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International Investment Law

JULIAN DAVIS MORTENSON

1 Introduction

Since the middle of the twentieth century, the field of international investment protection has gone through a period of more or less continuous expansion. From a single bilateral investment treaty ('BIT') signed between Germany and Pakistan in November 1959,[1] international investment law has seen the proliferation of some 3,200 investment treaties governing the treatment of foreign investors by the host States where they do business.

As a historical matter, the substantive elements of modern investment law emerged from a loose network of customary international law protections that pre-existed the treaties now dominating the regime. Customary international law had long required host States to extend certain guarantees of decent treatment to foreign citizens within their jurisdiction. The systematic codification of these customary norms into a far-flung network of treaties began in earnest with the late nineteenth century emergence of so-called 'friendship, commerce, and navigation' treaties, which incorporated existing customary rules and adopted various new substantive requirements. The treaty network took its next step when BITs proper emerged in the mid-twentieth century, characterised principally by the extension of dispute resolution options to individual investors.[2]

As customary investment law was gradually codified at the retail level, the law of treaties began to loom much larger in meta-regulation of the

[1] 457 UNTS 24.

[2] K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), pp. 1–119; T. Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Leiden: Martinus Nijhoff, 2013) and K. J. Vandevelde, 'A Brief History of International Investment Agreements', *UC Davis JILP*, 12 (2005), 157–194.

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regime. This chapter will explore some of the ways that the modern law of treaties interacts with the modern law of international investment protection. It will focus in particular on a handful of areas where the formal categories of treaty law map awkwardly onto the reality of modern investment law and adjudication.

Before turning to the law of treaties, it is necessary to begin with a further word on the basic unit to which that law is applied here: the individual bilateral investment treaty.[3] The basic structure of the modern BIT is well established. BITs generally create a set of substantive legal protections similar to the broad guarantees of fairness and due process found in many States' domestic constitutions. They typically prohibit expropriation without just compensation, while also promising 'fair and equitable treatment' – a sort of covenant of good faith and fair dealing. Many BITs include clauses guaranteeing both national treatment and most favoured nation treatment, which function in much the same way as their trade law cousins. And BITs often include a guarantee of 'full protection and security', which requires the host State, at a minimum, to provide adequate physical protection from violence and crime.[4]

While central to the modern investment regime, the substance of these protections is not actually the regime's more notable element in historical context. As noted previously, both treaties and customary law had long incorporated substantive protections for foreign investors. These protections were traditionally undercut, however, by a variety of restrictive doctrines and jurisdictional rules.[5] The signal innovation of the modern BIT – indeed, its defining feature as a category of agreement – removed many of these barriers by providing a direct remedy for the individual investor: mandatory dispute resolution through investor-State

[3] While investment guarantees are also included in a handful of important multilateral treaties, this chapter will for convenience simply use 'BITs' as shorthand for all investment treaties. The last two decades have seen particularly explosive growth in the number of BITs, with the total number rising from fewer than 500 in the late 1980s: United Nations Conference on Trade and Development, *World Investment Report 1996* (New York, NY/Geneva: United Nations, 1996), p. 147, to more than 3,200 by the end of 2013. See United Nations Conference on Trade and Development, *World Investment Report 2014* (New York, NY/Geneva: United Nations, 2014), p. 12.

[4] For a more in-depth survey of typical BIT protections, see R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), pp. 79–194.

[5] In particular, investors' only recourse was typically to petition their home government for assistance; unless the host State agreed to arbitrate treaty disputes, investors could not bring direct claims themselves under international law: Vandevelde, *supra* n. 2, at 159–161.

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arbitration, in which the individual investor and the host State faced off directly, without the intermediation of the investor's home State or any other international body.

As with all arbitration, no investment tribunal may be seised of a dispute until both parties – the aggrieved investor and the State defendant – have agreed to arbitrate. Typically, however, modern investment treaties contemplate neither an *ex post compromis* of existing disputes nor an *ex ante* dispute settlement contract. Rather, a typical BIT dispute resolution clause constitutes an open unilateral offer by each contracting State to arbitrate any future disputes that might arise with any qualifying foreign investor. This means that an aggrieved foreign investor can trigger binding BIT arbitration at her sole discretion, simply by filing a request for arbitration – even if she otherwise has no formalised legal relationship with the State. The open-endedness of these clauses is not unusual as such; any number of treaties contain *ex ante* dispute settlement clauses. But most unusual are these BIT clauses' one-sided nature, their contemplation of a private entity as the arbitral counterparty and their failure to require a formalised *ex ante* relationship between the defendant State and the aggrieved claimant.[6]

Taken as a body of treaty law, the signal characteristic of the investment law regime is its peculiar combination of pervasive similarity amidst relentless variation: the phenomenon that this chapter will describe as 'snowflakes in a blizzard'. These thousands of bilateral treaties are characterised by similar concerns, similar substance, similar enforcement structure and similar terms. And yet, the widely varying permutations of substantive guarantees, dispute resolution mechanics and covered activities mean that very few are *exactly* alike. The resulting structural tension between the requirements of contextually sensitive treatment and the demands of a systemically sensible administrative apparatus presents the defining challenge of applying the law of treaties to the investment context.

This chapter suggests that some of the most significant recurring treaty issues in international investment law emerge from this structural tension. To be sure, investment treaty disputes prompt all the usual

[6] For good discussion of the unusual mechanics of the BIT open consent mechanism, see *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14, Decision on Jurisdiction (24 Feb. 2014), paragraphs 155–231, and *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), paragraphs 160(1)–160(3). See, also, generally J. Paulsson, 'Arbitration without Privity', *ICSID Rev.*, 10 (1995), 232–257.

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disagreements about core substantive terms that characterize the adjudication of any substantive regime. But this chapter puts to one side the definitions of 'fair and equitable treatment', 'expropriation' or 'full protection and security' and emphasises instead the unique *structural* demands of applying, interpreting, and adjudicating treaty law in the international investment context.

On this background, the signal characteristic of the international investment law regime is multiplicity: a multiplicity of treaties, a multiplicity of claimants – and a multiplicity of tribunals. It is a measure of the sometimes awkward fit between the modern law of treaties and the modern law of investment protections that these various multiplicities seriously complicate at least three important aspects of treaty law: (1) the rules governing third-party beneficiaries, (2) the project of consistent interpretation in a decentralised system and (3) the distinction between multilateral and bilateral regimes. The remainder of this chapter will explore how the BIT ecosystem's peculiar combination of pervasive similarity and relentless variation plays out in each of these three areas. It will explore, in short, what the law of treaties can do when applied – over and over again, in predictably similar settings – to these snowflakes in a blizzard.

2 Third-Party Beneficiaries: Articles 34–38 of the Vienna Convention on the Law of Treaties

It is a fundamental presumption of modern treaty law that treaties do not create rights or obligations for 'third States' – i.e. States not party to the treaty in question.[7] Fully five articles of the Vienna Convention on the Law of Treaties (VCLT)[8] are devoted to this proposition and its implications.[9] Of particular relevance in the investment law context, Article 36 VCLT provides that 'a right arises for a third State' only if 'the parties to the treaty intend the provision to accord that right either to the third States, or to a group of States to which it belongs, or to all States, and the third State assents thereto'.

