System-Building in Investment Treaty Arbitration and Lawmaking

By Stephan W. Schill[*]

A. Introduction

Since the late 1990s investment treaty arbitration has developed into one of the most vibrant fields of international dispute settlement with now almost 400 known cases.[1] It involves claims by foreign investors against host States for breach of obligations assumed under one of the more than 2700 bilateral investment treaties (BITs), under the numerous investment chapters in bilateral or regional free trade agreements,[2] including the North American Free Trade Agreement,[3] or under sectoral treaties such as the Energy Charter Treaty.[4] All of these instruments offer comprehensive protection to foreign investors by setting down principles of substantive investment protection, including national and most-favored-nation treatment, fair and equitable treatment, full protection and security, protection against expropriation without compensation, and free capital transfer.[5] They

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[1] *See* United Nations Conference on Trade and Development (UNCTAD), *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1, 1–2 (2011), available at: http://www.unctad.org/en/docs/webdiaeia20113_en.pdf (recording an aggregate of 390 treaty-based investment disputes by the end of 2010).

[2] *See* UNCTAD, *World Investment Report 2010 – Investing in a Low-Carbon Economy*, 81 (2010), available at: http://www.unctad.org/en/docs/wir2010_en.pdf (recording an aggregate of 2750 BITs by the end of 2009 as well as 295 investment agreements other than BITs). On the development of international investment law, *see* Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 UC DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 157 (2005).

[3] North-American Free Trade Agreement (NAFTA), signed 17 December 1992, entered into force 1 January 1994, 32 INTERNATIONAL LEGAL MATERIALS (ILM) 289, 605 (1993).

[4] Energy Charter Treaty (ECT), Annex I to the Final Act of the European Energy Charter Conference, 17 December 1994, 34 ILM 373 (1995).

[5] For the content of investment treaties, *see*, *e.g.*, CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION - SUBSTANTIVE PRINCIPLES (2007); RUDOLF DOLZER & CHRISTOPH SCHREUER,

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also allow investors to enforce these standards in arbitral proceedings directly against the host State, most commonly under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).[6] Investment treaty arbitration thereby not only empowers foreign investors under international law, but also introduces investment treaty tribunals as novel actors into the arena of international investment law. Although arbitration has been a classic form of dispute settlement on the State-to-State level, including for the settlement of investment-related disputes,[7] modern investment treaty tribunals have wider jurisdiction and are more removed from State control than any of their predecessors.[8]

Functionally, investment treaty tribunals often replace dispute settlement between foreign investors and the host State in the host State's domestic courts. The reason for this is that foreign investors, in particular in developing and transitioning economies, often have reservations about the neutrality, impartiality, and independence of the host State's courts to settle disputes with the government.[9] Like courts, investment treaty tribunals engage in the finding of facts and the application of the governing law to those facts. Most importantly, arbitrators in investment treaty disputes are required to reach their decisions based on their impartial and independent judgment. Investment treaty arbitration, therefore, is an adjudicatory process that has little in common with commercial arbitration, where the parties under the principle of party autonomy have full liberty to determine not only which law to apply, but also whether to render a decision based in law or *ex aequo et bono*.[10]

In exercising their dispute settlement function, investment treaty tribunals exercise authority in several respects. First and foremost, investment treaty tribunals exercise authority over the parties to the proceedings. They determine in a binding decision with

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PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008); ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES - STANDARDS OF TREATMENT (2009).

[6] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, UNTS, vol. 575, 159. Investment treaty arbitration, however, may also take place under other procedural rules, most importantly the United Nations Conference on International Trade Law (UNCITRAL) Arbitration Rules. *See* DOLZER & SCHREUER (note 5), 222-229.

[7] *See* Charles H. Brower, *The Functions and Limits of Arbitration and Judicial Settlement under Private and Public International Law*, 18 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 259, 265 (2008).

[8] *See* discussion *infra*, section B.I-IV.

[9] *See* Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in: THE BACKLASH AGAINST INVESTMENT ARBITRATION, 29 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung & Claire Balchin eds, 2010).

[10] *See* Susan D. Franck, *International Arbitrators: Civil Servants? Sub Rosa Advocates? Men of Affairs?: The Role of International Arbitrators*, 12 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 499, 503 (2006).

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res judicata effect the lawfulness or unlawfulness of the respondent State's conduct under the applicable investment treaty and, in case of breach, grant remedies, most commonly damages or compensation. The tribunals' authority also covers determining how the arbitral proceedings are conducted. Although generally seeking the parties' consent, tribunals have wide-ranging powers to structure the proceedings, to order the taking of evidence, and to sanction non-compliance with tribunal orders.

