves to define the extent of the obligations which Contracting Parties incur in Part III.

Article 21 is a provision of byzantine complexity, whose contours can only be sketched here.[71] Article 21(1) provides that 'Taxation Measures' are governed exclusively by Article 21 and no other provisions of the ECT apply to them except as provided therein. 'Taxation Measures' are described in Article 21(7)(a) as including:

> (i) any provision relating to taxes of the domestic law of the Contracting Party or of a political subdivision thereof or a local authority therein; and
> (ii) any provision relating to taxes of any convention for the avoidance of double taxation or of any other international agreement or arrangement by which the Contracting Party is bound.

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[69] For further information, see Roe and Happold, see above note 60, pp. 134–5 and the works cited there.

[70] Article 18 ECT reaffirms Contracting Parties' sovereignty over their energy resources. However, this does not conflict with the protections granted Investors in Article 13, as it is generally agreed that states' permanent sovereignty over natural resources is preserved by permitting expropriation provided that the interests of investors are respected: see N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press, 1997). Similarly, Article 19 (environmental aspects) cannot serve to avoid the application of Article 13. If measures taken to protect the environment constitute, or are tantamount to, an expropriation, full compensation must be paid; see *Compañiá del Desarrollo de Santa Elena SA v Costa Rica*, ICSID Case No ARB/96/1, Award (Final), 17 February 2000, para 71.

[71] For further information, see Roe and Happold, see above note 60, pp. 186–94.

Beyond the fact that the terms 'tax provisions' and 'taxes' do not include custom duties,[72] no real definitions are provided. Indeed, the definition, by including 'any provision *relating* to taxes',[73] would seem to include penalties for late payments of taxes.

The provisions of Article 21 which specifically address Part III of the Treaty are contained in paragraphs (3), (5) and (6). Article 21(3) deals with questions of taxation and MFN and national treatment, and provides that Articles 10(2) and (7) do not apply to Taxation Measures on income and capital.[74] The intention seems to be to avoid conflict between those two provisions and applicable double taxation agreements, which usually cover taxes on income and capital. Indeed, even in cases relating to taxes other than on income and on capital, matters within the ambit of applicable double taxation agreements are excluded. Moreover, Articles 10(2) and (7) do not generally apply to 'any Taxation Measure aimed at ensuring the effective collection of taxes'. The meaning of this term is not elucidated but one might hazard that it applies to measures relating to the collection of taxes; to the application and enforcement rather than the substance of the tax code. With regards to such measures, Articles 10(2) and (7) only apply when such a measure arbitrarily discriminates against an Investor or 'arbitrarily restricts benefits accorded under the Investment provisions of this Treaty.'[75] There is, however, at present no arbitral jurisprudence clarifying the meaning of these provisions.

Article 21(5) covers allegations of expropriation under Article 13 ECT. Taxation of an Investment can amount to an expropriation and is covered by Article 13. However, the Investor alleging that an expropriation has taken place or that the expropriation was discriminatory is required to refer the issue to the 'Competent Tax Authorities'. Failure to do so, and the initiation of arbitration proceedings under Article 26 will simply result in the arbitral tribunal making the referral itself.[76]

A definition of a 'Competent Tax Authority' is provided in Article 21(7)(c). It means:

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[72] Article 21(7)(7)(d) ECT.
[73] Emphasis added.
[74] As defined in Article 21(7)(b) ECT.
[75] Although it should be recalled that Article 10(2) does not give rise to any rights enforceable by Investors.
[76] See Article 21(5)(b)(i) ECT.

> the competent authority pursuant to a double taxation agreement in force between the Contracting Parties or, when no such agreement is in force, the minister or ministry responsible for taxes or their authorized representatives.

The reference to Contracting Parties must mean the Contracting Party of which the claimant is a national and the Contracting Party to the dispute. Once seised, the Competent Tax Authorities have a period of six months in which to determine whether the tax is an expropriation or is discriminatory. No guidance is given as to the criteria which they should apply in order to decide whether there has been an expropriation. With regard to whether the tax is discriminatory, however, the Competent Tax Authorities are required to apply (i) the non-discrimination provisions of any relevant tax convention or (ii), if there is no such treaty, the non-discrimination principles in the OECD Model Tax Convention on Income and on Capital.[77]

The status of the conclusions of the Competent Tax Authorities depends on two things: first, their subject-matter and, secondly, whether they were arrived at within the six-month period following the issue's referral to the Tax Authority. As regards conclusions concerning whether a tax is an expropriation (regardless of whether they were issued timeously or not), a tribunal 'may' take them into account; that is, it is permitted but not required to.[78] As to whether a tax is discriminatory, however, provided the Tax Authorities have issued their conclusions within six months, the tribunal must take them into account.[79] If they were issued outside the six month period, the tribunal is entitled (but not obliged) to take them into account.[80] In consequence, therefore, the most that a tribunal is required to do is take such conclusions into account; they are persuasive but not determinative of its decision on the issue. The issue is likely to be re-argued in full before the tribunal. Given this, the utility of the procedure might be doubted. The procedure seems akin to a requirement to exhaust domestic remedies, a requirement which does not, of course, apply with in relation to other claims under the Treaty. Its practical effect is likely to be to extend the length and increase the cost of legal proceedings.

Finally, as regards transfers related to investments, Article 21(7) provides 'for the avoidance of doubt' that Article 14 'shall not limit the right of

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77 Article 21(5)(b)(ii) ECT.
78 Article 21(5)(b)(iii) ECT.
79 *Ibid.*
80 *Ibid.*

a Contracting Party to impose or collect a tax by withholding or other means.'

5. *Procedure*

As already mentioned, procedures for the settlement of investor-State disputes are set out in Article 26 of the ECT. Article 26(1) provides that the disputes to which it applies 'shall, if possible, be settled amicably'. Article 26(2) states that:

> If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:
> (a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
> (b) in accordance with any applicable, previously agreed dispute settlement procedure; or
> (c) in accordance with the following paragraphs of this Article.

The reference in subparagraph (c) is to conciliation or arbitration under the auspices of ICSID (under the ICSID Convention or the Additional Facility Rules); arbitration under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; or ad hoc arbitration under the UNCITRAL Arbitration Rules.[81] The choice between those options is the claimant's alone, subject to the fact that not all of the forums listed may be available in the particular case.[82] As with most bilateral investment treaties, there is no rule in the ECT that an aggrieved investor must exhaust all remedies in the host State's courts under the host State's domestic law before making a complaint under the Treaty.

The three-month 'waiting period' for amicable settlement is similar to the provisions of many investment treaties. Given the divergence of jurisprudence, however, it is unclear whether the provisions should be viewed as setting out a jurisdictional requirement or as simply directory.[83]

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[81] Article 26(4) ECT.

[82] In particular, the EU is not a party to the ICSID Convention, nor can it be a party to proceedings under the ICSID Additional Facility Rules.

[83] See, e.g., *Ethyl Corporation v Canada*, UNCITRAL, Decision on Jurisdiction, 24 June 1998 and *SGS Société Générale de Surveillance SA v Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6 August 2003 (directory); compare *Enron Corporation and Ponderosa Assets LP v Argentina*, ICSID Case No ARB/01/3, Decision on Jurisdiction, 14 January 2004, *Republic of Argentina v BG Group Plc*, D.C. Cir. Jan. 17, 2012 and *ICS Inspection and Control Services Ltd v Argentina*, UNCITRAL, Award on Jurisdiction, 10 February 2012 (jurisdictional).

The Contracting Parties' unconditional consent to arbitration is qualified in two respects. First, Article 26(3)(b) provides that:

> (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

This 'fork-in-the-road' provision, like others in bilateral investment treaties, is of somewhat uncertain effect. The difficulty lies in defining 'the dispute', prior submission of which to another forum under subparagraphs 2(a) and 2(b) removes the state's unconditional consent to its being arbitrated under subparagraph 2(c).[84] Secondly, Article 26(3)(c) contains a substantive, rather than procedural, limitation on the consent to arbitration under subparagraph 2(c). It provides that the Contracting Parties listed in Annex IA do not give their consent to such arbitration 'with respect to a dispute arising under the last sentence of Article 10(1)' (the 'umbrella clause'). However, only four States are listed in Annex IA, only one of which (Hungary) is a party to the ECT.

The powers of a tribunal constituted pursuant to Article 26 are largely delineated by the applicable rules: the ICSID Convention, the Additional Facility Rules, the SCC arbitration rules or the UNCITRAL Arbitration Rules as the case may be. Each of these is a subject in its own right and so will not be analysed here. To conclude, however, certain points concerning the application of these rules to an arbitration under the ECT will be briefly highlighted.

First, the ECT itself places no limits on the exercise by an arbitral tribunal of such powers as it may possess to make interim orders or orders for provisional measures. Secondly, so far as final relief is concerned, Article 26(8) expressly confirms an arbitral tribunal's power to award interest. Thirdly, the ECT does not generally limit the tribunal to awards for monetary damages and restitution of property. Indeed, Article 26(8) (second sentence) provides that:

> An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted.

Though this provision precludes the grant of non-monetary relief as a sole remedy in the particular circumstances in which it applies, it appears

[84] See the discussion in *Chevron Corporation v Ecuador*, UNCITRAL, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, paras 4.72–4.79.

premised on the general availability of an order for non-monetary relief – e.g. an injunction – without the option of paying damages in lieu. In practice, however, investment arbitral tribunals have proved reluctant to make such orders, even in cases where non-pecuniary remedies have been requested.

6. *Conclusion*

The ECT is a creature of its time: the period immediately following the lifting of the Iron Curtain, the end of Communist rule in central and eastern Europe, and the breakup of the Soviet Union.[85] Only a particular and fortunate set of political circumstances permitted the adoption of the Treaty. Greater energy cooperation between the States of western Europe, on the one hand, and those of east and central Europe and the former Soviet Union, on the other, was seen as both an economic and a political imperative. Yet even during the negotiation of the ECT, in the period 1992–4, ambitions had to be scaled back; and concessions made to keep Russia within the process led the United States deciding not to sign the Treaty. The ECT stands, then, as a monument to the difficulties that arise when seeking agreement on any multilateral investment agreement, even in favourable circumstances. Together with the OECD's ill-fated Multilateral Agreement on Investment, it could be seen as a negative precedent. But this would be to ignore its real achievements, of which investors continue to take advantage.

The ECT can be seen, in this sense, as marking the high-watermark of investor protection. What it lacks in breath of subject-matter (although the energy sector is a field of foreign investment of great significance and sensitivity), it makes up for in the number of parties. Moreover, by virtue of Article 45 ECT, Russia, despite its statement of 18 October 2009 that it does not intend to ratify the Treaty, remains bound to apply Parts III and V to Investments made up to that date for twenty years from the announcement. This is particularly important given how few – and how weak – are the BITS to which Russia is party.[86] The ECT's investment protection

[85] For further information, see J. Doré, "Negotiating the Energy Charter Treaty" in *The Energy Charter treaty: An East-West Gateway for Investment and Trade*, ed. T. Wälde (London: Kluwer Law International, 1996); and C. Bamberger, "The Negotiation of the Energy Charter Treaty", in Coop and Ribeiro, see above note 43.

[86] See N. Rubins and A. Nazarov, "Investment Treaties and the Russian Federation: Baiting the Bear?", (2008) 9 *Business Law International* 100.

provisions, by contrast, are strong and wide-ranging, including all the principal contingent and non-contingent standards, and permitting investors bring claims for breach of contract (via the umbrella clause in the final sentence of Article 10(1)) and for breach of (at least some) obligations owed under other treaties (under the penultimate sentence of Article 10(1) and, as regards TRIMS, Article 10(11)). And although Article 21 cuts down the Treaty's protections where the actions of the host State complained of concern tax, it does so to a lesser extent than the equivalent provisions in many BITs.[87]

[87] See T.W. Wälde and A. Kolo, "Taxation and Modern Investment Treaties", in P. Muchlinski, F. Ortino and C. Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), pp. 320–4.

CHAPTER FOUR

BILATERAL INVESTMENT TREATIES

Tarcisio Gazzini

Contents

I. *Introduction*

A variety of legal instruments, belonging to different legal systems, contribute to the legal protection of foreign investment.[1] Among them, bilateral investment treaties (BITs) have played and continue to play a prominent role with regard to both the creation of a stable and predictable normative framework and the settlement of related disputes.[2]

This chapter is intended to offer an overview of the main – and in many respects unique – features of BITs. It first describes the disadvantages advantages and potential of the largely bilateral framework for the protection of foreign investment (Part II). It then examines the special position

[1] On the sources of foreign investment law see, in particular: P. Juillard, "L'évolution des sources du droit des investissements", *Recueil des Cours* 250 (1994), p. 9, M. Hirsh, "Sources of International Investment Treaties", Hebrew University of Jerusalem, Research Paper 05–11, July 2011, available at www.ssrn.com/abstract=1892564 (last accessed 5 December 2011).

[2] On foreign investment treaties see in particular: R. Dolzer, M. Stevens, *Bilateral Investment Treaties* (The Hague: Nijhoff, 1995), G. Sacerdoti, "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours* 269 (1997), p. 251; K.J. Vandevelde, *Bilateral Investment Treaties. History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010); J.W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010); G. Van Harten, "Five Justifications for Investment Treaties: A Critical Discussion", 2 *Trade Law & Development* (2010), p. 1.

foreign investors enjoy under these treaties, in both substantive and procedural terms, keeping in mind that foreign investors are manifestly the main beneficiaries of these treaties, yet formally extraneous to the process leading to their conclusion, modification and termination (Part III). Part IV considers how BITs strike a balance between the sovereign prerogatives of States parties and the need to protect the legitimate expectations that these treaties create for foreign investors. Part V further elaborates on this balancing exercise from the standpoint of the law of treaties. Parts VI and VII are consecrated, respectively, to some issues of interpretation of BITs and the settlement of disputes arising from these treaties. Part VIII touches upon the interaction between BITs and State contracts, including the so-called umbrella clauses. A full discussion of the relationship between BITs and contracts can be found in Chapter VII of this book.

II. *A Largely Bilateral Framework*

There is no multilateral treaty on foreign investment comparable in terms of participation to multilateral trade agreements. Attempts to conclude such a treaty have failed and there is no evidence that any such treaty will be concluded in the near future. The unsuccessful negotiations of the Multilateral Agreement on Investment within the OECD[3] and the clumsy remake within the WTO[4] have demonstrated that disagreement on key issues remains an insurmountable obstacle to any meaningful multilateral agreement.

As a matter of treaty law, therefore, foreign investments are currently protected by a complex web of bilateral investment treaties (BITs), specific provisions, chapters, or legal documents contained in or attached to a large number of bilateral or plurilateral Regional Trade Agreements (RTAs),[5] as well as the Energy Charter Treaty, a multilateral agreement in the energy sector.[6]

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[3] OSCE, *Multilateral Agreement on Investment Draft Consolidated Text and Commentary*, 22 April 1998, respectively DAFFE/MAI(98)7/REVI and DAFFE/MAI(98)8/REVI. See also: UNCTAD, *Lessons from the MAI, New York and Geneva*, 1999, UNCTAD/ITE/IIT/MISC. 22; P.T. Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now?", 34 *International Lawyer* (2000), p. 1033.

[4] See Decision of the WTO General Council, 1 August 2004, WT/L/579, 2 August 2004.

[5] See, in particular, North America Free Trade Agreement (NAFTA, Chapter XI), European Free Trade Area (EFTA, Chapter IX), Central America Free Trade Area – Dominican Republic – (CAFTA-DR, Chapter X), Common Market for Eastern and Southern Africa (COMESA, Chapter XXVI), Association of East Asian Nations (ASEAN), and Southern Common Market (MERCOSUR).

[6] On the Energy Charter Treaty see the contribution by Matthew Happold in this volume. See also, in particular: T.W. Wälde, *The Energy Charter Treaty. An East-West Gateway*

Regional economic integration may be a vehicle for multilateralizing the legal protection of foreign investment. It can even offer a third way, alternative to a multilateral treaty on investment and a network of BITs.[7] Such an alternative may also strike a balance between the respective advantages of multilateralism and bilateralism. All these issues are discussed in Chapter II of this book alongside the question of the alleged incompatibility of BITs with the MFN clause embodied in Article II:1 of the General Agreement on Trade in Services (GATS).[8]

On that question, suffice it here to mention that the concern expressed in literature on the possible violations of the MFN (most-favoured-nation) obligation under GATS may be countered by arguing that the conclusion by virtually all States of a large number of BITs, coupled with the acquiescence by those States not involved in such practice, may amount to subsequent practice for the purpose of interpreting or even modifying Article II:1 GATS.[9]

For the time being, however, the legal protection of foreign investment remains to a large extent bilateral in character, with a wealth of about 2,800 BITs concluded since 1959 with a significant acceleration in the last two decades.[10] Although the figure is certainly impressive, its quantitative

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for Investment Trade (The Hague: Kluwer, 1996); T.W. Wälde, "Energy Charter Treaty-based Investment Arbitration", 5 *Journal of World Investment & Trade* (2004), p. 373; C. Ribeiro ed., *Investment Arbitration and the Energy Charter Treaty* (Huntington: Juris Publishing, 2006); G. Coop and C. Ribeiro eds., *Investment Protection and The Energy Charter Treaty* (Huntington: Juris Publishing, 2008).

[7] On the role the European Union plays in the field of foreign investment after the entry into force of the Lisbon Treaty see, in particular: M. Bungenberg, J. Griebel, S. Hindelang eds., "International Investment Law and EU Law", *European Yearbook of International Economic Law* (2011) Special Issue; A. Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2011).

[8] See, in particular, F. Ortino, "The Principle of Non-discrimination and its Exceptions in GATS: Selected legal Issues", in *The World Trade Organization and Trade in Services*, ed. M. Andenas, K. Alexander (Leiden: Martinus Nijhof Publishers, 2008), p. 173.

[9] From this perspective, the conclusion of a large number of BITS may be treated as "a discernable pattern implying the agreement of the parties regarding its interpretation", *Japan–Taxes on Alcoholic Beverages*, WT/DS11/AB/R [1996] 1 *DSR* 106; *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, para 214; *EC–Customs Classification of Certain Computer Equipment*,WT/DS62/AB/R, para 90; *US–Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, para 190. See also the views expressed by the International Law Commission, *Yearbook ILC* 18 (1966-II) 222. On acquiescence see *EC–Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, para 272. On the modification of treaties through subsequent practice, see, in particular, *Air Transport Services Agreement Arbitration*, U.S. v. France, 22 December 1963, in *International Law Reports* 38 (1969) 182, p. 249; *Case Concerning the Temple of Preah Vihear*, *I.C.J. Reports 1962*, p. 6.

[10] According to UNCTAD, at the end of 2010, States had concluded 2,807 BITs, *World Investment Report 2011* (UNCTAD/WIR/2011), p. 100, at http://www.unctad-docs.org/files/

importance should not be exaggerated for two reasons. On the one hand, these treaties cover roughly 14% of the bilateral relationship between states.[11] On the other hand, it must be noted that the Energy Charter Treaty alone accounts for the equivalent of more than 1,000 bilateral agreements.

Undoubtedly a multilateral treaty has many advantages. First and foremost, it establishes a single legal framework and ensures the greatest simplicity, coherence and uniformity with regard to the rules applicable to the parties. A multilateral treaty, however, does not need to be unduly rigid, and contracting parties may accommodate their specific needs through variable geometry, protocols, reservations, opting out mechanisms, optional declarations or in any other manner permitted under the law of treaties. While introducing into the system the necessary degree of flexibility, these devices should not be used excessively – or abused – lest they undermine the integrity of the treaty.

Additionally, multilateral treaties are expected to generate coherent State practice. This is facilitated by the existence of a single set of rules applicable by the entities responsible to implement the treaty within the jurisdictions of all parties to the treaties. State practice can thus consolidate a stable and predictable legal framework, clarify the meaning of the rules contained in the treaty, and possibly contribute to the crystallization or development of customary international law.

From the standpoint of the settlement of disputes, furthermore, the interpretation and application by national courts and investment arbitral tribunals of the same treaty will in all probability reduce the legal uncertainty surrounding investment-related disputes and progressively develop a consistent body of jurisprudence tribunals could comfortably rely upon. The risk of conflicting decisions, being inherent in the sovereign character of international investment tribunals, however, cannot be eliminated simply by the adoption of a multilateral treaty.

While recognizing all these advantages of multilateral treaties, nevertheless, one should not be unconditionally hostile to BITs, as bilateralism is not necessarily less effective or less adequate that multilateralism and in turn offers its own advantages.

UNCTAD-WIR2011-Full-en.pdf (last accessed 5 December 2011). For a detailed treatment of the historical evolution of BITs see K.J. Vandevelde, see above note 1, Chapter 2.

[11] To cover the totality of bilateral relationships between *n* States it is necessary to conclude a number of bilateral treaties equivalent to: n (n - 1) / 2, see E. Giraud, "Modification et terminaison des traités collectifs", 49 *Annuaire Institut de droit international* (1961) 1, p. 16 ff.

In the first place, there is no compelling economic evidence that a multilateral treaty would have a significantly bigger positive impact on the flow of foreign investment than a network of BITs. It must be noted in this respect that recent empirical studies point to the stimulating effect of BITs on the flow of investment towards the States concerned.[12] Apart from the difficulties in determining the link between the conclusion of BITs and the increase in foreign investment, however, it must not be ignored that countries bound by a handful of BITs or no BITs at all – such as Japan or Brazil – have managed to attract remarkable flows of foreign investment.

Secondly, the current legal framework, however fragmented, works quite well. It is in continuous expansion, even though the conclusion of new BITs has slowed down in the last few years. Additionally, the accuracy, level of sophistication and coherence of the current legal framework is progressively improving due the renegotiation of BITs, the elaboration of new model BITs, and the development of a largely consistent body of arbitral decisions.

Thirdly, the framework has significant potential for improvement with regard to both substantive and procedural rules (for instance, through the inclusion, respectively, of provisions on the protection of human rights and the environment, and of clauses on consolidation[13] and judicial review[14]).

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[12] See, for instance: E. Neumayer, L. Spess, "Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?", *World Development* (2005), p. 1567; K. Gallagher, M.B.L. Birch, "Do Investment Agreement attract Investment?", 7 *Journal of World Investment & Trade* (2006), p. 961; P. Egger, V. Merlo, "The Impact of Bilateral Investment Treaties on FDI Dynamics", *World Economics* 30 (2007), p. 1536; J.B. Yackee, "Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties", 33 *Brooklyn Journal International Law* (2008), p. 405; J. Tobin, S. Rose-Ackerman, "When BITs have some Bite", in *The Future of Investment Arbitration*, ed. R.A. Alford, C. Rogers (Oxford: Oxford University Press, 2009), p. 131.

[13] See, for instance: Article 1126 NAFTA; Article 33, 2004 United States BIT Model; Article 32, 2004 Canada BIT Model, at http://ita.law.uvic.ca/documents/Canadian2004-FIPA-model-en.pdf; Article 37 ASEAN Comprehensive Investment Agreement, 26 February 2009, at http://www.aseansec.org/22218.htm; Article 10.24, FTA United States – Mexico, 15-Jun-2004, at http://rtais.wto.org/UI/CRShowRTAIDCard.aspx?enc=Q6mlxSufgPIwin1qUYY1HY5jXkJ6LqSsfoOPqS+O+Jk= (last accessed 5 December 2011); Article 10.26 FTA Canada – Chile; Article 101, FTA Chile – Japan, 27-Mar-2007 at http://www.mofa.go.jp/region/latin/chile/joint0703/agreement.pdf (last accessed 5 December 2011). For a case of consolidation, see *Pan American Energy LLC and BP Argentina Exploration Company* v. Argentina, ICSID ARB/03/13, Decision on Preliminary Objections, 27 July 2006.

[14] See, for instance, Article 28 (10) 2012 United States BIT Model; Annex D (Possibility of a Bilateral Appellate Mechanism), 2004 United States BIT Model; Annex 10 D ((Possibility of a Bilateral Appellate Mechanism), FTA United States – Morocco.

Fourthly, the most-favoured-nation treatment clause (MFN) contained in the overwhelming majority of modern BITs upgrades the legal protection enjoyed by foreign investors, although the clause works in quite a different manner from MFN clauses contained in international trade agreements.[15] Described as a "potent ratchet",[16] this contingent standard enables foreign investors to invoke the better treatment accorded by the host State to investors of any third State,[17] provided that there is correspondence as to the subject matter between the two treaties (*ejusdem generis* principle).[18]

Finally, for decades BIT were concluded between developed countries and developing countries, as foreign investment essentially flowed from the former to the latter. Nowadays, investing abroad is no longer a privilege of developed countries, and BITs have a truly universal dimension as a large number of them are concluded between emerging or developing countries. Since the content of BITs is to a large extent similar or identical, at least with regard to the main substantive rules, these treaties have significantly influenced the customary rules in this field.[19] This process has contributed to increasing the coherence and uniformity of international investment law.[20]

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[15] See also Article 1103 NAFTA and Article 40 (2) of the EFTA/Singapore Agreement. See also UNCTAD, 'Most-Favoured-Nation Treatment', New York – Geneva, 1999, UNCTAD/ITE/IIT/10 (Vol. III), at http://www.unctad.og/en/docs/psiteiitd10v3.en.pdf (last accessed 5 December 2011); OECD, 'Most-Favoured-Nation Treatment in International Investment Law', Working Papers on International Investment, November 2004/2, at http://www.oecd.org/dataoecd/21/37/33773085.pdf (last accessed 5 December 2011). In literature see: S. Fietta, "Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?", 4 *IALR* (2005), p. 131; P. Acconci, "Most-Favoured-Nation Treatment and International Law on Foreign Investment", in *The Oxford Handbook of International Investment Law*, ed. P. Muchlinski, F. Ortino, C. Schreuer (Oxford University Press, 2008), p. 363; A. Ziegler, "Most-Favoured-Nation (MFN) Treatment", in *Standards of Investment Protection*, ed. A. Reinisch (Oxford: Oxford University Press, 2008), p. 59; S.W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), Chapter IV.

[16] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration* (Oxford: Oxford University Press, 2007), p. 254.

[17] As pointed out in *Siemens* v. *Argentina*, ICSID ARB/02/8, Jurisdiction, 3 August 2004, para 120, the clause "relates only to more favourable treatment".

[18] *The Ambatielos Claim* (Greece, United Kingdom of Great Britain and Northern Ireland), Award, 6 March 1956, XII UNRIAA (1963), p. 83, at p. 107. See also Parties in Italics Maffezini v. Spain, ICSID ARB/97/7, Award on Jurisdiction, 25 January 2000, para 48 ff.

[19] See, for instance, *Mondev International Ltd. v. United States*, ICSID ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 43.

[20] For a thoroughly discussion, see S.W. Schill, see above note 15. See also S.M. Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law", 98 *American Society International Law Proceedings* (2004), p. 27; J.H. Alvarez, "A BIT on Custom", 42 *N. Y. Univ. J. Int'l L. & Pol.* (2010), p.17.

Last but not least, three main specific advantages of bilateralism deserve to be mentioned.

First, the flexibility of a bilateral framework permits States to tailor their commitments to their specific needs.[21] Indeed, BITs contain a variety of provisions, especially with regard to the definition of investment, the nationality of the investor, pre-establishment treatment, emergency clauses, and, perhaps more prominently, the settlement of disputes.

More than that, it is not uncommon for the provisions of the very same BIT not to apply in a symmetrical way to both parties. This may occur with regard to substantive provisions or, more frequently, the provisions on the settlement of disputes. According to Article II (1) of the BIT between the United States and Argentina, for instance, each party is entitled to maintain or make exceptions to the national treatment obligation in the sectors indicated by each of them in the protocol. An example of asymmetrical provisions relating to the settlement of disputes can be found in Article 10 (2) of the BIT concluded between The Netherlands and China, according to which China may require Dutch investors to exhaust the domestic administrative review procedure before submitting the dispute to an international investment tribunal.[22]

Second, the bilateral nature of these treaties facilitates their modification through protocols, amendments or subsequent practice. Contracting parties may thus alter their obligations in order to meet their evolving financial or economic needs or to keep the rules governing foreign investment in line with the evolution of international law, especially in relation to the protection of the environment, labour standards and human rights.

From this perspective, BITs were traditionally silent on the protection of the environment or contained only broad references to it in preambles. In the last few years, however, contracting parties to BITs have with increasing frequency included provisions on the protection of the environment.[23] These provisions are rather heterogeneous as far as their

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[21] As noted by K.C. Kennedy, "A WTO Agreement on Investments: A Solution in Search of a Problem", 24 *Univ. Pennsylvania J. Int'l Econ. L.* (2003), p. 183, "Bilateral investment agreements offer the flexibility that is not possible under a multilateral framework. BITs can be tailored to fit country-specific needs in a way that is not possible under a multilateral framework".

[22] See also Ad Article 11 (2) of the Protocol to the BIT concluded between China and Switzerland; Article 8 (2) of the BIT between China and Argentina.

[23] For a couple of examples see Article VII (4) BIT between Belgium-Luxemburg Economic Union and Colombia, Article 2 (3) BIT between the Russian Federation and Hungary; Article 7 (2) BIT between Canada and Peru. For a recent survey see K. Gordon, J. Pohl, *Environmental Concerns in Investment Agreements: A Survey*, OECD Working Papers

content is concerned and are often drafted in general terms. Moreover, even when they impose sufficiently clear substantive obligations they normally do not fall within the scope of the arbitral clauses.[24] Nonetheless, it must be emphasized that the bilateral character of the framework allows for an incremental process which may be expected to lead in due time to the inclusion of these provisions on a large scale. Such a result may be difficult, if not impossible, to achieve in the context of a multilateral treaty.

It is also worth noting that some Free Trade Agreements (FTAs) or agreements concluded between a Free Trade Association and third States contain a so-called evolutionary clause whereby the parties undertake to review the legal protection of foreign investment, often through a Joint Committee, in order to bring it in line with further developments in international economic relations[25] or to improve the internal legal framework regarding investments.[26]

Third, the adoption of binding common interpretations, should the need arise to clarify the content of certain treaty provisions, is obviously much easier in the context of bilateral treaties than multilateral treaties. Certain BITs contain specific provisions for that purpose.[27] Argentina and Panama, for instance, exchanged diplomatic notes with an "interpretative declaration" of the MFN clause contained in the BIT they had concluded in 1996.[28]

III. *Nature of BITs*

BITs fall squarely within the definition of treaty under Article 2 (1) (a) of the Vienna Convention on the Law of Treaties (VCLT) as they are international agreements concluded between States in written form and governed by international law. They normally pursue two main objectives.

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on International Investment, No. 2011/1, May 2011, at http://www.oecd-ilibrary.org/finance-and-investment/environmental-concerns-in-international-investment-agreements_5kg9mq7scrjh-en (last accessed 5 December 2011).

[24] See, for instance, Articles 12, 13 and 37 of the 2012 United States model BIT.

[25] See, for instance, the agreement between the European Free Trade Association (EFTA) and Croatia, at http://www.efta.int/content/legal-texts/third-country-relations/croatia/HR-FTA.pdf (last accessed 5 December 2011).

[26] See, for instance, Article 33 of the Central European Free Trade Agreement (CEFTA), at http://www.cefta2006.com/doc/CETA-Linkovi/Home/eng/CEFTA%202006%20ANNEX%201.pdf (last accessed 5 December 2011).

[27] See, for instance, Article 17.2 BIT between the United Kingdom and Mexico. See also Article 30 (3) of the United States 2012 Model BIT.

[28] As referred to by the Tribunal in *National Grid plc v Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para 85.

On the one hand, they aim to stimulate the flow of foreign investment and create a stable and predictable legal environment for their management; on the other hand, they promote the economic development of the host State and the economic relations between the parties.[29] The two objectives are intimately related and mutually supportive.

As a matter of fact, however, virtually all substantive rules contained in these treaties are meant to protect foreign investors who, although not formally party to the treaty, are clearly its main beneficiaries.[30] It is illustrative that certain BITs,[31] along with the Energy Charter Treaty,[32] in case of disputes between foreign investors and the host State, provide access to international arbitral tribunals exclusively to the former.

It must also be noted that obligations imposed upon foreign investors by BITs, such as the obligation to act in good faith[33] or the obligations to comply with local laws and regulations,[34] are functional to the enjoyment by foreign investors themselves of the legal protection provided for by the treaties.

The manifestly asymmetrical nature of these treaties, with all obligations incumbent upon the host State and virtually all rights granted to the foreign investors, has often been criticized, especially from the human rights standpoint.[35] Such a feature is certainly not inherent in this kind of treaty, but rather a deliberate choice of the contracting parties. Nothing would prevent contracting parties from inserting in these treaties provisions imposing upon foreign investors or upon both foreign investors

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[29] See, for instance, *Saluka Investments BV* v. *Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 300.

[30] See, for instance, *American Manufacturing and Trading, Inc. v. Zaire*, ICSID ARB/93/1, Award, 21 February 1997, para 6.06.

[31] See, for instance, Article 10 (3) BIT between China and The Netherlands; Article 8 (2) BIT between Switzerland and Ethiopia; Article 9 (2) BIT between Italy and Pakistan; Article 6 (2) BIT between Egypt and Nigeria.

[32] Article 26 (1) of the Energy Charter Treaty provides for the settlement of disputes between a Contracting Party and a foreign investor "for alleged breach of an obligation of the former".

[33] In *Phoenix Action, Ltd. v. Czech Republic*, ICSID ARB/06/5, Award, 15 April 2009, para 106, for instance, the Tribunal held that "[t]he protection of international investment arbitration cannot be granted if such protection would run contrary to the general principles of international law, among which the principle of good faith is of utmost importance".

[34] See, for instance, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID ARB/03/26, Award, 2 August 2006, para 249.

[35] See, for instance, J.E. Alvarez, "Critical Theory and the North American Free Trade Agreement's Chapter Eleven", *Univ. Miami Inter-Am. Law Review* 28 (1996–7) 303, p. 308, who describes NAFTA investment chapter as "a human rights treaty for a special-interest group" and "a treaty that is effectively silent with respect of the rights of others, who may be affected by foreign direct investment flow".

and the home state substantive obligations, including those related to the protection of human rights and labour or environment standards. The contracting parties could even agree on the settlement through arbitration of disputes concerning these obligations between nationals of a party and investors of another party, or between those within the jurisdiction of a party and investors of another party.[36]

The asymmetrical nature of BITs is further amplified by more favourable provisions clauses often contained in BITs, according to which the treaty does not derogate from any other rules of international law, including other investment treaties, as well as national legislation, to the extent that the former are more favorable to the investor.[37]

More than the imbalance in substantive provisions, however, what make these treaties truly remarkable is that the investor is allowed to litigate violations of the obligations imposed by these treaties before the national tribunals of the host State and – with rare exceptions[38] – before international tribunals, normally without the exhaustion of domestic remedies being necessary.[39] This direct access to international tribunals has prompted a stimulating debate on the legal nature of the rights enjoyed by investors and the latter's status in international law.

The most enthusiastic position was taken by the *Plama* Tribunal. It observed that Article 26 of the Energy Charter Treaty, which provides for the settlement of disputes between foreign investors and the host State, "is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law".[40]

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[36] T. Weiler, "Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order", 27 *Boston College Int. & Comp. Law Review* (2004), p. 429, proposes some draft articles that could be inserted into investment treaties in order to recognize and make enforceable the investment-related human rights of nationals of the host State. In line with the scope of application of most human rights treaties, it may even be argued that these remedies should not be confined to nationals of the host State, but be available to those within its jurisdiction of the host State, regardless of their nationality. At any rate, these remedies could be subjected to the exhaustion of domestic remedies.

[37] For an example see Article 9 BIT between China and Switzerland.

[38] See below, note 96.

[39] Exhaustion of local remedies is rarely required in BITs. For an example see Article 13 (4) of the BIT between Australia and Poland. In literature, see M. Sornarajah, *The Settlement of Foreign Investment Disputes* (The Hague: Kluwer Law International, 2000); McLachlan, Shore and Weiniger, see above note 16; Z. Douglas, *The International Law of Investment Claims* (Cambridge: Cambridge University Press, 2009).

[40] *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24, Jurisdiction, 8 February 2005, para. 141 *in fine*.

According to a more prudent and convincing approach, foreign investors can be seen as participants in international law, thus overcoming the sterile dichotomy between subjects and objects. The basic assumption behind this approach is that 'there is no inherent reason why the individual should not be able to directly invoke international law and to be the beneficiary of international law'.[41]

Significantly, as early as in 1928, the Permanent Court of International Justice held that

> it cannot be disputed that the very object of any international agreement, according to the intention of the contracting parties, may be the adoption of some definite rules creating individual rights and obligations and enforceable by the national courts.[42]

The Court pointed out that the individual rights stemming from the treaty could be enforced before national tribunals, although this might require the adoption by the parties of the necessary national legal instruments.[43] The position of the Court nonetheless amounted to an important step as regards the participation of individuals in international law.

That an international treaty can create rights in favour of individuals was reiterated by the International Court of Justice in *LaGrand* with regard to Article 36 of the Vienna Convention on Consular Relations which creates individual rights which could be invoked before the ICJ by the national State of the person concerned.[44]

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[41] R. Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Clarendon, 1994), p. 54. On, see the notion of individuals as participants in international dispute settlement and investment arbitration: Eric De Brabandere, "Non-state actors in international dispute settlement: pragmatism in international law", in *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law*, ed. J. d'Aspremont (Abingdon: Routledge, 2011), p. 342–359; P. Dumberry, E. Labelle Eastaugh, "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration", in *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law*, ed. J. d'Aspremont (Abingdon: Routledge, 2011) p. 360–371

[42] *Jurisdiction of the Courts of Danzig*, Advisory Opinion, P.C.I.J., Ser. B, No. 15 (1928), p. 17–18.

[43] The Court also noted that Poland could not invoke the fact that the relevant treaty had not been incorporated into the Polish domestic legal system to escape from its international obligations (p. 26–7). On the necessity of a national legal instrument giving effect to the treaty within the jurisdiction of the parties, see one of the most influential members of the Permanent Court of International Justice, D. Anzilotti, *Cours de droit international public* (Paris: Sirey, 1929), p. 407 ff.

[44] *LaGrand* (Germany v. United States of America), Judgment, *I. C. J. Reports 2001*, p. 466, para 77. But see the separate opinion by Judge Shi, p. 518.

In a subsequent case, the International Court of Justice clarified its position by observing that the individual rights protected under paragraph Article 36 or the Vienna Convention on Consular Relations must be asserted first before national tribunals. According to the Court, only when local remedies have been exhausted is the national State entitled to espouse the individual claims of its nationals through diplomatic protection.[45]

Yet, two different and independent legal relationships coexist. The first legal relationship, between the host State and the individual, allows the latter to bring a claim before the tribunals of the former. Once the domestic remedies have been exhausted, the State may "espouse" the individual claim and exercise diplomatic protection.[46] The second legal relationship, between the host State and the national State, enables the latter to react directly on the international plane and possibly file an application before the ICJ, assuming that the Court can exercise its jurisdiction over the dispute. The same conduct by the host State may violate at once the rights of the individual and those of his national State, and therefore affect both legal relationships and trigger their respective remedies.

Against this background, investment treaties amount to a normative breakthrough as they normally pave the way for direct access by foreign investors to international investment tribunals. It must be emphasized in this respect that Article 26 of the ICSID convention expressly excludes the requirement of exhaustion of local remedies, unless otherwise agreed by the parties in the relevant international treaty.

Two alternatives have been suggested to explain the legal position of the investor in international investment treaties, and its relationship with both the host State and the home State:

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45 *Avena and Other Mexican Nationals* (Mexico v. United States), Judgment, *I. J. Reports 2004*, p. 12, para 40.

46 According to the UN International Law Commission "[t]he individual is the subject of many primary rules of international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments. … This protection is not limited to personal rights. Bilateral investment treaties confer rights and protection on both legal and natural persons in respect of their property rights", Commentary to Article 1 of the Draft Articles, para 4, at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf. The ILC further pointed out that, "[d]raft article 1 is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its nationals – or both. It views diplomatic protection through the prism of State responsibility and emphasizes that it is a procedure for securing the responsibility of the State for injury to the national flowing from an internationally wrongful act".

(1) the treaty creates a legal relationship between the host State and the investor. The latter is then the holder of substantive rights and may resort to the remedies available under the treaty;
(2) the substantive rules continue to apply exclusively between the Parties, but the related procedural rights in the event of disputes are granted to and can be exercised directly by the foreign investor concerned.[47]

Both alternatives elucidate the real nature of BITs and ultimately lead to the same result.[48] The first alternative, nonetheless, is to be preferred, as it realistically describes investment arbitration as "a remedy exercisable by an investor by itself and in its own right against the host state".[49] In a recent case, a tribunal held that

> in the case of Chapter XI of the NAFTA … the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive.[50]

It must however be pointed out that under neither alternative referred to above is the legal relationship between the States parties to the treaty disposed of. In both cases, the treaty continues to impose upon the host State primary obligations owed to the other State. Under the first alternative described above, these obligations have an identical content to those owed to the investor, but remain quite independent from them. As such, they may be the object of an international claim in accordance with the relevant rules contained in the treaty. Under the second alternative, while the State remains the sole holder of the rights stemming from the treaty, alleged non-compliance with the corresponding obligations may bring about a dispute between the investor and the host State as well as between the States concerned.

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[47] Z. Douglas, "The Hybrid Foundations of Investment Treaty Arbitrations", *British Year Book International Law* (2003), especially p. 181–184.

[48] See also *Occidental Exploration and Production Company* v. *Republic of Ecuador*, LCIA Case No. UN3467, Judgment of the Court of Appeal regarding non-justiciability of challenge to arbitral award, 9 September 2005, para 18.

[49] *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24, Jurisdiction, 8 February 2005, para.150. See also *Occidental Exploration* v. *Ecuador*, above n. 48, paras 14–22.

[50] *Corn Products International, Inc. v. Mexico,* ICSID ARB (AF)/04/1 (NAFTA), Decision on Responsibility (redacted version), 15 January 2008, para 169.

Either way, international investment treaties provide for two different categories of disputes between different parties and before different tribunals. The same facts may generate two independent disputes – the first between the investor and the host State and the second between the States concerned.[51] No question of *litispendens* would arise as the parties to the dispute are different. Consequently, the dispute between the foreign investor and the host State is not affected by the filing by the latter of a case against the home State. In *Empresas Lucchetti* v. *Peru*, the Respondent filed a request for suspension of the proceedings since the same allegations were the subject of a concurrent State-to-State arbitration. The Tribunal held that the conditions for suspension of the proceedings were not met and rejected the request without any further discussion.[52]

The dispute between the foreign investor and the host State is completely dissociated from and independent of the conduct of the home State. This is confirmed by the fact that home States have occasionally taken a position against the competence of investment tribunals to settle disputes between their own nationals and the host State[53] or have expressed disagreement on the merits with the position of their own nationals.[54]

IV. *States' Regulatory Powers and Investors' Legitimate Expectations*

International investment law is essentially concerned with the legal relationship between the host State and foreign investors. On the one hand, once admitted to invest in the territory of the host States, investors are subjected to and must comply with local laws and regulations. On the other hand, the host State is fully entitled to exercise its regulatory powers over foreign investors. The ultimate purpose of BITs is precisely to define

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[51] In *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24, Jurisdiction, 8 February 2005, para.150, the Tribunal held that even if the investor cannot invoke Article 26 Energy Charter Treaty (settlement of disputes between investors and host State), it would leave intact its home state's right to invoke Article 27 Energy Charter Treaty against the host State.

[52] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.* v. *Peru*, ICSID ARB/03/4, Award, 7 February 2005, paras 7 and 9.

[53] See, for instance, United States' Submission in *GAMI Investment Inc.* v. *Mexico*, available at http://www.state.gov/documents/organisation/22212.pdf (last accessed 5 December 2011).

[54] See, for instance, Canada's Second Submission in *Mondev* v. *United States*, 6 July 2001, available at http://www.state.gov/documents/organisation/18271.pdf (last accessed 5 December 2011).

how the host State must treat foreign investors. From this perspective, a delicate balance needs to be struck between the regulatory powers of the host State and the need legally to protect the interests of foreign investors.[55] While a full discussion on this balancing exercise, which is at the heart of foreign investment law, falls beyond the scope of this chapter, a couple of general considerations from the standpoint of BITs are in order.

By concluding a BIT the contracting parties accept some obligations – in addition to those stemming from customary international law and other applicable international treaties – in relation to the exercise of their sovereign rights in their dealings with foreign investors. As observed by a tribunal, according to 'the basic international law principles … while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. … [T]he rule of law, which includes treaty obligations, provides such boundaries'.[56] As long as these boundaries are respected, the host State has no duty to compensate foreign investors, even when the measures adopted have a negative economic impact on their business.[57] The principle is not affected by the fact that several provisions contained in BITs still remain fraught with legal uncertainty, as in the case of indirect expropriation.[58]

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[55] India has argued before the WTO Working Group on Trade and Investment that "investment protection at present is guaranteed by a host of bilateral investment promotion and protection agreements (BIPPAs) that countries have entered into with other countries. Many governments look upon these bilateral instruments as on the one hand giving policy flexibility for themselves while assuring foreign investors a degree of comfort and safety for their investments" (WT/WGTI/W/86, 22 June 2000, p. 3).

[56] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID ARB/03/16, Award, 2 October 2006, para 423.

[57] As emphasized in *Técnicas Medioambientales Tecmed, S.A.* v. *Mexico*, ICSID ARB (AF)/00/2, Award, 29 May 2003, para 119, '[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable'. See also *S.D. Myers v. Canada*, UNCITRAL (NAFTA), First Partial Award, 13 November 2000, para 285; *Methanex Corp.* v. *United States*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, para. 410; *Saluka Investments BV* v. *Czech Republic*, above n. 29, para 276.

[58] See, for instance, *Lauder* v. *Czech Republic*, UNCITRAL, Award, 3 September 2004, para 200; *Saluka Investments BV* v. *Czech Republic*, above n. 29, para 263. See also: A. Reinisch, "Expropriation", Report submitted to the ILA, at www.ilahq.org/pdf/Foreign%20Investment/ILA%20paper%20Reinisch.pdf (last accessed 5 December 2011); W.M. Reisman, R.D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation", 74 BYIL (2004), p. 115; J. Paulsson, Z. Douglas, "Indirect Expropriation in Investment Treaty Arbitration", in *Arbitrating Foreign Investment Disputes*, ed. N. Horn, S. Kröll (The Hague: Kluwer, 2004), p. 145; L.Y. Fortier, S.L. Drymer, "Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor", *ICSID Review – FILJ*

Equally important, investment tribunals are not meant to review or assess the exercise of regulatory powers by the host State. Quite the contrary; their task is strictly limited to determining whether the host State has violated any of the limits imposed by the relevant BIT. The finding of the Tribunal in *S.D. Myres* v. *Canada* in relation to Chapter XI NAFTA can certainly be extended to BITs. Accordingly, investment tribunals do not have

> an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.[59]

Some BITs further safeguard the regulatory powers of the parties by inserting three types of clauses. The first type reaffirms and elaborates on the right of States to regulate in certain specific domains, such as the protection of the environment. They vary significantly. A good example can be found in Article VII (4) of the BIT between Belgium-Luxemburg Economic Union and Colombia, which reads:

> [n]othing in this Agreement shall be construed as to prevent a Contracting Party from adopting, maintaining, or enforcing any measures that *it considers* appropriate to ensure that an investment activity in its territory is undertaken in accordance with environmental law of the Party.[60]

Although these clauses are normally not covered by the provisions on investor–State or State–State disputes, they may offer important indications with regard to the balancing of public interest against the interests of foreign investors.

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19 (2004), p. 293; A. Newcombe, "The Boundaries of Regulatory Expropriation in International Law", 20 ICSID Review - FILJ (2005), p. 1; S. Montt, *State Liability in Investment Treaty Arbitration* (Oxford: Hart, 2009), Chapter 5; T. Gazzini, "Drawing the Line between Non-compensable Regulatory Powers and Indirect Expropriation of Foreign Investment", 7 *Manchester Jour. Int. Econ. Law* (2010), p. 36.

[59] *S.D. Myers, Inc. v. Canada,* UNCITRAL (NAFTA), First Partial Award, 13 November 2000, para 261. See also *Gami Investments, Inc. v. Mexico*, UNCITRAL (NAFTA), Award, 15 November 2004, para 93.

[60] Emphasis added. See also Article 12 (1) of the United States model BIT, at http://italaw.com/documents/USmodelbitnov04.pdf, according to which the Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.

A second type of clause aims at preserving the right of States to adopt measures that are normally inconsistent with their international obligations, but nonetheless necessary to protect its fundamental interests.[61] Article 2 (3) of the BIT between the Russian Federation and Hungary, for instance, provides that

> [t]his Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, protection of the environment, morality and public health.

A third type of clause is a typical conflict clause. Article 7 (2) of the BIT between Canada and Peru, for instance, allows for the adoption of certain measures intended to protect the environment which otherwise would be contrary to treaty obligation, provided that they are non-discriminatory. It reads:

> [a] measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f) [to transfer technology, a production process or other proprietary knowledge]. For greater certainty, Articles 3 [national treatment] and 4 [most-favoured-nation treatment] apply to the measure.

All these clauses may be considered by an investment tribunal for the purpose of assessing the legitimate expectations of foreign investors. Yet, several investment tribunals have emphasized that in exercising its regulatory powers the host State must respect the expectations that foreign investors may have legitimately built on the basis of promises, undertakings, declarations and representations made explicitly or implicitly by local authorities in relation to the establishment and management of the investment.

The notion of legitimate expectations affects virtually all instances in which foreign investors enter into a contract with public authorities and are subject to the exercise of public powers by these authorities within the jurisdiction of the host State. In *Tecmed* v *Mexico*, for instance, the Tribunal considered the fair and equitable treatment (FET) standard and held that

> [Article 4(1) BIT between Spain and Mexico], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to

[61] A selection of these clauses can be found in K. Gordon, J. Pohl, see above note 23, p. 17–18.

> make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[62]

The finding, which has been quoted with approval by several tribunals,[63] emphasizes the need to protect the legitimate expectation of private investors in their dealings with the host State. Intimately related to the principle of good faith,[64] the principle of legitimate expectations has been borrowed from domestic administrative law. It has emerged within the different domestic legal systems for the purpose of protecting natural and legal persons subjected to the authority of public bodies.[65]

V. *States* Domini *of the Treaties*

While foreign investors are the main beneficiaries of BITs, State parties remain "the transaction's exclusive and absolute *domini*".[66] At any time

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[62] *Técnicas Medioambientales Tecmed, S.A.* v. *Mexico*, ICSID ARB (AF)/00/2, Award, 29 May 2003, para 154. See also: Wälde, Separate Opinion in *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Award, 26 January 2006, esp. paras 27 ff.; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.* v. *Kazakhstan*, ICSID ARB/05/16, Award, 29 July 2008, para 609. In literature, see, in particular R. Dolzer, "New Foundations of the Law of Expropriation of Alien Property", *American Jour. Int. Law* 75 (1981), p. 553; E. Snodgrass, "Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle", 21 *ICSID Review – FILJ* (2006); S. Fietta, "The 'Legitimate Expectations' Principle under Article 1105 NAFTA. *International Thunderbird Gaming Corporation* v. *Mexico*", 7 *Journal of World Investment & Trade* (2006), p. 423; I. Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2008), especially p. 163–168; K.J. Vandevelde, "A Unified Theory of Fair and Equitable Treatment", *New York Univ. Jour. Int. Law and Politics* (2010), p. 43.

[63] See, for instance, *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID ARB/01/7, Award, 25 May 2004, paras 114–115; *Eureko B.V. v. Poland*, Partial Award and Dissenting Opinion, 19 August 2005, para 235. A observed in *Saluka* v. *Czech Republic*, above n. 29, para 302, the standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard'.

[64] As early as in 1983, the Tribunal in *Amco* v. *Indonesia*, Award on Jurisdiction, 25 September 1983, p. 359, p. 385, held that 'any convention … should be construed in good faith, that is to say by taking into account the consequence of their commitments the parties may be considered as having reasonably and legitimately envisaged'.

[65] M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge: Cambridge University Press, 2010), p. 358. See also B. Kingsbury and S. Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law", September 2009, at ssrn.com.

[66] The expression has been borrowed from G. Arangio-Ruiz, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen a/d Rijn: Sijthoff & Noordhoff, 1979), p. 284–285, esp. note 183.

they can agree on a given interpretation of, formally or informally modify, or even terminate the treaty, in accordance with the treaty itself or, when the treaty is silent on the specific issue, with the law on treaties. This means that foreign investors are exposed to the risk of a change in the legal protection they enjoy under the BIT in the host State due to the joint or unilateral action of the parties to the treaty. It is worth pointing out that they may lose the protection of a BIT due to the decision of their own national states to terminate it.

From the standpoint of the law of treaties, the fact that the foreign investor is extraneous to the rule-making process leading to the conclusion, amendment and termination of the treaty calls for some important considerations.

In the first place, the parties to a BIT can at any time amend its content, either formally (i.e. through a protocol) or informally (through subsequent practice). For the purpose of interpreting and applying a provision in the settlement of a given dispute, nonetheless, the amendment cannot produce its effects retroactively if the rights acquired under the treaty by the foreign investor are to be adequately protected within a stable and predictable legal framework. This makes it indispensable to determine whether the amendment has taken place *at the time* of the conduct allegedly inconsistent with the BIT.

As pointed out by the *Enron* and *Sempra* tribunals with regard to the alleged self-judging character of Article XI of the BIT between Argentina and the United States,

> [e]ven if [the self-judging] interpretation were shared today by both parties to the Treaty, it would still not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries.[67]

It cannot be denied, however, that in practice it may be rather difficult to distinguish amendments, which alter the rights and obligations of the parties to the treaties, from interpretations, which on the contrary confirm or

[67] *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID ARB/01/3, Award, 22 May 2007, para 337; *Sempra Energy International v. Argentina,* ICSID ARB/02/16, Award, 28 September 2007, para 385. The statement would have been clearer had it specified in the first sentence that no change would have resulted "for the purpose of this dispute". As observed by B.C. Clagett, "Expropriation Issue before the Iran-United States Claims Tribunal: Is Just Compensation Required by International Law or Not", 16 *Law & Pol'y Int'l Bus.* (1984), p. 823, "[c]ustomary international law has long regarded such elementary principle as respect for lawfully acquired rights and respect for lawfully concluded agreements (*pacta sunt servanda*) as the cornerstones of relations between States and alien investors".

define their content. This was demonstrated by the controversial interpretation of Article 1105 NAFTA given in 2001 by the Free Trade Commission.[68]

Additionally, States may also react to what they perceive as an inaccurate interpretation or application of BITs and clarify their intention by adopting unilateral statements or agreeing on joint legal instruments. In *Société Générale* v. *Pakistan*, for instance, Switzerland submitted a declaration expressing concern over the narrow interpretation given by the arbitral tribunal to the meaning of the so-called umbrella contained in the relevant BIT.[69] Similarly, several States, concerned about the uncertainty which characterizes the interpretation of MFN treatment clauses and arguably in reaction to the *Maffezini* v. *Spain* decision on jurisdiction,[70] have availed themselves of different techniques to dissipate any possible doubt concerning their common intention.[71]

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[68] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001, at http://www.naftaclaims.com/files/NAFTA_Comm_1105_Transparency.pdf (last accessed 5 December 2011). For a sharp critique of the Commission's interpretation see Second Opinion of Professor R. Jennings, in *Methanex Corporation* v *United States*, UNCITRAL (NAFTA), at http://www.naftaclaims.com/disputes_us_methanex.htm (last accessed 5 December 2011). As pointed out by I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: MUP, 1984), p. 138, "[i]t is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effected under the pretext of interpretation". See also: J-P. Cot, "La conduite subséquente des parties à un traité", 70 *Revue générale droit international public* (1966), p. 633; M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traits", *Recueil des cours* 151 (1976-III) 1, Chapter IV; F. Capotorti, "Sul valore della prassi applicativa dei trattati secondo la Convenzione di Vienna", in *Il diritto internazionale al tempo della sua codificazione*, Studi Ago (Milano: Giuffrè, 1987), vol. I, p. 197; H. Thirlway, "The Law and Procedure of the International Court of Justice. 1960–1989 (Part Three)", 62 *British Year Book International Law* (1991) 1, p. 48 ff.

[69] Note on the Interpretation of Article 11 of the Bilateral Investment Treaty Between Switzerland and Pakistan, attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy-Secretary General, 1 October 2003, in *Mealey's International Arbitration Reports*, February 2004.

[70] Maffezini v. Spain, above n. 18.

[71] *Ad* art. 4, al. (2) of the Protocol of the BIT recently concluded between Switzerland and Colombia, for instance, reads in part: '[f]or greater certainty, it is further understood that the MFN treatment … does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned", available at http://www.admin.ch/ch/f/ff/2006/8081.pdf (last accessed 5 December 2011). See also Article 5 (2) of the BIT concluded between Switzerland and Serbia Montenegro, 7 December 2007, at http://admin.ch/ch/f/rs/i9/0.975.268.2.fr.pdf; Annex 804.1 of the FTA between Canada and Peru, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-PeruFTA_chapter8-en.pdf (last accessed 5 December 2011). Article 4 (3) of the 2007 Norway Model BIT, in turn, reads: "For greater clarity, treatment referred to in paragraph (1) does not encompass dispute resolution mechanism provided for in this agreement or other International Agreements".

Finally, since investments are normally long-term operations, it is necessary to ensure that the protection guaranteed under BITs is sufficiently stable, while preserving the right of States to denounce these treaties. This is achieved through peculiar clauses contained in virtually all BITs that allow both parties to terminate the treaty, either at the end of the initial or any subsequent period of validity, or at any time in the case of unlimited duration or extension. As a rule, the right to terminate the treaty must be exercised in accordance with the notice period requirement, which is normally six or twelve months.

What makes BITs unique from the point of view of their termination is the systematic inclusion of a provision according to which they continue to produce their effects after the date of termination in respect of investments made before such date. Examples of this clause can be found in numerous BITs, including BITs concluded between developing countries.[72] The period is normally 10 or 15 years, and occasionally 5 or 20 years.

VI. *Interpretation of BITs*

Numerous tribunals have held that investment treaties must be interpreted in accordance with the rules of interpretation contained in the VCLT, which reflect customary international law.[73] The applicability of these rules has rarely been challenged by the parties to investment disputes. When this occurred, tribunals discarded the argument. In *RosInvestCo UK Ltd* v. *Russian Federation*, in particular, the Tribunal rejected the Claimant' argument that these rules are no more than a convenient point of reference, and firmly held that the application of these rules is a matter of legal obligation.[74]

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[72] See, for instance, Egypt – India, Article 15 (2); Lebanon – Malaysia, Article 12 (4). See also India Model Treaty, Article 15 (2).

[73] See, for instance, *Saluka* v. *Czech Republic*, above n. 29, para 296; *Mondev International Ltd. v. United States*, ICSID ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 43; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan,* ICSID ARB/02/13, Jurisdiction, 9 November 2004, para 75; *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24, Jurisdiction, 8 February 2005, para.117; *Methanex Corp*. v. *United States*, above n. 57, Part II, Chapter B, para 15; *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia*, ICSID ARB/05/10, Annulment, 16 April 2009, para 56. It has also been pointed out that interpretation of investment treaties calls for a "particular duty of caution" as one of the parties to the disputes was a stranger to the treaty negotiation, Berman, dissenting opinion in *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A*. v. *Peru*, ICSID ARB/03/4, Decision on Annulment, 5 September 2007, para 9.

[74] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arb. V079/2005, Jurisdiction, October 2007, Para 38.

Only exceptionally have tribunals clearly departed from or misunderstood the legal nature of the VCLT. In *Inceysa Vallisoletana S.L. v. El Salvador*, for instance, the Tribunal began the interpretation of the relevant BIT by examining the *travaux préparatoires* and then looked at its terms. Although the *travaux préparatoires* and the literal arguments pointed in the same direction and led to what the Tribunal considered to be the only correct interpretation, the approach of the Tribunal remains questionable.[75] The logical sequence established in Article 31 VCLT, which has its natural point of departure in the literal analysis of the text, must be carefully respected by tribunals, and departures may lead to misinterpretations of the relevant provisions and ultimately distortions of the intention of the contracting parties.

After some hesitation, investment tribunals have definitely accepted that BITs must be interpreted in a balanced and unbiased manner as required by Article 31 VCLT. In this regard, in *Mondev* v. *United States*, the Tribunal unambiguously rejected the idea that these treaties call for an interpretation favourable to the host State or the foreign investor.[76] Another Tribunal confirmed that

> a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow.[77]

Some doubts have been expressed in literature, not about the applicability of the VCLT, but rather about its adequacy to solve interpretative questions of investment treaties. It has been argued that the VCLT "is only of limited use in giving guidance to a tribunal in its interpretative task. Problems arise because the VCLT's rules of construction are capable of supporting a wide range of potential interpretations".[78]

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[75] *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID ARB/03/26, Award, 2 August 2006, paras 190 to 203. The Tribunal finally held that the interpretation was confirmed by 'a harmonious interpretation' based on contextual considerations.

[76] *Mondev* v. *United States*, above n. 19, para 43 (footnote omitted).