This focus on third *State* beneficiaries is, from the outset, an awkward fit for the realities of investment law. It has of course long been the conceit of many international law regimes that harm to individual persons is cognisable only as attributed to the injured person's home State.

[7] See, further, the contribution to this volume of Waibel at pp. 201–236 (Chapter 8).
[8] 1155 UNTS 331. [9] I.e. Arts. 34–38 VCLT: *ibid*.

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And it is certainly true that investment law treaties do provide a concrete benefit for capital exporting States by providing additional protections for domestic capital when it is sent overseas. Yet, in the day-to-day reality of the regime, it is the individual investors who are the immediate beneficiaries of BIT protections, both in principle and (especially) when it comes to adjudicating alleged violations through mandatory investor-State arbitration procedures. Indeed, tribunals sometimes find a violation of the individual's substantive rights even when both State signatories agree that a given act does not violate the relevant BIT.[10]

That said, the third party considerations motivating Articles 34–38 VCLT are quite salient in modern investment law, with one key difference: it is *individuals* from third party States who are looking for the free ride. In this respect, the investment regime's core structural tension – of persistent differences among fundamentally similar agreements that all serve the same basic function – manifests in the form of aggressive efforts by investors to secure BIT protections negotiated by some other State than their own. These efforts respond to the facts that virtually all industrial countries have arranged BIT protections for their investors, that not all BITs are created equal and that not all investors' home States have a BIT with the State where those investors want to do business.

This section will focus on two ways that this pressure plays out doctrinally. First, it will discuss claimants' efforts to use most favoured nation clauses to pick and choose from a menu of treaty protections – not just those in the treaty that formally applies to their investment but those in all other treaties to which the host State is also party. Second, this section will discuss how tribunals deal with investors' use of strategic incorporation to invoke an attractive BIT which would not otherwise apply to the real party in interest.

In both cases, the background is set by the VCLT presumption that treaties do not create rights for third parties. And, yet, in both cases, tribunals regularly approve the application of provisions contained in a treaty that is 'third party' with respect to the home State (or at least what might seem to be the true home State) of the claiming investor. The practical consequence is that many investors are not limited to the unique permutations of the specific BIT that appears to apply to the economic substance of their activities. Instead, they can often pull in different BITs from elsewhere in the blizzard that offer more suitable

[10] See, e.g., *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2 (10 Apr. 2001), paragraph 116.

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protections for their particular situation. This leads to a predictable levelling up of protections in practice, even if not fully in theory. And it systematically and pervasively upends the VCLT presumption that the effect of a treaty generally extends only to signatory States.

2.1 *Most Favoured Nation (MFN) Clauses*

Most favoured nation clauses are well known throughout international law,[11] perhaps especially in the trade context. A typical clause might guarantee that 'investments made by investors of one contracting party in the territory of the other contracting party ... shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State',[12] or – with more specificity – that 'each Party shall accord to an investor of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of an investment in its territory'.[13]

Essentially, MFN clauses allow foreign investors to claim any higher standard of protection that is granted by the host State to nationals of a third State. An example may help explain the stakes of such clauses in the context of the BIT blizzard. Imagine that an investor wishes to challenge a State's failure to follow through on its contractual obligations to the investor. As a matter of substantive investment law, this sort of challenge is often brought under what is known as an 'umbrella clause'.[14] But imagine that Treaty A – a BIT between the investor's home State and the host State where the investor is doing business – does *not* include an

[11] *Anglo-Iranian Oil Co. Case*: United Kingdom v. Iran (Preliminary Objection) (1952) ICJ Rep. 93; *The Ambatielos Claim* (Greece, United Kingdom of Great Britain and Northern Ireland), RIAA, Vol. XII, 83–153, and *Case Concerning Rights of Nationals of the United States of American in Morocco*: France v. United States of America (1952) ICJ Rep. 176.

[12] Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Poland on the Promotion and Reciprocal Protection of Investments (5 June 1990), Art. IV(1) (http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/2694).

[13] Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments (9 Jan. 2014), Art. 5(1) (http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/3502).

[14] Such clauses typically provide something like: 'either party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other Party'. Agreement between the Federal Republic of Germany and the Islamic Republic of Pakistan for the Promotion and Protection of Investments: *supra* n. 1.

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umbrella clause. Is the investor out of luck? Not if Treaty A includes an MFN clause. Because if the investor can identify some Treaty B – between the host State and a third State – that *does* include an umbrella clause, then the investor can claim the substantive protection of that umbrella clause.

Unless the MFN clause is structured so as to exclude certain types of protections,[15] an investor covered only by Treaty A can thus use an MFN to claim the benefit of Treaty B's fair and equitable treatment guarantee, its expropriation prohibition or any other substantive guarantee of protection.[16] What's more, even though we might think that the 'favourableness' of treatment should logically be assessed *en bloc*[17] – i.e. requiring investors to choose either the full package of protections under Treaty A or the full package of protections under Treaty B – in practice, tribunals regularly allow a mix-and-match approach.[18] This allows investors essentially to cook up their own made-to-order BITs, in which they can invoke both Treaty A's full protection and security clause and Treaty B's umbrella clause – even if the latter was added to Treaty B precisely so as to counterbalance its lack of the former.

While the consequences of the choice between mix-and-match and package deal interpretations of the MFN clause are significant, the noisiest debate about MFN clauses in the BIT context focuses on the procedural mechanics of dispute resolution.[19] Imagine, for example, that

[15] For an example, see *Sergei Paushok et al. v. Mongolia*, Award on Jurisdiction and Liability (28 Apr. 2011), paragraphs 562–573 (noting that the MFN text applied only to the treaty's 'fair and equitable treatment' guarantee and not to its umbrella clause).

[16] *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), paragraphs 393–396 (applying MFN clause to incorporate substantive protections from another treaty) and *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (27 June 1990), paragraph 54 (similar).

[17] For an argument along these lines, see T. Cole, *The Structure of Investment Arbitration* (London: Routledge, 2012), pp. 104–107. For decisions that do adopt a 'package deal' view of MFN clauses, see *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (24 Oct. 2011), paragraphs 59–72 and 98–99 (holding that MFN clause imports dispute settlement provisions as part of 'the whole scheme' of protections created by a different BIT) and *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 Feb. 2012), paragraphs 269 (n. 297) and 318–325 (similar).

[18] *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2 Aug. 2004), paragraphs 102 and 119–120 (rejecting 'the proposition that, since a treaty has been negotiated as a package, for other parties to benefit from it, they also should be subject to its disadvantages').

