

## Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order”

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### Abstract

This paper seeks to examine the claim, made by certain legal scholars, that international investment law, though based mainly on Bilateral Investment Treaties (BITs) is in fact a multilateral order that introduces principles of an emergent “global administrative law” into the regulation of state conduct in relation to foreign investors and their investments. Such scholars argue that this order develops through the decisions of investor-State arbitral tribunals which are creating a harmonised understanding of the meaning of BIT provisions and an institutional system of adjudication that furthers the development of global administrative principles. Through a critical examination of this approach the paper argues that this field is not a multilateral order but an unstructured process of privatised legal entrepreneurship which seeks to further a professional interest in developing an extensive, investor friendly, regime of BITs. Furthermore, that process fails as a means of providing effective or legitimate legal review of administrative action. The argument is made both on a theoretical level and by a review of a specific issue in international investment law, namely, the development of wider types of claims and the rise of so-called “treaty shopping” by means of corporate group structuring. In particular the multi-jurisdictional location of various affiliates in a multinational enterprise creates a network of potential claimants in investor state disputes, giving rise to the risk of multiple claims, while the possibility of setting up affiliates in various jurisdictions creates opportunities for “treaty shopping”. “Treaty shopping” involves the enterprise locating an affiliate in a jurisdiction that has signed an investment protection treaty with the host country, allowing various affiliates and/or the parent in a group enterprise to benefit from treaty protection even though they possess the nationality of a state that has no such agreement with the host. In addition “treaty shopping” can be practiced by claimants possessing the nationality of the host country itself by way of the incorporation of a “shell company” in a country that has an investment protection agreement with the host country. It is argued that interpretations of treaty provisions in this area lack real legitimacy and create unacceptable procedural burdens on the host country.

### Key words

International Investment Law – multinational enterprises – treaty shopping – multilateral regimes – legal entrepreneurship - arbitration

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## Introduction

The world of international investment arbitration has been variously described as “international investment law” (Subedi 2008, Muchlinski et.al. 2008) as an emergent “multilateral legal order” (Schill 2009) or as a system of “international administrative law”(Kingsbury and Schill 2009). No doubt there is a great deal of legal activity going on here. However, as this paper will show, what is actually going on is less a system of “law” as properly understood and more a process of practitioner-led treaty interpretation that allows for a creative approach to investor and investment protection. This results in a facilitative environment for global business and for the safeguarding of its interests in ways that International Investment Agreements (IIAs), the treaties on which this process is based, never intended. The paper tests this hypothesis by reference to how the notion of the corporate group has been used to widen the protective power of IIAs. The role of legal creativity in this exercise is instructive. It has allowed for the development of so-called “treaty shopping” whereby investors from one country can take advantage of the legal protection offered under a Bilateral Investment Treaty (BIT) concluded between a second and third country, so as to extend the protection of that BIT to their investments in the third country, even though no such BIT exists between the third country and the home country of the investors.

Treaty shopping is not confined to such cases alone. As will be shown below, investors who are nationals of the host country have also been allowed to take advantage of BITs between their country and another country, by way of incorporating a shell company in the other country and transferring their assets to that foreign entity, thereby internationalising an otherwise completely domestic investment. As a result BITs have been invoked to protect the rights of purely national investors against their country of origin.

A further effect of corporate group structures on the operation of BITs has been the increased recognition of claims made by intermediate holding companies and minority shareholders allowing for multiple claims against the same host country arising out of the same investment. While in many cases such claims appear to be entirely legitimate the possibility of multiple claims has also created concern that the scope of protection under BITs is getting too wide.

The present paper will examine the main awards used to justify these positions. However, it is more than a “black letter” exposition of the “law”. It seeks to explain the outcomes of arbitral awards against the background of legal entrepreneurialism and of the needs of global business for delocalised and effective dispute settlement. In order to achieve this, the paper begins with a brief overview of the nature and purposes of IIAs concentrating on the most common type, the BIT. It will then consider the claims made that the system of investor-state dispute settlement (ISDS) amounts to a formal multilateral legal order based on general principles of administrative law and will examine the role of lawyers in that process. Third the main awards concerning the use of group structures in ISDS will be analysed from the perspective of legal entrepreneurship. The paper will conclude by considering the legitimacy of this process from the perspective of democratic accountability and transparent policy development.

## 1. The Nature and Aims of BITs

The current regime of BITs is characterised by the imposition of obligations on host countries to the exclusion of home country or investor obligations. Typically, a BIT will contain a duty on the host country to offer certain standards of protection to the investment once it has been made in accordance with the applicable laws on entry and establishment (Muchlinski 2007 p. 674-698, UNCTAD 2007, Newcombe and Paradell 2009). Some agreements, notably those of the US and Canada, and more recently Japan, go further and contain positive rights of entry and establishment which give foreign investors the right to admission into the host country on the basis of non-discrimination as regards domestic and other foreign investors in the same sector (UNCTAD 2007, p. 23). However the bulk of agreements only apply to the post entry phase of the investment.

All of these standards can be enforced through the investor-state dispute settlement provisions of the BIT. In current practice it is usual for the agreement to give to the investor the right to choose the method of dispute settlement. The choice is usually between national or international dispute settlement systems. In the latter case a further choice is given between ad hoc international arbitration and institutional arbitration, usually under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). Once the investor has made a choice other alternatives are excluded. This freedom has given rise to considerable concerns in that the investor is given a unilateral right to exclude national systems of dispute settlement and to internationalise the dispute with the host country. This may hand the settlement of a major issue, with far reaching consequences for national policy-making, into the hands of international arbitrators who are neither an international court, nor democratically accountable persons. It has led to a view that this system lacks political legitimacy unlike that of a court system (Van Harten 2007).

Why has such a system been accepted by capital-importing countries, given that IIAs tend to limit state control over domestic economic policy?<sup>1</sup> In the 1970s the developing countries, with the support of the socialist Eastern Bloc states, challenged the regulation of relations between states and foreign investors based on the development, by the major Western powers, of international norms relating to the treatment of aliens and their property, including expropriation, in the first half of the 20<sup>th</sup> century. The socialist states opposed norms based on notions of private property, and newly independent post-colonial states, opposed what they saw as colonial era norms that were not based on their consent as sovereign states. This culminated, in the mid-1970s, with the adoption of UN Resolutions calling for the establishment of a New International Economic Order (NIEO), with its emphasis on sovereign rights to regulate and control foreign investors and their investments, and on the recognition of permanent national sovereignty over natural wealth and resources.

However, by the 1990s, such sovereignty-oriented challenges appear to have been mitigated and replaced by an acceptance of international standards of treatment, at least as treaty-based standards. This can be explained by a number of factors: first, the demise of the Socialist Bloc, which brought to an end the Cold War, with its attendant clash of ideologies and alliances, and which gave rise to the process of transition to market based economies in the states of the former Soviet Union and Central and Eastern Europe; secondly, the effects of the debt crisis of the early

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<sup>1</sup> The following four paragraphs are based on Muchlinski (2008) at 4-5.