Second, decisions of arbitral tribunals also impact domestic administrative, legislative, and judicial decision- and policy-making. While tribunals cannot compel States to bring their domestic legal order into line with investment treaty obligations or quash domestic acts, the monetary sanctions they can impose exert considerable pressure on States to bring their domestic legal orders into conformity with their investment treaty obligations.

Furthermore, because foreign investors engage in virtually all industries, and because many State measures have effects on investment, a wide range of measures can come under the scrutiny of investment treaty tribunals. Disputes span the whole range of administrative, legislative and judicial decision- and policy-making, such as the cancellation or non-extension of operating licenses for waste disposals,[11] the scope of the legislator's emergency powers in economic emergencies,[12] the regulatory oversight over public utility companies,[13] the control and ban of harmful substances,[14] the protection of cultural property,[15] or the implementation of non-discrimination[16] and anti-tobacco policies.[17] Investment treaty disputes therefore involve core issues of public law in any area touching upon economic policy-making.

[11] *See*, *e.g.*, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 (all arbitral awards are available, unless otherwise stated, on the Investment Treaty Arbitration website at http://ita.law.uvic.ca or the Investment Claims website at http://www.investmentclaims.com).

[12] *See*, *e.g.*, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005; *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 3 October 2006.

[13] *See*, *e.g.*, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2004; *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010 (all cases concerning the water sector).

[14] *See*, e.g., *Methanex Corporation v. United States,* UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005.

[15] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL (NAFTA), Award of 8 June 2009.

[16] *Piero Foresti and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award of 4 August 2010.

[17] *FTR Holding S.A., Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, registered on 26 March 2010 (pending).

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Finally, while dispute settlement is the primary function of investment treaty tribunals, it is not their only function. Instead, investment treaty tribunals, as will be argued in this chapter, not only mechanically apply investment treaties to specific disputes. Rather, their impact is creative, forging international investment law with effects beyond the individual dispute at issue. Most importantly, investment treaty tribunals increasingly function as a mechanism of global governance, affecting not only the parties to the proceedings, but also foreign investors, host States, and civil society, more generally.[18] Although arbitral tribunals only resolve a specific dispute and vanish thereafter, the awards they render increasingly form a body of jurisprudence that affects the legal framework governing investor-State relations at a multilateral level, that is, rather independently of specific bilateral investment treaty relations. The reason for this is that investment treaty tribunals heavily rely on precedents set by earlier investment treaty tribunals, and increasingly are expected to fall into line which earlier arbitral jurisprudence.

In other words, in deciding cases investment treaty tribunals contribute to a growing body of case law that concretizes the principles of investment protection contained in investment treaties and further develops them. Arbitral tribunals thus are in a position to craft and develop treaty-overarching standards for investor-State relations that are hardly pre-determined by the texts of the specific investment treaty at issue. Instead, these standards increasingly are being applied and developed in a uniform manner across bilateral treaties. Investment treaty tribunals, therefore, multilateralize international investment law, even though it is enshrined in specific bilateral treaties and implemented by one-off arbitral tribunals. Tribunals 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. This facet of their exercise of public authority can be viewed as an instance of law-making by investment treaty tribunals.

Instead of focusing on the content of the often far-reaching restrictions on government conduct that investment treaty tribunals have developed in their interpretations of the rather vague principles of international investment law, the present contribution focuses on the aspect of system-building as a form of exercising public authority that is rather specific to investment treaty tribunals. With system-building, I refer to the phenomenon that investment treaty tribunals generate coherence rather than divergence in arbitral jurisprudence, and forge one treaty-overarching body of international investment law, even though the law governing investor-State disputes is enshrined in bilateral treaties and the tribunals only have the mandate to settle an individual dispute.[19]

[18] *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.

[19] System-building in the present context is therefore understood as a process that takes place within international investment law, that is, a process by which international investment law is established as a uniform body of law. System-building in this context is not about whether and how arbitral tribunals operate as part of the

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In order to show how investment treaty tribunals engage in this form of system-building, Part B describes the institutional infrastructure of investment treaty arbitration as the foundation of the tribunals' power over the parties and as law-makers in international investment law. It also addresses the limits imposed on investment treaty tribunals by different aspects of bilateralism. Part C then shows how arbitral tribunals overcome the limitations of bilateralism they face and succeed in crafting treaty-overarching standards of investment protection that effectively multilateralize international investment law. Part D concludes by pointing to strategies to legitimize system-building by investment treaty tribunals.

