

*Special Issue: International Investment Law*

EDITORIALS

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COMMENTS

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## TABLE OF CONTENTS

### EDITORIALS

1. A Yearful of Thoughts  
*Shashank P. Kumar* ...1
2. International Investment Law – Questions Riddling an Answer  
*Manu Sanan* ...9

### ARTICLES

3. Five Justifications for Investment Treaties: A Critical Discussion  
*Gus Van Harten* ...19
4. The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds  
*Stephan W. Schill* ...59
5. Shareholders' Action to Claim for Indirect Damages in ICSID Arbitration  
*Dolores Bentolila* ...87

### NOTES AND COMMENTS

6. Protected Investments and Protected Investors: The Outer Limits of ICSID's Reach  
*Omar E. García-Bolívar* ...145
4. The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?  
*Mihir C. Naniwadekar* ...169

Stephan W. Schill, *The Multilateralization of International Investment Law: Emergence of a Multilateral System of Investment Protection on Bilateral Grounds*  
2(1) TRADE L. & DEV. 59 (2010)

THE MULTILATERALIZATION OF INTERNATIONAL  
INVESTMENT LAW: EMERGENCE OF A MULTILATERAL  
SYSTEM OF INVESTMENT PROTECTION ON BILATERAL  
GROUNDS

STEPHAN W. SCHILL\*

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

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## TABLE OF CONTENTS

- I. INTRODUCTION
- II. THE POTENTIAL FOR FRAGMENTATION IN INTERNATIONAL LAW
  - A. *Multiplicity of Sources, Multiplicity of Proceedings*
  - B. *Fragmentation and Arbitration as a Dispute Settlement Mechanism*
- III. THE STANDARDIZATION OF INTERNATIONAL INVESTMENT TREATIES
  - A. *The Entrenchment of BITs in Multilateral Processes*
  - B. *Bilateralism, Hegemony and Fragmentation*
- IV. MULTILATERALIZATION THROUGH MOST-FAVORED-NATION CLAUSES
  - A. *The Multilateralization of Substantive Investment Protection*
  - B. *The Multilateralization of Access and Scope of Investor-State Arbitration*
- V. CORPORATE NATIONALITY AND TREATY SHOPPING
  - A. *Nationality as the Gateway to Investment Protection*
  - B. *Changing Corporate Nationality: Hiding Behind the Corporate Veil*
- VI. MULTILATERALIZATION THROUGH INVESTMENT TREATY ARBITRATION
  - A. *Investment Treaty Arbitration as a Compliance Mechanism*
  - B. *Investment Treaty Arbitration as Investment Law-Making*
- VII. MULTILATERALIZATION THROUGH INTERPRETATION AND USE OF SOURCES
  - A. *Interpretation in pari materia*
  - B. *The Use of Precedent*
- VIII. CONCLUSION

## I. INTRODUCTION

The development of international investment law on the basis of bilateral treaties contrasts significantly with the emergence of multilateral institutions in other areas of international economic law, in particular international trade and international monetary law. While multilateralism dominated international relations in these fields through the establishment of the General Agreement on Tariffs and Trade and later the World Trade Organization and the International Monetary Fund, several approaches to establish a multilateral investment treaty have failed.<sup>1</sup> Instead, international investment law is enshrined in currently over 2,600 bilateral, regional and sectoral investment treaties (collectively BITs).<sup>2</sup> Furthermore, compliance and dispute settlement do not rely on a uniform dispute settlement body, but make use of one-off arbitral tribunals with limited State

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<sup>1</sup> See Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U. C. DAVIS J. INT'L L. & POL'Y 157 (2005) (hereinafter Vandeveld); Riyaz Dattu, *A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment*, 24 FORDHAM INT'L L. J. 275 (2000).

<sup>2</sup> See UNCTAD, *Recent Developments in International Investment Agreements (2008-June 2009)*, IIA Monitor No.3, at p. 2 (2009), available at: [www.unctad.org/en/docs//webdiaeia20098\\_en.pdf](http://www.unctad.org/en/docs//webdiaeia20098_en.pdf) (last visited March 31, 2010) (recording an aggregate of 2,676 bilateral investment treaties by the end of 2008).

oversight and without institutional mechanisms to ensure consistency of the decision-making process of the tribunals.

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

However, what one can observe is a convergence, not a divergence in structure, scope and content of international investment treaties. Unlike genuine bilateral treaties, BITs do not stand isolated in governing the relation between two States; they rather develop multiple overlaps and structural interconnections that create a relatively uniform and treaty-overarching regime for international investment protection. Likewise, decisions of arbitral tribunals tend to create convergence and consistency rather than divergence and fragmentation. Although inconsistent and conflicting decisions as regards the interpretation of standard principles of international investment law exist, such decisions are not only rare, but moreover largely result from diverging views of different arbitral tribunals about the proper application of the standard investor's rights in question and are not a function of the divergence of the underlying treaties. This article therefore argues that BITs in their entirety function increasingly analogously to a truly multilateral system. Instead of being prone to almost infinite fragmentation, international investment law is developing into a uniform governing structure for foreign investment based on uniform principles with little room for insular deviation. Paradoxically, international investment law is therefore multilateralizing on the basis of bilateral treaties.

To be clear, the argument is not that bilateral investment treaties 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 unitary treaty-overarching legal framework that is based on largely uniform principles of international investment law and arbitration. The argument is also not that there is complete identity among BITs, but that there is enough convergence in order to understand international investment law as a defined international law discipline that provides structured legal foundations for an

international investment space as part of the global market economy on the basis of which efficient investor-State cooperation can take place.

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

## II. THE POTENTIAL FOR FRAGMENTATION IN INTERNATIONAL INVESTMENT LAW

Many observers of international investment law stress upon the threat, and the actual existence, of conflicting and inconsistent decisions of investment tribunals on comparable treaty provisions or even identical facts.<sup>3</sup> They thereby echo the more general debate, which has ensued in the wake of conflicting interpretations concerning the attribution of actions of paramilitary groups to a State in the International Court of Justice and the International Criminal Tribunal for the Former Yugoslavia, about the proliferation of dispute settlement mechanisms as one central factor for the fragmentation of international law.<sup>4</sup> In fact, inconsistent decisions in investment treaty arbitration have occurred with respect to several aspects of international investment protection, including the interpretation of standard element of investment treaties such as most-favoured-nation clauses or “*umbrella clauses*” that accord treaty protection to investor-State contracts and similar host State undertakings.<sup>5</sup>

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<sup>3</sup> See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

<sup>4</sup> Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums*, 25 MICH. J. INT’L L. 929, 956-957 (2004). See further KOSKENNIEMI, FRAGMENTATION OF INTERNATIONAL LAW (2007).

<sup>5</sup> STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 339-355 (2009) (hereinafter SCHILL).

*A. Multiplicity of Sources, Multiplicity of Proceedings*

The potential for inconsistent and conflicting decisions in investment treaty arbitration, or more generally incoherence in the law governing international investment relations, is indeed abundant. Its causes can be found in substantive as well as procedural law. Concerning substance, the fragmentation of sources of international investment law suggests that different levels of substantive investment protection exist depending on the nationality of the investor in question. Due to the large number of BITs, the same State measure might be assessed differently under two investment treaties. Different treaties might also contain different standards of investment protection, therefore resulting in differentiated protection of foreign investors.