1980s upon the availability of public and private sector loan capital, which rendered foreign direct investment (FDI) the major source of capital especially in developing countries (UNCTAD 1992, Dunning 1993 ch. 2); thirdly, the increased acceptance by governments, through the 1980s and 1990s, of market-based approaches to economic development, in both developed and developing countries, resulting in the processes of liberalisation, privatisation and gradual deregulation of national economies (Gilpin 2000, ch. 2). This last factor may be said to arise directly out of the underlying process of economic globalisation that is being driven by increased transnational economic integration through the growth of transnational production chains dominated by multinational enterprises (MNEs, also referred to as transnational corporations or TNCs in UN parlance) or through interlinked alliances of free-standing firms (Snyder 2002, Dicken 2010 chs. 2, 3 and 5). To be successful, such modes of production will require large areas of economic and regulatory uniformity across national boundaries. Hence it may be said that economic globalisation contains a built in "bias" in favour of liberalised national economic policies and pro-investor approaches to international business regulation. It may also require limits upon the sovereign right of states to regulate, as they please, economic activity within their borders. The system of BITs provides such limits.

However these treaties, mostly concluded in the 1970s and 80s, appear to be something of an anachronism. In practice BITs exist as a response to the threat of high level state interference with business in developing host countries. They are designed to deal with a mid-20<sup>th</sup> century developing host country with a post-colonial, possibly authoritarian, unaccountable and corrupt, government that cannot be relied upon to act predictably and transparently towards an investor in a major resource extraction or infrastructure project that requires major costs to function. In addition, the substantive content of the BIT reflects a division between developed capital exporting home countries and developing capital importing host countries, which are unlikely to have investments of their own to protect in the developed country Contracting Party. These assumptions are breaking down, at least in relation to the main players in the world of FDI.

Today the main types of investment are likely to be of a wider range and composition and made in increasingly well governed countries that respect property rights and are interested in increased inward and outward FDI flows. The normal host country is no longer the caricature "banana republic." A fundamental re-think is required as to what types of claims have to be preserved in order for investments to work with certainty, predictability and on a level competitive playing field in modern host countries. The debates to date have not done this but have tinkered with existing concepts which are distinctive for their vagueness and lack of detailed legal content. The result, as will be seen below, is a widening of the protection granted under BITs to investors in ways never contemplated by the negotiators of BITs. In a sense, legal entrepreneurship has revived a generation of 20<sup>th</sup> century treaties in the context of 21<sup>st</sup> century globalisation as tools for further deregulation of business activities. That was not their aim or purpose, but their wide provisions and general wording have allowed for highly creative interpretation that has further eroded the host country's power to regulate in the public interest.

In addition, it is uncertain that host countries were clear as to the real nature and effects of BITs when they signed them. For example in a recent review of its BIT policy the Government of South Africa stated:

"This review was partly necessitated by various arbitral proceedings initiated against the Republic of South Africa (RSA) and the need to conduct a comprehensive risk assessment. Prior to 1994, the RSA had no history of negotiating BITs and the risks posed by such treaties were not fully appreciated at that time. The Executive had not been fully apprised of all the possible consequences of BITs. While it was understood that the democratically elected government of the time had to demonstrate that the RSA was an investment friendly destination, the impact of BITs on future policies were not critically evaluated. As a result the Executive entered into agreements that were heavily stacked in favour of investors without the necessary safeguards to preserve flexibility in a number of critical policy areas. In reviewing the *travaux préparatoires* of the various BITs entered into at the time, it became apparent that the inexperience of negotiators at that time and the lack of knowledge about investment law in general resulted in agreements that were not in the long term interest of the RSA. To a large extent, the review seeks to correct this misalignment and to place before the Executive the true facts inherent to commitments undertaken by the RSA under BITs whilst at the same time updating the RSA's BIT regime as is being contemplated by many developed as well as developing countries whose history and experience of BITs is similar to that of the RSA." (Republic of South Africa 2009 p. 5)

This strong statement of concern is striking as it openly acknowledges the lack of understanding that the South African government had in this process. Given that such an advanced country with a well developed legal system can think this then it is certain that other less developed countries have faced similar issues. The actual process of concluding BITs is therefore open to debate and reviews of BITs have resulted in a number of countries. (Muchlinski, 2010).

## 2. The Rise of "Multilateral Investment Law"?

The concept of a multilateralised investment law, that seeks to submit host country administrative action to legal review, has been related to the notion of an emergent "global administrative law". This concept emanates from the work of scholars at the Centre for International Law and Justice at New York University Law School, led by Benedict Kingsbury. This approach begins by identifying a growing range of activities in the international sphere that require some form of legal control. These range from international security, environmental protection, banking and finance, trade in products or services to the cross-border movement of persons, to name but a few (Kingsbury et al 2005 p.16, Kingsbury 2005). The rise of internationalised areas of intergovernmental activity is said to have created, "an accountability deficit in the growing exercise of transnational regulatory power" (Kingsbury et al 2005 p.16). In response it is argued that a new type of "global administrative law" is needed. This is defined as follows:

"...the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance." (Kingsbury et al 2005 p. 17)

International investment law fits into this model through the vehicle of investor-State arbitration. This creates an international review mechanism for national regulatory activity that occurs “with reference to an international intergovernmental regime”. The aim is to provide, “checks for coordinated domestic administration” where domestic regulators act as participants in a global regime (Kingsbury et al 2005 p. 36).

An essential problem with this position is to prove that the mass of BITs and other IIAs, which contain investor-State arbitration provisions, are actually an “international intergovernmental regime”. Rather these treaties appear to be a relatively uncoordinated system of bilateral, regional and plurilateral instruments. They represent something less than a fully fledged multilateral regime. Indeed this system lacks any developed institutional form other than a privately ordered system of dispute settlement based on a variety of distinctive dispute settlement clauses. In response, advocates of the multilateral regime approach get around this conceptual problem by assuming that international investment arbitration is not just a system of dispute resolution but is also “a structure of global governance” (Kingsbury and Schill 2009 p. 1):

“Through publicly available and widely studied awards, investor-State arbitral tribunals are helping to define specific principles of global administrative law and set standards for States in their internal administrative processes. Similarly, investor-State arbitration functions as a review mechanism to assess the balance a government has struck in a particular situation between investor protection and other important public purposes, for example by using proportionality analysis. In addition, decisions made *ex post* by tribunals with regard to such balances may influence what later tribunals will do, and may influence *ex ante* the behavior of States and investors.” (Kingsbury and Schill 2009 *ibid*)

In performing this function tribunals “reflect general principles for the exercise of public power that are applicable not only to State conduct, but likely will be applied over time, *mutatis mutandis*, to the activities of arbitral tribunals themselves. Investor-State arbitration is thus developing into a form of global governance.” (Kingsbury and Schill 2009 p. 2) That these principles should also apply to the tribunals themselves is required to ensure the legitimacy of this system.