[19] For good overviews of this debate, see *Bilateral Investment Treaties 1995–2006, Trends in Investment Rulemaking* (2007), UNCTAD/IET/IIT/2006/5, pp. 39–42; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction

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Treaty A contains an open offer to arbitrate investment disputes under the United Nations Commission on International Trade Law (UNCITRAL) rules, while Treaty B contains a consent to arbitration within the International Centre for Settlement of Investment Disputes (ICSID) along with its more iron-clad guarantee that States parties must 'enforce the pecuniary obligations imposed by [an] award . . . as if it were a final judgment of a court in that State'.[20] Or imagine that Treaty A includes an eighteen-month waiting period or an administrative exhaustion requirement and Treaty B does not. In both instances, the investor protected by Treaty A might prefer the 'better' remedial provisions under Treaty B – whether because the forum seems substantively more attractive or because it avoids additional delay. And on the logic of the MFN clause, the investor in this second example might well invoke Treaty B's consent to ICSID arbitration as a way to get around Treaty A's limitation to the UNCITRAL rules.

The case law on the application of MFN clauses to procedural provisions is divided. Tribunals often work hard to extract textual clues about whether any *particular* MFN should apply to procedural protections – whether concluding that it does[21] or that it does not.[22] But the real debate is about

for Lack of Consent (3 July 2013), paragraphs 40–42 and fn. 53–54; *ST-AD GmbH v. Bulgaria*, Award on Jurisdiction (18 July 2013), paragraphs 386–392, and *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), paragraphs 179–184.

[20] 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159, Art. 51(1). For more on the unusual strength of this enforcement obligation, see R. P. Alford, 'Federal Courts, International Tribunals, and the Continuum of Deference', *Virginia JIL*, 43 (2005), 675–796, at 692.

[21] *RosInvestCo v. Russian Federation*, Award on Jurisdiction (1 Oct. 2007), paragraphs 126–139 (relying on MFN clause's application to protections relating to the 'use and management' of investments); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent (3 July 2013), paragraphs 39–46, 65–67 and 93–96 (close analysis of specific BIT text) and *National Grid v. Argentine Republic*, Decision on Jurisdiction (20 June 2006), paragraphs 81–83 (applying *expression unius* where dispute resolution was not included among exceptions to MFN obligation).

[22] *Renta 4 SVSA v. Russian Federation*, Award on Preliminary Objections (20 March 2008), paragraphs 69 and 119–120 (noting that MFN clauses can import procedural protections, but concluding that the particular clause at issue did not do so); *Sanum Investments Ltd. v. Lao People's Democratic Republic*, PCA Case No. 2013-13 (13 Dec. 2003), paragraphs 343–345 and 357–358 (concluding that MFN clause's specific reference to fair and equitable treatment means that it does not import procedural protections) and *Kilic v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013), paragraphs 7.3.1–7.3.9 (noting that close reading of treaty structure shows that MFN clause applies only to substantive provisions listed above it and not to the dispute resolution provision listed below it).

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whether MFN clauses should *generally* be presumed to apply to procedural rights. Some tribunals suggest that the treatment of an investment turns on its business experience in the regulated market: can the enterprise buy raw materials and sell goods; can it extract minerals; can it research and develop; can it acquire real estate and so on. Those adopting this perspective suggest that the 'treatment' of an investor and an investment presumptively begins and ends with the primary rules by which that investor and investments' behaviour is directly facilitated or constrained.[23] Many other cases take the opposite perspective, however, concluding that – particularly if domestic judiciaries are themselves capable of 'treating' an investor illegally under a BIT – there is no reason to exclude dispute resolution policy from the definition of 'treatment' or 'protection'.[24] Certainly, the investor who is permitted to go straight to dispute resolution receives superior protection of her interests, at least in that regard, than the investor who must twiddle her thumbs for eighteen months. Whatever the best answer, this struggle to apply VCLT third-party beneficiary concepts is a striking example of the systemic stresses imposed by so many claimants seeking the best package of protection from so many BITs.

[23] *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 Feb. 2012), paragraphs 297–304 (holding that MFN clause does not apply to procedure in absence of express provision to that effect); *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (29 May 2003), paragraph 69 (rejecting applicability of MFN clauses to procedure); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), paragraphs 190–197 (rejecting application of MFN clause to procedural provisions); *Salini Costruttori SPA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (15 Nov. 2004), paragraph 113–119 (MFN clause does not import procedure absent specific reference); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), paragraphs 183–184 and 203–204; *Telenor v. Hungary*, ICSID Case No. ARB/04/15, Award (13 Sept. 2006), paragraphs 83 and 90–91, and *Austrian Airlines v. Slovak Republic*, Final Award (9 Oct. 2009), paragraphs 123–140 (refusing to expand scope of dispute resolution absent specific reference in MFN to procedure).

[24] *Emilio Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (25 Jan. 2000), paragraphs 44–64; *Gas Natural SDG v. Argentine Republic*, ICSID Case No. ARB/03/10 (17 June 2005), paragraph 49; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2 Aug. 2004), paragraph 102 (elimination of eighteen-month waiting period *via* MFN clause); *Telefonica SA v. Argentine Republic*, ICSID Case No. ARB/03/20 (25 May 2006), paragraphs 102–103 (elimination of eighteen-month waiting period); *Suez et al. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006), paragraphs 63–66 (importing dispute resolution mechanism from a third party BIT) and *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31 (24 Oct. 2011), paragraphs 59–72 (importing dispute resolution mechanism from a third party BIT).

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2.2 Strategic Incorporation Decisions

Given how regularly sophisticated economic actors adjust their corporate structures with a view to regulatory or tax arbitrage, it is not surprising that they might sometimes do so with a view to favourable BIT coverage as well. Very few BITs speak directly to this question, for instance by specifying that the nationality of a corporate investor turns on whether it has a real presence in the place of incorporation.[25] Yet strategic incorporation pushes hard enough on the boundaries of privity-oriented third-party beneficiary norms to cause real discomfort. As Prosper Weil put it in a well-known dissent, logic might seem to dictate that 'economic and political reality [should] prevail over legal structure'.[26]

And yet it is close to black letter law that – at least as a default – substantive economic reality is irrelevant so long as a claimant satisfies the legal requirements for the requisite nationality, whether because of personal citizenship[27] or because of place of

[25] Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Exchange of Letters, Art. 1(2) (4 March 1994) (http://investmentpolicyhub.unctad.org/IIA/country/223/treaty/3054) (requiring real connection to signatory State); 1994 Final Act of the European Energy Charter Conference (Energy Charter Treaty), 2080 UNTS 95, Annex 1, Art. 17(1) (similar) and Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Art. 1(2) (similar) (14 Nov. 1991) (http://investmentpolicyhub.unctad.org/IIA/country/223/treaty/162); see, further, Amendment to the Protocol effected by Exchange of Notes at Buenos Aires on 24 Aug. 1992 and 6 Nov. 1992.