Similarly, inconsistent decisions can result from the possibility of having multiple proceedings relating to an identical set of facts. These may arise from independent claims by shareholders at different levels of a corporate structure.<sup>6</sup> Such a constellation led, for example, to inconsistent decisions by two tribunals in *CME v. Czech Republic* and *Lauder v. Czech Republic*.<sup>7</sup> Here, measures of the Czech Republic against a locally incorporated media company resulted in proceedings before two investment tribunals under two different BITs, one initiated by CME, the direct shareholder of the locally incorporated company, the other by Mr. Lauder, the controlling shareholder of CME. While the Tribunal in *CME* found that the Respondent's measures violated several provisions of the Dutch-Czech BIT and ordered it to pay in damages of approx. US\$ 270 million,<sup>8</sup> the Tribunal in *Lauder* only found a minor breach of the U.S.-Czech BIT, but did not award damages due to remoteness.<sup>9</sup>

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

Furthermore, the institutional design of dispute settlement under investment treaties using one-off arbitral tribunals is a threat to consistent decision-making.

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<sup>6</sup> This results from the broad definition of "investor" and "investment" which accords standing to shareholders at various levels. See Christoph Schreuer, *Shareholder Protection in International Investment Law*, in COMMON VALUES IN INTERNATIONAL LAW, ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 601 (Dupuy/Fassbender/Shaw/Sommermann eds., 2006).

<sup>7</sup> See Wolfgang Kahn, *How to Avoid Conflicting Awards – The Lauder and CME Cases*, 5 J. WORLD INV. & TRADE 7 (2004).

<sup>8</sup> *CME Czech Republic B.V (The Netherlands) v. The Czech Republic*, 9 ICSID Reports 121 (Sep. 13, 2001) Final Award of March 14, 2003 [all investment treaty awards are available via the Investment Treaty Arbitration website at <http://ita.law.uvic.ca> or the Investment Claims website at <http://www.investmentclaims.com>].

<sup>9</sup> *Lauder v. Czech Republic*, Final Award of Sept. 3, 2001, at para. 235.

Arbitral tribunals coexist without hierarchy and are not subject to external control mechanisms that could effectively ensure consistency in the decision-making process of the tribunals.<sup>10</sup> Furthermore, investment treaty arbitration also lacks a concept of *de jure stare decisis* that could operate in producing consistent decisions.<sup>11</sup> On the contrary, arbitral tribunals are free to adopt rulings that deviate from prior decisions by other tribunals.

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

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<sup>10</sup> See Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV.—FOREIGN INVESTMENT L. J. 321 (1991). The exclusive remedy against ICSID awards is annulment pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), adopted March 18, 1965, entered into force Oct. 14, 1966, 575 U.N.T.S. 159, which can be based on enumerated grounds. Lack of consistency or conflicts with earlier arbitral jurisprudence is not a ground for annulment. See *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (Oct. 19, 2009), at para. 24 (observing that “[t]he responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals”). Recognition and enforcement of non-ICSID awards are regularly subject to proceedings before domestic courts pursuant to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (“New York Convention”), 330 U.N.T.S. 38. While the Convention grants greater powers to domestic courts than the ICSID Convention, inconsistencies in arbitral jurisprudence alone are regularly not grounds for refusing recognition and enforcement of arbitral awards.

<sup>11</sup> See only art. 1136(1) NAFTA; Art. 53(1) ICSID Convention (both providing for the binding effect of awards between the parties to the proceeding only). Investment tribunals accept the lack of a rule of *de iure stare decisis*, see Gabrielle Kaufmann-Köhler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT’L 357 (2007) (hereinafter Kaufmann-Köhler).

<sup>12</sup> See Stephan Schill, *International Investment Law and the Host State’s Power to Handle Economic Crises*, 24 J. INT’L ARB. 265 (2007).

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

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

### III. THE STANDARDIZATION OF INTERNATIONAL INVESTMENT TREATIES

The bilateral form of investment treaties suggests that the treaties differ significantly in content and structure and resemble *quid pro quo* bargains rather than instruments governing international investment relations in a uniform way. However, international investment treaties generally conform to an archetype, converge in their wording and have developed a surprisingly uniform structure, scope and content.<sup>15</sup> Almost all investment treaties provide for national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security. They also contain prohibitions on direct and indirect expropriation and grant free transfer of capital. Finally, most investment treaties allow investors to initiate arbitration proceedings against the host State for

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<sup>13</sup> See, for example, Judith Gill et al., *Contractual Claims and Bilateral Investment Treaties*, 21 J. INT'L ARB. 397 (2004).

<sup>14</sup> See, for example, Faya Rodriguez, *The Most-Favored-Nation Clause in International Investment Agreements*, 25 J. INT'L ARB. 89 (2008). See also SCHILL, *supra* note 5, at 151-173.

<sup>15</sup> See for an older empirical study Mohamed I. Khalil, *Treatment of Foreign Investment in Bilateral Investment Treaties*, 7 ICSID REV.—FOREIGN INVESTMENT L. J. 339 (1992).

violating the treaty in question.<sup>16</sup> This convergence in form and content is particularly striking as one of the reasons why ordering international relations on a bilateral basis is preferable to multilateral ordering is the flexibility bilateral treaties offer to respond to specific needs and particularities.<sup>17</sup> This convergence, however, as argued in this section, is not accidental, but a result of multilateral processes behind multilateral treaty making that aim at uniform principles of international investment law.

#### *A. The Entrenchment of BITs in Multilateral Processes*

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

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<sup>16</sup> For general accounts of investment treaties and investment treaty arbitration see RUDOLF DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* (Kluwer International 1995)(hereinafter DOLZER & STEVENS); M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 315 *et seq.* (2d ed. 2004); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION – SUBSTANTIVE PRINCIPLES* (Oxford International Arbitration Series 2007) (hereinafter MCLACHLAN, SHORE & WEINIGER); ANDREAS F. LOWENFELD, *INTERNATIONAL ECONOMIC LAW* 467–591 (2008); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* (2008) (hereinafter DOLZER & SCHREUER); *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* (Muchlinski/Ortino/Schreuer eds., 2008) (hereinafter Muchlinski/Ortino/Schreuer eds.); ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES – ETANDARDS OF INVESTMENT PROTECTION* (2009).

<sup>17</sup> See generally on the variables that explain the institutional choice between bilateralism and multilateralism, T. Rixen & I. Rohlffing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INT'L NEGOTIATION 389 (2007).

<sup>18</sup> Various model BITs, including the ones of Austria, China, Denmark, Germany, Hong Kong, the Netherlands, Switzerland, the United States, and the United Kingdom, are reprinted in DOLZER & STEVENS, *supra* note 16, at 165 *et seq.*; MCLACHLAN, SHORE & WEINIGER, *supra* note 16, at 379 *et seq.*; DOLZER & SCHREUER, *supra* note 16, at 352 *et seq.*

<sup>19</sup> See Vandeveld, *supra* note 1, at 170.

