From Sources to Discourse: Investment Treaty Jurisprudence as the New Custom?

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Abstract

The topic my presentation focuses on is questioning to which extent customary norms in international investment law are increasingly enshrined not in State practice backed by *opinio juris*, but in the discursive practices of decision-making by investment treaty tribunals. These practices, one can argue, increasingly replace customary international law in creating a rather uniform, (quasi-)multilateral order for all those States and their investors that are part of the investment treaty arbitration regime. Arbitral discourse in this context assumes a very similar function as classical customary international law, namely the creation of multilateral order.

A. The Quest for Multilateral Order: From Custom to Arbitral Jurisprudence

At present, traditional customary international law only plays a minor role in resolving international investment disputes. Outside of the investment treaty context, there are few proceedings under international law relating to the resolution of investment disputes;[1] within investment treaty arbitration, reference to customary international law is the exception rather than the rule.[2] In the absence of a truly multilateral investment treaty the quest for multilateral order and the existence of a uniform system of international investment protection therefore seems forlorn. International investment law is seemingly doomed to suffer infinite fragmentation. Paradoxically, however, one can observe that the jurisprudence of investment treaty tribunals creates a significant amount of convergence rather than fragmentation and results in a system of international investment protection that can well be understood as a multilateral system, even though it is based largely on bilateral treaties and implemented by one-off arbitral tribunals.[3]

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[1] *But see Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, available via: http://www.icj-cij.org.

[2] *But see Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award of 8 June 2009, paras 598–616.

[3] *See* generally on the thesis that international investment law is multilateralizing STEPHAN SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW (2009).

Most importantly, the way in which arbitral tribunals draw on and make use of arbitral precedent has an effect in creating treaty-overarching unity in the interpretation of the central principles of international investment law, such as fair and equitable treatment, indirect expropriation, national treatment, etc. If one, perhaps the main, characteristic of customary law is that it was generally applicable and binding upon all States without specific commitment, therefore creating a multilateral legal framework, the same uniformity and standard-setting function is now forged by tribunals turning to arbitral precedent, even though in many cases that precedent concerns entirely different bilateral investment treaties. When examining the determinative factors of their decision-making, investment treaty tribunals therefore increasingly move from formal sources to discourse. This discourse, in turn, contributes to the creation of a uniform international investment regime, much like customary international law did before the advent of investment treaty arbitration. Investment treaty tribunals thus generate and implement a multilateral structure for international investment relations in the absence of a multilateral investment treaty and without a permanent dispute settlement body not by reference to customary international law, but by referencing their own jurisprudence.

In this sense, one can ask whether investment jurisprudence, and the application thereof by investment treaty tribunals, do not bring about a new customary international law of foreign investment protection? This new custom, of course, is limited to those States participating in the investment treaty arbitration regime, but its function and nature are analogous to traditional customary international law. It creates multilateral order and comes into existence because those who follow it (that is, the parties in their pleadings and arbitrators in their decision-making and reasoning) do so out of the conviction that is it binding just as under classical customary international law State practice and *opinio juris* developed in the context of diplomatic exchanges. Yet, unlike under a traditional view, this customary law is not enshrined in a source (which international courts and tribunals merely need to uncover), but in the discourse among, and practices of decision-making of, investment treaty tribunals. In the following, this paper illustrates how reference to precedent increasingly replaces customary international law as a source of a multilateral order in the absence of a multilateral treaty.

B. Multilateralizing International Investment Law through Jurisprudence

While arbitral tribunals have significant powers to settle disputes between the parties and apply the substantive rules on a case-by-case basis, they face significant limitations that would appear to exclude any implications for creating multilateral order in international investment law. These limitations are: first the fragmentation of substantive investment law largely into bilateral treaties, which one could attribute to a preference of States for tailor-made solutions over multilateral treaty-making;[4] second, the one-off nature of arbitral tribunals that coexist without hierarchy and without supervisory mechanisms that could ensure coherence in arbitral

[4] *Cf.* more generally on the variables that explain the institutional choice between bilateralism and multilateralism Thomas Rixen & Ingo Rohlfing, *The Institutional Choice of Bilateralism and Multilateralism in International Trade and Taxation*, 12 INTERNATIONAL NEGOTIATION 389 (2007).

jurisprudence; and third, the absence of a rule of *stare decisis* in investment treaty arbitration.[5] All this should suggests a chaotic and unsystematic aggregate of law governing international investment relations, giving rise to the expectation that there is little potential for multilateral order in international investment relations.

However, what one can observe is convergence, rather than divergence, in the structure, scope, and content of international investment treaties as well as in the jurisprudence of investment treaty tribunals. Unlike genuine bilateral arrangements, investment treaties are not isolated instruments governing the relation between two States only; rather, they develop multiple overlaps and structural interconnections that create a relatively uniform, treaty-overarching regime for international investment relations. International investment law, in other words, is multilateralizing.