[26] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (29 Apr. 2004), paragraph 24 (Dissenting Opinion of Prosper Weil). See, also, e.g., I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), p. 465 ('As a whole the legal experience suggests that a doctrine of real or genuine link has been adopted, and, as a matter of principle, the considerations advanced in connection with the *Nottebohm* case apply to corporations') and R. Y. Jennings and A. Watts, *Oppenheim's International Law* (Vol. I: Law of Peace) (Harlow: Longmans, 9th ed., 1992), p. 861 ('In many situations, however, it is permissible to look behind the formal nationality of the company, as evidenced primarily by its place of incorporation and registered office, so as to determine the reality of its relationship to a State, as demonstrated by the national location of the control and ownership of the company').

[27] *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (16 Dec. 2002), paragraph 36 (admitting NAFTA claims against Mexico by US resident who had permanent immigration status in Mexico); *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), paragraphs 355–360 (admitting BIT claims against Moldova by nationalised French citizen) and *Serafin Garcia Armas v. Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction (15 Dec. 2014), paragraphs 197–206 (admitting BIT claims against Venezuela by Venezuelan citizen with dual Spanish citizenship).

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incorporation.[28] In fact, tribunals typically approve even incorporation strategies designed specifically to secure the protection of a favourable BIT. Such tribunals deny that it is a 'misuse of the privileges of legal personality'[29] to locate an investment vehicle partly on the basis of the BIT protections that are available. As one tribunal observed, 'it is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for examples, of taxation or the substantive law of the jurisdiction, *including the availability of a BIT*'.[30]

This is certainly true when investors incorporate their enterprise so as to secure BIT protections to which they would not otherwise be entitled.[31] Perhaps more surprisingly, it is true even with respect to

[28] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (29 Apr. 2004), paragraphs 29 and 56 (holding that since the foreign corporation was formed by citizens of the host State long before the BIT entered into force and without any effort to hide the investors' 'the only relevant consideration' is whether the corporate investor was properly established under the laws of its formal home State); *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), paragraphs 226–230 (not questioning real economic interest under Netherlands-Czech BIT where it was the Japanese corporation's ordinary business practice to operate through Dutch corporation for all European operations) and *ADC Affiliate Ltd v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct. 2006), paragraphs 81 and 355–362 (accepting jurisdiction over corporation established by Canadian citizens in Cyprus for sole purpose of pursuing airport construction contract in Hungary).

[29] *Case Concerning the Barcelona Traction, Light and Power Company Ltd.*: Belgium v. Spain (Second Phase) (1970) ICJ Rep. 3, at p. 39 (paragraph 58) ('[T]he process of lifting the veil, being an exceptional one admitted by municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of legal personality').

[30] *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 Oct. 2005), paragraph 330(d) (emphasis added) (accepting jurisdiction where US corporation had transferred its shares to Dutch holding company prior to filing an ICSID claim).

[31] *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paragraphs 186–192 and 203–206 (holding that insertion of Dutch entity into corporate chain for the purpose of securing BIT protections would permit jurisdiction over new disputes, but not over existing ones); *Lao Holdings NV v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 Feb. 2014), paragraphs 2, 49, 56, 68–70, 76, 79–83, 146 and 156–158 (accepting jurisdiction where investment was re-incorporated from Macao to the Dutch Antilles before the actual dispute arose); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 June 2012), paragraphs 2.41 and 2.99–2.109 (accepting jurisdiction despite the fact that a 'principal purpose' of reincorporation was to secure BIT protection) and *Tidewater Inc. v. Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 Feb. 2013), paragraph 197 (accepting jurisdiction where corporate restructuring predated the reasonable foreseeability of BIT dispute).

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citizens of the host State who incorporated a foreign investment vehicle so as to restructure their *home State* activity under a shell that enjoys the protections of international investment law.[32] Tribunals facing this latter fact pattern sometimes find ways to exclude the investment from BIT protection, such as by finding that the shell incorporation did not constitute a jurisdictional 'investment' because it did not involve a sufficient financial commitment in the place of incorporation. But even those tribunals have not challenged the proposition that host State citizens can trigger BIT protection for fundamentally local activity by incorporating outside the country.[33]

That said, such regulatory restructuring is not without its limits. As a fairly straightforward application of the presumption against retroactivity (Article 28 VCLT),[34] such re-incorporations cannot transform an existing municipal dispute into a new international dispute for the purpose of a BIT. So tribunals in such circumstances do examine whether a particular reincorporation or share transfer took place before the facts

[32] *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility (18 Apr. 2008), paragraphs 71 and 110 (accepting jurisdiction over Dutch vehicle used by Romanian citizens to pursue economic activities in Romania, on the ground that 'neither corporate control, effective seat, nor origin of capital has any part to play in the ascertainment of nationality under the Netherlands-Romania BIT'); *Libananco Holdings v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011), paragraphs 98–101, 105 and 536 (conceding that Turkish investors managing their economic activity in Turkey through a holding company in Cyprus might be entitled to BIT protections, but denying jurisdiction since the relevant corporate restructuring took place after the investment dispute had already begun) and *Alpha Projektholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Award (8 Nov. 2010), paragraphs 335–339 and 343–345 (accepting jurisdiction over a BIT claim against Ukraine, where 50% of the shares in the complaining Austrian corporation were held by a Ukrainian investor).

[33] *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), paragraphs 7, 21, 90 and 120–124 (denying jurisdiction, not because the Dutch corporation was owned by a Kazakh citizen, but because the Dutch corporation's interest in the local investment vehicle was a gratis transfer rather than a genuine for-value exchange) and *Caratube International Oil Co. v. Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), paragraphs 455–456 (similar).

[34] Which provides that '[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date or entry into force of the treaty with respect to that party'. For cases applying this in other circumstances, see, e.g., *Chevron Corp. v. Republic of Ecuador*, Interim Award (1 Dec. 2008), paragraphs 173–189 and 263–270; *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (6 Nov. 2008), paragraphs 132–133; *Nordzucker AG v. Poland*, Partial Award (10 Dec. 2008), paragraphs 107–110 and *Société Générale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Jurisdiction (19 Sept. 2008), paragraphs 81–94.

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giving rise to the BIT dispute arose.[35] In at least some cases, strategic reincorporation can also be precluded by the abuse of process doctrine. Tribunals taking this latter approach refuse to extend BIT jurisdiction if the claimant restructured its assets after a regulatory dispute had become reasonably foreseeable, even if the dispute had not yet formally materialised at the time of the restructuring.[36] This abuse of process doctrine is as close as the regime comes to expressing unease about strategic reincorporation in a world of many BITs.

3 Interpretation and the Evolution of Precedent: Article 32 of the Vienna Convention on the Law of Treaties

The investment law regime's signal characteristic of diversity amidst sameness is only compounded by its radical multiplicity of fully independent tribunals. This phenomenon is distinct from the multiplicity of *cases*. Domestic judiciaries adjudicate exponentially more cases than the investment system, and yet they are typically disciplined by the existence of a single court that has final say on the relevant law. By contrast, the investment law system is radically decentralised. Efforts to create an appellate body for investment law have so far come to naught,[37] notwithstanding the inconsistent awards that inevitably emerge from such decentralisation.[38]

[35] *Libananco Holdings v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award (2 Sept. 2011), paragraphs 98–101, 105 and 536; *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paragraphs 186–192 and 203–206; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), paragraphs 136–138 and 141–144 (denying jurisdiction where reincorporation was for the sole purpose of repackaging an existing dispute as a BIT claim) and *ST-AD GmbH v. Bulgaria*, Award on Jurisdiction (18 July 2013), paragraphs 307–312, 404–406 and 423 (denying jurisdiction where claimant had purchased an already-expropriated asset with a view to pursuing a BIT claim on the basis of that expropriation).