This analysis appears to be rather lacking in grounded empirical observation. First, awards of investor-State tribunals are generally not public (Van Harten 2007, p. 30-32) Ad hoc awards are seldom even known about outside the practitioner community.<sup>2</sup> Awards made under the auspices of ICSID are publicly available, provided both parties do not object (ICSID 2006, Rule 48 (4)).<sup>3</sup> This falls far short of a fully open, transparent and accessible source of principles of law, let alone of “global administrative law”. This is exacerbated by the privacy of ICSID arbitral proceedings and the relative lack of open access to proceedings by interested third parties, although ICSID has made some concessions on this point (ICSID 2006 Rule 15, see further Schreuer 2009 704-707).<sup>4</sup> Second, only some tribunals have used a

<sup>2</sup> Thus UNCTAD notes in the latest available data on investor-State arbitrations: “In 2009, the number of known treaty-based investor-State dispute settlement cases filed under international investment agreements (IIAs) grew by at least 32 bringing the total number of known treaty-based cases to 357 by the end of 2009...” UNCTAD (2010) p. 2.

<sup>3</sup> Rule 48 (4) of the ICSID Arbitration Rules states: “The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.” At [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)

<sup>4</sup> See Rule 15 “Deliberations of the Tribunal”:

proportionality analysis in practice (Kingsbury and Schill 2009, p. 6-7). Tribunals are not courts of law and are free to decide the case as they see fit. Whether or not they use established principles of administrative review is in the discretion of the tribunal. Again there is no predictable and systematic application of principles. A lot depends on the composition of the tribunal, the nationality and resulting legal experience of tribunal members and on the types of arguments presented to the tribunal by counsel, whose own national legal background will no doubt influence the level of familiarity with given concepts of administrative justice. Given the rather limited pool from which arbitrators are chosen, a degree of convergence of opinion upon certain matters of law and practice has emerged (Van Harten 2007, ch. 6). But this is not of the same order or permanence as could be expected from a formal court structure. It is equally possible that the original consensus of arbitrators could be overturned by different arbitrators as the system evolves. Furthermore, the consensus to date appears to have been based on a highly pro-investor reading of BITs, one that may not stand up to the test of legitimacy based on an even-handed approach to investor and state interests.

Third, there is a hint at some kind of system of precedent. While decisions of earlier tribunals are often cited by subsequent tribunals, there is no obligation to do so. Thus tribunals can cite what they like in practice. Much depends on which prior awards are used in argument by counsel and which awards carry favour with a given arbitrator. Furthermore in the absence of an appellate body in investor-State arbitration there is no way to resolve lines of conflicting decisions. Indeed the field is replete with numerous such conflicts of "precedent". In this context it is hard to see that any system of precedent actually exists. Fifth, the influencing of investor and State behaviour is unpredictable in such a confused and uncertain environment. However the fear of being found to have infringed an investor protection standard has prompted many countries to worry about the risk of "regulatory chill", rendering ineffective legitimate administrative action for fear of incurring liability under a BIT. Equally, increasing numbers of countries are actually reviewing their BITs as a result of such concerns (Muchlinski 2010).

Finally, many, but not all, treaties offer recourse to ICSID arbitration and not always on the same terms (UNCTAD 2007, p. 110-112). Some make a unilateral offer of ICSID arbitration completed by the consent of the claimant to go there while other treaties demand the agreement of both the host country and the investor claimant at the time the dispute is deemed to require arbitration (Muchlinski 2007, p. 719-722). Some countries are not even ICSID members and so other fora must be used (UNCTAD 2007, p. 110-111). So, not even the architecture of arbitration is the same for all IIAs. Thus it is hard to defend the assertion by those cited above that international investment arbitration is a "structure of global governance". It is more accurately described as just a method of delocalised dispute settlement based on the specific rights of claim and procedures contained in each treaty.

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"(1) The deliberations of the Tribunal shall take place in private and remain secret.

(2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise." Ibid.

Rule 37(2) of the ICSID Arbitration Rules gives some limited *amicus curiae* rights to third parties.



A further claim is made by Stephan Schill, who argues forcefully that international investment law is a "multilateralised system" in his book which indeed is entitled *The Multilateralisation of International Investment Law* (2009). Schill's argument is reliant on the earlier work of John Ruggie. He cites Ruggie's definition of the concept:

"...multilateralism is an institutional form that coordinates relations between three or more states on the basis of generalised principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence." (Ruggie 1992 p. 571 cited in Schill 2009 at p.9)

Schill builds on this definition by saying that the nature of multilateral rules rests on the fact that they are generalised and apply without discrimination to all participating actors, rather than whether they are created in a two-party or multi-party setting (Schill 2009 *ibid*). Schill's contention that the system of rules created by BITs, and interpreted by investor-state arbitral tribunals, is multilateral, rests on the view that the underlying rules contained in the BITs and other relevant IIAs are in fact evidence of a convergent legal order:

"BITs... function analogously to a truly multilateral system as they establish rather uniform general principles that order the relations between foreign investors and host States in a relatively uniform manner independently of the sources and targets of specific transborder investment flows. Instead of being prone to almost infinite fragmentation, international investment law is thus developing into a uniform governing structure for foreign investment with only limited room for insular deviation by individual States." (Schill 2009, p. 16)

While he admits that the texts of all treaties are not identical, and that differences in wording matter, he sees sufficient convergence within the subject matter of IIAs to conclude that:

"...investment treaties follow uniform rationales, they are based on rather uniform investment law principles, and are implemented through rather uniform institutional mechanisms. It is possible to understand the web of investment treaties, whether bilateral, regional or sectoral, as part of a treaty-overarching legal framework that backs up the functioning of an international investment market within the emerging global economy. While investment treaties do not, therefore, represent an emulation of a multilateral system, the BIT framework, it is argued, shows sufficient parallels to a multilateral investment regime in order to support the thesis that international investment law is multilateralising on the basis of bilateral treaties." (Schill 2009 *ibid*)

Schill rejects the obvious counter-argument that attempts at genuinely multilateral agreements on investment have always ended in failure and so deny any multilateral basis to the regime of international investment law (Muchlinski 2007, p. 654-674). He says that the impossibility of such an agreement has simply led to the growth of bilateral agreements. As these are often based on the OECD Draft Convention on the Protection of Foreign Property of 1967, this provides evidence of a multilateral exercise (Schill 2009, p. 35-40). In addition, the multilateralisation of international investment law is supported by a number of elements. Thus negotiating processes have created broadly homogenous texts (Schill 2009, ch. III). Furthermore, an expansive interpretation of the Most-Favoured-Nation (MFN) clause by tribunals, which allows for the importation of higher standards of

substantive and procedural protection of investors from other BITs, offers access to the highest standards of protection regardless of the limits of the base treaty under which the investor brings their claim (Schill 2009, ch. IV). The extension of BIT protection to various elements in a corporate group structure, and the opportunity for treaty shopping, widen the protective power of individual treaties (Schill 2009, ch. V). The power shift from states to international arbitral tribunals and the development of coherent arbitral "jurisprudence" also add to the process of multilateralisation, in his view (Schill 2009, ch. VI and VII).