While the multilateralization of international investment law builds on a number of factors embedded in the substance and structure of investment treaty making,[6] the most important factor for it is the activity of investment treaty tribunals. They generate, with some exceptions, largely coherent decisions even across different investment treaties, above all as regards the interpretation of the substantive principles of investment protection. This generally coherent body of jurisprudence is not a product of mere coincidence, but is fostered by the wide-spread practice in investment treaty arbitration of citing and following earlier arbitral awards.[7] Certainly, the ways in which investment treaty tribunals make use of precedent differ. Yet, they

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[5] Some investment treaties, as well as the ICSID Convention, explicitly provide for the *inter-partes* effect of awards. *See* Art. 1136 (1) NAFTA; Art. 53(1) ICSID Convention. Similarly, arbitral tribunals stress that decisions made by earlier investment treaty tribunals are not binding on them as a matter of law. The Tribunal in *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para. 30, for example, stressed that "[e]ach tribunal remains sovereign and may retain . . . a different solution for resolving the same problem." This conclusion is shared widely by investment treaty tribunals more generally. For further arbitral jurisprudence on point, *see* SCHILL (note 3), 292, note 45. For a recent expression of the same view, *see Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para. 163. In fact, the non-binding nature of precedent in investment treaty arbitration is also amply demonstrated by directly conflicting decisions of different investment treaty tribunals on comparable or even identical facts, under comparable or even the same investment treaty obligation. *See* SCHILL (note 5), 284, 339.

[6] These are most importantly the close textual resemblance of different BITs, the negotiation of these treaties based on model treaties, and the entrenchment of bilateral treaty-making in multilateral processes, in particular the coordination of foreign investment policies by the most important capital-exporting countries within the OECD and elsewhere (*see* SCHILL (note 3), 65-120). Furthermore, most-favored-nation clauses in investment treaties have a significant effect in leveling differences in investment treaty protection (*see id.*, 121-196). Broad possibilities for treaty-shopping, finally, also have the effect of raising investment protection in a given host State to a uniformly high level (*see id.*, 197-240). Substantive investment law and the institutional framework in which investment treaties are negotiated therefore contain nuclei of a multilateral order for international investment relations, even though truly multilateral investment treaties that grant the same level of investment protection have not been accepted by the majority of States, both capital-importing and capital-exporting.

[7] References to earlier investment treaty awards and decisions can be found in virtually any of the now numerous awards. In fact, as quantitative citation analyses of investment treaty awards show, "citations to supposedly subsidiary sources, such as judicial decisions, including arbitral awards, predominate." Jeffrey Commission, *Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence*, 24 JOURNAL OF INTERNATIONAL ARBITRATION 129, 148 (2007).

all illustrate how investment treaty jurisprudence converges and forms part of a uniform treaty-overarching regime for international investment relations. Functionally, the discourse that develops based on precedent replaces customary international law as a source of multilateral order in international investment relations.

In ascending order of normative impact on tribunal decision-making, the use of precedent includes the following: (1) precedent as a source of cautious analogizing with earlier decisions; (2) precedent as a means of clarifying treaty provisions; (3) precedent as an abbreviation of reasoning; (4) precedent as a standard-setting device; and (5) precedent as an instrument of system-wide law-making.[8] Finally, precedent is even at play in cases of conflicting decision-making in investment treaty arbitration (see 6). Precedent, in consequence, becomes the basis for those affected by international investment treaties and investment treaty arbitrations to develop normative expectations about the existence of a multilateral international legal order protecting foreign investments (see 7).

I. Analogizing with Earlier Decisions

Analogizing with earlier decisions is one way in which arbitral tribunals make use of precedent. This approach was taken, for example, by the Tribunal in *AES Corporation v. Argentina* in a case that concerned the effects of Argentina's emergency legislation in 2001–2002. The Tribunal stressed that it was not bound by precedent,[9] but considered that it was allowed to use earlier arbitral decisions as a source of "comparison and . . . of inspiration."[10] In the Tribunal's view, this applied both to the interpretation of law and of facts:

> One may even find situations in which, although seized on the basis of another BIT . . . 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.
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> 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.[11]

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[8] *See* in depth Marc Jacob, *Lawmaking through Precedent: The International Dimension*, 12 GERMAN LAW JOURNAL (2011) (forthcoming).

[9] *See AES Corporation v. Argentina* (note 5), paras 23 & 30.

[10] *Id.*, para. 31. A similar approach may be found in *Gas Natural v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 July 2005, para. 36.

[11] *AES Corporation v. Argentina* (note 5), paras 31-32. Similarly, *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award of 26 November 2009, para. 170; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, 30 March 2010, para. 164.