[36] *Renee Rose Levy v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (9 Jan. 2015), paragraphs 180–195 (denying jurisdiction where corporate restructuring took place after dispute was already foreseeable); *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010), paragraph 186–192 and 204–206 and *Banro American Resources v. Democratic Republic of Congo*, ICSID Case No. ARB/98/7, Award (1 Sept. 2000). *Cf. Lao Holdings NV v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (21 Feb. 2014), paragraphs 76, 83, 116–119 and 146 (dictum) and *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 June 2012), paragraphs 2.41 and 2.99–2.109 (dictum).

[37] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration* (22 Oct. 2004), paragraphs 20–23 and Annex (discussing appeal of establishing an appellate body).

[38] See, e.g., S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', *Fordham L. Rev.*, 73 (2005), 1521–1625. The problem is presumably mitigated to some degree by the repeat

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A species of the fragmentation anxiety about international law more generally, this concern has particular bite in the investment regime, where extremely similar legal sources are continually interpreted by entirely independent tribunals.

The impact of this kind of decentralisation is sometimes felt when the same underlying dispute is litigated in parallel across multiple tribunals.[39] It also can happen, as with Argentina's turn-of-the-century economic crisis, that what amounts to a single event can injure a wide array of claimants, each of whom winds up with substantially similar legal claims. This can produce the occasional flash of what can only be taken as self-aware humour. In the words of the *Sempra v. Argentina* tribunal:

> A number of awards issued by ICSID tribunals have dealt with many issues concerning the measures adopted by the Respondent which have also been brought before this Tribunal. In some instances, counsel for each side has been the same as in previous cases and memorials have been written in similar or identical language. Members of this Tribunal have also sat in other such cases. On occasion, the wording used in the paragraphs that follow resembles that of prior awards. . . . The tribunal, however, has examined every single argument and petition on the basis of their merits in this proceeding.[40]

The more significant phenomenon from a systemic perspective, however, is the interpretation by many tribunals of similar or even identical language that appears in thousands of different BITs. Indeed, tribunals' standard disclaimer that they are 'not bound' by prior precedent is

player service of arbitrators on multiple cases. See, e.g., W. M. C. Weidemaier, 'Toward a Theory of Precedent in Arbitration', *Wm. & Mary L. Rev.*, 51 (2010), 1895–1958, at 1921.

[39] *Canfor v. United States*, Decision on Preliminary Question (6 June 2006), paragraph 3 (describing how softwood lumber dispute between USA and Canada had produced 'innumerable proceedings before NAFTA Article 1904 binational panels, WTO panels and the WTO Appellate Body, and the US Court of International Trade, which all involve highly complex issues of trade law', and noting that 'the present case was the result of a consolidation of three cases with numerous filings and a myriad of contentions'); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (18 Sept. 2009), paragraphs 102–103, 113 and 109 (noting parallel proceedings in multiple different fora); *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (15 Jan. 2008), paragraph 47 (similar); *CME v. Czech Republic*, Partial Award (13 Sept. 2001), paragraphs 140–144, 298 and 302 (similar) and *Amto LLC v. Ukraine*, SCC Arb. No. 080/2005 (26 March 2008), Final Award, paragraph 71 (discussing related proceedings before the ECtHR).

[40] *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award (28 Sept. 2007), paragraph 76.

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virtually always followed by the stipulation that such precedent does deserve 'serious consideration' – even if it emerges from the interpretation of a completely different BIT.[41] As a matter of international law, this claim is grounded either in the notion of judicial decisions as a subsidiary source of international law under Article 38 of the 1945 Statute of the International Court of Justice[42] or as a supplementary source of interpretive authority under Article 32 VCLT.[43] However you slice it, in the words of one arbitrator, 'there may not be a formal "stare decisis" rule as in common law countries, but precedent plays an important role. Tribunals and courts may disagree and are at full liberty to deviate from specific awards, but it is hard to maintain that they can and should not respect well-established jurisprudence'.[44]

The upshot of this is the gradual knotting together of precedent – or at least quasi-predictable majority and minority positions on any particular question – in a single system. And over time, that system thus clusters around more focused understandings of any particular BIT provision, notwithstanding that each individual treaty is just one iteration of a move that is repeated thousands of times across the system: an effort to protect investors by adopting similar, but not identical, textual provisions aimed at similar, but not identical, ends.

This mode of inter-treaty precedent extends even to the awkwardly reciprocal relationship between treaty jurisdiction under a BIT and adjudicatory jurisdiction under the selected forum. Especially when a claimant pursues ICSID arbitration, the adjudication of BIT claims often requires claimants to satisfy what is called a pair of 'double-barreled' requirements: the substantive requirements of the BIT and the access requirements of the arbitral forum. Both criteria must be satisfied in

[41] See, e.g., *Austrian Airlines v. Slovak Republic*, Final Award (9 Oct. 2009), paragraph 84; *Burlington Resources v. Republic of Ecuador*, Decision on Jurisdiction (2 June 2010), paragraphs 99–100; *Chevron Corp. v. Republic of Ecuador*, Interim Award (1 Dec. 2008), paragraphs 119–123; *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14, Decision on Jurisdiction (24 Feb. 2014), paragraph 85 and *Renta 4 SVSA v. Russian Federation*, Award on Preliminary Objections (20 March 2009), paragraphs 15–16.

[42] Attached to the 1945 Charter of the United Nations: 1 UNTS 16.

[43] *Canadian Cattlemen for Fair Trade v. United States*, Award on Jurisdiction (28 Jan. 2008), paragraphs 49–51; *Chevron Corp. v. Republic of Ecuador*, Interim Award (1 Dec. 2008), paragraphs 119–123, and *Enron Corporation Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3 (Annulment), Decision on Request for Stay (7 Oct. 2008), paragraphs 32–33.

[44] *International Thunderbird Gaming Corp. v. United Mexican States*, Award (26 Jan. 2006), paragraph 129 (Separate Opinion of Thomas Waelde).