B. Empowerment and Constraints of Investment Treaty Tribunals

Investment treaty tribunals operate in an institutional framework that confers significant powers on them. These powers chiefly serve the tribunals' primary function of settling specific investor-State disputes effectively. Yet, they also lay the foundations for investment treaty tribunals to act as law-makers in international investment law, in particular by concretizing and further developing uniform standards of treatment of foreign investors based on the principles of investment protection laid down in international investment treaties. The empowerment of investment treaty tribunals results not only in a transfer of dispute settlement powers from domestic courts, but also in a delegation of certain law-making powers in international investment law from States to arbitral tribunals.

Five components are critical for understanding the empowerment of arbitral tribunals: (1) the right of foreign investors to initiate arbitration directly against host States and to seek damages for breach of investment treaty obligations; (2) the limited influence of States on the arbitral process; (3) the limited review of arbitral awards; (4) the rules on the recognition and enforcement of investment treaty awards; and (5) the vagueness of investor rights. All of these elements, however, have to be seen against the significant institutional and structural constraints that arbitral tribunals face and that should significantly limit the impact of their decision-making beyond specific disputes (see 6). It is against this background that investment treaty tribunals engage in building a treaty-overarching system of international investment law, i.e., exercise public authority through system-building.

overarching system of international law or how international investment law relates to other bodies of international law.

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I. The Investor's Right to Initiate Arbitration and Seek Damages

Foreign investors under modern investment treaties are no longer mediated through an inter-State prism as they are under the customary international law system of diplomatic protection. Under that system, it is up to an investor's home State to espouse the claim of its national and to assert it, after exhaustion of local remedies, at the inter-State level against the host State.[20] Under modern investment treaties, by contrast, foreign investors have an independent right to initiate investor-State arbitration directly against a host State, regularly without the need to exhaust local remedies. They can seek redress in their own name, generally in the form of damages, for the host State's breach of its investment treaty obligations. The introduction of this private right of action has a number of consequences:

First, it transforms the way investment disputes are settled from a dyadic negotiation-based process between States, in which the relative power between them is crucial, into a triadic dispute settlement process.[21] Introducing an independent third party, i.e., the arbitral tribunal, enables the settlement of investment disputes according to pre-established legal rules.[22] This entails a move from politics to law and enables the judicialization of investor-State dispute settlement.

Second, investor-State arbitration disassociates the investor from potentially conflicting interests of its home State.[23] The decision whether to proceed with an investor-State claim no longer depends on aspects that are external to the relationship between investor and host State, such as the broader geo-political interests of the investor's home State. Instead, investment treaty arbitration transfers control over the initiation of disputes to private investors.[24]

Third, the control of States concerning their submission to investor-State dispute settlement is reduced to the one-time act of giving general and advance consent to

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[20] *See The Mavrommatis Palestine Concessions* (Greece v. Britain), Judgment of 30 August 1924, PCIJ 1924, Series A, No. 2, 12. On diplomatic protection generally, *see* CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION (2008).

[21] *See* Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMPARATIVE POLITICAL STUDIES 147 (1999).

[22] *See* Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 27*, in: THE ICSID CONVENTION - A COMMENTARY (2009), para. 14.

[23] *Cf.* Ibrahim F. I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA,* 1 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 1 (1986).

[24] An investor claiming violations of an investment treaty can simply invoke the host State's consent to investor-State arbitration given in the applicable investment treaty. No contractual privity between investor and State is necessary. *Cf.* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 232 (1995).

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arbitration in an investment treaty, thus allowing investment treaty tribunals to exercise jurisdiction over a theoretically infinite number of future investment-related disputes.[25]

Fourth, modern investment treaties generally dispense with the requirement to exhaust local remedies.[26] Investment treaty arbitration therefore regularly bypasses the domestic courts of the host State, who otherwise would be competent to entertain investor-State disputes. This not only removes the opportunity of domestic courts to remedy unlawful government conduct, but makes the international law under which investment treaty tribunals operate directly applicable to investor-State relations.

Finally, the award of damages allows the investor to be indemnified for the financial harm resulting from the host State's violation of an investment treaty;[27] this requires the host State to internalize the costs of a breach of its investment treaty obligations. It empowers investment treaty tribunals because States, in order to avoid potential liability, have an interest in aligning their conduct with how tribunals are expected to apply investment treaty obligations.