The approach chosen by the Tribunal in *AES Corporation* has a particular appeal for making reference to awards that are based on investment treaties other than the one applicable in the *cas d'espèce*, because it stresses that the legal basis of the earlier decision was different. It nevertheless enables a tribunal to integrate the reasoning and the result of an earlier decision into its own decision and built up consistency in arbitral decision-making across different cases and treaties. Reasoning by analogy, therefore, reconciles the principle of non-binding precedent with the persuasive influence of prior investment awards, in particular in relation to awards rendered on the basis of different investment treaties.

II. Precedent as a Means of Clarification of Investment Treaty Provisions

Other investment treaty tribunals have used precedent as a means of clarifying the meaning of provisions in the governing investment treaty. This reflects the function attributed to judicial decisions in Article 38(1)(d) ICJ Statute "as subsidiary means for the determination of rules of law." Accordingly, decisions by international courts and tribunals can be employed as evidence of the existence of a specific rule or principle of international law, or as evidence of a certain interpretation or application of a rule or principle.[12] Similarly, precedent can be used to ascertain the ordinary meaning of specific treaty provisions. As put by the Tribunal in *Azurix v. Argentina*: "The 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."[13]

Likewise, arbitral precedent can be used to determine, by taking into account how other tribunals interpreted similar provisions in different BITs, the function of a specific treaty provision. The Tribunal in *Eureko v. Poland*, for example, had recourse to arbitral precedent regarding the interpretation of umbrella clauses under the Switzerland-Pakistan and the Switzerland-Philippines BITs in order to elucidate the function and meaning of a comparable clause in the Netherlands-Poland BIT.[14] The Tribunal's majority not only relied on the plain meaning of the clause in question and the principle of effective interpretation,[15] but also invoked other investment awards,[16] stating that it "finds the foregoing analysis of the Tribunal in *SGS v. The Republic of the Philippines* . . . cogent and convincing."[17] Yet, even though the Tribunal put significant emphasis on the interpretation of the umbrella clause by the tribunal in *SGS v. Philippines*, it did not adopt that decision as a binding precedent, but rather engaged in its own interpretation of the Dutch-Polish BIT. Thus, it used arbitral precedent as an additional means of

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[12] *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 47 (1996).

[13] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 391.

[14] *Eureko B. V. v. Republic of Poland*, UNCITRAL, Partial Award of 19 August 2005. Similarly cautious in its use of precedent *also Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction of 8 December 2003, paras 73 & 89.

[15] *Eureko v. Poland* (note 14), paras 246-249.

[16] *Id.*, paras 252-258.

[17] *Id.*, para. 257.

interpretation, that is, as an interpretative aid without authoritative or binding effect. Still, such use of precedent allows tribunals to develop treaty-overarching convergence.

III. Abbreviation of Reasoning

Similarly cautious approaches to the use of precedent, however, are not followed by all investment treaty tribunals. Instead, one can regularly observe that investment treaty awards accord prior decisions much more immediate impact on their decision-making. Above all, the reference to precedent often is less embedded in a problem-oriented interpretation of the governing investment treaty that deals with earlier decisions as arguments, but attributes a more imminent function to precedent. This enhanced degree of influence of prior investment treaty awards can be illustrated, for example, in the Decision on Jurisdiction in *Enron v. Argentina*, a case also relating to Argentina's 2001–2002 economic emergency legislation.[18]

Unlike the *Eureko* tribunal, the Tribunal in *Enron* did not refer to earlier awards merely to support its own reasoning. Instead, it incorporated by reference the reasoning of earlier awards into its own decision. The Tribunal in that case used precedent of other arbitrations involving the lawfulness of the impact of Argentina's economic emergency legislation on the claimant at stake, which it designated as "ICSID's case law concerning the Argentine Republic,"[19] as a shorthand argument to reject Argentina's objections to jurisdiction. Thus, instead of rejecting those objections based on independent reasoning, and based on an independent interpretation of the governing law, it stated that "the Tribunal does not intend to discuss again questions that have been amply considered in recent decisions and which have been also extensively argued by the parties in this case."[20] Instead, it stated that it would only focus on the specific issues of the case that were different in law or in fact from similar cases already decided against Argentina by other investment treaty tribunals.[21]

While the Tribunal in *Enron* also stressed that it was not bound by precedent and stated that it used references to earlier decisions because it "believe[d] that in essence the conclusions and reasons of those decisions are correct,"[22] the use of precedent in order to abbreviate a tribunal's reasoning illustrates a qualitative step towards according more direct influence of earlier awards on the decision-making process of arbitral tribunals. It shows that the focus in investment treaty arbitration is moving in some cases from an independent case-by-case and tribunal-by-tribunal analysis towards an analysis that assesses whether earlier interpretations of the same or a different treaty were convincing and should be followed. This focus corresponds to an increased normative value of precedent.