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order for the arbitral tribunal to have jurisdiction over the substantive claims.[45]

The most frequent disputes about 'double-barreled' jurisdiction involve one of two questions: whether an aggrieved claimant possesses the legally requisite *nationality* to bring a claim, and whether the claimant has made a jurisdictionally sufficient *investment* to qualify for international protection. In both cases, the two treaty instruments contain requirements that are conceptually distinct. Formally speaking, an asset might well qualify as an 'investment' under the 'any asset' formulation of the U.K.-Kazakhstan BIT,[46] and yet still fail to qualify as an 'investment' under Article 25 of the ICSID Convention.[47]

And yet, this formal instinct does not always play out in practice. It is not unusual for tribunals to suggest that interpretation of one treaty is directly affected by the content of the other; suggesting (for example) that since 'Article 25(1) [of the ICSID Convention] does not touch upon the definition of "investment"', it therefore 'does not operate to define the particular investment. That is a matter to be determined by the terms of the [BIT] the document relied upon as constituting the consent'.[48]

[45] For examples involving the 'investment' requirement of BITs and the ICSID Convention, see, e.g., *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award (8 Apr. 2013), paragraphs 362–384; *Ambiente Ufficio v. Argentina*, ICSID Case No. ARB/08/9, Award (8 Feb. 2013), paragraphs 415–520; *El Paso Energy v. Argentine Republic*, ICSID Case No. ARB/03/15 (31 Oct. 2011), paragraphs 142–143; *Global Trading v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 Dec. 2010), paragraphs 43–57; *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), paragraphs 160–173; *MCI Power Group v. Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007), paragraphs 157–170; *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009), paragraphs 74–75 and 81–99, and *Salini Costruttori SpA. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), paragraphs 52–57 (23 July 2001). For examples involving the foreign control requirement under both BITs and the ICSID Convention, see, e.g., *Caratube International Oil Co. v. Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012), paragraphs 326–343, and *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), paragraphs 95–96.

[46] Treaty between United States of America and Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment (12 Jan. 1994) (http://investmentpolicyhub.unctad.org/IIA/country/223/treaty/2218).

[47] *Supra* n. 20. This gets more complicated when a particular BIT's only mandatory dispute resolution option is ICSID: the *effect utile* principle suggests that at least the BIT signatories believed that ICSID jurisdiction would extend to all assets covered by the BIT.

[48] See, e.g., *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Award (27 Nov. 2000), paragraphs 13.5–13.6 ('Article 25(1) does not touch upon the definition of "investment" for the purposes of either the Convention or the IGA') and *Lanco International Inc. v. Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction (8 Dec. 1998), paragraph 48 (Since 'the term "investment" is not defined in the ICSID

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Strictly speaking, this is a *non sequitur* – the best formulation of the expansive jurisdictional claim would begin with the proposition that the ICSID requirement is exceedingly loose and that the BIT therefore imposes the only serious limit regarding either 'nationality' or 'investment'. And yet the suggestion sometimes persists that the content of the ICSID 'investment' (or nationality) requirement might actually vary with the scope of 'investment' (or nationality) contemplated by any given BIT.

4 Multilateralising a Network of Successive Bilateral Treaties: Articles 30, 31 and 32 of the Vienna Convention on the Law of Treaties

The Vienna Convention drafters considered the possibility of adopting entirely separate rules for multilateral and bilateral treaties as a general matter, since it was understood that the two categories of agreement presented different challenges.[49] In the end, the drafters did not adopt a systematic distinction between the two types of treaty as a structuring principle of the VCLT itself. But they did make special provision for multilateral treaties in their treatment of several specific questions of treaty law.[50]

The distinction between bilateral and multilateral relations is straightforward: the former involves agreements between two parties, and the latter involves agreements among more than two parties. And yet, the investment law regime presses hard on this distinction, particularly for the purposes of interpretation.[51] The result has been something akin to an effectively *multilateral* regime that has emerged from a vast array of formally *bilateral* legal relations. The resulting quasi-hybrid has many features of a multilateral regime while maintaining a number of features that are profoundly at odds with genuinely multilateral coherence.

Convention', 'the bounds within which we operate in this case' are 'defined in the [relevant BIT]').

[49] For two examples, see, e.g., United Nations Conference on the Law of the Treaties, 2nd Sess., Vienna, 9 April–22 May 1969, Summary Record at pp. 213–220 (general discussion of whether to treat multilateral treaties separately) (10 Apr. 1969), U.N. Doc. A/CONF.39/11/Add. 1 (1970) and H. Waldock, First Report on the Law of Treaties, U.N. Doc. A/CN.4/144, pp. 33–34 ('Distinctions of other kinds do exist, for example, between bilateral, plurilateral and multilateral treaties, and, where appropriate, these distinctions find a place in the draft articles').

[50] See, e.g., Arts. 40, 41, 55, 58, 60, 69 and 70 VCLT: *supra* n. 8.

[51] There is a framing issue lurking here. This could be viewed as a question of interpretation under Arts. 31 and 32 VCLT: *supra* n. 8. Alternately, it could be viewed as a question of treaty formation, or indeed of how to identify the substantive contents and boundaries of a treaty *qua* single agreement.

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The strangeness of this hybrid is compounded by its regular application of sequentially successive treaties in a way that meshes awkwardly at best with the formal structure of Article 30 VCLT.

As a starting point, it is the rare international agreement that can avoid interaction with other sources of international law. In this sense, some problems of treaty interaction in investment law are not much different from similar questions in other areas. It is not strange for the WTO Appellate Body to review environmental treaties when interpreting WTO obligations,[52] or for the European Court of Human Rights to examine international humanitarian law when applying European human rights law.[53] So it comes as no surprise that the interpretation of investment treaty terms often involves attention to other sources of international law, whether the WTO/GATT agreements,[54] human rights law[55] or the European Union agreements.[56] To cite other sources is of course not to give them decisive influence; to the contrary, investment treaty tribunals sometimes discuss decisions from other regimes merely to distinguish

[52] See, e.g., *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, AB-199-4, WT/DS58/AB/R (12 Oct. 1998), paragraphs 124–126 and 155–156.

[53] See, e.g., *Al-Jedda v. United Kingdom*, Application No. 27021/08, Judgment (7 July 2011), paragraphs 42–46 and 107.

[54] *Continental Casualty Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award (5 Sept. 2008), paragraphs 192–199 (citing GATT and WTO precedent regarding meaning of 'necessity'); *Methanex Corp. v. United States*, Final Award, Part II-B (7 Aug. 2002), paragraph 6 (citing GATT precedent in the interpretation of NAFTA Chapter 11); *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (15 Jan. 2008), paragraphs 121–125 (finding WTO 'like circumstances' doctrine relevant to 'national treatment' requirement of NAFTA Chapter 11) and *SD Myers v. Canada*, Partial Award (13 Nov. 2000), paragraphs 243–251 (adopting WTO approach to 'like circumstances' in applying 'national treatment' requirement of NAFTA Chapter 11).

[55] See, e.g., *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2 (29 May 2003), paragraphs 116 (note 134) and 122 (note 140) (employing ECHR to interpret NAFTA prohibition on 'expropriation, including with reference to the proportionality and public interest requirements').