[77] *El Paso Energy* v. *Argentina*, Case ARB/03/15, Jurisdiction, 27 April 2006, para 70. In *AMCO* v. *Indonesia*, 25 September 1983, 89 *ILR* (1992) 379, p. 384–5, the Tribunal held that "a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method is but the application of the fundamental principle *pacta sunt servanda*".

[78] McLachlan, Shore and Weiniger, see above note 16, p. 67.

It is certainly true that Articles 31 to 33 VCLT have not satisfactorily settled all questions relating to interpretation,[79] and that they do not ensure an irrefutable interpretation in every case.[80] This is self-evident when the provision to be interpreted has been drafted – intentionally or not – in ambiguous or vague terms.

However, the relevant provisions of the VCLT are a well formulated compromise[81] and Article 31 in particular contains a single rule combining different elements.[82] An ICSID Tribunal has aptly observed that

> [i]nterpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.[83]

It may be argued that the main shortcoming of Article 31 VCLT lies in the fact that it presupposes the harmony of its different elements, in the sense that it assumes that is possible to find an interpretation based on literal and contextual considerations and consistent with the object and purpose of the treaty as well as with other rules of international law applicable between the parties. It offers little guidance to the interpreter on how to deal with situations in which the different elements the interpreter must take into account are conducive to different interpretations.

Investment treaties are not immune to this problem, as epitomized by the interpretation of Article 1 (2) (b) of the BIT between Lithuania and Ukraine, concerning the nationality of legal persons, in *Tokios Tokelés* v. *Ukraine*. The majority of the Tribunal stuck to a literal interpretation of the provision on the nationality of legal persons, and found that the only

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[79] For a balanced and thoughtful critical analysis see M. Fitzmaurice, "Dynamic (Evolutive) Interpretation", 21 *Hague Yearbook of International Law* (2008), p. 101.

[80] R. Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008), p. 9.

[81] T.W. Walde, "Interpreting Investment Treaties: Experiences and Examples", in *International Investment Law for the 21th Century. Essays in Honous of C. Schreuer*, ed. C. Binder *et al*, (Oxford: Oxford University Press, 2009), p. 746.

[82] See *Yearbook International Law Commission* 18 (1966-II), pp. 219–220. The Commission further noted that Article 31 'is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule'.

[83] *Aguas del Tunari S.A. v. Bolivia*, ICSID ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para 91. As pointed out by the WTO Appellate Body in *EC – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, 12 September 2005, para 176, interpretation is a "holistic exercise that should not be mechanically subdivided into rigid components". See also I. Sinclair, see above note 68, p. 153.

relevant consideration was whether the Claimant was established under the laws of Lithuania, regardless of the fact that Ukrainian subjects held 99 % of the company's shares.[84] In a strongly worded dissenting opinion, the president of the Tribunal argued that, the object and purpose of the whole ICSID system being the protection of *foreign* investment, control over the company is crucial and may prevail over the formal criteria indicated in the treaty.[85]

With regard to the interaction between BITs and other rules of international law, two questions must be briefly addressed. On the one hand, BITs cannot be interpreted "in isolation from public international law".[86] Under Article 31 (3) (c) VCLT, the interpreter has to take into account "any relevant rule of international law applicable in the relation between the parties". Article 31 (3) (c) has a huge potential in respect of the interpretation of BITs as the controversial question that has accompanied systemic interpretation – namely whether the relevant rules referred to must be applicable to the parties to the dispute or to the parties to the relevant treaty – does not arise in the context of BITs due to the bilateral character of these treaties.

While the relevance of Article 31 (3) (c) is generally accepted in investment arbitration,[87] the expression "to take into account" remains rather vague and could mean almost anything. The interpreter is then called upon rigorously to maintain the distinction between applicable law and systemic interpretation. From this perspective, a tribunal has aptly held that

> 'applicable in the relations between the parties' must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.[88]

On the other hand, in a few cases investment tribunals have taken into account, for the purpose of interpreting the BIT before them, other BITs concluded by one party – normally the Respondent – or both parties with

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[84] *Tokios Tokelés* v. *Ukraine*, ICSID ARB/02/18, Jurisdiction, 29 April 2004, para 38.

[85] Dissenting opinion of P. Weil, especially paras 19 ff. Subsequent tribunals have adopted the view of the majority in *Tokios Tokelés* v. *Ukraine*, see C. Schreuer, L. Malintoppi, A. Reinisch and A. Sinclair, *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009), p. 290–292.

[86] *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID ARB/06/5, Award, 15 April 2009, para 78.

[87] See, for instance, *Saluka Investments BV* (*The Netherlands*) v. *Czech Republic*, Partial Award, UNCITRAL, 17 March 2006, para 254.

[88] para 39.

third States.[89] Given the *res inter alios acta* character of treaties, these treaties must be treated with the greatest prudence[90] and can at best be an "aid to interpretation",[91] certainly not a canon or a rule of interpretation.[92]

In *Wintershall v. Argentina*, the Tribunal correctly refused to consider treaties concluded between the Respondent and third states for the purpose of interpreting the BIT the claimant had based its claim upon.[93] Indeed, the practice relating to the conclusion of BITs with third States does not amount to subsequent practice of the parties *in the application of the treaty* for the purpose of Article 31 (3) (b) VCLT, nor does it fall into any of the elements expressly provided for in Article 31 VCLT. In spite of the silence of the VCLT, nevertheless, it may be argued that these treaties could be taken into consideration to elucidate a term or a provision contained in the BIT to be interpreted, but solely to the extent that they show a clear and consistent pattern in the practice of *both* parties. Needless to say, such a technique might be impractical when the States concerned have ratified a large number of BITs.

VII. *Settlement of Disputes*

Whereas a full treatment of the settlement of disputes relating to the interpretation and application of BITs falls beyond the purpose of this chapter, a few basic considerations in this respect are in order. Traditionally, foreign investors could rely only on the domestic courts of the host State and on diplomatic protection. For different reasons, neither remedy

[89] See, for instance, *Maffezini v. Spain*, above n. 18, especially paras 57–61, taking into account only the practice of the Respondent; *Aguas del Tunari S.A. v. Bolivia*, above n. 83, especially paras 289–314, comparing the practice of both concerned States.

[90] In *AES Corporation v. Argentina,* ICSID ARB/02/17, Jurisdiction, 26 April 2005, paras 24–25, the Tribunal pointed out that 'each BIT has its own identity; its very terms should consequently be carefully analysed for determining the exact scope of consent expressed by its two Parties. This is in particular the case if one considers that striking similarities in the wording of many BITs often dissimulate real differences in the definition of some key concepts, as it may be the case, in particular, for the determination of "investments" or for the precise definition of rights and obligations for each party'.

[91] In *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID ARB/05/3, Decision, 12 July 2006, para 84 (ii), the Tribunal found in another BIT the confirmation *a contrario* of the interpretation reached on the basis of Article 31 VCLT.

[92] See H. Thirlway, see above note 68, p. 66. In the 2006 Supplement, *BYIL* 77 (2006) 1, p. 74, however, the same author takes a more nuanced position.

[93] *Wintershall Aktiengesellschaft v. Argentina*, ICSID ARB/04/14, Award, 8 December 2008, para 128.

offered in the past or offers today adequate and reliable protection. On the one hand, domestic tribunals do not always deliver their decisions effectively and independently;[94] on the other hand, diplomatic protection depends on a political initiative by the government concerned and is exposed to the risk of politically motivated decisions.

To overcome this unsatisfactory situation, virtually all modern BITs contain provisions on the settlement of disputes between the States parties as well as between one of them and the investors of the other. The first category of disputes can be settled either through mediation or negotiation, or by resorting to international tribunals. Investment- related arbitration between States, however, remains quite exceptional.[95]

As noted above, investment treaties typically provide also for the settlement of disputes between the host State and foreign investors.[96] Like State–State disputes, these disputes can be settled through negotiation, mediation, consultation or conciliation.[97] If a friendly settlement cannot be reached, the dispute may be settled before an arbitral tribunal modelled after international commercial arbitration.[98] The importance of access to investment arbitral tribunals has been emphasized by numerous tribunals. One of them pointed out that

> [t]he creation of ICSID and the adoption of bilateral investment treaties offered to investors assurances that disputes that might flow from their investments would not be subject to the perceived hazards of delays and political pressures of adjudication in national courts. Correspondingly, the prospect of international arbitration was designed to offer to host states freedom from political pressures by governments of the state of which the investor is a national.[99]

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[94] On the difficulties surrounding the assessment of the independence of domestic tribunals see, for instance, *Aguinda* v. *Texaco, Inc*., 142 F.Supp.2d 534 (S.D.N.Y. 2001); *Chevron Corporation* v. *S. Donziger*, 2011 WL 778052 (S.D.N.Y. 2011).

[95] For one of the rare examples of investment disputes between States see *Italian Republic v. Republic of Cuba*, *ad hoc* arbitration, Final Award, 15 July 2008.

[96] For two examples of BITs silent on the settlement of disputes between foreign investor and a party to the treaty see the BITs between Switzerland and Morocco, and between Bulgaria and Cyprus.

[97] For a BIT providing for conciliation see Article 9 (2) of the BIT between India and the United Kingdom.

[98] On the importance of negotiations and mediation see, in particular, T. Wälde, "Effective Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation", 22 *Arbitration International* (2006), p. 205.

[99] *Gas Natural SDG* v *Argentina*, ICSID ARB/03/10, Jurisdiction, 17 June 2005, paras 29 ff (notes omitted).

Provisions on the settlement of investor–State disputes may vary significantly with regard to their scope of application, the choice of the arbitral tribunal, the applicable law and any other procedural matters. They normally contain a standing offer that is unconditionally made by the host State and expresses the State's consent to settle before investment tribunals any dispute or certain categories of disputes that may arise with foreign investors of the other party. The consent of the host State matches that of the foreign investor the moment the latter files a request for arbitration or accepts in writing the competence of the arbitral tribunal.[100] Some BITs identify the arbitral tribunal competent to settle the dispute between foreign investors and the host State,[101] while others leave foreign investors and possibly the host State the choice between two or more investment arbitral proceedings.[102]

The requirement to exhaust them before resorting to international arbitration, which was rather rare in old BITs, has almost completely disappeared in modern BITs,[103] a development in line with Article 26 ICSID and the jurisprudence of investment tribunals outside ICSID.[104] Although abandoned as a procedural requirement, the exhaustion of domestic remedies may nonetheless still apply as a substantive standard with regard to certain categories of claims based on BITs, namely indirect expropriation[105] and denial of justice,[106] due to the intrinsic nature of the alleged breaches.

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[100] J. Paulsson, "Arbitration without Privity", 10 *ICSID Review - FILJ* (1995), p. 232; C. Schreuer, "Consent to Arbitration", in *The Oxford Handbook of International Investment Law*, ed. P. Muchlinski, F. Ortino, C. Schreuer (Oxford: Oxford University Press, 2008), p. 830

[101] See, for instance, Article 8 BIT between the United Kingdom and the United Arab Emirates.

[102] See, for instance, Article VI (2) BIT between the United States and Estonia; Article 9 (3) BIT between United Kingdom and India; Article 8 (5) BIT between Italy and Argentina; Article 8 (3) BIT between Pakistan and Egypt.

[103] C. Schreuer, "Travelling the BIT Route – Of Waiting Periods, Umbrella Clauses and Forks in the Road", 5 *Journal of World Investment & Trade* (2004), p. 231; C. Schreuer, "Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration", 1 *Law and Practice of International Courts and Tribunals* (2005), p. 1.

[104] See, for instance, within NAFTA, *Loewen Group, Inc. and Raymond L. Loewen v. United States,* ICSID ARB(AF)/98/3 (NAFTA), Merits, 26 June 2003, para 1424 ff.; and within ASEAN, *Yaung Chi Oo Trading PTE Ltd. v. Government of the Union of Myanmar* ASEAN ICSID Case No. ARB/01/1, Final Award, 31 March 2003, para 40.

[105] In *Generation Ukraine, Inc. v. Ukraine*, ICSID ARB/00/9, Final Award, 16 September 2003, para 20.30, the Tribunal referred to "a reasonable – not necessarily exhaustive – effort by the investor to obtain correction" before domestic courts.

[106] *Chevron Corporation* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, para 235.

Three types of clauses often deal with the co-ordination between proceedings before domestic courts and arbitral tribunals. Several BITs contain a co-called fork in the road provision, according to which the applicant must make a final choice between bringing the case before national courts or before investment tribunals. The wording of these provisions may vary and normally is sufficiently clear.[107] Their functioning is limited to cases in which the applicant is seeking to institute proceedings before a domestic court and an investment tribunal in relation to the same dispute involving the same parties and the same cause of action.[108]

A second type of clause contains a waiver, as does Article 26 (2) of the United States' Model Treaty.[109] Unlike fork in the road clauses, these clauses require foreign investors to waive, at the time they bring a dispute before an investment arbitral tribunal, all other claims relating to the same conduct or measures adopted by the host State. These clauses not only prevent parallel proceedings, but also offer to foreign investors the chance to have their claims adjudicated first by national tribunals and then, if necessary, by investment arbitral tribunals, and to the host State the opportunity to redress the wrongdoing, if any, judicially.[110]

A third type of clause imposes upon the applicant a waiting period during which litigation must be pursued before domestic courts before resorting to investment tribunals.[111] The period may be as long as 18 months,[112] and has been described by a tribunal as "nonsensical for a practical point

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[107] Compare, for instance, Article VI (2) BIT between the United States and Ecuador; Article 8 (2) BIT between France and Argentina; Article VIII (2) BIT between Indonesia and Zimbabwe; Article 13 (1) BIT between Argentina and Australia; Article VI (2) BIT between the United State and Estonia.

[108] C. Schreuer, with L. Malintoppi, A. Reinisch, A. Sinclair, see above note 85, p. 365 ff.

[109] For another example see Article 9 (2) BIT between Greece and Mexico, under which "[i]f an investor submits a claim to arbitration …, neither he or his investment that is a legal person may initiate or continue proceedings before a national tribunal, except for proceedings for injunctive, declaratory or other extraordinary relief, nor involving the payment of damages, before an administrative tribunal or court under the law of the disputing Contracting Party". See also Article 12 (3) of the BIT between Iran and South Africa, according to which "National courts shall not have jurisdiction over any dispute referred to arbitration".

[110] See on this point McLachlan, Shore and Weiniger, see above note 16, p. 107–109. See also *Waste Management, Inc.* v. *Mexico*, ICSID ARB(AF)/98/2 (NAFTA), Jurisdiction, 2 June 2000.

[111] See C. Schreuer, above n. 85.

[112] See, for instance Article 10 (2) BIT between Germany and Argentina ; Article 8 (3) BIT between Italy and Argentina. Under Article VII (2) BIT between Turkey and Pakistan, a dispute may be submitted before an arbitral tribunal if the investor concerned has brought it before the domestic courts of the host State and a final award has not be rendered within one year".

of view".[113] While the number of BITs containing such a clause remains limited, foreign investors are often able to dodge it by invoking MFN treatment.

VIII. *BITs and Contracts*

BITs and contracts are different legal instruments concluded between different parties and possessing a different legal nature. The rights and obligations they contain are entirely independent, are governed by the respective applicable laws, and are subject to their respective jurisdictional clauses.

Yet, conduct or a measure may amount to a violation of either or both the BIT and the contract. The claim(s) that may arise must be settled in accordance with the relevant jurisdictional clause(s).[114] As pointed out by the *ad hoc* Committee in *Vivendi I*,

> [w]hether there has been a breach of the BIT and whether there has been a breach of the contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract .... [115]

As long as a tribunal has been seised on the basis of the BIT, its competence is confined to determining whether a breach of the BIT has occurred and, if appropriate, to indicating the consequences of such a breach. For the purpose of the proceedings before the tribunal, it is irrelevant whether the act allegedly contrary to the BIT also amounts to a breach of a contract.[116]

Nonetheless, a tribunal is entitled, if not even obliged, to interpret the contract to the extent this is indispensable to establishing whether any

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[113] *Plama Consortium Limited* v. *Bulgaria*, ICSID Case No. ARB/03/24, Jurisdiction, 8 February 2005, para.224.

[114] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal* v. *Argentina*, ICSID ARB/97/3, Annulment, 3 July 2002, para 95 (*Vivendi I*). In *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID ARB/01/13, Jurisdiction, 6 August 2003, para 147, the Tribunal held that "the same set of facts can give rise to different claims grounded on different legal orders: the municipal and the international legal orders", para 147. See also *Impregilo S.p.A. v. Pakistan*, ICSID ARB/03/3, Jurisdiction, 22 April 2005, para 258; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan,* ICSID ARB/03/29, Jurisdiction, 14 November 2005, para 160; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina,* ICSID ARB/97/3, Award, 20 August 2007, 7.3.10 (*Vivendi II*).

[115] *Vivendi I*, para 96, *Vivendi II*, para 7.3.10.

[116] *Eureko B.V. v. Poland*, UNCITRAL, Partial Award, 19 August 2005, para 112.

violation of the BIT has been committed. This was clearly held in *Vivendi I* and *Vivendi II*. In the latter case, the Tribunal held that it was allowed

> to consider such alleged contractual breaches not for the purpose of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyse and determine whether there has been a breach of the Treaty.[117]

Moreover, States may commit themselves by treaty to comply with contractual obligations. Failure to comply with this commitment would amount to a breach of the treaty. Although "responsibility for breach of treaty is conceptually distinct from responsibility for breach of contract … the latter may, depending on the context, entail or imply the former".[118]

If the treaty, interpreted in accordance with the rules on interpretation contained in the VCLT, so provides, therefore, a treaty-based investment tribunal may exercise its jurisdiction in respect of contractual claims. This may occur, in the first place, on the basis of sufficiently wide jurisdictional clauses which confer on the tribunal competence, for instance, for "disputes regarding investments",[119] "dispute with respect to investments",[120] or "any dispute arising"[121] between a Contracting Party and the investor of the other Contracting Party.

On this point, it has been observed that

> when a BIT provides for investor/State arbitration in respect of all investment disputes rather than dispute concerning violations of the BIT, the tribunal is competent even for pure contract claims. [122]

Not all contractual obligations can be brought before a treaty-based investment tribunal. It must be stressed that the obligation must be related to

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[117] *Ibid.* para 7.3.10.

[118] J. Crawford, "Treaty and Contract Investment Arbitration", Treaty and Contract in Investment Arbitration", 24 *Arbitration International* (2008), p. 357–358.

[119] Article 7 BIT between Italy and Lebanon. Article 8 BIT between France and Argentina reads in the relevant part "tout différend relatif aux investissements".

[120] Article 9 (1) BIT between China and Switzerland.

[121] Article 9 (1) BIT between Italy and Pakistan.

[122] C. Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims – the *Vivendi I* Case Considered", in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. T. Weiler (London: Cameron, 2005), p. 281. In ICSID jurisprudence, see, for instance, *SGS Société* Générale *de Surveillance S.A. v. Philippines*, ICSID ARB/02/6, Jurisdiction, 29 January 2004, para 131. See also S. Alexandrov, "Breach of Treaty Claims and Breach of Contract Claims: Is it Still Unknown Territory?", in *Arbitration under International Investment Agreements: a Guide to the Key Issues*, ed. K. Yannaca-Small (Oxford: Oxford University Press, 2010), p. 323.

the investment. An ordinary contract, such as a contract for the supply of goods, does not fall within the competence of the tribunal.[123]

Additionally, the contract must in principle be attributable to the State itself and not to State entities possessing independent legal personality, unless the treaty provides otherwise. However, it may further be argued that nothing prevents contracting parties from committing themselves to respect, as a matter of treaty law, contracts concluded between these entities.

Claims based on contracts can also reach a treaty-based investment tribunal through so-called umbrella clauses. These clauses are inserted in several BITs and typically guarantee that each Contracting Party shall observe any obligation it owes to foreign investments.[124] Since both the wording and the scope of application of these clauses may vary, a careful interpretation of umbrella clauses on an individual basis is required.

After decades of oblivion, these clauses made a boisterous appearance in ICSID arbitration at the end of 2003. The decisions that followed have not always been consistent and jurisprudence remains unsettled. The interpretation and application of these clauses, as well as the construction of the underlying rights, will be discussed in detail in Chapter VII of this book. For the purpose of the present chapter, suffice it to note that, despite several divergences both in jurisprudence and literature, there is ample agreement that umbrella clauses may cover contractual obligations – the extent of which remains undefined – that could be susceptible of adjudication before treaty-based international investment tribunals. This has been accepted by all tribunals, even those that have adopted a narrow interpretation of these clauses.[125] It remains to explain how this occurs. Two theoretical explanations have been put forward.

According to the first view, these clauses oblige the host State to comply with its contractual obligations lest it commit a breach of the treaty

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[123] See, for instance, *CMS Gas Transmission Company* and *Argentina*, ICSID Case ARB/01/8, Award, 12 May 2005, para 299. See also J. Crawford, above n. 118, p. 362.

[124] In literature see C. Schreuer, see above note 103, p. 231; S.A. Alexandrov, "Breaches of Contract and Breaches of Treaty. The Jurisdiction of Treaty-based Arbitration Tribunals to Decide of Contract Claims in *SGS v. Pakistan* and *SGS v. Philippines*", 5 *Journal of World Investment & Trade* (2004), p. 555; T.W. Wälde, "The "Umbrella" Clause in Investment Arbitration – A Comment on Original Intentions and Recent Cases", 6 *Journal of World Investment & Trade* (2005), p. 183.

[125] *SGS Société Générale de Surveillance S.A. v Pakistan*, Decision on Jurisdiction, 6 August 2003; *Joy Mining Machinery Ltd v Egypt*, ICSID ARB/03/11, Jurisdiction, 6 August 2004. The second tribunal seems to limit such a possibility to contract of a certain – yet undefined – magnitude (para 51).

which would unavoidably entail its international responsibility and trigger its jurisdictional remedies. Nonetheless, the nature of contractual obligations does not change and they remain distinct from the obligations stemming from the treaty. As pointed out by the *ad hoc* Committee in *CMS* v. *Argentina*,

> [t]he effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected, as is its proper law. If this is so, it would appear that the *parties* to the obligation (i.e., the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[126]

According to the second view, on the contrary, umbrella clauses transform breaches of the contract into violations of the treaty. In *L.E.S.I.* v. *Algeria*, the tribunal held that

> [c]es clauses ont pour effet de transformer les violations des engagements contractuels de l'Etat en violations de cette disposition du traité et, par là même, de donner compétence au tribunal arbitral mis en place en application du traité pour en connaître. [127]

The debate is however largely academic and of limited practical relevance if it is accepted that under these clauses a treaty-based tribunal is entitled to adjudicate on contractual claims. The crux of the matter remains to establish when a contractual obligation falls within the scope of an umbrella clause. Again, given the textual differences in umbrella clauses, this must be determined on a case-by-case basis in accordance with the VCLT rules on interpretation.

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[126] *CMS Gas Transmission Company v. Argentina,* ICSID ARB/01/8, Annulment Decision, 25 September 2007, para 95 (c). According to P. Mayer, "La neutralisation du pouvoir normative de l'Etat en matière de contrats d'Etat", 113 *Journal de droit international* (1986) 5, p. 36–7, umbrella clauses "empêchent l'Etat de méconnaître ses engagements contractuels sous peine de violer le traité. Mais certains auteurs leur attachent une conséquence encore plus radicale: ils transformeraient les obligations contractuelles en obligations internationales. Cette position méconnaît qu'il existe deux rapports distincts et parallèles: le rapport inter partes, entre parties au contrat d'Etat, qui reste soumise à la *lex contractus*, et le rapport interétatique, qui relève du droit de gens. Que la violation par l'Etat de ses obligations nées du contrat constitue en même temps la violation du traité ne suffit pas à altérer la nature de l'un ou de l'autre".

[127] *Consorzio Groupement L.E.S.I.* v. *Algeria*, ICSID Case ARB/03/08, 10 January 2005, para 25 (ii). Here the Tribunal is paraphrasing P. Weil, "Problèmes relatifs aux contrats passés entre un état et un particulier", *Recueil des cours* 128 (1969) p. 130. See also E. Gaillard, *Journal de droit international* (2005), p. 211.

IX. *Concluding Remarks*

Bilateral investment treaties have played and continue to play a crucial role in the promotion of the rule of law and the development of a stable and predictable legal framework. They are not only there to stay, at least in the near future: they are also quite successful. Their success is due to several factors, including the following.

First, the great flexibility of a bilateral framework allows contracting parties to tailor and adapt treaty provisions to meet their own specific and evolving needs. From this perspective, while BITs remain manifestly unbalanced in favour of foreign investors, recent practice shows that some States are prepared to include in BITs provisions on the protection of the environment, thus addressing one of the main sources of criticism of BITs, alongside the scant attention paid to human rights and labour standards.

Second, from the standpoint of foreign investors, BITs contain attractive substantive provisions the effects of which are amplified by the MFN and NT clauses. BITs have generated a largely coherent body of jurisprudence and had a significant impact on the evolution of customary international law. Yet, inconsistent decisions on BIT claims have been delivered in the past and several issues still remain fraught with uncertainty. The risk of inconsistent decisions, however, is not peculiar to a bilateral framework, but rather inherent in the sovereign character of arbitral tribunals.

Third, BITs provide for truly innovative provisions on the settlement of disputes. These provisions elevate foreign investors to the status of full participants in international law through direct access to international investment tribunals. Such access ensures foreign investors of an unprecedented level of legal protection and overcomes the risks and hazards which are often associated with domestic remedies and diplomatic protection.

Fourth, by concluding BITs States certainly do not relinquish their regulatory powers; they merely agree to respect some further limits to their exercise in dealings with foreign investors of the other party. It will inevitably be for adjudicators to determine, in the light of the facts at issue, whether these limits have been breached.[128] Adjudicating often requires

[128] See, with regard to indirect expropriation, L.Y. Fortier, "Caveat Investor: The Meaning of Expropriation and the Protection Afforded Investors Under NAFTA", 20 *News from ICSID* (2003), p. 11.

one to strike a delicate balance between the right of the host State to regulate and the protection of foreign investors' rights and legitimate expectations.

Considering that the conclusion of a multilateral treaty on investment still appears rather remote and without prejudice to the increasing importance of investment-related provisions in regional economic integration agreements, the real challenge today is how to increase the coherence and effectiveness of the current, largely bilateral, legal framework. From this perspective, the potential of BITs is enormous and not yet fully exploited.

CHAPTER FIVE

GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT LAW

Stephan W. Schill

Contents

Introduction: The Transformative Potential of General Principles

Debates about sources of international law are not as detached from the reality of social relations as the formal and seemingly bloodless framing of the topic may suggest. Debates about sources are not only about the form international law takes, but also about its substance, and that in at least three dimensions. First, the sources applicable in a legal regime reflect the

underlying ordering paradigm of a specific field, namely whether it is structured according to multilateral or bilateral rationales, whether it is based on generally applicable, non-discriminatory standards of conduct or whether it enshrines *quid pro quo* bargains and preferential treatment to the exclusion of outsiders. Second, the sources of international law, and the relationship between different sources, are relevant for determining in the abstract how different interests in a given situation relate to each other, in particular whether the default regime of customary international law is modified by international treaties. And third, the sources of international law determine on which grounds dispute settlement institutions have to decide, and thus what substantive law comes into play in the resolution of individual cases.

The connection between formal sources and material content becomes nowhere clearer than in international investment law, where the fierce debate during the 1970s and 1980s between capital-exporting and capital-importing countries about the establishment of a New International Economic Order was a battle about the content of international law on the protection of property as much as it was a battle about the proper sources to govern investor–State relations.[1] After all, developing countries were opposed to the independent protection of alien property under customary international law, arguing that domestic law was the relevant yardstick, but were open to agreeing to restrictions of their sovereignty that went beyond customary international law under international investment treaties.[2] At the same time, with customary international law tumbling, arbitral tribunals called upon to resolve investment disputes, namely the famous oil concession cases during the 1970s and 1980s, increasingly turned to general principles of law as a substitute source.[3] This allowed tribunals to bypass debates about the content of customary international law and about the relationship between treaty and custom and to implement what were formerly firm grounds under customary international law

[1] See Patrick Juillard, "L'évolution des sources du droit des investissements", Recueil des Cours 250 (1994-VI), p. 21–22 (observing that "[l]es controverses relatives aux sources du droit des investissements recouvrent, en réalité, les controverses relatives au droit des investissements. … toutes les sources du droit des investissements ont été prises dans la tourmente Nord-Sud, au cours des décennies 1970 et 1980, pour la simple raison que l'accord ne se faisant pas sur le contenu, le contentant ne pouvait échapper au désaccord.").

[2] On the evolution of international investment law in the struggle between capital-exporting and capital-importing countries see Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009), p. 23–64.

[3] See André von Walter, "Oil Concession Disputes, Arbitration on", in *Max Planck Encyclopedia of Public International Law*, Vol. VII, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2012), p. 948, paras. 24–34 (discussing the use of general principles in oil concession arbitrations in the 1950s through 1980s).

as part of general principles. Also in this respect, the issue of sources was less about form than about substance.

The evolution of the sources of international investment law, that is, the downfall of domestic law and customary international law and the concomitant rise of bilateral investment treaties (BITs) and general principles during the 1970s and 1980s, as contradictory as it may seem, is explicable in terms of the quest for order and legal certainty – concerns that are at the heart of every legal system and central for law's function to stabilize social relations – and about underlying ordering paradigms.[4] While the rise of BITs provided a substitute for the void in substantive investment protection left by the challenge developing countries brought against customary international law, the rise of general principles reflected the interest in a universal order that was threatened by the rise of BITs.[5] Henceforth, BITs and general principles of law would form an amalgam to meet the double objective of combining a treaty-based re-organisation of investor–State relations with multilateral ambitions in the absence of a multilateral treaty. Still today, while true universalization can only be achieved by one multilateral treaty with universal adherence, general principles of law may be the best explanation to link the multilateralization of international investment law, that is the emergence of a uniform international legal regime governing investor–State relations on the basis of bilateral treaties,[6] to a multilateral source.[7]

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[4] See Juillard, see above note 1, p. 207–209.

[5] *Ibid.*, p. 208.

[6] See my argument to this effect in Schill, see above note 2. I doubt, however, whether it is strictly necessary to link the multilateralization of international investment law to a multilateral source of international law in the sense of Article 38(1) of the Statute of the International Court of Justice. Instead, it seems sufficiently clear to me that the multilateralization of international investment law is connected to a social practice of making largely identical bilateral treaties and of having these treaties applied by a relatively small group of arbitrators who knit what may seem like instances of purely bilateral treaty-making into a treaty-overarching framework. Since this process is known by States –partly intentionally envisaged at the time of making bilateral investment treaties, partly accepted ex post – it seems little relevant whether the multilateralization of international investment law as a social phenomenon goes together with the existence or emergence of a multilateral source of international law. Instead, as international investment law shows, the qualification of a source as multilateral or bilateral, and the qualification of the ensuing rules and principles as multilateral or bilateral, are not necessarily linked. On the difference between form and substance in the definition of multilateralism see also John G. Ruggie, "Multilateralism: The Anatomy of an Institution", in *Multilateralism Matters – The Theory and Praxis of an Institutional Form*, ed. John G. Ruggie (New York: Columbia University Press, 1993), p. 8–14.

[7] On the problems connected to linking the proliferation of bilateral treaties to the creation of customary international law see the chapter by Jean d'Aspremont in this book. See also José E. Alvarez, "A BIT on Custom", *N.Y.U. J. Int'l L. & Pol.* 42 (2009), p. 17.

The importance of general principles of law, however, goes beyond their impact on investment law's underlying ordering paradigm. They can equally have considerable impact on the relations between investor rights and public interests, and thus play an important role in the current process of recalibrating international investment law in reaction to what is called either a backlash in international investment law or investment law's legitimacy crisis.[8] Arguably, one of the reasons for the backlash or sense of crisis is the combination of public international law as the applicable framework with an arbitration mechanism that attracts primarily practitioners with a commercial arbitration background.[9] This leads to the clash of two radically different conceptualizations of the function of investor–State dispute settlement and of international investment law more generally: while those with a commercial arbitration mind-set focus on the dispute settlement aspects of the field and see international investment law mainly as providing arguments and counterarguments in an adversarial proceeding, public international lawyers conceptualize international investment law as part of general international law and attribute to it an overarching ordering function for the international society.[10] General principles of law could help overcome the frictions between the public international law framework and the private law dispute settlement mechanism if those engaged in investor–State arbitrations do not only consider general principles of *private* law, but recognize the potential of general principles of *public* law to reshape investor–State arbitration and international investment law. This may put calls radically to remodel international investment law and investor–State dispute settlement into perspective.[11]

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[8] See, for example, *The Backlash Against Investment Arbitration: Perceptions and Reality*, eds. Michael Waibel et al. (Alphen aan den Rijn: Kluwer Law International, 2010); Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions", *Fordham L. Rev.* 73 (2005), p. 1521; M. Sornarajah, "A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration", in *Appeals Mechanism in International Investment Disputes*, ed. Karl P. Sauvant (New York: Oxford University Press, 2008), p. 39. See also Charles N. Brower and Stephan W. Schill, "Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", *Chi. J. Int'l L.* 9 (2009), p. 473 (with further references).

[9] See Charles N. Brower, "W(h)ither International Commercial Arbitration", *Arb. Int'l* 24 (2008), p. 191.

[10] See Stephan W. Schill, "Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator", *Leiden J. Int'l L.* 23 (2010), p. 406–409.

[11] For a call for such a radical re-modeling, see "Public Statement on the International Investment Regime" (August 31, 2010), available at: http://www.osgoode.yorku.ca/public_statement (last visited 28 May 2012).

Hence, in the present chapter, I do not want to ask the question of whether it is possible to extract from the practice of treaty-making and arbitral decision-making general principles of law governing investor-State relations, which can then be applied as a source of international law to other disputes.[12] Instead, I want to clarify the function of general principles of law as a source in the resolution of investor-State disputes and explore their transformative potential within the existing institutional framework of investor-State arbitration.[13] The argument I pursue in this chapter is that recourse to general principles of public law is an important strategy for arbitral tribunals to react to the criticism they have faced in respect of some of their interpretations of substantive standards of international investment law. By making more use of general principles of public law, I submit, arbitral tribunals can improve the outcome of decision-making in investor-State arbitration and their own reasoning and achieve a balance of investor rights and public interests that is acceptable to the different stakeholders in the process, namely States, investors, and civil society.

Furthermore, in the present chapter, I will not expand on the full range of general principles of public law and how they can help reshape international investment law and investor-State arbitration. They can aid in re-conceptualizing the powers of arbitral tribunals, the choice of remedies, the calculation of damages, the standards of review to be applied by

[12] This was the purpose, for example, of studies undertaken during the preparatory work for the Worldbank Guidelines on the Treatment of Foreign Direct Investment. See Antonio R. Parra, "Principles Governing Foreign Investment, as Reflected in National Investment Codes", in *Legal Treatment of Foreign Investment: "The World Bank Guidelines"*, ed. Ibrahim F.I. Shihata (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 311; John A. Westberg and Bertrand O. Marchais, "General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists", in *Legal Treatment of Foreign Investment: "The World Bank Guidelines"*, ed. Ibrahim F.I. Shihata (Dordrecht: Martinus Nijhoff Publishers, 1993), p. 337.

[13] This function of general principles is necessarily dependent upon the existence of an international treaty or investor-State contract that contains a State's consent to arbitration. For present purposes, general principles are therefore a source of law that depends upon the operation of other sources of law in order to come into play in the resolution of investor-State disputes. This is not to deny that general principles of law constitute an independent source of international law and can have an autonomous function as part of the law relating to foreign investment. As understood in the present chapter, however, international investment law today is for all practical purposes the law applicable in investor-State arbitrations. It is in this context that the operation of general principles of law is triggered by the operation of other sources of law containing the parties consent to arbitrate. In the absence of such a source, general principles of law only confirm that recourse to international arbitration requires the agreement of the parties. See Westberg and Marchais, see above note 12, p. 353.

arbitral tribunals when reviewing regulatory acts of host States, or help to better balance competing interests of investors and of host States. I am also not able to provide a full argument on why international investment law should best be analogized with public law systems rather than private law systems. I have expanded on this analogy elsewhere, coupled with many examples that explore that analogy.[14] The essence of such an analogy is that international investment law directly governs the relations between foreign investors and States and provides foreign investors with a remedy that resembles judicial review, more than it resembles classical commercial arbitration or dispute settlement under public international law.[15]

Instead, what I will do in the following is to deal with the conceptual and methodological foundations for general principles generally and general principles of public law more particularly before concentrating on one example that well reflects the potential general principles of public law have in re-conceptualizing international investment law. The example is the interaction between general principles of public law and the fair and equitable treatment standard, which is contained in virtually all international investment treaties and constitutes the most powerful standard of investment protection.

I. *Framing General Principles: Conceptual and Methodological Foundations*

In order to unfold my argument that general principles of public law should play an increasingly important role in international investment law, this section challenges several claims made about general principles of law that would discourage their use in investment arbitrations. These are, first, the claim that general principles are only a residual and weak source of international law whose primary function is to deal with technical issues of law and dispute settlement and to fill gaps left by the other sources of international law; second, that general principles of law are necessarily highly dependent upon subjective evaluations of arbitrators and lack rigorous conditions for their development and application; and

[14] See the contributions in *International Investment Law and Comparative Public Law*, ed. Stephan W. Schill (Oxford: Oxford University Press, 2010).

[15] See Stephan W. Schill, "International Investment Law and Comparative Public Law – An Introduction", in *International Investment Law and Comparative Public Law*, see above note 14, p. 10–17.

third, that general principles of law are misused to favour interests of foreign investors over those of host States and interests of capital-exporting over interests of capital-importing States.[16]

Instead, I submit that general principles of law are an important source despite the increasing treatification of international investment law - or perhaps precisely because of that treatification; that the danger of subjectivity can be countered through more rigorous methodology in developing general principles of law, in particular through more rigorous comparative analysis; and that comparative law analysis illustrates the great potential of general principles of public law to provide well-balanced solutions for investor-State relations.

A. *Realizing the Relevance of General Principles*

General principles, originally included as a source of international law in Article 38(1)(c) of the Statute of the Permanent Court of International Justice, and later of the International Court of Justice, in order to avoid a finding of *non liquet* by the Court,[17] are often perceived as a subsidiary source of international law. They are viewed as no more than "a residual reservoir of legal rules that may fill gaps where no applicable treaty provision or international customary rule exist"[18] and as reflective of an historically embryonic state of international law that has been overcome. In Moshe Hirsch's words, "[t]he recourse to this vague source of international law was a characteristic feature of arbitral awards and states in the early stages of international law."[19] Even the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have only hesitantly had recourse to general principles of law.[20] General principles of international law thus appear as rather insignificant in the overall scheme of international legal sources.

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[16] On the criticism see, for example, Moshe Hirsch, "Sources of International Investment Law", Hebrew University of Jerusalem Research Paper No. 05–11, July 2011, p. 13–18, available at http://ssrn.com/abstract=1892564 (last visited 5 December 2011); M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 3rd ed. 2010), p. 85–87 and 418.

[17] See Alain Pellet, "Article 38", in *The Statute of the International Court of Justice: A Commentary,* eds. Andreas Zimmerman et al. (Oxford: Oxford University Press, 2006), p. 677, para. 245.

[18] Hirsch, see above note 16, p. 13.

[19] *Ibid.*

[20] Fabián O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Leiden: Martinus Nijhoff, 2008), p. 17–35; Hermann Mosler, "Rechtsvergleichung vor völkerrechtlichen Gerichten" [Comparative Law Before

The same holds true in international investment law. In Hirsch's view, "[g]eneral principles of law played a significant role in the formative period of international investment law, prominently in the oil concession arbitrations and in the pre-BIT era (such as in the Iran-US Claims Tribunal) but it seems that they are largely neglected by contemporary arbitral tribunals."[21] Moreover, their scope is often considered as of minor importance in governing investor-State relations. For Christoph Schreuer et al., general principles of law "[t]ypically … involve questions of a less political and more technical character than rules of customary international law."[22] Along the same line, Ole Fauchald concluded as a result of a quantitative citation analysis of the sources of law applied by ICSID tribunals between 1 January 1998 and 31 December 2006 that "tribunals examined general principles of law as a separate legal basis in only eight of the 98 decisions."[23] Even more reduced was their practical impact. As Fauchald summarizes,

> [t]ribunals made use of general principles of law as an interpretive argument in only four decisions. Hence, even if international investment law is an area of law where there are close links between domestic and international law and where general principles derived from domestic legal systems may be expected to be of importance to the interpretation and application of international law, there were few instances where such principles had practical significance. Moreover, there was no thorough analysis of the content of the principles in any of the decisions, and the principles were not used as essential interpretive arguments, but rather as non-essential arguments or as general starting points for the subsequent analysis.[24]

Judging solely by the numbers, however, gives a distorted picture about the extent to which international courts and tribunals have already had recourse to general principles and the range of situations in which they have applied them. In fact, general principles have been used in a number of cases and in different contexts: to develop the procedural law of

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International Courts], in *Internationale Festschrift für Alfred Verdross zum 80. Geburtstag* [*Liber Amicorum in Celebration of Alfred Verdross' 80th Birthday*], eds. René Marcic et al. (München/Salzburg: Wilhelm Fink, 1971), p. 400–405; Wolfgang Weiss, "Allgemeine Rechtsgrundsätze des Völkerrechts" [General Principles of International Law], *Archiv des Völkerrechts* 39 (2001), p. 417–418; Jaye Ellis, "General Principles and Comparative Law", *Eur. J. Int'l L.* 22 (2011), p. 950.

[21] Hirsch, see above note 16, p. 16 (footnotes omitted).

[22] Christoph H. Schreuer et al., *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2nd ed. 2009), Art. 42, para. 178.

[23] Ole K. Fauchald, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", *Eur. J. Int'l L.* 19 (2008), p. 312.

[24] *Ibid.*, p. 326.

international adjudication,[25] as a source of substantive rights and obligations,[26] to fill lacunae in the governing law, and to aid interpretation and the further development of international law.[27] Even though international courts and tribunals often do not explain the methodology they apply in extracting general principles, and often proclaim the existence of a general principle rather than provide structured comparative law analysis,[28] many dispute settlement bodies have had recourse to such principles, including but not limited to the PCIJ and the ICJ,[29] the World Trade Organisation (WTO) Appellate Body,[30] the various international criminal tribunals,[31] the Court of Justice of the European Union (CJEU),[32] and the European Court of Human Rights (ECtHR).[33]

Likewise, in the context of foreign investment disputes, both under investment treaties and investor-State contracts or concession agreements, investment arbitration tribunals have drawn on general principles of law for a variety of purposes, such as filling gaps in the governing law and serving as an aid to treaty interpretation, but also to determine the mutual rights and obligations of the parties to a dispute. While it is true that general principles have played a particularly important role during the formative period of international investment law, namely in the oil concession cases[34] and in the Iran-United States Claims Tribunal,[35] arbitral tribunals in present-day investment arbitrations still regularly have

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[25] See Chester Brown, *A Common Law of International Adjudication* (New York City: Oxford University Press, 2007), p. 53–55; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons, 1953), p. 257–258.

[26] Cf. *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, Award, 28 August 1951, 18 I.L.R. 144, p. 149–150 (supporting the proposition that contracts of an international character may be governed by international law or general principles of law even without such specific provisions); see also Cheng, see above note 25, p. 29–31.

[27] See Weiss, see above note 20, p. 411–414.

[28] See Michael Bothe, "Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte" [The Importance of Comparative Law in the Practice of International Courts], *ZaöRV* 36 (1976), p. 283–286.

[29] See reference above note 20.

[30] See Weiss, see above note 20, p. 418–420.

[31] Raimondo, see above note 20, p. 73–163.

[32] For a comprehensive overview of the subject, see Xavier Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006); Takis Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2d edn. 2006); Armin von Bogdandy, "Founding Principles", in *Principles of European Constitutional Law*, eds. Armin von Bogdandy and Jürgen Bast (Oxford, München: Hart Publishing, 2d rev. ed. 2011), p.11.

[33] See Mosler, see above note 20, p. 391–400.

[34] See von Walter, see above note 3, paras. 24–34.

[35] See Grant Hanessian, "General Principles of Law in Iran-U.S. Claims Tribunal", *Columbia J. Transnat'l L.* 27 (1989), p. 309.

recourse to general principles. They come in as part of the applicable law either because choice of law-clauses explicitly so provide,[36] or because arbitral tribunals rightly hold that investment treaties need to be interpreted in accordance with public international law and its general principles.[37] Similarly, in contract-based investment arbitrations, general principles of law are applied by investment tribunals, either because the contracts at issue contain choice of law-clauses to this effect or because general principles of law come in as applicable law via Article 42(1) of the ICSID Convention[38] and because of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[39]

Thus, Schreuer et al. provide in their commentary on the ICSID Convention an impressive list of issues ICSID tribunals have applied as general principles, including, *inter alia*, good faith, the prohibition of corruption, the principle that nobody can benefit from his or her own fraud, the principle of *pacta sunt servanda*, estoppel, unjust enrichment, questions relating to the burden of proof, the duty to mitigate damages, or the principle of *res judicata*.[40] More recently, arbitral tribunals have applied as

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[36] Occasionally, general principles of law are mentioned explicitly as applicable law in international investment treaties. Art. 10(5) of the Argentina-Spain BIT (Acuerdo para la promoción y la protección recíproca de inversiones entre el Reino de España y la Republica Argentina, signed 3 October 1991, entered into force 28 September 1992, available at http://www.unctad.org/sections/dite/iia/docs/bits/argentina_spain_sp.pdf), for example, provides:

> The Arbitral Tribunal shall decide the dispute in accordance with the provisions of this Agreement, the terms of other Agreements in force between the parties, the law of the Contracting Party in whose territory the investment was made, including its rules of conflict of laws, and general principles of international law (translation by author).

On similar choice of law-clauses in international investment agreements see further Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), p. 79–83 (noting at p. 79 that the most common type of choice of law-clauses in international investment agreements contains a reference to general principles of law). Notably, there are also multilateral investment treaties that contain similar choice of law-clauses; see Article 26(6) of the Energy Charter Treaty (providing that "[a] Tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law").

[37] *Phoenix Action. Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 75, 77, 78, 80, 99, 100 *et s*.

[38] Cf. *Duke Energy International Investments No. 1, Ltd v. Republic of Peru* (*Duke v. Peru*), ICSID Case No ARB/03/28, Award, 18 August 2008, paras. 159–161.

[39] *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the a*d hoc* Committee, 1 March 2011, para. 87.

[40] Schreuer et al., see above note 22, Art. 42, para. 180; see also Tarcisio Gazzini, "General Principles of Law in the Field of Foreign Investment", *J. World Investment & Trade* 10

general principles of law the principle of abuse of right,[41] the principle of estoppel[42] and collateral estoppel,[43] the principle of non-retroactivity,[44] the separability of the arbitration agreement as a general principle,[45] and the good faith construction of arbitration agreements.[46] Furthermore, at least one tribunal has had recourse to general principles in order to concretize the concept of legitimate expectations as part of fair and equitable treatment.[47] This widespread practice indicates that general principles of law are not as insignificant as the numbers may suggest.

Moreover, a quantitative analysis of past decisions has no predictive force about the future potential of general principles, in particular not in connection with the concretization of the most notorious and vaguely crafted treaty provisions in international investment treaties, such as fair and equitable treatment, the concept of indirect expropriation, or full protection and security. In fact, in this context general principles of public law are becoming more and more important, given that international law is no longer restricted to governing the relations between States. Instead, international law increasingly encompasses, including in international investment law, rules governing the relations between States and private actors. This also impacts the scope of general principles. When Hersch Lauterpacht in his 1927 study, *Private Law Sources and Analogies of International Law*, maintained that the "general principles of law are for most practical purposes identical with general principles of private law",[48] he wrote at a time

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(2009), p. 109–115 (discussing the use and nature of general principles of law in modern investment arbitration).

[41] See *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 106–113; *Mobil Corporation, Venezuela Holding et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 19 June 2010, paras. 169–185.

[42] *Duke Energy International Investments No. 1, Ltd v. Republic of Peru* (*Duke v. Peru*), ICSID Case No ARB/03/28, Award, 18 August 2008, paras. 231 and 241–249.

[43] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.2.

[44] *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 54 and 57; *AES Summit Generation Limited AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 5.2; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 45; *Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the a*d hoc* Committee, 1 March 2011, para. 172.

[45] *Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the a*d hoc* Committee, 1 March 2011, para. 131.

[46] *Ibid*., paras. 140 and 142.

[47] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 111–134.

[48] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (London: Longmans, Green and Co. Ltd., 1927), p. 71.

when international law was primarily a law coordinating the interactions between equal sovereigns. Meanwhile, the situation has changed radically: international law is not anymore the traditional inter-State law of Westphalian times, but increasingly the law of an international society comprised of States, international organisations, and individuals. Accordingly, what Wolfgang Friedmann stated in 1963 all the more holds true today:

> The science of international law can no longer be content with the analogous application of private law categories. It must search the entire body of the "general principles of law recognized by civilized nations" for proper analogies. With the growing importance of international legal relations between public authorities and private legal subjects, public law will be an increasingly fertile source of international law.[49]

General principles of public law may become relevant both in the context of clarifying the interpretation of the principal standards contained in international investment treaties, but also in respect of customary international law. For even in cases where investment treaty concepts are closely tied to the customary international law,[50] comparative public law and the development of general principles are relevant and appropriate tools to concretize the rights and obligations in investor-State relations. After all, even historically the breach of the international minimum standard required, as expressed in *L.F.H. Neer v. United Mexican States*,[51] "an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[52] This, by definition, involves recourse to comparative law in order to determine the relevant international standards.[53]

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[49] Wolfgang Friedmann, "The Uses of 'General Principles' in the Development of International Law", *Am. J. Int'l L.* 57 (1963), p. 295.

[50] This is particularly the case with respect to fair and equitable treatment and full protection and security under Article 1105(1) of NAFTA. On the relation between fair and equitable treatment and the customary international law minimum standard see Newcombe and Paradell, see above note 36, p. 263–275.

[51] *L.F.H. Neer v. United Mexican States*, Opinion, 15 October 1926, 4 R.I.A.A. 60.

[52] *Ibid.*, p. 61–62.

[53] See Edwin Borchard, "The 'Minimum Standard' of the Treatment of Aliens", *Mich L. Rev*. 38 (1940), p. 448–449 (explaining that the customary international law minimum standard "is also composed of the uniform practices of the civilized states of the western world who gave birth and nourishment to international law. Long before article 38 of the Statute of the Permanent Court of International Justice made the 'general principles of law recognized by civilized states' a source of common international law, foreign offices and arbitral tribunals had relied on such general principles to work out a loose minimum which they applied constantly in interstate practice."). See also Restatement (Second) of Foreign

In sum, it therefore seems likely that general principles, in particular general principles of public law, will become an increasingly relevant source in international investment law and investor-State arbitration. General principles have had more impact in the past than often recognized and may find a potent field of application in the context of concretizing the often vague principles of international investment law. They are a relevant source for resolving investor-State disputes, but may simply have lain dormant.

B. *Avoiding Pitfalls: Towards a More Rigorous Methodology*

The use of general principles of law in international investment law has to overcome considerable criticism. Critics not only consider them as a "weak source of international law",[54] but also as "manipulable according to subjective preferences."[55] As M. Sornarajah argues:

> Their weakness is accentuated by the common tendency to select a proposition from a few national systems and argue that they constitute a general principle, which should be treated as international law. Thereafter, like-minded scholars seek to achieve this conversion through constant repetition. This is a phenomenon which frequently occurs in international investment law. The selectivity involved in the technique is illustrated by the fact that often the choice of the principles is restricted to a particular period in the history of legal systems or the principle is chosen and the exceptions to it in the legal systems are jettisoned.[56]

In Sornarajah's view, these weaknesses, however, not only involve technical questions of methodology, but go deeper and touch upon questions of power and hegemony, and directly influence the substance of the law governing investor-State relations. While he acknowledges the "capacity of general principles to contribute to the law",[57] he also criticizes that

> tribunals have used general principles in a manner which may not be acceptable to states. They have often selected rules that favour the promotion of investment protection and which are detrimental to the interest of the host

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Relations Law of the United States (1965), § 165(2) (providing that "[t]he international standard of justice .... is the standard required for the treatment of aliens by: (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles, (b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.").

54 Sornarajah, see above note 16, p. 418.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*, p. 86.

> state. This result can be explained only on the basis that the present arbitral system is inclined towards investment protection rather than towards the acknowledgment of norms that may favour developing states.[58]

A successful and acceptable use of general principles of law thus calls for both a more rigorous methodology in developing them and the search for balance of the sometimes competing interests of investors and host States. Both objectives, in my view, can be achieved through general principles of public law and their application in investor-State arbitrations.

First and foremost, it is arbitral tribunals themselves that have to adhere to a more rigorous and convincing methodology in developing general principles of public law in order to minimize the influence of subjective preferences. Moreover, arbitrators are under an obligation to do so, as disregard of the proper comparative methodology in developing general principles of law can result in an annullable error.[59] In addition, scholars of international investment law, international dispute settlement, and comparative public law are called on to contribute to a better knowledge about general principles governing the relations between States and investors.

While I do not want to address all details of the process of distilling general principles, a few important issues will need to be addressed in light of the above mentioned criticism. These are the choice of comparative legal orders, the question of whether to engage in multilateral or bilateral comparison, and the interaction between general principles and investment treaties. All of these aspects aim at providing a well-founded and objective basis for the process of developing general principles of law for investor-State relations and thus counter the criticism that these

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[58] *Ibid*.

[59] This may be concluded from the decision of the first Annulment Committee in the *Klöckner* case. See *Klöckner Industrie-Anlagen GmbH et al. v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, paras. 63–73. While the Annulment Committee emphasized in the case, which was based on an investor-State contract, that the direct application of principles of international law without first asserting the content of the law of the host State was contrary to Article 42(1) ICSID Convention (*ibid*., para. 69), its decisions also clearly expresses criticism of the methodology applied by the tribunal in developing the principle in question merely be recourse to a single legal order and the simple statement that "the same is 'indeed the case under other national codes which we know of'" (*ibid*., para. 67 – quoting from the tribunal's award). Such an approach to develop general principles of law in the sense of Article 38(1)(c) of the ICJ Statute is clearly insufficient and would have merited, if intended, as the Annulment Committee suspected was the case (see *ibid*., para. 69), in itself annulment of the award for excess of power by not applying the content of a proper source of law, but by developing the standard to be applied to judge the legality of the host State's conduct out of the arbitrators' purely subjective assumption about what international law requires.

principles are malleable and no more than the expression of subjective and biased preferences of arbitrators.

1. *The Choice of Comparative Legal Orders*

A central question when determining the existence of general principles is which legal orders to include in a comparative survey. Article 38(1)(c) of the Statute of the International Court of Justice (ICJ Statute) speaks of "the general principles of law recognized by *civilized* nations."[60] While connoting certain hegemonic notions of international law, nowadays this statement is generally understood as meaning that a certain principle must exist in the *principal* legal orders of the world.[61] In a pluralist international legal order, this allows drawing on a wide variety of domestic legal orders without *a priori* restrictions. At a minimum, however, comparative research aimed at identifying a general principle will have to encompass representative legal systems of the common and civil law, as these two traditions have influenced most domestic legal systems worldwide, in private as well as in public law.[62]

As a matter of practical convention, and in view of difficulties comparative lawyers face in terms of availability of foreign law sources and scholarship, the legal orders most often analysed are German, French, English, and U.S.-American law. The reason for this choice is not one of legal hegemony, but rather the fact that these legal orders are easily

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[60] Art. 38(1)(c) of the ICJ Statute (emphasis added).

[61] The qualification in Article 38(1)(c) of the ICJ Statute, that a principle must be recognized by "civilized nations", today no longer has a discriminatory function in excluding the domestic legal orders of certain countries. Instead, as U.N. Charter, art 2(1) makes clear, all UN members are equal sovereigns and therefore recognized as civilized nations. Notwithstanding, the limitation to the principal legal systems of the world can be justified, for example, in view of ICJ Statute, art. 9, which states, as regards the composition of the court, that "the representation of the main forms of civilization and of the principal legal systems of the world should be assured." This suggests an equation between civilized nations in ICJ Statute, art. 38 (1)(c) and the principal legal systems mentioned in ICJ Statute, art. 9; see also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Vol. I (London: Stevens and Sons, 3d ed. 1957), p. 44; Weiss, see above note 20, p. 405–406.

[62] See Raimondo, see above note 20, p. 50–57. While there are also other conceptions of law and distinct legal traditions, common law and civil law cover a broad spectrum of domestic legal systems in all continents, as these legal traditions have spread from their European roots to many other countries, partly because they were enacted in dependencies or former colonies, but also because in legal reform processes many countries around the world adopted the well-developed public law systems of one of the major civil or common law countries; see also Pellet, see above note 17, p. 258 note 699 (observing that most domestic legal systems borrow their rules from common or civil law systems). For a recent discussion on the proper methodology for the distillation of general principles see Ellis, see above note 20, p. 953–959.

accessible and, above all, have influenced the legal systems of many other countries.[63] Yet, nothing, in principle, prevents one from drawing on legal systems outside this classical comparative canon. On the contrary, including other legal systems enriches and strengthens a comparative law argument. The object and purpose of investment treaties, and the ideational market-friendly context they are embedded in,[64] however, suggests drawing primarily on legal systems that endorse a rights-based approach to ordering the relations between the State and society, that are based on rule-of-law thinking, and that respect individual economic rights.

Distilling a general principle of law does not require a quantitative study of all, or nearly all, domestic legal orders. Rather, comparative law analysis can restrict itself to a qualitative study of the legal principles of the principal domestic legal orders or of international relations. In addition, it is not necessary that the same legal rule exists in the legal systems studied, but that a certain principle underlying the legal rule in question is broadly recognized. In consequence, comparative law is not a mechanical quantitative process, but one of abstraction, weighing, and qualitative evaluation. While comparative analysis must not become uncritical towards differences of different legal systems, it must analyse them in a functional perspective and against a sufficiently elevated level of abstraction. Otherwise, a comparative analysis gets lost in the particularities and overlooks the common ordering principles that many legal orders, including in domestic law, share.[65]

In addition, a quest for general principles of law can also engage in cross-regime comparison with other international legal regimes.

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[63] See, for example, Rudolf Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* [Property, Expropriation, and Compensation in Current International Law] (Berlin/Heidelberg: Springer, 1985), p. 213–215 (on methodological questions concerning the choice of relevant domestic legal orders in the context of concretizing the scope of the concept of indirect expropriation in international investment law).

[64] See Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty", *Am. J. Int'l L.* 92 (1998), p. 627 ("BITs present themselves as quintessentially liberal documents."). See also Kenneth J. Vandevelde, "Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties", *Colum. J. Transnat'l L.* 36 (1998), p. 501 (emphasizing that BITs form part of a movement to liberalize the international economy while leaving States considerable leeway for intervention); Kenneth J. Vandevelde, "Sustainable Liberalism and the International Investment Regime", *Mich. J. Int'l L.* 19 (1998), p. 373 (arguing that BITs represent at least a temporary consensus on a liberal order for international investment relations).

[65] In this sense, as della Cananea rightly points out: "the idea of general principles of law is not necessarily in contrast with the recognition of particularities." Giacinto della Cananea, "Minimum Standards of Procedural Justice in Administrative Adjudication", in *International Investment Law and Comparative Public Law*, see above note 14, p. 41.

For international investment law, a particularly promising field for such an approach is the comparative evaluation of human rights, as both systems govern relations between the State and private actors.[66] In this context, the elaborate jurisprudence of the ECtHR on Article 6 of the European Convention on Human Rights could thus be used to develop general principles regarding the timely administration of justice or the right to a fair trial.[67] Similarly, comparative recourse could be made to the emerging principles of European administrative law[68] or the jurisprudence of the WTO Appellate Body in order to concretize standards of good governance that host States have to live up to under investment treaties.[69] Furthermore, cross-regime comparison can be a fruitful source for developing concepts that structure the relation between the parties to an investment arbitration and arbitral tribunals, including procedural maxims,[70] appropriate standards of review,[71] issues of openness and transparency,[72] or questions

[66] See generally Ursula Kriebaum, *Eigentumsschutz im Völkerrecht: Eine vergleichende Untersuchung zum internationalen Investitionsrecht sowie zum Menschenrechtsschutz* [Property Protection in International Law: A Comparative Study on International Investment Law and Human Rights Protection] (Berlin: Duncker & Humblot, 2008).

[67] See Ali Ehsassi, "Cain and Abel - Congruence and Conflict in the Application of the Denial of Justice Principle", in *International Investment Law and Comparative Public Law*, see above note 14, p. 227–229; see also Andrea K. Bjorklund, "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims", *Va. J. Int'l L.* 45 (2005), p. 809.

[68] For modern scholarly texts on European administrative law, see, for example, Mario P. Chiti, *Diritto amministrativo europeo* [European Administrative Law] (Milano: Giuffrè, 3d ed. 2008); Paul Craig, *EU Administrative Law* (Oxford: Oxford University Press, 2006); Jean-Bernard Auby and Jacqueline Dutheil de la Rochère, *Droit administratif européen* [European Administrative Law] (Brussels: Bruylant, 2007); Jürgen Schwarze, *Europäisches Verwaltungsrecht* [European Administrative Law] (Baden-Baden: Nomos, rev. 1st ed. 2006); and Thomas von Danwitz, *Europäisches Verwaltungsrecht* [European Administrative Law] (Berlin/Heidelberg: Springer, 2008).