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[18] *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction of 14 January 2004.

[19] *Id.*, before para. 24.

[20] *Id.*, para. 38.

[21] *Id.,* para. 41.

[22] *Id.*, para. 40.

IV. Precedent and Standardization of Interpretation: Towards a Jurisprudence Constante

Several arbitral awards go even further and view precedent as constituting a standard that they will only depart from upon the presentation of new facts, new legal aspects, or upon the showing that the Contracting Parties' intentions departed from the common framing of investment treaties as regards the specific issue at stake. The Tribunal in *Camuzzi v. Argentina*, for example, likewise faced with a case relating to Argentina's economic emergency legislation, in essence required the party that was arguing for a departure from earlier investment treaty jurisprudence to provide the Tribunal with reasons for doing so. It maintained that "the Tribunal has no reason not to concur with [an earlier] conclusion, even though some of the elements of fact in each dispute may differ in some respects."[23] The perception of precedent in this case thus moves extremely close to the common law system of *stare decisis*. The Tribunal no longer seems to interpret the governing law, but confines itself to referring to prior discourse of ICSID tribunals as an authoritative source of law.

Such reasoning implies that a change in jurisprudence would require the parties to provide reasons for such a change and accordingly shifts the burden of argumentation and persuasion to the party wishing to modify existing jurisprudence, even if this jurisprudence has developed based on unrelated investment treaties between different States.[24] In this context, precedent standardizes the interpretation of investment treaties to a point where few differences exist between persuasive and binding precedent and, above all, where differences in the governing bilateral treaties become less and less relevant.

Building on this consideration, a convergence of investment treaty jurisprudence towards a *jurisprudence constante* increasingly has the effect that investment treaty tribunals perceive themselves as agents of a treaty-overarching regime for the protection of foreign investment, which they feel bound to apply. The statement of the Tribunal in *Saipem v. Bangladesh* may be taken as a representative expression of a position that is increasingly taking hold among arbitrators in investment cases:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion 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

[23] *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction of 11 May 2005, para. 82; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction of 11 May 2005, para. 94.

[24] *Cf.* also *Gas Natural v. Argentina* (note 10), para. 49 (observing that "unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement").

> meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[25]

While precedent, in this view, does not bind later investment treaty tribunals, it shifts the burden of argumentation by demanding a reasoned justification for departing from precedent. The more established precedent becomes, and the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes to meet that burden and to convince tribunals to adopt solutions that deviate from prior discourse.[26] This phenomenon is a core element for creating a uniform treaty-overarching body of law applicable in investment treaty arbitration.

V. Delegation of Law-Making Functions from States to Tribunals

While most of the decisions discussed above concerned the use of precedent in proceedings involving similar factual circumstances, relating above all to the evaluation of Argentina's economic emergency legislation, the use of precedent also plays an important role for the clarification and further development of standard investor rights, such as the prohibition of indirect expropriations without compensation, fair and equitable treatment, national treatment, or full protection and security. In fact, the interpretation and application of these standards of treatment is driven more by arbitral precedent than by the texts of the applicable treaty or State practice.[27] The primary reason for this is the terminological vagueness of these rights. Since the methods of treaty interpretation endorsed by the Vienna Convention on the Law of Treaties provide little guidance, investment treaty tribunals are often forced to resort exclusively to assessing the practice of earlier investment treaty tribunals in order to determine, respectively develop, the normative standard to apply.

How influential precedent in the interpretation and application of investor rights has become can be illustrated in respect of fair and equitable treatment, the normative content of which has been structured primarily through the jurisprudence of arbitral tribunals.[28] The NAFTA award in *Waste Management v. Mexico* is representative of arbitral practice in that respect. In this case, the Tribunal extensively described prior investment awards applying the fair and equitable treatment standard in order to extrapolate a workable definition of that standard. After discussing earlier precedent at length, the Tribunal concluded:

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[25] *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Provisional Measures of 21 March 2007, para. 67.

[26] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL (NAFTA), Arbitral Award of 26 January 2006, Separate Opinion of Thomas Wälde, para. 16 ("A deviation from well and firmly established jurisprudence requires an extensively reasoned justification").

[27] An exception is the award in *Glamis Gold v. United States* (note 2), paras 598–616, which stressed the importance of State practice and *opinio juris* in the context of interpreting fair and equitable treatment under Art. 1105(1) NAFTA.

[28] The same dynamic, however, equally holds true with respect to all other standards of investment protection, including full protection and security, the prohibition of direct and indirect expropriation without compensation, or national treatment.