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

The link between BITs and other multilateral developments can also be illustrated by the Fourth Lomé Convention concluded between EC Member States and 68 developing countries from the African, Caribbean and Pacific region. The Convention did not only affirm the importance of concluding investment treaties between the contracting parties,<sup>21</sup> but also determined some of the content of these agreements,<sup>22</sup> aiming at ensuring the homogeneity of such future treaties. The entrenchment of BIT treaty-making in multilateral processes therefore illustrates that the bilateral form of BITs was not a reaction to the need for flexibility regarding the law governing international investment relations but that bilateral treaties were merely the vehicle for implementing the multilateral aspirations expressed in earlier multilateral projects for international investment protection that failed to materialize because no consensus between capital-exporting countries and capital-importing countries could be found regarding the scope of protection of foreign investment under international law.<sup>23</sup>

### B. *Bilateralism, Hegemony and Fragmentation*

Given that the multilateral processes BIT treaty-making is embedded in were driven and devised by capital-exporting countries, the content of BITs possibly could be viewed as a function of the hegemonic behavior of those countries *vis-à-*

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<sup>20</sup> See, for example, Anthony Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411 (2004) (concerning the development of umbrella clauses).

<sup>21</sup> See art. 260(1) of the Fourth ACP-EEC Convention (Lomé Convention, signed Dec. 15, 1989), 29 I.L.M. 809 (1990).

<sup>22</sup> Annex LIII of the Final Act concerning the Lomé Convention, 29 I.L.M. 802 (1990).

<sup>23</sup> See SCHILL, *supra* note 5, at 31-40.

*vis* their capital-importing counterparts.<sup>24</sup> If this was the case, the apparent convergence of international investment treaties would merely conceal that BITs in fact endorse preferential benefits of stronger *vis-à-vis* weaker capital-exporting States. In other words, it would be likely that stronger capital-exporting States seek specific benefits in BITs in relations to competing capital-exporters, just as States in the inter-war period have used their negotiating power in bilateral economic relations to ensure advantages over competing powers by concluding protectionist regimes with weaker States.<sup>25</sup> Thus, the apparently uniform wording of similar treaty provisions could merely conceal differences in relative negotiating power of the parties to the treaty and differences in the content of the treaties concluded. The requirement to treat foreign investors fairly and equitably, for example, could possibly afford much greater protection to U.S. investors in Uruguay than to Dutch investors in China, given the greater relative negotiation power of the United States.

However, investment treaties are grounded on notions of equality and non-discrimination, reflected above all in the principles of national and most-favored-nation treatment, and therefore on genuinely multilateral rationales. Furthermore, investment treaties apply the same standards to both contracting parties, that is, to both the net capital-importing as well as the net capital-exporting country. This aspect develops into an increasingly real restriction of the State's conduct *vis-à-vis* foreign investors in both contracting States, with more capital not flowing only in one direction, from the capital-exporting to the capital-importing country but in both directions. Finally, the expanding number of South-South BITs,<sup>26</sup> concluded between developing countries, where investment flows are presumably bi-directional, equally endorse the same standard terms as those contained in North-South BITs. This suggests that the content of investment treaties today is generally considered as constituting an appropriate balance between investment protection and State sovereignty, independent of whether BITs are concluded in North-South or South-South relations.<sup>27</sup> In other words, the fact that South-South BITs are not different in content from traditional North-South BITs suggests that the content of investment treaties is not a function of relative negotiation power between the contracting parties, but rather an indication that the standards and principles of international investment treaties nowadays are

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<sup>24</sup> In this sense B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 7 *et seq.* (2004).

<sup>25</sup> See Charles P. Kindleberger, *Commercial Policy Between the Wars*, in THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 161 (Vol. VIII) (Mathias & Pollard eds., 1989).

<sup>26</sup> UNCTAD, *South-South Cooperation in International Investment Arrangements*, available at: [http://www.unctad.org/en/docs/iteiit20053\\_en.pdf](http://www.unctad.org/en/docs/iteiit20053_en.pdf) (last visited March 31, 2010).

<sup>27</sup> Stephan Schill, *Tearing Down the Great Wall – The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 114 *et seq.* (2007).

rather universally accepted as appropriate standards governing investor-State relations. Certainly, hegemonic elements were at play when developed States switched from multilateral to bilateral negotiation settings, where they had greater relative bargaining power.<sup>28</sup> Yet, this hegemonic behavior did not result in preferential or discriminatory investment protection standards, but rather aimed at ensuring that capital-importing countries would agree to the same set of non-discriminatory and non-preferential standards they would not agree on in a multilateral setting.

The reason for the convergence of BITs, therefore, is that uniform and universal rules are in principle in the interest of all States. The hypothesis, in this context, is that uniform rules governing international investment relations are not only beneficial for developed countries as a group, but are in the interest of every single State, whether developed or developing. Such an explanation for the convergence of investment treaties is based on the crucial role uniform rules have for the creation of a level-playing field for foreign investment, which in turn enables investment in a global economy to flow to wherever capital is most effectively allocated. Uniform standards are particularly salient as they are the prerequisite for competition in a global market. From this point of view, establishing uniform rules is in the long-term interests of all States and explains why bilateral investment treaties are so similar and can be seen as a substitute for a single multilateral investment treaty.

#### IV. MULTILATERALIZATION THROUGH MOST-FAVORED-NATION CLAUSES

The interest of States in creating uniform rules for investment protection also surfaces in the BITs themselves. An express basis for the multilateralization of investment relations are most-favored-nation (“MFN”) clauses incorporated in almost every treaty. With some variations, these clauses are reciprocal, unconditional and indeterminate.<sup>29</sup> They require to “treat investments and activities associated with investments in its own territory . . . on a basis no less favourable than that accorded to investments and activities associated with investments of nationals of any third country”.<sup>30</sup> MFN clauses break with general international law and the bilateralist rationale that permits differential treatment

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<sup>28</sup> Eyal Benvenisti & George W. Downs, *The Empire’s New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 611-612 (2007).

<sup>29</sup> See Pia Acconci, *Most-Favoured-Nation Treatment*, in Muchlinski/Ortino/Schreuer eds., *supra* note 16, at 363, 368.

<sup>30</sup> Art. 3(c) of the Agreement between the Government of Australia and the Government of the People’s Republic of China on the Reciprocal Encouragement and Protection of Investments, signed and entered into force July 11, 1988.

of different States and their nationals.<sup>31</sup> They oblige the State granting MFN treatment to extend to the beneficiary State any more favorable treatment as may be accorded to third States<sup>32</sup> and thus require non-discrimination between the beneficiary and any third State.

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

#### *A. The Multilateralization of Substantive Investment Protection*

The application of MFN clauses to import more favorable substantive conditions from third-country BITs is largely uncontested. Several tribunals held that MFN treatment would apply to incorporating more favorable substantive investment protection from third-party BITs. Already in the first known investment treaty dispute, the Tribunal in *Asian Agricultural Products v. Sri Lanka* accepted the general proposition that an investor covered by the basic treaty could rely on more favorable substantive conditions granted in another BIT concluded with a third State.<sup>33</sup> The extension of substantive rights by means of an MFN clause was also accepted in *Pope & Talbot v. Canada*,<sup>34</sup> *MTD v. Chile*,<sup>35</sup> and *Rumeli Telekom v. Kazakhstan*,<sup>36</sup> and is firmly accepted in arbitral jurisprudence.