[69] See Jürgen Kurtz, "The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO", in *International Investment Law and Comparative Public Law*, see above note 14, p. 250–255; see also Giacinto della Cananea, "Beyond the State: The Europeanization and Globalization of Procedural Administrative Law", *Eur. Pub. L.* 9 (2003), p. 575.

[70] See generally Chester Brown, "Procedure in Investment Treaty Arbitration and the Relevance of Comparative Public Law", in *International Investment Law and Comparative Public Law*, see above note 14, p. 681–688.

[71] See generally William Burke-White and Andreas von Staden, "The Need for Public Law Standards of Review in Investor-State Arbitrations", in *International Investment Law and Comparative Public Law*, see above note 14, p. 689 (arguing for the adoption of the margin of appreciation doctrine of the ECHR as the standard of review in investment arbitrations).

[72] See generally Alessandra Asteriti and Christian J. Tams, "Transparency and Representation of the Public Interest in Investment Treaty Arbitration", in *International Investment Law and Comparative Public Law*, see above note 14, p. 787.

of remedies.[73] What is important, in any event, is not to forget relevant differences between different regimes.[74]

2. *Bilateral or Multilateral Comparison?*

Another aspect concerning the choice of legal systems to examine in the foreign investment context, in particular when aiming at determining the existence of general principles of public law, relates to the question of whether to look primarily at the domestic legal orders of the contracting parties to an applicable investment treaty or whether to engage in a broader comparative exercise. The form of investment treaties as mostly bilateral treaties suggests looking only toward the public law systems of the contracting parties.[75] However, unlike genuinely bilateral treaties that reflect the result of a *quid pro quo* bargain, BITs develop multiple overlaps and structural interconnections and create a relatively uniform and treaty-overarching regime for international investment protection that is functionally largely equivalent to a multilateral system.[76] This underlying

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[73] See Irmgard Marboe, "State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests", in *International Investment Law and Comparative Public Law*, see above note 14, p. 382–405; Borzu Sabahi & Nicholas J. Birch, "Comparative Compensation for Expropriation", in *International Investment Law and Comparative Public Law*, see above note 14, p. 755–756, 784–785; Anne van Aaken, "Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View", in *International Investment Law and Comparative Public Law*, see above note 14, p. 746–752.

[74] Cf. Kurtz, see above note 69 (arguing that WTO law is often abused and uncritically reflected in investment arbitration jurisprudence on national treatment).

[75] The Iran-U.S. Claims Tribunal, for instance, has mainly relied on the legal orders of the United States and Iran when developing general principles. See Hanessian, see above note 35, p. 318; see also Michael Akehurst, "Equity and General Principles of Law", *Int'l & Comp. L.Q.* 25 (1976), p. 824–825 (pointing out the connections between the choice of legal orders when determining general principles and the bilateralism/multilateralism distinction).

[76] This particularly holds true as regards the principles of international investment protection that are rather uniform across different bilateral treaties, such as the prohibition of direct and indirect expropriation without compensation, fair and equitable treatment, full protection and security, and national treatment. On the thesis that international investment law constitutes an essentially multilateral system of law even though it is enshrined in bilateral treaties (see generally Schill, see above note 2). To be clear, the argument is not that BITs are 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 forms part of the global 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 one discipline that is made up of uniform investment law principles, is implemented through rather uniform institutional mechanisms, and follows rather uniform rationales.

conceptual uniformity should also be reflected in the scope of the comparative method, namely by drawing on public law concepts more generally, without limitation to the law of the contracting parties to the governing BIT.

There are several factors suggesting that international investment treaties are not bilateral treaties in the sense of *quid pro quo* bargains between two countries, but rather form part of a treaty-overarching system of investment protection — in other words, a framework that is multilateral in nature, even though it has taken the form of bilateral treaties. First, international investment treaties generally conform to an archetype. They converge in their wording and have developed a surprisingly uniform structure, scope, and content.[77] In particular, most investment treaties provide for the same set of substantive investor rights. This convergence is also not coincidental. Rather, the similarities of BITs result from various international processes embedding BITs within a multilateral framework. Thus, BITs can usually be traced back to national model treaties, which, in turn, share a common historic pedigree. In fact, most of today's model treaties are inspired by the concerted efforts of capital-exporting countries in the 1960s to establish a multilateral investment treaty within the Organisation for Economic Cooperation and Development (OECD). Although alternative model treaties existed, the OECD model became predominant for both the negotiation of treaties between capital-exporting and capital-importing countries and later also the negotiation of South-South BITs.[78] The reason for the convergence of BITs is arguably that uniform rules are in principle in the interest of all States, because uniform rules are necessary to create a level playing field that enables investments to flow to wherever capital is allocated most efficiently.[79]

Second, BITs regularly contain MFN clauses that require States to treat investors and their investments equally, independent of nationality.[80] MFN clauses therefore multilateralize benefits from a particular BIT and harmonize the protection of foreign investments in a specific host State. While there is controversy in arbitral jurisprudence as to whether MFN clauses encompass more favorable access requirements to investor-State dispute settlement and broader consent to arbitration beyond the

[77] See Schill, see above note 2, p. 70–88.
[78] See *ibid.*, p. 88–93.
[79] See *ibid.*, p. 93–115.
[80] On the scope, effect, and function of MFN clauses, see *ibid.*, p. 121–196.

substantive standards granted to foreign investors,[81] it is clear that MFN clauses, in principle, level the inter-State relations between the host State and third States and push the system of international investment protection towards multilateralism.

Third, investors themselves have ample options to circumvent restrictions that may exist in a specific investment treaty independent of the application of MFN clauses.[82] Although BITs are limited *ratione personae* to nationals of the other contracting party, investors can often bring their investment under the scope of application of a more favorable treaty simply by channeling it through a subsidiary in a third State.[83] Such treaty shopping is possible because BITs regularly protect corporate structures independently of the nationality of the shareholders behind them.[84] The broad options for treaty shopping undermine the understanding of investment treaties as expressions of bilateral bargains, because investors can often circumvent the limitations of a specific BIT. Finally, arbitral practice, and in particular the way tribunals interpret investment treaties, suggests that BITs form part of a uniform treaty-overarching framework of investment protection that is based on uniform principles.[85] This shows above all in the ubiquitous use of precedent in investment arbitration, including treaty-overarching precedent.[86]

For these reasons, it seems inappropriate to limit the comparative method to the domestic legal orders of the contracting parties to the applicable investment treaty. Instead, comparative legal analysis should also take into account other relevant domestic and international public law regimes, ultimately with the purpose of determining the existence of general principles of public law that can be applied to resolve investment disputes and to concretize the rights an obligations in investor-State relations.

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[81] See *ibid.*, p. 151–173.
[82] See *ibid.*, p. 197–240.
[83] See *ibid.*, p. 221–236.
[84] See *ibid.*, p. 200–221.
[85] See *ibid.*, p. 278–361.
[86] See *ibid.*, p. 321–357. In addition, arbitral tribunals make use of other methods of treaty interpretation that suggest the existence of a treaty-overarching framework of international investment law, namely interpretation *in pari materia*. See Schill, see above note 2, p. 305–312. This method of treaty interpretation involves interpreting the governing treaty in the light of other treaties with a similar subject matter, potentially including investment treaties between wholly unrelated parties. The use of this method of treaty interpretation suggests that arbitral tribunals perceive that BIT practice in general, not only the BIT practice of one of the contracting parties, forms part of the sources that can be used for guidance in interpreting a specific investment treaty. See also the chapter by Eric De Brabandere in this book.

3. *Interaction of General Principles and Other Sources*

A comparative analysis may concretize the interpretation of investor rights mainly in two ways. It may enable investment tribunals to deduce requirements from comparable domestic and international standards for a context-specific interpretation of the respective standard of treatment in question, such as fair and equitable treatment, indirect expropriation, full protection and security, or national treatment. A comparative public law analysis of domestic legal systems, for example, may be used to develop methods and thresholds for determining when non-compensable regulation turns into a regulatory taking requiring compensation.[87] The general principles thus developed could then guide the application of treaty provisions prohibiting indirect expropriations without compensation.

Alternatively, comparative public law analysis may also be used to justify the conduct of a State *vis-à-vis* a foreign investor. If conduct similar to that at issue in an investment arbitration is generally accepted by domestic legal systems, investment tribunals could, and arguably need to, adopt the same solution as an expression of a general principle. The Tribunal in *Noble Ventures v. Romania*, for example, in determining whether the initiation and conduct of bankruptcy proceedings, without more, was arbitrary, rightly attributed much weight to the fact that

> [s]uch proceedings are provided for in all legal systems and for much the same reasons. One therefore can not say that they were 'opposed to the rule of law.' Moreover, they were initiated and conducted according to the law and not against it. [The company] was in a situation that would have justified the initiation of comparable proceedings in most other countries. Arbitrariness is therefore excluded.[88]

Similarly, the Tribunal in *Plama v. Bulgaria* pointed out that because of

> evidence which shows that the tax laws of many countries around the world treat debt reductions, as were negotiated in this case, as income taxable to the beneficiary … [i]t cannot be said that Bulgaria's law in this respect was unfair, inadequate, inequitable or discriminatory. It was part of the generally applicable law of the country like that of many other countries.[89]

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[87] See Markus Perkams, "The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark", in *International Investment Law and Comparative Public Law*, see above note 14, p. 121–137 (looking at the treatment of indirect expropriation in the United States and Germany).

[88] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Final Award, 12 October 2005, para. 178.

[89] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 269 (internal reference omitted). Cf. also *Joseph Charles Lemire v. Ukraine*, ICSID

In this context, comparative public law, and the general principles of public law thus distilled, can serve as a yardstick not only to develop minimum but also to identify maximum standards of investment protection. General principles of law can thus help to interpret investment treaties so that they do not impose restraints on domestic legislators, administrations, and the judiciary that are more onerous than those imposed, in a comparative perspective, by domestic public law systems.[90] This suggests that general principles of public law do not one-sidedly work in favor of foreign investors, but are equally able to defend the public interests against private usurpation.

Comparative public law and general principles of public law thus can affect international investment law and arbitration through various channels and in various aspects. They can help to clarify the meaning of other sources applicable in investor-State arbitration, in particular provisions in international investment treaties. They also do not necessarily function to the benefit of investors and capital-exporting countries. Instead, a rigorous methodology not only reduces the influence of subjective preferences of arbitrators but also guarantees outcomes that are as balanced (or imbalanced) as those of domestic public law systems. This rebuts much of the criticism that the increased use of general principles will enhance the influence of subjective and biased preferences of arbitrators, which are criticized as working one-sidedly in favor of foreign investors and capital-exporting countries. Much to the contrary, the increased use of general principles can have positive impact for reshaping international investment law and re-aligning it with domestic public law standards.

C. *Examples of Sophisticated Comparative Analysis in Investment Treaty Arbitration*

In fact, a number of recent decisions illustrate that investment treaty tribunals are capable of applying sophisticated comparative public law

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Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (observing that "[t]he desire to protect national culture is not unique to Ukraine. France requires that French radio stations broadcast a minimum of 40% of French music, Portugal has a 25–40% Portuguese music quota and a number of other countries impose similar requirements." - footnotes omitted).

[90] See Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford, Portland: Hart Publishing, 2009), p. 74–82 (summarizing the normative claim that investment treaty standards cannot be understood to go beyond the limits developed countries establish for government conduct in their own domestic legal orders).

analysis and on that basis render decisions that achieve an acceptable balance between investor rights and host State public interests. One example is the decision of the ICSID Tribunal in *Total v. Argentina*, which heavily drew on comparative law, including domestic law in various common and civil law jurisdictions, general international law, human rights law, and EU law, to determine the restrictions the concept of legitimate expectations imposes on a State's regulatory powers when no specific promise to refrain from regulation was given.[91] On a broad comparative basis, the Tribunal concluded that

> [t]he determination of a breach of the [fair and equitable treatment] standard requires … 'a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate regulatory interest on the other.' Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.[92]

Based on the principle of proportionality thus developed, the Tribunal decided that the Claimant in the case at hand could not oppose changes to Argentina's monetary policy, in particular the abolition of the convertibility of the peso to the US dollar, and the abolition of dollar-denominated tariffs,[93] but was "entitled […] to expect that the gas regime would respect certain basic features",[94] namely that tariffs would be adjusted through negotiations with the competent regulatory authority so as to ensure "[t]he basic principles of economic equilibrium and business viability enshrined in the Gas Law."[95] Overall, proportionality balancing between

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[91] See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 111–134.

[92] *Ibid.*, para. 123 (quoting *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 306). See also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, para. 309 lit. h.) (observing that "an evaluation of fairness must take into account the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a standard of reasonableness and proportionality"). Similarly, the Tribunal suggested that proportionality balancing was also applicable in delineating compensable indirect expropriations from non-compensable regulation; see *ibid.*, para. 197.

[93] *Ibid.*, paras. 135–165 (concerning Claimant's investment in the gas distribution sector), paras. 315–324 (concerning Claimant's investment in the power generation sector), paras. 428–431 (concerning Claimant's investment in the hydrocarbons sector).

[94] *Ibid.*, para. 168.

[95] *Ibid.*, para. 168 (concerning Claimant's investment in the gas distribution sector); similarly, paras. 313 and 325 (concerning Claimant's investment in the power generation sector).

the investor's interest in regulatory stability and the host State's interest in adaptation of the regulatory framework therefore was key for the Tribunal in interpreting the fair and equitable treatment standard. The decision's normative basis was a sophisticated and rigorous comparative public law analysis.

Similarly, the Tribunal in *Mobil Corporation et al. v. Venezuela* engaged in a thorough comparative analysis in order to provide a solid normative basis that all legal orders know concepts framed to avoid the misuse of law, such as the principle of good faith and the prohibition of abuse of rights.[96] While the Tribunal did not dwell on comparative domestic law – except for noting that "in all systems of law, whether domestic or international, there are concepts framed in order to avoid misuse of the law",[97] it carefully reviewed the jurisprudence of the ICJ, the PCIJ, the WTO Appellate Body, the Administrative Tribunal of the International Labour Organisation, the CJEU, and arbitral tribunals, as well as international treaty law, EU law, and writings of the most highly qualified publicists on the issue in question.[98]

Both decisions not only engaged in a thorough analysis of a large amount of material that encompasses several domestic legal orders and international legal regimes, they also apply general principles thus developed to safeguard the host State against far-reaching claims by foreign investors and therefore make use of them to balance investor rights and public interests. As these decisions show, the development of general principles can reflect an enhanced understanding of how domestic public law and other international legal regimes structure the relations between States, private actors, and international tribunals, and integrate such an understanding into international investment law. It may therefore only be a matter of time until sophisticated comparative analysis and balanced decision-making by applying general principles of law takes hold in investment arbitration and will be increasingly frequently applied. The existing examples in arbitral jurisprudence already send a promising signal. Their pioneering efforts about establishing comparative public law analysis

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[96] *Mobil Corporation, Venezuela Holding et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 19 June 2010, paras. 169–185.

[97] *Ibid.*, para. 169.

[98] *Ibid.*, paras. 170–184. For another example of how comparative law analysis and the quest for general principles can influence the application of investment treaty provisions, namely non-precluded measures-clauses, see *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, paras. 621–624.

firmly in investment arbitration in order to distill general principles should be welcomed and followed in other investment disputes as well.

II. *Concretizing Fair and Equitable Treatment through General Principles: A Case Study*

Arguably, one of the most important areas where general principles of public law can impact and transform international investment law is in elucidating the interpretation of broadly formulated substantive standards of treatment, such as fair and equitable treatment, or the concept of indirect expropriation. In this context, general principles of law can help arbitral tribunals to develop more robust views on how to interpret the many vague standards of treatment contained in international investment treaties and thus counter the criticism that arbitral tribunals are unable to apply and to concretize them in individual disputes in a balanced manner that takes account of both the protection of foreign investments and competing public interests.

How such an approach can be conceptualized and put into practice will be analysed in this section with respect to the fair and equitable treatment standard. It can equally be applied, however, with regard to other standard investor rights, such as indirect expropriation, full protection and security, national treatment, or the interpretation of umbrella clauses. In interacting with investment treaty standards, general principles of public law can have a triple function: first, they can clarify the normative concept of a treaty standard such as fair and equitable treatment; second, they can concretize the normative content of the conceptual approach thus clarified; and third, they can concretize the application of the normative content to concrete cases.

A. *Clarifying Normative Concepts: Linking Treaty Standards and General Principles of Law*

Fair and equitable treatment is the clearest example of how vague the standard clauses in international investment treaties are formulated.[99] It is characterized by a lack of clarity concerning not only its scope, but its

[99] What follows draws in part on Stephan W. Schill, "Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law", *IILJ Working Paper* 2006/6 (Global Administrative Law Series), available at http://iilj.org/publications/2006–6Schill.asp (last visited 5 December 2011). Arbitral jurisprudence on fair and equitable treatment has been updated, but only selectively as most of the more recent jurisprudence on the cause of action in question has remained within the framework set out by earlier investment treaty precedent.

underlying normative concept.[100] Apart from consensus on the fact that fair and equitable treatment constitutes a standard that is independent from the host State's domestic legal order and does not require State conduct in bad faith,[101] it is hardly substantiated by State practice or elucidated by *travaux préparatoires* and difficult to narrow down by traditional means of interpretation.

An interpretation of the ordinary meaning may replace the terms "fair and equitable" with similarly vague and empty phrases such as "just", "even-handed", "unbiased", or "legitimate",[102] but does not succeed in clarifying its normative content.[103] Above all, the semantics of fair and equitable treatment do not clarify as against which standard "fairness and equitableness" have to be measured. It could equally refer to notions of equality or substantive justice, or to less grand notions of procedural due process. Likewise, a teleological interpretation hardly provides a more specific meaning even if the purpose of international investment treaties points to the protection and promotion of foreign investment and the deepening of the mutual economic relations between the contracting States.[104] While this narrows down possible interpretations, a purposive interpretation does not enable tribunals to directly translate the broad

[100] There is a vivid debate whether and to which extent the fair and equitable treatment standard is equivalent to the customary international law minimum standard. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (New York: Oxford University Press, 2008), p. 124–128. More recently, see also *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award of 8 June 2009, paras. 598–618; *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL/NAFTA, Award, 31 March 2010, paras. 182–213. In my view, this controversy, however, does not lead far in concretizing the content of what fair and equitable treatment requires, as, even if it is tied to customary international law, its content remains vague, given that the customary international law minimum standard itself is rather amorphous. I am thus critical as to whether it is feasible to draw sensible distinctions between a standard that equates fair and equitable treatment with customary international law and an autonomous interpretation of fair and equitable treatment.

[101] Concerning the independence of fair and equitable treatment from domestic law see, for example, Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", *Int'l Law*. 39 (2005), p. 88; on independence from bad faith see Christoph Schreuer, "Fair and Equitable Treatment in Arbitral Practice", *J. World Investment & Trade* 6 (2005), p. 384 et s.

[102] See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 113.

[103] It rather confirms that a terminological approach does not succeed in substantiating and clarifying what fair and equitable refers to. In this sense *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 297; differently Dolzer, see above note 101, p. 88.

[104] On the object and purpose of investment treaties and the statements contained in the treaties' preambles see Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (The Hague/Boston: Martinus Nijhoff Publishers, 1995), p. 11 et s., 20 et s.

language into specific guarantees for foreign investors in the sense of hard and fast rules. It is difficult, above all, to foresee whether a certain interpretation of fair and equitable treatment will actually encourage investment flows.[105]

The traditional methods of treaty interpretation therefore prove to be relatively ineffective in clarifying the meaning of fair and equitable treatment and its underlying normative concept. Understandably then, investment tribunals do not follow a uniform methodology.[106] Some tribunals follow an approach that extensively describes the facts of a case and simply characterizes them as a violation of fair and equitable treatment without laying open the normative standard applied.[107] Other tribunals posit an abstract normative standard which they subsequently apply to the fact without clarifying how that standards flows from the fair and equitable treatment clause in the treaty in question.[108] Meanwhile most tribunals apply fair and equitable treatment with a strong reference to prior arbitral jurisprudence.[109] While this takes account of the fact that normative expectations of investors and States increasingly form based on how arbitral tribunals interpret investment treaties, this approach prompts the criticism that earlier decisions have themselves applied a problematic methodology which failed to grasp or clarify the normative basis and content of fair and equitable treatment.

By failing to establish clear normative content of fair and equitable treatment, arbitral tribunals run the risk of facing the reproach that they handle the standard as a malleable tool of *ex post facto* control of host State conduct based on the personal preferences of arbitrators about what

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[105] Accordingly, the Tribunal in *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Final Award, 12 October 2005, para. 52 warned that a teleological interpretation should not automatically lead to an interpretation of bilateral investment treaties *in dubio pro investore*.

[106] See Dolzer, see above note 101, p. 93 et s. (discerning the three lines of reasoning addressed in the text).

[107] From the early arbitral jurisprudence, see for example *Mondev v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 118 (stressing that "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case"). See also the little normative, but very fact-intensive approach in *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No. 88/2004, Partial Award, 27 March 2007, paras. 222–343.

[108] From the early arbitral jurisprudence, see for example *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 134.

[109] From the early arbitral jurisprudence, see for example *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 89 et s. Meanwhile virtually all tribunals define and apply fair and equitable treatment in relation to the statements contained in earlier arbitral jurisprudence.

is fair and equitable.[110] Furthermore, to the extent arbitral tribunals generate unpredictable, or even worse inconsistent, decisions, they fail to meet the expectations of host States and foreign investors in a stable and predictable investment climate. Accordingly, the way arbitral tribunals handle the interpretation of the fair and equitable treatment standard has given rise to critical remarks such as that of Pedro Nikken in his Separate Opinion in the *Suez* cases, in which he criticized that the Tribunals' majority linked fair and equitable treatment to the protection of legitimate expectations. In his view

> the development of the doctrine of legitimate expectations is the result of the interaction of the claims of investors and their acceptance by arbitral tribunals, buttressed by the presumed moral authority of the decided cases. I believe that the standard of fair and equitable treatment has been interpreted so broadly that it results in arbitral tribunals imposing upon the Parties obligations that do not arise in any way from the terms that the Parties themselves used to define their commitments. Indeed, more attention has been paid to what the claimants have considered the scope of their rights than what the Parties defined as the extent of their obligations. Unfortunately, I have not had the intelligence or the ability to convince my colleagues in this Tribunal … about the irrationality and the weakness of this jurisprudence, of which I am convinced.[111]

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[110] The assumption that personal convictions, instead of prescriptive legal standards, play a major role in applying fair and equitable treatment is nourished by the frequent reference to treatment that "shocks, or at least surprises, a sense of juridical propriety" as a yardstick for the standard's application. See for example *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 (quoting the decision of the International Court of Justice in *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), Judgment, 20 July 1989, I.C.J. Reports 1989, 15, para. 128). For criticism of the ICJ's test for arbitrariness in the *ELSI* case see Kurt Hamrock, "The *ELSI* Case: Toward an International Definition of 'Arbitrary' Conduct", *Tex. Int'l L. J.* 27 (1992), p. 849 (highlighting the prevalence of subjective elements in the Court's test). See also UNCTAD, *Fair and Equitable Treatment* (1999), p. 10 (noting the "inherently subjective" trait of the concepts of fairness and equitableness); Catherine Yannaca-Small, "Fair and Equitable Treatment Standard in International Investment Law", *OECD Working Papers on International Investment*, No. 2004/3 (2004), p. 2 et s., available at http://www.oecd.org/dataoecd/22/53/33776498.pdf (last visited 5 December 2011) (mentioning the concern of "a number of governments … that, the less guidance is provided for arbitrators, the more discretion is involved and the closer the process resembles decisions *ex aequo et bono*, i.e based on the arbitrators' notions of 'fairness' and 'equity'.").

[111] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic,* ICSID Case No. ARB/03/19 and *AWG Group v. The Argentine Republic* (joint cases), Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, para. 27; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, para. 27.

An alternative approach to conceptualize and interpret fair and equitable treatment in investment treaty arbitration could therefore lie in drawing parallels to public law standards used in both domestic law and other international legal regimes. The conceptual idea would be to tackle problems arising under international investment treaties by means of a comparative methodology, focusing on comparative administrative and comparative constitutional law, as well as cross-regime analysis, for example as regards WTO law or human rights law. This approach could serve the purpose of concretizing and clarifying the interpretation of the often vague standards of investment protection, such as the concept of indirect expropriation or fair and equitable treatment, by assessing which commonalities exist on the level of domestic legal systems and other international regimes in dealing with certain questions of public law that empower and/or restrict the State in its relations with private individuals and corporate actors.

Such an approach suggests drawing, in a comparative perspective, on the functions of public law to limit, but also to legitimize, State action *vis-à-vis* private actors. Its ultimate purpose is to develop general principles of law in the sense of Article 38(1)(c) of the ICJ Statute; these would, in turn, inform the interpretation and application of the standard of fair and equitable treatment.[112] This coincides with an attempt to link fair and equitable treatment to standards of good governance, as suggested by Pedro Nikken in his Separate Opinions in the *Suez* cases.[113] It also reflects the close interaction of general principles of law and investment treaty law as sources of international investment law and, in fact, the function of general principles of law to clarify the normative concept underlying fair and

[112] Notably, such a comparative law approach already explicitly forms part of the 2004 United States Model BIT that defines fair and equitable treatment as "includ[ing] the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world." U.S. Model BIT (2004), Article 5(2)(a), reprinted in Dolzer and Schreuer, see above note 100, p. 385–419.

[113] See Separate Opinion of Arbitrator Pedro Nikken, see above note 111, para. 20 (stating that "[i]t is unreasonable to assume that the States would have been willing to commit themselves beyond what the canons of ***good governance*** would require. With the propriety of the government '*of a reasonably well-organized modern State*.' On the contrary, it is illogical to understand that the intention of the Parties was to extend the protection of fair and equitable treatment that they undertook to give to the investments (***not investors***) of the other Party, above what is implied in good governance, just as it would be if treatment below what is expected from good governance were offered." (quoting *Asian Agricultural Products Ltd v. Sri Lanka*, ICSID Case No ARB/87/3. Final Award on Merits and Damages, 27 June 1990, para. 170) - emphases in the original; internal footnote omitted).

equitable treatment. This interaction was also noted by the NAFTA Tribunal in *Merril & Ring v. Canada*, which stated in the context of interpreting the fair and equitable treatment standard in Article 1105(1) of NAFTA:

> The Tribunal must note that general principles of law also have a role to play in this discussion. Even if the Tribunal were to accept Canada's argument to the effect that good faith, the prohibition of arbitrariness, discrimination and other questions raised in this case are not stand-alone obligations under Article 1105(1) or international law, and might not be a part of customary law either, these concepts are to a large extent the expression of general principles of law and hence also a part of international law. Each question will have to be addressed on its own merits, as some might be closely related to such principles while other issues are not. Good faith and the prohibition of arbitrariness are no doubt an expression of such general principles and no tribunal today could be asked to ignore these basic obligations of international law. The availability of a secure legal environment has a close connection too to such principles and transparency, while more recent, appears to be fast approaching that standard.[114]

This statement indicates that general principles of law have a function to clarify the conceptual approach underlying fair and equitable treatment. General principles of law, in other words, are not only a simple aid to interpretation but a basis to understand the normative concept of fair and equitable treatment itself. While the inclusion of fair and equitable treatment clauses in international investment treaties constitutes the formal source of the international obligation in question, general principles of law clarify the normative concept and, as will be shown in the next section, also concretize the normative content of vague treaty standards such as fair and equitable treatment.

B. *Concretizing Normative Content: Fair and Equitable Treatment As an Embodiment of the Rule of Law*

In order to link treaty law and general principles of public law, it is necessary to draw parallels between the standards of protection in investment treaties and the respective standards in domestic public law. This requires understanding the standards of protection as public law concepts. Accordingly, in this section an attempt is made to conceptualize fair and equitable treatment as an embodiment of the rule of law (*Rechtsstaat*, *état de droit*), a concept well-known from domestic administrative and

[114] *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL/NAFTA, Award, 31 March 2010, para. 187.

constitutional law, by illustrating the parallels between investment treaty jurisprudence and the content of domestic legal systems. This exercsie not only shows that fair and equitable treatment can be understood as enshrining the concept of the rule of law as a normative concept, but also that the various subelements of the rule of law are able to concretize the normative content of fair and equitable treatment.

The rule of law is a wide-spread concept of positive law that can be found with similar characteristics in most legal systems that adhere to liberal constitutionalism.[115] Relying on a common tradition,[116] the main thrust of the rule of law is the aspiration to subject public power to legal control.[117] As stated by F. A. Hayek,

> stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[118]

The rule of law primarily refers to the formal quality of law as providing guidance for human affairs and comprises the institutional aspiration that government has to use law as a means of exercising power.[119] This abstract

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[115] See Helmuth Schulze-Fielitz, "Art. 20", in *Grundgesetz – Kommentar*, Vol. II, ed. Horst Dreier (Tübingen: Mohr Siebeck, 2nd edn. 2006), paras. 1–33 (describing the development of the concept of the rule of law as a central principle of constitutionalism). See also the contributions in *Rechtsstaatlichkeit in Europa*, eds. Rainer Hofmann et al. (Heidelberg: C. F. Müller, 1996); *Ius Publicum Europaeum*, Vol. I, eds. Armin von Bogdandy et al. (Heidelberg: C. F. Müller, 2008); *The Rule of Law in Comparative Perspective*, eds. Mortimer Sellers and Tadeusz Tomaszewski (Dordrecht, Heidelberg: Springer, 2010).

[116] On the development of the rule of law in its politico-philosophical background see Brian Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge: Cambridge University Press, 2004). For the thesis that the rule of law is a concept common to civil and common law see also Danilo Zolo, "The Rule of Law: A Critical Appraisal", in *The Rule of Law: History, Theory and Criticism*, eds. Pietro Costa and Danilo Zolo (Dordrecht: Springer Netherlands, 2004), p. 3.

[117] David Dyzenhaus, "The Rule of (Administrative) Law in International Law", *Law & Contemp. Prob.* 68 (2005), p. 130; similarly, Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?", *Law & Philosophy* 21 (2002), p. 158; Konrad Hesse, "Der Rechtsstaat im Verfassungssystem des Grungesetzes", in *Rechtsstaatlichkeit und Sozialstaatlichkeit*, ed. Ernst Forsthoff (Darmstadt: Wissenschaftliche Buchgesellschaft, 1968), p. 560 et s. As such, it should also be distinguished from other concepts of good and desirable government, such as human rights, democracy, or justice. See Joseph Raz, "The Rule of Law and its Virtue", *L. Quart. Rev.* 93 (1977), p. 195.

[118] Friedrich August von Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 1944), p. 54.

[119] On the formalist ideal of the rule of law see Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse", *Columb. L. Rev.* 97 (1997), p. 14 et s.

principle of the rule of law translates into procedural requirements for the deployment of legal processes[120] and mandates that "individuals whose interests are affected by the decisions of [...] officials have certain rights," such as

> the right to a hearing before a decision is made, the right to have the decision made in an unbiased and impartial fashion, the right to know the basis of the decision so that it can be contested, the right to reasons for the official's decision, and the right to a decision that is reasonably justified by all relevant legal and factual considerations.[121]

Hence, the rule of law requires that the affected individual is recognized as a subject with certain rights that have to be taken into account in the decision-making process of public authorities. In addition to the recognition of procedural rights, the rule of law is often also at the origin of the idea of proportionality, referring to the proper balance between the interests of the individual and competing public interests.[122] Finally, the rule of law has implications for the institutional design of government. It mandates a basic separation of powers and the possibility to seek review of public acts by an independent judiciary.[123] Essentially, it is this primarily formal understanding of the rule of law that prevails in many domestic legal traditions.[124]

Given its wide-spread presence across domestic legal orders, the concept of the rule of law itself can be understood as constituting a general principle of public law in the sense of Article 38(1)(c) of the ICJ Statute that governs the relations between States and private actors. In this sense,

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120 On the "legal process ideal" of the rule of law see *ibid*., p. 18 et s.

121 Dyzenhaus, see above note 117, p. 129.

122 This thrust that has been developed particularly in the German tradition and has been taken up in the reasoning of other domestic courts as well as international dispute settlement bodies, including the European Court of Human Rights, the European Court of Justice, and the WTO Dispute Settlement Body. See Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism", *Columb. J. Transnat'l L.* 47 (2008), p. 72.

123 Dyzenhaus, see above note 117, p. 130 et s.

124 See on the primarily formal tradition in Germany for example Schulze-Fielitz, see above note 115, paras. 13 et s. Similarly, the due-process clause of the U.S. Constitution has mainly found a procedural interpretation; see Kurt L. Shell, "Rechtsstaatlichkeit und Demokratie in den USA", in *Der bürgerliche Rechtsstaat*, ed. Mehdi Tohidipur (Frankfurtam Main: Suhrkamp, 1978), p. 377 et s. On the decline of the substantive understanding of due process by the Supreme Court and the emphasis on procedure see also Mark Kantor, "Fair and Equitable Treatment: Echoes of FDR's Court-Packing Plan in the International Law Approach Towards Regulatory Expropriation", *Law & Practice Int'l Courts & Tribunals* 5 (2006), p. 231.

the normative concept of fair and equitable treatment can be understood as an embodiment of the concept of the rule of law that host States have to embrace when dealing with foreign investors. While this concept may not seem like much of a concretization of fair and equitable treatment given different historical developments and thrusts of the rule of law in different national legal systems, and in light of the fact that the exact content of the rule of law are debated,[125] it arguably nevertheless constitutes a viable approach to explain the normative content of fair and equitable treatment.

In fact, a comparative view of municipal law reveals certain common ideas and standards that are understood as part of the rule of law and that can serve as standards a State has to conform to in order to comply with the concept of "fairness and equitableness" in international investment law. At least five clusters of normative principles can be discerned that occur in recurring fashion in the reasoning of arbitral tribunals and are presented as elements of fair and equitable treatment. These principles are (1) the requirement of stability, predictability, and consistency of the legal framework, (2) the protection of legitimate expectations, (3) the requirement to grant procedural and administrative due process, and the prohibition of denial of justice, (4) the requirement of transparency, and (5) the requirement of reasonableness and proportionality. These principles also figure prominently as sub-elements or expressions of the concept of the rule of law in domestic legal systems and can thus be understood as the expression of general principles of public law that concretize the normative content of fair and equitable treatment.

1. *Stability, Predictability, Consistency*

Investment tribunals have repeatedly associated fair and equitable treatment with stability, predictability, and consistency of the host State's legal framework. The Tribunal in *CMS v. Argentina*, for example, stated that "there can be no doubt … that a stable legal and business environment is an essential element of fair and equitable treatment."[126] Predictability of the legal framework governing the activity of foreign investors has received comparable emphasis. The Tribunal in *Metalclad v. Mexico*, for example,

[125] See only Waldron, see above note 117, p. 137.

[126] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274. Similarly, *Occidental Exploration and Production Company* (*OEPC*) *v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 183; *LG&E Energy Corp, LG&E Capital Corp, LG&E International*

based its finding of a violation of Article 1105(1) of NAFTA, *inter alia*, on the argument that Mexico had "failed to ensure a … predictable framework for *Metalclad's* business planning and investment."[127] Similarly, the Tribunal in *Tecmed v. Mexico* considered that the foreign investor needs to "know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[128]

Some tribunals have added that a lack of clarity of the legal framework or excessively vague rules can violate fair and equitable treatment.[129] Equally, consistency in the government's conduct found strong emphasis in the jurisprudence. Thus, the Tribunal in *Tecmed v. Mexico* emphasized the need for consistency in the decision-making of a national agency in order to conform to fair and equitable treatment.[130] Likewise, in *MTD v. Chile*, the Tribunal found a violation of fair and equitable treatment due to "the inconsistency of action between two arms of the same Government *vis-à-vis* the same investor."[131]

Taken together, these dicta embody several elements of the basic requirements for law as adumbrated in Lon Fuller's "internal morality of

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Inc v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 124. See also *PSEG Global Inc., The North American Coal Corp., and Konya Ingin Electrik Uretim ve Ticaret Ltd Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 250 et s. (finding a breach of fair and equitable treatment by what the Tribunal described as "the 'roller-coaster' effect of the continuing legislative changes").

[127] See *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para. 99. See further *BG Group plc v. Republic of Argentina*, Final Award, 24 December 2007, para. 307; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 333; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 347.

[128] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154.

[129] See for example *Occidental Exploration and Production Company* (*OEPC*) *v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 184 (criticizing the vagueness of a change in the domestic tax law that did not "provid[e] any clarity about its meaning and extent").

[130] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 154 and 162 et s.; *Occidental Exploration and Production Company* (*OEPC*) *v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 184. Similarly, *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, paras. 292 et s.

[131] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 163. Similarly, *PSEG Global Inc., The North American Coal Corp., and Konya Ingin Electrik Uretim ve Ticaret Ltd Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 246 and 248; *LG&E Energy Corp, LG&E*

law."[132] Many national legal systems place similar emphasis on legal certainty and legal security, perhaps most firmly instantiated in the German concept of *Rechtssicherheit*,[133] suggesting the existence of a general principle of public law in this context. The core aspect of normativity of law this principle relates to allows individuals and entities to adapt their behavior to the requirements of the legal order and form stable social and economic relationships. It is an aspiration of most legal systems, certainly under democratic conditions of advanced capitalism, and thus arguably a general principle of public law that can be used to concretize the normative content of fair and equitable treatment.

Yet, stability and predictability cannot and should not mean that the legal framework will never change, nor do they in themselves provide a business guarantee to investment projects.[134] Thus, the Tribunal in *AES v. Hungary* pointed out that the need to provide a stable legal framework does not amount to a "stability clause"; it rather emphasized that a "legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."[135] Similarly, domestic regulatory frameworks are seldom completely free from inconsistencies.[136] In addition, the degree of stability in each legal order will vary with the circumstances the State is facing.[137] Likewise, a serious crisis or even an emergency situation may call for different reactions than the normal deployment of public

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Capital Corp, LG&E International Inc v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 131; *Biwater Gauff* (*Tanzania*) *Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602.

[132] Lon L. Fuller, *The Morality of Law* (New Haven, London: Yale University Press, 1969), p. 4. See also Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", *Eur. J. Int'l L.* 20 (2009), p. 23.

[133] This aspect of the rule of law is recognized, mostly as a constitutional standard, in many domestic legal systems. See, for example, for its implementation in the German Constitution Schulze-Fielitz, see above note 115, paras. 129 et s.; see further Fallon, see above note 119, p. 14 et s. (with references to U.S. constitutional practice); more generally see also Raz, see above note 117, p. 198. On legal certainty as a principle of EU law, see Tridimas, see above note 32, p. 242–251.

[134] See *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 64; *Marvin Roy Feldman Karpa v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 15 December 2002, para. 112.

[135] *AES Summit Generation Limited AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.29.

[136] Cf. Susan D. Franck, "International Decisions: Occidental Exploration & Production Co. v Republic of. Ecuador", *Am. J. Int'l L.* 99 (2005), p. 678.

[137] See *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 335; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 193–194; *AES*

power.[138] Stability, predictability, and consistency will thus have to be implemented in view of the circumstances of the case at hand as well as in light of, and balanced against, legitimate competing policy concerns. These qualifications are generally enshrined in domestic legal systems and can therefore be understood as reflecting general principles of law.

2. *The Protection of Confidence and Legitimate Expectations*

A second important concept arbitral tribunals use to review State action under the fair and equitable treatment standard is the protection of legitimate expectations. The Tribunal in *Saluka v. Czech Republic* referred to the concept of legitimate expectations as "the dominant element of [the fair and equitable treatment] standard."[139] While it is occasionally criticized that one cannot derive from the ordinary meaning of fair and equitable treatment an obligation not to frustrate an investor's legitimate expectation,[140] the concept can be found, in different forms, in many national legal systems[141] and perhaps in general international law.[142] Again, its wide-spread acceptance suggests that the

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Summit Generation Limited AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.30.

[138] See, for example, *Elettronica Sicula S.p.A.* (*ELSI*) (*United States of America v. Italy*), Judgment, 20 July 1989, I.C.J. Reports 1989, 15, para. 74 (stating that "[c]learly the right [to control and manage a company] cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like."). See also *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 166; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, para. 201.

[139] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 301. See also Elizabeth Snodgrass, "Protecting Investors' Legitimate Expectations", *ICSID Review – FILJ* 21 (2006), 1.

[140] See Separate Opinion of Arbitrator Pedro Nikken, see above note 111, paras. 2 et s.

[141] See Dyzenhaus, see above note 117, p. 133 et s. (with reference to case law in Australia and the United Kingdom); Schulze-Fielitz, see above note 115, paras. 146 et s. (concerning German constitutional law); Søren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000) (on English, French, and EC/EU law); Bruce Dyer, "Legitimate Expectations in Procedural Fairness after Lam", in *Law and Government in Australia*, ed. Matthew Groves (Sydney: Federation Press, 2005), p. 184 (on Australian law); see also Jean-Marie Woehrling, "Le Principe de Confiance Légitime dans la Jurisprudence des Tribunaux", in *Comparative Law Facing the 21st Century*, ed. John W. Bridge (London: United Kingdom National Committee of Comparative Law, 1998), p. 815 (summarizing a comparative study by the XVth International Congress of Comparative Law, Bristol in 1998). See also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 113 et s., in particular paras. 128 et s.

[142] See Jörg P. Müller, *Vertrauensschutz im Völkerrecht* (Köln/Berlin: Heymanns, 1971). See more specifically in the context of the law of expropriation of aliens Rudolf Dolzer,

protection of legitimate expectations constitutes a general principle of public law.

The main thrust of the principle is the protection of confidence, which is induced by government conduct, against administrative and legislative conduct that frustrates legitimate expectations. Thus, the Tribunal in *Tecmed v. Mexico* held that fair and equitable treatment requires "provid[ing] to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investors to make the investment."[143] Similarly, the Tribunal in *International Thunderbird Gaming v. Mexico* explained that

> the concept of "legitimate expectations" relates … to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.[144]

"New Foundations of the Law of Expropriation of Alien Property", *Am. J. Int'l L.* 75 (1981), p. 579 et s. See also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 130 et s. (linking the protection of legitimate expectations to the principle of good faith under international law).

[143] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154. The Tribunal's approach was also taken up in a number of other cases. See *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Final Award, 9 January 2003, para. 189; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paras. 114 et s.; *Occidental Exploration and Production Company (OEPC) v. The Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 185; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 279; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 235 and 241.

[144] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA, Award, 26 January 2006, para. 147 (internal citation omitted). On the protection of legitimate expectations as part of fair and equitable treatment, see also *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, paras. 182–185; *MCI Power Group LC and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, paras. 279 and 325; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.42; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 329 et s.; *BG Group plc v. Republic of Argentina*, Final Award, 24 December 2007, para. 310; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 347; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 69; *National Grid plc v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, paras. 173–175; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 186; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/

Various limitations in the scope and applicability of the doctrine, however, require further clarification. Ordinarily, such expectations arise through (explicit or implicit) representations made by the host State.[145] In addition, as the Tribunal in *Eureko v. Poland* suggested, a breach of basic expectations may not be a violation of fair and equitable treatment if good reasons existed why the expectations of the investor could not be met.[146] Similarly, the Tribunal in *Saluka v. Czech Republic* specifically warned of the danger of taking the idea of the investor's expectation too literally since this would "impose upon host States' [sic] obligations which would be inappropriate and unrealistic."[147] Instead, the Tribunal considered that departing from legitimate expectations of an investor was possible and legitimate provided such departures were proportional arguing that "[t]he determination of a breach of [fair and equitable treatment] requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[148] Against this background, the concept of legitimate expectations requires careful comparative law analysis in order to clarify the contours of the protection of legitimate expectations as a general principle of law that can concretize the normative content of fair and equitable treatment.

3. *Administrative Due Process and Denial of Justice*

As long-standing customary international law recognizes, and as many tribunals applying investment treaties have decided, fair and equitable treatment embraces elements of due process specifically, administrative and

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NAFTA, Award of 8 June 2009, para. 766; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 179. See also Hector A. Mairal, "Legitimate Expectations and Informal Administrative Representations", in *International Investment Law and Comparative Public Law*, see above note 14, p. 413.

[145] On the link between legitimate expectations and government conduct see *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Final Award, 9 January 2003, para. 189. On explicit representations see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 218; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award of 8 June 2009, para. 766. Legitimate expectations can, however, also arise under specific circumstances, from the general legal framework of the host State. See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 113 et s.

[146] See *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras. 232 et s.

[147] *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 304.

[148] *Ibid*., para. 306.

judicial due process.[149] Fair and equitable treatment is thus closely connected to the proper administration of civil and criminal justice, arguable another general principle of law found in international and domestic legal systems.[150] The Tribunal in *Waste Management v. Mexico*, for example, defined a violation of fair and equitable treatment as "involv[ing] 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."[151] Similarly, for the Tribunal in *S.D. Myers v. Canada* fair and equitable treatment, among other elements, included "the international law requirements of due process."[152] The Tribunal in *International Thunderbird Gaming v. Mexico* held that the proceedings of a government agency "should be tested against the standards of due process and procedural fairness applicable to administrative officials."[153] These decisions

[149] The national legislator, so far, has not been subjected to any due process notions in investment arbitration. This could, however, be conceivable in the context of legislative expropriations since most BITs explicitly require host States to grant affected investors due process. See Dolzer and Stevens, see above note 104, p. 106 et s.

[150] Comprehensively on the closely related concept of denial of justice in international law see Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005). More recently, both an explicit reference to due process and the concept of denial of justice as part of fair and equitable treatment have been included in the treaty practice of the United States. See, for example, Article 10.5(2)(a) of the Dominican Republic – Central America – United States Free Trade Agreement, signed 5 August 2004, available at http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited 5 December 2011), for instance, stipulates that "fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."

[151] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. On the meaning of denial of justice and due process in judicial proceedings, see also *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2 (NAFTA), Award, 1 November 1999, para. 102; *Victor Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, paras. 653 et s.; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, PCA Case No. 34877, UNCITRAL, Partial Award on the Merits, 30 March 2010, para. 250.

[152] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 134.

[153] *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL/NAFTA, Award, 26 January 2006, para. 200. See also *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 609 and 617; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, para. 187; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award, 8 June 2009, para. 616; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 178 and 344.

therefore link fair and equitable treatment to the concept of due process which is found as a principle of administrative and constitutional law in all well-developed systems of public law.[154]

Issues closely connected to due process are also reflected in the jurisprudence linking fair and equitable treatment to the prohibitions of arbitrariness and discrimination, arguably other general principles of public law connected to the concept of the rule of law. The Tribunal in *Loewen v. United States*, for example, stated in obiter that fair and equitable treatment is violated by "[a] decision which is in breach of municipal law and is discriminatory against the foreign litigant."[155] Similarly, the Tribunal in *Waste Management v. Mexico* suggested that "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."[156] Other tribunals, by contrast, suggest drawing a clearer distinction between fair and equitable treatment and the prohibition of discriminatory conduct. They emphasize that "[c]ustomary international law does not … require that a state treat all aliens (and alien property) equally, or that it treats aliens as favourable as nations."[157] They only consider a violation of

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[154] Cf. John P. Gaffney, "Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System", *Am. U. Int'l L. Rev.* 14 (1999), p. 1175–1182 (with further references).

[155] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, para. 135. Cf. also *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para. 266.

[156] *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; similarly, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, para. 233 (finding that the State "acted not for cause but for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character" and therefore breached fair and equitable treatment). See also *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 287–288; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, paras. 670–673; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602; *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 261; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 609; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL/NAFTA, Award of 8 June 2009, para. 616; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 178.

[157] *Alex Genin, Eastern Credit Ltd, Inc and AS Baltoil v. Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, para. 368. Similarly, *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award, 3 August 2005, para. 25.

fair and equitable treatment if the investor was specifically targeted or if the differential treatment amounted to bad faith.[158]

What is not yet fully defined, however, is how exactly the requirements of due process blend an international law standard with the controlling local law.[159] Thus, the Tribunal in *AES v. Hungary* emphasized that not every procedural shortcoming will amount to a failure to provide fair and equitable treatment, since this standard does not require perfection.[160] Yet, a State's violation of local law can be a significant datum, as several cases illustrate. In *Metalclad v. Mexico*, for instance, the Tribunal focused on the apparent misapplication of a construction law by a local municipality as one element for finding a violation of fair and equitable treatment.[161] Similarly, in *Pope & Talbot v. Canada,* the Tribunal referred to a lack of competence of a particular agency under national law to initiate administrative proceedings against a foreign investor. Instead of relying "on naked assertions of authority and on threats that the Investment's allocation could be cancelled, reduced or suspended for failure to accept verification", the Tribunal said, "before seeking to bludgeon the Investment into compliance, the SLD [i.e., the Canadian administrative agency involved] should have resolved any doubts on the issue and should have advised the Investment of the legal basis for its actions."[162]

Likewise, the Tribunal in *GAMI Investments, Inc. v. Mexico* deduced from fair and equitable treatment an obligation not only to abide by, but also to enforce existing provisions of national law.[163] In *Tecmed v. Mexico,* the Tribunal underscored that host States have to make use of "the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments."[164]

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158 *Alex Genin, Eastern Credit Ltd, Inc and AS Baltoil v. Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001, paras. 369 and 371.

159 In detail Monique Sasson*, Substantive Law in Investment Treaty Arbitration. The Unsettled Relationship between International and Municipal Law* (Alphen aan den Rijn: Kluwer Law International, 2010).

160 *AES Summit Generation Limited AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 9.3.40.

161 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para. 93.

162 *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001, paras. 174 et s.

163 *GAMI Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL/NAFTA, Final Award, 15 November 2004, para. 91.

164 *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154.

Yet, as the Tribunal in *Lemire v. Ukraine* stated that "[a]lthough not every violation of domestic law necessarily translates into an arbitrary or discriminatory measure under international law and a violation of the FET standard, in the Tribunal's view a blatant disregard of applicable tender rules, distorting fair competition among tender participants, does."[165]

Conversely, the conformity of a State's administrative measure with the relevant domestic legal rules has in some cases been referred to by tribunals as indicative that there has not been a violation of the fair and equitable treatment standard. In *Noble Ventures v. Romania*, for example, the Tribunal observed that certain bankruptcy proceedings "were initiated and conducted according to the law and not against it"[166] and therefore denied a violation of fair and equitable treatment. Similarly, in *Lauder v. Czech Republic,* the Tribunal emphasized that a violation of fair and equitable treatment was usually excluded in case of a "regulatory body taking the necessary actions to enforce the law."[167]

This set of cases broadly aligns with the democratic requirement that public power derives its authority from a legal basis and that it must be exercised along the lines of pre-established procedural and substantive rules. This may thus translate into a general principle of public law connected to the concept of the rule of law, namely the principle of legality. As such, the violation of domestic law can translate, but does not need to, into a violation of the fair and equitable treatment standard, as the international law standard of fair and equitable treatment is not simply a mirror of whatever the national law provides.

4. *Transparency*

Another important element that arbitral tribunals derive from the fair and equitable treatment standard is transparency. Traditional customary international law on treatment of foreigners and of foreign investments is quite underdeveloped with regard to transparency of governmental information and decision processes. Yet, in international law more broadly, the crafting and application of international legal standards for national governmental transparency has been an important direction of legal

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[165] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 385.

[166] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Final Award, 12 October 2005, para. 178.

[167] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 297.

development. Likewise, domestic legal systems increasingly establish transparency, for example through freedom of information acts, as a principle governing relations between the State and private individuals. This suggests that transparency may emerge as a general principle of public law that can concretize the fair and equitable treatment standard. However, it remains a challenging branch of international legal practice, whether in the WTO, international environmental law, or EU law, as well as of domestic law. In particular, defining the proper limits on transparency requirements, such as the protection of privacy interests, of commercial confidentiality, or of national security, is complex.

Despite these difficulties – but perhaps in line with the emergence of a general principle of law - investment tribunals interpret fair and equitable treatment as requiring a certain degree of transparency for investor-State relations. Thus, the Tribunal in *Metalclad v. Mexico* concluded that Mexico breached Article 1105(1) of NAFTA because "Mexico failed to ensure a *transparent* and predictable framework for Metalclad's business planning and investment."[168] However, the reference in this holding to a transparency requirement was set aside by the Supreme Court of British Columbia exercising jurisdiction under the British Columbia International Arbitration Act.[169]

While that court's decision is problematic in some respects,[170] it seems justified to cast doubt on the breadth of the tribunal's statement that "all relevant legal requirements for the purpose of initiating, completing and successfully operating investments [...] should be capable of being readily known to all affected investors" and that the host State is required "to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."[171] Statements of such breadth could result in redefining the position and function of administrative agencies, by obliging them to reorient their priorities and function so as to act as consultative units and even as de facto

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[168] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para. 99 (emphasis added).

[169] See Supreme Court of British Columbia, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 644.

[170] See Charles H. Brower, "Investor-State Disputes Under NAFTA: The Empire Strikes Back", *Colum. J. Transnat'l L.* 40 (2001), p. 43.

[171] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 (NAFTA), Award, 30 August 2000, para. 76 (for both citations).

insurers for the implementation of foreign investment projects.[172] Such an understanding seems overly broad also against the background of how most domestic legal systems understand the function of administrative agencies.

Similar concerns could be expressed about the dictum in *Tecmed v. Mexico* that connected the element of legitimate expectations to the requirement of transparency in reasoning as follows:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[173]

Such a broad conception raises difficulties in comparison to how other legal systems understand transparency. Yet, a comparative public law analysis may suggest a more restrictive reading of transparency as part of fair and equitable treatment that is grounded in general principles of public law. After all, in the *Tecmed* case, transparency was mainly applied to procedural aspects of administrative law, such as the requirement to give sufficient reasons[174] and the obligation to act in a comprehensible and predictable way.[175] These requirements, however, coincide with generally

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[172] Stephan W. Schill, "Revisiting a Landmark: Indirect Expropriation and Fair and Equitable Treatment in the ICSID Case Tecmed", *TDM* 3 (2006), p. 15.

[173] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; similarly, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 83; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 131; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, paras. 609 and 617; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009,

[174] See *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 123 (stating that "administrative decisions must be duly grounded in order to have, among other things, the transparency required so that persons that disagree with such decisions may challenge them through all the available legal remedies"). Similarly, *ibid*., para. 164.

[175] See *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 160 (stating that "[t]he incidental statements as to the Landfill's relocation in the correspondence exchanged between INE and Cytrar or Tecmed … cannot be considered to be a clear and unequivocal expression of the will of the Mexican authorities to change their position as to the extension of the Permit so long as Cytrar's business was not relocated, nor can it be considered an explicit, transparent and

accepted principles of administrative law that domestic legal systems have come to enshrine.[176] In that sense, transparency under fair and equitable treatment can be understood as part of the rule of law, and thus be in line with general principles of public law.

5. *Reasonableness and Proportionality*

Finally, investment arbitration tribunals link fair and equitable treatment to the concepts of reasonableness and proportionality. Like proportionality, but with much less methodological precision, reasonableness can be used to control the extent to which interferences of host States with foreign investments are permitted. Thus, the Tribunal in *Pope & Talbot v. Canada* repeatedly referred to the reasonableness of the conduct of an administrative agency in declining to find a violation of fair and equitable treatment.[177] The element of reasonableness can also be incorporated into a proportionality test, as in the dictum in *Tecmed v. Mexico* that "[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[178] Likewise, the Tribunal in *Saluka v. Czech Republic* applied proportionality analysis as part of the fair and equitable treatment standard as a way to balance the host State's interest with the expectations of the foreign investor.[179] More recently, and as mentioned above, the Tribunal in *Total v. Argentina* linked the interpretation of fair and equitable treatment with the principle of proportionality.[180]

Although integrating proportionality analysis into the principle of fair and equitable treatment allows, to a certain extent, for a substantive

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clear warning addressed to Cytrar from the Mexican authorities that rejected conditioning the revocation of the Permit to the relocation of Cytrar's operations at the Landfill to another place.").

[176] On the duty to give reasons see della Cananea, see above note 65, p. 67–69. On legal certainty cf. Tridimas, see above note 32, p. 242–251 (in the context of EU law).

[177] See *Pope & Talbot, Inc. v. The Government of Canada*, UNCITRAL/NAFTA, Award on the Merits of Phase 2, 10 April 2001, paras. 123, 125, 128, 155; see also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 109 (with a reference to an expert opinion by Stephen Schwebel).

[178] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 122. It is possible that an independent jurisprudence of reasonableness can be established and given detailed content. See Olivier Corten, *L'utilisation du "raisonnable" par le juge international: discours juridique, raison et contradictions* (Brussels: Bruylant, 1997).

[179] See above notes 147 and 148 and accompanying text.

[180] See above notes 91–95 and accompanying text.

control of host State conduct, the proportionality requirement also clarifies that fair and equitable treatment is not an inflexible standard, but allows, in particular when combined with sophisticated comparative analysis, for balancing the interests of host States and foreign investors. Understanding it as part of fair and equitable treatment appears all the more justified as proportionality analysis is an increasingly wide-spread method to review the legality of government conduct that is used by both domestic courts in a great number of jurisdictions as well as international courts and tribunals.[181] There are, in other words, good grounds to understand proportionality as an emerging general principle of public law that can also be used to concretize the normative content of the fair and equitable treatment standard.

C. *Refining the Application of Fair and Equitable Treatment for Specific Cases*

Understanding fair and equitable treatment as an embodiment of the rule of law, and linking it with general principles of public law, does not only clarify its normative content and suggest the concretization into the sub-elements noted above; it also suggests a specific methodology for the further concretization of the standard and its sub-elements in concrete cases. Instead of primarily relying on prior arbitral decisions, an approach that is of little help in particular when disputes concern novel circumstances, or positing the content of fair and equitable treatment in an abstract way without sufficient justification, tribunals should use a comparative method that draws on domestic and international law regarding the concept of the rule of law. When faced with the question of whether specific State conduct constitutes a breach of fair and equitable treatment, arbitral tribunals should, in other words, consider how the same facts would be assessed under various domestic public law systems and in other international legal regimes, such as under human rights treaties.

The purpose of such a comparative exercise would be to attempt to extract general principles of public law that concretize fair and equitable treatment and its various sub-elements in specific contexts. This approach has already been proposed before the current rise of investment treaty arbitration in order to concretize the concept of indirect expropriation under international law and its distinction from non-compensable

[181] See extensively Stone Sweet and Mathews, see above note 122, p. 72.

regulation.[182] The same approach can be made equally fruitful when linking fair and equitable treatment to the concept of the rule of law and examining, in a comparative perspective, how that concept and its sub-elements affect investor-State relations in specific contexts.

A comparative analysis geared towards developing general principles for the interpretation of fair and equitable treatment can work in two ways. First, it may enable investment tribunals to positively deduce institutional and procedural requirements from both domestic rule of law standards, as well as international rule of law standards, for a context-specific interpretation of fair and equitable treatment. These requirements, provided they are generally accepted in comparative perspective, constitute general principles of law. A comparative analysis of other public law systems and their understanding of the rule of law may, for example, be used to justify the standards administrative proceedings affecting foreign investors have to live up to,[183] to develop conditions under which unilateral representations of public officials are binding upon States or create legitimate expectations,[184] etc.

Second, a comparative analysis of the implications of the rule of law in other public law systems, and the development of general principles of law, may be used to justify the conduct of a State *vis-à-vis* a foreign investor as not constituting a breach of fair and equitable treatment. If similar conduct, for instance the repudiation of an investor-State contract in an emergency situation, is generally accepted by domestic legal systems and other international legal regimes as being in conformity with their understanding of the rule of law, investment tribunals could transpose such findings to the level of international investment law. Even more: they have to do so if the rule in question is generally accepted and thus forms a general principle of law. In that sense, general principles of law structure investor-State relations and concretize the vague standards of investment protection contained in investment treaties by establishing both minimum[185] and maximum standards.[186]

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[182] Dolzer, see above note 63, p. 213 et s. Rudolf Dolzer, "Indirect Expropriation of Alien Property", *ICSID Review - FILJ* 1 (1986), p. 41. Similarly, Jeswald W. Salacuse and Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", *Harv. Int'l L. J.* 46 (2005), p. 115.

[183] See also della Cananea, see above note 69, p. 575 (explaining that the WTO Appellate Body in the Shrimps Case has "subsumed from national legal orders some general or 'global' principles of administrative law" in order to impose procedural rule of law elements on the exercise of public power of the WTO Member States).

[184] See Mairal, see above note 144.

[185] Cf. della Cananea, see above note 65.

[186] Cf. Montt, see above note 90, p. 74–82.

All in all, engaging in a quest for the existence of general principles of law, and the comparative law exercise this entails, arguably can help investor-State arbitration to benefit from the experience of more sophisticated and tested public law systems by drawing on the structures these systems have developed both to limit the exercise of State power, but also to empower the State in acting in the public interest. Ultimately, this may help to legitimize arbitral tribunals in implementing, interpreting, and further developing international investment law in ways that are in line with the general principles of public law that can be distilled from domestic and international legal systems that structure the relations between States and private economic actors.