Every element of this forceful thesis is open to challenge. The first element concerns the notion of multilateralism itself. John Ruggie's account of this concept needs some further explanation to show that it is a more difficult and nuanced idea than suggested by the above quotation, and one that is not as rule based as Schill appears to suggest. Writing in the early 1990s, the problem Ruggie was addressing lay in the unwillingness of the then dominant neo-realist theories to integrate institutions into their paradigm of international relations, which was based exclusively on inter-state interactions (1992, p. 562 and 597). Equally Ruggie was concerned that his fellow institutionalist theoreticians placed too little emphasis on the nature of international institutions (1992, p. 566 and 598). For Ruggie this meant more than intergovernmental organisations or regimes of cooperation. It required an examination of how certain issues of international interactions have found their expression in multilateral solutions.

For such interactions to be multilateral Ruggie not only stressed the need to have certain common generalised ordering principles, such as for example the MFN principle in international trade, but also other factors including "an indivisibility among members of a collectivity with respect to the range of behaviour in question," which he described as a social construction, and, "an expectation of 'diffuse reciprocity' that is to say, the arrangement is expected by its members to yield a rough equivalence of benefits in the aggregate and over time." (Ruggie 1992, p. 571) Thus the adherence of GATT members to the MFN norm makes the system of international trade an indivisible whole, and not some inherent attribute of trade as such (Ruggie 1992), while the expectation of diffuse reciprocity suggests that states believe that current sacrifices will in fact yield a longer-term return and that others would not renege on their commitments when tempted to do so (1992, p. 583). Ruggie also considers the nature of domestic settings to be important. Thus he argues that the leading role taken by the US in developing post World War II multilateral economic institutions was a result of both strong international forces with the US as the emergent major power but also compatible domestic environments: "the United States after World War II sought to project the experience of the New Deal regulatory state into the international arena." (1992, p. 592-593) Ruggie concludes:

"It follows from this definition and its corollaries that multilateralism is a highly demanding institutional form. Its historical incidence, therefore, is likely to be less frequent than that of its alternatives; and if its relative incidence at any time were to be high, that fact would pose an interesting puzzle to be explained." (1992, p. 572)

Thus bilateralism, the process of specific reciprocity, coupled with, "a simultaneous balancing of specific quids-pro-quos by each party with every other at all times" (Ruggie 1992 *ibid*) is the more likely explanation of what is going on under a treaty described as "bilateral". The burden of proof is therefore high when asserting that the system of BITs is in fact multilateral.

### 3. The Reality of BITs

Turning to international investment law as a possible candidate for a multilateral institutional order, it would appear that the evidence fails to support such a claim. Schill concentrates on the existence of "generalised principles" exemplified by the rules of foreign investment law. This argument connotes the idea of customary rules of international law. Only customary rules can carry sufficient weight to be regarded as generally binding in the absence of a treaty provision. It is uncertain that the wide range of IIAs whether bilateral, regional or in the case of the GATS multilateral, each of which serves a specific function in a specific context, can create such generalised legal rules. Given that evidence of consistent and generalised state practice is the key determinant of customary law, IIAs do not allow for this. As Sornarajah asserts, "...such a thesis will not get off the ground. Not only are treaties diverse in their formulation, but the arbitral awards that interpret them exhibit such divergence that it is unlikely that common principles can be extracted from them." (2010, p. 82)

This view is at odds with Schill's position that negotiations of BITs have come up with broadly homogenous texts. However Sornarajah's position is closer to the reality of the IIA universe than is Schill's. In particular, leaving aside the great variety of agreements that come under the rubric of IIAs, even in relation to BITs there are such fundamental differences between types of BIT models as to make Schill's suggestion hard to accept. In particular, BITs divide into two main types: a "controlled entry" model that reserves the right of the host state to regulate the entry of foreign investments into its territory and a "full liberalisation" model that extends the non-discrimination standard (both national treatment and MFN treatment) in the agreement to the pre-entry stage of the investment (UNCTAD 2004a p.142-160, Pollan 2006 ch. 4). The latter approach is particularly favoured in the practice of NAFTA (NAFTA Articles 1102-1108 cited in UNCTAD 1996) and in the bilateral treaty practice of the United States and Canada. The majority of BITs follow a "controlled entry" approach. Therefore, the application of the treaty to an investment is made conditional on its being approved in accordance with the laws and regulations of the host state (UNCTAD 2007 p. 21-22, AALCC 1984 Art. 3, UNCTAD 2005b). This distinction is highly significant in practice and amounts to a substantial difference in coverage, and in the scope of host country discretion, in dealing with foreign investors and investments. Indeed the "controlled entry" model appears at odds with a multilateral system as it specifically reinforces the territorial sovereignty of the host country by permitting discriminatory exclusion of foreign investors.

Other fundamental differences also exist too numerous to mention in this brief paper. They can be further studied in other sources (UNCTAD 2004a, 2004b and 2004c, Sornarajah 2010 ch. 5-6, Muchlinski 2007 Part IV). The situation is well summarised by UNCTAD in their study of BIT trends of 2007:

"This study has shown that BITs concluded since the later 1990s continue to have a structure and a content similar to those of earlier BITs. However, the fact that most BITs address basically the same issues does not mean that they have the same underlying rationale, nor does it mean that all agreements provide the same degree of investment protection or have evolved homogeneously over the last decade. Rather the enormous increase in BITs during the review period has resulted in a greater variety of approaches with regard to their individual content."(UNCTAD 2007, p. 141)

In response it could be said that the MFN norm in international trade is cited by Ruggie as an example of a “generalised principle” and that this is exclusively a treaty-based norm of international law (Jackson 1997 p. 158, Schwarzenberger 1945, Schwarzenberger 1971 p. 137-138 and ch. 8,). However, Ruggie limits his example to MFN in international trade, a field where it was embodied in the GATT as a multilateral treaty giving the norm binding force in this form since 1947. In addition the establishment of the WTO, and the continuation of the GATT through the 1994 revision, is strong evidence that a sufficiently large, geo-politically representative body of states has indeed accepted the principle and has gone further to establish an intergovernmental organisation to protect this principle, among others. Thus the evidence here of multilateralism is rather strong.