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<sup>31</sup> Endre Ustor, *Most-Favoured-Nation Clause*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 468 (Vol. III) (Bernhardt & Macalister-Smith eds., 1997).

<sup>32</sup> *See id.* at 468.

<sup>33</sup> *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of June 27, 1990, para. 54 (hereinafter *Asian Agricultural Products v. Sri Lanka*).

<sup>34</sup> *Pope & Talbot Inc. v. Canada*, UNCITRAL/NAFTA, Award on the Merits of Phase 2 of April 10, 2001, para. 117. *See also* *Pope & Talbot v. Canada*, UNCITRAL/NAFTA, Award of May 31, 2002, para. 12.

<sup>35</sup> *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of May 25, 2004, paras. 100 *et seq.*, 197 *et seq.*

<sup>36</sup> *See* *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of July 29, 2008, paras. 572, 575, 609-619.

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

Yet, MFN clauses, at least those that are not explicitly limited to substantive treatment, can equally apply to investor-State arbitration. Thus, in arbitral practice, MFN clauses have been interpreted as encompassing more favorable conditions concerning dispute settlement mechanism under BITs. In *Maffezini v. Spain*, for example, the Tribunal held that, by means of an MFN clause, the claimant was not bound by a waiting period contained in the basic treaty, but could rely on more favorable conditions in Spain's third-party BITs that allowed initiating investor-State arbitration more quickly.<sup>37</sup>

While the application of neutrally worded MFN clauses to questions of admissibility of investor-State claims has been rather uniformly accepted in arbitral jurisprudence, mostly in the context of importing shorter waiting-clauses from third-party BITs,<sup>38</sup> it is contentious whether MFN clauses can also broaden the jurisdiction of an arbitral tribunal.<sup>39</sup> The Tribunal in *Plama v. Bulgaria* declined

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<sup>37</sup> Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of Jan. 25, 2000, paras. 38 (hereinafter *Maffezini v. Spain*).

<sup>38</sup> See *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of Aug. 3, 2006, para. 52; *Suez, Sociedad General de Aguas de Barcelona, S.A. (AGBAR) and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of Aug. 3, 2006, paras. 52 *et seq.* (hereinafter *Suez and Vivendi Universal v. Argentina*); *Suez, Sociedad General de Aguas de Barcelona, S.A. (AGBAR) and Interaguas Servicios Integrales del Agua, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction of May 16, 2006, para. 52; *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005, paras. 24 *et seq.* (hereinafter *Gas Natural v. Argentina*); *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of Aug. 3, 2004, paras. 32 *et seq.*; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction of May 11, 2005, para. 121; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction of June 20, 2006, paras. 53 *et seq.* So far, only the Tribunal in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of Dec. 8, 2008, (hereinafter *Wintershall v. Argentina*) disagreed with the result in *Maffezini* and its progeny that waiting periods could be shortened based on an MFN clause (*see id.*, paras. 158-197). However, the Tribunal in *Wintershall* qualified the requirement to pursue local remedies for eighteen months before turning to international arbitration as a jurisdictional condition to the host State's consent to arbitration, rather than as an admissibility-related question (*see id.*, paras. 108-157). For this reason, it applied the reasoning and the rationale of *Plama v. Bulgaria*. *See infra* notes 40-41 and accompanying text.

<sup>39</sup> See on this debate with further references Stephan Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration*, 10 J. WORLD INV. & TRADE 189 (2009).

such an argument.<sup>40</sup> While the arbitration clause in the basic treaty only provided for arbitration concerning the amount of compensation for expropriation, other host State BITs provided for comprehensive investor-State arbitration regarding all causes of action. The Tribunal held, however, that in order to benefit from the broader consent in subsequent BITs, the MFN clause needed to encompass investor-State dispute settlement in a “clear and unambiguous” fashion.<sup>41</sup>

However, it is questionable whether the arguments for the restrictive view on the scope of application of MFN clauses of the Tribunal in *Plama* are convincing. The main reason for being skeptical in this respect is that the provisions on investor-State dispute settlement are arguably the most important rights accorded to foreign investors, because they effectively allow enforcing compliance with the host State’s obligations under an international investment treaty.<sup>42</sup> It would thus be surprising if States include MFN clauses into their investment treaties that do not encompass the most important right granted to foreign investors under the treaties, *i.e.*, the right to initiate investor-State arbitration. This is all the more so, as equal treatment regarding access to arbitration is as important for a level playing-field for foreign investors with different nationalities as equal treatment regarding substantive investor’s rights.<sup>43</sup> Furthermore, there is no principle in international law that requires a State’s consent to international dispute resolution to be “clear and unambiguous.” Instead, it is sufficient that consent to arbitration can be found by interpreting the respective treaty in question and determining the existence of consent on an objective basis.<sup>44</sup> Accordingly, some more recent decisions have accepted, at least in principle, that MFN clauses can apply to incorporating broader consent to investor-State arbitration in third-party BITs.<sup>45</sup>

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<sup>40</sup> See *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of Feb. 8, 2005, para. 183 *et seq.* (hereinafter *Plama v. Bulgaria*).

<sup>41</sup> *Id.*, para. 200; see also *id.*, para. 218. Likewise, *Salini Costruttori S.p.A and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of Nov. 15 2004, paras. 102 *et seq.* (hereinafter *Salini v. Jordan*); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award of April 21, 2006, paras. 159-208; *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ISCID Case No. ARB/04/15, Award of Sept 13, 2006, paras. 81 *et seq.*; *Wintershall v. Argentina*, *supra* note 38, paras. 167, 187-189.

<sup>42</sup> Cf. *Gas Natural v. Argentina*, *supra* note 38, para. 49. See on this and the following also SCHILL, *supra* note 5, at 173-193.

<sup>43</sup> SCHILL, *supra* note 5, at 180-182.

<sup>44</sup> *Id.*, at 184-187.

<sup>45</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction of Oct. 2007, paras. 124-139 (finding that the MFN clause in question in connection with broader consent given by Respondent in a third-country BIT extended the Tribunal’s jurisdiction); *Renta 4 S.V.S.A et al. v. The Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections of March 20, 2009, paras. 68-120

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

## V. CORPORATE NATIONALITY AND TREATY-SHOPPING

Unlike genuine multilateral treaty regimes, the scope of application of BITs is restricted *ratione personae* to investors that have the nationality of the other contracting Party. Inclusion into and exclusion from a treaty's protection therefore depend on the bond of nationality between the investor and its home State. This provides a strong counterargument against the thesis that the BIT regime develops towards a multilateral system that imposes uniform obligations upon States as regards the treatment of foreign investments. However, investment treaties actually allow for various forms of treaty-shopping through corporate structuring, thus allowing investors to react to potential differences between investment treaties of the host State. This can have a similar effect as MFN clauses in preventing States from applying different standards of investment protection to foreign investors depending on their nationality.