Conclusion

This chapter has analysed the potential of general principles of law to adapt international investment law and investor-State arbitration to the challenges the system is facing because of its impact on domestic law and policy-making. In developing general principles of law relevant for international investment law, this chapter has urged to make use, above all, of a comparative public law perspective that views issues of State responsibility under investment treaties and investor-State dispute resolution not in isolation, but in the context of analogous problems that arise at the domestic and the international level. Standards of treatment in international investment treaties should, in other words, be viewed in parallel to functionally equivalent public law concepts that appear, often as constitutional standards, in domestic legal orders. Provided they are sufficiently widely accepted, these concepts can be understood as enshrining general principles of public law, which, as a source of international law, can be used to clarify the normative content of the many vague and ambiguous treaty standards contained in international investment treaties.

Once investment treaty standards are identified as specific public law concepts, or even general principles of public law, a more refined comparative public law analysis can help to concretize, through the development of more specific general principles of public law, the meaning and operation of investment treaty concepts in specific contexts. This involves, for example, assessing to what extent domestic and international legal systems handle liability for representations made by government officials, what kind of limits the protection of property imposes on the tax legislator, or how the tensions between the protection of cultural heritage and

the right to property are resolved in other public law systems. Potentially, the way how other public law systems deal with these and similar issues can be restated in the form of general principles of law that then become directly relevant for the interpretation and application of treaty standards, such as fair and equitable treatment, national treatment, full protection and security, the prohibition of indirect expropriation without compensation, etc.

Making use of comparative public law analysis in this way infuses international investment law with the experience other public law regimes have developed not only in limiting the exercise of State powers, but also in empowering the State, namely by illustrating the extent of regulatory space they are generally accorded. The principles of public law developed on this basis help to channel the interpretation and application of international investment treaties in ways that are in tune with solutions that are tested and accepted in more mature systems of public law, and help arbitral tribunals to understand the basis and limits of their function to exercise judicial review. This also carries the advantage of being less subjective than approaches focusing solely on treaty interpretation as a means of concretizing the broad and partly ambiguous standards of treatment contained in international investment treaties. General principles of law therefore cannot only help to make investment law more predictable, but also increase its legitimacy by aligning State liability under investment treaties with general concepts and principles of State liability and the balance these principles strike between private rights and public interests.

Overall, general principles of public law thus appear as a potent source of international law that has transformative potential for adapting international investment law and the practice of investor-State arbitration without modifying substance or procedure of the existing international law framework. In doing so, general principles of public law promise to fulfill the legitimate expectations of all stakeholders, States, foreign investors, and civil society, and deliver solutions that are in line with standards of good governance that not only protect private interests against the misuse of governmental powers, but also recognize that States have a legitimate mandate and obligation to pursue and act in the public interest.

CHAPTER SIX

NATIONAL LEGISLATION AND UNILATERAL ACTS OF STATES

Makane Moïse Mbengue

Contents

Introduction

The present contribution deals with the issue of national investment legislation as a potential source of international investment law. To a certain extent, municipal investment laws function as unilateral acts of states under international law. Despite this important characteristic, investment legal scholarship has barely concentrated on the contours and elements that allow the depiction of municipal investment laws as unilateral acts of states under international law. Arbitral practice in the field of investment disputes has been restricting the qualification of national investment legislation as unilateral acts of states under international law (I), while general international law itself has set up "hurdles"[1] that prevent municipal investment laws from being considered *prima facie* as *legal acts* within the international legal order (II), and, thus, even less as unilateral acts of states under international law.

[1] L. Boisson de Chazournes, "Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law", in *Arbitration Advocacy in Changing Times*, ed. A. J. van den Berg, ICCA Congress Series No. 15 (Alphen aan de Rijn: Wolters Kluwer, Alphen aan den Rijn, 2011), p. 310–314.

I. *In Search of Lost Time*...[2]

Investors have "basic expectations",[3] not to mention legitimate expectations.[4] These expectations are "not based on an individual negotiation between [an investor] and [a] State".[5] Rather, "they represent the common level of legal comfort which any protected foreign investor [may] expect".[6] And it is essentially because of those investors' expectations that governments – especially from the developing world – commit themselves *unilaterally* in order to "persuade them to invest in their state".[7]

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[2] M. Proust, *In Search of Lost Time*, translated by C.K. Scott Moncrieff, Terence Kilmartin and Andreas Mayor, revised by D. J. Enright (New York: The Modern Library, 1992). The structure of the present contribution is based on some of the main volumes composing Marcel Proust's classic masterpiece *In Search of lost Time*.

[3] As stated by the Tribunal in the *Tecmed* case, "in light of the good faith principle established by international law, [the FET (fair and equitable treatment)] requires the Contracting Parties to provide to international investments treatment that does not affect the *basic expectations* that were taken into account by the foreign investor to make the investment" (*Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154) (italics added). All the arbitral awards (except as otherwise indicated) mentioned in the present case can be found on the following website: http://italaw.com/.

[4] See, *e.g.*, *Perenco Ecuador LTD. V. The Republic of Ecuador and Empresa Estatal Petroleos Del Ecuador* (*PETROECUADOR*), Decision on Jurisdiction, ICSID Case No. ARB/08/6, 30 June 2011, para. 15. The relevant paragraph of the award shows that legitimate expectations of investors are often at the heart of an investment dispute: "This dispute arises out of Ecuador's enactment of legislative measures which increased its participation under the Participation Contracts on "extraordinary revenues" earned under the Contracts. Briefly summarized, it is Perenco's contention that it has certain enforceable contractual rights as a party to the Participation Contracts, and that *in reliance on those rights* it invested large sums in the exploration and extraction of oil in Ecuador" (italics added). For an explicit reference to "legitimate expectations of investors", see *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 117. See also *SOABI* v. *Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, para. 4.10: "In other words, the interpretation must take into account the consequences which the parties must reasonably and *legitimately* be considered to have envisaged as flowing from *their undertakings*" (italics added).

[5] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 70.

[6] *Ibid.*

[7] W. M. Reisman and M. H. Arsanjani, "The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes", in *Völkerrecht Als Wertordnung – Common Values in International Law. Essays in Honour of Christian Tomuschat*, ed. P.-M. Dupuy et al. (Kehl/Strasbourg: N.P. Engel Verlag, 2006), p. 409. The authors explain that "[g]overnments in developing countries which seek to encourage foreign direct investment must reach an undifferentiated global community of potential investors ... Because many such governments are seeking to attract a common but finite pool of available foreign capital, the competition for it may become intense. Competitors may somewhat enhance their own national infrastructures but the natural features of a country are essentially fixed, so the competition often turns on relative terms of investment. One of those terms is the normative environment ..." (p. 409–410).

That states commit themselves through bilateral or multilateral investment treaties or through contracts with foreign investors is now part of the legal *déjà vu,* to say the least. That states may commit themselves *via* unilateral *binding* statements or declarations is today a fact of international life,[8] since it is broadly accepted that unilateral declarations of states may create rights and obligations under international law,[9] although this category of sources is not expressly mentioned in the inescapable article 38 of the Statute of the International Court of Justice (ICJ).[10]

What is rather challenging for the theory of sources of international investment law is the practice of states making unilateral undertakings[11] within the frame of *national investment legislation*. National investment legislation embodies, *inter alia,*[12] substantive standards of investment treatment (fair and equitable treatment, national and most-favoured-nation treatment, protection from arbitrary and discriminatory measures, protection from nationalization and expropriation, and the right to free transfer of capital),[13] provisions defining the notions of an investment and

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[8] *Ibid.*, p. 410.

[9] See *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472 para. 46: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations." In this respect, see also the position of the International Law Commission (ILC) in its 1997 report: "In their conduct in the international sphere, States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political, economic and technological changes taking place in the international community at the present time and, in particular, the great advances in the means for expressing and transmitting the attitudes and conduct of States", (*Official Records of the General Assembly*, *Fifty-second Session*, *Supplement N° 10* (A/52/10), para. 196).

[10] See P. Guggenheim, "La validité et la nullité des actes juridiques internationaux", 74 *Recueil des cours* (1949-I), p. 191. See also, G. Abi-Saab, "Les sources du droit international: essai de déconstruction", in *International Law in an Evolving World: Liber Amicorum in tribute to professor Eduardo Jiménez de Aréchaga*, ed. M. Rama-Montaldo (Montevideo: FCU, 1994).

[11] In the context of the present contribution, those unilateral undertakings will be indifferently referred to as 'investment national legislation', 'national foreign-investment statutes', 'investment promotion legislation', 'national foreign-investment law', 'domestic investment laws', 'municipal investment laws' or 'unilateral investment law undertakings'.

[12] For a detailed analysis of the content of national foreign-investment statutes see M. Potestà, "The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws", 27 *Arbitration International* 2 (2011), p. 150. National foreign-investment statutes can consist of "legislation specifically addressing investments by foreign investors" or of "general legal framework consisting of tax laws, labour laws, environmental laws, corporate laws, competition laws, and intellectual property laws": see A. Joubin-Bret, "Admission and Establishment in the Context of Investment Protection", in *Standards of Investment Protection*, ed. A. Reinisch (Oxford: Oxford University Press 2008), p. 18–19.

[13] See, *e.g.*, Article 8 of the Mongolian Foreign Investment Law, which provides as follows: "1. Foreign investment within the territory of Mongolia shall enjoy the legal protection guaranteed by the Constitution, this law and other legislation, consistent with those

of an investor,[14] as well as rules dealing with the settlement of disputes between the host state and the foreign investor (domestic courts and/or investor–state arbitration).[15] Whatever their variable normative content,[16] domestic investment laws have as a common denominator their role as matrices of legal commitments in favour of foreign investors and/or investments.

These self-imposed legal commitments assumed by states lay investment promotion legislation within the realms of the international legal order. Indeed, such investment promotion legislation formulates

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laws and international treaties to which Mongolia is a party … 3. Investments of foreign investors may be expropriated only for public purposes or interests and only in accordance with due process of law on a non-discriminatory basis and on payment of full compensation …" See also, Article 9 of the Mongolian Foreign Investment Law, which reads as follows: "Mongolia shall accord to foreign investors favorable conditions not less than those accorded to Mongolian investors, in respect of the possession, use, and disposal of their investments", quoted in *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company LTD. v. The Government of Mongolia and MONATOM Co., LTD.*, Notice of Arbitration, 10 January 2011, paras. 69–70.

[14] See, *e.g.*, Article 2, paragraph 4 of the 2002 South Korean Investment Protection Act, which reads as follows: "The term "foreign investment" shall refer to any of the following; (a) Where a foreigner purchases, under the conditions prescribed by the Presidential Decree, stocks or holdings (hereinafter referred to as "stocks") of a Korean corporation (including a Korean corporation in the process of being established) or a company run by a national of the Republic of Korea, for the purpose of establishing a continuous relationship with and participating in the management of said Korean corporation or company; (b) Where a loan with the maturity of not less than five years is extended to a foreign-capital invested company by its overseas holding company or by a company in a relationship with said holding company of the capital investment prescribed by the Presidential Decree The term "foreign investor" shall refer to a foreigner who is in possession of stocks, under the conditions prescribed by this Act", available at: http://untreaty.un.org/cod/avl/pdf/ls/Shin_RelDocs.pdf.

[15] See, *e.g.*, Article 25 of the Mongolian Foreign Investment Law, which provides that: "Disputes between foreign investors and Mongolian investors as well as between foreign investors and Mongolian legal or natural persons on the matters relating to foreign investment and the operations of the foreign invested business entity shall be resolved in the Courts of Mongolia unless provided otherwise by international treaties to which Mongolia is a party or by any contract between the parties", quoted in *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company LTD. v. The Government of Mongolia and MONATOM Co., LTD.*, Notice of Arbitration, 10 January 2011, para. 67.

[16] For instance, some national foreign-investment laws do not contain any rules on dispute settlement. This is the case of the Syrian Investment Law (1991), the South Korean Foreign Investment Protection Act (2002), the Foreign Investment Law of Myanmar (1988), the Mexican Foreign Investment Law (2001), the Honduran Decree N° 80–92 of June 1992 on investments. On the content of the aforementioned national investment legislations see V. J. Tejera Pérez, "Do Municipal Laws Always Constitute a Unilateral Offer to Arbitrate? The Venezuelan Investment Law: A Case Study", in *Investment Treaty Arbitration and International Law*, ed. I. A. Laird, T. J. Weiler (Huntington: JurisNet, 2008), p. 85.

rights[17] and obligations in relation to foreign investment that can benefit fully from the "protection of international law".[18] The nexus between national foreign-investment statutes and international law stems from the fact that those domestic laws confer and attribute "rights and other advantageous legal situations (faculties, legal powers and expectations)"[19] to foreign investors; as a result, "the very existence of the international obligation[s] [towards foreign investors and/or investments] depends on a *state of affairs created in municipal law*" (italics added).[20] That 'state of affairs' itself derives from a "certain freely adopted attitude on the part of the legal order of [a] State".[21] Moreover, it is precisely because of this 'freely adopted attitude' that a state can decide to commit itself *unilaterally* with respect to foreign investment protection and promotion. Once it does so within the framework of national legislation, the instrument at stake acquires *prima facie* the legal nature of an autonomous unilateral act under international law,[22] i.e. a *legal act* "made in the exercise of a state's

[17] Foreign investment laws not only embody 'obligations' for states but also 'rights' for foreign investors. See, *e.g.*, *Rumeli Telekom A.S. and Telsim Mobil Telemoki* "it is also well established in international law that a State may not take away *accrued rights* of a foreign investor by domestic legislation abrogating *the law granting these rights*" (ICSID Case No. ARB/05/16, Award, 29 July 2008).

[18] On this expression see G. A. Alvarez and S. Montt, "Investments, Fair and Equitable Treatment, and the Principle of "Respect for the Integrity of the Law of the Host State: Toward a Jurisprudence of "Modesty" in Investment Treaty Arbitration", in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, ed. M. H. Arsanjani et al. (Leiden/Boston: Martinus Nijhoff Publishers, 2011), p. 582.

[19] Separate opinion of Judge Morelli, *Barcelona Traction, Light & Power Co. Limited* (*Belgium v. Spain*), *Judgment*, *I.C.J. Reports 1970*, p. 233, para. 3.

[20] *Ibid.*, p. 234, para. 4.

[21] *Ibid.*, p. 234, para. 3.

[22] See, *e.g.*, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. and The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011, where the arbitral tribunal acknowledged that consent to investment arbitration may derive from "two separate arbitral consents … one arising under CAFTA and the other under the *Foreign Investment Law of El Salvador*" (para. 118). Furthermore, the arbitral tribunal also considered that claims under a BIT or a multilateral investment agreement have to be raised separately from claims under a national foreign-investment law. According to the tribunal, "The Tribunal is not satisfied that Claimants have in fact raised any claims – i.e., causes of action – under the Foreign Investment Law … Further, Claimants' "confirmation" that they have submitted a claim for breach of the Foreign Investment Law is unsupported by their submissions. Claimants have not articulated any claims; rather, as the following review of the submissions demonstrates, they have provided a perfunctory recital of the articles of the Foreign Investment Law, at most … Indeed, in the Request, Claimants state that the Request was filed pursuant to the ICSID Convention, CAFTA and the Foreign Investment Law. Claimants make no other reference to the Foreign Investment Law in this document, not even in paragraph 31 where they set forth their request for relief (referring only to "El Salvador's violation of its obligations under CAFTA-DR with respect to treatment of foreign investors")" (*ibid.*, paras. 124–125).

freedom to act on the international plane".[23] The very *raison d'être* of such a legal transmutation is that international law deduces and "imposes certain obligations on [a] State"[24] whose municipal legal order has *unilaterally* conferred rights on foreign investors/investments.[25] From this *modus operandi*, national foreign-investment laws are then eligible to penetrate the world of unilateral acts of states.

A. *The 'Captive'[26]: Stereotyping Investment National Legislation As Unilateral 'Declarations' of States*

Unilateral acts of states are generally perceived as unilateral governmental "declarations"[27] or "statements"[28] if not understood as "oral declarations of diplomats, some of which reduced to notes, rather than formal acts".[29] However, the recourse to national investment laws has provoked a sort of semantic maelström in the constellation of unilateral acts of states. Indeed, instances of confusion between national investment laws – when these laws are considered unilateral *acts* of a state – and unilateral *declarations* of states occur in practice.[30] Yet, not every unilateral declaration of

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[23] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 81. See also *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85.

[24] Separate opinion of Judge Morelli, *Barcelona Traction, Light & Power Co. Limited* (*Belgium v. Spain*), *Judgment*, *I.C.J. Reports 1970*, p. 235, para. 4.

[25] See *Biwater Gauff* (*Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 566: "The question is not what the investor would prefer to have happened, or even what the investor subjectively expected to happen, but what the investor was objectively entitled to expect. All relevant circumstances, *including the governing municipal law*, should be considered in determining what was objectively reasonable" (italics added).

[26] Proust, see above, note 2, *The Captive & The Fugitive* (*In Search of Lost Time: Volume VI*).

[27] See *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472, para. 46.

[28] Reisman and M. H. Arsanjani, see above note 7.

[29] D. Caron, "The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law", in *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*, ed. M. H. Arsanjani et al., see above note 18, p. 649.

[30] See, *e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 282, where the document qualifies Article 15 of the Salvadoran Investment Law as a "unilateral declaration at issue is not unclear". See also *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 81, in which the arbitral tribunal qualifies expressly a provision (article 22) of the Venezuelan Law on the Promotion and Protection of Investments as "a unilateral declaration by Venezuela." See also *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 61: "In deciding whether in the circumstances of the present case Law N°. 43 constitutes

a state constitutes a unilateral act of that state,[31] and not every unilateral act of that state is crafted as a declaration.

A unilateral investment-related declaration may have a declaratory effect without producing any formal legal effect under international law.[32] It may be a "trial balloon"[33] or may reflect simple experimental political statements of states "in order to evaluate the reactions to [those] statements for purposes of then taking a particular position or making commitments".[34] It may also function as some preambular parts of certain treaties[35] by simply setting out political and – albeit more rarely, legal – aspirations. The 1988 Foreign Investment Law of Myanmar offers a good illustration of the 'semi-preambular function' that unilateral *statements* of states might perform.[36]

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consent to the Centre's jurisdiction, the Tribunal will apply general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to *unilateral declarations*" (italics added).

[31] For an example of a declaration that is not a unilateral act of a state see the reference to the declaration of the President of El Salvador against mining in the *Pac Rim Cayman LLC v. Republic of El Salvador* case, Notice of arbitration, 30 April 2009, paras. 107–108: "In March 2008, after several months of discussion with MARN officials over the reasons why the Enterprises' application for environmental permits remained unresolved, *President Saca made a public declaration against mining. The declaration represented a radical change in the Government's position with respect to mining and was a radical departure from controlling Salvadoran law*" (italics added).

[32] See J. W. Garner, "The International Binding Force of Unilateral Oral Declarations", 27 *American Journal of International Law* (1933), p. 493–497. See also V. D. Degan, "Acte et norme en droit international public", 227 *Recueil des cours* (1991-II), p. 357–418. See also the position of the Special Rapporteur, Mr. Victor Rodriguez-Cedeno, in his first report on unilateral acts of states where he admits a distinction between 'political unilateral acts' and 'legal unilateral acts' (International Law Commission, UN Doc. A/CN.4/486, 5 March 1998, para. 44): "The intention of the State which formulates or issues a declaration is what really must determine its legal or political character; in other words, whether that State intends to enter into a legal engagement or a political engagement. State practice appears to indicate that in their international relations States formulate purely political unilateral or bilateral declarations without any intention of entering into legal engagements."

[33] Reisman and Arsanjani, see note 7, p. 422.

[34] *Ibid.*

[35] On the value of preambles in general international law see M. M. Mbengue, "The Notion of a Preamble", *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012).

[36] Indeed, the Foreign Investment Law of Myanmar shows that national investment legislation can contain both elements of a unilateral statement without any kind of legally generative force and elements of a unilateral legal act of a state under international law. That Foreign Investment Law clearly distinguishes between the "Statement on Foreign Investment Law on Myanmar" and the "Union of Myanmar Foreign Investment Law" *per se*. The relevant parts of the Statement read as follows: "… Foreign investors who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against

By contrast,[37] a unilateral act of a state should be qualified as such under international law only if it induces a legally generative force[38] or when it "has the force of [an] international commitment".[39] Hence, it is suggested (or preferable) to use expressions such as "autonomous unilateral legal acts"[40] or "unilateral legal acts"[41] or even "unilateral

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nationalization of their business in operation. All these rights and privileges would be granted in the interest of the Union of Myanmar and its people … At present, enquiries are being made by foreign companies and persons wishing to make investments in the State in a reasonable manner … *As it is necessary to make legal provisions for the above-mentioned matter, the State Law and Order Restoration Council has enacted the Foreign Investment Law*" (italics added). More specifically, the last sentence demonstrates that the "Statement on Foreign Investment Law on Myanmar" does not purport to create international obligations (like a unilateral *act* of a state aims at) but only at declaring political (and to a certain extent, legal) aspirations in relation to foreign investment protection and promotion.

[37] The position of the International Court of Justice (ICJ) in the *Nuclear Tests* cases should be rethought. The Court declared that "of course, not all unilateral acts imply obligation" (*Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 472, para. 47). Such a position brings uncertainty in the theory of sources of international law. If it is recognized that unilateral acts of states are sources of rights and obligations under general international law, legal security and legal predictability require treating all unilateral acts of states as a single category of sources of international law. Creating a differentiation among unilateral acts of states might be confusing for "the creation and performance of legal obligations" or might impend "trust and confidence in international cooperation" (*ibid.*, para. 49). Either an act of a state is a unilateral act of that state or is not. If it is a unilateral act of a state then it has a legally generative force and is binding upon the state under international law. For concerns of legal security in the area of unilateral acts of states: see Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 503, para. 19.

[38] On this point see E. Suy, "Unilateral Acts of States as a Source of International Law: Some New Thoughts and Frustrations", in *Droit du pouvoir. Pouvoir du droit. Mélanges en l'honneur de Jean Salmon* (Bruxelles : Bruylant, 2007), p. 632. The author emphasizes the semantic difficulties attached to the concept of 'unilateral acts of states': "When dealing with unilateral acts of states we are confronted with two major difficulties of a semantic nature. The first problem is one of linguistic and concerns the qualification of a unilateral act for which the English language does not seem to be very helpful. Whereas in French, Spanish, Italian and German, a unilateral act is qualified as an *acte juridique*, *acto juridico*, *negozio giuridico*, *Rechtsgeschäft*, the English rendering is simply *unilateral act*. This expression does not explain the subtleties behind the German words *Rechtsgeschäft* and *Rechtshandlung*, or the difference between the Italian words *atto* and *negocio*."

[39] *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), *Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 27, para. 46.

[40] On this expression see Suy, see above note 38, p. 634. The author stresses, "Unilateral legal acts are declarations of the will emanating from one subject of international law aiming at a legal effect. The characteristics of a unilateral legal act are that it contains the declaration of the will of only one subject of international law, and that this declaration has an effect without the involvement by other subjects of international law. This important characteristic leads to the expression 'autonomous unilateral legal act.'"

[41] On this expression see K. Zemanek, "The Legal Foundations of the International System", 266 *Recueil des cours* (1997), p. 193–194.

engagements"[42] properly to designate the generic category of unilateral acts of states, whether made orally or in writing.[43]

National foreign-investment statutes purport to produce legal effects either *exclusively* at the domestic level[44] (these are national laws "without international connection"[45]) or *concomitantly* at the domestic and international[46] levels; as such they are not *in se* unilateral declarations or statements. When it aims to generate legal force at the international level, a national foreign-investment law must be individualized as "a unilaterally enacted legislation [which] has created an international obligation"[47] or, simply put, as a "*strictly* unilateral act of a state".[48] Therefore, a line should

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[42] On this expression see the introductory note of the Special Rapporteur on the law of treaties, Mr. Brierly ("wholly unilateral engagements, engagements to the creation of which only one international legal person is a party…"), *Yearbook of the International Law Commission*, *1950*, vol. II, p. 225, para. 10.

[43] On the irrelevance of form for unilateral acts of states see: *The Mavrommatis Jerusalem Concessions*, *P.C.I.J.*, Series A, No. 5, p. 37; *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 13; *Legal Status of Eastern Greenland* (P.C.I.J., *Series* A/B, No. 53, p. 71); *Case of the Free Zones of Upper Savoy and the District of Gex* (P.C.I.J., *Series* A/B, No. 46, p. 170–172); *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 473, para. 48).

[44] See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 212–213 and 217, in which the arbitral tribunal analysed the existence of a state of necessity separately under Argentinean domestic law and under customary international law: "*The issue for the Tribunal to establish is whether, under Argentine law, there is any valid excuse for not complying with the terms of the contractual and legal arrangements Argentina had entered into* … The Argentine Government has invoked in the alternative the existence of a state of necessity under international law as an exemption from liability. The state of international law on this question will be examined separately … In light of this discussion, the Tribunal is persuaded that the state of necessity under domestic law does not offer an excuse if the result of the measures in question is to alter the substance or the essence of contractually acquired rights" (italics added).

[45] Expression borrowed from *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Decision on Jurisdiction, 22 February 2006, para. 30.

[46] See, *e.g.*, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 33, in which the arbitral tribunal acknowledged implicitly that international commitments in relation to foreign investment could also derive from national legislation: "The Tribunal also concludes, however, that it has jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of *legally binding commitments made to the investor* in treaties, *legislation* or contracts" (italics added).

[47] *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85.

[48] On this expression see Rodriguez-Cedeno, see above note 32, para. 12. For a discussion of the limits that characterize the definition of "strictly unilateral acts" see *infra*, pp. 11–12.

be drawn between unilateral investment-related declarations and investment national legislation.

B. *The 'Fugitive':*[49] *Extracting National Investment Legislations from the Bedrock of Unilateral 'Declarations' of States*

Unilateral declarations or statements in the field of investment promotion and protection consist mainly of "statements made either orally or distributed in writing in either hard copy or on-line, clearly promising certain conditions or treatment for foreign investors"[50] (i.e., "announcements"[51] to attract foreign investors, statements on the "websites of its embassies"[52] and "publications to inform prospective investors"[53] by national entities established to promote investments within the jurisdiction of a state). The broad array of so-called unilateral declarations or statements made by states to provide "assurances about how foreign investment will be treated"[54] do not necessarily pertain to the category of states' unilateral acts capable of being sources of rights and obligations under general international investment law.[55]

In the same vein, unilateral declarations or statements are neither pieces of legislation nor acts of a legislative nature *per se*. Rather than being 'auto-normative' acts (in French, "*actes autonormateurs*"[56]) or 'hetero-normative' acts (in French, "*actes hétéronormateurs*"[57]), investment-related declarations of states are generally more declaratory of

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[49] Proust, see above note 26.

[50] Reisman and Arsanjani, see above note 7, p. 422.

[51] *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 100.

[52] *Ibid.*, para. 100.

[53] *Ibid.*, para. 101.

[54] Caron, see above note 29, p. 649.

[55] Reisman and Arsanjani acknowledge themselves that not all "sorts of unilateral statements or declarations should be deemed binding in international investment law (Reisman and Arsanjani, see above note 7, p. 422) and suggest a peculiar threshold for unilateral governmental statements in relation to foreign investment to be binding or sources of investment law. Indeed, for these two authors, it is only when the statements are "clearly promising certain conditions or treatment for foreign investors and such statements are made public and are made repeatedly and foreign investors relied on them, and governments do not retrieve or qualify those statements of commitment before the conclusion of contracts with foreign investors" that the said statements "bind the State" (*Ibid.*, p. 422).

[56] P. Daillier, M. Forteau and A. Pellet, *Droit international public* (Paris: LGDJ, 2009), p. 400–402.

[57] *Ibid.* pp. 402–403. For a qualification of unilateral acts of states as 'hetero-normative' acts see Rodriguez-Cedeno, see above note 32, para. 25.

"general [investment] policy"[58] than of "pure"[59] investment law.[60] In most cases, they provide 'evidentiary' value on whether or not a given state has *unilaterally* bound itself under international law through a municipal investment law.[61] Thus, referring to national foreign investment laws or to provisions contained therein as being *par définition* mere 'unilateral declarations' may be misleading when it comes to precisely defining the contours of the sources of international investment law.[62]

But then, what prompted the confusion between national foreign-investment laws and unilateral 'declarations' of states in certain arbitral awards? And what explains the quasi-absence of qualification of municipal investment laws as unilateral acts of states *per se* in practice?

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[58] By analogy to what an arbitral tribunal said in relation to "questions of general economic policy". See *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, para. 27.

[59] Understood in the Kelsenian sense: see H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1970).

[60] This is not to say that investment-related unilateral declarations or statements are *always* precluded from producing legal effects at the international level and from being regulated by international law. What is being stressed here is that the obligatoriness of investment-related unilateral declarations often depends on the political will of states, while national foreign investment laws—when assimilated to unilateral acts of states under international law—base their obligatoriness in international law.

[61] See, e.g., *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, paras. 301–305. In its rejoinder, the claimant enumerates a number of unilateral declarations that prove that Article 15 of the Investment Law of El Salvador constitutes a unilateral act of El Salvador on the basis of which that state has consented to ICSID arbitration. The claimant made reference to a "slide" in a powerpoint presentation made before the *Asamblea Legislativa* on the country's proposed investment law ("The Power Point presentation made before the *Asamblea Legislativa* when the proposal of the Investment Law was being debated contained a slide on dispute resolution that expressly referred to "international arbitration administered by ICSID" for the case of foreign investment), to the comments by El Salvador's representative before the World Trade Organisation on that law in November 1996 ("when he stated that the new investment law would guarantee foreign investors access to international arbitration"), and an UNCTAD report on the Foreign Investment Law of el Salvador ("The report was prepared on the basis of input provided by the Salvadoran Government, including its investment agency (PROESA), and then subsequently publicly endorsed by the Government at the report's official presentation in April, 2010 … the Report was prepared with official input by PROESA and other Government ministries, and was endorsed by El Salvador's Ambassador to the United Nations and the Director of PROESA, both acting in their official capacity").

[62] See, *e.g.*, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 286. In its rejoinder, the claimant uses at least four different concepts to refer to the same unilateral act (Article 15 of the Investment Law of El Salvador): "Respondent argues that Article 15 of the Investment Law should be interpreted restrictively because it is not an *instrument of consent* but a *unilateral declaration of the State* having no bearing on arbitral jurisdiction. However, several ICSID tribunals have confirmed that *unilateral jurisdictional*

Besides the "lack of a theory of international unilateral acts of states",[63] it is noteworthy that foreign investment laws are primarily not seen as the raw material upon which unilateral acts of states are built in the field of investment protection and promotion.[64] Nevertheless, it is not such a perception of the intrinsic and extrinsic relationship between unilateral acts of states and national investment statutes that has propelled the so-called semantic maelström. Confusion is rather a consequence of a spiral of preconceived ideas. Two layers of the spiral deserve particular attention.

The first layer is grounded on the preconceived idea according to which "the most common formal unilateral act of a State is a declaration"[65] and that "it is difficult in practice to find substantive unilateral acts that are not expressed or embodied in a declaration".[66] The International Law Commission (ILC), for instance, when dealing with its aborted project on 'Unilateral Acts of States' did not mention at all national foreign-investment statutes as examples of unilateral acts.[67] Yet, the Special Rapporteur on the topic of 'Unilateral Acts of States' contemplated

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instruments should not be interpreted restrictively. And at least three tribunals have confirmed that Article 15 of the Investment Law is an *instrument of consent*" (italics added).

63 Rodriguez-Cedeno, see above note 32, para. 13.

64 In general, this is true for much areas of international law concerned with unilateral acts of states. As explained by the Special Rapporteur in his first report, "in the law of unilateral acts, the unilateral declaration is probably the means or procedure by which a State most often performs unilateral acts and assumes strictly unilateral obligations" (*ibid.*, para. 19). More specifically, this is also accurate when it comes to investment protection and promotion. As explained by Reisman and Arsanjani, "… the governments of some States face a particularly hard "sell" when their predecessor governments had not kept commitments. As a result, their national image has acquired a deserved (and legally eufunctional) notoriety. To reach this part of the global market, other techniques must be found. Governments facing this quandary frequently resort to active promotional campaigns in order to assure prospective investors that, among other things, a new government will not succumb to the practices of its predecessors. The campaigns are conducted either at the national level or abroad through diplomatic and consular channels, or through agencies and lobbyists and even through promotions via Internet" (Reisman and Arsanjani, see above note 7, p. 409–410).

65 *Ibid.*, para. 73. See also K. Skubiszewski, "Unilateral Acts of States", in *International Law: Achievements and Prospects*, ed. M. Bedjaoui (Dordrecht/Paris: Nijhoff/UNESCO, 1991), p. 233.

66 Rodriguez-Cedeno, see above note 32, para. 13.

67 See *Eighth Report on unilateral acts of States*, by Victor Rodriguez-Cedeno, Special Rapporteur, 26 May 2005, UN Doc. A/CN.4/557. For a similar point of view see Caron, see above note 29, p. 669: "… in addressing unilateral acts – both oral and written – neither the Special Rapporteur nor tbe ILC appeared to contemplate foreign investment laws as an example of unilateral acts. Domestic statutes are only sporadically mentioned in the reports, and they never concern foreign investment. In his overall work on the topic, the Special Rapporteur, and subsequently the ILC, remained primarily concerned with diplomatic acts performed by states in the areas of recognition of states, maritime and terrestrial boundaries, and other questions concerning sovereignty."

the fact that some "*acts of domestic scope* which do not have effects at the international level"[68] may reflect "substantive unilateral legal acts of States which fall within the treaty sphere".[69] Nevertheless, the Special Rapporteur totally omitted domestic acts that may have effects at the international level, or what he called "formal unilateral legal acts of internal origin which may produce effects at the international level"[70] (like national investment laws), and, accordingly, ignored the rightful placement of those acts within the category of unilateral acts of states. Such a pattern of thought has led some arbitral investment tribunals to "lose sight of the fact that a legislative act of a state, like all other acts of a state, can have meaning within several legal systems simultaneously"[71] and should be qualified *uti singuli* as an *autonomous unilateral legal act* of a state under international law,[72] rather than a mere unilateral declaration.

The second layer of the spiral of preconceived ideas rests on the assumption that unilateral acts that are envisaged under international law pertain to a so-called category of "*strictly* unilateral acts".[73] National statutes in general and municipal investment laws in particular are not commonly perceived as being "strictly unilateral acts". While their very nature is to be adopted at the internal level of each state, they are not in essence considered *strictly* unilateral. They are emanations of the sovereignty of each state to exercise regulatory powers within its jurisdiction. From there, national laws receive in principle their specific legal qualification from the 'pyramid of internal norms' (i.e., the domestic legal order) and not by virtue of international law. Within that 'pyramid', the concept of unilateral acts of states is rather non-existent, not to mention unconventional. Thus, by formulating the high threshold of the 'strictly unilateral act', the ILC – at least unconsciously – excluded *de facto* national investment legislation from the scope of study of unilateral acts of states.

Furthermore, even when looking at the criteria that the ILC highlighted in order to determine whether a given act of a state constitutes a *strictly* unilateral act under international law, it is difficult to see how national

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68 Rodriguez-Cedeno, see above note 32, para. 96.

69 *Ibid.*

70 *Ibid.*, para. 105.

71 Caron, see above note 29, p. 649.

72 For a similar view see Zemanek, see above note 41, p. 193–194: "Autonomous unilateral legal acts are communications under, not about, rules of the existing legal order and intend to confirm or to change the legal position of the author state in application of the respective rule of international law." See also Potestà, see above note 12, p. 161.

73 Rodriguez-Cedeno, see above note 32, p. 12.

investment legislation would qualify as 'strictly unilateral acts' through which a states assumes "*strictly* unilateral (legal) obligations".[74]

The first criterion that was suggested by the ILC is based on 'the single expression of will'. Defining this criterion, the ILC stated that "a unilateral act should be understood as an act which is attributable to one or more States and which creates a new legal relationship with a third State which did not participate in its elaboration".[75] The second criterion that was stressed by the ILC dealt with the 'autonomy of the act and of the obligation'. Here, among the several explanatory points raised by the ILC, one is noteworthy. The ILC emphasized that "although it is rare for a State to commit itself and to assume obligations without any quid pro quo, this is possible under international law, in accordance with the generally accepted principle that a State may, in the exercise of its free will and of the power of auto-limitation conferred on it by international law, contract unilateral obligations".[76]

It is striking that the two criteria identified by the ILC to define *strictly* unilateral acts of states do not properly match the configuration of municipal investment laws. Firstly, the latter are not addressed to third states and do not intend to "create a new legal relationship with a third State". The addressees of investment national legislation are those legal and natural persons who form part of the "foreign investment community"[77], as well as the state that is itself the 'author' of the investment legislation.[78] Secondly, the ILC's interpretation of the autonomy of a unilateral act does not correspond to the rationale that governs national foreign-investment statutes. Indeed, it is not international law *per se* and *exclusively* that founds the power of a state to formulate unilateral commitments *vis-à-vis* foreign investments and investors; municipal investment laws are, first and foremost, rooted in the domestic legal order of the state. Many of such

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[74] *Ibid.*, para. 19.

[75] *Ibid.*, para. 133.

[76] *Ibid.*, para. 141.

[77] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Pac Rim Cayman LLC's Rejoinder on Respondent's Objections to Jurisdiction, 2 March 2011, para. 283.

[78] See, *e.g.*, the Foreign Investment Law of Myanmar (see above note 16): "*Foreign investors* who invest and operate on equitable principles would be given the right to enjoy appropriate economic benefits, to repatriate them, and to take their legitimate assets back home on closing of their business. They would also be given proper guarantee by the Government against nationalization of their business in operation. *All these rights and privileges would be granted in the interest of the Union of Myanmar and its people*" (italics added).

investment national laws do not even refer to international law.[79] To consider that strictly unilateral acts solely derive from the exercise by a state of its "free will and power of auto-limitation *conferred on it by international law*" leads to a subversive result: excluding municipal investment laws from the realms of (strictly) unilateral acts under international law. It is not surprising therefore that arbitral practice has been characterized by irresolution in approaching national foreign-investment laws as autonomous unilateral legal acts of states under international law, or by confusion in systematically qualifying municipal investment laws as mere unilateral declarations of states.

Nevertheless, the responsibility for such a state of facts is not only attributable to arbitral practice. General international law has inherently (and maybe constantly) caught up municipal laws as being mere *facts* and, as a result, has failed in accurately considering that pure *legal acts* under international law could emerge out of the interstices of municipal laws. So is the '*Lost Time*'[80] found (i.e., acknowledging in principle that municipal law can function to a certain extent as unilateral acts of states under international law)? Not yet. It is still necessary to go in search of the '*Act*' (i.e., finding what constitutes and what does not constitute a unilateral *legal act* of a state within a municipal investment law) and of its legal effects as a source of international investment law.

II. *In Search of the Lost Act: Factum Est Servanda?*

"From the standpoint of International law and of the Court which is its organ, *municipal laws are merely facts* which express the will and constitute the activities of States, in the same manner as do legal decisions and administrative measures."[81] This dictum—which is maybe the ultimate *locus classicus* in international jurisprudence—sums up by itself the perception that general international law induces from municipal laws: these laws are not "determinative of international law."[82] Not surprisingly,

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[79] See, *e.g.*, the South Korean Foreign Investment Act: "The purpose of this Act is to promote foreign investment in this nation by providing incentives and inducements with the ultimate view of contributing to the sound development of this nation's economy." Throughout the entire act, no reference at all is made to international law.

[80] By reference to Proust, see above note 12.

[81] *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19 (italics added).

[82] *Pac Rim Cayman LLC v. Republic of El Salvador*, Pac Rim Cayman LLC's Response to Respondent's Preliminary Objections, ICSID Case No. ARB/09/12, 26 February 2010, para. 128.

that approach is sometimes imported into the domain of international investment law.[83] But is it really an "axiom of international law"[84] to consider *all* municipal laws as mere 'facts'?

A. *'In the Shadow of Young Girls in Flowers'*:[85] *Photographing*[86] *National Investment Laws As 'Facts'*

To answer such a query, it is essential to decrypt the meaning of the aforementioned dictum of the Permanent Court of International Justice (PCIJ). The main legal consequence that the PCIJ deduced from that statement was as follows: "[t]he Court is certainly not called upon *to interpret the Polish law as such*, but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention."[87] It follows that the PCIJ was *in limine litis* dealing with an issue of *applicable law*[88] and not with an issue of *source of international*

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[83] See, *e.g.*, *Ioannis Kardassopoulos* (*Greece*) *v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 146: "In the present case, *Georgian law is relevant as a fact* to determine whether or not Claimant's investment is covered by the terms of the ECT and the BIT. But, what ever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law" (italics added). See also, Arbitration pursuant to the Canada-Ecuador Bilateral Investment Treaty and UNCITRAL Rules (London Court of International Arbitration), *EnCana Corporation v. Republic of Ecuador*, Partial Dissenting Opinion of Dr. Horacio A. Grigera Naon, Award, 3 February 2006, para. 12: "Consequently, the local laws, administrative acts and practices and other conduct attributable to the host State at the moment they had effect of operating the deprivation of property, are *facts* to be freely evaluated by the arbitrators …" (italics added). For a less explicit reference see the *Bernardus Henricus Funnekotter* case, where the arbitral tribunal observed that Zimbabwe domestic law may provide "*useful information* on the situation which prevailed in Zimbabwe from 2002 to 2005" (italics added) (*Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 103). The tribunal added that "in any event, *it is on the basis of the applicable rules of International Law* that, in conformity with Article 9(3) of the BIT, the Tribunal must decide whether or not there was at the time a state of necessity which could have made lawful deprivation of property without compensation. In other words, *ultimately international law, not the domestic law of Zimbabwe*, must determine the effect any state of emergency would have on the dispute before the Tribunal" (*ibid.*, para. 103) (italics added).

[84] *Georges Pinson* (*France*) *v. United Mexican States*, 24 April 1928, *Reports of International Awards*, vol. V, United Nations, p. 393, para. 32.

[85] Proust, see above, note 2, *In the Shadow of Young Girls in Flowers* (*In Search of Lost Time: Volume II*).

[86] Metaphor taken from *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

[87] *Case concerning certain German Interests in Polish Upper Silesia,* Merits, P.C.I.J., *Series* A, No. 7, p. 19.

[88] This appears clearly from a careful reading of the *Brazilian Loans* case (*Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment N° 15,

law or of *source of international obligations*.[89] In other words, the PCIJ did not aim to preclude that national legislation could entail *unilateral* international commitments; the PCIJ only pinpointed that because of their nature as 'facts', "tout tribunal international, de par sa nature, est obligé et autorisé à les [i.e., municipal laws] examiner à la lumière du droit des gens."[90]

Quite the reverse; the PCIJ was diligent in specifying that municipal laws "express the *will*"[91] of states. By expressing its will, a state may choose to commit itself *unilaterally* and, as a result, *all* municipal laws cannot be restrictively profiled *mutatis mutandis* as mere 'facts'. In certain instances, municipal laws should rather be sketched as unilateral acts of states under international law, and in particular, when those *national* unilateral commitments are directed towards an 'extraneous factor' (or an 'international factor') such as the foreign investment community.[92] The judgment of the International Court of Justice (ICJ) in the *Frontier Dispute* (*Burkina Faso/*

1929, P.C.I.J., *Series A N° 20/21*, p. 124): "Though bound to apply municipal law when circumstances so require, the Court, which is a tribunal of international law, and which, in this capacity, is deemed itself to know what this law is, *is not obliged also to know the municipal law of the various countries*. Alı that can be said in this respect is that *the Court may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied*. And this it must do, either by means of evidence furnished it by the Parties or by means of any researches which the Court may think fit to undertake or to cause to be undertaken" (italics added).

[89] In the present contribution, we will not deal with the question whether unilateral acts of states constitute a source of international law or a source of international obligations. We consider that the debate is somewhat futile. International law is based on rights and obligations. Therefore, it is difficult to see how an instrument which is a *source of international obligations* does not qualify as a *source of international law*. For a similar point of view see Suy, see above note 38. For a different view see Rodriguez-Cedeno, see above ntoe 32, 82–83. The Special Rapporteur concludes: "Much of the doctrine concludes that unilateral act of States do not constitute a source of law. That does not mean, however, that a State cannot create international law through its unilateral acts. Some of these acts can give rise to rights, duties or legal relationships, but they do not, because of that fact, constitute a source of international law. Unilateral acts are sources of international obligations. International tribunals have not taken a position on the question of whether unilateral acts are a source of international law; they have confined themselves to specifying that such acts are a source of international obligations."

[90] *Georges Pinson* (*France*) *v. United Mexican States*, 24 April 1928, *Reports of International Awards*, vol. V, United Nations, p. 393, para. 32.

[91] *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19.

[92] For a similar point of view see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), p. 95: "*The investment rights* … arise in the context of legal relationships governed by domestic law. Hence, IIAs (international investment agreements) and international law leave questions to be decided, in principle, *by the law of the host state*" (italics added).

Mali) confirms this reading of the dictum of the PCIJ. The ICJ, indeed, acknowledged that a domestic law "may play a role not in itself, but only as one factual element among others, or as evidence".[93] However, the ICJ indirectly recognized that "international law could effect [a] renvoi to … any legal rule *unilaterally established by any State* whatever."[94] Henceforth, national laws are perhaps *more or less* 'facts' when it comes to the law applicable before international courts and tribunals.[95] They may, alternatively, function as unilateral 'legal acts' under international law when they operate as sources of international law or international obligations, i.e. when they purport to "creat[e] and perform…. legal obligations"[96] and manifest at the same time the "will"[97] of a state to commit itself unilaterally in its international relations. One scholar goes in the same direction when affirming that "in international law, national unilateral acts, be they legal or illegal, emanating from national authorities are mere facts. But, some of the unilateral acts can be elements of state practice contributing to the formation of a customary rule of international law or *otherwise affecting the rights and obligations of a State in its international relations. Behind some of the legal acts there is an intention to create legal situations*."[98]

It is difficult to see why a municipal investment law would be tantamount to a mere 'fact' when the domestic law (or at least certain of its provisions) "concerning legal or factual situations, may have the effect of creating legal obligations",[99] and both "when it is the intention of the State [enacting the law] that it should become bound according to its terms"[100] and when "that intention confers on the [law] the character of a legal undertaking, the State [is] thenceforth legally required to follow a course of conduct consistent with the [law]".[101] Denaturing the legal characteristics of some of the provisions contained in national foreign-investment laws as being mere 'facts' under general international law comes close to "legal genetic engineering".[102]

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93 *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

94 *Ibid.*

95 In the field of international investment arbitration, this affirmation can be nuanced. See *infra* p. 15.

96 *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 473, para. 49.

97 *Case concerning Certain German Interests in Polish Upper Silesia*, Merits, Judgment N° 7, 1926, P.C.I.J., *Series A N° 7*, p. 19.

98 Suy, see above note 38, p. 632–633 (italics added).

99 *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 473, para. 46.

100 *Ibid.*

101 *Ibid.*

102 Expression attributed to Prof. Georges Abi-Saab in his Dissenting opinion, *Abaclat and others v. The Republic of Argentina*, ICSID Case No. ARB/07/5, 28 October 2011, para. 139.

Certainly, "international tribunals are properly reluctant to conclude that national law contradicts international law".[103] Admittedly, "arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest",[104] nor "an open-ended mandate to second-guess government decision-making".[105] Assuredly, "compliance with municipal law and compliance with the provisions of a treaty are different questions".[106] Unquestionably, "international law overrides domestic law when there is a contradiction since a State cannot justify non-compliance of its international obligations by asserting the provisions of its domestic law".[107] Supposedly, "international law does not appraise the content of a regulatory programme extant before an investor decides to commit".[108] The list goes on....

Ultimately, however—regardless of the merits of these "radical or moderate dualist"[109] approaches—nothing precludes an investment arbitral tribunal from qualifying a national foreign-investment law "*as it is*",[110] that is a unilateral act of a state under international law if it operates as such in its machinery, its content and its structure.

It can even be asserted that international investment law, more than any other field of general public international law,[111] requires that qualification. Indeed, international investment law appears as a sort of self-contained system within the sphere of which municipal laws play more of

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[103] In Proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, *GAMI Investments, Inc.* (*Claimant*) *and The Government of the United Mexican States* (*Respondent*), Final Award, 15 November 2004, para. 41.

[104] *Ibid.*, para. 93

[105] In Proceedings pursuant to NAFTA Chapter 11 and the UNCITRAL Arbitration Rules, *S.D. Myers* (*Claimant*) *v. The Government of Canada* (*Respondent*), First Partial Award, 13 November 2000, para. 261.

[106] *Case concerning Elettronica Sicula S.p.A* (*ELSI*), *Judgment, I.C.J. Reports 1989*, p. 51, para. 73. See also, *Avena and Other Mexican Nationals* (*Mexico v. United States of America*), *Judgment, I.C.J. Reports 2004*, p. 65, para. 139.

[107] *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 94.

[108] *GAMI Investments, Inc.* (*Claimant*) *and The Government of the United Mexican States* (*Respondent*), Final Award, 15 November 2004, para. 91.

[109] Expression attributed to Alvarez and Montt: see above note 18, p. 593–594.

[110] *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30 (italics in the original).

[111] See the position of de Beus (J.G. de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico under the Convention of September 8, 1923* (The Hague: Martinus Nijhoff, 1938), p. 140) who implicitly acknowledged that municipal law could benefit from an autonomous legal qualification under international law, without going as far as explicitly admitting that municipal law could constitute a (unilateral) legal act under international law. According to the author: "Experience shows, and this is really understandable, that an act at variance with municipal law is seldom deemed to come up

a normative role than international law[112] and not a 'factual' role. And even if "international law is fully applicable",[113] there are still situations in which the rights of foreign investors can only (or at least, mainly) be measured and determined in light of the *unilateral* commitments of a state, embodied in its national foreign-investment law. The arbitral tribunal in the *EnCana* case has acknowledged this reality by stating, "[u]nlike many

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to international standards … In the great majority of cases conduct towards a foreigner which does not conform with local law, is also at variance with the law of nations … The only value which can under the law of nations be attributed to domestic law *as a standard* is, on the one hand, that if the behavior complained of shows a pronounced departure from that law to the prejudice of a foreigner, there is an international delinquency, and on the other hand, that if the action is in accordance with that law, international commissions will perhaps hesitate to declare that the national law is below international standards of civilization …."

[112] See, *e.g.*, Article 42(1) of the ICSID Convention which reads as follows: "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." The PCIJ also admitted that domestic law can form an integral part of the applicable law before international courts and tribunals when it comes to 'foreign-investment activities'; see *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, Judgment N° 15, 1929, P.C.I.J., *Series A N° 20/21*, p. 124. According to the PCIJ: "Once the Court has arrived at the conclusion *that it is necessary to apply the municipal law of a particular country, there seems no doubt that it must seek to apply it as it would be applied in that country*. It would not be applying the municipal law of a country if it were to apply it in a manner different from that in which that law would be applied in the country in which it is in force" (italics added).

[113] *Amco Asia Corporation and others v. Republic of Indonesia*, Resubmitted case, ICSID Case No. ARB/81/1, Award, 5 June 1990, para. 40. See also and more specifically, *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010, para. 85, where the arbitral tribunal emphasized that a unilateral undertaking in a national foreign-investment law should be interpreted in light of principles and rules of international law: "…the jurisdictional issue in this case *involves more than interpretation of municipal legislation*. The issue is *whether certain unilaterally enacted legislation has created an international obligation under a multilateral treaty*. Resolution of this issue involves *both statutory interpretation and treaty interpretation* … Thus in deciding whether in the circumstances of the present case, Law N° 43 constitutes consent to the Centre's jurisdiction, the Tribunal will apply *general principles of statutory interpretation taking into consideration, where appropriate, relevant rules of treaty interpretation and principles of international law applicable to unilateral declarations*" (italics added). For a similar position see *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, para. 81: "It is clear to the Tribunal that, in view of the fact that Article 22 of the LPPI is a unilateral declaration of the Venezuelan State, *it is necessary that the initial process of interpretation be conducted within the parameters set by the Republic's legal system, based on its Political Constitution, which is the supreme norm of that country*. However, because any conclusions that may be reached in the process of interpretation of that article must be applied to determine whether Venezuela granted its consent to ICSID jurisdiction under Article 25 of the ICSID Convention, *it is necessary to take account of the principles of International Law to reach a definitive conclusion*" (italics added).

BITs there is no express reference to the law of the host State in the [Canada-Ecuador BIT]. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) *the rights affected must exist under the law which creates them, in this case, the law of Ecuador*."[114] Therefore, one should concur with the opinion according to which "where the existence of a right may only be established by reference to domestic law, an examination of the municipal legal system at issue necessarily precedes any investigation into the protection of that right under BITs or general international law'.[115]

For the sole purpose of identifying what constitute unilateral 'legal acts' under international law in the context of a municipal investment law, the "examination of the municipal legislation at issue"[116] should allow moving it away from the 'Shadow of Young Girls in Flowers' (that is, the 'shadow of facts'). From there on, the examination must consist in 'freezing'[117] the *act*(*s*) in national foreign-investment legislation *via* which states enunciate unilateral commitments under international law.

B. *'Time Regained':*[118] *Freezing Investment National Legislation As 'Unilateral Legal Acts' under International Law*

In principle, for a unilateral act of a state to produce legal effects, "nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required … since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".[119] In this context, through which legal transmutation[120] can a given

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[114] Arbitration pursuant to the Canada-Ecuador Bilateral Investment Treaty and UNCITRAL Rules (London Court of International Arbitration), *EnCana Corporation v. Republic of Ecuador*, Award, 3 February 2006, para. 184. From this statement it seems that it is not only "a failure to comply with the national law to which a treaty refers [that] will have an international legal effect" (*Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 394). The failure of a state to comply with its own unilateral undertakings under its municipal investment law can also "have an international legal effect" even in the absence of a treaty referring to the said municipal investment law.

[115] Alvarez and Montt, see above note 18, p. 588.

[116] *Ibid.*

[117] Metaphor inspired by *Frontier Dispute, Judgment, I.C.J. Reports 1986,* p. 568, para. 30.

[118] Proust, see above, note 2, *Time Regained* (*In Search of Lost Time: Volume VII*).

[119] *Nuclear Tests* (*New Zealand v. France*)*, Judgment, I.C.J. Reports 1974,* p. 472, para. 46.

[120] For a similar position see Caron, see above note 29, p. 653: "A legislative act of any state, like all other acts of a state, can have meaning within several legal systems simultaneously."

municipal investment law serve as a basis for unilateral legal acts under international law, i.e. legal enunciations or enactments that *unilaterally* bind a state *vis-à-vis* foreign investors or investments?

At the outset, one would be tempted simply to consider that, if a "foreign investor is entitled to reasonable reliance upon the state's contemporaneous manifestations of its understanding of its laws",[121] nothing precludes *a fortiori* a foreign investor from relying upon the "state's contemporaneous manifestations"[122] of its legal undertakings. And if those legal undertakings are manifested *unilaterally* within the frame of domestic investment laws, they should be opposable to the states concerned under general international law as well as under international investment law, knowing in particular that "it is well established that there are provisions of international agreements that can *only be given meaning by reference to municipal law*".[123]

Therefore, national foreign-investment laws – in reality, only some of their provisions – may be qualified as unilateral (legal) acts of states under international law because of the *offer*(*s*)[124] they contain and the *confidence* that foreign investors place on those offer(s) (not to say the *acceptance*[125] of the offer(s) by foreign investors). This is a sort of 'contractual' approach that indicates that unilateral undertakings made through the prism of municipal investment laws are not only "*acta sunt servanda*" but are also

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[121] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 392.

[122] *Ibid.*

[123] *Ioannis Kardassopoulos* (*Greece*) *v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 145.

[124] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 79: "Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not". See also *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 85: "Legislation and more generally unilateral acts by which a State consents to ICSID jurisdiction must be considered as *standing offers* to foreign investors under the ICSID Convention" (italics added).

[125] See, *e.g.*, *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 258: "The Tribunal can only hold that Inceysa's investment is also excluded from *the unilateral offer to accept* the jurisdiction of the Centre made by the Salvadoran State in its Investment Law" (italics added). See also *Report to the Executive Directors*, accompanying the ICSID Convention, which emphasizes that "a host State might in its investment promotion legislation *offer* to submit disputes … to the jurisdiction of the Centre, and the investor might give its consent by *accepting the offer* in writing (*ICSID Documents concerning the Origin and the Formulation of the Convention*, Vol. II, p. 1069) (italics added).

reflective of *pacta sunt servanda*.[126] This line of thought is akin to the analysis by the ICJ in the *Nuclear Tests* cases. Indeed, the Court held, "[j]ust as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[127] So as to confirm the so-called 'contractual' approach to the binding character of unilateral acts of states under international law, the Court stressed the importance of "trust and confidence".[128] Transposing the rationale of the Court in the field of unilateral undertakings enacted in municipal investment laws, it is then possible to conclude that national investment legislation can be 'frozen' as unilateral acts of states under international law as long as "interested investors may take cognizance of unilateral [offers made in national investment legislations] and place confidence in them", and "are entitled to require that the obligation thus created be respected".[129]

Despite the relevance of this approach, in practice, it might prove difficult clearly to delineate the provisions in municipal investment laws that constitute unilateral (legal) acts of a state under international law. This is the case with provisions dealing more specifically with the issue of consent to ICSID arbitration contained in domestic investment laws. A state

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126 On this point see C. Goodman, "*Acta Sunt Servanda?* A Regime for Regulating the Unilateral Acts of States at International Law", 25 *Australian Yearbook of International Law* (2006), p. 67: "The term *pactum* could quite easily be extended to cover both conventional and unilateral acts without suffering any substantial change in its criteria. Second, and in the alternative, it has been suggested that a new term such as *promissio est servanda*, reflective of their autonomous nature, could be coined to apply the principle *pacta sunt servanda* to unilateral acts." See also Rodriguez-Cedeno, see above note 32, para. 156: "Recognition of the principle of respect for promises, known as *pacta sunt servanda* in the law of treaties, is also applicable in the case of unilateral acts, although some authors, who place such acts in the context of the law of international agreements, consider that that fundamental norm would also apply to unilateral acts."

127 *Nuclear Tests* (*New Zealand v. France*), *Judgment, I.C.J. Reports 1974,* p. 473, para. 49.

128 *Ibid.*

129 By analogy to what the Court said in the *Nuclear Tests* cases, id. For a similar position see also Rodriguez-Cedeno, see above note 32, para. 162: "Necessary confidence in the relationships and expectations which are created by a State which formulates a declaration and assumes an engagement also found or justify the binding nature of that declaration. The binding nature of the unilateral obligation contracted through a declaration, based on the above-mentioned rules, allows the addressee State(s) to require its performance by the author State. The third State has placed its trust in the conduct or in the declaration constituting the unilateral act and in the author of that act not attempting to go back on its word. A more specific formulation of the general rule of good faith *contra factum proprium non concedit venire* should therefore determine the opposability of the unilateral act vis-à-vis its author."

can decide "by means of a unilateral commitment … set forth in its legislation, for example, about the promotion of investments"[130] to "*propose* … to submit the differences, arisen from any investment or any kind of investment, to the ICSID jurisdiction".[131] Does such a 'proposal' or 'offer' amount in every case to a *binding unilateral commitment under international law*?[132] From the perspective of investment arbitral tribunals, this is not always so. As a general rule, it is within the *compétence de la compétence* of investment arbitral tribunals and not up to the state concerned to decide whether a given provision of a municipal investment law reflects a "unilateral offer made in the Host State's legislation".[133]

In order to determine whether a binding unilateral commitment does exist, primacy should be given to the *ordinary meaning of the terms* of the provision at stake in domestic investment law.[134] Yet, interpreting whether unilateral consent to ICSID arbitration could be induced from a 'Notice' of the Ministry of Foreign Affairs of the Slovak Republic announcing the

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[130] *IBM World Trade Corporation v. Republic of Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 24.

[131] *Ibid.* See also *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 45: "Many investment laws of developing countries provide for the State's acceptance of ICSID jurisdiction (or for alternative dispute resolution methods) for disputes with the investor arising out of a particular investment. Under some laws the offer is deemed to be accepted as soon as the foreign investor files an investment application pursuant to such a law, regardless of whether the application includes a reference to the arbitration provision contained in the law".

[132] See Caron, see above note 29, p. 655. The author explains that "even though a national foreign-investment law has a legal meaning given to it by the specific national legal system, the question whether that statute as a unilateral act under international law contains, for example, a consent to ICSID arbitration, is a question to be determined in accordance with international law".

[133] See *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 69. See also *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 60; *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, paras. 212–213; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 Jan. 2003, para. 339.