In sum, the right of foreign investors under investment treaties to initiate arbitration directly against host States, and to seek damages for breach of a treaty, fundamentally changes the dispute settlement structure in foreign investment disputes. It subjects investor-State relations directly to international law and removes State control over the use of dispute settlement procedures. The investor's right to arbitration, therefore, is at the basis of the judicialization of international investment law.

II. The Limited Influence of States on the Arbitral Process

The influence of States, however, is not only reduced in respect of the control of access to investor-State dispute settlement under international law. Their power is also significantly reduced in relation to the dispute settlement process itself. In this respect, States can exercise no more power than the private investor. Instead, the host State and the investor

[25] Modern investment treaty tribunals have more extensive jurisdiction than tribunals established in post-conflict situations whose mandates were limited to a certain time-period, such as the Iran-United States Claims Tribunal, the Ethiopia-Eritrea Claims Commission, or the claims commissions during the pre-World War II era. On the specifics of State consent in modern investment treaties compared to more classical investment dispute settlement mechanisms, *see* Barton Legum, *The Innovation of Investor-State Arbitration under NAFTA*, 43 HARVARD INTERNATIONAL LAW JOURNAL 531 (2002).

[26] *See* AMERASINGHE (note 20), 334-341.

[27] This conforms to the principle of State responsibility, according to which an injured State is entitled to obtain reparation for the internationally wrongful act of another State. *See* Art. 34 of the ILC Articles on State Responsibility.

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are, in principle, treated as parties on equal footing.[28] This can be seen, above all, in their shared powers to appoint arbitrators.[29]

The limited influence of States on the arbitral process is also evidenced in relation to the written and oral submissions of the respondent State on matters of interpretation of investment treaties. Thus, arbitral tribunals accord no more weight to the written and oral submissions of the host State than to that of the investor,[30] even though the host State shares, together with the investor's home State, the role as authoritative treaty interpreter.[31]

Finally, the ICSID Convention prevents the collective power of the investor's home State and the host State from influencing arbitral proceedings or settling pending investment treaty arbitrations.[32] In view of the host State's advance consent to arbitration, this *de facto* also excludes a settlement of foreign investment disputes at the inter-State level, since the investor can initiate arbitration unilaterally.

III. Finality of Arbitral Awards

The authority of arbitral tribunals is further strengthened by the finality of investment treaty awards. Unlike in the WTO dispute settlement system, where the Dispute Settlement Body can reject adoption of a Panel or Appellate Body report by consensus,[33] investment treaty awards become final and binding for the parties to the arbitration even if both States parties to the investment treaty in question disagree with the outcome or reasoning of a tribunal. States are not empowered to overrule the outcome of an investment treaty arbitration, for example, because of the breadth of an interpretation adopted by an arbitral tribunal of certain standards of investment protection.

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[28] Yet, States retain certain procedural privileges, such as the right to invoke national security interests against producing evidence. *See*, *e.g.*, Richard M. Mosk & Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, 50 INTERNATIONAL COMPARATIVE LAW QUARTERLY (ICLQ) 345, 363 (2001).

[29] *See*, *e.g.*, Art. 37 of the ICSID Convention; Art. 7 of the UNCITRAL Arbitration Rules.

[30] *See Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction of 11 May 2005, para. 146.

[31] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AJIL 179 (2010) (stressing that States in investment treaty arbitration have a dual role as parties to the arbitration and as parties to the applicable investment treaty).

[32] Although home State and host State are empowered under general international law to dispose of a claim raised by an investor, the ICSID Convention arguably restricts this right to the period prior to the commencement of arbitration. *See* STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 253 (2009).

[33] *See* Arts 16(4) & 17(14) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, UNTS, vol. 1869, 401.

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Furthermore, investment treaty awards are shielded effectively from review by domestic courts both in the host State as well as any third State. Under the ICSID Convention, the exclusive remedy against an ICSID award is a request for annulment under Article 52 of the ICSID Convention based on strictly limited, primarily procedural grounds; it is decided by an *ad hoc* Annulment Committee appointed by ICSID.[34] Non-ICSID awards, while possibly subject to set-aside procedures in the domestic courts at the place of arbitration,[35] are also significantly shielded from review by State courts. This is particularly the case as arbitral tribunals themselves can choose the place of arbitration freely, unless the parties to the proceedings agree otherwise.[36] This allows arbitral tribunals effectively to evade *ex post*-control by State courts of the interpretations they make of international investment law.