### A. Nationality as the Gateway to Investment Protection

Nationality as the decisive factor for inclusion of a specific investor in and exclusion from the protection offered by a specific BIT is becoming an increasingly elusive criterion as States have difficulties in limiting the protection a specific BITs offers to a specific bilateral inter-State relationship. The reason for this mainly is the broad definition in most BITs of the notion of "investor",

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(declining to extend jurisdiction based on the MFN clause in question because, in the majority's reading, the clause did not cover questions of dispute settlement, but "agree[ing] that 'more favourable' may in principle include accessibility to international fora," *id.*, para. 119 – the Separate Opinion on the case concluded that the MFN clause in question would extend the Tribunal's jurisdiction in light of more favorable consent in the host State's third-country BITs).

which regularly does not only comprise natural persons,<sup>46</sup> but also corporate investors. While the nationality of natural persons is relatively stable and not subject to frequent change, corporate entities can change their nationality quickly and at little cost by migrating to another jurisdiction or by setting up a corporate subsidiary abroad. This effectively allows investors to change their nationality for purposes of investment protection by hiding behind the corporate veil and by structuring their investment so that they are covered by the investment treaty they prefer. This involves a large potential for “treaty shopping,” and undermines an understanding of BITs as expressions of bilateral bargains, because an investor can easily opt into almost any BIT regime it wishes. The interplay between investment protection, corporate law and corporate structuring thus has a profound influence on the multilateralization of international investment law.

Above all, arbitral tribunals so far have declined to take a look behind the corporate veil in order to determine the nationality of corporate investors according to the nationality of its shareholders; what is relevant instead is either the place of incorporation or the corporate *siège social*.<sup>47</sup> Arbitral tribunals have thus accepted to view corporate vehicles as investors and have accorded them protection under “their” home State BIT, even though the controlling shareholders might be covered by a different investment treaty with the host State, or even no investment treaty at all.

### B. *Changing Corporate Nationality: Hiding Behind the Corporate Veil*

Arbitral jurisprudence has accepted such treaty-shopping in a number of different situations. In *Aguas del Tunari v. Bolivia*, the Tribunal accepted that an investment that was originally not protected by an investment treaty, because the investor’s home State had not entered into a BIT with the host State, could be brought under BIT protection by changing the corporate structure and interposing an entity that was covered by an investment treaty.<sup>48</sup> Likewise, arbitral

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<sup>46</sup> International law does, however, require that a sufficiently “genuine link” between the individual and the State granting nationality exists in order for the foreign nationality to be recognized by other countries. See *Nottebohm Case* (Liechtenstein v. Guatemala), Judgment of April 6, 1955, I.C.J. Reports 1955, pp. 4, 20 *et seq.*

<sup>47</sup> Using the control theory, by contrast, which determines corporate nationality according to the nationality of the controlling shareholders, is rather exceptional. See DOLZER & STEVENS, *supra* note 16, at 34 *et seq.*; Anthony Sinclair, *The Substance of Nationality Requirements in Investment Treaty Arbitration*, 20 ICSID-REV.-FOREIGN INVESTMENT. L. J. 357, 368-378 (2005) (hereinafter Sinclair – *Substance of Nationality Requirements*).

<sup>48</sup> *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction of Oct. 21, 2005, paras. 67 *et seq.* (hereinafter *Aguas del Tunari v. Bolivia*); See also *Saluka Investments BV v. The Czech*

jurisprudence has accepted that dual nationals, who also have the nationality of the host State, can hide behind the corporate veil of a company incorporated in the State of their other nationality. In *Champion Trading v. Egypt*, the Tribunal accepted that dual U.S.-Egyptian nationals, who were themselves denied standing under Art. 25(2)(a) ICSID Convention, could bring claims against Egypt by structuring their investment through a company incorporated in the United States.<sup>49</sup> Finally, in *Tokios Tokelés v. Ukraine* the Tribunal even accepted that nationals of the host State could, by means of corporate structuring, hide behind a corporate structure incorporated in another jurisdiction and thus bring their investment under the protection of the BIT between their home State and the company's home State.<sup>50</sup> While the Respondent argued that “find[ing] jurisdiction in the case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government,”<sup>51</sup> the Tribunal's majority concluded that the definition of investor in the BIT also comprised constellations of reinvestments as the one in the case at hand.<sup>52</sup>

Some treaties, however, restrict the possibilities of investors to use corporate vehicles in a third-country jurisdiction to opt into a different BIT regime by employing so-called “denial of benefits”- clauses that allow the host State to deny

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Republic, UNCITRAL, Partial Award of March 17, 2006, paras. 222-242; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal of Oct. 2, 2006, paras. 335-362.

<sup>49</sup> See *Champion Trading Company Ameritrade International, Inc., James T. Wahba, John B. Wahba and Timothy T. Wahba v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction of Oct. 21, 2003, paras. 3.4.1 *et seq.*

<sup>50</sup> *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of April 29, 2004, paras. 21 *et seq.* (hereinafter *Tokios Tokeles v. Ukraine*). See on the case also Markus Burgstaller, *Nationality of Corporate Investors and International Claims against the Investor's Own State*, 7 J. WORLD INV. & TRADE 857 (2006).

<sup>51</sup> *Tokios Tokeles v. Ukraine*, *supra* note 50, para. 22. A somewhat different approach was taken in *TSA Spectrum de Argentina, S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of Dec. 19, 2008, paras. 133-162, where the Tribunal declined jurisdiction because of lack of a company under “foreign control” in the sense of art. 25(2)(b) of the ICSID Convention in case of a locally incorporated company that was owned, via an intermediary corporate entity incorporated in the Netherlands, by an Argentine national. While the Tribunal supported piercing the corporate veil in the case at hand, the decision is arguably limited to the specific jurisdictional requirements of art. 25(2)(b) of the ICSID Convention and does not concern the determination of nationality of corporate investors under investment treaties and, thus, does not take a negative stance against corporate structuring in more general terms. See SCHILL, *supra* note 5, at 232-234.

<sup>52</sup> *Id.*, para. 36. *Similarly*, *Wena Hotels Limited. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction of June 29, 1999, 41 I.L.M. 881, 886-889 (2002); *The Rompetrol Group N.V. and Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility of April 18, 2008, paras. 75-110.

investment treaty protection to those investors that have merely opted into the treaty regime in question through the establishment of a shell or mailbox corporation.<sup>53</sup> The U.S.-Georgian BIT, for instance, provides that:

Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and ... the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.<sup>54</sup>

Such “denial of benefits” provisions thus recognize that corporate entities can be used as vehicles to bring an investment under the applicability *ratione personae* of a third-country BIT. They aim at preventing such corporate structuring for purposes of investment treaty protection in case the corporate vehicle has no business activities in the jurisdiction of incorporation and thus no “genuine link” to this jurisdiction. At the same time, “denial of benefits”-clauses are also a clear illustration that States are aware of the possibility of investors to channel their investments through third-country corporations in order to benefit from the protection of a specific investment treaty. The clauses therefore confirm that in their absence corporate structuring can be used by investor for treaty-shopping.