[134] By analogy to what the ICJ said about the interpretation of unilateral declarations recognizing the compulsory jurisdiction of the Court under article 36 (2) of the Statute of the ICJ. See, *e.g.*, *Anglo-Iranian Oil Co*., Preliminary objections, Judgment, *I.C.J. Reports 1952*, p. 105, where the Court stated that a declaration under article 36 (2) "must be interpreted as it stands, having regard to the words actually used". More specifically in the field of investment arbitration: see *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 90: "The starting point in the interpretation of unilateral declarations (as well as in statutory interpretation or in the interpretation of treaties) is the textual analysis of the document to be construed".

entry into force of the 1992 Treaty on the Promotion and Reciprocal Protection of Investments between the Government of the Slovak Republic and the Government of the Czech Republic, an arbitral tribunal—quoting the judgment in the *Nuclear Tests* cases—estimated that "even if the Notice were to be characterized as a unilateral declaration by the Slovak State, it still needs to be asked whether it was '*the intention* of the State making the declaration that it should become bound according to its terms', as required by the international law principles applicable to unilateral declarations".[135] Arguably, the intention of the state is perhaps the criterion that best fits unilateral declarations of states. Nonetheless, this criterion should not prevail for *all* kind of unilateral acts of states, and in particular investment "domestic legislative acts"[136] that contain binding unilateral offers (commitments) in favour of foreign investors.[137]

In some instances, indeed, national foreign-investment legislation has been considered as containing such binding unilateral offers under international law when it "*clearly* contain[ed] a *standing* offer by the state to submit disputes to the ICSID",[138] regardless of the intention of the state. The arbitral tribunal in *Tradex Hellas v. Albania*, for example, after having recognized that "it can now be considered as established and not requiring further reasoning that [consent to ICSID jurisdiction] can also be effected unilaterally by a Contracting State in its national laws the consent becoming effective at the latest if and when the foreign investor files its claim with ICSID making use of the respective national law",[139] concluded

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[135] *Ceskoslovenska Obchodni Banka, a.s. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision on Jurisdiction, 24 May 1999, para. 46.

[136] *Ibid.*, para. 44.

[137] In this sense, the statement according to which "[i]n interpreting a unilateral declaration that is alleged to constitute consent by a sovereign State to the jurisdiction of an international tribunal, consideration must be given to the intention of the government at the time it was made" should be nuanced and not understood as giving prevalence to the criterion of intention: *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para. 107.

[138] Potestà, see above note 12, p. 156. The author stresses that "this is the case when the piece of legislation uses formulations such as 'the host state hereby consents' or 'the consent of the host state is constituted by this article'." As an illustration, he gives a list of provisions contained in African national foreign-investment laws, such as Article 5 of Togo's Investment Code (Law No. 89–22 of 31 October 1989), Article 21 of Mali's Law No. 91–048/AN-RM of 26 February 1991 Bearing on Investment Law, Article 24 of Law No. 95–620 of 3 August 1995 on the Investment Code of the Republic of Côte d'Ivoire, and Article 38 of the *Code des Investissements* of the Democratic Republic of Congo (Law No. 004/2004 of 21 February 2002) (*ibid.*, footnote 29).

[139] *Tradex Hellas S.A.* (*Greece*) *v. Republic of Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, *ICSID Review – Foreign Investment Law Journal*, p. 187.

that Article 8, paragraph 2, of the 1993 Albanian Law on Foreign Investment was "unambiguous"[140] in constituting a binding unilateral offer under international law. In other instances, *a contrario*, some municipal investment laws do not clearly embody a binding unilateral offer to submit investment disputes to ICSID arbitration as demonstrated in the *Biwater Gauff v. Tanzania* case, where the arbitral tribunal found that the language of section 23 of the 1997 Tanzanian Investment Act did not "suggest a *standing unilateral offer*"[141] by the Republic of Tanzania.

The above-mentioned case law demonstrates that the identification of binding unilateral commitments within the frame of national foreign-investment legislation follows to a certain extent the basic methodology of treaty interpretation by giving prevalence to the *ordinary meaning of the terms* (what is strictly said in the unilateral offer), in their *context* (domestic investment laws as instruments of protection and promotion of foreign investment) and in light of their *object and purpose* (i.e., to provide legal assurances and safeguards to foreign investors).

The criterion of the intention of the state should formally (i.e., as separate or decisive criterion) come into play only when difficulties arise in identifying the existence of a unilateral legal act under international law,[142] that is when municipal investment laws are purely ambiguous or when they do not embody an explicit statement of consent by the state. Even in the latter situation, a unilateral binding offer under international law can be detected when the "offer to submit disputes to ICSID may nonetheless result *from phrases which are worded so as* to grant investors an unrestricted and unequivocal right to submit a dispute to ICSID".[143] This is the case with Article 15 of the Salvadorian Investment Law, which reads as follows in its relevant part: "[i]n the case of controversies arising

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[140] *Ibid.*

[141] *Biwater Gauff* (*Tanzania*) *Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 329 (italics added). According to the arbitral tribunal, "the options for dispute resolution in Section 23.2 (a)-(c) are conditioned by the words '*as may be mutually agreed by the parties*'." In the present context, these words are most naturally read as meaning that a dispute may be referred to any one of the three options, but only depending upon the agreement of the parties. In other words, a subsequent agreement between the parties is required, *which is very different from a standing unilateral offer which simply requires acceptance by an investor*" (italics added).

[142] Thus, the author of the present contribution therefore disagrees with the arbitral tribunal in *CEMEX* when it concluded that: "the intention of the declaring State must prevail" (*CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 87).

[143] Potestà, see above note 12, p. 157.

between foreign investors and the State regarding their investments in El Salvador, the investors may submit the controversy to: a) the International Centre for Settlement of Investment Disputes (ICSID), with the purpose of solving the controversy through conciliation and arbitration, in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of other States".[144] From an ordinary reading of the terms, the arbitral tribunal in *Inceysa Vallisoletana v. El Salvador* concluded that "by"[145] Article 15 of the Investment Law, the Salvadoran state "made to the foreign investors a unilateral offer of consent to submit, if the foreign investors so decides, to the jurisdiction of the Centre".[146] If the existence of binding unilateral offers can more easily be deduced from provisions like Article 15 of the Salvadorian Investment Law, such is not the case for provisions of domestic investment laws that are characterized by "unclear and imprecise formulations".[147] It is in the context of these unclear and imprecise formulations that the delineation of unilateral binding offers within municipal investment laws must accordingly take into account the intention of the state.

In recent arbitral practice, much controversy has arisen in relation to obscure consent to arbitration-related provisions of municipal investment laws. The most prominent example is Article 22 of the 1999 Venezuelan Decree-Law No. 356 for the Promotion and Protection of Investments. Article 22 provides as follows: "[d]isputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention establishing the Multilateral Investment Guarantee Agency (OMGI-MIGA) or the Convention on the Settlement of Investment Disputes between States and nationals of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when

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144 *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 268.

145 *Ibid.*, para. 332.

146 *Ibid.*

147 Potestà, see above note 12, p. 157. See also Tejera Pérez, see above note 16, p. 89. This author explains that "there are cases where the specific language of investment laws is not so clear. That may happen, for example, because the particular provision dealing with arbitration contains disclaimers or qualifications such as '*if applicable*' or '*where applicable*' that make it difficult for the reader to interpret the actual meaning of the provision."

appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect".[148]

Some scholars firmly believe that "although with an awkward wording, Article 22 of the Venezuelan Investment Law contains in itself an offer of ICSID arbitration from the Bolivarian Republic of Venezuela to settle disputes with all foreign investors".[149] However, the arbitral tribunal in the *CEMEX v. Venezuela* case reached a total different conclusion,[150] finding that "if it had been the intention of Venezuela to give its advance consent to ICSID arbitration in general, it would have been easy for the drafters of Article 22 to express that intention clearly"[151] and "that such an intention hav[ing] not been established … it cannot conclude from the obscure and ambiguous text of Article 22 that Venezuela, in adopting the 1999 Investment Law, consented unilaterally to ICSID arbitration for all disputes covered by the ICSID Convention in a general manner".[152] It is neither within the scope of the present contribution to discuss whether the arbitral tribunal was correct in the result achieved[153] nor in its ambition to

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[148] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para. 64.

[149] Tejera Pérez, see above note 16, p. 101.

[150] The arbitral tribunals in *Mobil Corporation, Venezuela Holdings, B.V. et al v. The Bolivarian Republic of Venezuela*, ICSID Case ARB/07/27, Decision on Jurisdiction, 10 June, 2010 and in *Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, reached the same conclusion with approximately similar reasoning.

[151] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, para.. 137.

[152] *Ibid.*, para. 138.

[153] For critical point of views see Tejera Pérez, see above note 16, p. 107. The author considers: "[c]oncluding that Article 22 of the Venezuelan Investment Law is not an offer to ICSID arbitration … would leave Article 22 with no object and purpose … Thus, one could ask: if Article 22 does not contain an offer of ICSID arbitration, what is the purpose of such provision? Just informing the community that Venezuela is an ICSID Convention signatory? In our opinion, that cannot be a correct and good faith interpretation …." See also Potestà, see above note 12, p. 166: "the two … ICSID tribunals drew a complete analogy with the regime applicable to the interpretation of declarations made under Article 36(2) of the ICJ Statute. It could, however, be questioned whether an indiscriminate analogy between an ICJ optional clause declaration and a foreign investment law (and the consequent emphasis placed on the search for the state's 'intention' behind the declaration) might always lead to fully satisfactory results. It might be a very hard task to ascertain what the real intent behind a piece of legislation is, especially if (as was the case with Venezuela) there are no travaux préparatoires or other official reports which could shed light on the drafters' intention. In such a case, it might be questioned whether greater emphasis should be placed on this subjective element or rather on the 'context' in which the dispute settlement provision was inserted, that is, a law enacted with the specific aim of attracting foreign capital into the host state."

discuss whether a so-called principle of 'restrictive interpretation' should govern the interpretation of unilateral acts of states in case of doubt regarding their terms.[154]

To conclude, it is nonetheless important to stress that conferring primacy on the criterion of intention in the identification of the potential unilateral legal acts that could derive from municipal investment laws is somewhat contestable. The 'freezing' of unilateral legal acts of states in the field of international investment law requires a more sustained and sustainable treatment of obscure provisions contained in domestic investment legislation. That approach should consist in a "weighing and balancing process"[155] of three criteria: the *ordinary meaning of the words*, the *intention of the state* and the *legitimate expectations of investors*. It is not appropriate when it comes to national foreign-investment laws to consider that a "State which formulates the [unilateral act] is bound to fulfill the obligation which it assumes, *not because of the potential juridical interest of the addressee* but because of the intention of the State making the [unilateral act]".[156] The 'potential juridical interest of the addressee' (i.e. the juridical interest of the foreign investment community) is essential in the crafting and formulation of municipal investment laws. These laws are "not similar to a diplomat's off-the-cuff apparent promise or a

[154] See, ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006, Principle 7: "A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. *In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner*. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated" (italics added), available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. For a critical analysis of the so-called principle of restrictive interpretation suggested by the ILC see Caron, see above note 29, p. 671: "In light of this history, and the goals of the ILC Guiding Principles, it appears that, in applying these Guiding Principles to a unilateral act such as a national foreign investment law, a tribunal should take into account that such legislation was not the evident focus of the ILC. Such a unilateral act is not an unscripted statement by a diplomat, nor does it limit sovereign rights and powers with respect to such subjects as territorial boundaries or military practices. Its analysis therefore seems not to require a restrictive interpretation. Therefore, although the ILC Guiding Principles with respect to unilateral acts remain a helpful guide in their analogy to Article 31(1) of the Vienna Convention and their focus on the factual circumstances in which they were made, and of the reactions to which they gave rise, I do not view the adoption by the Guiding Principles of a restrictive interpretation in case of doubt to be as readily applicable."

[155] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the WTO Appellate Body, 12 March 2001, WT/DS135/AB/R, para. 172.

[156] Rodriguez-Cedeno, see above note 32, para. 160 (italics added).

leader's political statement".[157] Rather, they are the roots of "an indispensable basic premise"[158] of any legal relation, "namely the confidence each party has in the other".[159] Moreover, "if this confidence did not exist, the parties would have never entered into the legal relation in question, because the breach of the commitments assumed would become a certainty, whose only undetermined aspect would be the question of time".[160]

When a state makes unilateral offers in its foreign investment law, good faith must be the guiding principle with respect to the determination of the binding nature of such offers under international law, regardless of the 'obscurity' or 'ambiguity' of the offers.[161] One of the legal translations of good faith in international investment law is 'protection of the integrity of the legitimate expectations of foreign investors'.[162] A state cannot reasonably hide behind the curtain of legal obscurity to exclude unilateral offers that the foreign investors perceived in good faith as constituting binding unilateral acts (commitments) under international law.[163] As rightly pointed out by the arbitral tribunal in the *Tecmed* case, "the foreign investor expects the host state to act in a consistent manner, *free from ambiguity and totally transparently in its relations with the foreign investor*, so that it may know beforehand *any and all rules and regulations* that will govern its investments as well as the *goals* of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."[164] Thus, ambiguity in the formulation

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[157] Caron, see above note 29, p. 674.

[158] *Inceysa Vallisoletane, SL v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 232.

[159] *Ibid.*

[160] *Ibid.*

[161] See *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, 7 February 2011, para. 115: "…the safeguarding of good faith is one of the fundamental principles of international law and investment law, which has a complementary function allowing for lacunae in the applicable laws to be covered and for obscurities of the law to be clarified."

[162] By analogy to the principle of "respect for the integrity of the law of the host state" referred to in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines,* ICSID Case No. ARB/03/25, Award, 16 February 2007, para. 402.

[163] See, *e.g.*, *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil & Gas Ventures, Ltd. and Bridas Corporation v. Government of Turkmenistan, Concern Balkannebitgazsenagat and State Concern Turkmenneft*, ICC Arbitration Case No. 9058/FMS/KGA, First Partial Award, 25 June 1999, p. 19: "The legitimate expectation of a party can translate into intention. That is, the legitimacy of the expectation reflects the intention of the representor for the representee to have an expectation. The expectation reflects the intention of the representee."

[164] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para. 154.

of unilateral commitments within the frame of municipal investment laws should not profit the state.[165] Only then will 'Time' be regained, once unilateral offers in national foreign investment laws are approached as "unilateral assumption[s] of an obligation under international law".[166]

[165] See *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Separate Opinion of Thomas Wälde, Award, paras. 47 and 71: "The implications of the obligation to be clear and avoid ambiguity is that the government agency has to bear the risk of its own ambiguity. This allocation of the risk of ambiguity requires that the investor did and could reasonably have confidence in the assurance, not as an ultra-perfect lawyer equipped with a hindsight vision facility, but as a reasonable businessman in the position of the investor would do in the particular circumstances … the principle of good-faith which emphasises transparency, clarity and discourages the abuse of intentional ambiguity to allow a government to first make the recipient and investor believe one message and then turn around and claim it really had sent the opposite message."

[166] Caron, see above note 29, p. 673.

CHAPTER SEVEN

INTERNATIONAL INVESTMENT CONTRACTS

Patrick Dumberry

Contents

Introduction

State contracts are entered into between a foreign investor and a State. As such, they are a unique source of rights and obligations in international investment law.[1] One of the fundamental characteristics of these contracts is the 'double role' played by the State; it is not only a party to the contract, but it is also the sovereign State where the investment is made. It follows from this unique feature that a foreign investor is constantly exposed to the risk posed by the State's ability to affect the execution of the contract

[1] Several books have been published on State contracts: B. Audit, *L'arbitrage transnational et les contrats d'Etat* (Dordrecht: Martinus Nijhoff Publishers, 1988); L. Lankarani El Zein, *Les contrats d'État à l'épreuve du droit international* (Bruxelles: Bruylant, 2000); Ph. Leboulanger, *Les contrats entre États et entreprises étrangères* (Paris : Economica, 1985); F. A. Mann, *Studies in International Law* (Oxford : Clarendon Press, 1973); F.A. Mann, *Further Studies in International Law* (Oxford : Clarendon Press, 1990); E. Paasivirta, *Participation of States in International Contracts and Arbitral Disputes* (Helsinki : Lakimiesliiton Kustannus, 1990); J.O. Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Leiden : Martinus Nijhoff, 2010); I. Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Oxford : Hart, 2011); P. Weil, "Problèmes relatifs aux contrats passés entre un Etat et un particulier", 128 *RCADI* (1969), p. 95–240.

through either legislative or administrative means. In order to attenuate any such risk of potential unilateral State action and to limit the vulnerability of the investor's contractual rights, State contracts typically contain specific provisions. These measures include a stabilization clause, an arbitration clause, and a choice of law clause. The present chapter examines these clauses and, more specifically, the question of the substantive applicable law to State contracts as well as the controversial issue of their 'internationalisation'.

State contracts also are a peculiar source of international investment law in their interaction with other sources of international law, such as the law of the host State, customary international law and treaties. The second part of this chapter analyses this interaction, particularly between State contracts and BITs. More specifically, it examines the impact that the proliferation of BITs in the last two decades has had on State contracts. One question that is addressed is whether or not a tribunal constituted under a BIT (containing a broad dispute settlement provision) has jurisdiction over disputes arising from breaches of a State contract. The question regarding the effect of the presence of an 'umbrella' clause contained in a BIT under which a State undertakes to observe *any* obligations it may have entered into with respect to investments is also addressed.

1. *State Contracts*

1.1. *Definition*

A State contract is a binding legal instrument entered into between a foreign company and a State.[2] That does not mean, however, that all contracts concluded between a private foreign entity and a State are necessarily considered as 'State contracts'. Thus, ordinary commercial contracts are generally excluded from the analysis of State contracts because they lack some of the latter's fundamental characteristics (which will be examined below).[3] State contracts will typically involve an 'investment' made by a foreign party in the host State.

State contracts do not necessarily need to be concluded with the host State *per se* in order to be qualified as such. It has long been recognised that they may also be concluded with a State-owned company (which has

[2] UNCTAD, *State Contracts*, UNCTAD Series on Issues in International Investment Agreements (2004), p. 4; Voss, see above note 1, p. 15–16.

[3] UNCTAD, see above note 2, p. 4.

a separate legal personality).[4] In fact, modern State contracts are often entered into by such entities.[5] State-owned companies are characterized by the control or ownership that the State exercises over them.[6] Several ICSID tribunals have concluded that a State is responsible for the acts committed by State-owned companies.[7] To constitute a State contract, the other party must meet two conditions. First, it must be a physical or legal person (such as a corporation). Contracts entered into between a State-owned entity and a State (or between two State-owned entities) are generally not considered State contracts. Second, the physical or legal person must originate from a country other than that of the State party in order for the contract to achieve an international character.[8]

1.2. *Unique Characteristics of State Contracts*

Traditionally, State contracts were typically entered into between a company originating from a developed country and a developing State. They most often involved concession agreements that entitled a Western company to extract natural resources in poorer, newly-independent countries at a low cost and for a long period of time.[9] These contracts were imbalanced and one-sided and reflected the balance of power and politics of the time.[10] Modern State contracts are different insofar as they contain more balanced rights and obligations, reflecting the fundamental changes in North-South relations since the 1960s and the increased bargaining power of developing States.[11] These modern contracts take many forms and are no longer limited to concession agreements for the

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[4] J.-F. Lalive, "Contrats entre États ou entreprises étatiques et personnes privées. Développements récents", 181 *RCADI* (1983–III), p. 28–29; Ch. Leben, "La théorie du contrat d'État et l'évolution du droit international des investissements", 302 *RCADI* (2003), p. 236. *Contra*: Maurice Kamto, "La notion de contrat d'État: une contribution au débat", *Revue de l'arbitrage* (2003), p. 722–729.

[5] Voss, see above note 1, p. 25.

[6] Under Article 8 of the International Law Commission ('ILC') *Draft Articles on State Responsibility for Internationally Wrongful Acts*, the conduct of an entity (or person or group of persons) is considered an act of a State under international law if the entity "is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

[7] For instance, *Emilio Agustín Maffezini v. Spain*, ICSID No. ARB/97/7, Award, January 25, 2000.

[8] Jean-Michel Jacquet, "Contrat d'Etat", *Jurisclasseur Droit international*, fasc. 565, 11/98, para. 1.

[9] Voss, see above note 1, p. 17–25.

[10] Id. 19.

[11] This era was fundamentally marked by newly independent States' claims to sovereignty over their natural resources (*Resolution on Permanent Sovereignty over Natural*

extraction of natural resources. They include lease agreements, supply or service agreements, labour contracts, loan agreements, trade or exchange agreements and financing or commercial partnerships such as joint ventures.[12] Another noteworthy development is the fact that these contracts are no longer confined to the North-South axis and are increasingly 'South-South'.

The nature of the parties involved in State contracts necessarily distinguishes them from other types of contracts. At least four characteristics are particularly significant for the purpose of the present chapter.

First, State contracts are characterized by a unique asymmetry in bargaining power between parties that sets them apart from other types of agreements. Prior to the conclusion of the contract, this imbalance in bargaining power is in favour of the foreign private party. During contractual negotiations, this party often finds itself in both an economically and technologically superior position to the State in terms of its ability to finance and technically execute the contract.[13] At this stage, the investor's aim is to capitalize on the unequal power that it enjoys by negotiating favourable contractual terms.[14] This serves to offset the unequal power that the State might otherwise enjoy after the contract is concluded, by which time the foreign private party's leverage will have been exhausted. Once the contract is concluded, it is indeed the State that will enjoy unequal power because of its ability to unilaterally change its legislation and impact the contract. This scenario, though common, is of course not always the case. The asymmetry in bargaining power may in some circumstances be in favour of the host State during negotiation. This is, for instance, the case of powerful States fortunate enough to benefit from abundant and highly demanded natural resources that foreign companies are particularly eager to exploit. In this context, the State can simply play each contractual offer off others in order to secure the best possible deal.

Second, while a State contract is clearly *not* a treaty (which is concluded between *States*[15]), it is, at the same time, also not a 'simple' contract either.

Resources, G.A. Res. 1803 (XVII), 14 Dec. 1962) and the adoption in 1974 of the *Charter of Economic Rights and Duties of States* (G.A. Res. 3281 (XXIX), 12 Dec. 1974).

[12] UNCTAD, see above note 2, p. 4.

[13] Jacquet, see above note 8, paras. 5–8; Nagla Nassar, "Internationalization of State Contracts: ICSID, The Last Citadel", 14 *Journal of International Arbitration* (1997), p. 190.

[14] Nassar, see above note 13, p. 190.

[15] *Vienna Convention on the Law of Treaties*, 1969, 1155 *UNTS*, 331. See: *Anglo-Iranian Oil Company case* (United Kingdom v. Iran), preliminary objection, Judgment of 22 July 1952, *ICJ Rep. 1952,* 112, where the Court refused to qualify a contract that had been entered into between Iran and a British investor as a treaty. It should be noted that in the past some

It is true that a State contract, like any other contract, contains binding legal obligations that must be respected by both parties. What is special about State contracts, however, is that they can engender the host State's responsibility *under international law*. That does not mean that a breach of contract is a violation of international law *per se*, as explained by the *SGS v Pakistan* Tribunal.[16] According to the ILC Commentaries, a breach of contract may amount to an internationally wrongful act by a State and engage its responsibility on the international plane.[17] Although State contracts are *not* a formal source of international law (under Article 38 of the ICJ Statute), some scholars have suggested that they are true 'international legal acts'.[18] What matters is that State contracts are clearly a source of rights and obligations for the host State under international investment law. This is undoubtedly one of the most peculiar and unique features of these contracts.

Third, under a State contract, a corporation possesses not only substantive rights but also the ability to bring a claim against the host State on the

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authors have considered that, in some circumstances, these contracts were to some extent "equivalent" to international treaties: A. Verdross, "Quasi-International Agreements and International Economic Transactions", 18 *Yearbook of World Affairs* (1964), p. 231; I. Seidl-Hohenveldern, "The Theory of Quasi-international and Partly International Agreements", 11 *Revue Belge de Droit International* (1975), p. 567.

[16] *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Award on Jurisdiction, 6 August 2003, para. 167. See also: Voss, see above note 1, p. 33 and 223. However, there are situations where there will be some overlaps and where a simple breach of contract will also constitute a breach of a BIT provision (a point further examined below).

[17] *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the International Law Commission at its Fifty-Third Session* (*2001*), November 2001, Report of the I.L.C. on the work of its Fifty-third Session, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2), Art 4, para (6) : "It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or '*acta iure gestionis*'. The breach by a State of a contract clearly does not as such entail a breach of international law. Something further is required before international law becomes relevant, e.g. a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it may amount to an internationally wrongful act."

[18] P. Weil, "Droit international et contrat d'Etat", in: *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (Paris : Pedone, 1981), p. 562 (emphasis added): "Le contrat enraciné dans l'ordre juridique international doit être regardé comme un *véritable acte juridique international*: ceux des contrats d'Etats qui sont fondés dans l'ordre international constitueraient ainsi une *catégorie spécifique d'actes juridiques internationaux*, à côté des traités, des actes unilatéraux des Etats et des organisations internationales et des actes judiciaires et arbitraux." See also: C. Leben, "Retour sur la notion de contrat d'Etat et sur le droit applicable à celui-ci", in: *L'évolution du droit international: Mélanges offerts à Hubert Thierry* (Paris : Pedone, 1998), p. 248, who speaks of "acte juridique international".

basis of those rights before an international tribunal. According to the *Texaco* arbitral tribunal,[19] as well as numerous authors,[20] the combination of substantive and procedural rights found in such contracts is an indication that corporations possess *under that contract* international legal personality.[21] It is important to note, however, that it is a *limited* personality, in the sense that corporations, like international organisations, do not possess the full range of capacities attributed to States under international law. A corporation may only exercise those limited powers and claim those rights that the contract has granted it. The legal personality is also *derivative*, in the sense that a corporation is a 'secondary' subject of international law. Its status as a subject is thus not inherent, but rather emanates from the express will of one State. In the context of BITs, corporations are *passive* subjects because they are not direct participants in the negotiation and generation of the legal norms on which their international legal personality rests. The situation is somewhat different, however, in the context of State contracts where a corporation is not a mere bystander (and a beneficiary), but rather a direct participant in the *creation* of legal norms (the contractual terms) which must be complied with by the contracting State.[22]

Fourth, State contracts invariably contain three clauses that set them apart from other types of contracts: the arbitration clause, the stabilization clause and the applicable law clause. They are meant to address the "concern over the impartiality of domestic courts and the objective to neutralize the in-built superiority of host country institutions, because of their sovereign powers of legislation abrogating or interfering with contracts".[23] The goal is to set the parties on equal footing in terms of avoiding breach of contract and, failing that, providing for a neutral resolution of any disputes.[24] The classic arbitration clause requires little explanation, as it simply establishes (in advance) that any dispute will be settled in a

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[19] *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v Libyan Arab Republic*, Award, 19 January 1977, 53 *I.L.R.* (1977), p. 459.

[20] One recent example is Leben, see above note 4, p. 308–309.

[21] See P. Dumberry, "L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements", 108 *RGDIP* 1 (2004), p. 103–122; P. Dumberry & E. Labelle Eastaugh, "Non-State Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration", in *Participants in the International Legal System: Multiples Perspectives on Non-State Actors in International Law*, ed. Jean d'Aspremont (Abingdon: Routledge, 2011), p. 360–371.

[22] Leben, see above note 4, p. 302 (fn 151).

[23] UNCTAD, see above note 2, p. 5.

[24] Leben, see above note 4, p. 258.

forum (typically international arbitration) other than that of the State party's domestic legal system.[25] The stabilization and applicable law clauses will now be further discussed in the next two sections.

1.3. *The Stabilization Clause*

The stabilization clause is a central feature of modern State contracts. It stipulates that the State must maintain the legal framework existing at the time of the conclusion of the contract for a set period of time (or throughout the contract's term). The clause prohibits the State from employing legislative means to alter the rights or obligations of the parties or to hinder the execution of the contract.

The validity of these clauses has been called into question by some writers. They argue that the clause poses significant restrictions on a State's sovereign right to exercise its legislative prerogative within its own borders and, consequently, shifts the balance of power towards the private party.[26] Another related argument is that this clause runs against the principle of a State's permanent sovereignty over its natural resources.[27] As a matter of principle, stabilization clauses are not contrary to international law.[28] Thus, one of the undeniable attributes of State sovereignty is to contract on the international plane.[29] Nothing prevents a State from agreeing to restrict its own authority and such a concession is, in fact, an act of sovereignty in and of itself.[30] It has been convincingly argued that these clauses should therefore be best described as "a self-imposed but temporary limitation on the sovereignty of host governments" that cannot be "construed as an absolute block on the legislative power of the state" since they "merely [mean] that any legislation subsequently enacted which may have a particularly adverse impact upon the contract regime will not be applicable to it".[31] The prevalent view amongst arbitral tribunals is that

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[25] For a complete survey of the arbitration clause, see: Jacquet, see above note 8, para. 68 ff.

[26] M. Sornarajah, *International Law on Foreign Investment* (Cambridge: Cambridge University Press, 3rd ed., 2010), p. 281–284.

[27] P. Bernardini, "The Renegotiation of Investment Contracts", 13 *ICSID Review* 2 (1998), p. 415; M. Sornarajah, "The Myth of International Contract Law", 15 *J. World Trade L.* (1981), p. 187.

[28] Jacquet, see above note 8, paras. 135–139.

[29] *Wimbledon case*, PCIJ Ser A No 1 (1923).

[30] Jacquet, see above note 8, para. 135; Nigel Rawding, "Protecting Investments Under State Contracts: Some Legal And Ethical Issues", 11 *Arbitration International* 4 (1995), p. 249.

[31] Abdullah Al Faruque, "Validity and Efficacy of Stabilisation Clauses", 23 *Journal of International Arbitration* (2006), p. 324–325.

such clauses are indeed not invalid merely on the basis of State sovereignty.[32] The *Aminoil* Tribunal held that there was no rule of public international law preventing a State from pledging itself not to nationalize foreign undertakings *for a limited period of time.*[33] A clause's validity ultimately depends on its scope and duration.[34]

In any event, recent studies have concluded that such clauses have limited effectiveness in terms of prohibiting the host State to legislate.[35] Arbitral tribunals have, indeed, held that the clause does not prevent a State from conducting an otherwise *lawful* act of expropriation against the private party.[36]

One way by which the parties may wish to avoid the contentiousness of a stabilization clause is by opting instead for a 'renegotiation' (or 'intangible') clause.[37] This is one example of such a clause:

> "If after the Effective Date, new law(s) and/or regulation(s) are introduced in Vietnam adversely affecting Contractor's interest, or any amendments to existing laws and/or regulations are made then the Parties shall meet and consult each other and shall make the necessary changes to this Agreement to ensure that Contractor is restored to the same economic conditions which could have prevailed if the new law and/or regulation had not been introduced".[38]

These clauses are, in fact, slowly replacing the classic stabilization clauses.[39] The effect of this clause is to freeze the host State's legal framework and require the renegotiation of the contract whenever a State wants to enact legislation that may affect the contract.[40] The goal of such a clause is to amend the contract when needed while retaining the original equilibrium between the parties' respective rights and obligations.

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[32] *Texaco Overseas Petroleum,* paras. 66 and 68; *Revere Copper*, 17 *I.L.M.* (1978), p. 1321, 1831; *AGIP v. Popular Republic of the Congo*, ICSID Case No. ARB/77/1, Award, 30 November 1979, 21 *I.L.M.* (1982), p. 726.

[33] *Government of the State of Kuwait v. American Independent Oil Company* (Aminoil), Award, 24 March 1982, *JDI* (1982), p. 893.

[34] Sornarajah, see above note 26, p. 281; Al Faruque, see above note 31, p. 326.

[35] Al Faruque, see above note 31, p. 334.

[36] *Libyan American Oil Company* (*Liamco*) *v. Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 *I.L.M.* (1981), p. 1; *Aminoil*, 1982, p. 976. See also: Al Faruque, see above note 31, p. 325–326; Rawding, see above note 30, p. 350.

[37] Bernardini, see above note 27; Wolfgang Peter, *Arbitration and Renegotiation of International Investment Agreements*, (The Hague: Kluwer, 2nd ed., 1995).

[38] Article 17 (8), Contract between Vietnam National Oil and Gas Corporation of Vietnam and Lasmo Vietnam LtD & C. Itoh Energy Ltd, 19 August 1992.

[39] Leben, see above note 4, p. 268.

[40] Jacquet, see above note 8, para. 10.

1.4. *The Substantive Applicable Law Clause and the Controversial Question of the 'Internationalisation' of Contracts*

In contract negotiations between a foreign private party and a State, the decision regarding the *substantive* applicable law is likely to be contentious. Typically, the State will insist on applying its own domestic law, while the other party will generally prefer non-national rules such as, *inter alia*, international law or general principles of law. Like the stabilization clause and the arbitration clause, the applicable law clause operates to restrict the otherwise disproportionate power that the State would enjoy over the execution and survival of the contract under its own legal system.

What are the possible options? The cornerstone is party autonomy, which leaves the parties the freedom to choose the law applicable to the contract. In a 1979 Resolution, the *Institut de Droit International* clearly stated that the parties to a State contract have a variety of choices in terms of the applicable law to their contract:

> The parties may in particular choose as the proper law of the contract either one or several domestic legal systems or the principles common to such systems, or the general principles of law, or the principles applied in international economic relations, or international law, or a combination of these sources of law.[41]

The first, and most obvious, choice is the law of the host State of the investment. This is, in fact, the option that is by far the most prevalent in State contracts.[42] There are many good reasons for this choice of law. This is, indeed, the law where the investment is made and where the contract is likely to be performed. There is also, however, an obvious and inherent risk in such a choice: the host State's ability to unilaterally change its own law to affect the rights and obligations under the contract. As mentioned above, the insertion of a stabilisation clause may limit such a risk.

A second option is the *tronc commun*: a combined set of common principles/laws from the Host State's domestic law and the law of *another State*

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[41] Art. 2, Resolution on "The Proper Law of the Contract in Agreements between a State and a Foreign Private Person", in: Institut de Droit international, *Tableau des résolutions adoptées (1957–1991)*, 1992, 332, p. 333.

[42] Leben, see above note 4, p. 266; Jacquet, see above note 8, para. 57–58; Ahmed S. El-Kosheri & Tarek F. Riad, "The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process", 1 *ICSID Rev.* - FILJ (1986), p. 266; George R. Delaume, "The Proper Law of State Contracts Revisited", 12 *ICSID Rev.* - FILJ (1997), p. 24.

(typically that of the home State of the investor).[43] This option is seldom used in the context of State contracts.[44] A third available option which is, in practice, very rarely used in State contracts is to apply only the laws of *another* State (i.e. any other State than the State party to the contract).[45]

A fourth option, used only in a minority of State contracts, is the choice of concurrent applicable laws where the host State's law is applied in conjunction with international law (or sometimes general principles of law).[46] These clauses sometimes provide for the contract to be governed by the host State's law only to the extent that it does not contradict international law, in which case the latter prevails. Another option is for the contract to be governed by the host State's law unless it is silent on a specific point, in which case international law would apply. Very few contracts provide for the application of international law *only*.[47]

The application of international law to State contracts is one of the most contentious issues in doctrine. Many authors have referred to the unique characteristics of these contracts (i.e. State as a party, arbitration and stabilisation clauses) as clear indicia of their 'internationalisation'.[48]

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[43] The most famous example of a *tronc commun* applicable law clause is in the context of the Channel Tunnel Project between French and English companies: Art. 19(6), *Treaty between the United Kingdom of Great Britain and Northern Ireland and the French Republic concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link*, signed at Canterbury on 12 February 1986, instruments of ratification being exchanged on 19 July 1987.

[44] One example is the clause contained in concession agreements entered into by NIOC (National Iranian Oil Company) and referred to in: *Sapphire International Petroleums Ltd v. National Iranian Oil Company,* Award, 15 March 1963, 35 *ILR* (1967), p. 136: "In view of the diverse nationalities of the parties to this Agreement, it shall be governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with principles of law recognised by civilised nations in general, including such of those principles as may have been applied by international tribunals."

[45] One example is discussed in: *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Award, 17 December 2003, para. 14–15, where the State contract between an English company and the Seychelles was governed by "the laws of England."

[46] Leben, see above note 4, p. 270 ff; Jacquet, see above note 8, para. 60. One example is the clause at the heart of three famous Libyan oil nationalisation arbitration cases in the 1970s (see at footnote 60): "This concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals."

[47] Leben, see above note 4, p. 278–279.

[48] Some of the first authors include: F.A. Mann, "The Theoretical Approach Towards the Law Governing Contracts Between States and Private Persons", 11 *Revue Belge de Droit International* (1975), p. 564–565; P. Weil, see above note 1.

For the supporters of this theory, the goal is the 'delocalisation' of contracts from the legal order of the host State so that they be no longer regulated by municipal law, but instead subject to other sets of rules like international law (or even, as suggested by some writers, the contract's own provision, the *pacta sunt servanda* principle or principles of *lex mercatoria*).[49] One classic application of the 'internationalisation' theory is the reasoning of the Sole Arbitrator Dupuy in the *Texaco* award. He held that the contract's reference in the choice of law clause to general principles of law and to international law, the presence of an arbitration clause and the fact that it was an international development agreements (because of the presence of a stabilization clause) were all elements which contributed to the 'internationalisation' of the contract.[50]

Several other writers have rejected this theory of internationalisation for a variety of reasons. Frequent objections to applying international law include the arguments that investors are not subjects of international law,[51] that international law only applies in relations between States,[52] or that no body of rules of international law apply to such contracts.[53] Based on the dictum by the PCIJ in the *Serbian and Brazilian Loans* case,[54] these writers hold the view that the law of the host State is the proper applicable law to State contracts.[55]

My basic position is that a tribunal should apply the law expressly chosen by the parties in the contract.[56] This principle has consistently been applied in arbitration.[57] Thus, a tribunal must respect the parties' choice

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[49] These different theories are examined in: A.F.M. Maniruzzaman, "Conflict of Laws Issues in International Arbitration: Practice and Trends", 9 *Arb. Int'l* (1993), p. 371.

[50] *Texaco Overseas Petroleum,* p. 389.

[51] Kamto, see above note 4, p. 734 ff.

[52] P. Mayer, "La neutralisation du pouvoir normatif des Etats", *JDI* (1986), p. 21.

[53] Sornarajah, see above note 26, p. 285. See also: Nassar, see above note 13, p. 194; J. Verhoeven, "Traités ou contrats entre Etats? Sur les conflits de lois en droit des gens", *JDI* (1984), p. 609 ff.

[54] *Serbian and Brazilian Loans,* P.C.I.J., Series A, No. 21, at 83 ("any contract which is not a contract between States in that capacity as subjects of international law, is based on the municipal law of some country").

[55] Sornarajah, see above note 26, p. 285–286.

[56] *Saudi Arabia v. Arabian American Oil Company* (*Aramco*), Award, 23 August 1958, 27 *ILR* (1963), p. 165.

[57] Voss, see above note 1, p. 40. See the cases examined in: Nassar, see above note 13, p. 186. One example is *Elf Aquitaine Iran* (*France*) *v. National Iranian Oil Company,* Preliminary Award, 14 January 1982, *ILR* 96 (1994) 251, where the choice of law clause stipulated that the award shall be based on "considerations of equity and generally recognized principles of law and in particular International Law" (at 253). The Tribunal applied this choice of law.

of a combination of the host State's law with international law. In fact, nothing prevents the parties from choosing *international law* as the *only* applicable law to their dispute. It may not, however, be the most practical choice insofar as it is not as complete as domestic law in terms of resolution of contractual disputes.[58] This is probably why State contracts rarely refer to international law *only* as the applicable law.[59]

Even if the parties do make a clear choice of law in their contract, it still leaves tribunals a great margin of appreciation to interpret what that choice actually means. A classic illustration is the famous Libyan oil arbitrations of the 1970s where three tribunals gave different interpretations of the meaning to be given to an identical choice of law clause requiring the application of "the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals".[60]

The frequent choice made by parties in State contracts to opt for the domestic law of the host State does not mean, however, that international law is somewhat excluded. In many countries, international law forms part of the domestic legal order. In this context, principles of international law may apply to a dispute even when domestic law was expressly chosen by the parties in a contract as the applicable law. Some cases, such as the ICC *Pyramid* case, even suggest that in such situations international law should in fact *override* municipal law in the event of any inconsistency between them.[61] Thus, international law would somehow be reintroduced through the back door by arbitrators in situations where the parties have

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and added that in the absence of such a choice of law, it would have been the proper law of the agreement.

[58] Leben, see above note 4, p. 278–279.

[59] *Ibid*., p. 270, 278; Voss, see above note 1, p. 46; Jacquet, see above note 8, para. 59.

[60] *Texaco Overseas Petroleum*; *BP Exploration Company* (*Libya*) *Ltd v. Government of the Libyan Arab Republic,* Award, 1 August 1974, 53 *ILR* (1979), p. 297; *Libyan American Oil Company* (*Liamco*) *v. Government of the Libyan Arab Republic,* Award, 12 April 1977, 20 *ILM* (1981), p. 1. In doctrine: B. Stern, "Trois arbitrages, un même problème, trois solutions: les nationalisations pétrolières libyennes devant l'arbitrage international", *Rev. Arb.* (1980), p. 3–43.

[61] *SPP* (*Middle East*) *Ltd.* (*Hong Kong*) *& Southern Pacific Properties Ltd.* (*Hong Kong*) *v. Arab Republic of Egypt & The Egyptian General Company for Tourism and Hotels* (*"EGOTH"*), Award, 16 February 1983, ICC case no. 3493, 9 *Yearbook Commercial Arbitration* (1984) 111–123, at para. 50. The Arbitral tribunal concluded that Egyptian law was the proper law of the contract, but added that "reference to Egyptian law must be construed so as to include such principles of international law as may be applicable and [...] the national laws of Egypt can be relied upon only in as much as they do not contravene said principles".

explicitly elected domestic law in a choice of law clause.[62] This solution seems, indeed, to be contrary to the principle of the autonomy of will of the parties and has thus been rejected by many writers. In any event, it is undeniable that rules of customary international law (for instance, the 'minimum standard of treatment') apply to *all disputes* involving a State, even those arising from a State contract where the parties have expressly chosen domestic law as the applicable law to their disputes.[63] The same goes for *jus cogens* (peremptory) norms.[64]

What happens when parties do *not* make any choice of law in the contract? In this situation, tribunals have decided in several older arbitration cases not to apply the law of the host State to settle disputes between the parties.[65] These cases include the *Abu Dhabi* case,[66] the *Ruler of Qatar* case,[67] the *ARAMCO* case,[68] and the *Sapphire* case.[69] Similarly, in the 1989

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[62] This issue is discussed in: A.F.M. Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", 12 *European Journal of International Law* 2 (2001), p. 317 ff.

[63] *Ibid.*, p. 323; C. Schreuer, "Commentary on the ICSID Convention: Article 42", 12 *ICSID Rev.* (1997), p. 443.

[64] *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID ARB/06/5, Award, 15 April 2009, para 78: "It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. To take an extreme example, 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 made in pursuance of torture or genocide or in support of slavery or trafficking of human organs".

[65] These awards are discussed in: André von Walter, "Oil Concession Disputes, Arbitration on", in: *Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrüm (Oxford: Oxford University Press, 2012).

[66] *In the Matter of an Arbitration between Petroleum Development* (*Trucial Coast*) *Ltd. and the Sheikh of Abu Dhabi*, Award, September 1951, 18 *ILR* (1951), p. 144; 1 *ICLQ* (1952), p. 247. Umpire Lord Asquith infamously disqualified Abu Dhabi law as the proper law governing the concession on the ground that this law did not contain "any settled body of legal principles applicable to the construction of modern commercial instruments". He decided to apply "principles rooted in the good sense and common practice of civilized nations – a sort of 'modern law of nature'." (p. 251).

[67] *Ruler of Qatar v. International Marine Oil Company, Ltd.,* Award, June 1953, 20 *ILR* (1953), p. 534. The sole arbitrator held that Qatar law could not be the proper law of the contract because "Qatari law does not contain any principles which would be sufficient to interpret this particular contract." He concluded that the agreement should be governed by "the principles of justice, equity and good conscience".

[68] *Aramco*. The Tribunal held that Saudi Arabian law would have normally applied, but added that such law had to be "interpreted or supplemented by general principles of law, by the custom and practice in the oil business and by notions of pure jurisprudence."

[69] *Sapphire,* p. 136. The Tribunal decided that the dispute between the parties "should be settled according to the general principles universally recognized and should not be subject to the particular rules of national laws".

case of *Deutsche Schachtbau v. Rakoil,* the Tribunal applied "internationally accepted principles of law governing contractual relation."[70]

A different approach was taken in 1982 by the *Aminoil* Tribunal which had been expressly mandated by the parties to determine the applicable law to the contract.[71] The Tribunal held that the agreement was governed by the law of Kuwait, but that in any event international law was necessarily a part of the law of that State.[72] A similar approach was adopted in 1988 in *Wintershall v. Qatar* where, in the absence of a choice by the parties, the Tribunal decided in favour of the application of Qatari law and added that public international law would only apply in the event that the tribunal would consider it to be relevant to decide an issue (which turned out not to be the case).[73]

In my view, this blend of State law and international law is a well-balanced solution. A tribunal should opt for the application of the national laws of the host State insofar as they are in accordance with international law. This is also the conclusion reached by many in doctrine.[74] This solution respects the sovereignty of the host State and secures the investor against any potential gaps or shortcomings under that law since it is 'controlled' by international law. In my view, it is not advisable, for practical reasons, to elect international law *only*.[75] The *Aminoil* Award suggests that State contracts should not be governed exclusively by international law unless this was the clear intention of the parties.[76] In any event, the mere presence of a stabilisation clause in a contract does not *in itself* 'internationalise' the contract by making international law automatically applicable in the absence of a clear intention to that effect by the parties.[77]

The question of the applicable law is different when a dispute resolution clause contained in a contract specifically makes reference to arbitration under the ICSID Convention.

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[70] *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v. Government of the State of R'as Al Khaimah and R'as Al Kaihmah Oil Company* (*Rakoil*), 14 *Yearbook Commercial Arbitration* (1989), p. 117.

[71] The clause provided that: "The law governing the substantive issues between the parties shall be determined by the tribunal, having regard to the quality of the parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."

[72] *Aminoil*, 1982.

[73] *Wintershall AG v. Qatar,* Awards, 5 February 1988 and 31 May 1988, 28 *ILM* (1989), p. 795.

[74] Bernardini, see above note 27, p. 63, 66; Leben, see above note 4, p. 278–279; Rawding, see above note 30, p. 351.

[75] Voss, see above note 1, p. 48–49; Leben, see above note 4, p. 278–279.

[76] Bernardini, see above note 27, p. 63.

[77] Al Faruque, see above note 31, p. 326 ff.

1.5. *The Applicable Law When the ICSID Convention Applies*

The solution adopted under the ICSID Convention is straightforward. Although it gives precedence to the choice of the parties, it also establishes a framework for determining the applicable law in the absence of an agreement to that effect. Two situations must be distinguished.[78]

The first scenario is when the parties *have* specifically chosen the applicable law.[79] Some tribunals have respected the parties' choice to apply the host State's laws to the dispute,[80] or any other domestic law.[81] In one recent example, *Aguaytia Energy v. Peru*, the Tribunal was faced with a contract governed by Peruvian Law and concluded that it did not need to look beyond the host State's laws.[82] This conclusion may have been influenced by the fact that in this case both parties had expressly agreed in the proceedings that Peruvian law was consistent with international law. But the reasoning of some these tribunals suggests that international law would have been applied in the event of any inconsistencies with domestic law.

As mentioned above, the parties will sometimes refer to the law of the host State in combination with international law. In some cases, such as *AGIP v. Congo*, ICSID tribunals have respected such a combination choice and have, accordingly, applied both domestic and international law.[83] The same solution was also adopted by several recent ICSID tribunals,

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[78] This section only examines ICSID cases which were introduced by investors *based on a State contract*, and not those filed under a BIT.

[79] See the analysis of Nassar, see above note 13, p. 196.

[80] *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, para. 12–16.

[81] *CDC v. Seychelles*, para. 14–15, in this case, the Tribunal applied the law chosen by the parties in their contract, i.e. "the laws of England" (the investor was a company registered in England). In the case of *World Duty Free Company Limited v. Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, para. 158 ff., the substantive law clause in a State contract between a company from the Island of Man and the Government of Kenya provided for Kenyan law to apply, while the arbitration clause contained in the contract indicated that the tribunal shall apply English law to settle any dispute. The Tribunal decided to apply both laws since English principles of law on contracts were part of Kenyan Law and, in any event, there were no material differences between the two laws on the relevant point to be decided in the case. The Tribunal also concluded (para. 157) that bribery was "contrary to the international public policy of most, if not all, State, or to use another formula, to transnational public policy."

[82] *Aguaytia Energy LLC v. Peru*, ICSID Case No. ARB/06/13, Award, 11 December 2008, para. 71–74.

[83] *AGIP S.P.A. v. Government of the People's Republic of the Congo,* ICSID Case No. ARB/77/1, Award, 30 Nov. 1979, 21 *ILM* (1982), p. 726. The choice-of-law clause expressly provided for "Congolese law, supplemented if necessary by any principles of international law". The Tribunal indicated that the "…use of the term 'supplemented' at least means that there can be recourse to the principles of international law either to fill a gap in Congolese law or to supplement it if necessary." (para. 83).

such as *CSOB v. Slovakia*.[84] The reasoning of other tribunals suggests, however, that international law *always applies*, even in cases where the parties have expressly (or implicitly) agreed for the host State law to govern their disputes.[85] This is, for instance, the case of *Letco v. Liberia* where although the Tribunal decided that Liberian law had implicitly been chosen by the parties as the applicable law, it nevertheless emphasized the potential controlling role to be played by international law.[86]

In *SPP v. Egypt,* the Tribunal did not expressly determine whether the parties to a State contract had chosen Egyptian law as the applicable law but mentioned that in any event international law would apply because no domestic law is in itself complete.[87] These developments have been criticized in doctrine by many who believe that this approach render the first sentence of Article 42(1) meaningless.[88] In practical terms it would mean that tribunals would not have to respect the freedom of the parties to choose whatever law they wish to govern their contract.[89]

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[84] *CSOB v. Slovakia*, ICSID Case No. ARB/97/4, Award, 29 December 2004, paras. 59 ff.

[85] Leben, see above note 4, p. 285.

[86] *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, 26 *ILM* (1987), p. 648. The Tribunal held that reference to Liberian law in the preamble of the contract "appears to indicate an express choice of the parties of the law of Liberia as the law governing the concession agreement" (p. 658). The Tribunal added: "The law of the contracting State is recognized as paramount within its own territory, but is nevertheless subjected to control by international law. The role of international law as a 'regulator' of national systems flaw has been much discussed, with particular emphasis being focused on the problems likely to arise if there is divergence on a particular point between national and international law. No such problem arises in the present case; the Tribunal is satisfied that the rules and principles of Liberian law which it has taken into account are in conformity with generally accepted principles of public international law governing the validity of contracts and the remedies for their breach."

[87] *Southern Pacific Properties* (*Middle East*) *Ltd. v. Arab Republic Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, *ICSID Report* 3, 189, "Even accepting the Respondent's view that the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct applicability of international law in certain situations. The law of the ARE, like all municipal legal systems, is not complete or exhaustive, and where a lacuna occurs it cannot be said that there is agreement as to the application of a rule of law which, *ex hypothesi*, does not exist. In such case, it must be said that there is 'absence of agreement' and, consequently, the second sentence of Article 42(1) would come into play." (Para. 80). For the Tribunal, "when municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law" (paras. 83–84).

[88] Jacquet, see above note 8, para. 54. See also: Reisman W. M., "The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold", 15 *ICSID Review - FILJ* (2000), p. 362.

[89] Maniruzzaman, see above note 62, p. 327; Nassar, see above note 13, p. 202 ff; Chukwumerije, "International law and Article 42 of the ICSID Convention", 14 *Journal of International Arbitration* (1997), p. 87.

Others writers have argued that while it is undisputable that a tribunal should first apply domestic law (when chosen by the parties), it nevertheless remains that a tribunal should also always 'control' that law with principles of international law.[90] Under this approach, favoured by the majority of writers,[91] rules of international law would apply whenever the application of the host State's laws would be contrary to international law.[92] In any event, and whatever the approach adopted, it remains that certain mandatory rules of customary international law always apply.[93]

The second scenario is when the parties have *not chosen* any applicable law in the contract. In this case, Art. 42(1) of the Convention refers to the application of a *combination* of the host State's law and international law. It is generally recognized, however, that this provision gives supremacy to rules of international law.[94] This is the case regardless of the fact that the drafting history of the convention apparently does not support this expanding application of international law.[95] As explained by the *ad hoc* annulment Committee in *Klöckner v. Cameroon*, international law has "a dual role, that is, complementary (in the case of a 'lacuna' in the law of the State), or corrective, should the State's law not conform on all points to the principles of international law."[96] The same conclusion was also reached

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[90] Leben, see above note 4, p. 283–288.

[91] D. Di Pietro, "Applicable law under Article 42 of the ICSID Convention", in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. T. Weiler (London: Cameron May, 2005), p. 278.

[92] C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2002), p. 588; E. Lauterpacht, "The World Bank Convention on the Settlement of International Investment Disputes", in: *Recueil d'Etudes de Droit International et Hommage à Paul Guggenheim* (Geneva: 1968), p. 658–660.

[93] Schreuer, see above note 92, p. 590.

[94] Leben, see above note 4, p. 294; A. Broches, "The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 136 *RCADI* (1972), p. 392; Voss, see above note 1, p. 112; E. Gaillard and Y. Banifatemi, "The Meaning of 'and' in Article 42(1), Second Sentence of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18 *ICSID Rev. - FILJ* (2003), p. 375, 383–88.

[95] Nassar, see above note 13, p. 206.

[96] *Kloeckner Industrie-Anlagen GmbH* v. *Cameroon*, ICSID Case No. ARB/81/2, *ad hoc* annulment Committee decision, 3 May 1985, 2 *ICSID Rep.* (1994), p. 95, 122. The Committee added that "in both cases, the arbitrators may have recourse to the 'principles of international law' only after having inquired into and established the content of the law of the State party to the dispute (….) and after having applied the relevant rules of the State's law". In fact the award was annulled on the ground that the tribunal rendered its decision based on international law without having first established the content of Cameroun law. See also: *Wena* v. *Egypt*, Decision on Annulment, ICSID Case No. ARB/98/4, 8 December 2000, para 40: "[Article 42 (1) allows] for both legal orders to have a role. The law of the State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit."

by the two *ad hoc* annulment tribunals in *Amco v. Indonesia*.[97] One recent Tribunal came to the conclusion that, in the absence of a choice of law in the contract, it had "the authority and the duty to subject Peruvian law [the host State's law] to the supervising control of international law."[98]

In sum, tribunals have interpreted Art. 42 of the ICSID Convention to mean that international law essentially always applies in cases where a dispute resolution clause refers to the Convention. This solution contrasts with *ad hoc* arbitration where tribunals have been more reluctant to give such a role of supremacy to international law over domestic law of the host State.

2. *Interaction between State Contracts and BITs*

This section examines the interaction between State contracts and another important source of rights and obligations in international investment law: BITs. The question addressed is how a State contract entered into between an investor from State A with State B will be impacted by the fact that both States A and B are parties to a BIT.

2.1 *The Impact of BITs on State Contracts*

The first question concerns jurisdiction *per se*. Does a tribunal established under a BIT (hereinafter 'BIT tribunal') have jurisdiction over a dispute in the event that the contract contains a forum selection clause referring disputes to domestic courts (or any other forum)? In other words, can the

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[97] *Amco Asia Corp.* v. *Indonesia,* ICSID Case No. ARB/81/1, *ad hoc* annulment Committee decision, 16 May 1986, 1 *ICSID Rep.* (1993) 509, 515, para. 22. The Tribunal also stated: "It seems to the ad hoc Committee worth noting that Article 42(1) of the Convention authorizes an ICSID tribunal to apply rules of international law only to fill up *lacunae* in the applicable domestic law and to ensure precedence to international law norms where the rules of the applicable domestic law are in collision with such norms". (para. 20). The other Tribunal examining the resubmission of the claim, *Amco Asia Corp.* v. *Indonesia,* ICSID Case No. ARB/81/1, Award, 31 May 1990, *ICSID Rep.* 1 (1993) 569, 580, para. 40, also came to the same conclusion, but added that international law was not limited only to a gap-filling and corrective role: "This Tribunal notes that Article 42(1) refers to the application of host State law and international law. If there are no relevant host State laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host State laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as 'only' supplemental and corrective' seems a distinction without a difference."

[98] *Duke Energy International Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision on Jurisdiction, 1 February 2006, para. 162.

very existence of such a forum selection clause effectively block the jurisdiction of a BIT tribunal over all disputes, including those related to treaty violation? The *Vivendi* annulment Committee clearly established the principle that a BIT tribunal cannot decline jurisdiction over claims arising from alleged violations of the BIT on the ground that the contract contains such a forum selection clause concerning contract disputes.[99]

The second question concerns the *extent* of a BIT tribunal's jurisdiction. There is no doubt that a BIT tribunal has jurisdiction over allegations that the host State has violated the BIT.[100] The controversial question is whether BITs are self-contained regimes or broad instruments covering all types of disputes. In other words, does a BIT between States A and B *only* covers *treaty* breaches committed by State B against an investor from State A? Or, does the BIT also cover disputes arising from alleged breaches of the State contract committed by State B against that same investor?

Tribunals, starting with the *Vivendi* annulment Committee, have consistently distinguished between contractual and treaty based claims. A contractual claim involves allegations of breaches of the contract, whereas a treaty claim concerns allegations related to breaches of the BIT.[101] Even when such breaches arise from the exact same action/omission by the State, they must be examined separately as two distinct breaches.[102] Therefore, the same sets of facts can constitute the basis of *two* different claims before *two* different bodies applying different laws. On the one hand, contractual claims will be examined by the forum selected in the contract (which may be the domestic court of the host State) applying the proper law of the contract (which will often be domestic law). On the other hand, allegations of BIT breaches will be examined by the BIT tribunal under international law.[103] This is a fundamental distinction because a breach of contract is *not* per se a breach of treaty. Thus, a late

[99] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 101. In fact, a failure by a tribunal to exercise jurisdiction over these treaty claims has been considered as an excess of powers leading to the annulment of the award.

[100] C. Schreuer, "Investment Treaty Arbitration and Jurisdiction over Contract Claims: The *Vivendi I* Case Considered", in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, ed. T. Weiler (London: Cameron May, 2005), p. 293.

[101] *Vivendi v. Argentina*, para. 113.

[102] *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 258.

[103] *Vivendi v. Argentina*, paras. 95–96, 98, 101.

payment by the State may be in breach of a contract provision but will normally not constitute an expropriation or violate the fair and equitable treatment clause contained in a BIT. It is true, however, that, under certain circumstances, certain actions by the host State in breach of a contract will *also* be considered as a breach of a treaty provision.[104] For instance, in the *Siemens* case the Tribunal held that the termination of a State contract by a governmental decree by Argentina was an act of expropriation contrary to the Argentina-Germany BIT.[105]

In sum, 'purely' contractual claims (i.e. those not amounting to a BIT violation) are, in principle, excluded from the jurisdiction of BIT tribunals. There are, however, specific circumstances under which a BIT tribunal will have jurisdiction over such contractual claims in the context of BIT arbitration proceedings.[106] This is the case when both the scope of the definition of 'investment' and the dispute settlement provision in the BIT are wide enough to cover such claims.

First, the scope of the definition of 'investment' found in a BIT needs to be broad in order to cover State contracts.[107] BITs typically contain very broad definitions of what constitutes an investment, such as: 'any kind of assets', 'any kind of property', 'claims to money', etc. Most State contracts will therefore be considered an investment under the typically broad-language definitions of investment found in most BITs.[108] Simple commercial contracts and those related to sales of goods, however, will be excluded.

Second, the dispute settlement provision in the BIT also needs to be wide enough to cover State contracts. There is no doubt that a BIT tribunal has jurisdiction over contractual claims whenever such claims are expressly referred to in the dispute resolution clause.[109] On the other hand, some BITs expressly limit jurisdiction of tribunals only to claims

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104 Schreuer, see above note 100, p. 295–296, discussing several cases.

105 *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 253. Similarly a breach of contract may in some circumstance amount to violation of the legitimate expectation of the foreign investor and therefore breach the fair and equitable treatment clause typically contained in a BIT. See: Voss, see above note 1, p. 211.

106 This is recognized by writers: James Crawford, "Treaty and Contract in Investment Arbitration", *TDM* (2008), p. 13; Schreuer, see above note 100, p. 296, 299; S. Schill, "Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties", 18 *Minn. J. Int'l L.* 1 (2009), p. 52.

107 UNCTAD, see above note 2, p. 15 ff.

108 Voss, see above note 1, p. 122. see above note 2, p. 45, has developed different drafting models of the definition of investment to exclude or limit coverage of state contract or, on the contrary, to cover them.

109 For instance, US Model BIT, art. 24.

arising from the BIT, thereby excluding any contractual claims.[110] More problematic are those BITs containing broad clauses referring, for instance, to 'disputes with respect to investments', 'all disputes', 'any disputes' or 'any legal disputes' concerning investments. Does a BIT tribunal have jurisdiction over a breach of a State contract under such a broad clause that does not amount to a treaty violation? It is generally recognised that since no distinction is made in BITs using such broad language nothing should prevent a BIT tribunal from having jurisdiction over 'purely' contractual claims.[111] Most tribunals have indeed adopted this approach favouring the inclusion of claims based on contractual violations.[112] Others tribunals have, however, adopted a narrow approach rejecting jurisdiction over those claims.[113]

Finally, it should be mentioned that even in situations where the scope of both the definition of 'investment' and the dispute settlement provision in the BIT is wide enough to cover, as a matter of principle, 'purely' contractual claims, some tribunals have nonetheless declined jurisdiction over such claims. The *SGS v Philippines* Tribunal did so on the ground that the contract contained a forum selection clause referring to the exclusive jurisdiction of domestic courts over contractual disputes.[114] The conclusion of the Tribunal on this point is controversial in doctrine. While some writers agree with the reasoning of the Tribunal,[115] others believe that a BIT tribunal should have jurisdiction over contractual claims even when faced with such a forum selection clause providing exclusive jurisdiction for domestic courts.[116]

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[110] These BITs will refer to disputes relating to an "obligation under this agreement" or disputes "concerning the interpretation or application of this Agreement". This is, for instance, the case under NAFTA Art. 1116 and 1117.