IV. Recognition and Enforcement of Arbitral Awards

The authority of investment treaty tribunals is further buttressed by the widespread enforceability of their awards. ICSID awards, for example, have to be recognized and enforced by all Contracting Parties to the ICSID Convention in relation to pecuniary obligations like a final judgment of the enforcement State's own courts.[37] This allows enforcement of an ICSID award across several jurisdictions without the distorting effects of post-breach bargaining between the respondent State and the enforcement State. In particular, the enforcement State cannot invoke its public policy against an ICSID award, challenge the tribunal's competence or arbitrability of the claim, or refuse enforcement because of the way the tribunal resolved a legal question.[38] The only exception to enforcement is State immunity.[39]

For non-ICSID awards, possibilities to resist enforcement are slightly broader. Notably, the New York Convention allows the enforcement State to invoke its public policy against

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[34] On annulment proceedings, *see* Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 52*, in: THE ICSID CONVENTION - A COMMENTARY (2009). Grounds for annulment are limited to improper constitution of the tribunal, corruption by one of the tribunal's members, the tribunal's manifest excess of power, its serious departure from a fundamental rule of procedure, or its failure to state the reasons for the award. *See* Art. 52(1) of the ICSID Convention.

[35] Under rare circumstances, domestic courts already have set aside investment treaty awards. *See*, *e.g.*, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 644.

[36] *See*, *e.g.*, Art. 16(1) of the UNCITRAL Arbitration Rules.

[37] Art. 54(1) of the ICSID Convention.

[38] Christoph Schreuer, Loretta Malintoppi, August Reinisch & Anthony Sinclair, *Art. 54*, in: THE ICSID CONVENTION - A COMMENTARY (2009), para. 74.

[39] *See* Art. 55 of the ICSID Convention.

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enforcement and recognition of arbitral awards.[40] That notwithstanding, the rules on recognition and enforcement for investment treaty awards give States a particularly strong incentive not only to comply with awards already rendered against them, but also to change their behavior prospectively so as to avoid any potential liability for breach of investment treaty obligations as interpreted by investment treaty tribunals.

V. The Vagueness of Substantive Investor Rights

The institutional structure of investment treaty arbitration significantly reduces the power of States: it bestows arbitral tribunals with effective means to settle investor-State disputes and provides foreign investors with the means to initiate arbitration and to enforce investment treaty awards. With their dispute settlement function arbitral tribunals assume an important position in protecting the rights of foreign investors and in constraining host States in their treatment of foreign investors. They help to ensure that States treat foreign investors according to standards laid down in international investment treaties.

However, arbitral tribunals also exercise significant law-making powers in international investment law. The reason for this is the vagueness of the principles of investment protection contained in international investment treaties. The wording of standard guarantees of international investment law, such as the prohibition of indirect expropriations without compensation, and the requirement to accord foreign investors fair and equitable treatment and full protection and security, are so vague that they lack well-defined and easily ascertainable normative content. Fair and equitable treatment, for example, does not have a clearly ascertainable conventional core meaning, nor does an accepted definition exist that could be developed from State practice. Legal concepts such as fair and equitable treatment, in other words, are difficult to narrow down by traditional means of interpretation, i.e., focusing on wording, context, and object and purpose.[41] Similar observations hold true for almost all other investor rights, including the concept of indirect expropriation and the obligation to provide full protection and security.[42] The core legal concepts of international investment law, in other words, only assume a more concretized meaning over time because of the interpretations investment treaty tribunals give to them in their decisions.

[40] *See* Art. V(2)(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 10 June 1958, UNTS, vol. 330, 38.

[41] *See MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 113; *Saluka Investments BV v. The Czech Republic*, UNCITRAL, Partial Award of 17 March 2006, para. 297.

[42] *See only* Markus Perkams, *The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark*, in: INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 107, 108 (Stephan W. Schill ed., 2010).

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The vagueness of the substantive standards that are applied as a yardstick for the international responsibility of host States are the root cause for the significant law-making activities arbitral tribunals engage in. This law-making activity is a consequence of the position that was envisaged for them by States: on the one hand, investment treaty tribunals not only have the authority but also the duty to apply the principles contained in international investment treaties by having recourse to accepted methods of treaty interpretation;[43] yet, on the other hand, the tribunals have been given little guidance by the States parties to the treaties in question as to the precise meaning of the principles in question. As a consequence, investment treaty tribunals inevitably are faced with filling the significant gaps left by the ambiguity of the standard investor rights. This vagueness, in turn, leaves arbitral tribunals with ample interpretative choices about how to concretize the content of investment treaty obligations and what concrete obligations to derive from—or to read into—them.