Can the same be said for MFN in the investment field? First, Ruggie does not cover investment in his argument, which by the time of his writing was already a field replete with BITs. In addition, as a scholar of international relations and not law, he does not take into account the legal distinction between customary norms of international law and treaty based norms in his model. Widespread use of a principle in treaties may well generalise a practice into a customary norm but, as Brownlie notes, “considerable caution is necessary in evaluating treaties for this purpose.” (2008, p. 14) Given that we are here discussing generalised *legal* principles and not international relations norms we need to remember this. As noted above, it is hard to say that the IIA universe is evidence of such a generalised acceptance of investor protection norms that they can amount to customary law.

Furthermore, the expansive interpretation of the MFN clause by tribunals which Schill cites as further evidence of the multilateralisation of international investment law is only a partially persuasive argument. It is certain that the MFN clause has the capacity to lock in higher protection standards for investors from other treaties if so interpreted. It is not like the MFN standard in trade agreements, which applies to states only, but rather it offers direct rights to investors to expect improved treatment on the basis of higher standards found in other investment agreements. While most treaties accept that the MFN clause can introduce better substantive treatment standards from other treaties, opinion is mixed over whether this effect also extends to procedural issues related to dispute settlement. The argument begins with the decision of the ICSID Tribunal in the case of *Maffezini v Spain* (2001). There the claimant sought to avoid a provision in the Argentina-Spain BIT which required that, in the absence of an amicable settlement within six months, disputes were to be submitted to the courts of the host country, which had a period of eighteen months to deal with the dispute, before they could be taken to arbitration. The Claimant argued that, by reason of the MFN clause in the Argentina-Spain BIT, this provision could be replaced by the provision used in the Chile-Spain BIT, which allowed recourse to arbitration after the six-month period allowed for negotiations had expired. The Tribunal accepted the Claimant’s position that they were being treated less favourably than a Chilean investor in Spain by reason of the additional requirement to submit disputes to a local court (Muchlinski 2007, p. 631). This award has not been uniformly followed. It was followed in four subsequent cases involving Argentina as respondent (*Siemens AG v Argentina*, *Cammuzi International SA v Argentina*, *Gas Natural SDG SA v Argentina*, *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v Argentina*). Other cases have rejected this approach (*Salini Costruttori SPA and others v Jordan*, *Plama Consortium Limited v Bulgaria*, *Telenor v Hungary*, paras. 81-101). Thus there is little uniformity in the interpretations of arbitral tribunals on this issue.

Furthermore, it is doubtful that when BITs were negotiated such a development was foreseen. Claims concerning the procedural scope of the MFN clause have only arisen very recently while most BITs were negotiated some years ago. Therefore, it may be more accurate to view the *Maffezini* line of cases as revising the agreements in question, by way of arbitral creativity, rather than applying them in accordance with the intentions of the Contracting Parties (Muchlinski 2007, p. 635). This view is reinforced by the fact that more recent model agreements take differing approaches to the *Maffezini* award. While some treaties remain silent on this (the precise effect of which is hard to determine though it suggests a tacit acceptance of *Maffezini*), others are expressly including or excluding the award from the interpretation of the MFN provision. Exclusion of the award limits the operation of the MFN standard to substantive protection only and excludes it from dispute settlement procedures (UNCTAD 2007, p. 39-42). Such differences cast doubt on the existence of a generally accepted approach to the MFN clause and leave open the possibility of its restriction by state-to-state agreement.

In addition, the variety of approaches to investor protection in IIAs suggests that this universe fails to meet Ruggie's requirement of "indivisibility among members of a collectivity with respect to the range of behaviour in question". This is reinforced by the manner in which BITs were concluded and by current reactions of certain countries to their BITs as well as by the failure of attempts at a multilateral agreement. The apparent homogeneity of BITs can be explained up to a point. Most importantly, the use by the main capital exporting countries of model agreements has ensured that their treaties appear consistent with that model (Schill 2009, p. 90-91). However, even within individual country practice one can see significant divergences which complicate the actual legal environment. For example the Chinese model BIT has evolved through at least three forms to date. Earlier and later treaties thus do not display uniform characteristics (Gallagher and Shan 2009, p. 35-43). Similarly the US Model BIT has undergone major changes in form and content with the 2004 revision with similar consequences (Vandewelde 2009). Secondly, the process of concluding first generation BITs was one in which developing countries were presented with such agreements on a "take it or leave it" basis. Thus there was little choice but to accept the model agreement offered by the home country of investors or risk losing their investment due to the unavailability of home country investment risk insurance in the absence of a BIT (Van Harten 2007, p. 42). The correct analogy here is with a standard form consumer contract offered by a major retailer or service provider which the consumer has little choice but to accept if they want the goods or services on offer. It is uncertain whether such a context is one in which there is a clear "indivisibility" as to the behaviour in question, namely to accept an agreement that favours investor rights over host country rights to regulate. This doubt is reinforced by the fact that, in recent years, more countries have renounced their BITs or have begun a process of renegotiation. (See further Muchlinski 2010). While this does not amount to a wholesale rejection of BITs the increasing incidence of such events must cast doubt on the validity of the claim to the homogeneity of the IIA universe or to the durability of the first generation investor friendly agreements. It also points to evidence of disquiet in domestic settings concerning the scope, content and effect of BITs.

Moreover, the question remains as to why international investment law has not generated the same degree of generalised institutional acceptance as international trade regulation. The failure of the negotiations on the Multilateral Agreement on Investment (MAI) and the failure to establish negotiations on investment rules in the WTO are the clearest examples of this problem. The MAI failed as a result of developed country concerns over excessive inroads into state sovereignty when

dealing with the presence of foreign investors in their territory (Muchlinski 2000, Picciotto 1998, Picciotto and Mayne 1999). The failure in the WTO arose out of a clear disagreement between the developed countries that were requesting negotiations and the group of developing countries that opposed such a move (Muchlinski 2007, p. 669-674). It cannot be said that the scope of any such negotiations would have mirrored the content of current BITs. For example, the Doha Declaration, upon which the current round of WTO negotiations is based, is silent on such substantive issues as the taking of property, incentives, performance requirements and transfer of technology and contains no reference to dispute settlement. The inclusion of these most sensitive substantive issues would be opposed by developing countries as a direct assault upon their regulatory discretion (UNCTAD 2003, chs. IV and V). Thus the mandate for negotiations would have achieved far less than could already be done under BITs. This cannot be ignored when determining whether BITs express a clear commitment to certain multilateralised standards.