[111] Voss, see above note 1, p. 73.

[112] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Award on Jurisdiction, 23 July 2001, para. 59; *Consortium R.F.C.C. v. Morocco*, ICSID Case No. ARB/00/6, Award on Jurisdiction, 16 July 2001, para. 67; *Impregilo v. Pakistan*, para. 198, 211; *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Award on Jurisdiction, 29 January 2004, para. 29; *Vivendi v. Argentina*, para. 55.

[113] *SGS v. Pakistan*, para., 161–162.

[114] *SGS v. Philippines*, para. 155, 134–135.

[115] Crawford, see above note 106, p. 13.

[116] E. Gaillard, "Investment Treaty Arbitration and Jurisdiction over Contract Claims: The SGS Cases Considered", in: *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law,* ed. T. Weiler (London: Cameron May, 2005), p. 334; Voss, see above note 1, p. 330; Schreuer, see above note 100, p. 293.

2.2. *The Effect of an 'Umbrella' Clause*

Some BITs contain clauses extending jurisdiction to 'any dispute relating to investments' and requires the host State to 'observe any obligation it may have entered to'. These provisions are often referred to as 'umbrella clauses'.[117] The practice of States is not uniform. While some States (Switzerland, Netherlands, United Kingdom, Germany) often include umbrella clauses in their BITs, other States rarely do (France, Australia) and others never do (Canada).[118] A typical umbrella clause is Article 8(2) of the German Model BIT readings as follows: "Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party". According to some estimates, some 40% of BITs contains such broad language clause.[119]

What is the effect of an umbrella clause contained in a BIT under which the State parties undertake to observe any obligations they may have entered into with respect to investments? Can this clause turn contractual breaches into a violation of international law under the BIT? This is one of the most contentious issues discussed in doctrine in recent years. For the purpose of the present chapter, it is sufficient to highlight the basic elements of the debate.

The 'umbrella clause' has been in use since the 1950s,[120] but at the time few writers had yet to discuss its potential effect.[121] It was not until two cases in 2003 involving *SGS Société Générale de Surveillance SA*, however, that the umbrella clause was truly tested. These two tribunals have adopted contradictory conclusions on the effect to be given to similarly drafted clauses. Since then, subsequent tribunals have also been divided on the issue. Their reasoning can essentially be divided in three ways.

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[117] Other formulations have been used: "mirror effect", "elevator", "parallel effect", "sanctity of contract", "respect clause", etc.

[118] OECD, *Interpretation of the Umbrella Clause in Investment Agreements*, Working Papers on International Investment no. 2006/3 (2006) 5–6. The Model US BIT and NAFTA do not contain such clause.

[119] Judith Gill et al., "Contractual Claims and Bilateral Investment Treaties", 21 *Journal of International Arbitration* (2004), fn 31.

[120] A.C. Sinclair, "The Origins of the Umbrella Clause in the International Law of Investment Protection", 20 *Arbitration International* (2004), p. 411–434.

[121] For instance: Weil, see above note 1, p. 132 ff; F.A. Mann, "British Treaties for the Promotion and Protection of Investments", 52 *British YIL* (1981), p. 246; R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (The Hague: Kluwer, 1995), p. 81–82.

A number of tribunals have adopted a narrow interpretation of the clause. This is, for instance, the position adopted by the *SGS v. Pakistan* Tribunal rejecting the investor's contention that Article 11 of the Pakistan-Switzerland BIT automatically elevated breaches of contract to breaches of the treaty.[122] For the Tribunal, "the legal consequences were so far-reaching in scope and so burdensome in their potential impact on the State" that "clear and convincing evidence of such an intention of the parties" would have to be proved.[123] The Tribunal therefore declined jurisdiction over purely contractual claims submitted by the claimant. This narrow approach has also been adopted by other tribunals.[124] This approach has received limited support, however, in doctrine.[125]

Several other tribunals have adopted a wider interpretation of the clause. This is the case of *SGS v. Philippines,* where the Tribunal held that the effect of the umbrella clause was to give it jurisdiction over purely contractual claims.[126] Many other tribunals have adopted this position.[127] This is also the option favoured by most in doctrine.[128]

A third group of tribunals have adopted a middle-position. This is, for instance, the case of the *El Paso* Tribunal which first acknowledged that although an umbrella clause does not automatically elevate a breach of contract into a treaty claim under international law,[129] it remains that such a clause would cover those contractual claims where the investor

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[122] *SGS v. Pakistan,* para. 166, 167, 173.

[123] Id., para. 167. The Tribunal concluded (at para. 173) that no such proof existed in the present case.

[124] *Joy Mining Machinery Limited v. Egypt,* ICSID case No. ARB/03/11, Award on Jurisdiction, August 6, 2004, para. 81; *Salini Construttori S.p.A. and Italstrade S.p.A v. Jordan*, ICSID case No. ARB/02/13, Decision on Jurisdiction, 29 November, 2004, para. 126.

[125] See the review of literature in: Voss, see above note 1, p. 235 ff.

[126] *SGS v. Philippines,* para. 130–135. Although the Tribunal accepted, as a matter of principle, jurisdiction over contract claims, it nevertheless decided to stay the proceedings and refer the decision on the merits to domestic courts in accordance with the exclusive dispute resolution clause contained in the contract.

[127] *Sempra Energy International v. Argentina*, ICSID case No ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, para. 100, 101; *Eureko B.V. v. Poland*, UNCITRAL, Partial Award, 19 August 2005, para. 246; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentina*, ICSID case No ARB/02/1, Decision on Liability, 3 October 2006, paras. 169–175. Some other tribunals have expressed similar views even though the instruments did not contain such a clause: *Waste Management Inc. v. Mexico*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, para. 73; *Consorzio Groupement L.E.S.I.-DIPENTA c. Algérie,* ICSID case no ARB/03/08, Award, 10 January 2005, para. 25(ii).

[128] See, the review of literature in: Voss, see above note 1, p. 238 ff.

[129] *El Paso Energy International Company v. Argentina,* ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, para. 66–88.

contracted with the State in its capacity as a Sovereign as opposed to when it acts as a mere 'merchant'.[130] This approach has since then been adopted by other tribunals[131] and is supported by some authors.[132]

I believe, like most in doctrine, that the narrow interpretation adopted by some tribunals must be rejected.[133] The clause must be interpreted based on its plain meaning.[134] The words 'shall observe' is a straightforward and mandatory obligation for the State. The words 'all' or 'any' obligations undertaken by a State necessarily include contractual obligations under a State contract.[135] Moreover, the adoption of a narrow interpretation of such a clear and unambiguous clause would deprive it of any effect. This runs contrary to the principle of *effet utile*, whereby a clause must be interpreted so as to render effective as opposed to having no effect whatsoever.[136] In fact, the only State to have publically expressed its opinion on the clause (Switzerland) stated that it was precisely the parties' intention to cover all commitments taken by States in contracts.[137]

In sum, the practical effect of a broadly-worded umbrella clause is to turn *all* contractual claims into treaty violation. Such a clause covers all obligations undertaken by a State in a State contract.[138] According to the dominant view held in doctrine, this would include even those contractual commitments undertaken by a State as a 'merchant', i.e. in such cases

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[130] Id. para. 81.

[131] *CMS v. Argentina*, ICSID case No. ARB/01/8, Award, 12 May 2005, para. 299, 302, 303 (stating that the umbrella clause operates to elevate a contractual dispute to the level of a treaty claim when there is "significant interference by governments or public agencies with the rights of the investor"); *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13 and *BP America Production Co. and Others v. Argentina,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 108 ff.

[132] For instance, see: Thomas W. Wälde, "The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases", 6 *Journal of World Investments & Trade* (2005), p. 196.

[133] Voss, see above note 1, p. 238 (see also his extended review of literature, p. 236 ff).

[134] Art. 31(1), *Vienna Convention of the Law of Treaties,* 1155 *U.N.T.S.* 331.

[135] *Eureko v. Poland*, para. 246.

[136] *Noble Ventures, Inc. v. Romania,* ICSID Case No ARB/01/11, Award, 12 October 2005, para. 50,52.

[137] "Note on the Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No. ARB/01/13 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*", attached to the Letter of the Swiss Secretariat for Economic Affairs to the ICSID Deputy Secretary-General dated 1 October, 2003, published in: 19 *Mealey's: Int'l Arb. Rep.* (Feb. 2004) E3.

[138] *SGS v. Philippines,* para. 127; Schill, see above note 106, p. 85.

where the State does not exercise its sovereign prerogatives.[139] There are, however, a number of limitations. The umbrella clause can only cover contractual commitments by the host State that are related to *an investment* as defined under the relevant BIT.[140] Also, a contract concluded with a State-owned entity having its own legal personality (and *not directly* with the host State) would not be covered by an umbrella clause.[141]

One controversial question is whether an investor can commence arbitration proceedings under a BIT, based on the violation of an umbrella clause, in cases where the contract contains a forum selection clause in favour of a domestic court or arbitration. While some tribunals have declined jurisdiction over contractual claims based on the existence of such a clause in the contract,[142] others have held, on the contrary, that it was precisely because of the umbrella clause that they had jurisdiction over contractual disputes, even when faced with such a forum selection clause.[143] The last approach is generally adopted in doctrine.[144] The principal reason for this is that a violation of an umbrella clause (even one alleging a breach of contract) is in fact a *treaty* breach like any other BIT violations.[145]

In sum, the umbrella clause does not 'transform' or 'convert' contractual claims into treaty claims.[146] The clause does not change the character and content of the obligations contained in a contract. The function of the clause is more limited. What would normally (i.e. absent an umbrella clause) be considered as a breach of contract will now constitute a breach of a BIT. The clause elevates a breach of contract into a breach of international law by generating the international responsibility of the host State.[147] The object and purpose of the clause is ultimately to give investors an extra protection under a BIT.[148] It offers an effective enforcement

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139 Voss, see above note 1, p. 271–272; Schill, see above note 106, p. 37–47; Crawford, see above note 106, p. 19.

140 Voss, see above note 1, p. 270–271.

141 *Ibid.*, p. 276; David Foster, "Umbrella Clauses: a Retreat from the Philippines?", 9 *Int'l A.L.R.* 4 (2006), p. 108.

142 *SGS v. Philippines,* para. 143.

143 *Eureko v. Poland,* para. 92–114, 250.

144 Schill, see above note 106, p. 63–70: Voss, see above note 1, p. 330; Jarrod Wong, "Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes", 14 *George Mason Law Review* (2006), p. 165 ff.

145 Schill, see above note 106, p. 69.

146 Crawford, see above note 106, p. 18, 20. See: *CMS v. Argentina*, para. 95(c).

147 Voss, see above note 1, p. 273.

148 Schreuer, see above note 100, p. 301.

mechanism against violation of contractual obligations by the host State.[149]

Conclusion

Are State contracts still relevant in this age of BIT proliferation? There is no doubt that the importance of State contracts in securing legal protection for investors when doing business abroad has decreased as a result of the growing numbers of BIT entered into in the last two decades. This is clearly the case since the emergence of arbitration without privity.[150] Thus, some 2,600 BITs provide legal protection to an overwhelmingly greater number of foreign investors than all existing State contracts combined together.[151] Moreover, these treaties also generally provide better substantive protections than State contracts. Put simply, BITs are now performing the function of providing essential legal protection to foreign investors that was once done by State contracts until as recently as the 1990s. BITs are also performing this function on a massive scale, rather than on an individual basis.

Does this mean that State contracts are irrelevant nowadays? First, State contracts are very relevant when no BIT exists. However numerous BITs may be, it remains that they certainly do not cover the whole spectrum of possible bilateral treaty relationships between States. Since a BIT is only binding on the parties to the treaty and not on third parties, the limited geographical scope of BITs necessarily results in gaps in the legal protection to foreign investments. According to some estimates, BITs in fact only cover some 13% of the total bilateral relationship between States worldwide.[152] As a matter of illustration, Canada has entered into BITs with less than 30 countries. The vast majority of Canadian companies doing business abroad are therefore not protected by a BIT.

It can therefore be concluded that most foreign investors doing business abroad are still not protected under any investment treaties. The most detailed legal protection that is available to those foreign investors is still found in State contracts. It is true that these investors will also benefit

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149 Schill, see above note 106. p. 35, 59, 94; Crawford, see above note 106, p. 20.

150 *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

151 According to UNCTAD, *Recent Developments in International Investment Agreements (2008 – June 2009)*, IIA Monitor no. 3 (2009), there were 2,676 treaties at the end of 2008.

152 Tarcisio Gazzini, "The Role of Customary International Law in the Protection of Foreign Investment", 8 *Journal of World Investment and Trade* 5 (2007), p. 691.

from legal protection existing under the legislation of the host State as well as those under customary international law. The latter regime may not necessarily provide adequate protection to investors, however, as only a limited number of principles of customary international law have emerged in the field of international investment law.[153] It is generally recognised that the obligation for the host State to provide foreign investors with the 'minimum standard of treatment' is a customary norm.[154] Similarly, the host State cannot expropriate a foreign investor's investment unless four conditions are met: the taking must be for a public purpose, as provided by law, conducted in a non-discriminatory manner and with compensation in return.[155] Moreover, even if the legal protection offered to investors (corporations and their shareholders) under international law has rapidly evolved in the last few decades,[156] no rule of customary international law providing them with an *automatic* right to submit arbitration claims before international tribunals has yet to crystallize.[157] This is why the arbitration clause typically contained in a State contract offers a greater level of protection to foreign investors.

Second, State contracts are also relevant when a BIT exists. Thus, contracts will contain contractual rights and obligations that are much more detailed than those broadly-defined ones typically found in BITs. This is why it is often necessary (even in cases where a BIT exists) to conclude a contract including detailed provisions on issues such as taxation, technical requirement, deadlines, etc. Ultimately, the number of arbitrations cases involving State contracts shows that they are still very much relevant for foreign investors. Thus, according to the most recent ICSID statistics, the basis of consent invoked by claimants to establish jurisdiction of ICSID

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153 Patrick Dumberry, "Are BITs Representing the 'New' Customary International Law in International Investment Law?", 28 *Penn State International Law Review* (2010), p. 675–701.

154 *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB/99/2, Award, 11 Oct. 2002, para. 121. See also: Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford: Oxford University Press, 2008), p. 61–62; OECD*, Fair and Equitable Treatment Standard in International Investment Law,* Working Paper No. 2004/3 (2004) 8.

155 *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 11.3.

156 P. Dumberry and M.J. Valasek, "Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes", 26 *ICSID Rev. - FILJ* (2011), p. 34–75.

157 P. Dumberry, "The Legal Standing of Shareholders before Arbitral Tribunals: Has Any Rule Of Customary International Law Crystallised?", 18 *Michigan State Journal of International Law* 3 (2010), p. 353–374.

tribunals is a State contract in 22% of all ICSID cases, and in 14% of new cases registered in 2010.[158]

It is submitted that BITs will have another type of impact on State contracts. The generous substantive protections typically offered to foreign investors in BITs and the interpretation given to these provisions by tribunals is gradually developing into a body of rules of international law. Some speaks of the emergence of a "common law of investment protection".[159] This growing body of law will no doubt influence the way tribunals will interpret similarly drafted clauses in State contracts.[160] In other words, the content of substantive rights contained in State contracts is likely to be influenced by investor-State arbitration under BITs.

Finally, another interesting question is whether the debate about the 'internationalisation' of State contracts is now moot as a result of the proliferation of BITs and the fact that a large number of them contain broad umbrella clauses.[161] It has been argued that the theory of internationalisation has ultimately failed.[162] The answer depends on what is actually meant by 'internationalisation'. Clearly, the umbrella clause does not 'internationalise' the State contract by making international law the applicable law to determine whether or not any breach of contract has been committed.[163] Thus, even if a BIT tribunal has, in certain circumstances, jurisdiction over contractual claims, it will still have to determine whether or not the host State has actually breached a contractual provision based on the law chosen by the parties to the contract (which is often the domestic law of the host State).[164] Consequently, the question of whether or not a breach of contract has been committed will more often than not be decided by a BIT tribunal based on the *domestic law* of the host State, not international law.[165] The umbrella clause does not change that. If anything, the real 'internationalisation' of contracts occurred in 1965 with the adoption of Article 42 of the ICSID Convention and the

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158 The ICSID Caseload, Statistics (issue 2011–1), p. 10, 21.

159 C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2007), p. 18–21.

160 Leben, see above note 4, p. 314.

161 E. Gaillard, "Chronique", *JDI* (2004) 214.

162 Voss, see above note 1, p. 7, 9.

163 *Ibid.*, p. 273.

164 *CMS v. Argentina*, para. 95(c). This is also the position adopted by authors: Crawford, see above note 106, p. 20; Schill, see above note 106, p. 59–62. See, the review of literature in Voss, see above note 1, p. 273.

165 Voss, see above note 1, p. 284–285.

interpretation subsequently given by ICSID tribunals about the primacy of international law.

What a broad dispute resolution clause or an umbrella clause does, however, is it gives BIT tribunals jurisdiction over contractual claims even when the forum selection clause in the contract gives exclusive jurisdiction to domestic courts. Under these specific circumstances, allegations of breach of contract that would have normally been decided by a domestic court (or any other arbitration forum) would now be under the jurisdiction of a BIT tribunal. A BIT tribunal consisting of international investment law specialists will therefore decide over purely contractual claims. In that sense, it can be argued that broad dispute resolution clauses (including umbrella clauses) have led to an increasing 'internationalisation' of State contracts.

CHAPTER EIGHT

ARBITRAL DECISIONS AS A SOURCE OF INTERNATIONAL INVESTMENT LAW

Eric De Brabandere

Contents

Introduction

Whether judicial and arbitral decisions are a source of law, and thus binding upon international courts and tribunals, is from a theoretical perspective a relatively easy question, but nevertheless proves to be a controversial

one when taking into account the practice of international courts and arbitral tribunals. Judicial decisions are explicitly mentioned in Article 38 of the Statute of the International Court of Justice (ICJ) as 'as subsidiary means for the determination of rules of law'. While customary law, treaties and general principles, also set out in Article 38 of the Statute of the ICJ, are generally regarded as the main or formal sources of international law, doctrine and judicial decisions are categorized as subsidiary or material sources.[1] Indeed, only customary law, treaties and general principles are a source of obligations for States, while judicial decisions, and the doctrine, cannot in themselves be considered independent sources of obligations for States. The only exception in respect of judicial and arbitral decisions is the *inter partes* effect of a binding judicial or arbitral decision which in itself implies that the decision is a formal source of law applicable between the parties to the dispute.[2] The principle that, in and of themselves, judicial decisions are not a source or rights and obligations for States stands in sharp contrast to the practice of many international courts and arbitral tribunals. Despite the absence of any rule on binding precedent in international law generally[3] and in international investment law, many investment tribunals very often refer to previous investment law cases in their decisions.

The question I will address here is whether, outside the formal context of the States party to a dispute, a judicial or arbitral decision can be considered a source of rights and obligations for States in the context of international investment arbitration. It is not the purpose here to be exhaustive in the sense that all cases which have cited previous decisions or which have discussed the notion and use of precedent in international arbitration will be analysed in detail. This chapter will rather focus on certain developments concerning the use of precedent in international investment arbitration and the cases that underscore this development. In line with the overall theme of the book, the focus will specifically lie on the question whether the use by international investment tribunals in their decisions of previous arbitral decisions can be seen as implying that these decisions amount to a source of rights and obligations for States. More specifically, I will argue that precedents are an important but subsidiary source of

[1] See Hugh Thirlway, "The sources of international law", in *International Law,* ed. Malcolm D. Evans (Oxford : Oxford University Press, 2006), p. 129.

[2] Paul Reuter, *Droit international public* (Paris: Presses Universitaires de France, 1958), p. 85.

[3] See Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996), p. 1.

international investment law. The practice of arbitral tribunals in relying extensively on previous decisions is not problematic as such, and even a welcome practice since it furthers the development of the law relating to foreign investment. Crossing the line between treating precedents as a material or subsidiary source and as a formal source, when tribunals for example rely on precedents without other argument or when tribunals consider it necessary to follow a developed '*jurisprudence constante*', however, poses serious problems since it runs counter to the very foundational principles underlying investment arbitration and the formal absence of binding precedent in international investment law.

I will first briefly address the status of judicial and arbitral decisions as a source of general international law (1). I will then analyse judicial and arbitral decisions as a source of law in the decisions of international investment tribunals (2). In doing so, the absence of a formal rule on binding precedent in investment arbitration (2.1), the *de facto* importance of the use of precedent in international investment arbitration (2.2), and decisions of international investment tribunals with a 'quasi-legislative character' (2.3) will be discussed. I will finally turn to the question how certain jurisprudential developments have impacted on State practice in international investment law (3). It should be noted from the outset that the use of precedents from courts and tribunals outside the area of international investment law will not be discussed here considering the overall objective of the book in focusing on the sources of international investment law only.[4]

1. *Judicial and Arbitral Decisions As a Source of General International Law*

International law has no doctrine of binding precedent or *stare decisis*. Most, if not all, statutes of international courts and tribunals provide that the decision is binding only for the parties to the dispute.[5] Thus, Article 59 of the Statute of the International Court of Justice provides that '[t]he

[4] One nevertheless needs to acknowledge that investment tribunals occasionally refer to decisions of courts and tribunals when dealing with issues other than international investment law. See generally Gilbert Guillaume, "The Use of Precedent by International Judges and Arbitrator", 2 *Journal of International Dispute Settlement* (2011), p. 5–23.

[5] See for an exception the Agreement Establishing the Caribbean Court of Justice, which provides in its Article XXII –entitled "Judgment of the Court to Constitute Stare Decisis"- that "Judgments of the Court shall be legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article XX." (available at http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf, accessed 7 June 2011).

decision of the Court has no binding force except between the parties and in respect of that particular case'. It is moreover interesting to note that this idea is reinforced by Article 38 of the Statute, which includes an explicit reference to Article 59 of the Statute in determining the subsidiary character of judicial decisions in general as a source of law: 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, [are] subsidiary means for the determination of rules of law'. Judicial decisions are mentioned in Article 38 of the Statute of the ICJ as subsidiary means for the *determination* of rules of law. The wording of Article 38 of the ICJ Statute implies that judicial decisions are not a means for the *creation* of rules of law.

In this section I will first analyse generally the role of judicial and arbitral decisions as subsidiary means for the determination of rules of law (1.1). I will next address the notions of *stare decisis* and *jurisprudence constante* and their role in contemporary international dispute settlement (1.2).

1.1. *Judicial Decisions As Subsidiary Means for the Determination of Rules of Law*

Although both doctrine and judicial decisions are subsidiary sources of international law, the analogy between the two is limited. Paul Reuter noted that while doctrine by no means can be considered a source of law, a more balanced approach is necessary as far as judicial and arbitral decisions are concerned.[6] In addition, despite the unambiguousness of the subsidiary character of judicial and arbitral decisions as sources of law, judicial and arbitral decisions do play a very important role in defining international law.

The first main theoretical reason for the need for a more balanced consideration of judicial decisions as a subsidiary source of international law is that the interpretation and application of a certain rule by an international court or arbitral tribunal is no purely mechanical operation, in the sense that every judicial or arbitral decision to a certain extent implies a 'development' of the general rule to be applied.[7] In applying the law to a particular case, a court or tribunal does not mechanically apply a certain given rule to a case but is often required further to define and clarify the applicable law. Not only decisions of the Permanent Court of International

[6] Reuter, see above note 2, p. 84.
[7] *Ibid.*, p. 85.

Justice (PCIJ) and the ICJ, but many arbitral decisions have thus contributed to the development of international law.[8] While judicial or arbitral decisions in and of themselves have no binding effect except for the parties to the dispute, the reasoning underlying a judicial or arbitral decision has –at least *de facto*- legal implications that extend well beyond the mere parties to the dispute. This is so because the law is applied or interpreted by the court or tribunal in a sense that can reflect the customary status of the norm or an exception to that norm, or because the legal reasoning underlying a decision can be regarded as the correct interpretation of a treaty rule binding upon a party. The reason decisions of courts and tribunals have legal weight is thus not linked to their character of judicial or arbitral decisions. Judicial and arbitral decisions remain a *material* source of international law.

The second reason judicial and arbitral decisions are important in practice is that, despite the theoretical premise that judicial and arbitral decisions are merely a subsidiary source of the law, the principled *inter partes* effect of decisions, and the absence of *stare decisis* or binding precedent in international law, judicial and arbitral decisions play a very important role in international judicial and arbitral decision-making. From an empirical perspective, international courts and tribunals including international investment tribunals very often refer to the case law of other international courts and arbitral tribunals or to their own previous decisions.[9] As the ICJ for example recalled on numerous occasions:

> 'while … decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameroon* v. *Nigeria : Equatorial Guinea intervening*), while "[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases" which do not have binding effect for that State, in such circumstances "[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases" (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28)'.[10]

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[8] See Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003), p. 19.

[9] See generally Guillaume, see above note 4.

[10] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412, para. 53.

It is particularly interesting to note that even when confirming this general principle in its recent case law, the ICJ ironically cites one of its previous decisions in this respect. This practice has been termed by some authors as a *de facto stare decisis* doctrine.[11]

1.2. *Precedents,* Stare Decisis *and* 'Jurisprudence Constante'

Precedent can refer either to a form of 'binding precedent' as a synonym to the concept of '*stare decisis*', to the notion of 'persuasive precedent' in the sense that the precedent is not binding but nevertheless deserves some special consideration, or simply to previous case law.[12] I will use these same notions here.

As noted by Judge Shahabuddeen in his seminal work on the role of precedent in the work of the ICJ,[13] precedent can, simply put, operate in three ways: 1) judicial and arbitral precedents may be considered by a judge or arbitrator as part of the legal materials available to ascertain the law while not being obliged to follow previous rulings or awards; 2) a judge or arbitrator may be obliged to decide a case in the same way as a previous case, unless there are good reasons to deviate from previous cases; and 3), a judge or arbitrator may be obliged to decide a case in the same way as previous cases even if there are good reasons not to, which is usually referred to as 'binding precedent' or '*stare decisis*'.[14] It is generally aknowledged that the first meaning of the role of precedent is applicable in continental legal systems or civil law systems[15] –although some civil law systems also have some inclination towards the second understanding – while common law systems generally follow the third and sometimes the second meaning of the rule of precedent.[16] International law largely follows the civil law system, considering that there is no rule that would oblige a court or tribunal to follow decisions made by an earlier court or tribunal or by earlier decisions of the same court or tribunal.

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[11] Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?", 23 *Arbitration International* (2007), p. 361.

[12] *Ibid.*, p. 358.

[13] Shahabuddeen, see above note 3.

[14] *Ibid.*, p. 9.

[15] See for example Art. 5 of the French Code Civil which states that: "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises".

[16] Shahabuddeen, see above note 3, p. 9.

The concept of *stare decisis* as used in common law legal systems is the consequence of the fact that in common law countries judges are not only asked to apply the law, but also to a certain extent to define the legal rules, and the *raison d'être* of the concept of *stare decisis* is thus the logical consequence of a 'judge-made' legal system.[17] The concept of binding precedent, although often referred to as part of common law legal systems, is in fact substantially different in the judicial practice of different common law countries.[18] There is thus no unitary doctrine of binding precedent.[19] It is moreover important to point out that the authority of 'binding precedent' only extends to the *ratio decidendi* of the decision, that is the necessary basis of the decision, or the rule established by the court or tribunal. It does not extend to *obiter dicta, i.e.* the arguments stated by the court or tribunal which are not necessary to reach the decision.[20] The latter can have only 'persuasive value'.

A related – and in international investment arbitration often invoked – notion is that of *'jurisprudence constante'. Jurisprudence constante* is often used in civil law systems to denote a series of cases on similar issues which form a uniform and consistent interpretation or application of a certain rule.[21] In that sense, the value of previous case law resides in the *de facto* rather than *de jure* –which would be the case in the event of 'binding precedents' or '*stare decisis*' – recognition of a certain 'persuasive authority'.[22] The Supreme Court of Lousiana, which follows in part the civil law legal system, for example noted that '[a]lthough Louisiana has never adopted the common law doctrine of *stare decisis,* it has followed the civilian doctrine of *jurisprudence constante.* The chief distinction between *stare decisis* and *jurisprudence constante* is that a single case affords sufficient foundation for *stare decisis*, while a series of adjudicated cases, all in accord, form the basis for *jurisprudence constante*'.[23]

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[17] René David and John E.C. Brierly, *Major Legal Systems in the World Today* (London: Stevens & Sons, 1985), p. 376–377.

[18] *Ibid.*, p. 376 et s.

[19] James Crawford, "Similarity of Issues in Disputes Arising under the Same of Similarly Drafted Investment Treaties", in *Precedent in international arbitration,* ed. Yas Banifatemi (Huntington: Juris Publishing, 2008), p. 101.

[20] David and Brierly, see above note 17, p. 379.

[21] See generally Robert L Henry, "Jurisprudence Constante and Stare Decisis Contrasted", 15 *A.B.A. J.* (1929), p. 11–13 and Vincy Fon and Francesco Parisi, "Judicial precedents in civil law systems: A dynamic analysis", 26 *International Review of Law and Economics* (2006).

[22] Albert Tate Jr., "Techniques of Judicial Interpretation in Louisiana", 22 *La. L. Rev.* (1962), p. 743.

[23] *Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm'n.*, 903 So.2d 1071, at n.17 (La. 2005), p. 26 (footnote 17) at http://www.lasc.org/opinions/2005/

The Supreme Court noted that in any event *jurisprudence constante* functions only as 'persuasive authority',[24] which again stands in stark contrast to the notion of *stare decisis,* which relies on a *de jure* recognition of the binding precedential value of previous decisions. The doctrine of *jurisprudence constante* is widely used in civil law systems,[25] but transposed to the international legal system, especially in international investment arbitration, it is of only limited value. It is often considered to represent more than it actually means. First, considering the absence of binding precedent in international law generally, judges and arbitrator have no obligation to follow precedents, even if they constituted *jurisprudence constante*. Secondly, in reality, as pointed out before, *jurisprudence constante* simply indicates that a series of cases have decided a certain point of law in a certain particular manner,[26] and that because of the existence of this sequence of cases they constitute 'persuasive authority'. It does not imply that the judge or arbitrator has a specific obligation to decide the case in the same sense as the 'established' *jurisprudence constante*. For example, in the event of a *revirement de jurisprudence,*[27] *i.e.* a reversal of an established *jurisprudence constante*, a court or tribunal is in no way obliged to justify this reversal.[28] Although the contrary has been argued by some authors in relation to international investment arbitration,[29] as will be pointed out later, such assumption is contrary not only to the generally accepted value of arbitral decisions as a source of international investment law, but also to the very foundational principle underlying the notion of *jurisprudence constante* as applied in the majority of civil law systems.

2. *Decisions of International Investment Tribunals As a Source of Rights and Obligations*

From a theoretical perspective, the role played by judicial and arbitral decisions in international investment law and international investment

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04c0473.opn.pdf (accessed 26 May 2011). See also Richard D. Moreno, "Scott v. Corkern: Of Precedent, Jurisprudence Constante, and the Relationship between Louisiana Commercial Laws and Louisiana Pledge Jurisprudence", 10 *Tul. Eur. & Civ. L.F.* 31 (1995).

[24] *Ibid.*, p. 62.

[25] Robert L Henry, see above note 21, p. 11.

[26] Catherine Kessedjian, "To Give or Not to Give Precedential Value to Investment Arbitration Awards", in *The Future of Investment Arbitration*, ed. Catherine A. Rogers and Roger P. Alford, (Oxford: Oxford University Press, 2009), p. 49.

[27] See generally Isabelle Rorive, *Le revirement de jurisprudence. Etude de droit anglais et de droit belge* (Brussels: Bruylant, 2003).

[28] David and Brierly, see above note 17, p. 136.

[29] See *infra* section 2.2.1. 'Precedents and the Legal Reasoning of Arbitral Tribunals'.

arbitration follows the principles established above. But despite the absence of any rule on binding precedent in international law generally and in international investment law specifically, many investment tribunals very often refer to previous decisions of investment tribunals.

I will first address the formal absence of *stare decisis* in investment arbitration (2.1.) before turning to how and why international investment tribunals make use of precedents (2.2.). I will then turn to arbitral decisions which have a 'quasi-legislative' character (2.3.).

2.1. *The Formal Absence of Binding Precedent in International Investment Arbitration and the Ad Hoc Character of Arbitral Tribunals*

There is no doubt that there is no binding precedent in international investment arbitration as much as there is no such rule in general international law. This fundamental principle is included in Article 53 (1) of the ICSID Convention, which provides that the award rendered by the arbitral tribunal is binding upon the parties, thus implicitly excluding any precedential value to awards rendered under the ICSID Convention.[30] There is moreover nothing in the *travaux préparatoires* that would indicate the application of the doctrine of *stare decisis* to investment arbitration.[31] The Arbitral Tribunal in *SGS v. The Philippines* nevertheless raised doubts whether the wording of Article 53 (1) of the ICSID Convention can be read as implying the absence of any precedential value to arbitral awards: '[t]he ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the res judicata effect of awards rather than their impact as precedents in later cases'.[32] At the same time however the Tribunal in that case confirmed that 'there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision'.[33] An explicit rule on the absence of precedential value to previous case law is contained in Art. 1136 of NAFTA, which states that '[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case'. From the perspective of the

[30] See also Christoph Schreuer and Matthew Weiniger, "A Doctrine of Precedent?", in *The Oxford Handbook of International Investment Law*, ed. P. Muchlinski, F. Ortino and C. Schreuer, (Oxford, OUP: 2008), 1189 and Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2001), p. 1082.

[31] *Ibid.*

[32] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Swiss Confederation/Republic of the Philippines BIT), Decision on Jurisdiction, 29 January 2004, para. 97 (footnotes omitted).

[33] *Ibid.* (footnotes omitted).

sources of international investment law, it is thus evident that arbitral decisions are not a source of law and are not binding upon States generally. So far, the principles applicable to investment tribunals thus follow the lines of other international courts and tribunals, which equally have an obligation to assess each case anew, without any requirement to follow precedent, as detailed above.

International investment arbitration moreover has certain specific features, compared to standing judicial bodies or centralized dispute settlement mechanisms, which accentuate the impropriety of considering previous decisions as a source of law, *i.e.* as having a binding character.

Firstly, investment treaty arbitration is a decentralized *ad hoc* legal system of dispute settlement. When compared to other dispute settlement bodies, such as the system established under the WTO Dispute Settlement Understanding which also functions with *ad hoc* panels but has an appeals mechanism –the WTO Appellate Body – the concept of binding precedent seems even more unsuitable since it (international investment arbitration) lacks a hierarchical structure. *Stare decisis* and *jurisprudence constante* very often presuppose a hierarchical system of courts and tribunals, as is the case in various national legal systems.[34] Investment tribunals cannot however be expected to act as national courts in hierarchical vertical legal systems which function with rules on binding precedent or *jurisprudence constante*.[35] Within international investment arbitration, such a system is clearly lacking, although the *Ad Hoc* Annulment Committees which deal with annulment claims against arbitral awards might be able to play a role in fostering a *jurisprudence constante*, as will be discussed below. The very fact that States have chosen to establish a horizontal system of *ad hoc* arbitration with no appellate mechanism by necessary implication results in a system whereby each arbitral tribunal assesses the case without any obligation to consider or apply previous case law. As the Arbitral Tribunal in *SGS v The Philippines* noted, '[t]here is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals'.[36]

Secondly, international arbitration is substantially different from permanent international courts and tribunals, mainly because the

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[34] See Catherine Kessedjian, see above note 26, p. 63.

[35] Schreuer and Weiniger, see above note 30, p. 1189.

[36] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 97 (footnotes omitted).

international arbitral tribunal is created only to resolve one specific dispute between two parties, and its composition thus differs from one case to another. Although one could expect arbitral tribunals to decide similar issues in the same way, the fact that a tribunal is an *ad hoc* tribunal, instead of a standing body, weakens the expectation of 'consistency', and thus the application of any form of binding precedent. There is, so to speak, no interconnection between the various investment tribunals which operate independently one from the other, besides the similarity in the object of the dispute and the procedural rules.

Thirdly, although publication has become the standard for investment decisions made by arbitral tribunals operating under the ICSID Convention, this is not the case for arbitration conducted under other rules such as the UNCITRAL Arbitration Rules. As a consequence, not all arbitrators have knowledge of all decisions previously delivered in investment disputes.[37]

Fourthly, the *ad hoc* arbitral character of investment arbitration implies that arbitral decisions of international investment tribunals have varying quality,[38] which makes the development of any form of binding precedent or *jurisprudence constante* difficult to establish and recognize. On the other hand, Jan Paulson has pointed out that less notable decisions will without doubt succumb to the 'Darwinian reality: the unfit will perish'.[39]

Finally, the rise in the number of cases brought before investment tribunals over time will render the use of precedents difficult, especially if certain substantive issues have not (yet) resulted in a consistent series of cases.[40]

The main reason for and benefit of the absence of binding precedent in international investment arbitration is that the parties are assured that their case will be examined in full based on its specific factual circumstances, the law applicable to that dispute and the legal arguments presented by the parties. One of the Members of the Annulment Committee in *Vivendi II* noted in an additional opinion that '[i]t may be recalled that in international law, there has never been a rule of binding precedent and

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37 See also Guillaume, see above note 4, p. 14.

38 See also *Ibid.*

39 Jan Paulsson, "The Role of Precedent in Investment Arbitration", in *Arbitration under International Investment Agreements. A Guide to Key Issues*, ed. Katia Yannaca-Small, (Oxford: Oxford University Press 2010), p. 704.

40 Andrea K. Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*", in *International economic law : the state and future of the discipline*, ed. C.B. Picker, I.D. Bunn and D.W. Arner, (Oxford: Hart, 2008), p. 266.

this is so for very good reasons. … the Arbitral Tribunals and *ad hoc* Committees … must find the law based on the facts as they present themselves to them. This does not, of course, rule out that earlier cases may have persuasive value but it is for the relevant Tribunal or *ad hoc* Committee to decide in each instance, taking into account the submissions of the parties.'[41]

Many tribunals have confirmed the independence of arbitral tribunals, even in cases presenting similar facts and circumstances. In the *LESI ASTALDI* and *Consortium LESI-DIPENTA* cases, for example, which had similar facts and legal arguments and which were heard by an identically composed arbitral tribunal,[42] the Tribunal rightly confirmed that:

> En dépit du fait que le présent Tribunal arbitral est composé des mêmes personnes que celles qui formaient le premier, il n'est pas lié par les positions qui ont été prises sur les objections que la Défenderesse a formées, en des termes parfois identiques, à l'encontre de la compétence du Tribunal arbitral et de la recevabilité de la demande.[43]

The independence of arbitral tribunals can also easily be demonstrated by the numerous cases brought against Argentina over the past decade. Argentina has each time made very similar arguments, in particular in relation to the alleged lack of jurisdiction and the presence of necessity as a circumstance precluding wrongfulness. Each tribunal has examined the case *de novo* based on the specific facts of the case and legal arguments presented by both parties.[44] In doing so, several Tribunals have explicitly

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[41] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Proceeding, 10 August 2010, Additional Opinion of Professor JH Dalhuisen under Article 48(4) of the ICSID Convention, Paras. 16 and 18.

[42] The Tribunal noted :

> 'la présente procédure est liée à la première procédure (ci-dessus n 38 ss). Elle est dirigée contre la même Défenderesse ; elle repose sur les mêmes faits ; elle contient des conclusions analogues fondées sur les mêmes normes. Elle s'en distingue essentiellement par le fait que la requête a été introduite non plus par le « Consortium LESI-DIPENTA», mais par les deux entreprises LESI et ASTALDI.
>
> Les Parties ont de plus décidé pour des motifs d'économie et de cohérence de confier la solution de la présente procédure à un Tribunal arbitral composé des mêmes personnes que celles qui formaient le premier Tribunal arbitral (ci-dessus n ? 44). Les Demanderesses ont aussi déclaré que les dossiers de la première procédure faisaient partie intégrante de celle-ci (ci-dessus n 43, Dem 15.02.05 p. 5). (LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria ICSID Case No. ARB/05/3), Decision on Jurisdiction (July 12, 2006), para. 56).

[43] *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3), Decision on Jurisdiction, 12 July 2006.

[44] See for an overview Schreuer and Weiniger, see above note 30, p. 1189 et s.

rejected any notion of binding precedent, and instead have emphasized the need to examine every case in light of its specific circumstances.[45] The Tribunal in *AES* for instance noted:

> 'An identity of the basis of jurisdiction of these tribunals, even when it meets with very similar if not even identical facts at the origin of the disputes, does not suffice to apply systematically to the present case positions or solutions already adopted in these cases. Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem.'[46]

It should also be emphasized that arbitral tribunals are mandated by the parties to settle the dispute, and not to resolve doctrinal controversies or create binding norms applicable to other states, which future courts and tribunals should take into account.[47] As noted by the Tribunal in *Romak*:[48]

> Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of "arbitral jurisprudence." The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general.

2.2. *The* De Facto *Importance of Precedents in Investment Arbitration: Why and How Arbitral Tribunals Cite Previous Case Law*

As is the case in general international law, despite the relative clarity of the principle that arbitrators are not bound by previously decided cases, the role of precedent in international investment law has attracted much

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[45] See for example: *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic,*ICISD Case No. ARB/01/3, Decision on Jurisdiction (August 2, 2004), para. 40; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction 14 November 2005, para. 94 ; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, para. 36.

[46] *AES Corporation v. The Argentine Republic*, Decision on Jurisdiction, ICSID Case No ARB/02/17, April 26, 2005, para. 30.

[47] Devashish Krishan, "A Notion of ICSID Investment", in *Investment Treaty Arbitration and International Law*, ed. T.J. Grierson Weiler (Huntington: Juris Publishing, 2008) and Toby Landau, "Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration", in *ICCA Congress Series N8 14 Dublin Conference, 2008*, ed. A.J. van den Berg, (The Hague: Kluwer 2009), p. 199.

[48] *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, Award, 26 November 2009, para 171 (footnote omitted).

attention, since the practice of investment tribunals shows that they very often rely upon previous awards of both investment tribunals and other international courts and tribunals, as evidenced by several empirical analyses.[49]

This section will analyse why and how investment tribunals cite previous case law. From a practical perspective, precedents form an important part of the legal reasoning of arbitral tribunals (2.2.1). The reasons investment tribunals have developed the practice of 'taking into account' prior awards are either because tribunals have considered these cases as 'useful' (2.2.2), or because the taking into consideration of previous decisions enhances the consistency of the corpus of international investment law (2.2.3). However, despite the practice of investment tribunals, on many occasions investment tribunals have departed from previous case law, resulting in a number of conflicting decisions (2.2.4). Finally, I will address the potential role to be played by *Ad Hoc* Annulment Committees in 'harmonizing' investment law (2.2.5).

2.2.1. *Precedents and the Legal Reasoning of Arbitral Tribunals*

Gabrielle Kaufmann-Kohler argued that the absence of any explicit provision in respect of the precedential value of arbitral decisions under the ICSID Convention does not imply that precedents should not be used by arbitral tribunals.[50] That investment tribunals cite precedents is indeed, as such, not problematic, and forms part of the legal reasoning of arbitral tribunals. The Arbitral Tribunal in *El Paso v. Argentina* for instance argued that:

> ICSID arbitral tribunals are established *ad hoc*, from case to case, in the framework of the Washington Convention, and the present Tribunal knows of no provision, either in that Convention or in the BIT, establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitral organs, especially those set by other international tribunals. The present Tribunal will follow the same line, especially since both parties, in

[49] See for example J. P. Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence", 24 *Journal of International Arbitration* (2007) and Ole Kristian Fauchal, "The Legal Reasoning of ICSID Tribunals – An Empirical Analysis", 19 *European Journal of International Law* (2008), p. 301.

[50] Kaufmann-Kohler, see above note 11, p. 368.

> their written pleadings and oral arguments, have heavily relied on precedent.'[51]

In two other cases, presided over by Gabrielle Kaufmann-Kohler, the Tribunal in very similar terms equally confirmed the absence of binding precedent in international investment arbitration, but noted that previous decisions would be 'carefully consider[ed] ... whenever appropriate'.[52]

The principal duty of the arbitral tribunal is to apply the law as defined by the parties and to deliver a reasoned award. From a tribunal's perspective, citing previous case law is important since it *de facto* adds a justification to the position adopted by the tribunal.[53] Even if judicial and arbitral decisions are not a formal source of law, the fact that several tribunals have developed a consistent line of reasoning can add legal authority to the tribunal's own reasoning.

The obligation for arbitral tribunals to deliver a reasoned award is contained in Article 48 (3) of the ICSID Convention. Article 32 (2) of the UNCITRAL Arbitration rules likewise provides for an obligation to deliver a reasoned award, unless of course parties have decided otherwise. There are many reasons underlying this principle.[54] Essentially, the requirement

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[51] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (April 27, 2006), para. 39. See also *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 42 which reproduces the same argument. Note however that in the last case the tribunal was composed of the same arbitrators, two of whom were equally part of the tribunal in El Paso.

[52] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 130 and *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras. 62–63.

[53] Emmanuel Gaillard, "Foreword", in *Precedent in international arbitration,* ed. Yas Banifatemi (Huntington, Juris Publishing, 2008), p. 2.

[54] See generally: T. Bingham, "Reasons and Reasons and Reasons: Differences Between a Court Judgement and an Arbitral Award", 4 *Arbitration International* (1988), p. 141; Pierre Lalive, "On the Reasoning of International Arbitral Awards", 1 *Journal of International Dispute Settlement* (2010), p. 55–65 and Landau, see above note 47. See for an extensive discussion of the requirement for reasons in international investment arbitration *Glamis Gold, Ltd. v. United States,* NAFTA (UNCITRAL), Final Award, 8 June 2009, para. 8, where the Tribunal noted that:

> it is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal's view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organizations composed of

of a reasoned award is the logical consequence of the fact that the parties have chosen a *legal* method of dispute settlement, based on the application of law, rather than on principles of equity (*ex aequo et bono*). Tribunals thus have the obligation to deliver an award based on the rational application of the law, rather than on their own view of justice.[55] Moreover, under the ICSID system, a failure to state the reasons can lead to an annulment of the decision.[56] This rule reflects a general principle of international law, and has been confirmed outside the context of ICSID.[57] The majority of ICSID Annulment Committees have followed the principle that the requirement of a reasoned award entails an obligation for the tribunal to state reasons in order to enable the reader to understand how the tribunal came to its conclusion.[58]

The requirement to deliver a reasoned award equally contains an obligation to deliver an award based on the law as defined by the parties and/or the applicable procedural rules. In principle, the legal instrument providing for the competence of an arbitral tribunal to settle the dispute determines the legal rules to be applied for the settlement of the dispute. If the instrument contains no specific provision in relation to the applicable law, the procedural rules chosen by the parties will often contain the law to be applied by the tribunal. Article 42(1) of the ICSID Convention for example states that 'the Tribunal shall apply the law of the Contracting

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multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilizing arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions. (Footnote omitted.)

55 Landau, see above note 47, p. 188 and 190.

56 Article 52 (1) (lit e) of the ICSID Convention.

57 See for a discussion outside the context of investment arbitration International Court of Justice, *Arbitral Award of 31 July 1989* (Guinea-Bissau *v.* Senegal, Judgment of 12 November 1991, para. 36 *et s.*). See generally Shabtai Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards* (Leiden/Boston: Martinus Nijhoff Publishers, 2007).

58 See for a discussion Tai-Heng Cheng and Robert Trisotto, "Reasons and Reasoning in Investment Treaty Arbitration", 32 *Suffolk Transnat'l L. Rev.* (2009).

State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. A failure to apply the law might, under the ICSID system be a ground for annulment because of 'manifest excess of power'.[59]

Although it has been argued that arbitral tribunals would simply first assess the precedents invoked by the parties and then 'choose' either to follow or depart from these,[60] the arguments of a tribunal, even when an award follows one or more precedents, have to be the result of the tribunal's own interpretation and application of the law to the dispute at hand. The mere reference to precedents, without any form of argument would indeed amount to a 'failure to state reasons' or a 'manifest excess of power', and could thus result in annulment of the decision. Arbitral tribunals are under an obligation, if they choose to follow previous case law, to reason why a precedent needs to be followed, based on the specific law applicable to that dispute.[61] That arbitral tribunals have the same obligation when they depart from previous case law,[62] although posited for example by the Tribunal in *Glamis,*[63] seems overstated considering the absence of *stare decisis*. Some authors have nevertheless pointed out that the lack of citation of precedents, in particular those that constitute *'established jurisprudence'* combined with a lack of 'extensive effort at reasoning, distinction and providing full hearing to the parties on their intention to deviate', could also be a ground for annulment.[64] This idea is too far-fetched, especially in view of the subsidiary character of judicial and arbitral decisions as a source of law. The situation is of course different in the case of a complete absence of reasoning, but to require arbitral tribunals to argue

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59 Article 52(1) (lit b) of the ICSID Convention. See generally Lalive, see above note 54.

60 Tai-Heng Cheng, "Precedent and Control in Investment Treaty Arbitration", 30 *Fordham International Law Journal* (2007), p. 1031 and 1034–1035.

61 Landau, see above note 47, p. 200.

62 *Ibid.*, 200.

63 *Glamis Gold, Ltd. v. United States,* NAFTA (UNCITRAL), Final Award, June 8, 2009, para. 8, where the Tribunal noted, before quoting the Opinion by Thomas Wälde in the *Thunderbird* decision mentioned in the next footnote, that: … a NAFTA tribunal, while recognizing that there is no precedential effect given to previous decisions, should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so. ….

64 Thomas Wälde, "The present state of research carried out by the English speaking section of the Centre for Studies and Research", in *Les aspects nouveaux du droit des investissements internationaux / Académie de Droit International de La Haye / New aspects of international investment law / Hague Academy of International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), p. 137 and International *Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, Separate Opinion of Thomas Wälde, para. 16.

why precedents are *not* followed in a particular case runs counter to the very idea that precedents are not binding upon arbitral tribunals, since it presupposes that previous case law should be followed unless there is reason not to do so. It is beyond doubt however that, in so far as previously established case law corresponds to a customary legal norm or general principle,[65] the tribunal has an obligation to give reasons for such a departure.

Considering the absence of binding precedent in international law and arbitration and the subsidiary character of judicial and arbitral decisions as a source of law, problems can occur if investment tribunals refer to previous cases without arguing why such precedents are relevant (or not) to the dispute under consideration. In such cases, *i.e.* when precedents are treated as a source of law, the decisions may be subjected to annulment because of lack of sufficient reasoning, in accordance with Article 52 of the ICSID Convention. Argentina raised this point in *AES* by claiming that '[r]epeating decisions taken in other cases, without making the factual and legal distinctions, may constitute an excess of power and may affect the integrity of the international system for the protection of investments'.[66] The danger of the use of precedent without any independent treaty interpretation by an arbitral tribunal can be clearly illustrated by the Tribunal's decision in *Waste Management v. Mexico*. The tribunal essentially derived from the S.*D. Meyers*, *Mondev*, *ADF* and *Loewen* cases and the Free Trade Commission's interpretation of Article 1105(1) the standard to be applied to the minimum standard of treatment contained in Article 1105 (1) NAFTA. Although the Tribunal subsequently noted that 'evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case',[67] it is important to point out that the definition of the standard was not derived from the Tribunal's own interpretation of NAFTA, but rather taken from the interpretations of that convention by previously constituted tribunals.

In the same vein, the Tribunal in *RSM* simply considered the legal reasoning of a previous award to be applicable because of the similarity in facts: '[h]aving regard to the fact similarity between this and the Helnan case, the Tribunal considers the reasoning in the Hellnan [*sic*] Award is

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[65] See in this respect the contributions by Jean d'Aspremont and Stephan Schill in this volume.

[66] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 22.

[67] Para. 99.

persuasive and applicable here'.[68] This practice is visible in several other arbitral awards in relation to the standards of investment protection.[69] A similar decision was reached by the Tribunal in *Camuzzi:* '[t]he same conclusion has been shared by the tribunals in CMS and Enron (Additional Claim), among various others. This Tribunal has no reason not to concur with that conclusion, even though some of the elements of fact in each dispute may differ in some respects.'[70]

2.2.2. *Arbitral Decisions As a Material Source: Precedents As a 'Source of Inspiration'*

From a practical or practitioner's perspective, arbitral decisions are very important material sources of law.[71] They indeed give guidance on how a certain treaty provision or other legal rules have been interpreted and applied by arbitral tribunals, and arbitral decisions thus form an important part of the parties' and their counsel's task to convince the tribunal of their argument.[72] The idea that previous case law functions as a source of inspiration interconnects with the idea that judges and arbitrators should consider authorities invoked by the parties to the dispute. Parties themselves very often bring previous decisions to the attention of the arbitral tribunal. One can then consider that judges and arbitrators have an obligation as a matter of due process to consider these and to respond to authoritative precedents invoked by the parties.[73] As noted by the Tribunal in *Glamis,* '[i]n terms of its case-specific mandate, a tribunal should decide the matter before it on the basis of the authorities submitted to it, and to the degree that the parties to the dispute do not raise what the tribunal regards to be a particularly relevant authority, the tribunal should bring such an authority to the attention of the parties and provide them an opportunity to comment'.[74] Of course, such a taking into consideration

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[68] *RSM Production Company and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 6.1.3.

[69] See Stephan Schill, "System-Building in Investment Treaty Arbitration and Lawmaking", 12 *German Law Journal* (2011), p. 1092.

[70] *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, para. 82.

[71] Barton Legum, "The Definitions of "Precedent" in International Arbitration", in *Precedent in international arbitration,* ed. Yas Banifatemi (Huntington, Juris Publishing, 2008), p. 8–9.

[72] Gaillard, see above note 53, p. 3.

[73] Paulsson, see above note 39, p. 701.

[74] *Glamis Gold, Ltd. v. United States,* NAFTA (UNCITRAL), Final Award, 8 June 8 2009, para. 8 (footnote omitted).

can only extend to the argument contained in the decision, not to the decision as such, considering that previous cases are not binding on the tribunal as a matter of law. On certain occasions, the tribunal itself has asked parties to comment upon precedents published at a later stage in the proceedings, and which as a consequence had not been addressed by the parties in their submissions.[75]

Previous decisions are valuable guidelines to investment tribunals on issues similar to those presented to the arbitral tribunal. The similarity of issues to be decided by investment tribunals logically results in the consultation of previous cases by both parties and other arbitral tribunals, and the use of similar terminology in investment treaties makes the reliance on previous cases as a source of inspiration relatively sound and reasonable. On the other hand, as was pointed out before, this does not exempt the tribunal from effectively arguing why a certain interpretation of a treaty provision is applicable in that specific case. The Arbitral Tribunal in *AES v. Argentina,* for example, confirmed the absence of any form of binding precedent in international investment arbitration but acknowledged that previous decisions are a very important source of inspiration:

> … decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest; this Tribunal may consider them in order to compare its own position with those already adopted by its predecessors and, if it shares the views already expressed by one or more of these tribunals on a specific point of law, it is free to adopt the same solution.
>
> One may even find situations in which, although seized on the basis of another BIT as combined with the pertinent provisions of the ICSID Convention, a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.
>
> The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case. If the present Tribunal concurs with the analysis

[75] See for a discussion R. Sureda, "Precedent in Investment Treaty Arbitraton", in *International Investment Law for 21st Century: Essays in Honour of Christoph Schreuer*, ed. C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (Oxford: Oxford University Press, 2009), p. 834–835 and the cases *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007 and *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, 24 January 2003 (unpublished).

> and interpretation of these facts as they generated certain special consequences for the parties to this case as well as for those of another case, it may consider this earlier interpretation as relevant.[76]

It is to be noted that the Tribunal in *AES* unambiguously refers to the 'solution' adopted by another tribunal, and not to the decision of the tribunal as such. Previous decisions are here rightly considered in their usual quality as a material or subsidiary source of law.

The fact that tribunals often refer to other decisions as a source of inspiration can also be explained by the fact that tribunals very often turn to previous cases in order to clarify the meaning of certain treaty provisions in accordance with Article 31 of the VCLT.[77] As noted by the Tribunal in *Azurix*, '[t]he Tribunal is required to consider the ordinary meaning of the terms used in the BIT under Article 31 of the Vienna Convention. The findings of other tribunals, and in particular of the ICJ, should be helpful to the Tribunal in its interpretative task.'[78] In *Brandes* the Tribunal similarly noted, in relation to the interpretation of a BIT:

> The Tribunal does not consider that the decisions of other arbitral tribunals are decisive in resolving this matter. Furthermore, it is evident that those decisions are not binding on this Tribunal. However, this does not preclude this Tribunal from considering the substance of decisions rendered by other arbitral tribunals, and the arguments of the Parties based on those decisions, to the extent that those decisions may shed light on the issue to be decided at this stage of the proceeding.[79]

The Tribunal in *Romak* likewise noted that:

> Even presuming that relevant principles could be distilled from prior arbitral awards (which has proven difficult with respect of many of the decisions cited by the Parties in these proceedings), they cannot be deemed to constitute the expression of a general consensus of the international community,

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[76] *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, paras. 30–32.

[77] Schill, see above note 69, p. 1097.

[78] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 391. The inspiration sought by investment tribunals in previous decisions is not confined to ICSID Arbitration. In respect of the question whether investment tribunals can accept unsolicited *amicus curiae* brief tribunals have referred to NAFTA Arbitration conducted under the UNCITRAL Rules, the Iran-US Claims Tribunal and even the WTO Appellate Body. See on this: Eric De Brabandere, "NGOs and the "Public Interest": The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes", 12 *Chicago Journal of International Law* (2011), p. 85–113.

[79] *Brandes Inv. Partners, LP v. Venezuela*, ICSID Case No. ARB/08/3, Award, 2 August 2011, paras. 30–31.

> and much less a formal source of international law. Arbitral awards remain mere sources of inspiration, comfort or reference to arbitrators.[80]

Other examples are the Tribunal in *LETCO v. Liberia* which noted that '[t]hough the Tribunal is not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations'.[81] The subsidiary character of other tribunal decisions was also explicitly set out by the decision of the Tribunal in *RosInvestCo,* under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce: '[i]t is in any event clear that the decisions of other tribunals are not binding on this Tribunal. … However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case'.[82]

2.2.3. *Precedents and* 'Jurisprudence Constante'*: 'Harmonizing' International Investment Law*

The extensive references to precedents by investment tribunals have often been justified by the need to develop a *jurisprudence constante* in order to 'harmonize' international investment law. The absence of binding precedent in international investment law according to certain scholars would undermine the consistency of international investment law[83] and the need for legal predictability in international business transactions.[84] Other authors have argued that the current system of the *de facto* and unfettered use of precedent is not suitable for international investment arbitration, and have instead argued for an application of *jurisprudence constante*.[85] As will be discussed, some tribunals have gone even further by arguing that tribunals have a duty to contribute to the harmonization

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[80] *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, Award, 26 November 2009, para 170 (footnote omitted).

[81] *Liberian Eastern Timber Corporation* (*LETCO*) *v Republic of Liberia*, (ICSID Case No. ARB/83/2); Award 31 March 1986.

[82] *RosInvest Co UK Ltd v Russian Federation*, SCC Case No 075/2009, Final Award, 12 September 2010.

[83] I. Laird and R. Askew, "Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System", 7 *Journal of Appellate Practice and Process* (2005), p. 285.

[84] Frank Spoorenberg and Jorge E. Vinuales, "Conflicting Decisions in International Arbitration", 8 *The Law and Practice of International Courts and Tribunals* (2009), p. 92.

[85] Bjorklund, see above note 40, p. 2008), 270 et s. See however M-L. M. Rodgers, "Bilateral Investment Treaties and Arbitration: An Argument and a Proposal for the ICSID's Implementation of a System of Binding Precedent", 5 *Transnational Dispute Management* (2008), p. 5–6.

of international investment law. The idea is that the development of a *jurisprudence constante* would thus be necessary 'to foster consistency', especially in those areas of the law which are not yet well developed.[86] Although I pointed out earlier that any form of formal precedential value given to arbitral decisions runs counter to the very system of international investment arbitration and its *ad hoc* character, one can easily understand why certain coherence would be beneficial to the development of international investment law.[87] In the long run, references to previous awards can indeed enhance the consistency of the system of international investment law as such. This idea has been explicitly adopted by certain arbitral tribunals. In *Saipem v. Bangladesh* for example, the tribunal, although adhering to the principle that 'it is not bound by previous decisions',[88] noted that:

> … it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has 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.[89]

The same theory, with a specific reference to the need to enhance legal certainty, was adopted by the Annulment Committee in *MCI*:[90]

> the reporting of cases and the commentaries of scholars and practitioners are extensive and undeniably promote the consistent application of investment law. … the Committee considers it appropriate to take those decisions into consideration, because their reasoning and conclusions may provide guidance to the Committee in settling similar issues arising in these annulment proceedings and help to ensure consistency and legal certainty of the ICSID annulment mechanism, thereby contributing to ensuring trust in the ICSID dispute settlement system and predictability for governments and investors.