The possibility of corporate structuring shows above all that ordering international investment relations on a truly bilateral basis with rights and benefits only accruing to nationals of one specific home State is an increasingly illusionary undertaking, since the nationality of corporate investors has become as fungible as capital in global markets. Corporate structuring, therefore, multilateralizes investment treaties because virtually any investor from virtually any country is capable of opting into virtually any BIT regime. Similarly, access and exit from the BIT regime resembles a multilateral treaty regime if corporate structuring is taken into account. Thus, access to investment protection in a specific host State can become operative through a single BIT. Concluding a single BIT, in other words, could potentially offer investment protection to all foreign investors in the

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<sup>53</sup> On such clauses see Sinclair – *Substance of Nationality Requirements*, *supra* note 47, at 378-387; See also *Plama v. Bulgaria*, *supra* note 40, paras. 143-170 (attributing, however, to “denial of benefits”-clauses the questionable content of only allowing host States to deny benefits of the investment treaty protection prospectively after the invocation of the clause, instead of handling it properly as an objection to jurisdiction or admissibility of the claim).

<sup>54</sup> Art. XII Treaty between the Government of the United States of America and the Government of the Republic of Georgia concerning the Encouragement and Reciprocal Protection of Investment, signed March 7, 1994, entered into force Aug. 10, 1999. Art. 17(1) of the Energy Charter Treaty (annex I of the Final Act of the European Energy Charter Conference), adopted Dec. 17, 1994, 34 I.L.M. 373 (1995), contains a similar denial of benefits clause.

host State concerned, provided the BIT in question encompasses corporate structures without taking into account the shareholders behind them. Conversely, corporate structuring restricts selective exits from investment protection in relations to specific States. Instead, effective exit from international investment protection is only possible if a host State terminates all of its investment treaties as investors can always bring their investment under the protection of a different BIT simply by restructuring through a corporate intermediary covered by a different BIT.

In sum, multi-jurisdictional structuring therefore shows that bilateralism as an ordering paradigm for international investment relations is unfeasible, because investors can often opt for the BIT regime they prefer. Although the possibility of treaty-shopping per se suggests that there are relevant differences between investment treaties, treaty shopping also shows that a treaty-overarching regime or system of international investment law develops independently of the actual uniformity in content of bilateral investment treaties and independent from the inclusion of most-favored-nation clauses. Rather, by accepting corporate structuring, BITs provide investors themselves with a tool to multilateralize international investment protection.

## VI. MULTILATERALIZATION THROUGH INVESTMENT TREATY ARBITRATION

The multilateralization of international investment law does not only take place on the level of substantive investment protection. It is also furthered by the introduction of investor-State arbitration as a mechanism for settling disputes under BITs. By granting investors the right to initiate arbitration and thus force host States to comply with the treaties, leeway for inter-State negotiations about the consequences of breaches of BITs after a dispute has arisen is virtually abolished. This excludes bilateral post-breach bargaining and ensures that investment treaties are enforced independent of the relative power relations between host and home States. Apart from its compliance function, investor-State arbitration also empowers tribunals to function as law-makers for the entire investment treaty regime.

### *A. Investment Treaty Arbitration as a Compliance Mechanism*

Traditional international law allowed States to flexibly negotiate around the consequences of breaches of international obligations, if this was in their interest and was achievable in view of their bargaining power.<sup>55</sup> Inevitably, this flexibility

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<sup>55</sup> See, for example, the practice of lump-sum agreements in settling claims for the violation of alien property RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENTS* (1975); BURNS H. WESTON,

could lead to contortions in the competition between investors depending on their national origin. Access to investor-State arbitration, by contrast, ensures that investors are able to enforce investment treaties against States independently of their home State's relative power.<sup>56</sup> This does not only consolidate international investment law as a functioning legal regime, but also ensures that the general and uniform principles that investment treaties establish are implemented without contortions in the enforcement stage. Investor-State arbitration as a dispute settlement and compliance mechanism thus restricts bilateralism in the enforcement of investment treaty obligations by removing the power of States to defect from their treaty obligations based on bargaining with the investor's home State. Furthermore, the ICSID Convention excludes the exercise of diplomatic protection by the investor's home State, thus ensuring that investor-State arbitration remains the only mechanism to settle disputes about compliance of the host State with its treaty obligations.<sup>57</sup> The establishment of investor-State arbitration, in other words, is part of the development to resolve investment-related disputes in a judicial forum and by legal means, rather than by inter-State bargaining and diplomatic pressure.

In addition to that, the ICSID Convention, which governs most investment treaty disputes,<sup>58</sup> itself constitutes a multilateral convention. Consequently, it subjects investor-State disputes, independent of the governing investment treaty, to the same procedural rules and imposes equal transactions costs regarding the settlement of investment treaty disputes. Furthermore, the rules in the ICSID Convention concerning the recognition and enforcement of investment treaty awards respond to the necessity of implementing an arbitral award effectively across several jurisdictions. It provides for the recognition of arbitral awards in all Member States of the ICSID Convention and thereby transforms the effect of an award rendered pursuant to the rules of a specific BIT into a specific obligation that has to be complied with by all Member States of the Convention.<sup>59</sup> This makes it more difficult for respondent States to frustrate the enforcement of arbitral awards in its own territory by enabling investors to enforce it against

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DAVID J. BEDERMAN, RICHARD B. LILICH, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENTS 1975-1995 (1999).

<sup>56</sup> Cf. Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes – The Role of ICSID and MIGA*, 1 ICSID REV.–FOREIGN INVESTMENT L. J. 1 (1986). On investor-State arbitration as a compliance mechanism see Stephan Schill, *Arbitration Risk and Effective Compliance: Cost-Shifting in Investment Treaty Arbitration*, 7 J. WORLD INV. & TRADE 653, 681 - 683 (2006).

<sup>57</sup> See art. 27 ICSID Convention.

<sup>58</sup> UNCTAD, *Latest Developments in Investor-State Dispute Settlement*, IIA Monitor No. 1 (2008), at p. 2, available at: [http://www.unctad.org/en/docs/iteiia20083\\_en.pdf](http://www.unctad.org/en/docs/iteiia20083_en.pdf) (last visited March 31, 2010).

<sup>59</sup> See art. 54 ICSID Convention.

assets the host States holds in third States, for example bank accounts. By automatically recognizing ICSID awards as final and binding in all Member States jurisdictions, the ICSID Convention thus elevates the enforcement of awards from the bilateral to the multilateral level.

Both procedural aspects add to the idea that investment treaties are part of the legal framework for a global economy that is based on market mechanisms and equal competition among investors from different home States and that enables investments to flow to wherever capital is allocated most efficiently. Multilateral rules for investment arbitration and enforcement respond to this objective by creating a level playing-field for the settlement of disputes and the enforcement of investment treaty obligations.

### B. *Investment Treaty Arbitration as Investment Law-Making*

Investor-State arbitration, however, not only contributes to the multilateralization of international investment law because it functions as a compliance mechanism, but also because it helps to generate treaty-overarching norms governing investor-State relations.<sup>60</sup> This norm-generative function is based on two factors: the institutional structure of investment treaty arbitration and the vagueness of the substantive provisions of investment treaties.