Equally it is unclear whether current BITs meet Ruggie's criterion of "diffuse reciprocity". The first generation BITs were concluded almost exclusively between developed capital exporting countries and developing capital importing countries. By no stretch of the imagination could they be classed as reciprocal arrangements even though they included reciprocal wording. Unlike trade agreements, where developing country parties would be likely to have some primary commodities to trade in return for goods or services from developed country parties, investment agreements were asymmetrical in economic terms and hence in practice non-reciprocal. The developed country party would receive full protection for its investors and their investments under the agreement, given its technical capacity as a home country to provide investors and the interest in investing in the host country which prompted the conclusion of the BIT. By contrast, the developing host country would have neither the technical capacity nor the resources to invest on a reciprocal basis in the developed country. The only possible advantage the developing country would have is the increased expectation that more investment would come in.

In this connection, Schill asserts that "recent empirical studies show that BITs seem to achieve their objective of attracting foreign investment and thus to contribute to economic growth in developing countries" (Schill 2009, p. 107). This underestimates the ambiguity of the empirical studies upon which Schill relies (Sauvant and Sachs 2009, Part II). The empirical evidence is mixed. Some studies find a positive correlation between the conclusion of BITs and increases in investment flows (Salacuse and Sullivan 2005, Neymeyer and Spess 2005). Others do not (UNCTAD 1998 ch.IV, Hallward-Driemeier 2009, Rose-Ackerman 2009). This is perhaps to be expected as it is difficult to consider one part of a wider regulatory framework in isolation. Equally it may be hard to exclude other factors that may affect the size and origin of inward FDI flows. The domestic political, economic and institutional environment may be equally as important in determining inward investment flows as are individual BITs (Rose-Ackerman 2009 p. 321), as might the economic sector in which investment is made (Aisbett 2009, p.423). Thus there is still no incontrovertible evidence that BITs will deliver increased FDI flows. Yet developing host countries continue to sign up to them even though there are clear sovereignty and welfare costs involved given the responsibilities host countries assume concerning the protection of investor rights and given the increased recent risk of investor-state arbitration resulting in an award of damages (Sauvant and Sachs 2009 p. xxvii at xli, Guzman 2009). The true reasons for concluding BITs are many and varied ranging from the "state visit" treaty – where something concrete has to come out of such a visit and the signing of a BIT may be

such a thing – to an indication that the host country is willing to provide a good regulatory environment for FDI. However, the enhancement of economic development through increased FDI flows may not be the most important of these reasons nor the most likely consequence of the signing of a BIT. Thus, on balance, the case for viewing the universe of BITs and international investment law as an example of a multilateral institution based on “diffused reciprocity”, as understood by John Ruggie, remains open to doubt.

#### **4. The Role of Investment Law Practitioners**

This raises a further question: why is there a case for viewing international investment law as a multilateralised system? The situation seems to fit well the description given by Yves Dezalay of the activities of the practitioners of international business law, as engaging in an age-old process of “double dealing, by guiding their clients through the regulatory maze they know all the better for having been, to a great extent, its designers.” (Dezalay 1993, p. 203) In particular national systems of regulation are being disrupted by the, “competitive pressure exerted by forum shopping for regulatory regimes to which multinationals of expert services incite their clients.” (Dezalay 1993, p. 202) The resulting regulatory space can be filled by lawyers who offer a means of navigation for international businesses though the complexities of the transformation of the state from a protective regulatory order, that seeks to limit the impact of international competition upon national markets, to one that eliminates barriers to such competition (Dezalay 1993, p. 207-208). Thus the lawyer’s knowledge of how to deal with these regulatory spaces becomes a key element in the process of globalization of business. That knowledge itself creates the resources for the development of new structures of regulation and helps develop a “vision of the social world or of the technical-political stakes” that allows international business lawyers to ensure for themselves a “situational rent” based on their self-developed normative system (Dezalay 1993, p. 211).

Applied to the notion of a “multilateral investment law” we see this process at work. International investment lawyers are highly adept at taking BITs and reading into their vague and general language meanings that ensure the most client-friendly outcome. In this case the clients are foreign investors – who can range from large multinationals to small and medium sized enterprises with overseas investments, or even passive shareholders in foreign investment ventures – and the aim is to ensure that national regulatory action is kept under as tight a control as possible so as to reduce investment risk to a minimum. That aim is backed up by an expansive reading of the jurisdiction of investor-state tribunals both as regards subject matter and personal jurisdiction. The system of arbitration itself is the engine of this growth. In particular, it is well understood that the arbitrators are themselves drawn from the pool of international investment law practitioners that represents clients in such procedures. Thus conflicts of interest arise in that arbitrators may need to ensure the development of interpretations of BITs that are client friendly. Since the main clients will be foreign investors who seek redress under a BIT against the host country, it is not possible to maintain independence with any confidence in such cases. The temptation to read the general wording of the BIT in favour of investor rights, and in favour of widening jurisdiction over increasing types of transactions and wider classes of claimants, must be irresistible, indeed natural (Van Harten 2007 p. 172-175; see further Dezalay and Garth 1996). It conforms to the liberal market view of the global economy and the need to “keep government small”.

That is not to say that all arbitrators take this line or that it is indefensible. Indeed it is entirely legitimate to find a host country liable for serious maladministration that leads to unjustifiable economic loss to the foreign investor. Rather, the argument is that the system, as developed by private practitioners, cannot be expected to work as if it were an impartial court system applying rules of global administrative law in an objective and balanced way. All the more so as no-one expected this to happen when the BITs were signed, as noted in the South African government position cited above. Indeed the inadequacies of the arbitral process are acknowledged by the advocates of a global administrative law approach to investor-state disputes. Thus Kingsbury and Schill write:

“...administrative law protects the rights of individuals and other civil society actors, mainly through their participation in administrative procedures and through the availability of review to ensure the legality of a decision. Protection of foreign investors is one instantiation of this conception. This conception may also be extended to the protection of the rights of States; this idea may help to protect publics and public interests even within powerful States, but it is likely to be especially valuable for many developing countries and other weak states that lack political and economic bargaining power and influence. This conception may also overlap with the notion that global administrative law can promote the rule of law by ensuring the public character of regulatory norms, their reasoned elaboration, and their impartial and predictable application. These three normative conceptions inform quests for legitimacy and accountability in the work of international institutions. They have a direct bearing on the design and functioning of the system of investor-State arbitral tribunals, and on their legitimacy as they exercise the governance functions which are an ineluctable part of their current mandates.” (Kingsbury and Schill 2009, p. 51)