VI. Constraints on Multilateral Law-Making

While arbitral tribunals have significant powers to settle disputes between the parties effectively and concretize the substantive rules on a case-by-case basis, they face significant limitations that would appear to exclude any systemic implications of the activity of individual tribunals for international investment law more generally. These limitations are the fragmentation of substantive investment law largely into bilateral treaties, the one-off nature of arbitration, and the absence of a rule of *stare decisis* in investment treaty arbitration.

First, the bilateral form of international investment treaties suggests divergence rather than convergence in the applicable standards of protection of foreign investors depending on the applicable investment treaty. After all, the flexibility to agree on tailor-made solutions would seem to be one reason for States to prefer bilateral over multilateral treaty-making.[44] This fragmentation of sources also would militate against the impact of arbitral decisions on third-party investment treaties.

Second, compared to a standing court that can easily develop a uniform jurisprudence, the institutional set-up of investment treaty tribunals as one-off dispute settlement bodies, which are created for the resolution of an individual dispute and vanish thereafter, limits the law-making power of individual tribunals and their impact beyond a specific dispute. One-off tribunals coexist without hierarchy and without supervisory mechanisms that

[43] Art. 42(2) of the ICSID Convention explicitly prohibits the finding of *non liquet* on the ground of silence or obscurity of the law.

[44] *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).

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could ensure coherence in arbitral jurisprudence. This militates against the possibility of arbitral tribunals to engage in system-building in international investment law.

Third, investment treaty tribunals are formally independent in their assessment of law and facts. In particular, there is no principle of *stare decisis*, or binding precedent, that could serve as a cross-award mechanism for producing consistent jurisprudence. Some investment treaties, as well as the ICSID Convention, even explicitly provide for the *inter-partes* effect of awards.[45] 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*, for example, stressed that "[e]ach tribunal remains sovereign and may retain . . . a different solution for resolving the same problem."[46] In fact, directly conflicting decisions of different investment treaty tribunals on comparable or even identical facts, under comparable or even the same investment treaty obligation, are a recurring phenomenon.[47]

The combined effect of the above mentioned factors should give rise to the expectation that arbitral tribunals play but a minor role in the development of a system of international investment law and jurisprudence. The embryonic infrastructure and the limited mandate of investment treaty tribunals to settle a singular dispute rather suggest that arbitral tribunals are not able to exercise public authority in making law beyond an individual dispute in a significant manner. It is against the background of these institutional obstacles that the development of a large degree of treaty-overarching uniformity in the jurisprudence of arbitral tribunals, in particular concerning the principles of investment protection, has to be appraised.

C. System-Building Through Precedent in Investment Treaty Arbitration

The fact that international investment law is enshrined in bilateral treaties and implemented by one-off arbitral tribunals suggests a chaotic and unsystematic aggregate of law governing 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

[45] Art. 1136 (1) of the NAFTA; Art. 53(1) of the ICSID Convention.

[46] *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para. 30. This conclusion is shared widely by investment treaty tribunals more generally. For further arbitral jurisprudence on point, *see* SCHILL (note 32), 292, footnote 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 of 30 March 2010, para. 163.

[47] *See* SCHILL (note 32), 284, 339.

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and structural interconnections that create a relatively uniform, treaty-overarching regime for international investment relations.

Certainly, this multilateralization of international investment law builds on a number of factors embedded in the substance and structure of investment treaty-making, 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.[48] Furthermore, most-favored-nation clauses in investment treaties have a significant effect in leveling differences in investment treaty protection.[49] Broad possibilities for treaty-shopping, finally, also have the effect of raising investment protection in a given host State to a uniformly high level.[50] Substantive investment law and the institutional framework in which investment treaties are negotiated therefore already 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.

An even more important factor for the multilateralization of international investment treaties, however, 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. References to earlier investment treaty awards and decisions can be found in virtually any of the more recent 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."[51] Unlike in commercial arbitrations between private parties that are held behind closed doors, this development is possible because awards in investment treaty arbitrations are regularly published on the Internet and in print journals and are discussed extensively in the investment law community and general media. Furthermore, convergence in the

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[48] *See* on the standardization of treaty texts and the entrenchment of bilateral treaty-making in multilateral processes *id.*, 65-120.