> 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.[29]

What is noteworthy is that the Tribunal did not interpret fair and equitable treatment independently by using the methods of treaty interpretation under the Vienna Convention. Rather, it couched the meaning of the standard in terms of the holdings of arbitral precedent.

While the cases taken into account in *Waste Management* were all NAFTA arbitrations, most investment treaty tribunals deduce the meaning of fair and equitable treatment from the case law more generally without paying much attention to the investment treaty that was at issue in those cases. Thus, for purposes of interpreting fair and equitable treatment, the definition by the Tribunal in *Tecmed v. Mexico* of this standard in an arbitration under the Spain-Mexico BIT[30] has already become the standard definition; other tribunals have adopted and refined this definition in BITs between Chile and Malaysia,[31] Ecuador and the United States,[32] or Germany and Argentina.[33] What is crucial in order to understand arbitral decision-making as an exercise of authority and multilateralization is that subsequent tribunals increasingly do not critically examine earlier jurisprudence and its premises, but apply it as if it were binding. In other words, arbitral tribunals simply posit the normative content of the principles of international investment law without engaging in a normative deduction that explains the tribunals' premises and that grounds these premises and its conclusions in accepted international legal instruments and methods of interpretation.

Essentially, the vague language of fair and equitable treatment and other investor rights, buttressed by the institutional structure provided above all by the ICSID Convention, makes these rights functionally comparable to "general clauses" in civil codes, such as good faith or

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[29] *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award of 30 April 2004, para. 98.

[30] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 154.

[31] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, paras 113 *et seq*.

[32] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award of 1 June 2004, para. 185.

[33] *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8, Award of 6 February 2007, paras 298-299.

bonos mores, that allow the decision-maker to ascertain and craft, with a certain degree of independence, the normative content and the precise standard applicable to certain social situations.[34] The vagueness of the principles of investment protection, such as fair and equitable treatment, are quite similar to such general clauses in that they de facto involve a substantial delegation of law-making power from States to tribunals in the international investment context. Thus, it is much more the jurisprudence of investment treaty tribunals concretizing the meaning of the standards of investment protection that determines the interpretation of international investment law, than any guidance provided by the Contracting States in their investment treaties or classical customary international law.

VI. Multilateralization and Conflicting Decisions

Quite notably, the creation of treaty-overarching uniformity by investment treaty tribunals cannot only be observed with respect to the use of precedent resulting in consistent arbitral case law. On the contrary, the idea of the existence of a multilateral system of international investment law regularly can also be traced in decisions that deliberately deviate from, and therefore conflict with, earlier arbitral jurisprudence. Yet, instead of serving as a counter-argument for the thesis that one can see the emergence of a multilateral system of international investment law, the way tribunals deal with precedent in such instances itself shows the deeply rooted perception among arbitrators that investment treaty tribunals operate within the confines of a multilateral system.

First, arbitral tribunals generally try to avoid openly conflicting decisions about the proper interpretation of standard concepts of international investment law. Instead, they often seek to substitute divergence with alternative interpretative strategies that uphold the consistency of international investment law, while allowing divergence in respect of the specific dispute at hand. One method consists of distinguishing the case at hand from earlier investor-State disputes by stressing differences in the facts, in the procedural posture, or in the applicable investment treaty. Another method is to reconcile seemingly irreconcilable decisions on the basis of meta-rules. Overall, even in cases where investment treaty tribunals deviate from earlier arbitral jurisprudence, they often extensively deal with conflicting earlier awards and distinguish their case on the basis of the facts, or redefine an earlier holding on a point of law from a precise rule to a broader principle that allows for exceptions, or from a rule to an exception.[35] Similarly, some tribunals occasionally also conceal jurisprudential conflicts in ways that suggest that they intended to uphold the perception that they did not in fact deviate from earlier investment treaty jurisprudence.[36]

Second, even in cases of open conflict, investment treaty tribunals use argumentative strategies that presuppose the existence of a treaty-overarching framework of international investment law. Thus, investment treaty tribunals rarely argue that their deviating from earlier case law is precipitated by the bilateral nature of investment treaties or because their function was restricted

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[34] *See* on the function of general clauses GUNTHER TEUBNER, STANDARDS UND DIREKTIVEN IN GENERALKLAUSELN 60 *et seq.* (1971).

[35] *See* SCHILL (note 3), 347-352.

[36] *Id.*, 352-355.

to resolving a specific dispute;[37] instead, they regularly deviate from earlier jurisprudence because they consider an earlier interpretation as unpersuasive from a principled perspective.[38] Accordingly, investment treaty tribunals regularly frame their disagreement with earlier jurisprudence in systemic terms and thereby aspire to influence, in the long term, the development of a treaty-overarching investment jurisprudence. Open conflicts, in other words, are deliberately accepted in order to arrive at sustainable and systemic solutions as investment treaty jurisprudence develops.