Their hope is that the system will introduce better reasoning methods, use stronger administrative law principles based on the proportionality of governmental action to the regulatory aims sought, to create a proper system of precedent and make investor-State arbitration more democratically accountable (Kingsbury and Schill 2009). These are laudable aims if the current system is to continue and to be more legitimate. But it cannot resolve the basic problem of the privatisation of the review of national administrative action. Arguments in favour of a multilateral system of investment law simply serve to reinforce this very problem. It is the private challenge to national regulatory space that causes the legitimacy crisis of international investment arbitration and law in the first place. Nor is this a natural outcome of international developments, even allowing for the fact that a greater range of countries has concluded BITs including among developing countries. As noted in 1996 by Dezalay and Garth:

“Legal actors on the periphery may be quicker to forge international connections and apply them domestically in part because their own legal systems point to the center. Constructed by and for international relations of economic and symbolic dependency, the legal systems that have been established on the periphery are by definition rooted in internationalization. Nevertheless, on the periphery and elsewhere, the impact of internationalization is not automatic or determined in advance. It depends in every case on the relative powers and relations between the protectionist and internationalist groups from among legal elites.” (Dezalay and Garth 1996, p. 317)

The outcomes of such struggles are by no means clear or settled for all time. The international field is “a field of struggle, which means that different outcomes are possible.” (Dezalay and Garth 1996)



## 5. The Corporate Group and the Privatisation of International Investment Law<sup>5</sup>

The claim that international investment law is a system based on privatized legal entrepreneurship can be illustrated by the way in which the corporate group form has been used to extend the operation of BITs far beyond the subject matter, and personal, jurisdiction that might have been expected at the time of their conclusion. This is a direct result of treaty interpretation by arbitral tribunals and not by the more usual means of state diplomatic practice, official interpretations by the Contracting Parties by way of interpretative notes or through the re-negotiation of agreements, or by way of international judicial pronouncements in the International Court of Justice. Thus a self-selecting body of private practitioners has given a gloss to BITs that serves to widen the range of claims that their potential clients can pursue. It is a gloss that serves well the interests of globalised capital but at the cost of state control over the content and effect of these treaties. Two main developments can be highlighted here: an increase in the range of claims that a multinational group of companies can bring and the phenomenon of "treaty shopping" (Schill 2009 ch. V, UNCTAD 2011, Dolzer and Schreuer 2008 ch. III, Schlemmer 2008, McLachlan et al 2007 ch. 5-6).

First, as to the multiplication of claims, tribunals have widened the interpretation of the terms "investor" and "investment" in the scope and definition clause to cover not only direct but indirect interests in the foreign investment, allowing rights of claim not only by the controlling shareholders in the host country company, but also minority shareholders and indirect investors. The development impact of such an approach to complex group structures will be felt mainly in relation to the risk of multiple claims being made on the basis of the same investment by various classes of shareholders. This could expose the host country to considerable legal pressure and uncertainty, as well as risk the creation of inconsistent decisions by domestic and/or various international tribunals involving different claimants from the group and its outside shareholders. Thus the risk of lack of predictability in the investment arbitration process may be enhanced by such events.

The potential for multiple claims is well illustrated by the case brought by the American entrepreneur Ronald Lauder against the Czech Republic arising out of the dispute over the Czech TV station TV Nova. Mr. Lauder had set up this station but lost control over it in circumstances which he alleged had been engineered by the Czech State amounting to a breach of his rights against expropriation under the US-Czech Republic treaty in relation to his own losses as the ultimate owner, and under the Netherlands-Czech Republic BIT in relation to the losses alleged to have been suffered by the Netherlands holding company of TV Nova. The first case *Lauder v Czech Republic* (2001) was unsuccessful. On the other hand the claim brought by the holding company *CME Czech Republic v Czech Republic* (2003) was successful, even though the facts of each case were identical. Both tribunals noted that the Czech Republic had refused an offer of consolidation of the claims. Equally both tribunals felt that they were entitled to act independently and to come to their own decisions as each tribunal was dealing with a different BIT and with different parties. In addition, the CME Tribunal held that this was not a proper case in which to apply a "single economic entity" or "company group" theory, which was generally not accepted in international arbitration especially as in this case Mr. Lauder was not the majority shareholder in CME even though he was the ultimate controller of the group (*CME Czech Republic v Czech Republic* 2003, para. 436).

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<sup>5</sup> This section draws upon and updates sections of the preparatory study prepared by the author for UNCTAD on Scope and Definition in International Investment Agreements. See further UNCTAD 2011.

To avoid such an outcome a host country may wish to ensure that a control based test of corporate nationality is included in its IIAs so that the tribunal is enabled to lift the corporate veil and to see the nationality of the ultimate controller. However on the facts of the CME Case this might not have helped as Mr. Lauder had only a minority interest in CME. Equally in the CME/Lauder case the respondent host country was offered a consolidation of claims but declined to do so. On the other hand a better solution might be to require a consolidation of claims under two or more BITs in one case and to introduce such a clause into all BITs signed by the host country.

Secondly, tribunals have accepted formal tests of corporate nationality, based on incorporation or principal seat of the company, for the purposes of personal jurisdiction where the applicable BIT does not expressly require a control based test of such nationality, resulting in the avoidance of any lifting of the corporate veil to determine the true controlling nationality of the investment. This has led to the use of shell companies that allow investors to take advantage of "treaty havens", that is countries which have a BIT with the host country, in circumstances where the true nationality of the controlling interest would mean that no treaty would protect the investment. This allows investors from third countries, which have no BIT with the host country, to enjoy treaty protection by reason of the nationality of the shell company. Thus investors have a possibility of "treaty shopping" and of improving the protection that international law can offer to them. Indeed "treaty shopping" could also be used to take advantage of the more protective types of BITs used by some countries so as to enhance the overall level of protection offered when the BIT between the home country of the controlling interest and the host country is more limited. More surprisingly, a formal approach to corporate nationality has also led tribunals to accept claims by nationals of the host country itself where they have established a shell company in the other Contracting Party country.

The difference in approach between formal and substantive tests of nationality was well illustrated by the disagreement on this issue that arose in the Tribunal that decided the case of *Tokios Tokelés v Ukraine* (2005a). By a majority, the tribunal held that a company incorporated in Lithuania, but owned and controlled by Ukrainian nationals (who owned 99% of the shares and comprised two-thirds of the management), was a Lithuanian national for the purposes of Article 25 (2) (b) of the ICSID Convention, which deals with jurisdiction over legal persons for the purposes of that Convention and which contains a control based test of corporate nationality.<sup>6</sup> The tribunal held that as this provision was aimed at expanding, and not restricting, the jurisdiction of ICSID so long as the formal nationality of incorporation was that of another Contracting Party the Tribunal would not "lift the corporate veil" (*Tokios Tokelis v Ukraine* 2005a para. 45-51, *Saluka Investments BV v Czech Republic* 2006 para. 229-230).<sup>7</sup> This conclusion was reinforced by the fact that the BIT defined an "investor" of Lithuania under Article 1(2) (b) as an "entity established in the territory of the Republic of Lithuania in conformity with its

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<sup>6</sup> By Article 25 (2) (b) of the ICSID Convention the term "national of another contracting state" means, for the purposes of Article 25(l): "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another contracting state for the purposes of this Convention".