[56] See, e.g., *Electrabel SA v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction and Liability (30 Nov. 2012), paragraphs 4.129–4.4.134 and 4.173–4.191 (seeking to interpret Energy Charter Treaty consistent with European Union agreements); *Oostergetel v. Slovak Republic*, Decision on Jurisdiction (30 Apr. 2010), paragraphs 72–88 (holding that the EC Treaty did not terminate existing Netherlands-Slovakia BIT as a later incompatible treaty under Art. 59 VCLT); *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013), paragraphs 178–186 and 813–827 (holding that Romania's obligation to comply with EU law constituted reasonable cause to change subsidies that were otherwise protected by the Romania-Sweden BIT); *Eureko BV v. Republic of Poland*, Partial Award (19 Aug. 2005), paragraphs 57–142, and *AES Summit Generation Ltd v. Republic of Hungary*, ICSID Case No. ARB/07/22 (23 Sept. 2010), paragraphs 7.2.1–7.6.12.

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them. But this is typically because of particularised reasons to think the referenced treaty is genuinely different rather than because of any rigid determination to keep investment law in a silo.[57]

Of greater interest for present purposes are those instances where the terms of one BIT influence the interpretation of another BIT between two *different* parties. When interpreting the Germany-Argentina BIT, in other words, tribunals might sometimes ask about the wording of the Germany-Congo BIT – in fact, they might sometimes even investigate the structure of the France-Colombia BIT despite the fact that *neither* France *nor* Columbia had anything to do with the BIT actually at issue.

To understand better how this works, think about statutory interpretation in the domestic context. Imagine that in 1990, a domestic legislature enacted the Racial Equality Act, which protects the civil rights of racial minorities. The Racial Equality Act includes a judicial cause of action and stipulates that plaintiffs must exhaust administrative remedies before filing suit in court. Now imagine that five years later, the legislature enacts the Religious Freedom Act, which protects the civil rights of religious minorities. The Religious Freedom Act also includes a judicial cause of action but makes no reference to the exhaustion of administrative remedies – neither requiring them nor excusing their absence. What happens when a citizen files suit under the Religious Freedom Act, claiming violation of her religious rights? Does she have to exhaust administrative remedies before going to court? There would of course be complicated questions about the jurisdiction's baseline expectations of administrative law. But a thorough job of interpretation would require at least some reference to the differences in remedial structure between the Racial Equality Act and the Religious Freedom Act. The statutes deal with very similar topics, they include otherwise comparable judicial provisions, and they demonstrate two different ways of dealing with the same problem.[58]

[57] See, e.g., *Corn Products International v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (15 Jan. 2008), paragraphs 154–160 (distinguishing GATT Article XX precedent on countermeasures from customary international law precedent regarding countermeasures more generally) and *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (18 Sept. 2009), paragraphs 193–194 and 203–210 (distinguishing NAFTA's reference to 'like circumstances' from GATT's reference to 'like products' on the grounds that characteristics unrelated to the product itself might be relevant to the NAFTA determination).

[58] For a real life example, see *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 88–92 (1991) (comparing various fee shifting statutes to conclude that the legally relevant provision's failure to reference expert fees was significant).

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One reason we do this in the domestic context – especially, but not only, when interpreting the second-in-time statute – is that we (heroically) infer something like a consistent legislative will, such that both variations and similarities among legislative mechanisms should be given effect. Whether described as the 'whole code canon' or simply representing a good sense effort to look at the same jurisdiction's law on similar subjects, this move is standard practice at the domestic level.

It is less clear that the move is sensible as a matter of modern treaty theory. The touchstone of VCLT treaty interpretation is the arrangement worked out by *these* parties to *this* treaty. A highly formalistic approach might thus fence out anything not demonstrably connected to the negotiated result between particular parties to a particular treaty – which constitutes not a link in a conceptually seamless web of municipal legislation but an international contract between sovereign States at a specific point in time. And, indeed, the strictest approach categorically refuses to offer *any* interpretive weight to other BITs. One NAFTA tribunal, disavowing interest in the litigants' reference to 'other BITs, the draft [Multilateral Treaty on Investment], [and] the Uruguay round', noted that '[t]hese agreements and sources are not the NAFTA, they did not involve entirely the same parties to the negotiation, at times raise inter-temporal discontinuities, and the extent to which they did not did not influence the NAFTA parties in the preparation of the NAFTA text is not well-established'.[59]

And yet, that view is the exception rather than the rule. Because in fact tribunals adjudicating BIT claims regularly reference provisions of BITs that are plainly inapplicable to the dispute being adjudicated. Indeed, it has become close to black letter law that 'it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those

[59] *Mobil Investments Canada Inc. v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum (22 May 2012), paragraphs 228 and 230. See, also, e.g., *Aguas del Tunari, SA v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 Oct. 2005), paragraph 291 ('[t]he fact that a pattern might exist in the content of the BITs entered into by a particular State does not mean that a specific BIT by that State should be understood as necessarily conforming to that pattern rather than constituting an exception to that pattern') and *Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility (18 Apr. 2008), paragraph 108 (rejecting relevance of 'impressive list of more-or-less contemporaneous Romanian BITs containing in express language restrictive definitions of the nationality of corporate investors', on the ground that it was merely 'positive confirmatory evidence of an intention to equip the present BIT with an unrestricted definition'). Cf. *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (2 Aug. 2004), paragraph 106 (holding that comparative deviation from Germany's model BIT is irrelevant).

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treated in the treaty under consideration' and that 'establishing the practice followed through [a] comparative law survey' is 'an extremely useful tool'.[60]

The simplest case involves instances where one party to the BIT at issue (call it Treaty A) has also adopted another BIT (call it Treaty B) that contains different terms or structure.[61] Under circumstances like these, the cross-treaty application of the *expressio unius* principle has been applied to infer significance from, for example, the omission of a reference to the customary international law standard,[62] the omission of an emergency exception,[63] the lack of an express reference to self-judging emergency provisions[64] or the applicability of a most favoured nation clause to dispute resolution procedures.[65] In each of these instances, the outcome turned at least in part on the fact that Treaty B specified the existence of the feature whose absence from Treaty A was deemed significant.

There are, naturally, many variations on this theme. The same move is sometimes deployed to emphasise the breadth, rather than the narrowness, of Treaty A.[66] Sometimes it matters that Treaty B existed before

[60] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3 (27 June 1990), paragraph 40.

[61] For a precursor in general international law, see *Case Concerning Oil Platforms*: Iran v. United States of America (Preliminary Objections) (1996) ICJ Rep. 803, at pp. 812–814 (paragraphs 24–28).

[62] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (14 July 2006), paragraphs 358, 363 and 372 (citing other US FTAs that specify customary international law minimum standard).

[63] *BG Group v. Argentine Republic*, Final Award (24 Dec. 2007), paragraphs 385–387 (finding that the existence of an emergency provision in US-Argentina BIT suggests that the lack of a similar provision in the UK-Argentina BIT is significant).

[64] *El Paso Energy v. Argentine Republic*, ICSID Case No. ARB/03/15 (31 Oct. 2011), paragraphs 591–603 (reviewing other US treaty practice regarding self judging emergency clauses).

[65] *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction (10 Feb. 2012), paragraphs 297–304 and 314–317 (surveying contemporary BIT practice regarding the application of MFN clauses to procedural questions).