Likewise, the Tribunal in *Pey Casado v. Chile* noted:

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[86] Kaufmann-Kohler, see above note 11, p. 377.

[87] See generally, Gabrielle Kaufmann-Kohler, "Is Consistency a Myth?", in *Precedent in international arbitration,* ed. Yas Banifatemi (Huntington, Juris Publishing, 2008), p. 137 et s.

[88] *Saipem v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para. 90.

[89] *Ibid.*, para. 90.

[90] *M.C.I. Power Group L.C. And New Turbine Inc. v. Republic Of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment, 19 October 2009, para. 25.

> Avant de procéder à l'examen de ces conditions, le Tribunal tient à préciser qu'il n'est pas lié par les décisions et les sentences CIRDI rendues antérieurement. Le présent Tribunal estime toutefois qu'il se doit de prendre en considération les décisions des tribunaux internationaux et de s'inspirer, en l'absence de justification impérieuse en sens contraire, des solutions résultant d'une jurisprudence arbitrale établie. Tout en tenant compte des particularités du traité applicable et des faits de l'espèce, le Tribunal estime aussi devoir s'efforcer de contribuer au développement harmonieux du droit des investissements et, ce faisant, de satisfaire à l'attente légitime de la communauté des Etats et des investisseurs quant à la prévisibilité du droit en la matière.[91]

A similar consideration was mentioned by the Tribunal in *Burlington v. Ecuador,*[92] although interestingly there only two Arbitrators backed this statement, which at the same time proves the lack of unanimity on this issue: 'Arbitrator Stern does not analyse the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend'.[93]

Several tribunals thus have decided that previous case law will be followed unless there is a (valid) reason not to do so, following the same line of reasoning as the ICJ's jurisprudence mentioned above. It is interesting to note that while international investment tribunals have argued for the need to develop a *jurisprudence constante* or to adhere to a 'settled jurisprudence', they have at the same time confirmed the essentially subsidiary character of judicial and arbitral decisions, and thus the absence of binding precedent in international (investment) law. This however in fact results in treating 'settled jurisprudence' as the applicable law:[94] if it is considered that the existence of a *jurisprudence constante* results in the need for subsequent arbitral tribunals to follow that line of reasoning,[95] it

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[91] *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, (ICSID Case No. ARB/98/2), Award, 8 May 2008, para. 119.

[92] *Burlington Resources Inc. and others* v. *Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*PetroEcuador*), US/Ecuador BIT (ICSID), Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100.

[93] *Ibid.*, para. 100.

[94] Thomas Wälde, "Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication", in *Precedent in international arbitration,* ed. Yas Banifatemi (Huntington, Juris Publishing, 2008), p. 115.

[95] This has for example also been argued by Thomas Wälde: '[w]hile individual arbitral awards by themselves do not as yet constitute a binding precedent, a consistent line of reasoning developing a principle and a particular interpretation of specific treaty obligations should be respected' (*International Thunderbird Gaming Corporation v. Mexico,* UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, Separate Opinion of Thomas Wälde, para. 16 (footnotes omitted)).

de facto comes down to treating arbitral decisions as binding precedents and thus as a source of law. This runs counter to the absence in contemporary international law not only of any rule on binding precedent, any international legal obligation for courts or tribunals to develop a *jurisprudence constante*, but also of any international legal obligation for arbitral tribunals to decide alongside an already established *jurisprudence constante* in a certain area of the law[96] –which moreover begs the question of who has, in a decentralized legal system as investment law, the necessary authority to decide whether or not there is a *jurisprudence constante*.

There are two 'exceptions' to this, which we briefly addressed before. First, the consent of the parties to the dispute can define the law to be applied by the arbitral tribunal, and parties could thus in theory ask the arbitral tribunal to apply 'established case law' or *jurisprudence constante*. Secondly, when certain case-law would be the materialization of a rule of customary international law or a general principle of international law,[97] one could argue that a *jurisprudence constante* would have to be followed by an arbitral tribunal.[98] Then, however, and in accordance with the general rules on the sources of international law explained above, the binding character of a certain rule is not the consequence of its incorporation in or application by an arbitral tribunal, but of its customary or principled character.[99]

The development of a *jurisprudence constante* undoubtedly has certain value, because it does increase the consistency and contribute to the development of international investment law. The harmonization of international investment law can however be achieved by the current

[96] It is indeed important to distinguish between the notions of *jurisprudence constante* and binding precedent Cf. *supra* Section 1.2. See also Charles N. Brower, Michael Ottoolenghi and Peter Prows, "The Saga of CMS: *Res Judicata*, Precedent and the Legitimacy of ICSID Arbitration", in *International Investment Law for 21st Century: Essays in Honour of Christoph Schreuer*, ed. Ch. Binder, U. Kriebaum, A. Reinisch, S. Wittich (Oxford: Oxford University Press, 2009), p. 852.

[97] See in this respect the contributions by Jean d'Aspremont and Stephan Schill in this volume.

[98] On the latter see Spoorenberg and Vinuales, see above note 84, p. 104.

[99] It is indeed not the mandate of investment tribunals to create custom or general principles, but merely to identify and apply these. Therefore, I have doubts whether a *jurisprudence constante* can by itself be transformed into a rule of customary international law without the necessary state *opinio juris*, in particular in view of the fact that international arbitral tribunals essentially interpret and apply bilateral investment treaties. See however *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, Separate Opinion of Thomas Wälde, para. 16, arguing that 'if an authoritative jurisprudence evolves, it will acquire the character of customary international law and must be respected'.

unregulated use of precedent, without one having to establish a 'duty' for arbitral tribunals to adhere to established jurisprudence unless there is a reason not to, as mentioned by the tribunals in *Saipem* and *Pey Casado*. A more cautious approach seems to have been taken by the Tribunal in *ADC v. Hungary*, which for instance noted that 'cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States'.[100] This careful approach was equally followed by the Tribunal in *Gas Natural v. Argentina,* which noted that it was 'satisfied that its analyses and decisions, independently arrived at, are consistent with the conclusions of other arbitral tribunals faced with similar issues'.[101] The Tribunal previously had stated that

> [t]he Tribunal wishes to emphasize that it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.[102]

The idea of a *jurisprudence constante* is moreover at variance with the numerous conflicting awards in international investment arbitration. There is indeed today no *jurisprudence constante* in many areas of investment law.[103] On many occasions investment tribunals have departed from previous case law, resulting in a number of conflicting decisions.[104]

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[100] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No. ARB/03/16), Award, 2 October 2006, para. 293.

[101] *Gas Natural SDG. S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, para. 52.

[102] *Ibid.*, para. 36.

[103] Crawford, see above note 19, p. 102.

[104] See for example the conflicting conclusions of Arbitral Tribunals, in respect of identical facts: *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, 9 ICSID Rep 62 and *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award of 13 September 2001, 9 ICSID Rep 113 ; in respect of the 'umbrella clause': *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 and *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB 01/13, decision of 6 August 2003, (2003), and in respect of the application of the most-favoured nations clause to dispute settlement provisions in BITs: *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. CASE NO. ARB/97/7, decision on jurisdiction, 25 January 1999, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004,

2.2.4. *Precedents, Conflicting Decisions and the Similarity of Investment Treaty Language*

The reasons underlying conflicting awards are threefold. First, the factual circumstances of each dispute are very often dissimilar, and thus result in a different solution to the dispute. Tribunals have therefore often differentiated between the *facts* underlying a previous dispute and the facts underlying the dispute under consideration, in order to justify a 'departure' from previous cases. Thus, in *Sempra* the Tribunal noted

> The Tribunal has examined with particular attention the recent decision on liability and subsequent award on damages in the *LG&E* case as they have dealt with mostly identical questions concerning emergency and state of necessity. The decision on liability has been contrasted with the finding of the Tribunal in *CMS*. While two arbitrators sitting in the present case were also members of the tribunal in the *CMS* case the matter has been examined anew. This Tribunal must note, first, that in addition to differences in the legal interpretation of the Treaty in this context, an important question that distinguishes the *LG&E* decision on liability from *CMS*, and for that matter also from the recent award in *Enron*, lies in the assessment of the facts.[105]

Another example is the decision of the Tribunal in *LG&E* on the question whether 'fair market value' is the appropriate standard of compensation for the breach of the 'fair and equitable treatment' or 'full protection' standards, in the absence of an expropriation. The *LG&E* Tribunal departed from the decisions in *CMS* and *Azurix* on the basis of the differences in factual circumstances between the cases:

> The Tribunal notes, however, that when addressing the question of the absence of applicable treaty compensation standards for breaches other than expropriation, recent tribunals have opted to apply FMV. Yet, their decisions were grounded on the correspondence between the situation under analysis and expropriation. In *Azurix v. Argentina* the tribunal decided that "*compensation based on the fair market value of the Concession would be appropriate, particularly since the Province has taken it over*." The tribunal in *CMS v. Argentina* noted that "*While this standard* [FMV] *figures prominently*

Plama v. Bulgaria, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005 and *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on jurisdiction, 3 August 2006. See for an overview of the various conflicting decisions: Schreuer and Weiniger, see above note 30, p. 1191 et s. ; Kaufmann-Kohler, see above note 87, p. 137 et s. ; Kaufmann-Kohler, see above note 11, p. 369 et s and Spoorenberg and Vinuales, see above note 84, p. 91–113.

[105] *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Award of the Tribunal, September 28, 2007, para. 346 (footnotes omitted).

> *in respect to expropriation, it is not excluded that it might also be appropriate for breaches different from expropriation if their effect results in important long-term losses."* The Tribunal considers that the situation in *Azurix* is different from that of LG&E because the Licenses, the main asset of the Licensees, are still in force. With respect to *CMS*, the Tribunal is of the view that "*important long-term losses*" in the circumstances of this case are too uncertain and have not been adequately proven.[106]

Paradoxically however, one might consider that such differentiation enhances rather than weakens the concept of precedent, because the perceived need to differentiate between the factual circumstances of two cases shows to a certain extent that, in the event of similar factual circumstances, the final outcome of the award should be identical. This was for instance argued by the Tribunal in *RSM*, which we have already criticized above, since it noted that '[h]aving regard to the fact similarity between this and the *Helnan* case, the Tribunal considers the reasoning in the *Hellnan* [*sic*] Award is persuasive and applicable here'.[107]

Secondly, tribunals have departed from previous cases by emphasizing the differences in the law applicable to the dispute. The Tribunal in *Salini* for example noted in respect of the 'umbrella clause' that 'Article 2(4) of the BIT between Italy and Jordan is couched in terms that are appreciably different from the provisions applied in the arbitral decisions and awards cited by the Parties'.[108] The differentiation of cases in function of the *law applicable to each case* is very much the consequence of the fact that, on the one hand, international investment law is not governed by a single set of legal rules, be it customary international law[109] or a single multilateral treaty.[110] Since every dispute needs to be solved according to the specific rules applicable to that particular dispute –mainly the contract and the bilateral investment treaty[111]- it is indeed not surprising, in principle, to have divergent case law. It is true that many investment treaties contain similar provisions, but it is also true that many do not.[112] Some authors

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[106] *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 39 (footnotes omitted).

[107] *RSM Production Company and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, para. 7.1.14.

[108] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 126.

[109] See the contribution by Jean d'Aspremont to this volume.

[110] See the contribution by Erik Denters and Matthew Happold to this volume. See also Stephan Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2010).

[111] See the contributions by Tarcisio Gazzini and Patrick Dumberry to this volume.

[112] Crawford, see above note 19, p. 100–101 and Bjorklund, see above note 40, p. 270.

have thus argued that uniformity must not be a goal in and of itself.[113] This idea is grounded in the fact that international investment law today essentially consists of bilateral treaties and that the attempts to create a multilateral treaty have not yielded any results. As a consequence, there is no real need for uniformity in the interpretation of these diverse treaty provisions.[114] Moreover, as noted before, the fact that States have explicitly favoured the resolution of investment disputes through *ad hoc* arbitration instead of a hierarchical court structure implies that States –and foreign investors – may not necessarily have intended international investment law to be interpreted in a uniform way.[115] On the other hand, some authors have argued that the web of bilateral investment treaties has *in effect* created or resulted in a multilateral system of international investment which is moreover reinforced by the massive use of precedents by international investment tribunals.[116] This is of course more the consequence of the use of precedent than the reason explaining the use of precedent by investment tribunals.

The use of similar terminology within the various BIT's of course encourages tribunals to adopt similar interpretations of these notions. In addition, considering the vagueness of many substantive provisions of international investment law, investment tribunals are granted wide-ranging *de facto* 'law-making' power.[117] This has been the case from the very start of international arbitration under the ICSID Convention.[118] This also highlights a major difference between the use of precedent in international investment arbitration and international commercial arbitration. The latter indeed is generally considered to rely more on the contract negotiated between the parties, and thus a unique set of factual and legal circumstances mainly regulated by private international law and commercial law. In contrast, international investment law is governed more by relatively similar rules of international law.[119] The use in investment treaties of generic international legal terms thus inspires arbitral tribunals to take into consideration previous arbitral case law. But here again, it is

[113] Catherine Kessedjian, see above note 26, p. 58.
[114] *Ibid.*, p. 59–60.
[115] *Ibid.*, p. 61.
[116] See generally Schill, see above note 110 and Schill, see above note 69, p. 1094.
[117] Schill, see above note 69, p. 1092.
[118] See Commission, see above note 49, p. 144–145.
[119] Kaufmann-Kohler, see above note 11, p. 376. See also Catherine Kessedjian, see above note 26, p. 44–45 and Karl-Heinz Böckstiegel, "Introductory Remarks", in *Precedent in International Arbitration*, ed. Yas Banifatemi, (Huntington: Juris Publishing, 2008), p. 23.

unclear whether States parties to a certain investment treaty have intended a generic and recurring legal term to be interpreted in the same way as in other treaties. Investment tribunals have therefore delivered awards which give different meanings to the same notions.[120] As one author commented, 'the fair and equitable treatment standard … represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty's object and purpose in [the context of] particular disputes'.[121]

The situation is somewhat different in respect of the procedural rules applicable to investment tribunals. Indeed, when tribunals are confronted with jurisdictional issues, they may first of all relate to those rules of procedure enshrined in the ICSID Rules of Arbitration or the UNCITRAL Arbitrations Rules which are applicable to every investment dispute – provided of course that the parties have not departed from these by common agreement. Moreover, decisions on jurisdiction generally are less fact-sensitive than decisions on the merits.[122] Several tribunals have thus referred to 'ICSID jurisprudence' to establish certain procedural questions. The Arbitral Tribunal in *Tokio Tokeles* for instance noted in respect of the compulsory character of provisional measures that '[i]t is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures "recommended" by an ICSID tribunal are legally compulsory; they are in effect "ordered" by the tribunal, and the parties are under a legal obligation to comply with them'.[123] Another example relates to the provision introduced in the ICSID Convention in 2006 in relation to claims that are 'manifestly without legal merit'.[124] This new rule obviously left some questions open to discussion, such as the meaning of 'manifestly' and 'without legal merit'. In the *Global Trading Corp v. Ukraine* case,[125] the Tribunal, after noting that this was only the third occasion on which a decision in respect of a claim under Article 41 (5) and (6) of the Arbitration Rules had to be taken, commented that '[t]he Tribunal is thus particularly conscious of its responsibility to

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120 See Kaufmann-Kohler, see above note 87, p. 137.

121 Charles H.Brower, II, "Investor-State Disputes Under NAFTA: The Empire Strikes Back", 40 *Colum. J. Transnat'l L.* (2001), p. 56.

122 Paulsson, see above note 39, p. 700.

123 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18 (Lithuania/Ukraine BIT), Procedural Order No. 1, 1 July 2003, para. 4.

124 Article 41 (5) and (6) of the Arbitration Rules.

125 *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010.

contribute to shaping both an understanding of the Rule itself and of the procedure which ought to be followed under it',[126] and referred on many occasions to the previous two cases. When procedural rules are at stake, the provision of the ICSID Convention of Arbitration Rules to be interpreted and applied by a tribunal is identical in all cases, and the precedential value of early decisions elaborating on these rules will be more important and at the same time less problematic. However, here again, investment tribunals remain independent and can thus depart from previous case law.

Thirdly, tribunals have on several occasions explicitly departed from previous cases by simply arguing that previous case law is not binding upon the tribunal and that the tribunal's independent assessment of the facts and the applicable law is at variance with previously delivered decision on similar issues. It is in these particular cases that the need for consistency might arguably be the most necessary, since one could expect that similar answers would be given to similar legal questions.[127] However, here again one needs to accept that the choice of international arbitration as a dispute settlement method implies that tribunals independently assess the facts and the law of the case, without being bound by previous decisions. Each case deserves an independent new appraisal of the arguments and facts brought by the parties. Authors have rightly pointed out that divergent jurisprudence is as such a 'fact of life' inherent in many legal systems.[128] The independence of each arbitral tribunal and the absence of a formal rule on binding precedent by definition imply that arbitral tribunals can arrive at different conclusions, even though the legal and factual circumstances of the case may bear some resemblance to those in previous cases. The Arbitral Tribunal in *SGS v The Philippines* noted, in respect of the value of the decision of another Arbitral Tribunal in *SGS v Pakistan,* that:

> … the present Tribunal does not in all respects agree with the conclusions reached by the SGS v. Pakistan Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT …. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it

[126] *Ibid.*, para. 29. See generally: Eric De Brabandere, "The ICSID Rule on Early Dismissal of Unmeritorious Investment Treaty Claims: Preserving the Integrity of ICSID Arbitration", 9(1) *Manchester Journal of International Economic Law*, pp. 23–44.

[127] Kaufmann-Kohler, see above note 87, p. 144.

[128] Bjorklund, see above note 40, p. 274. See also Kaufmann-Kohler, see above note 87, p. 143.

> must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.[129]

Contradictory awards involving the interpretation of clauses in the same BIT thus underscore the idea that tribunals operate in an independent manner, and do not consider themselves to be bound by precedent.[130] In that respect, it is important to point out that arbitral tribunals when deciding cases in relation to issues which were the subject of controversial and conflicting awards in the past, and thus discussing these conflicting decisions, have explicitly confirmed that they are not bound by either of the positions adopted by these tribunals. The Tribunal in *Joy Mining* for instance, when discussing the ambit of the controversial question whether the 'umbrella clause' in effect transforms a contract claim into a treaty claim noted that '[t]here has been much argument regarding recent cases, notably SGS v. Pakistan and SGS v. Philippines. However, this Tribunal is not called upon to sit in judgment on the views of other tribunals. It is only called to decide this dispute in the light of its specific facts and the law, beginning with the jurisdictional objections'.[131]

2.2.5. *The Role of Annulment Committees*

The question remains whether within the ICSID arbitral system special attention should be given to the decisions of annulment committees. In other dispute settlement mechanisms, the question whether 'lower' courts and tribunals should defer to the decisions of the internal appellate or review mechanisms has been answered in different ways.[132] Within ICSID,

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[129] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Swiss Confederation/Republic of the Philippines BIT), Decision on Jurisdiction, 29 January 2004, para. 97 (footnotes omitted).

[130] See also the conflicting interpretations of the 'umbrella clause' in the Argentina-US BIT, in *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, *El Paso Energy International Company v. Argentine Republic*, (ICSID Case No. ARB/03/15) Decision on Jurisdiction, 27 April 2006 and *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13 (US/Argentina BIT), Decision on Preliminary Objections, 27 July 2006.

[131] *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11,-Award on Jurisdiction, 6 August 2004. para. 80.

[132] See Gilbert Guillaume, see above note 4, p. 12. Judge Guillaume points out that this has generally been accepted by the international criminal tribunals and within the European Court of Human Rights, but not in such systems as the World Trade Organisation. See also Mark A. Drumbl and Kenneth S. Gallant, "Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases", 3 *The Journal of Appellate Practice and Process* (2001), p. 589.

however, it is beyond doubt that the rules on annulment can enhance the degree of consistency of ICSID case law.[133] The presence within the ICSID system of the ability to file a claim to annul a decision is often considered as a factor which would potentially result in a *jurisprudence contstante*. As noted by the Tribunal in *AES*, '[f]rom a more general point of view, one can hardly deny that the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or jurisprudence constante, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features'.[134] This potential role for annulment committees has also been explored by the Tribunal in *SGS v. The Philippines*, quoted above, in which it argued that 'it must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or jurisprudence constante, to resolve the difficult legal questions discussed by the SGS v. Pakistan Tribunal and also in the present decision.'[135] The Committee in *MCI*[136] nevertheless clearly refuted the role for annulment committees established under the ICSID Convention to enhance the consistency of international investment law, instead referring such a role back to the Tribunals, interestingly and quite paradoxically citing the Tribunal's decision in *SGS v. The Philippines:*

> The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of "une jurisprudence constante", as the Tribunal in SGS v. Philippines declared.

There is no rule within the ICSID Convention which requires arbitral tribunals to defer to the decisions made by Annulment Committees. Moreover, the limited grounds[137] for claims in annulment limit the

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[133] See also Guillaume, see above note 4, p. 16.

[134] *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, paras. 30–33.

[135] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 97 (footnotes omitted).

[136] *M.C.I. Power Group L.C. And New Turbine Inc. v. Republic Of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment, 19 October 2009.

[137] Article 52 (1) of the ICSID Convention states that

possibility of creating a *jurisprudence constante* in many areas of substantive investment law.[138] At the same time, since the grounds for filing a claim in annulment relate to procedural and not substantive rules, annulment committees may nevertheless play a very important role in mainstreaming the jurisdictional and procedural rules.[139] However, here again, contradictions between several decisions of annulment committees show that a *jurisprudence constante* has not yet been developed in many areas of international investment law.[140]

One should also keep in mind that the main reason annulment procedures were included in the ICSID Convention is alien to the idea of creating a hierarchical system of 'appellate' control over the arbitral tribunals. Since the ICSID Convention explicitly waives the possibility for national courts to review decisions of ICSID arbitral tribunals,[141] States favoured the inclusion of an internal review system.[142] It was thus not the purpose of the annulment committees to fulfil a role in the harmonization or 'unification' of international investment law.

Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based.

[138] Kaufmann-Kohler, see above note 87, p. 146. See also *M.C.I. Power Group L.C. And New Turbine Inc. v. Republic Of Ecuador*, ICSID Case No. ARB/03/6, Decision on annulment, 19 October 2009, para. 23.

[139] Kaufmann-Kohler, see above note 11, p. 377.

[140] See for example the decisions in *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010 and *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (US/DRC BIT), -Decision on the Application for Annulment of the Award, 1 November 2006, which have adopted decisions which are not in line with previous Annulment Committee's case-law. See on the first case the contributions of: Tarcisio Gazzini, Wouter G. Werner and Ige F. Dekker, "Necessity Across International Law: An Introduction" and August Reinisch, "Necessity in Investment Arbitration" in *The Netherlands Yearbook of International Law* Volume 41, Part 1 2011 and on the second case: Emmanuel Gaillard, "A Black Year for ICSID", 134 *Journal du Droit International* (2007), p. 359.

[141] Article 54 (1) ICSID: 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'.

[142] Schreuer, see above note 30; Catherine Kessedjian, see above note 26, p. 58.

2.3. *Decisions of International Investment Tribunals with a 'Quasi-Legislative Character'*

On several occasions, international tribunals have extended their legal reasoning beyond what was really necessary for the resolution of the dispute. These statements clearly do not form part of the reasons advanced by the tribunal to arrive at the conclusion as an application of its duty to deliver a reasoned award. As such, international investment tribunals, just like international courts and tribunals, are required to settle the dispute between the parties which have given such mandate to the court or tribunal. As a consequence, and as already mentioned above, international arbitral tribunals do not have a mandate to act as 'legislators' in the sense that their reasoning should be limited to what is necessary to settle the dispute brought before them. In doing so, tribunals can and should identify, interpret, clarify and apply the law applicable to the dispute. In that process, tribunals can thus be required to elaborate on the existence or not of a certain rule of international law. However, as noted by the already cited decision of the Tribunal in *Romak,* '[i]t is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law'.[143] Similarly, and in line with our findings on the legal reasoning of arbitral tribunals generally, the NAFTA Tribunal in *Glamis* noted that:

> …, a tribunal should confine its decision to the issues presented by the dispute before it. … given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding. The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency; it believes that its case-specific mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.[144]

As noted by the *Glamis* Tribunal, some tribunals or annulment committees have extended the legal reasoning beyond the limit of what was really necessary to settle the dispute, through the use of *obiter dicta*. The Annulment Committee's argument in *CMS v. Argentina* for example

[143] *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, Award, 26 November 2009, para 171.

[144] *Glamis Gold, Ltd. v. United States,* NAFTA (UNCITRAL), Final Award, June 8, 2009, para. 8.

reveals a tendency to comment upon the law applicable to investment disputes generally, although it was not necessary for the annulment procedure *sensu stricto*. Although the Committee did not annul the award, based on the restrictive mandate given to annulment committees under the ICSID Convention, it nevertheless extensively commented on how the tribunal should actually have assessed the claim. The Committee, before noting that it 'cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal' and that 'there is accordingly no manifest excess of powers',[145] nevertheless proceeded with an extensive explanation of its own view on the relationship between 'necessity' as contained in Article 25 of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts and the 'necessity' clause contained in Article XI of the applicable BIT. As such, the Committee could have limited itself to noting that because the Tribunal gave an interpretation to Article XI of the BIT –even if erroneous – there was no 'manifest excess of powers'. It chose to expand on the relationship between the two provisions, although this was not strictly necessary for the fulfilment of its mandate. Such decisions undeniably contribute to the development of international investment law, but are not strictly speaking part of the mandate of either investment tribunals or annulment committees.

Another example is the decision of the Tribunal in *Maffezini v. Spain* in respect of the application of the most favoured nation clause to dispute settlement provisions contained in BITs.[146] In the paragraphs preceding the Tribunal's conclusion that the most favoured nation clause included in the Argentine-Spain BIT included dispute settlement provisions, the Arbitrators found it necessary to expand on the limits of the principle they had applied[147] and on 'a number of situations not present in the instant

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[145] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007, para. 136.

[146] ICSID Case No. ARB/97/7, Award on Jurisdiction, 25 January 2000.

[147] *Ibid.*, para. 62:

> 'Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.'

case'[148] to which the rule identified by the Tribunal would not apply. It is interesting to note that the Tribunal explicitly mentioned that such situations were hypothetical and not at issue in the present dispute. As a consequence, those *obiter dicta* were not necessary to solve the dispute before the Tribunal. Again, this is not problematic *in se*. However, the result of such far-reaching *obiter dicta* is that they can weaken the value of the decision as such, as shown by the following remark of the Tribunal in *Plama* in respect of the *obiter dicta* in *Maffezini:* '[t]he present Tribunal was puzzled as to what the origin of these "public policy considerations" is. When asked by the Tribunal at the Hearing, counsel for the Claimant responded: "They just made it up." [D2.134]. The present Tribunal does not wish to go that far in its appraisal of the Maffezini decision.'[149] Interestingly, the *Plama* Tribunal in its final award[150] equally discussed the claims on the merits, although it had previously concluded that the claimant's investment had not been made in good faith and thus could not be enforced by the tribunal.[151] The Tribunal nevertheless went on to discuss the merits of the case 'in acknowledgment of the Parties' efforts'.[152] The Tribunal noted that this discussion 'will lead to the conclusion that, even if Claimant would have had the benefit of the substantive protections of the ECT, Claimant's claims on the merits would have failed'.[153]

The decision by the Tribunal in *Alps Finance and Trade AG v. Slovak Republic*[154] is also of interest here. After having decided that the investor could not qualify as a protected investor under the Swiss-Slovak BIT, the Tribunal nevertheless engaged in a discussion of whether the investment by *Alps Finance* could qualify as an 'investment' in Slovakia and whether the claimant's claim could *prima facie* constitute a breach of the BIT. The Tribunal argued that considering the lengthy pleadings by the parties on these issues, it was apparently necessary to discuss these 'for sake of completeness'.[155] Such a determination was however not necessary since the tribunal had already declined jurisdiction.

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148 *Ibid.*, para. 63.

149 *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 221.

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

151 *Ibid.*, paras. 143–144.

152 *Ibid.*, para. 147.

153 *Ibid.*

154 *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL (Switzerland/Slovak Republic BIT). Award, 5 March 2011.

155 *Ibid.*, para. 228.

Finally, in the *Global Trading Corp v. Ukraine* case[156] mentioned above, the Tribunal, after noting that this was only the third occasion on which a decision in respect of a claim under Article 41 (5) and (6) of the Arbitration Rules had to be taken, proceeded with the endorsement of the decision of the *Brandes* Tribunal in its conclusion that the claim must relate to legal rather than factual issues,[157] although in the case under consideration 'there is no disagreement that the objection is based on an issue (or issues) of law and does not involve disputed issues of fact'.[158]

Overall, this tendency is not necessarily problematic. As such, the use of *obiter dicta* is not contrary to the mandate given by the parties, and it does not constitute an 'excess of powers', since the tribunal neither refuses to exercise its powers, nor does it exercise its powers beyond the mandate given by the parties, in the sense that the tribunal does not address legal issues between the parties which have not been put before the tribunal by the parties. Nevertheless, it shows that in investment arbitration certain arbitral tribunals have an inclination towards considering it necessary to contribute to the development of international investment law by elaborating on rules of investment law beyond what is actually necessary to settle the dispute. Such practice clearly is aimed at directing future international investment tribunals on how to deal with a certain question. However, considering the absence of binding precedent in international arbitration, future tribunals are not bound by these *dicta*, as discussed above. Moreover, if one takes the rule on *stare decisis* as it is used in common law jurisdictions, this principle only extends to the *ratio decidendi* and not to *obiter dicta*.[159] In addition, such considerations do not necessarily achieve their objective, namely to develop and clarify international investment law, since practice shows that subsequent tribunals and annulment committees do not necessarily follow the jurisprudence of previous annulment committees or tribunals.

3. *The Impact of Decisions on the Practice, Rights and Obligations of States*

The whole question, as rightly put by Jan Paulsson, is not really whether arbitral decisions are norms of international investment law, but rather

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[156] *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010.

[157] *Ibid.*, para. 30.

[158] *Ibid.*, para. 31.

[159] Paulsson, see above note 39, p. 701.

whether and how they contribute to the development of international investment law.[160] It is indeed clear from both theory and practice that in and of themselves, arbitral decisions are not a source of rights and obligations. At the same time, their impact on the rights and obligations of States is beyond doubt. I will reflect here briefly on the consequences that certain tribunal decisions have had on the development of international investment law, and the mechanism used by States to 'rectify' certain arbitral decisions, very often through the use of 'interpretative statements'.

First, States have on several occasions reacted to investment arbitration jurisprudence by altering treaty provisions in existing or post-decision investment treaties or in the procedural rules. In respect of *amicus curiae* briefs, for example, after the ICSID Tribunal Decision in *Suez/Vivendi*[161] the ICSID Rules of Arbitration were amended in 2006 now explicitly to include, under certain conditions, the capacity for a tribunal to allow a non-disputing party which has a significant interest in the case to file a written submission.[162] These developments have prompted certain States to include the possibility for NGOs to submit *amicus curiae* briefs, and the limitations thereto, also in their bilateral investment treaties.[163] In the United States-Uruguay BIT for example, the parties have agreed that the arbitral tribunal has the authority to accept and consider *amicus curiae* submissions from 'a person or entity that is not a disputing party'.[164]

Another example is the result of the *Maffezini* case in relation to the application of the most favoured nation clause to dispute settlement provisions contained in BITs. Several investment treaties have been modified in order to reflect the award of the Tribunal in that case, and several dispute settlement provisions in newly concluded BITs have explicitly been drafted so as to reflect ICSID case law on this issue. On occasion, States

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[160] *Ibid.*, p. 710.

[161] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19), Order in Response to a Petition for Participation as Amicus Curiae (19 May 2005).

[162] Art. 37 (2) ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) <http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf> accessed 14 April 2010. See generally De Brabandere, see above note 78, p. 85–113.

[163] See for an overview K Tienhaara, "Third Party Participation in Investment-Environment Disputes: Recent Developments", 16 *Review of European Community & International Environmental Law* (2007), p. 232–233.

[164] Art. 28, 3, Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (4 November 2005), available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/Uruguay_BIT.asp (accessed 2 April 2011). See also Art. 28 of the US Model BIT, available at http://www.state.gov/documents/organization/117601.pdf (accessed 21 November 2011).

have included 'anti-Maffezini' clauses in their BITs. The 2008 Canada-Peru BIT for example provides that '[f]or greater clarity, treatment in respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments referred to in paragraphs 1 and 2 of Article 804 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international treaties or trade agreements.'[165] This has also been done in respect of allegedly overly broad interpretations of the 'fair and equitable treatment' clause or the concept of 'indirect expropriation'.[166]

A second way in which the impact of arbitral decision on the rights and obligations of States can be noticed is the issue of interpretative statements by States.[167] Although States are generally free to issue interpretative statements in respect of a treaty to which they are party, the 2004 Model US BIT provides in its article 30 (3) that '[a] joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision'.[168] Since the tribunal's task essentially consists of interpreting the applicable treaties in light of the intent of the parties and any 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions',[169] interpretative statements issued by the states parties to the BIT should be taken into consideration by the tribunal.

The Argentine Republic and Panama, for example, after the *Siemens* decision on jurisdiction, 'exchanged diplomatic notes with an "interpretative declaration" of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention'.[170] In certain cases, institutionalized mechanisms exist for the issue of interpretative statements,

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[165] Canada – Peru Free Trade Agreement, 2008, Section C – Definitions, Annex 804.1, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-peru-perou.aspx (accessed 10 June 2011).

[166] Schill, see above note 69, p. 1108.

[167] See for an extensive discussion the dual role of states in investment treaty interpretation: Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States", 104 *American Journal of International Law* (2010).

[168] United States Model Bilateral Investment Treaty, 2004, available at http://www.state.gov/documents/organization/117601.pdf (accessed 10 June 2011).

[169] Article 31 (3) (a) of the Vienna Convention on the Law of Treaties.

[170] *National Grid PLC v. Argentina*, Decision on Jurisdiction, UNCITRAL, 20 June 2006, para. 85.

as is the case for the NAFTA. In respect of *amicus curiae* briefs, following the ground-breaking *Methanex* decision[171] in this area, the NAFTA Free Trade Commission issued a statement confirming that no provision in the NAFTA limits the discretionary authority of arbitral tribunals to accept submissions of non-disputing parties.[172] This practice, although not very common, has posed problems when the statement is issued in the course of the proceedings. Indeed, on a few occasions, this was done in order to influence the tribunal's decision on a case pending before it.[173] A binding interpretation of the NAFTA was for example adopted by the Free Trade Commission in respect of the scope and content of the fair and equitable treatment and the full protection and security standards in the NAFTA.[174] The Tribunal in *Pope & Talbot*[175] viewed the issue of the interpretative statement more as an amendment to the NAFTA that an interpretation, mainly aimed at influencing the tribunal's decision in that case. In *ADF Group* on the other hand, the Tribunal noted in respect of the interpretive statement that 'we have the Parties themselves – all the Parties – speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.'[176]

Finally, several States have withdrawn from the ICSID or have suspended BITs with other States because of their dissatisfaction with the general jurisprudence of investment tribunals.[177]

Although States thus occasionally decide to react to arbitral decisions,[178] this is not tantamount to considering that the decisions are as

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[171] *Methanex Corporation v. the United States of America*, Decision of the Tribunal on Petitions form Third Persons to Intervene as 'Amici Curiae', UNCITRAL, 15 January 2001, para. 32.

[172] Statement of the Free Trade Commission on non-disputing party participation, para. A. 1, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Nondisputing-en.pdf (accessed 7 April 2010).

[173] See Schreuer and Weiniger, see above note 30, p. 1189.

[174] Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

[175] *Pope & Talbot v. Canada*, Interim Award, on Damages, UNCITRAL, 31 May 2002.

[176] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, paraz. 177.

[177] See generally, Christopher Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration", in *The Backlash against Investment Arbitration: Perceptions and Reality*, ed. Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin, (The Hague: Kluwer Law International, 2010), p. 353 et s.

[178] It is also interesting to note that after the decision of the Tribunal in *SGS v. Pakistan*, the Swiss Government sent a letter to the ICSID Deputy Secretary- criticizing the Tribunal's interpretation of the intent of the Swiss Government in respect of the effect of the 'umbrella

such a source of law of the parties to the treaty. However, from a practical perspective, if a certain case law has developed in a uniform sense, for example in relation to the interpretation of a procedural requirement, this *de facto* can amount to the creation of a binding norm for States. This is not necessarily so because of the arbitral decision *sensu stricto*, but rather because the meaning given to a certain norm is generally considered to be the 'customary' interpretation of that norm. If States disagree with such case law, they can and have to react by one of the means discussed above.

Conclusion

In applying the general principles of the sources of law, the answer to the question whether arbitral decisions are a source of law is relatively unequivocal, at least from a theoretical point of view: judicial and arbitral decisions are not formally a source of obligations for states. No precedential value is attached to judicial and arbitral decisions in international law and case law in the field of international investment law has unambiguously confirmed the absence of any form of *stare decisis* in international investment law. The massive use of precedents by investment tribunals in their reasoning is not the equivalent of the development of a rule of binding precedent. There is indeed a very important distinction between the *de facto* use of precedent, the need to adhere to and develop a *jurisprudence constante,* and the 'obligation' to follow precedents. As long as arbitral tribunals treat and apply previous decisions as mere subsidiary or material sources of law, as is the case when previous decisions are used as a source of inspiration or to add authority to a certain reasoning developed by the tribunal, there is no problem in the use of precedents. The use of precedents in awards cannot be the result of the 'value' attached to these precedents – even if they should be considered as part of a *jurisprudence constante* – but rather the result of the independent reasoning of the arbitral tribunal. Arbitral tribunals are indeed not mandated to engage in law-making, especially since they are established to decide a specific dispute between two parties. The absence of *stare decisis* and the absence of an obligation to decide along an established *jurisprudence constante* equally have the advantage of ensuring that every case is assessed anew based on the specific factual and legal circumstances of the dispute.

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clause'. See Christoph Schreuer, "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", 3 *Transnational Dispute Management* (2006), p. 16.

I argued that crossing the line between treating precedents as a material source and as a formal source, when tribunals for example rely on precedents without other reasoning or when tribunals are required to follow a developed *jurisprudence constante*, is hazardous since it runs counter to the very foundational principles underlying investment arbitration, especially the *ad hoc* and horizontal character of investment tribunals.

I have argued that precedents are *in fact* an important subsidiary source of international investment law. The practice of arbitral tribunals to rely extensively on previous decisions is in and of itself not problematic, and even a welcome practice since it furthers the development of the law relating to foreign investment. Without doubt, a settled jurisprudence or *jurisprudence constante* is a good way forward to achieve both harmonization and development of the law.[179] But the assumed 'need' for such a development, the obligation for tribunals to contribute to the creation of a *jurisprudence constante*, and the obligation to adhere to an established *jurisprudence constante* cannot be founded in legal texts such as the ICSID Convention or NAFTA. Indeed both the ICSID Convention and NAFTA clearly state that the decision is binding (only) upon the parties, and implicitly or explicitly exclude any formal precedential value to arbitral decisions. In that sense, the rules applicable to investment arbitration confirm the rules of general international law. I thus questioned whether it is really necessary to refer to notions such as *jurisprudence constante* in order to achieve a harmonization of investment law. There are in addition various conflicting decisions, and several tribunals have departed from rules previously 'established' by other arbitral tribunals, even in respect of similar issues. Various questions of international investment law have not yet been finally settled, and there is thus no *jurisprudence constante* in many respects. This is inherent in the use of international arbitration as a dispute settlement tool.

I have equally argued that the differentiation in the applicable law and facts of course implies that precedents simply are not always relevant. The *ad hoc* character of investment arbitration and the choice of arbitration rather than a permanent court or tribunal to settle investment disputes imply that every tribunal even more functions in an independent way in assessing the facts of and the law applicable to the dispute. It is obvious that in view of the lack of a single set of legal norms applicable in investor–state relations, which are essentially governed by BITs, the

[179] Bjorklund, see above note 40, p. 273.

development of a *jurisprudence constante* in all issues covered by international investment law is an illusion. This is particularly true for substantive questions. In respect of procedural questions, a certain coherence is easier to achieve because the provisions to be interpreted and applied are identical in all cases, and the precedential value of early decisions elaborating on these rules is important.

Finally, from a practical perspective, if certain case law has developed in a uniform sense, for example in relation to the interpretation of a procedural requirement, this *de facto* can amount to the creation of a binding norm for states. States however always have the opportunity to react to certain case law, and have done so in the past, for instance by issuing interpretative statements or by specifying and altering treaty provisions. The numerous contradictory and conflicting decisions mentioned above leave the States with the main responsibility in clarifying, if they wish to do so, the scope and application of certain provisions in their investment treaties. This too contributes to the development and consistency of international investment law.

CHAPTER NINE

NON-BINDING DOCUMENTS AND LITERATURE

Tony Cole

Contents

Introduction

Law is not advice.[1] It can certainly play important roles in guiding behaviour or establishing standards, and it need not be generated in particular ways or by certain bodies. However, while the formal structures within which law is created and implemented can vary significantly from one

[1] Thomas Hobbes, *On the Citizen*, ed. Richard Tuck & Michael Silverthorne (Cambridge: Cambridge University Press, 1998), 154 ("[S]ince laws are obeyed not for their content, but because of the will of the instructor, law is not advice but command.").

legal system to another, one essential characteristic that all law must possess is that it is binding on those to whom it is directed.[2]

This, at least, is the conception of law that has long been dominant in international law, and that is reflected in the classical statement of the sources of international law, Article 38 of the Statute of the International Court of Justice ('ICJ').[3] Article 38 only identifies three types of instrument that can legitimately serve as sources of international law, and all three unquestionably generate norms that are intended to have binding force.[4] As a result, while an instrument that is not binding can be useful as a source of information on the content of international law, it cannot be a source of that law.[5] It cannot, that is, create binding legal obligations or alter any legal obligations already in effect.

While this conception of the legitimate sources of international law remains dominant, it has been increasingly challenged in recent years,

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[2] *See, e.g.* Mark Greenberg, "The Standard Picture and Its Discontents", in *Oxford Studies in Philosophy of Law* vol. 1, ed. Leslie Green & Brian Leiter (New York: Oxford University Press, 2011), p. 85 ("An intuitive way of putting the point is that the law is supposed to be binding, where that means generally binding all things considered – not just legally binding (which the law trivially is)."); Malgosia A. Fitzmaurice, *International Protection of the Environment* (Den Haag: Kluwer, 2002), p. 125 ("Some outstanding authors reject the concept of 'soft law' altogether and claim that either law is binding or it is not law at all."); Jan-R. Sieckmann, "Basic Rights in the Model of Principles", in *Challenges to Law at the End of the 20th Century*, ed. Rex Martin & Gerhard Sprenger (1997), p. 32 ("Legal systems claim the validity and bindingness of their norms for the norm addressees.").

[3] Article 38 does not itself refer to the "sources" of international law, listing instead only those instruments that the ICJ "shall apply" in determining the law. It is, therefore, only directly binding on the ICJ itself. However, it has come to be recognised as the authoritative, although not exhaustive, guide to the sources of international law. *See, e.g.* V.D. Degan, *Sources of International Law* (The Hague: Martinus Nijhoff Publishers, 1997), p. 5 ("It can therefore be presumed that Article 38 determines sources of that international law which is generally accepted by States."); Gennadii M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff Publishers. 1993), p. 36 (referring to "the widespread recognition that sources of law listed in Art. 38 of the I.C.J. Statute are at the same time sources of international law in general").

[4] *See generally* Malcolm Shaw, *International Law* 6th ed. (Cambrigde: Cambridge University Press, 2008), chapter 3.

[5] It should be emphasised that Article 38 is no longer considered to be a complete statement of the sources of international law, but only of the most important sources. *See, e.g.* Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford: Oxford University Press, 2011), p. 71 (noting that Article 38 "has never purported to exhaust the list of sources of international law"); Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2003), p. 89 (noting as sources of law in addition to those listed in Article 38, "unilateral acts of states" and "acts of international organisations"). Nonetheless, this expansion has not altered the connection Article 38 embodies between law and bindingness, as under the classical conception of international law these additional "sources" also only generate law only in so far as they are binding.

with even the International Court of Justice allowing non-binding instruments to influence its decisions.[6] The arguments in favour of acknowledging the relevance of non-binding instruments to international law are varied, but socio-legal scholarship in particular has been influential, with writers arguing that the conception of law embodied in Article 38 is unrealistically narrow.[7] In addition, some writers have argued that this conception is particularly problematic in the context of international law, as it results in the interests and attitudes of developed States being privileged over those of developing States.[8]

This chapter will not directly address this debate, but will instead take as given that the classical statement of the sources of international law, as found in Article 38, is indeed correct. It will argue, though, that in the context of international investment law it is inappropriate to concentrate solely on correctly identifying and understanding the sources of international law. Such an approach ignores an equally important question, namely the nature of an international investment arbitrator's role.[9]

As a substantive area of law, international investment law originally developed from public international law, and so the content of public international law is unquestionably relevant to any attempt to determine the content of international investment law.[10] Nonetheless, while at a substantive level the two fields of law are clearly closely tied, they have come to be implemented through fundamentally different mechanisms. Public international law is dominated by a permanent court, populated by judges with long-term appointments, while international investment law is dominated by arbitration tribunals, composed of individuals selected by the parties to the dispute being heard, and with no ongoing role beyond that

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[6] *See, e.g. Gabčíkovo-Nagymaros Project* (*Hungary/Slovakia*), Judgment, I.C.J. Reports 1997, p. 7, paras. 49–58.

[7] *See, e.g.* Christine M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 *Int. & Comp. L.Q.* 850 (1989); Godefridus J.H. Hoof, *Rethinking the Sources of International Law* (Deventer: Kluwer, 1983), p. 188.

[8] W. Michael Reisman, "A Hard Look at Soft Law", 82 *Am. Soc'y Int'l L. Proc.* (1988), p. 374 (noting that "scholars in many weak and small states view some very 'hard' law… as naked power").

[9] In this respect it relies upon a similar approach to the analysis of the work of IIA tribunals as that advocated in W. Michael Reisman, "Soft Law and Law Jobs", 2 *J. Int'l Disp. Settlement* (2011), p. 25. However, while Reisman's article and this chapter are both based upon a recognition of the importance of "law jobs", the analysis and conclusions of the two pieces differ greatly.

[10] A survey of the historical development of international investment law is available at Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn: Kluwer Law International, 2009), chapter 1.

single appointment. International investment arbitration ('IIA') arbitrators, that is, are simply performing a different institutional role than International Court of Justice judges, for whom Article 38 was developed.

Section 2 of this chapter offers a structural analysis of international investment arbitration, arguing that the manner in which IIA tribunals are appointed and operate undercuts any argument that they are bound by the constraints of Article 38. Consequently, the rules that should guide IIA tribunals in their use of non-binding documents and literature cannot be derived from Article 38, but must instead be determined through an analysis specific to international investment arbitration.

The remainder of the chapter is divided into two sections, corresponding to what are argued to be the two different types of non-binding instrument. Section 3 addresses "authoritative instruments", which are those relied upon by IIA tribunals as authoritative guides to the content of international investment law. It is argued that although IIA tribunals can legitimately rely upon soft law instruments as a means of understanding the obligations existing between two or more States, the highly contested nature of international investment law precludes any other instrument serving as an authoritative guide to the content of international investment law.

Section 4 then addresses "persuasive instruments", which are those relied upon by tribunals as sources of arguments regarding the content or interpretation of international investment law. Although such writings are already used significantly more often by IIA tribunals than is standard in public international law, it is argued that they are nonetheless used less often than is required by the structure of international investment arbitration.

1. *The Use of Non-Binding Instruments in International Investment Arbitration*

The classical approach to the sources of international law, as enunciated in Article 38 of the Statute of the International Court of Justice, is deliberately restrictive in terms of the sources on which tribunals can rely in determining the content of international law. This was, after all, a system devised by States, for the resolution of State-State disputes. There was, then, little support for any approach to the sources of international law

that would detract from the high level of control States had always possessed over the content of that law.[11]

As a result, Article 38 explicitly recognises as sources of international law only three things, each of which incorporates a requirement that States have acknowledged its contents to be legally binding.[12] By contrast, while some recognition of the relevance of non-binding instruments was ultimately included in Article 38, it was very limited, and extended only to "the teachings of the most highly qualified publicists".[13] Moreover, even these "teachings" were acknowledged to be relevant only as a "subsidiary means" for determining which rules of international law existed, not as actual sources of international law. That is, under Article 38, non-binding instruments cannot themselves give rise to international law, but can provide confirmation that a rule of law has developed by means of one of the three acknowledged binding sources.[14]

While criticism has been made of Article 38's restrictive approach to the sources of international law, particularly in recent years, it nonetheless remains the accepted statement of the sources of international law, not only for the ICJ itself, but for international tribunals generally.[15]

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[11] Hugh Thirlway, "The Sources of International Law", in *International Law*, 2nd. ed, ed. Malcolm D. Evans (Oxford: Oxford University Press, 2006), p. 18 ("The Permanent Court was to be the first standing international tribunal to decide disputes between States; if States were to be willing to accept it, one of the matters that had to be defined in advance was the nature of the law that the Court would apply.") (referring to Article 38 of the Statute of the Permanent Court of International Justice, which subsequently became Article 38 of the Statute of the International Court of Justice).

[12] That is, "international treaties", "international custom" and "the general principles of law recognized by civilized nations".

[13] Article 38 does also recognise "judicial decisions" as non-binding "means for the determination of rules of law", but as case law is addressed in a separate chapter of this book, it will not be addressed here.

[14] Richard J. Gardiner, *International Law* (London: Pearson Education Limited, (2003), p. 27 ("[T]he task of identifying propositions of general international law…is not as open-ended a process as it may sound; but it does require a willingness to undertake what may sometimes amount to considerable academic research. Sub-paragraph (d) recognises that where such work has already been done it may be of value to the Court.")

[15] Thirlway, see above note 11, p. 139 ("The definition given in Article 38 of the Statute of the Court has proved to embody a workable structure of recognized law-making processes, and despite the criticisms made of it, and the multiplicity of new approaches to international law, that definition seems likely to continue to guide the international community and the international judge.") (citations omitted).

What is important for the present chapter, however, is not the applicability of Article 38 to public international law tribunals generally, but the potential impact of its application in the international investment law context. After all, if IIA tribunals are bound by Article 38, then they cannot legitimately rely on any non-binding instrument other than "the teachings of the most highly qualified publicists" when determining international law. Other non-binding instruments might be relevant as context to the interpretation of an applicable treaty, but they can play no role in the tribunal's efforts to determine the content of international investment law.

Unlike most public international law treaties, however, which detail with some precision the rights and obligations of the States party to the treaty, international investment treaties are characterised by their inclusion of generalised references to international norms. Thus, for example, rather than detailing precisely which actions States party to a treaty may and may not take with respect to investors, investment treaties will commonly include a simple reference to an obligation to provide "fair and equitable treatment", thereby incorporating an international standard in place of an explicit agreement between the parties.[16]

If, however, IIA tribunals are understood to be bound by Article 38, then the parties' inclusion of an international law norm into their treaty has major consequences for the instruments upon which the tribunal may rely in interpreting the treaty. That is, if "fair and equitable treatment" were merely a treaty term then the tribunal could legitimately rely upon any instrument that would clarify the parties' understanding of the term. However, since "fair and equitable treatment" is an international law standard, Article 38 requires that the only non-binding instruments that can be used in its interpretation are "the teachings of the most highly qualified publicists".

The combination, then, of the inclusion of international legal standards in investment treaties and the application of Article 38 to IIA tribunals, stands to impact significantly upon the work of IIA tribunals. It will restrict their use of non-binding instruments not only with respect to the determination of the content of international law, but even with respect to their interpretation of certain treaty provisions.

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[16] On the "fair and equitable treatment standard, see generally Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: Oxford University Press, 2008); Stephen Fietta, "Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors' 'Expectations' in International Investment Arbitration", 23 *J. Int'l Arb.* (2006), p. 375; Rudolf Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", 39 *Int'l Law* 87 (2005).

The remainder of this section of the chapter will, however, attempt to demonstrate that any concerns of this type are unfounded. It will be argued that even if it is accepted that Article 38 is binding for all international tribunals determining the content of international law, Article 38 is nonetheless not binding on IIA tribunals. IIA tribunals, that is, are not part of the judicial structure of international law, and consequently are simply not engaged in the same enterprise as those tribunals bound by Article 38.

This is perhaps a counterintuitive claim, given the role that IIA tribunals unquestionably have in enforcing and interpreting international investment law. However, a close examination of the structure of international investment dispute adjudication, and specifically of the role of IIA arbitrators within that structure, makes clear that an IIA arbitrator simply cannot be understood as a judge, objectively interpreting and applying law that is independent of the parties. Instead, she is best understood as involved in the resolution of a dispute, even though the nature of the dispute requires that international law be used as a reference point.

Two primary structural differences are essential to recognising the important difference between ICJ judges and IIA arbitrators with respect to the instruments upon which they can legitimately rely. The first relates to the differing structures of dispute resolution used in public international law and international investment law, while the second relates to the different ways in which ICJ judges and IIA arbitrators are appointed to their posts.

Traditionally, of course, disputes in international investment law and public international law were resolved through precisely the same mechanisms. Some would be resolved through negotiation, some through resort to domestic courts, and a small minority would be addressed through arbitration.[17] An important change occurred at the beginning of the 20th Century, however, with the institutionalisation of public international law as a result of the creation of the Permanent Court of International Justice ('PCIJ'), and then the International Court of Justice.[18] While neither court was ever the exclusive forum for the resolution of public international law disputes, the prominence of both courts and the high degree of international consensus that lay behind their creation, meant that both the PCIJ

[17] Newcombe and Paradell, *supra* n.10, at 5–8.

[18] On the historical background to the development of these two courts, see Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003), p. 6–22.

and the ICJ assumed a position as final arbiter on the content of international law.[19]

In the current structure of public international law, that is, the ICJ serves as a norm-adopting institution, fixing the substance of the rules of public international law through its decisions.[20] Other tribunals are not formally bound by the decisions of the ICJ, but the authority of the ICJ as a permanent court created by States to resolve disputes over the content of the international law that they themselves have created, ensures the deference of other tribunals to its decisions. If the ICJ says that a certain rule of international law exists, then it exists, and it exists because the ICJ says that it does.[21]

International investment law, however, has taken a fundamentally different path. The resolution of international investment law disputes remained closely entwined with the resolution of public international law disputes for most of the 20th Century.[22] However, this changed fundamentally in the 1990s with the rise of bilateral investment treaty arbitration, and today international investment arbitration is unquestionably the central dispute resolution mechanism for international investment disputes.[23] Consequently, while the ICJ has become the authoritative centre

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[19] *See generally* J.G. Merrills, *International Dispute Settlement*, 5th ed. (Cambridge: Cambrigde University Press, 2011) (discussing the broad range of contemporary international dispute mechanisms).

[20] A "norm-adopting" legal tribunal is one with the authority to develop and pronounce legal norms that are then followed by other tribunals within the same legal structure, either due to formal obligation or merely because of the authority of the norm-adopting tribunal.

[21] *See, e.g.* Oscar Schachter, *International Law and Theory in Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991), p. 39 (noting that "international lawyers have a strong tendency to welcome the decisions of judicial tribunals, especially those of the International Court of Justice, as authoritative law, even as the touchstone of law"). *See also* Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Heidelberg: Springer, 2006) p. 6 (noting "the authority of [the ICJ's] opinions as authoritative statements of law"); M.N.S. Sellers, "The Authority of the International Court of Justice", 8 *Int'l Legal Theory* (2002), p. 41 (noting that "[r]ecently some lawyers and statesmen have begun to cite judgments of the International Court of Justice as if they were decisive evidence of the content of international law."); Renata Szafarz, "Introduction", in *The Compulsory Jurisdiction of the International Court of Justice ix*, ed. Renata Szafarz (Dordrecht: Martinus Nijhoff Publishers, 1993) (referring to the ICJ as "the most authoritative organ to voice opinions on matters of international law").

[22] Surya Subedi, *International Investment Law* (Oregon: Hart Publishing, 2008), p. 81 (noting that "the idea of granting access to foreign investors to treaty-based bodies operating under international law is a novelty and a post-Second World War innovation").

[23] Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Alphen aan den Rijn: Kluwer Law Internationa, 2011), p. xi-xii ("ICSID arbitration was little used for the first 20 years of its existence…The situation changed dramatically beginning in the

of public international law, to the extent that such a role exists in international investment law it is played by a network of IIA tribunals, which routinely cite to one another's decisions when attempting to establish the content of international investment law.

While the ICJ and IIA tribunals have parallel central roles in their respect fields, however, they operate in importantly different institutional contexts. Neither has the capacity to deliver interpretations of the law that are binding on other tribunals. However, the ICJ is an ongoing institution established through the almost-universal agreement of States,[24] while IIA tribunals are temporary bodies established to hear a single case and constituted solely by the parties to the dispute.[25] IIA tribunals, that is, simply lack the institutional context that gives the ICJ its status as an authoritative interpreter of the law.

This, though, is not the only important structural difference between ICJ judges and IIA arbitrators. The ICJ's ability to act as a norm-adopting authority for public international law is importantly tied to the fact that ICJ judges hold long-term appointments, and are selected through a process that operates independently of any individual case.[26] This does not mean that no political considerations at all enter into the ICJ appointment process, but only that such influences will reflect the generalised desire of certain States to influence the direction of public international law, rather than their desire to win a particular case.

By contrast, IIA arbitrators are appointed to tribunals for a single case, are appointed on the nomination of a single party to the dispute, and are selected after the nominating party is aware of the relevant facts of the case and the likely legal issues that the tribunal must decide.[27] Unsurprisingly, the IIA appointment process is a highly contentious one, with parties often approaching it as a means of gaining advantage in the

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mid-1990s as a consequence of the proliferation of bilateral treaties for the promotion and protection of investment").

[24] As of December 12, 2011, 192 States were entitled to appear before the ICJ. http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a

[25] In investor-State arbitration, of course, only one of these parties will be a State. However, ultimately two States are involved in the dispute, as the investor must operate within the legal framework established by the State-State agreement(s) under which it is bringing its claim.

[26] *See generally* Ruth Mackenzie, et al., *Selecting International Judges* (Oxford: Oxford University Press, 2010), p. 187–191.

[27] *See, e.g.* Reed, Paulsson & Blackaby, see above note 23, p. 130–33 (discussing the appointment procedure for ICSID arbitrators).

upcoming proceedings, rather than as a means of ensuring the best understanding of the applicable law.[28]

This fundamental difference between the means of appointment of ICJ judges and IIA arbitrators further undermines any claim IIA tribunals might otherwise have to being able to serve as authoritative norm-adopting interpreters of international investment law. IIA tribunals unquestionably have the authority to decide the dispute before them, and in doing so they must interpret and apply the applicable law.[29] However, an IIA tribunal's decision on the content of this law ultimately just represents the opinion of individuals appointed to resolve a specific dispute. It does not create a norm to be followed by subsequent tribunals.

It should be emphasised, though, that the inability of IIA awards to create binding norms is not necessarily a weakness of international investment arbitration. Not every situation, after all, is ideally addressed through an objective and universally binding interpretation of the law. The structural differences between the roles of IIA arbitrator and ICJ judge, then, merely indicate that a difference exists, not that one is an unsuccessful version of the other.

Indeed, any portrayal of IIA arbitrators as unsuccessful judges would make incomprehensible the continuing endorsement of international investment arbitration by States. States agreeing to international investment arbitration, that is, simply do not do so with the expectation that arbitrators will reach their decisions in the same way as would ICJ judges. This is just not the way that States have structured the international investment law dispute resolution system.

Recognition of the differences in structure between the roles of ICJ judge and IIA arbitrator, then, should not lead to discussions of how the role of IIA arbitrator can be reformed to make it resemble more

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[28] *See, e.g. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify an Arbitrator, 12 August 2010 (appointment by Argentina of an individual who had previously written on the interpretation that should be given to a clause of the treaty at stake in the arbitration). On the rejection of the Claimant's challenge to this arbitrator, see Tony Cole, "Arbitrator appointments in investment arbitration: Why expressed views on points of law should be challengeable", *Investment Treaty News Quarterly* ("As the Claimants argued, McLachlan had basically already stated how he would rule on at least one central issue in the case"), *available at* http://www.iisd.org/itn/2010/09/23/arbitrator-appointments-in-investment-arbitration-why-expressed-views-on-points-of-law-should-be-challengeable-2/ (last visited January 2, 2012).

[29] *See, e.g.* Taida Begic, *Applicable Law in International Investment Disputes* (Utrecht: Eleven International Publishing, 2005), p. 169–187 (discussing cases in which ICSID annulment committees have addressed applications for annulment of ICSID awards for failure to apply the proper law).

closely that of ICJ judge. It should, instead, lead to an analysis of what is distinctive about the structure of the role of IIA arbitrator, and what that distinctiveness indicates about how the role of IIA arbitrator should be performed.