Investor rights such as fair and equitable treatment, full protection and security, indirect expropriation or national treatment leave a wide margin of discretion to arbitral tribunals in determining the normative content of those principles and in applying them to the specific facts of a case. In fact, these principles of international investment protection can rather be understood as “general clauses” that delegate substantial rule-making powers to decision-making bodies.<sup>61</sup> As a consequence, arbitral tribunals emerge as important law-makers in international investment law when transforming the broad principles of international investment law into more precise rules that affect the executive, the legislative and the judiciary of the host State in their activities.<sup>62</sup>

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<sup>60</sup> See Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, 3(5) TRANSNAT'L DISP. MGMT (2006).

<sup>61</sup> Cf. GUNTHER TEUBNER, STANDARDS UND DIREKTIVEN IN GENERALKLAUSELN: MÖGLICHKEITEN UND GRENZEN DER EMPIRISCHEN SOZIALFORSCHUNG BEI DER PRÄZISIERUNG DER GUTE-SITTE-KLAUSELN IM PRIVATRECHT 60 *et seq.* (1971); Critical on the delegation of such law-making functions to tribunals Matthew C. Porterfield, *An International Common Law of Investor Rights?*, 27 U. PA. J. INT'L ECON. L. 79 (2006).

<sup>62</sup> See Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality, and the Emerging Global Administrative Law*, IILJ Working Paper 2009/6 (Global Administrative Law Series), pp. 1-2, *available at*:

The power-shift from States to tribunals becomes all the more visible in view of the restrictive possibilities that States have in influencing the direction of investment jurisprudence. Restricted possibilities in influencing the appointment of arbitrators, the arbitral process and the enforcement of arbitral awards leave only limited leeway to counterbalance the authority that investment tribunals exercise. Similarly, the power to react to what States might perceive as mistaken jurisprudential developments through the modification of treaties is limited, as treaty adjustments require the consent of all States concerned.

Investor-State arbitration and the law-making function arbitral tribunals assume, however, does not need to be seen as a threat to State sovereignty; the norm-generative function of investment arbitration also adds to the multilateralization of international investment law and helps to resolve uncertainty about the vagueness of many standard investor rights. The function of arbitral tribunals to generate norms and fill gaps in investment treaties in fact enables States to enter into long-lasting and stable investment relations that are not obstructed by continuous bilateral bargaining every time the broad principles have to be concretized for specific areas of State conduct. Investor-State arbitration thereby responds to the need to solve uncertainty and ambiguity in international investment relations, to stabilize them over time, and to adapt them to changing realities.<sup>63</sup> Most notably, the function of concretizing investment law and generating new law is not limited to a specific investment treaty that governs a dispute submitted to arbitration, but affects the interpretation of investment treaties in general. How arbitral tribunals contribute to generating a treaty-overarching framework of international investment protection shall be evident in the next section.

## VII. MULTILATERALIZATION THROUGH INTERPRETATION AND USE OF SOURCES

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

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<http://www.ijl.org/publications/2009-6Kingsbury-Schill.asp> (last visited March 31, 2010).

<sup>63</sup> See SCHILL, *supra* note 5, at 261-263.

doing so, investment tribunals translate the similarities of bilateral treaties into a multilateral reality.

A. *Interpretation in pari materia*

Departing from a strict bilateral focus in interpreting BITs, arbitral tribunals frequently make use of “cross-treaty interpretation” or “interpretation *in pari materia*”, *i. e.* reference to third-party treaties that are not binding upon the parties involved in an investment dispute in order to interpret and apply the governing treaty.<sup>64</sup> This has the effect of creating uniformity in the treaty interpretation of different BITs by embedding bilateral treaties in a treaty-overarching framework. Even though third-party treaties do not become sources of law strictly speaking, they nevertheless inform the interpretation of the governing treaty. This has a multilateralizing effect as the strict emphasis on the bilateral relationship in treaty interpretation is abandoned. Instead, investment treaties are treated as if they emanate from a single source and enshrine a body of investment law principles that is applicable rather independently from the governing treaty.

The validity of this method of interpretation for BITs was recognized in the first known investment treaty arbitration in *Asian Agricultural Products v. Sri Lanka* where the Tribunal considered it “proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration.”<sup>65</sup> Subsequently, this approach played a role in numerous other arbitral decisions. In *Maffezzini v. Spain*, for example, the Tribunal took into account the general BIT practice of the contracting State parties in interpreting the MFN clause in question.<sup>66</sup> In *Plama v. Bulgaria*, the Tribunal drew an *argumentum e contrario* from third-country treaties in order to support a narrow interpretation of an MFN clause. Similarly, many other cases of interpretation *in pari materia* can be observed.<sup>67</sup> This suggests that arbitral tribunals perceive that investment treaty practice of States in general forms part of the relevant sources

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<sup>64</sup> *Id.*

<sup>65</sup> *Asian Agricultural Products v. Sri Lanka*, *supra* note 33, para. 40.

<sup>66</sup> *Maffezzini v. Spain*, *supra* note 37, paras. 52 *et seq.*

<sup>67</sup> See further *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, para. 55; *Aguas del Tunari v. Bolivia*, *supra* note 48, paras. 289-314.; *Suez and Vivendi Universal v. Argentina*, *supra* note 38, para. 58; L.E.S.I.–DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/8, Award of Jan. 10, 2005, para. 25(ii); *Salini v. Jordan*, *supra* note 41, para. 116; *Tokios Tokelos v. Ukraine*, *supra* note 50, paras. 34 *et seq.*; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL/NAFTA, Arbitral Award of Jan. 26, 2006, Separate Opinion by Prof. Wälde, para. 106 (hereinafter *Thunderbird Gaming v. Mexico*).

of international investment law, which accordingly can be used for guidance in interpreting a specific investment treaty.

*B. The Use of Precedent*

The second important aspect suggesting that arbitral tribunals are actively engaged in producing and reproducing a treaty-overarching framework for international investment protection is the extensive use arbitral tribunals make of precedent. Far from constituting a subsidiary source of international law as envisaged by Art. 38(1)(d) ICJ-Statute, precedent has become both quantitatively as well as qualitatively the premier determinant for the outcome of investor-State disputes. Even though arbitral precedent is considered to be non-binding, it has a considerable *de facto* force in shaping the uniform interpretation of BITs. Notably, even in cases of conflicting and inconsistent arbitral decisions, tribunals employ various interpretative strategies to uphold consistency in investment treaty arbitration and unity of international investment law. These strategies include the distinction of cases based on differences in the underlying facts and differences in the wording of the BITs in question,<sup>68</sup> simply concealing dissent with earlier arbitral decisions<sup>69</sup> and reconciling seemingly conflicting decisions based on conflict rules, such as the relation between principles and exceptions.<sup>70</sup> System-consistency is thus clearly a concern that influences and drives investment treaty jurisprudence despite the existence of a myriad number of BITs. Comparable to the use of cross-treaty interpretation, the use of precedent reinforces the view that international investment law is based on a uniform order that overarches individual bilateral treaties. It also creates intra-system communication and consistency and secures that differences in jurisprudence are addressed and dealt with. Again, inconsistent decisions exist, but they are not so pervasive as to invalidate the observation that the jurisprudence of investment tribunals is predominantly consistent.