Systemic aspirations in cases of open conflict can be seen, for instance, in the way investment treaty tribunals deal with the notorious issue of interpreting umbrella clauses, that is, clauses requiring a State to observe specific undertakings made *vis-à-vis* foreign investors, for example, in an investor-State contract. A case in point is how the Tribunal in *SGS v. Philippines* dealt with the precedent set by the award in *SGS v. Pakistan*. The *SGS v. Philippines* Tribunal strongly disagreed with the *SGS v. Pakistan* Tribunal. Despite the fact that the *SGS v. Philippines* Tribunal had to interpret an umbrella clause in the Switzerland-Philippines BIT, whereas the *SGS v. Pakistan* Tribunal was dealing with the interpretation of an umbrella clause in the Switzerland-Pakistan BIT, the Tribunal in *SGS v. Philippines* did not simply ignore the precedent because it concerned a different BIT. Rather than trying to avoid conflict, the Tribunal in *SGS v. Philippines* noted that its interpretation was "contradicted by the decision of the Tribunal in *SGS v. Pakistan*."[39] While explicitly criticizing the earlier decision in *SGS v. Pakistan* as "failing to give any clear meaning to the 'umbrella clause',"[40] the Tribunal in *SGS v. Philippines* nonetheless considered whether it should "defer to the answers given by the *SGS v. Pakistan* Tribunal" for the sake of consistency.[41] It observed, however:

> [A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it 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. Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There 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. 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

[37] Differently in this respect *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V 079/2005, Award on Jurisdiction of October 2007, para. 137.

[38] SCHILL (note 3), 341-347.

[39] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of 29 January 2004, para. 119.

[40] *Id.*, para. 125.

[41] *Id.*, para. 97.

> 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.[42]

The Tribunal in *SGS v. Philippines* therefore clearly recognized that coherence in investment treaty jurisprudence was desirable, but pointed out that the mechanism for achieving such coherence could not lie in requiring subsequent tribunals to follow earlier decisions they considered as unpersuasive or even incorrect. Instead, the Tribunal considered that the method to arrive at system-wide coherence should be a matter of evolution in investment treaty jurisprudence. The decision in *SGS v. Philippines*, thus, expressly recognized the existence of a treaty-overarching system of investment protection and stressed the importance of generating unity and consistency within this system even though it rendered a decision that was inconsistent with the reasoning of an earlier decision. In other words, the Tribunal's divergence from the earlier decision in *SGS v. Pakistan* cannot be seen as indicating the lack of a multilateral system of international investment law, but rather reflects divergence about how certain principles should be applied within that one system.[43]

Although contradicting interpretations of core investor rights are undesirable for legal certainty and the predictability of international investment law, jurisprudential conflict is also one of the driving forces behind the development of a system of precedent because it enables tribunals to engage in a critical discourse about the proper interpretation of investor rights in view of different hypotheses. Divergence in investment arbitration therefore does not need to be seen as defying the concept of a uniform system, but may well be part of the evolution towards a *jurisprudence constante*. Conflicting precedent, in that sense, is part of the multilateralization exercise investment treaty tribunals engage in; it illustrates the divergent views which direction investment treaty jurisprudence should take, rather than defiance of the existence of a multilateral system of international investment law.

VII. Precedent and the Generation of Normative Expectations

References by investment treaty tribunals to prior arbitral decisions, in particular to cases that concern the interpretation of wholly unrelated investment treaties, highlight that investment treaty arbitration is in a state of self-institutionalization in which the resolution of individual disputes is interconnected and embedded in a treaty-overarching framework. This self-institutionalization through discourse enshrined in arbitral case law is particularly striking with respect to the concretization of vague substantive standards of treatment, such as fair and equitable treatment. While many substantive investor rights were initially not well-defined by either the texts of investment treaties or State practice, investment treaty tribunals at first merely posited the normative content of such rights; later on, by contrast, the tribunals turned to arbitral precedent as the preeminent source for getting direction concerning the interpretation and application of investor rights. Because of this process, the normative content of investor rights is

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[42] *Id.*

[43] Similar systemic considerations also reappear in later decisions on umbrella clauses, some of which supported *SGS v. Pakistan*, some of which supported *SGS v. Philippines*.

quintessentially coined by investment treaty jurisprudence, with every decision containing concretizations not only of the specific investment treaty in question, but of the treaty-overarching principles of international investment law. Investment jurisprudence thus assumes and fulfills a function in concretizing the normative content of the core investor rights for the entire system of investment protection and functions as a mechanism of global governance influencing investor-State relations worldwide in a way that is comparable to customary international law in its potential to forge multilateral order.