[66] *Emilio Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (25 Jan. 2000), paragraphs 60–61 (comparing applicable MFN clause to the narrower MFN clauses contained in some other Spanish BITs); *KT Asia Investment Group BV v. Kazakhstan*, ICSID Case No. ARB/09/8, Award (17 Oct. 2013), paragraph 123 (noting that, in contrast to many Kazakhstan BITs, the applicable treaty does not specify a siege sociale rule for nationality) and *Philip Morris Brands SARL v. Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013), paragraphs 108 (n. 53) and 109 (discussing different BITs' wording of provisions requiring domestic litigation).

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Treaty A; sometimes it does not.[67] Sometimes it matters that the comparator treaties were explicit on the point in debate; sometimes it does not.[68] But in each case, the interpreter acts as though there is at least a presumption that a party's drafting choices in Treaty B might affect the interpretation of that party's agreement in Treaty A with a completely different State.

Perhaps even more striking, tribunals regularly go further still, affording significance to BIT practice *generally* – even where that means reviewing a series of BITs that were concluded between States that had nothing to do with the BIT that actually applies. Here too, tribunals regularly look to the inclusion or exclusion of various restrictions and options as evidence in interpreting the BIT actually at issue.[69] It is not that every such excursion into third party practice bears interpretive fruit. But even when tribunals are unpersuaded by the actual evidence of the specific third party practice surveyed, its conceptual relevance is typically taken for granted. Some such tribunals focus on the temporal irrelevance of a Treaty B that was concluded after Treaty A.[70] Others find that no

[67] *El Paso Energy v. Argentine Republic*, ICSID Case No. ARB/03/15 (31 Oct. 2011), paragraphs 591–603.

[68] *Mondev International v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002), paragraphs 110–112 (reviewing US transmittal statements regarding other BITs using similar 'fair and equitable treatment' language) and *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 Jan. 2004), paragraphs 124–127 (doubting that the location of umbrella clause is significant, since an identically phrased clause appears in different places in other Philippine BITs).

[69] *Salini Costruttori SPA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13 (15 Nov. 2004), paragraph 117 (noting that United Kingdom BIT practice specifically includes procedural issues in the scope of its MFN provisions, and concluding that the lack of similar specificity in the applicable BIT should be given effect); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), paragraphs 166–167 (similar); *Saluka Investments BV v. Czech Republic*, Partial Award (17 March 2006), paragraph 204 (contrasting the relevant BIT's lack of any reference to customary international law to NAFTA's reference to customary international law in its 'fair and equitable treatment' provision); *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18 (29 Apr. 2004), paragraphs 33–36 (noting that, in contrast to many other BITs, the relevant treaty does not expressly exclude investments controlled by an entity that does not have a substantial economic presence in its place of incorporation); *El Paso Energy v. Argentine Republic*, ICSID Case No. ARB/03/15 (31 Oct. 2001), paragraphs 591–592 and 602–603 (noting that BITs enacted after the ICJ's *Nicaragua* judgment often mention their self-judging character explicitly) and *Kilic v. Turkmenistan*, ICSID Case No. ARB/10/1, Award (2 July 2013), paragraphs 7.6.8–7.6.17 (emphasising the different wording of other BITs whose MFN provisions had been deemed to apply to dispute resolution).

[70] *El Paso Energy v. Argentine Republic*, ICSID Case No. ARB/03/15 (31 Oct. 2011), paragraph 591 (dismissing as irrelevant evidence of treaty practice that emerged after the

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consistent pattern actually emerges from other BIT practice that could give rise to any reliable implications about Treaty A.[71] Still others find the precedents invoked too far afield to be of use for the interpretive question at issue.[72] Taken as a whole, however, the tribunals that give serious consideration to other BITs – even those to which *neither* signatory of the applicable BIT is a party – easily outnumber the tribunals that categorically refuse to consider such evidence.

The consequences are significant. Rather than taking each BIT as a thing unto itself, this approach situates each as an integral part of an overall ecosystem in which meaning is developed organically over time, with interpretive practices that resemble a domestic court's review of the 'whole code' promulgated by one legislature. To be clear, this is not necessarily inappropriate. At minimum, this kind of evidence seems obviously eligible for consideration as 'supplementary evidence' of meaning under Article 32 VCLT – which includes but is not limited to drafting history. But it comes far closer to Myres McDougal's vision of adjudication as the administration of a complex multifaceted system than to the purist's belief that arbitrators take cases one at a time, interpreting isolated text within hermetically sealed treaties.[73]

applicable BIT) and *Enron Corporation Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), paragraphs 335–337 (similar).

[71] *Churchill Mining Plc v. Republic of Indonesia*, ICSID Case No. ARB/12/14, Decision on Jurisdiction (24 Feb. 2014), paragraphs 195–207 (finding that the signatories' other BIT practice was too varied to permit any conclusions about their baseline expectations) and *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005), paragraph 195 (similar).

[72] *HICEE BV v. Slovak Republic*, Partial Award (23 May 2011), paragraphs 141–144 (dismissing similar treaty practice and statements regarding other treaties as insufficiently relevant to the point in dispute) and *National Grid Plc v. Argentine Republic*, Decision on Jurisdiction (20 June 2006), paragraphs 84–85 and 93 (describing the other treaty practice of the two signatories to the relevant BIT as conflicting and therefore inconclusive).

[73] Compare M. S. McDougal, H. D. Lasswell and J. C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven, CT: Yale University Press, 1967), p. 41 (advocating an interpreter's 'obligation [to] examine the significance of every specific controversy for the entire range of policy purposes sought by the total system to which he is responsible') with, e.g., *Burlington Resources v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), paragraph 100 ('Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend'). For an excellent investigation of how this quasi-multilateralisation affects the operation of investment law as a control regime, see S. Schill, *The Multilateralization of International Investment Law* (Cambridge: Cambridge University Press, 2009).

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5 Conclusion

In each of these respects, the sheer scale of the international investment regime – its massively multiple treaties, claimants and tribunals – seriously complicates the application of modern treaty law to modern investment law. The relentless similarity of BITs only highlights their persistent variations in both small details and large structure. In a system with many tribunals, many claimants and many sources of law – all brought to bear on an essentially similar problem of limiting the regulatory authority of domestic governments *vis-à-vis* foreign investors – the result is something like shadow multilateralism, with a persistent instinct for coherence and manageability even where that requires some inattention to black letter treaty law and formalistic VCLT categories.

The treaty problems canvassed here each emerge from efforts to tame and restrain the diversity of the BIT ecosystem in perhaps-unconscious service of something like the Benedict Kingsbury view of international administrative law – or, more controversially, the Myres McDougal understanding of judges as international administrators.[74] There is no getting around the fact that these efforts sometimes press hard on the black letter norms of modern treaty law. If we take seriously the challenges of sorting snowflakes in a blizzard, the system may have no other choice.

[74] Compare, e.g., B. Kingsbury, N. Krisch and R. B. Stewart, 'The Emergence of Global Administrative Law', *Law & Contemp. Prob.*, 68 (2005), 15–61, with McDougal, Lasswell and Miller, *supra* n. 73.

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