References to ICSID decisions can be found in nearly all of the more recent ICSID decisions on jurisdiction and awards on the merits. A recent quantitative citation analysis, for example, concluded that “citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate.”<sup>71</sup>

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<sup>68</sup> *Salini v. Jordan*, *supra* note 41, paras. 102 *et seq.*

<sup>69</sup> *See, for example*, LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability of Oct. 3, 2006 (where the tribunal repeatedly cited *CMS v. Argentina* in support of its interpretation of fair and equitable treatment or the application of the umbrella clause, *id.*, paras. 125, 128, 171, but failed to mention that that decision reached a contrary result concerning the necessity defense, *id.*, paras. 204-266).

<sup>70</sup> *Plama v. Bulgaria*, *supra* note 40, paras. 217 *et seq.*

<sup>71</sup> Jeffery P. Commission, *Precedent in Investment Treaty Arbitration – A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129, 148 (2007).

Although tribunals regularly emphasize the non-binding nature of precedent, they nevertheless primarily turn to earlier decisions for guidance.<sup>72</sup> The Tribunal in *El Paso v. Argentina*, for example, stated that it would “follow the same line [as earlier awards], especially since both parties, in their written pleadings and oral arguments, have heavily relied on precedent.”<sup>73</sup> The way the parties to disputes rely on precedent, suggests the emergence of expectations that tribunals will decide cases not by abstractly interpreting the governing BIT, but by embedding interpretation and reasoning into the preexisting discursive structure as it is shaped by prior investment treaty awards.<sup>74</sup>

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

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.<sup>75</sup>

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<sup>72</sup> See also Kaufmann-Köhler, *supra* note 11.

<sup>73</sup> *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of April 27, 2006, para. 39. See also *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of April 26, 2005, para. 18.

<sup>74</sup> Cf. on the emergence of expectations in the reference to, application of and justified departure from precedent *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report of Oct. 4, 1996, at p. 14; See also *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures of March 21, 2007, para. 67; *Thunderbird Gaming v. Mexico*, (*supra* note 677, paras. 16, 129-130.

<sup>75</sup> *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award of Apr. 30, 2004, para. 98.

Thus, what primarily mattered for the Tribunal in the application of fair and equitable treatment was the application of the facts of the case to a standard developed from earlier NAFTA decisions, not one developed by independent interpretation of the treaty text itself.<sup>76</sup> Such a use of precedent is characteristic for arbitral tribunals and can be traced with respect to virtually all standards of investment protection.

The contribution that investment jurisprudence makes towards a multilateralization of international investment law is most apparent when juxtaposing the emerging common law of investment arbitration with the traditional view of the effects of bilateral treaties and bilateralist methods of treaty interpretation. From a bilateralist perspective, making use of precedent in cross-treaty cases and referring to third-party treaties as an interpretative aid would be seen as a violation of the *inter partes* effect of international treaties, since the third-party treaty is indirectly accorded normative weight. Clearly, if third-party treaties are used as an interpretative aid, this can amount to either creating new or reducing existing obligations under investment treaties. Likewise, the extensive reliance on precedent could be seen as a violation of the traditional doctrine of sources of international law, because precedent in international investment arbitration is not merely applied as a subsidiary source of international law, but constitutes the primary normative framework in the decision-making of arbitral tribunals. Notwithstanding the above, the heavy use of precedent can be reconciled with the principles of treaty interpretation, if one considers that the regime established by the entirety of more than 2,600 BITs either reproduces customary international law,<sup>77</sup> or forms part, as a treaty-based multilateral system, of “any relevant rules of international law applicable in the relations between the parties” in the sense of Art. 31(3)(c) of the Vienna Convention on the Law of Treaties. In other words, the heavy use of precedent, as well as other forms of treaty interpretation that are characteristic for a multilateral system, can be reconciled with traditional concepts of the law of sources and treaty interpretation if one assumes that BITs are merely the form a treaty-overarching, multilateral system of international investment protection has taken.

## VIII. CONCLUSION

Most international treaties order the relations between two States only. They create mutual rights and obligations and coordinate State behavior on a bilateral basis. While allowing for flexible solutions depending on the specific situation

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<sup>76</sup> *Id.*, paras. 99 *et seq.*

<sup>77</sup> See, for example, Steffen Hindelang, *Bilateral Investment Treaties, Custom and a Healthy Investment Climate – The Question of Whether BITs Influence Customary International Law Revisited*, 5 J. WORLD INV. & TRADE 789 (2004).

and interests of the States involved, bilateralism inhibits the emergence of the legal foundations for an international community. It puts the State, its sovereignty and its consent to the creation of international law center stage and secures the precedence of State interests over interests outside or beyond its realm. This fortification of the State coined the traditional understanding of international law as it developed throughout the 19<sup>th</sup> and most of the 20<sup>th</sup> century. It characterized its doctrine of sources by strictly focusing on State consent, it denied international law subjectivity to non-State actors, and *de facto* linked the enforcement of international law in a non-hierarchical order to a favorable distribution of power.<sup>78</sup>

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

Typically, multilateralism is implemented on the basis of multilateral treaties that “serve as the vehicle *par excellence* of community interest”.<sup>79</sup> They base relations of States on general non-discriminatory principles and thereby create legal institutions around which the expectations and conduct of States and their citizens can evolve. However, multilateralism can also develop and be implemented on the basis of bilateral treaties. In the realm of international investment protection, bilateral rather than multilateral treaties are creating the institutions necessary for the development and stabilization of a global economy. Similar to multilateral treaties, BITs order international investment relations on the basis of general principles that are relatively uniform across the myriad number of bilateral treaty relationships. They do not constitute *quid pro quo* bargains, but establish a uniform legal framework that stabilizes and structures the

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<sup>78</sup> Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS 217, 230 *et seq.* (1994).

<sup>79</sup> *Id.*, at 323.

economic activity of foreign investors and requires host States to conform their behavior to rule of law standards, thereby enabling market forces to unfold.

Along these lines, this article has argued that international investment law is evolving towards a multilateral system of investment protection based on bilateral treaties. This understanding has an impact on practical questions of BIT interpretation that should conform to multilateral rather than bilateral rationales and provides a justification for the heavy use of precedent. More importantly, however, the understanding of investment protection as a multilateral system forms the basis for other theoretical projects concerning the function of investment treaties in a global economy. It is the precondition for understanding the BIT regime as a uniform body (or system) of law and, thus, forms the theoretic basis for projects embedding investment treaties into the global administrative law project<sup>80</sup> or advancing the thesis that international investment law is in a process of evolving constitutionalization.<sup>81</sup>

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<sup>80</sup> Cf. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121 (2006).

<sup>81</sup> See David Schneiderman, *Investment Rules and the Rule of Law*, 8 CONSTELLATIONS 521, 523 *et seq.* (2001); Peter Behrens, *Towards the Constitutionalization of International Investment Protection*, 45 ARCHIV DES VÖLKERRECHTS 153 (2007).