[49] *See id.*, 121-196.

[50] *See id.*, 197-240.

[51] Jeffrey Commission, *Precedent in Investment Treaty Arbitration - A Citation Analysis of a Developing Jurisprudence*, 24 JOURNAL OF INTERNATIONAL ARBITRATION 129, 148 (2007).

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jurisprudence of investment treaty tribunals is fostered because a relatively small pool of arbitrators is appointed in the most prominent and influential cases.[52]

How arbitral tribunals translate the patchwork of international investment treaties into a genuine (sub-)system of international law becomes most obvious in regard of the use of precedent. Thus, arbitral tribunals establish a system of precedent not only with respect to the interpretation of the same investment treaty, but across various treaties. Certainly, the ways in which investment treaty tribunals make use of precedent differ. Yet, they all illustrate how investment treaty jurisprudence converges, and forms part of a uniform treaty-overarching regime for international investment relations, and how investment treaty tribunals actively engage in system-building in this field. 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.[53] 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 system of international investment law and its functioning (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,[54] but considered that it was allowed to use earlier arbitral decisions as a source of "comparison and . . . of inspiration."[55] 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

[52] *See id.*, 137-141.

[53] *See* in depth Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue.

[54] *See AES Corporation v. Argentina* (note 46), paras 23 & 30.

[55] *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.

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> precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.
>
> The same may be said for the interpretation given by a precedent decision or award to some relevant facts which are basically at the origin of two or several different disputes, keeping carefully in mind the actual specificities still featuring each case.[56]

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) of the 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.[57] 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."[58]

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[56] *AES Corporation v. Argentina* (note 46), 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 v. Ecuador* (note 46), para. 164.

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

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

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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.[59] The Tribunal's majority not only relied on the plain meaning of the clause in question and the principle of effective interpretation,[60] but also invoked other investment awards,[61] stating that it "finds the foregoing analysis of the Tribunal in *SGS v. The Republic of the Philippines* . . . cogent and convincing."[62] 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 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. Thus, 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.[63]

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, stemming from other arbitrations involving the lawfulness of the impact of Argentina's economic

[59] *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.

[60] *Eureko v. Poland* (note 59), paras 246-249.

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

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

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

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emergency legislation on the claimant at stake, which it designated as "ICSID's case law concerning the Argentine Republic," [64] 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."[65] 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.[66]

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,"[67] 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 goes along with an increased normative value of precedent.

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 on 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."[68] The perception of precedent in this case thus moves extremely close to the common law

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

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

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

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

[68] *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 v. Argentina* (note 30), para. 94.

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system of *stare decisis*. The Tribunal no longer seems to interpret the governing law, but confines itself to referring to prior ICSID practice as an authoritative source of law.

Such reasoning implies that a change in jurisprudence requires the parties to provide reasons for such a change; this accordingly shifts the burden of argumentation and persuasion to the party wishing to change existing jurisprudence, even if this jurisprudence has developed based on unrelated investment treaties between different States.[69] 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 meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[70]

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

[69] *Cf.* also *Gas Natural v. Argentina* (note 55), 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").

[70] *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.

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becomes to meet that burden and to convince tribunals to adopt solutions that deviate from prior practice.[71] This phenomenon is a core element for system-building 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 expropriation 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.[72] The primary reason for this is the terminological vagueness of these rights.[73] 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.[74] 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:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of

[71] *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").

[72] An exception is the award in *Glamis Gold v. United States* (note 15), 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) of the NAFTA.

[73] *See*, *supra*, section B.V.

[74] 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. For the jurisprudence on these standards, *see* the references cited *supra*, note 5.

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> 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.[75]

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 that standard in an arbitration under the Spain-Mexico BIT[76] has already become the standard definition; other tribunals have adopted and refined this definition in BITs between Chile and Malaysia,[77] Ecuador and the United States,[78] or Germany and Argentina.[79] What is crucial in order to understand arbitral decision-making as an exercise of public authority and law-making 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 the conclusions derived from them in accepted international legal instruments and methods of interpretation.

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

[76] *Tecmed v. Mexico* (note 11), para. 154.

[77] *MTD v. Chile* (note 41), paras 113 *et seq.*

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

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

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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 *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.[80] The vagueness of the principles of investment protection, such as fair and equitable treatment, are quite similar to such general clauses in that they involve a substantial delegation of law-making powers from States to tribunals in the international investment context. Accordingly, it is much more arbitral jurisprudence 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.