With respect to the use of non-binding instruments, the most important aspect of the structure of the role of IIA arbitrator concerns the appointment process already described. While ICJ judges are appointed to long-term positions in which they address disputes between many parties, IIA arbitrators are appointed to address a single dispute, at a time that the parties are already aware of the legal and factual issues that the tribunal will likely have to address. Because of this structure, parties selecting an IIA arbitrator pay significant attention to the substantive legal views of any potential appointee. Doing so allows each party to ensure that substantive views of particular importance to it are represented in the tribunal's deliberations.

Appointing arbitrators in this way, however, would make no sense if an IIA arbitrator's role was to arrive at a detached and generalizable understanding of the content of the applicable law. It is a structure that strongly emphasises the arbitrator's substantive views on the law, and it provides no protection against a tribunal composed of individuals who all share a minority understanding of that law.

The structure of the appointment process of IIA arbitrators, then, is best understood as allocating to them a responsibility to engage in what can be called the 'substantive interpretation' of the applicable law. They must certainly decide in accordance with the law, as anything else would be inconsistent with the status of arbitration as a legal dispute resolution mechanism.[30] However, in arriving at their determination of what the content of that law is, they have no obligation to conform to any view they do not share, not matter how broadly accepted that view might be.[31]

It is this important difference between the roles of ICJ judge and IIA arbitrator that justifies the conclusion that IIA arbitrators are not bound by the constraints of Article 38 of the ICJ Statute. The Statute identifies rules designed for a judge, and as a representative of a broader legal community a judge is obligated to conform his opinions to developing trends

[30] *Ibid.* "Substantive interpretation", then, is not the same as deciding *ex aequo et bono*.

[31] *But see contra* Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse?", 23 *Arb. Int'l* (2007), p. 357 (arguing that 'arbitral precedent' should be regarded as a necessity for certain types of disputes).

within past caselaw and within the reasoning of his fellow judges.[32] An IIA arbitrator, however, is not a judge. He is instead an individual appointed to reach his own conclusions on points of fact and law. The two roles are different, and hence the rules in accordance with which the roles must be performed are different as well.

The remainder of this chapter will look more closely at the manner in which IIA arbitrators can legitimately rely upon non-binding instruments in reaching their interpretations of the content of international investment law. Two types of instruments will be addressed, identified in accordance with the manner in which they can legitimately be relied upon by an arbitrator. The term 'authoritative instruments' will be used to refer to those non-binding instruments that serve as authoritative guides to the normative principles that underlie international investment law. The term "persuasive instruments" will be used to refer to those non-binding instruments that have their impact through the strength of the arguments they contain.

2. *The Use of Authoritative Instruments in International Investment Arbitration*

2a. *The Legitimacy of the Use of Authoritative Instruments by IIA Tribunals*

Although it has been argued above that IIA tribunals are not bound by the constraints of Article 38, it does not follow that Article 38 is therefore irrelevant to a discussion of the use of non-binding instruments by IIA tribunals. Article 38, after all, is the outcome of an extended deliberation by prominent experts as to the instruments that should be used by an international tribunal when determining the content of international law.[33] Consequently, even though it is not binding on IIA tribunals, it may reflect

[32] This is not, of course, to state that all judges are subject to doctrines of binding precedent, but only to acknowledge the existence of an obligation of conformity, even within jurisdictions that do not recognise binding precedent. *See, e.g.* Vincy Fon and Francesco Parisi, "Judicial Precedents in Civil Law Systems: A Dynamic Analysis", 26 International Review of Law and Economics (2006), p. 519 (examining the persuasive impact of precedent in civil law systems).

[33] *See generally* Ole Spiermann, "'Who attempts too much does nothing well': the 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice", 73 *Brit. Y.B. Int'l L.* (2002), p. 187.

an approach to the topic that is compelling in its own right.[34] The following discussion will, therefore, begin with Article 38's approach to the use by tribunals of authoritative instruments, and will explain why Article 38's approach is not one that IIA tribunals should adopt.

The most notable aspect of the approach of Article 38 to authoritative instruments is the starkly different treatment that is given to two different types of instrument: (i) authoritative commentaries, and (ii) State-generated 'soft law' instruments. Under Article 38(1)(d), 'the teachings of the most highly qualified publicists' can legitimately be used as a guide to the content of international law. No mention at all is made, however, of a similar use of non-binding State-generated soft law instruments.

It is not difficult to see why tribunals should be allowed to consult authoritative commentaries (i.e 'teachings'), as doing so allows the tribunal to draw from expertise it might not itself possess. More questionable, though, is allowing tribunals to use commentaries written by individuals with no role in the creation of international law, while simultaneously precluding the use of non-binding instruments generated by the very entities that create international law in the first place. Intuitively, if either of these two groups is likely to possess reliable insights into the current content of international law, it will be States.

One simple rationale for this exclusion of soft-law instruments derives from the practicalities of State control over the content of international law. That is, allowing tribunals to rely on non-binding instruments generated by States would potentially undermine the ability of States to control their international obligations. After all, the potential range of State-generated instruments that could be taken to constitute soft law is enormous.[35] Consequently, if tribunals could rely on soft-law instruments,

[34] Article 38 is, for example, recommended as non-binding guidance for ICSID tribunals in the Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, at para. 40: "Under the Convention an Arbitral Tribunal is required to apply the law agreed by the parties. Failing such agreement, the Tribunal must apply the law of the State party to the dispute (unless that law calls for the application of some other law), as well as such rules of international law as may be applicable. The term 'international law' as used in this context should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes."

[35] *See, e.g.* Chinkin, see above note 7, p. 851 ("[s]oft law instruments range from treaties, but which include only soft obligations…to non-binding or voluntary resolutions and codes of conduct…to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.").

almost any instrument generated by a State could be used by a tribunal to influence its determination of the content of international law. This would significantly undermine the distinction States have attempted to maintain between those instruments by which they are legally bound, and those by which they are not.

On the other hand, however, denying the relevance of soft law instruments to the content of international law leaves a great deal of State action difficult to understand. That is, many non-binding instruments generated by States are clearly meant to be norm-creating, and are taken seriously by States to an extent that would be difficult to understand if those instruments were meant to have no impact on States' international legal obligations.[36] Even more significantly, States are known to use soft law instruments both to supplement hard law instruments and to undermine them, actions that would be pointless if it was possible to determine the content of international law without consulting soft law instruments.[37] In order to determine the true content of international law, then, so this argument concludes, it is essential to consider soft law instruments, which play a different role in the formation of international law than hard law instruments, but nonetheless play a role.

In the context of the Statute of the ICJ, it is clear why concerns about the need to respect State control over international law would be given priority, as the ICJ is a norm-adopting body capable of determining the content of international law. It is less clear, however, that this same concern is equally powerful with respect to IIA tribunals. IIA tribunals, after all, are not norm-adopting, but instead merely deliver awards that express the views of the tribunal's members regarding the content of international law. These views are not only not binding on other tribunals, but will

[36] *See, e.g.* Ibrahim F.I. Shihata, *The Legal Treatment of Foreign Investment* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 43 (on the development of the World Bank Guidelines on the Treatment of Foreign Direct Investment: "This purpose [i.e. promoting FDI], it was thought, would be better served if part descriptive, part normative principles were developed, which, given their preparation by international organizations of near universal membership and the broad consultations we intended to undertake, could receive broad acceptance in practice.").

[37] *See generally* Gregory C. Shaffer & Mark A. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", 94 *Minnesota Law Review* (2010) (discussing the means by which States use soft law instruments to alter their international legal obligations).

simply be rejected by any subsequent tribunal with a different intellectual composition.[38]

Nonetheless, this does not mean that an IIA award is merely a forum in which a tribunal announces its decision, as an award must also present the reasoning behind the decision.[39] This requirement gets little attention, but it adds an important element to the role of IIA arbitrator. Given that an IIA tribunal is not norm-adopting, its decision has no direct relevance for future tribunals. Consequently, the existence of this requirement can only be understood as reflecting an obligation on the part of IIA tribunals to attempt to ensure that the parties to the dispute can both understand and accept the decision they have received. Achieving this goal is clearly more likely if a tribunal appeals to a broad range of conduct by States as a means of supporting its decision than if it merely invokes the reasoning of its constituent members, all of whom were appointed in a highly adversarial context.[40]

There is, then, clear justification for the use of both authoritative commentaries and authoritative soft law instruments by IIA tribunals. A tribunal's use of authoritative commentaries can both increase the likelihood that its understanding of international law is correct, and increase the persuasiveness of its award for the parties, while the tribunal's invocation of soft law instruments in its award can increase the persuasiveness of the award for the parties, whether or not those instruments constitute sources of international law.

Nonetheless, even if the use of authoritative instruments by IIA tribunals is accepted, this does not clarify precisely how they should be used.

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[38] *See, e.g. Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, decision on the Application for Annulment, April 16, 2009, para. 78 (rejecting prior caselaw and giving "precedence to awards and analyses that are consistent" with the tribunal's own views); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004, para. 125 (rejecting the conclusions of an earlier tribunal involving the same claimant and parallel legal issues as "unconvincing").

[39] *See, e.g.*, ICSID Convention, Art. 52(1)(e) (allowing annulment of an ICSID award that has "failed to state the reasons on which it is based").

[40] Keith E.W. Mitchell, Arbitrator Selection and Appointment Under the North American Free Trade Agreement, in *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, ed. Todd Weiler (New Orleans: Transnational Publishers, 2004), p. 313 ("Generally, a party attempts to select an arbitrator predisposed to a favorable consideration of their case, but not legally biased such as to result in disqualification."). On the impact of the structure of arbitrator selection on the arbitral process see generally Tony Cole, "Authority and Contemporary International Arbitration", 70 *La. L. Rev.* 801 (2010).

The following two sections of the chapter will, therefore, address this question, first by establishing the current use of authoritative instruments by IIA tribunals, and then by examining whether that current use is appropriate.

2b. *The Current Use of Authoritative Instruments in International Investment Arbitration*

A study of citations in published IIA awards was undertaken for this chapter, with cited writings being sorted into 'academic' and 'institutional' categories.[41] 'Academic' writings were those that expressed the views of one or a small number of authors, and were relied upon because of the individual reputations of the authors. 'Institutional' writings were those developed through an organised process involving groups of individuals, entities or States, that had collaborated to produce a single writing. That writing might not fully reflect the views of any single participant, but was intended to contribute to the codification and/or development of the law. Such writings were relied upon because of the institutional context in which they were developed, rather than because of the expertise of the participants.

Two notable results emerge from the study. Firstly, awards on the whole adopt an approach to citation that is more appropriate to norm-adopting judicial decisions than to IIA awards intended to be persuasive to the parties to the dispute. That is, rates of citation in general are low, with tribunals usually content merely to express an opinion, without then supporting that opinion through citation to authoritative instruments.

Secondly, when authoritative instruments are cited by tribunals, the instruments in question are rarely State-generated soft law instruments. Such writings constituted only 18% of all citations to institutional writings,[42] with only two soft law instruments being cited in more than one IIA award: the UNIDROIT Principles of International Commercial

[41] The study was undertaken by Madhu Agrawal, an undergraduate research assistant, based on the the collection of publicly available investment arbitration awards collected at italaw.com. Madhu's work was completed in mid-2011. The subsequent categorisation and analysis of the results of the study was undertaken by the author of this chapter.

[42] "Citation" as used here refers to citation in a single decision. That is, if a single writing is cited many times in a single decision, this nonetheless counts as a single citation. Alternatively, if a single writing is cited by a single tribunal in two separate decisions, this counts as two citations.

Contracts,[43] cited four times, and National Treatment for Foreign-Controlled Enterprises,[44] cited twice.[45]

By contrast, twelve non-State-generated institutional writings were cited in more than one IIA award, with one publication alone, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, being cited in 36 awards. Indeed, the dominance of the International Law Commission in the category of institutional writings is itself notable, with the ILC generating three of the four most cited writings, and 67% of citations to all institutional writings. Citation to the International Law Commission, that is, was three times more common than citation to instruments produced by States themselves, and thirteen times more common than citation to the next most highly-cited institution, the International Law Association.

Academic writings were also cited significantly more often than State-generated soft law instruments, and indeed were also cited more often than non-State-generated institutional writings.[46] The category of 'academic writings', of course, includes both writings cited by tribunals as authoritative instruments and writings cited as persuasive instruments. As a result, it isn't possible to draw strong conclusions on the use of academic writings as authoritative instruments based purely on rates of citation. A single writing may, after all, be relied upon by one tribunal as an authoritative instrument, but by another as a persuasive instrument. Nonetheless, the following general observations can be made.

Within the specialist topic of international investment law, a unique position has been achieved by Christoph Schreuer's The ICSID Convention: A Commentary, which was cited in 60 separate awards. Three other specialist international investment law writings also repeatedly invoked by

[43] http://www.unidroit.org/english/principles/contracts/main.htm (last visited Jan. 11, 2012).

[44] http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf (last visited Jan. 11, 2012).

[45] Given the low number of citations of the writings highlighted, it is worth emphasising that no empirical study is methodologically flawless. Consequently, it is certainly possible that there may be one or more additional State-generated authoritative writings that have been cited more than once by IIA tribunals. It would, after all, only require that a single citation have been missed for a writing to drop below the "two or more citations" threshold being used here. Nonetheless, small possible variations of this nature do not affect the truth of the broader point being made regarding the rate of citation of State-generated authoritative writings.

[46] This statement is true whether the standard is the number of different writings cited or the number of citations received by individual writings.

tribunals were Rudolf Dolzer & Christoph Schreuer's Principles of International Investment Law, cited 8 times, Rudolf Dolzer & Margrete Stevens' Bilateral Investment Treaties, cited 8 times, and Campbell McLachlan, Laurence Shore & Matthew Weinger's International Investment Arbitration: Substantive Principles, cited 7 times. In addition, two general commentaries on public international law were repeatedly cited by tribunals: Ian Brownlie's Principles of Public International Law, cited 16 times, and Oppenheim's International Law, cited 9 times.

Overall, then, IIA tribunals have been unwilling to invoke State-generated soft law instruments in support of their conclusions, even though they have not hesitated to invoke the support of non-State-generated institutional writings where available. In addition, despite the relative youth of international investment arbitration, certain texts have already begun to emerge as authoritative instruments, with Christoph Schreuer's The ICSID Convention: A Commentary and the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts rapidly becoming the most authoritative writings within the field.

The following two sections of the chapter will examine more closely what the structure of the role of IIA arbitrator indicates should be the approach adopted by IIA tribunals to the citation of authoritative sources, and whether the citation practices just identified are indeed appropriate for international investment arbitration.

2c. *Citation to Soft Law Instruments in IIA Awards*

As mentioned in the previous section, IIA tribunals have rarely cited to authoritative soft law instruments, preferring instead either to cite to non-State-generated institutional writings, or to just blankly state their own conclusions on the content of the applicable law, without citation to any authoritative support.[47] This section of the chapter will argue that proper attention to the structure of an IIA arbitrator's role indicates clearly that this practice is misguided, and that soft law can play an important part in fulfilling a tribunal's obligations to the parties. As a result, tribunals should be citing to soft law at a much higher rate than they currently do.

The central consideration in this respect relates to the nature of substantive interpretation, which up to this point has been described as

[47] Tribunals may, of course cite instead to non-authoritative writings, but such citations cannot perform the same role as citations to authoritative writings.

allowing each arbitrator to determine for himself what he believes to be the content of the applicable law. This description has been based primarily on the role of the parties in the appointment process of arbitrators, and the ability this role gives parties to appoint arbitrators who hold particular legal views.

Focus solely on the control of the parties over the appointment process, however, results in an incomplete understanding of the IIA arbitrator's role, which is not simply to be an agent of the party that appointed him. Instead, while a single party may be responsible for the appointment of an IIA arbitrator, it is nonetheless clear that after appointment IIA arbitrators owe equal obligations to both parties.[48] This is reflected in the fact that the parties do not have unconstrained freedom in their selection of an arbitrator, and a lack of impartiality between the parties is a valid ground on which an appointment can be challenged.[49]

A minimal interpretation of this requirement of impartiality would not support a finding of impartiality based solely on an arbitrator's substantive views of law, but such an interpretation would be inconsistent with the importance of those views in the arbitrator selection process. An IIA arbitrator, that is, is to a significant extent selected by his appointing party as a means of getting certain views represented on the tribunal, not merely because of any expertise he may possess. Because of this, a dogmatic insistence by an IIA arbitrator on his own views constitutes privileging the views of his appointing party over those of the other party to the dispute. Such a privileging is inconsistent with the arbitrator's obligation of impartiality between the parties.

Recognition of this fact, however, does not entail that an arbitrator should simply abandon substantive interpretation, and attempt to deliver an 'objective' and generally acceptable decision on the content of the applicable law. Doing so would, after all, be inconsistent with the centrality of the parties to the IIA arbitrator appointment process.

Instead, the obligation of an IIA arbitrator to be impartial between the parties indicates a limitation within which substantive interpretation must be implemented. That is, while an IIA arbitrator is empowered to reach her own conclusions on the content of the applicable law, this must be done within the boundaries of any consensus of the parties.

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[48] *See generally* Noah Rubins and Bernhard Lauterberg, "Independence, Impartiality and Duty of Disclosure in Investment Arbitration", in *Investment and Commercial Arbitration*, ed. Christina Knahr et al. (Utrecht: Eleven International Publisher, 2010), p. 153.

[49] *Ibid.*

Only in this way can an arbitrator exhibit proper consideration to the views of the party that had no role in her appointment, while still fulfilling her responsibility to reflect the views for which she was appointed.

Soft law instruments, however, play an important role in identifying the views of States, beyond those limited occasions on which they are willing to be legally bound. States, after all, must be presumed to have entered into soft law instruments in good faith. Consequently, where a soft law instrument either acknowledges an obligation on the part of signatory States to pursue a certain goal, or recognises the legitimacy of State action to achieve such a goal, this indicates a normative consensus reached by all States party to the instrument.

In the context of a treaty-based arbitration, then, in which an investor has been given the power to institute and control its own claim, but must do so within the legal regime established between the Home and Host States, soft law instruments can play an important role in establishing the content of the applicable law. Such instruments cannot themselves create binding legal obligations, but this does not make them irrelevant for the purposes of substantive interpretation, where they can establish the existence of a normative consensus between the Home and Host States, that must be respected by arbitrators acting impartially between the parties.[50]

2d. *Citation to Other Authoritative Instruments in IIA Awards*

Although IIA tribunals rarely invoke authoritative soft law instruments in support of their reasoning, the same reticence has not extended to authoritative instruments not generated by States. Instead, citation to such instruments, whether 'institutional' or 'academic', is a routine feature of IIA awards. This practice might seem unproblematic, given that citation to 'teachings' is a standard practice in public international law adjudication and is expressly sanctioned by Article 38. However, it will be argued here that the specific context of contemporary international investment law means that such writings simply cannot be relied upon as authoritative instruments, and can instead only be invoked for their persuasive value.

Authoritative writings have an obvious appeal for IIA tribunals, as they eliminate the need for the tribunal to determine for itself the content of the applicable law. While ordinarily the tribunal would be obligated to

[50] It is worth emphasising that this analysis has been restricted to investment treaty arbitration. It cannot be applied directly to investment arbitrations conducted under an investment contract directly between an investor and the Host State.

undertake an extended analysis of any potentially significant legal issue, the existence of a clear statement from an authoritative writing allows the tribunal simply to invoke the authoritative writing and proceed without further analysis or argument. This not only makes the tribunal's job easier, but also reduces the likelihood that the tribunal's award will be controversial, as it can be seen to be based upon a trustworthy source.

The legitimacy of a tribunal's reliance on authoritative writings, however, is inextricably tied to the role these writings play in the tribunal's reasoning. Authoritative writings are not, that is, mere sources of persuasive arguments, but are instead invoked by tribunals as guides to the content of the applicable law. Any writing can provide an argument that a tribunal decides to use, but only an authoritative writing can provide a conclusion that a tribunal can legitimately adopt. Mere invocation of the authoritative writing justifies the tribunal's conclusion. No further argument is necessary.

It is, however, important to emphasise that authoritative writings do not themselves create law, but only serve as guides to its content. The consequence of this is that no writing can be authoritative where the content of the law is highly contested. A *reliable* guide in such a situation is simply impossible, as it is inherently unclear which view on the content of the law will prevail. A writing may still be highly persuasive to a particular tribunal, and it may be persuasive on a contested issue because it is authoritative on other issues. Nonetheless, it cannot legitimately be invoked as authoritative on the contested issue, because to attribute to a writing the ability to resolve conflicts on the content of law is to grant it the power to create law, rather than merely to serve as a guide to it.

"Contested", however, is the most apt description of the state of contemporary international investment law. IIA tribunals contradict one another on issues of law, commentators criticise the holdings of tribunals, and those same commentators routinely disagree with one another.[51] Moreover, this disagreement exists not just with respect to certain new and unresolved issues within the field, but on even the most central topics.[52] In such a situation of ongoing and wide-ranging dispute, it is simply

[51] *See, e.g.* citations note 38.

[52] See, for example, the wide diversity of opinions on the meaning of "investment" expressed in Tony Cole, "Power-Conferring Treaties: The Meaning of 'Investment' in the ICSID Convention, 24 *Leiden J. Int'l L.* (2011); Devashish Krishan, "A Notion of ICSID Investment", in *Investment Treaty Arbitration and International Law*, ed T.J. Grierson Weiler (New York: JurisNet, 2008); Julian Davis Mortenson, "The Meaning of 'Investment: ICSID's *Travaux* and the Domain of International Investment Law", 51 *Harvard J. Int'l L.* (2010).

impossible for any writing to serve as a *reliable* guide to the content of the law.[53]

The problem this creates is that IIA tribunals nonetheless demonstrably do cite to certain writings as though they were authoritative. That is, they rely upon the conclusions of writings that they present as authoritative, and do not themselves present and evaluate the arguments that underlie those conclusions. In doing so, these tribunals treat as authoritative writings that are in reality only capable of providing persuasive arguments, and in doing so inadvertently transform those writings into sources of international investment law, a role they cannot legitimately perform.

The practice adopted by IIA tribunals of invoking writings as authoritative guides to the content of international investment law, then, simply cannot be justified. Only once the field of international investment law has matured and settled to a significant degree will it be possible for any writing to serve as authoritative. Until that time, writings, whether 'institutional' or 'academic', can only legitimately serve as persuasive sources of arguments to be considered by IIA tribunals.

3. *The Use of Persuasive Instruments in International Investment Arbitration*

3a. *The Legitimacy of the Use of Persuasive Instruments by IIA Tribunals*

Scholarship has traditionally had a privileged place within international law, with tribunals in all jurisdictions regularly relying on leading commentaries as means of establishing the content of the law.[54] To a large degree this practice was a response to the lack of an international judiciary, as tribunals addressing questions of international law were unable to invoke decisions by authoritative international tribunals.[55]

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[53] Although it should be emphasised that this qualification only applies to the use of allegedly authoritative writings as a guide to the content of international investment law. It does not apply to the use of authoritative writings as a guide to the content of public international law, even if done by IIA tribunals.

[54] William J. Aceves, "Symposium Introduction: Scholarship as Evidence of International Law", 26 *Loy. L.A. Int'l & Comp. L. Rev.* 1 (2003) ("International law has long-recognized the role of scholarship as a subsidiary means for the determination of rules of law.") (quotation marks omitted).

[55] Thirlway, see above note 11, p. 129 ("Now that there exists a much greater body of judicial and arbitral decisions enunciating rules of law, the emphasis in practice has shifted to the contribution made by such decisions, and away from the views of 'the most highly qualified publicists of the various nations'.").

Instead, they were required either to rely upon the views of prominent commentators or be seen as merely expressing a personal opinion on what international law should be. Since these tribunals were either domestic courts with no particular expertise in international law, or arbitral tribunals with no recognised legitimacy beyond the dispute they were addressing, the ability to invoke highly-regarded scholarship was widely embraced.[56]

The creation of a broad range of international tribunals in the twentieth century changed this situation significantly, of course, as it became increasingly possible to resolve questions of international law through direct reliance on decisions of international tribunals.[57] As a result, the direct impact of scholarship on the jurisprudence of international law has unquestionably declined.[58]

What is important for present purposes, however, is not the degree to which scholarship remains influential in international law, but the manner in which its ongoing influence is exerted. That is, as discussed above, non-State-generated writings can legitimately be relied upon by tribunals either as authoritative guides to the content of the law, or as persuasive sources of arguments about the law. Article 38, however, only mentions one of these two uses, sanctioning the use of scholarship in so far as it is authoritative, but impliedly excluding its use as merely persuasive.

This distinction might seem surprising, as a tribunal that considers only authoritative guides to the content of the law will be unlikely to deliver as sound and well-reasoned a decision as one that also considers arguments advanced by specialists as to how the law should be understood or developed. The inclusion of this distinction within Article 38 can be readily understood, however, if the Article is considered in the context in which it was originally advanced.

Article 38, that is, was developed to direct the interpretative practices of the ICJ, a norm-adopting judicial tribunal with a central role in establishing and developing the content of international law.[59] However, the

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[56] Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p. 25. ("Whatever the need for caution, the opinions of publicists are used widely.").

[57] Thirlway, see above note 11, p. 129.

[58] *Ibid.*

[59] Article 38 was, of course, originally developed for the Permanent Court of International Justice, not the International Court of Justice. Aceves, see above note 54, p. 4 ("The use of international legal scholarship as evidence of international law was codified in the Statutes of both the Permanent Court of International Justice and the International Court of Justice."). However, that distinction makes no difference to the point being made here.

existence of such a tribunal unavoidably entails a risk that its decisions will develop in a direction that is at odds with the wishes of States, the traditional forces behind the creation of international law. Article 38, then, by allowing the ICJ to rely only on those non-State-generated instruments that serve as reliable indicators of the content of State-generated law, reflects a desire to minimise the risk that States will lose control over the development of that law. It is, in short, a rule expressly designed for a norm-adopting tribunal, rather than one designed to ensure that the best ruling is reached on the content of international law.

This understanding of Article 38, however, makes clear that the distinction it adopts between authoritative and persuasive instruments is not easily extended to IIA tribunals. After all, IIA tribunals are, as argued above, not norm-adopting. Consequently, the existence of the system of international investment arbitration does not entail the same risk that States will lose control over the development of the law as is created by the existence of the ICJ. This is not to say that no risk exists at all, but the non-normative nature of IIA awards, combined with the ability of States to select arbitrators for each IIA tribunal, means that the risk is significantly lower.

The primary concern that motivated the exclusion of persuasive instruments from Article 38, then, simply does not apply in the international investment arbitration context. Nonetheless, it does not follow from this that IIA tribunals should rely upon persuasive instruments, as there may be reasons unique to IIA tribunals that make a parallel exclusion appropriate. Before examining this question, however, the following section will examine the current practice of IIA tribunals with respect to citation to non-State-generated writings.

3b. *The Current Use of Persuasive Instruments in International Investment Arbitration*

It is often argued that IIA tribunals cite to non-State-generated writings at a far higher rate than is typical of international legal tribunals, and this observation is supported by the study undertaken for this chapter.[60]

[60] *See, e.g.* Jeswald W. Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), p. 156–57 ("Both counsel and tribunals in investor-state arbitrations routinely refer to such works in analysing the meaning of treaty terms in specific cases."); Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge: Cambridge University Press, 2011), p. 617 ("As would be expected, ICSID tribunals and *ad hoc* committees have frequently relied on academic writings on various points of international law.").

Indeed, while the ICJ has adopted an informal policy of never citing to academic writings in majority decisions, such citations are a standard feature of the drafting of IIA awards.[61]

Of course, the mere existence of a difference in citation rates between IIA and other international tribunals is not necessarily meaningful, as it may simply reflect different attitudes to citation in the public international law and international investment law communities. However, the considerable overlap between these two communities makes this explanation unlikely, as public international law specialists, including former ICJ judges, are regular members of IIA tribunals.[62] Moreover, IIA tribunals composed partly of public international law specialists display no particular unwillingness to cite to academic writings.[63]

The most likely explanation for this observable difference in citation rates, then, is that the individuals serving on IIA tribunals perceive the role of such tribunals as in some way significantly different to the role of other international legal tribunals. No other explanation would appear able to explain the different attitude to citation displayed by the same individuals when serving on IIA and on other international legal tribunals. However, closer examination of the citation practices of IIA tribunals is necessary if the nature of this perceived difference is to be properly clarified.

For example, while IIA awards regularly cite to non-State-generated writings, this fact in itself says nothing about the way the cited writings are actually being used by tribunals. After all, as has been argued above, tribunals can rely upon such writings either as authoritative guides to the content of the applicable law, or as sources of persuasive arguments relating to the applicable law.

In this respect the great diversity of writings cited by IIA tribunals appears significant. Of the approximately 300 distinct writings cited by IIA tribunals as of mid-2011, only 69 were cited in more than one award. This great diversity of writings supports a conclusion, then, that IIA tribunals are primarily invoking non-State-generated writings for their persuasive

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[61] Thirlway, see above note 11, p. 129 ("The Court itself does not quote teachings").

[62] See, for example, the annulment committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10. Of the three members of the committee, one was the serving Vice President of the International Court of Justice, while another was a former President.

[63] See, for example, the majority decision by the annulment committee in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, which cited to academic writings despite being authored by a current Vice President and a past President of the International Court of Justice.

value. It is clearly implausible, after all, that such a large number of authoritative writings exists within such a relatively youthful field.

Such an interpretation of IIA tribunal citation practices becomes less plausible, however, once the manner in which tribunals cite to non-State generated writings is examined. That is, if non-State-generated writings were being cited to by IIA tribunals for their persuasive value, such citations would be expected to appear as part of analytic discussions in which tribunals examined the primary arguments available on particular points of law, and cited to writings they found insightful and useful on the topic. That is, after all, the only context in which persuasive writings are relevant to a tribunal's award.

However, this is simply not the manner in which IIA tribunals cite to non-State-generated writings. IIA awards certainly include extended passages of analytic discussion, but this discussion is rarely supported by more than an occasional citation to a non-State-generated writing. Indeed, it is standard for multiple pages of discussion to be offered with the tribunal never expressly considering even a single argument advanced in an academic or institutional writing. Moreover, when non-State-generated writings are cited, it is rarely as part of the tribunal's analysis, but is instead a means of validating the tribunal's conclusion, by indicating clearly that this conclusion is one that has also been reached by a specialist commentator.

That is, the standard approach by IIA tribunals to the citation of persuasive instruments is defensive. The citation is not added to the award because the writing cited is believed by the tribunal to be authoritative, but neither is it included because the tribunal is analysing an argument originally advanced in the cited writing. Instead, the citation serves merely to defend against potential criticism of the award. It adds nothing to the quality of the award itself, but is offered to reassure readers of the award who are not persuaded by the tribunal's own reasoning that its conclusion is nonetheless defensible.

Such reassurance, however, is not necessary for those international legal tribunals with which IIA tribunals have attempted to align themselves. Those tribunals, after all, are norm-adopting. Consequently they do not need to defend their conclusions against criticism.[64] The problem that

[64] This is not to say, of course, that norm-adopting tribunals are completely immune to any form of criticism. However, the acknowledged right they have to adopt legal norms insulates them from a significant amount of the criticism directed at IIA tribunals, who do not possess this right.

exists for IIA tribunals is that they are attempting to replicate the low-citation drafting style of norm-adopting tribunals, but are unable to avoid the reality that they are not themselves norm-adopting. As a result, they are forced to defend their reasoning to a degree not necessary for norm-adopting tribunals, and use citation to non-authoritative writings as a means of doing so.

The citation practices of IIA tribunals, then, can be explained by the fact that IIA tribunals have attempted to locate themselves in a middle-ground between norm-adopting tribunals capable of relying only on citation to authoritative writings, and non-norm-adopting tribunals required to rely heavily on persuasive writings. Unfortunately, no such tenable middle-ground exists, and as a result IIA awards have generally suffered from having both too little authority and too little persuasiveness.

Because this weakness derives from the standard citation practices used in IIA awards, it can only be resolved through a significant change in those practices. The concluding section of this chapter will, therefore, examine what the structure of international investment arbitration indicates should be the citation practices adopted by IIA tribunals.

3c. *Citation to Persuasive Instruments in IIA Awards*

This chapter has argued that the structural differences between IIA tribunals and norm-adopting bodies such as the ICJ have important consequences for the appropriate use in IIA awards of non-binding documents and literature. IIA awards cannot establish new law, as they lack the institutional context necessary to have this effect. However, they are also not fora in which arbitrators are invited to express their personal views on the proper understanding and content of international investment law. Instead, IIA awards have the important role of explaining to the parties the tribunal's decisions on any relevant points of law, in order that the parties can both understand and accept the tribunal's conclusions.

It has already been argued that this obligation of IIA tribunals to draft persuasive awards underlies the legitimacy of the use by IIA tribunals of soft law instruments. This same obligation, however, also entails that IIA tribunals have a responsibility to use persuasive writings to a far greater degree than is the case in current arbitral practice. An award cannot be persuasive, after all, if it does not clearly and compellingly express the reasoning on which its conclusions are based. The obligation to draft a persuasive award, then, gives rise to two responsibilities for IIA arbitrators with respect to persuasive writings.

Firstly, an IIA arbitrator must be sufficiently aware of the available persuasive literature on each legal issue he must decide that he can justifiably be content both that he has considered the most important applicable arguments and that his conclusions are correct. As a result, he cannot just rely upon his pre-appointment views, but must instead reconsider those views during his appointment through a re-examination of the relevant persuasive literature. In addition, however, he also cannot restrict his examination of the persuasive literature to only those writings relied upon by the parties in their submissions. The parties, after all, have cited to persuasive writings as a means of winning a dispute, not in order to provide the tribunal with the literature necessary for an informed decision on the law. Each tribunal member, then, must undertake an independent examination of the relevant persuasive literature if he is to fulfil his responsibility to deliver an informed and considered decision on the law.

Secondly, an IIA award must be drafted in a form that explains clearly and compellingly why the tribunal reached the conclusions that it did. As a result, it must convey both that the tribunal undertook the research necessary to reach an informed decision on the law, and that the authors of the award have defensible reasons for adopting the understandings of the law upon which they have relied. It must, therefore, include both thorough citation to the variety of persuasive writings that the tribunal have considered, and explicit analytical discussions of the most important arguments those writings presented. Only an award of this form has any probability of convincing an unsuccessful party that its loss resulted from anything other than poor litigation strategy.

4. *Conclusion*

The manner in which IIA tribunals should and should not use non-binding documents and literature in their awards has as yet received little attention in international investment arbitration scholarship. At most commentators have combined a simple observation of the fact that tribunals do indeed cite to literature with a discussion of soft law instruments that is indistinguishable from discussions that occur in the public international law context. The goal of this chapter has been to demonstrate that this is a mistake. International investment arbitration has its own distinctive structure, and consequences flow from that structure for the manner in which non-binding documents and literature can and should be used.

International investment law has developed significantly since its genesis as a department of public international law, and it is only by considering it in its new context, and in particular the central role in its contemporary development of international investment arbitration, that it can really be understood.

CONCLUSION

THE SOURCES OF INTERNATIONAL INVESTMENT LAW: CONCLUDING THOUGHTS

Christian J. Tams

Contents

Questions of 'sources' tend to be complex, or treated as complex, in international law. More than domestic lawyers – used to legislation (parliamentary and/or executive) and, depending on the respective national legal orders, judge-made law – international lawyers feel the need to explore the process by which international law is made and developed. No doubt this process involves a variety of actors, forms and methods.[1] Article 38(1) of the ICJ Statute is commonly perceived as relevant, but really provides no more than the starting-point of the debate: In lit. (a) – (c), it lists three particularly important formal sources of law (i.e. law-generating processes); yet the list is non-exhaustive; it does not clarify the relationship between the different sources, and merely hints at the distinction between formal and material sources of the law.[2] Perhaps more importantly, the process of law-making and development on the international plane is context-specific; it depends on the relevant branch of international law: depending on the progress of codification, in some areas, multilateral treaties dominate; in others, custom reigns; yet others are shaped by judicial decisions. And of course, the different processes of law-making and development can interact.

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[1] For a survey of debates see R. Wolfrum, "Sources of International Law", in Max Planck Encyclopedia of Public International Law, online edition at www.mpepil.com; for a detailed treatment cf. A. Boyle and C. Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007).

[2] Wolfrum, see above note 1, at MN 10–11.

The contributions to the book analyse these – and many other – questions in relation to international investment law. They provide a wealth of information and present a useful panorama of the state of the discipline looked at through the lens of international law's sources doctrine. Understandably, focusing on investment law, they do not purport to offer a comparative assessment – do not seek to evaluate the sources of investment law against the backdrop of the general debate about the sources of international law. Rather than trying to summarize the main findings of the contributions, the following brief comments are intended to offer some comparative observations, aimed at helping us understand the special features of the 'sources mix' of investment law.

1. *The Successful Integration of Investment Law*

A first observation is implicit in what has been stated already. The various contributions to the book consider international investment law to be part of (public) international law – in fact they do so quite naturally and without much discussion. Given the amount of debate about investment law's hybrid foundations, this may be surprising. However, it is also telling and indicative of the successful 'integration' of an "exotic"[3] sub-discipline into the mainstream of public international law.

Judging from the various contributions, this process of integration can be considered to be at an advanced stage.[4] With few exceptions, the different chapters address the 'usual suspects' – the law-generating processes one might expect to be addressed in any collection of essays on sources of international law: hence there are chapters on treaties,[5] custom,[6] general principles[7] and on the subsidiary means of Article 38(1)(d), notably

[3] Cf. ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi", UN Doc A/CN.4/L.682, at para. 8.

[4] The picture emerging from the contributions to some extent reflects choices about the inclusion and exclusion of topics. *Lex mercatoria* and domestic court or arbitral decisions, to mention just two examples, might have been more difficult to link to the regular sources of public international law. Yet the decision not to cover them is telling and may be taken to reflect the decreasing relevance of both lex mercatoria and domestic decisions.

[5] See the contributions by Gazzini, Denters, Happold/Roe (in this volume, at pp. 99, 49, 69 respectively).

[6] D'Aspremont, in this volume, at p. 5.

[7] Schill, in this volume, at p. 133.

decisions and writings.[8] All this suggests that to a large extent the sources of investment law are the same as those of public international law more generally. However, even the chapters addressing 'less usual suspects' clearly approach their respective topics from the perspective of public international law. Patrick Dumberry's discussion of investment contracts addresses the interaction of contracts and treaties and demonstrates that, notwithstanding the wording of Article 42 of the ICSID Convention, investment tribunals today rather liberally consider contracts to be controlled (if not governed) by public international law.[9] In his contribution on national legislation, Makane Moise Mbengue inquires whether domestic codes of investment protection can be qualified as unilateral promises binding under international law.[10] Both approaches display a tendency to link specific rules of investment law to the regular sources of international law. The general impression thus gained from the contributions is that the sources of investment law are more or less those of 'regular' public international law. This may be taken to reflect the fact that – at a time when commercial law firms are moving into investment arbitration – conceptually, investment law has been successfully 'taken over' by international law.

2. *Special Features of the 'Sources Mix' of International Investment Law*

It is clear from the foregoing that international investment law is comprised of rules deriving from different sources of law. This in itself is not unusual. Most branches of international law comprise a mix of sources and are shaped by their interaction. What varies from area to area is the relative importance of individual sources. In this respect, investment law displays a number of peculiar features. Three points would seem to be particularly relevant.

a) *The Importance of Particular Rules*

The crucial relevance of particular –as opposed to general – rules may be the most obvious *specificum* of investment law as presented in the various

[8] See Eric De Brabandere and Tony Cole (in this volume, at pp. 245, 289 respectively).
[9] Dumberry, in this volume, at p. 229.
[10] Mbengue, in this volume, at p. 183.

contributions.[11] While the enforcement of investment law is generally regulated by widely-ratified multilateral treaties (notably ICSID, but also the New York Convention[12]) or general rules governing the consequences of wrongful acts,[13] substantive standards of investment protection typically derive from particular rules of international law, i.e. rules that apply between a limited number of parties only. To the extent that they are governed by international law and thus can be qualified as a source,[14] this is true for investment contracts concluded between investors and States (or separate legal entities controlled by the State), which are tailored to the demands of a specific investment project and do not create rights and obligations for non-parties. Perhaps more importantly, it equally applies to bilateral investment treaties (BITs) concluded between States with a view to establishing favourable investment conditions.

The special relevance of BITs for contemporary investment law is generally acknowledged – including in Tarcisio Gazzini's contribution to the present volume[15]– and brought out by terms such as 'BIT generation'[16] and 'BIT era'.[17] The estimated figure of 2,800 BITs is regularly mentioned and hardly ever fails to impress. (It is much less often noted that this figure amounts to less than 15% of potential BIT relations between States.[18] However, concepts like nationality and (indirect) investment have often proved flexible enough to be used by investors seeking to avoid gaps in the system of protection – so from the perspective of investors, the BIT system

[11] As with respect to the prevalence of the 'regular' sources of public international (cf. supra, footnote 4), this to some extent reflects the editors' choice to focus on standards of investment protection. Notably, there are no contributions dealing specifically with enforcement (which would have inevitably emphasised the importance of multilateral treaties such as the ICSID or New York Convention), with remedies (which might have provided an in depth assessment of general rules of State responsibility) or with attempts to integrate investment protection into the WTO regime (which would have had to deal with a major multilateral treaty).

[12] 575 U.N.T.S. 159; 330 U.N.T.S. 38.

[13] Notably as formulated in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (Annex to GA/Res. 56/83).

[14] Cf. supra, section 1, for brief comment.

[15] See Gazzini, in this volume, at p. 99.

[16] S. Montt, *State Liability in Investment Treaty Arbitration. Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart, 2009).

[17] G. Bottini, "Protection of Essential Interests in the BIT Era", in Investment *Treaty Arbitration and International Law*, ed. Todd Weiler (Huntington: Juris Publishing, 2008), p. 145.

[18] But cf. Gazzini (in this volume, at p. 101). Along similar lines, Dumberry notes that "most foreign investors doing business abroad are … not protected under any investment treat[y]" (in this volume, at p. 240).

may be more comprehensive than the figure of 15% suggests.) At least initially, the different BITs typically included very similar clauses and almost inevitably laid down limits on expropriation as well as a number of basic standards of protection in a small number of vague and brief provisions. These basic standards continue to feature in recent BITs; however, treaties seem to become more comprehensive, more holistic (taking into account non-investment concerns) and more complex.[19]

From a comparative perspective, the dominance of particular rules – and of BITs in particular – makes international investment law stand out amidst other sectoral regimes of international law. The 'rise and rise' of multilateral treaty-making over the course of the last century has meant that, typically, contemporary sectoral regimes of universal scope are based on widely-ratified agreements: covering fundamental rules of international co-existence, the law of the sea, international humanitarian law, human rights, world trade, diplomatic and consular relations and important areas of international environmental law. Where international legal relations are not shaped by multilateral treaties (as with respect to jurisdiction and immunities[20]), usually general rules of custom apply. As regards the major areas of substantive international regulation, investment law (perhaps alongside extradition and mutual legal assistance, if that field of law is counted as a 'major area') is the only one to be based largely on bilateral treaties.[21]

The 'particularism' of investment law comes at a price: as regards the substantive scope of protection afforded, international investment law is highly fragmented. Contracts are tailored to fit one particular investment project. As regards BITs, each of the 2,800 treaties is a separate legal document, and it is by no means obvious that, taken together, these treaties should add up to a body of unified investment law. If we commonly treat investment law as such, then this first and foremost reflects a certain degree of pragmatism. In addition, it is of course helped by the fact that, while formally separate, BITs tend to be similar in scope. Other centripetal

[19] Ibid. at pp. 100–105.

[20] It will have to be seen whether the 2004 Convention on Jurisdictional Immunities of States and Their Property will herald a change: so far, the ratification process has been relatively slow: cf. the information at http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en.

[21] Historically, consular law might have provided another example of an international regime built on largely parallel bilateral treaty commitments. Yet the hundreds of consular relations treaties concluded before the 1960s have now been completely superseded by the multilateral regime established by the 1963 Vienna Convention (596 UNTS 261).

factors are also relevant.[22] Unless a different intention is manifest, common clauses tend to be interpreted in a similar way. Arbitral practice within a fairly defined group of clients, counsel and arbitrators would strengthen the 'pull of the mainstream', as would provisions designed to level the field such as MFN clauses. But with BITs becoming more diversified, the "challenge to increase [or even maintain some level of] coherence"[23] becomes ever more difficult. An investment law system based on standards of treatment found in BITs (and to some extent contracts) thus is constantly in danger of fragmentation. As new BITs tend to be more complex, this danger will be felt more acutely in the future.

b) *The Re-Discovery of General Principles*

If we look at general rules of international law, we can observe a second special feature of investment law as presented in the contributions to this book. Not merely are general rules less dominant than in other major areas of international law. Moreover, the debate about general rules follows a peculiar logic.

General rules typically derive from multilateral treaties with broad membership, from customary international law, or from general principles of law in the sense of Article 38(1)(c). Of these three categories, the last is typically neglected: if we look at the general sources debate, general principles are 'wallflowers' existing on the margins of international legal argument – occasionally useful to fill gaps, but typically side-lined by legally relevant conduct of a genuinely international character. A quick glance at the current academic debate is sufficient to show that international investment law – again – is different. If (in line with the focus of the present book[24]) we leave aside questions of law enforcement, multilateral treaties are few and far between, and those that exist – the Energy Charter Treaty and NAFTA chiefly among them – do not aspire to universal participation. Custom is hugely relevant in determining underlying issues, such as consequences of breaches, aspects of statehood, immunity from suit and enforcement, etc. However, it mostly comes into play interstitially, namely when treaty rules or jurisdictional provisions are applied;

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[22] Cf. S Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009) for a detailed account. For brief comment see Gazzini (in this volume), at p. 104.

[23] Cf. Gazzini (in this volume), at p. 103.

[24] For brief comment see above, section 1.

and perhaps because of this, is not often discussed. By contrast, general principles are very much *en vogue*. As Stephan Schill shows in his contribution, a considerable strand of the current scholarship aims at 'realizing the relevance of general principles'[25] in investment law: as a force for stability and order in a system lacking a multilateral treaty (and agreement on the scope of custom).[26] To some extent, investment law may only be following a trend – a trend that has seen concepts like 'global administrative law' rise to fame.[27] But it is difficult to think of another branch of international law in which general principles are heralded with the same excitement.[28]

There is a lot that is puzzling about the renaissance of general principles in investment law. After decades arguing in favour of internationalization, is it not curious that many contemporary investment lawyers should see the future of their discipline in (comparative) domestic law? Yet this is another debate for another day. Whatever the merits of the approach, it is clear that general principles are being perceived as a fertile source of inspiration and guidance. Domestic sources and analogies – unlike traditionally and elsewhere, typically deriving from public law[29] – are used to fill gaps in the law, concretize the scope of vaguely formulated investment standards and help unearth hidden meanings of provisions. Decisions like *Total*[30] and *Mobil*[31] suggest that a comparative analysis is employed with a view to strengthening the reasoning of tribunals and – much in line with the traditional understanding of general principles – to overcoming deficiencies in the existing system of international (investment) law.[32]

None of this suggests that general principles take centre stage in international investment law. They play an auxiliary role, are resorted to notably when recourse to treaty law produces no clear results. However, from a

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[25] Schill, at p. 139.

[26] Cf. ibid., 150.

[27] See e.g. B. Kingsbury, N. Krisch and R. Stewart, "The Emergence of Global Administrative Law", 68 *Law & Contemporary Problems* (2005), p. 15.

[28] See notably the many contributions in S. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

[29] Contrast H. Lauterpacht's *Private Law Sources and Analogies of International Law* (London: 1927).

[30] *Total v Argentina*, ICSID Case ARB/04/1, Decision on Liability of 27 December 2010, at paras. 111 et seq.

[31] *Mobil v. Venezuela*, ICSID Case ARB 07/27, Decision on Jurisdiction of 19 June 2010, at paras. 169 et seq.

[32] Cf. the positive assessment by Schill, pp. 155–156.

comparative perspective, international investment law clearly is unusual in that it accords general principles such an auxiliary role – and in that it sees their 're-discovery' as a step forward. Should the trend signalled by decisions such as *Total* or *Mobil* continue, investment lawyers will no doubt have to confront the structural problems of general principles, which have led to their virtual disappearance from the sources debate outside investment law: the difficulty of establishing 'generality' and the almost inevitable bias in favour of a few national legal systems – typically those well-known to the decision-makers.

c) *Arbitral Decisions As Agents of Legal Development*

Finally, the important role of arbitral tribunals in shaping and developing investment law is noteworthy. As Eric De Brabandere's contribution clarifies,[33] binding decisions clearly are not a formal source of investment law – they are binding *inter partes* only. In fact, if anything, the fragmentation of substantive investment law should weaken the authority of dispute settlement bodies: how could a tribunal addressing a dispute arising under one BIT even begin to think that its decision should be relevant in another case, involving not only a different dispute and different parties, but also *a different treaty*? And yet, much of contemporary investment law undoubtedly is shaped by arbitral decisions.[34] Given the dominance of treaty law, interpretation is the key to the success of investment tribunals as 'agents' of legal development.[35] By interpreting a treaty provision in a certain way, tribunals have e.g. clarified the scope of vaguely-worded standards of protection and determined the reach of their jurisdiction. Typically, they have been successful 'agents' whose interpretation has been followed. However, occasionally – and perhaps (as suggested in Eric De Brabandere's contribution[36]) increasingly – controversial decisions prompt States to take treaty action designed to 'overrule' a decision.

Nothing of this takes investment law completely out of the ordinary. Dispute settlement bodies exercise influence on other areas of international law as well: Panels and the Appellate Body – while officially not supposed to "add to or diminish the rights and obligations provided in the

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[33] De Brabandere (in this volume) at pp. 245–247.

[34] Ibid., p. 257.

[35] Cf. H. Lauterpacht, *The Development of International Law by the International Court of Justice* (London 1958), at 5: international tribunals as 'agencies for the development of international law'.

[36] De Brabandere (in this volume) at pp. 282–283.

covered agreements"[37] – develop WTO law. In the 1990s, ad hoc tribunals raised international criminal law to a new level. The ECtHR, through decades of decisions, has 'moulded' the European Convention which has come to be 'what the judges say it is'. Looked at from this angle, investment law may simply be the most recent area of law that to a significant degree is 'judge-made'. There are some special features, though. One has been mentioned already[38]: the law to be moulded in the arbitral process is fragmented – the influence of arbitral tribunals depends on our perception of investment law as a system characterised by common provisions that, as a rule, carry the same meaning. Furthermore, the 'agents' are a fairly unorganised group[39]: they are established to settle one particular dispute, they are not part of any hierarchical structure, and they each lead their separate existence. Given these features, it may be surprising that tribunals should exercise so much influence over the law-making process. That they are able to do so reflects the power of informal processes of coordination just as much as the limited impact of more organised and orderly processes of law-making: substantive investment law suffers from a dearth of institutions and other standard-setters; and States have traditionally been reluctant to formulate specific treaty clauses restricting the discretion of tribunals. Arbitral tribunals have not hesitated to fill the 'law-making vacuum'; but it may be that as law-making in investment law becomes more sophisticated and treaties become more detailed, the potential for judge-made law will shrink.

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No doubt a lot more could be said about the relative relevance of the various sources of international investment law. However, it is believed that the three special features mentioned illustrate that notwithstanding the successful integration into public international law, investment law retains special features – which keeps the debates about sources of international law alive and interesting.

3. *Investment Law Sources As a 'Moving Target'*

Finally it is worth emphasising that our contemporary assessment of the sources of investment law is no more than a snapshot: a snapshot of a

[37] See Article 3:2 WTO Dispute Settlement Understanding.
[38] See abobe, section 2.a.
[39] A point made by de Brabandere (in this volume) at p. 254.

body of law that is dynamic, and that undergoes constant readjustment. This readjustment is obvious with respect to the substance of investment law, which is being built layer by layer – or indeed (as is being put frequently) 'BIT by BIT'.[40] For present purposes, however, a separate point is relevant: just as substantive investment law evolves, so does the relative importance of its various sources. The dominant sources of today may become remnants of the past sooner than we think. A brief hypothetical may serve to illustrate the point. The hypothetical is based on a simple question: How would previous generations of commentators have described the sources of international investment law (or its predecessors) in the 1960s, 1970s or 1980s?

In the 1960s, many would have taken issue with the most fundamental assumption underlying the contributions to the book – namely that rules for the protection of investments abroad would be part of public international law.[41] A conference on the sources of investment law (perhaps referred to as the 'Protection of Alien Property') would presumably have focused on the potential for 'internationalising' investment contracts – notwithstanding the ICJ's cautious approach in the *Anglo-Iranian Oil Company* case[42]. As regards conduct of an indisputably international character, diplomatic claims on behalf of corporations and shareholders, as well as lump-sum agreements, would probably have been discussed. By contrast, treaties (with the exception of FCN treaties) would have played a limited role. Some might have viewed the Abs-Shawcross draft[43] as an interesting project. By contrast, BITs – as the (eventually successful) strategy of ensuring the internationalisation of investment protection – would have hardly merited detailed debate: the first modern example (concluded between Germany and Pakistan in 1959[44]) might have featured. Yet probably it would have been treated as an isolated development – and, without providing investors with direct access to internationalised dispute resolution,[45] as not really that revolutionary.

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[40] The pun seems difficult to avoid: cf. e.g. J.W. Salacuse, "BIT by BIT: The growth of bilateral investment treaties and their impact on foreign investment in developing countries", 24 *The International Lawyer* (1990), p. 655.

[41] See supra, section 1.

[42] *Anglo-Iranian Oil Co.* case (Jurisdiction), Judgment of 22 July 1952, I.C.J. Reports, p. 93.

[43] Hermann Abs and Hartley Shawcross, 'The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by its Authors', 9 *Journal of Public Law* (1960); p. 115.

[44] *Bundesgesetzblatt* 1961 II, 793.

[45] See ibid., Article 11(2) (envisaging State-to-State dispute settlement only).

A decade later, a conference on the sources of investment law might have moved on to other sources. The 1970 *Barcelona Traction* judgment[46] would presumably have triggered debates about the role of international courts as law-makers,[47] and the crucial relevance of domestic rules in laying down a fundamental distinction between corporations and shareholders (a distinction recognised by international law by way of a *renvoi*). Perhaps as importantly, debates would have centred on the potential of law-making by international organisations. The 1967 OECD Draft Convention on the Protection of Foreign Property[48] might have been mentioned. But perhaps, by the mid-1970s, it would have been overshadowed by attempts at 'UN law making': indeed, at the time, it would not have been far-fetched to envisage the emergence of a genuinely multilateral regime of investment protection based on general rules laid down in major General Assembly resolutions such as GA Res. 3171, 3201 and 3281.[49] A regime of investment protection based on these resolutions would not have been popular among investors, but in terms of the sources, it would have been multilateral – and much more in line with law-making in other areas of international relations that have been shaped by the General Assembly. As regards bilateral treaties, the first BITs to include direct investor-State dispute resolution[50] might have been remarked upon, but only prophetic commentators would have been able to view them as the beginning of an 'era'. Arbitral decisions would have remained the exception; and while ICSID – established in between the first two hypothetical conferences – might have been of interest, one could not, at the time, notice its difficulty in attracting cases.

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[46] ICJ Reports 1970, 3.

[47] For a reprise see C. J. Tams and A. Tzanakopoulos, '*Barcelona Traction* at 40: The ICJ as an Agent of Legal Development', 23 *Leiden Journal of International Law* (2010), p. 781.

[48] OECD Doc C(67)102, in ILM 7 (1968), 117.

[49] 'General Assembly Resolution on Permanent Sovereignty over Natural Resources', GA Res 3171, 17 Dec. 1973, (1974) 13 ILM 238; 'Declaration on the Establishment of a New International Economic Order', GA Res 3201, 1 May 1974, (1974) 13 ILM 715; 'Charter of Economic Rights and Duties of States', GA Res 3281, 12 Dec. 1974, (1975) 14 ILM 251.

[50] Namely Indonesia-Netherlands (1968) and Chad-Italy (1969) (both available at http://www.unctadxi.org/templates/docsearch____779.aspx). As Newcombe and Paradell note, these BITs "rather than Germany-Pakistan (1959), marks the true beginning of modern BIT practice because it combines substantive investment promotion and protection obligations with binding investor-state arbitration to address alleged breaches of those obligations" (*Law and Practice of Investment Treaties* (Alphen aan den Rijn: Kluwer, 2009), at 45). For a similar observation see Jacob, 'Investments, Bilateral Treaties', in Max Planck Encyclopedia (www.mpepil.com), at para. 11.

Fast-forward another decade, the early 1980s would have seen commentators address the sources of investment law from yet another perspective. The 'Libyan arbitrations'[51] would have most likely led to renewed debate about the internationalisation of concessions – and also highlighted the weaknesses of law-making by arbitrators who even then, when recourse to them was much less common, occasionally tended to disagree with each other – or indeed offered three different answers to one and the same question.[52] *Lex mercatoria* may have been the main new item on the agenda and would probably have given rise to lively debates – as the (then[53]) 'new way out' of the old dilemma: a curiously 'private' source of law claiming global application; the new strategy to avoid host State law and to 'mercantilise' investment contracts.[54] BITs would most likely have remained a side-issue,[55] and ICSID still had not administered more than an handful of cases.[56] (Maybe speakers would have commented upon ICSID's efforts to attract disputes by opening up, through its additional facility,[57] to non-parties and non-party nationals, perhaps dismissing them as ill-fated or desperate.)

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But enough of hypothetical conferences. It is hoped that the brief journey through time illustrates that not just the substance, but also the sources of investment law are evolving. When seeking to assess their relevance, we

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[51] *BP Exploration Company Ltd. v. Libya* (1979) 53 ILR 297; *Texaco Overseas Petroleum Co.* (*TOPCO*) *and Californian Asiatic Oil Co. v. Libya*, (1979) 53 ILR 389 (English translation); *Libyan American Oil Co.* (*LIAMCO*) *v. Libya* (1981) 20 ILM 1.

[52] Cf. B. Stern, 'Trois arbitrages, un même problème, trois solutions', *Revue de l'Arbitrage* (1980), 3. For further comment see C. Greenwood, "State Contracts in International Law—The Libyan Oil Arbitrations", 53 *British Yearbook of International Law* (1982), p. 27.

[53] It is telling that *lex mercatoria* is not addressed specifically in the contributions to the present book. BITs have proven the more effective strategy of ensuring internationalisation.

[54] See e.g. O. Lando, "The *Lex Mercatoria* in International Commercial Arbitration", 34 *International and Comparative Law Quarterly* (1985), p. 747 and B. Goldman, "The Applicable Law: General Principals of Law—The *Lex Mercatoria*", in *Contemporary Problems in International Arbitration,* ed. J.D. Lew (Centre for Commercial Law Studies: 1986), p. 113.

[55] Between 1970 and 1979, about one hundred BITs were concluded: cf. Newcombe/Paradell, see above note 50, p. 46. The United States launched its BIT programme in 1977; China concluded its first BIT in 1982. The 'BIT movement' began in earnest in the 1980s. For a useful summary see Jacob (supra note 50), paras. 11–13.

[56] The first instalment of the ICSID Reports contains a useful chronology of investment disputes brought between 1972 and 1981: see E. Lauterpacht and R. Rayfuse, *ICSID Reports*, vol. 1 (Cambridge: Cambridge University Press 1993), at pp. xxi-xxiv.

[57] See the original version of the Additional Facility Rules of 1978.

are observing a moving target. This is of more than historical relevance; in fact it yields an obvious lesson. Just as the target has moved considerably in previous decades, so it is likely to move in the future. To some extent, this is reflected in the contributions, which hint at, or warn against, a number of future developments – among them a more critical approach to arbitral decisions, the resurgence of contracts, and a greater resort to custom.[58]

Yet it is a further development that could have the greatest impact on the current sources of investment law. At least with respect to substantive investment protection, the future may well be regional. As noted by Erik Denter, regional PTIAs offer distinct advantages.[59] They can provide for a more balanced system of investment protection, and they would allow future generations to overcome the trade-investment divide.[60] Nothing suggests that the move towards PTIAs will formally disapply the existing network of BITs. However, a gradual shift towards more comprehensive agreements binding more than two States – which then coexist alongside traditional BITs – indeed seems likely. Such a gradual shift would move international investment law into its 'post-BIT era'. As any transition from one era to another, such a shift will be accompanied by change. Yet it should not be seen as a threat, but as a chance: a chance to cure some of the deficiencies of the present system and to 'recalibrate'[61] international investment law. In terms of the sources at play, such a recalibration, involving a gradual move towards regional and multilateral rules, would bring investment law in line with other branches of international law.

[58] Cf. De Brabandere, at pp. 271–274; Dumberry, at pp. 232–240; and d'Aspremont, at pp. 20–22.

[59] Denter (in this volume), especially at pp. 51 and 66.

[60] Ibid., at pp. xx.

[61] Cf. J. Alvarez, "Why are we 'Re-calibrating' our Investment Treaties?", 4 *World Arbitration & Mediation Review* (2010), 143.

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