At first glance, understanding investment treaty arbitration as a mechanism of global governance appears surprising, as unaffected third investors and States should not be interested in—let alone concerned about—arbitral proceedings between wholly unrelated parties. In fact, substantive and procedural investment law are drafted to avoid effects on non-parties: not only is international investment law governed by bilateral treaties, but various treaties adamantly deny any importance of arbitral awards as precedent in future arbitrations.[44] The reality, however, is different and displays numerous ways in which investors and States are affected by arbitrations between wholly unrelated parties. Above all arbitral precedent has become a focal point, giving rise to normative expectations: investors, States, and those acting as counsel and arbitrators expect arbitral tribunals to decide future cases consistently with earlier cases. In other words, those affected by investment treaty arbitration form expectations about how investment treaties will be and should be applied and interpreted in the future based on how investment treaties have been applied and interpreted in the past.

Investors and States introduce these expectations into arbitral proceedings by actively and comprehensively citing previous arbitral decisions.[45] Parties to investment arbitrations therefore expect that tribunals will decide cases not by abstractly interpreting the governing investment treaty, but by embedding their interpretation in the discursive framework created by earlier investment treaty awards. Similarly, users of investment treaty arbitration increasingly expect that investment treaty tribunals render consistent decisions, although the governing law is contained in bilateral treaties. Tribunals, in turn, react to such expectations by striving to render consistent decisions and to develop a *jurisprudence constante*, which, while permitting divergence, imposes an argumentative burden on those arbitral tribunals that want to diverge from precedent.

This process of generating normative expectations interestingly takes place rather independently of whether a certain award concerned the same or a different investment treaty. That it takes place, and that arbitral precedent has an effect on the behavior of third parties can also been seen from reactions of some States to investment treaty awards rendered under treaties they were not parties to. Thus, there are instances where States who disagree with certain lines of arbitral jurisprudence adversely react to an investment treaty tribunal's decision by redrafting their own investment treaties, although the decision in question was rendered under a different investment

[44] *See*, *supra*, note 5.

[45] *See*, *e.g.*, *AES Corporation v. Argentina* (note 5), para. 18.

treaty.[46] The interpretation of most-favored-nation clauses by the Tribunal in *Maffezini v. Spain*,[47] for example, has had the effect that wholly unrelated States included "anti-Maffezini"-clauses in their investment treaties.[48] Similarly, broad interpretations of fair and equitable treatment, or of the concept of indirect expropriation, have led several States to introduce a more restrictive wording of the respective provisions in their more recent BITs.[49] This illustrates the systemic effect States attribute to decisions of investment treaty tribunals.

As a result, investment treaty tribunals actively engage in building a system of treaty-overarching precedent, partly reacting to the parties' expectations, partly driven by their own need for direction as regards the interpretation of investment treaties or the understanding that past experience and practice legitimizes future decision-making. This has the effect that arbitral decisions increasingly craft treaty-overarching rules of international investment law and thereby function as a mechanism of global governance.[50] This is significantly different from commercial arbitration, where the focal point in arbitral decision-making around which normative expectations coalesce usually is not the jurisprudence of other arbitral tribunals, but the domestic law of a State as interpreted by its domestic courts. In investment treaty arbitrations, by contrast, normative expectations are generated based on the jurisprudence of investment treaty tribunals themselves. Arbitral precedent, in other words, is the catalyst and cause of those expectations much like customary international law was in pre-investment treaty arbitration times.

The expectations of States, investors, and the professional communities involved in investment treaty arbitration, however, have limits. While they cannot encompass the expectation that investment treaty tribunals will always decide consistently or may not deviate from earlier jurisprudence—an expectation that would result in arbitral precedent being binding—they encompass the expectation that investment treaty tribunals operate as part of a treaty-overarching framework of international investment law and provide good reasons for their decisions, including a justification for any deviation from the decision of other investment treaty tribunals. The expectations *vis-à-vis* investment treaty tribunals, in other words, are similar to those *vis-à-vis* domestic or international courts more generally: these institutions are expected to exercise their judicial function and, above all, satisfy the standards of judicial reasoning. This means that a departure from earlier case law requires reasons, not least because like cases should be treated alike.

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[46] On the interaction between investment treaty arbitration and investment treaty making, *see also* UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (2007), available at: http://unctad.org/en/docs/iteiia20073_en.pdf.

[47] *See Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction of 25 January 2000, paras 38-64.

[48] *See* Art. 10.4(2) footnote 1 Draft of the Central America - United States Free Trade Agreement, dated 28 January 2004, available at: http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf.

[49] *Cf.* Art. 10.5(2)(a) of the Dominican Republic-Central America-United States Free Trade Agreement, available at: http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta.