VI. System-Building and Conflicting Decisions

Quite notably, system-building by investment treaty tribunals cannot only be observed with respect to the use of precedent resulting in consistent arbitral case law. Rather, the idea of the existence of a 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 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 uniform 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. In other words, 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.[81] Similarly, some tribunals occasionally also conceal jurisprudential conflicts in ways that suggest that they

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

[81] *See* SCHILL (note 32), 347-352.

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intended to uphold the perception that they did not in fact deviate from earlier investment treaty jurisprudence.[82]

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 to resolving a specific dispute;[83] instead, they regularly deviate from earlier jurisprudence because they consider an earlier interpretation as unpersuasive from a principled perspective.[84] 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.[85] 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*."[86] While explicitly criticizing the earlier decision in *SGS v. Pakistan* as "failing to give any clear meaning to the 'umbrella clause',"[87] the Tribunal in *SGS v. Philippines* nonetheless

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

[83] 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.

[84] SCHILL (note 32), 341-347.

[85] *See* comprehensively Stephan W. Schill, *Enabling Private Ordering - Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINNESOTA JOURNAL OF INTERNATIONAL LAW 1 (2009).

[86] *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.

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

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considered whether it should "defer to the answers given by the *SGS v. Pakistan* Tribunal" for the sake of consistency.[88] 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 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.[89]

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 system of international investment law, but rather reflects divergence about how certain principles should be applied within that system.[90]

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

[89] *Id.*

[90] 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*. *See* Schill (note 85).

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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 perspectives. 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 system-building exercise investment treaty tribunals engage in; it illustrates the divergent views about which direction investment treaty jurisprudence should take, rather than defiance of the existence of a 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 as a system of investment protection in which the resolution of individual disputes is interconnected and embedded in a treaty-overarching framework. This self-institutionalization through communication 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 most 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 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 law-making 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.

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.[91] The reality, however, is different and displays numerous ways in which

[91] *See*, *supra*, note 45.

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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.[92] 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 recalibrating their own investment treaties, although the decision in question was rendered under a different investment treaty.[93] The interpretation of most-favored-nation clauses by the Tribunal in *Maffezini v. Spain*,[94] for example, has had the effect that wholly unrelated States included "anti-Maffezini"-clauses in their investment treaties.[95] Similarly, broad interpretations of fair and equitable treatment, or of the concept of indirect expropriation, have led several States to introduce

[92] *See*, *e.g.*, *AES Corporation v. Argentina* (note 46), para. 18.

[93] 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.

[94] *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.

[95] *See* Art. 10.4(2), footnote 1 of the 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.

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more restrictive wording of the respective provisions in their more recent BITs.[96] 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 motivated by their own need for direction as regards the interpretation of investment treaties, and partly driven by 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.[97] 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.

These expectations, 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 accepted standards of judicial reasoning. This means that a departure from earlier case law requires reasons, not least because like cases should be treated alike.

D. Conclusion

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. While bilateral investment treaties contain various elements allowing for a multilateralization of these

[96] *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.

[97] *See* Kingsbury & Schill (note 18).

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treaties, in particular the effect of most-favored-nation clauses, as well as the possibilities for treaty-shopping they grant, the principal 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 normally would have in creating uniform rules for investment protection and for investment-related aspects of the emerging global economy. This function of system-building in international investment law constitutes a specific exercise of public authority and a form of law-making by investment treaty tribunals.

Such an exercise of public authority, however, is not without problems, in particular as the law-making function that is connected with the creation of a system of international investment law can have significantly constraining effects on the possibility of States to regulate in the public interest. At the same time, system-building increases legal certainty and the predictability of international investment law as a whole. System-building, therefore, also has positive effects in countering the fragmentation of international investment law. Furthermore, it is a precondition for developing systemic solutions to systemic problems arising in investment treaty arbitration in respect of the relationship between States and investment treaty tribunals.

The challenge in international investment law will therefore be twofold: to maintain a reasonable level of uniformity and predictability of decisions 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 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 strikes an appropriate balance between the interests of investors and States. Yet, as long as States do not bring about such institutional reforms it will be for investment treaty tribunals, annulment committees, and arbitral institutions to meet concerns as regards the legitimacy of investment treaty arbitration in general and the system-building exercise arbitral tribunals engage in in particular.

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Strategies for investment treaty tribunals to meet such concerns could involve various elements:[98] 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 public law approaches to conceptualize the public authority investment treaty tribunals exercise and to develop solutions in line with the general principles governing the exercise of such authority.

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

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