[50] *See* Benedict Kingsbury & Stephan W. 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), available at: http://www.iilj.org/publications/documents/2009-6.KingsburySchill.pdf.

C. Concluding Remarks: From Discourse Back to Sources

We live in an increasingly global economy. Yet there is no global, multilateral treaty governing investor-State relations. Instead, international investment law is governed by a myriad of bilateral investment treaties, investment chapters in free trade agreements, as well as a few sectoral and regional treaties. This suggests chaos and fragmentation in international investment relations. Surprisingly, however, one can observe convergence in the international law governing the protection of foreign investments much like customary international law in pre-investment treaty arbitration times. While bilateral investment treaties contain various elements allowing for a multilateralization of these treaties, in particular the effect of most-favored-nation clauses, as well as the possibilities for treaty-shopping they grant, the primary actors crafting uniformity in international investment law are investment treaty tribunals.

Above all, investment treaty tribunals create a system of persuasive and non-binding precedent that States and investors generally focus on in developing normative expectations both about how investment treaties should be interpreted by arbitral tribunals and about how States should conduct themselves in order to conform to their investment treaty obligations. In doing so, arbitral tribunals craft, despite the structural limitations they face, treaty-overarching standards of investment protection and effectively multilateralize international investment law through interpretation. Arbitral tribunals are developing the aggregate of bilateral investment treaties into a functional substitute for a multilateral investment instrument and are establishing overarching linkages between seemingly unconnected treaty relationships. They thereby assume the function multilateral treaty-making or customary international law normally would have in creating uniform rules under international law.

This process, however, is not without problems in terms of legitimacy, in particular as the generation of treaty-overarching standards can have significantly constraining effects on the possibility of States to regulate in the public interest, even though it is not backed by multilateral consent. Such multilateral consent seems necessary as one-off arbitral tribunals can hardly rely on a mandate to generate a multilateral order for international investment relations based on the consent of the two parties to the dispute, moreover with one of them being a private investor.[51] At the same time, having treaty-overarching standards also has positive effects. Most importantly, it increases legal certainty and predictability of international investment law as a whole.

The challenge the multilateralization of international investment law poses will therefore be twofold: to maintain a reasonable level of uniformity and predictability of decision-making by investment treaty tribunals so that States and investors can adapt their behavior and plan accordingly; and to ensure that arbitral jurisprudence develops balanced solutions that

[51] *See* Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT/HEIDELBERG J. INT'L L. 1 (2010); Armin von Bogdandy & Ingo Venzke, "Beyond Dispute? International Judicial Institutions as Lawmakers", 12 GERMAN LAW JOURNAL (2011) (forthcoming).

sufficiently protect foreign investors against the abuse of governmental powers, while leaving sufficient policy space for States to regulate in the public interest. This challenge, some argue, should be met by reforming the system of investor-State arbitration institutionally, for example by introducing an appeals facility for investor-State awards, or by establishing a permanent international investment court. This could ensure the development of a *jurisprudence constante* that not only strikes an appropriate balance between the interests of investors and States but is legitimized by the consent of States on a multilateral level. As long as States do not bring about such institutional reforms, however, it will be for investment treaty tribunals, annulment committees, and arbitral institutions to meet concerns as regards the legitimacy of investment treaty arbitration, in particular as regards the creation of a multilateral order arbitral tribunals engage in.

Strategies for investment treaty tribunals to meet such concerns could involve various elements:[52] developing the substantive law contained in international investment treaties in ways that are accepted by States, investors, and civil society; ensuring the openness of international investment law *vis-à-vis* general international law and other specific international legal regimes, such as human rights, international environmental law, the protection of cultural property, international labor law, etc.; developing appropriate standards of review for acts of host States; increasing the transparency of investor-State arbitration so that outsiders can assess its benefits, but also address criticism; developing further mechanisms for non-parties affected by the outcome of arbitrations to participate in the proceedings and voice their position, for example through amicus curiae-interventions; reconsidering the procedural maxims governing investor-State arbitrations to meet the requirements of a global governance system; and strengthening the independence and impartiality of arbitrators by excluding undue influence on their decision-making due to conflicts of interests and conflicts of roles. Overall, these strategies will involve strengthening approaches to conceptualize the authority investment treaty tribunals exercise and to develop the substantive and procedural law relating to investment treaty arbitration in line with general principles of law; as ultimately, the move from sources to discourse in order to create a multilateral order for international investment relations will only be legitimate and accepted by States if it remains linked to one of the traditional sources of multilateral order under international law, that is either a multilateral treaty, customary international law, or general principles of law. Methodologically, general principles may the be only doctrinally viable and convincing way to justify the multilateralization of international investment law through the discourse of investment treaty tribunals.

[52] *See* in depth the contributions in STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010).