<sup>7</sup> The Tribunal held that a formal legal definition of "investor" is effective to determine corporate nationality and that, in the absence of a specific treaty provision, a Tribunal does not have the power to look behind corporate structures unless these have been used to perpetrate fraud or other malfeasance: at paras.229-30.

laws and regulations." This method of defining corporate nationality was found by the tribunal to be consistent with modern BIT practice and that it satisfied the requirements of Article 25 (*Tokios Tokeles v Ukraine* 2005a para. 52). In addition, the company had been incorporated six years before the BIT between Ukraine and Lithuania had entered into force, showing that the incorporation was not undertaken to gain access to ICSID arbitration (*Tokios Tokeles v Ukraine* 2005a para. 56).

This decision engendered a strong dissent from the President of the Tribunal, Professor Prosper Weil, who held that this finding undermined the object and purpose of the ICSID Convention, which required that the investor be a national of a Contracting Party other than the respondent Contracting Party (*Tokios Tokeles v Ukraine* 2005b).<sup>8</sup> There is much to be said for this position, given the history of the Convention. It is also supported by academic opinion. Thus according to Schreuer et al, "the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of the host State" (Schreuer et al 2009, p. 323). Against this the majority justifies its view by reference to the intention of the parties as expressed in the BIT. In this the arbitrators may be said to follow the rules on treaty interpretation in the Vienna Convention on the Law of Treaties, which posits that the best evidence of parties' intent is the ordinary meaning of the terms used in the treaty. Indeed, arbitrators often invoke the "ordinary meaning of the terms of the treaty" and decline to infer any other "intent" because that is what the Vienna Convention calls for.

It may be said, in response, that the jurisdiction of ICSID cannot be determined by the subjective intention of the parties to a BIT but by the Convention organs themselves (*Tokios Tokeles* 2005b para. 16). More recently, in *TSA Spectrum de Argentina S.A. v. Argentine Republic* the corporate veil was lifted by the tribunal to reveal that the Dutch claimant company was in fact owned and controlled by an Argentine citizen for the purposes of article 25(2)(b) of the ICSID Convention and so the tribunal had no jurisdiction (2008, paras. 114-162). Thus the approach of the majority in the *Tokios Tokeles Case* is not uniformly followed though a number of more recent cases have done so where the applicable treaty and/or national law refer only to a test of formal incorporation as determining nationality (*ADC v Hungary* 2006, para. 85, *Rompetrol v Romania* 2008). According to Schill, the *TSA Case* can be distinguished from *Tokios Tokeles* on the ground that it only covers a limited jurisdictional issue under Article 25 (2) (b) of the ICSID Convention, namely, whether a company that is incorporated in the host country could be treated as under foreign control which, by Article 25 (2) (b) would permit a claim to be brought by its controlling interests despite host country nationality of the local subsidiary. It did not deal with the issue of corporate nationality under the Netherlands Argentina BIT (Schill 2009, p. 234). Otherwise, given that ICSID jurisdiction is governed by the consent of the parties their determination of what constitutes corporate nationality should be decisive as it was in the majority opinion in *Tokios Tokeles*.

The *Tokios Tokeles Case* shows that "treaty shopping" is a phenomenon that tribunals will accept if they take a formal view of a BIT that makes the nationality of incorporation the main test of nationality for a legal entity to be regarded as an "investor". Equally the use of an intermediate holding company in a non-Contracting Party state has also been seen as no bar to jurisdiction nor has the

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<sup>8</sup> Professor Weil resigned from the Tribunal in protest.

ownership of the local subsidiary by a non-Contracting Party parent company which then transfers the majority of the shares in the subsidiary to a holding company in a Contracting Party state (Schill 2009, p. 201-234 and cases cited therein). This paves the way for investors to structure their investments so as to take advantage of nominal "home" jurisdictions that have a network of BITs in place so as to attract "treaty shoppers".

Commenting on the above cases and issues, Schill concludes that,

"..the possibility of corporate structuring shows that nationality as a criterion to restrict the benefits of an investment treaty to specific nationals is becoming increasingly ineffective in regulating access to, and exclusion from, the protection of bilateral investment treaties. It shows that ordering international investment relations on a truly bilateral basis with rights and benefits only accruing to the nationals of one specific home State is an increasingly illusory undertaking, since the nationality of corporate investors has become as fungible as capital in global markets. Instead, the possibility for investors to set up multi-level, multi-jurisdictional corporate structures allows them to circumvent the remaining bilateral elements in international investment relations because corporate nationality no longer functions effectively as a distinguishing criterion. Ultimately, BIT protection is less a question of the investor's nationality, but rather a question of whether an investment is structured in a specific way." (Schill 2009, p. 239)

To Schill this development is further evidence for the multilateralisation of international investment law. Equally he supports the notion of treaty shopping as it offers an economically efficient solution in that it can generalise BIT protection allowing for greater investment security and so spurring on that process. Corporate structuring merely allows for that efficiency gain to be realised (Schill 2009, p. 235). Indeed the assumption is that given the object and purpose of BITs is to promote foreign investments, "it should matter little for the host State where the capital for such investments comes from and what relations a corporate investor has to the State of its incorporation." (Schill 2009, p. 228).

This position is interesting espousing as it does a "hyper-globalist" view of the world and its economic actors (Muchlinski 2003, p. 223). However it may be open to challenge. First it is not clear how one can argue that international investment law is multilateral in nature while at the same time admitting that the protection offered under various treaties differs, or that there need to be some countries that act as "treaty havens" in order for this to be realised. For some countries to do this undermines the notion of an undivided commitment to certain regulatory standards by others which the havens seek to uphold. Secondly, while it might be efficient from the corporate perspective to use shell companies to take advantage of BIT protection it may not be from a host country welfare perspective. In particular it exposes the host country to the risk of claims by persons or entities that it would not otherwise accept as investors within its borders had the true nationality of the controllers been known when the investment was made. This could create a risk of claims made under the BIT with the home country of the shell corporation when regulatory action is taken by the host country in response to nationality based rules and regulations. For example, where investors from the true home country are regarded as enemy aliens by the host country, or where that country is the subject of an international boycott, the use of a nationality of convenience by carrying out the investment through a "treaty haven" holding company could give rise to a claim by the controlling investor, through the vehicle of the intermediate holding company, when the host country finds out the actual nationality of the controllers

and applies its laws to the investment causing loss to the controllers. Surely in such a case a Tribunal would be bound to defer to the legitimate regulatory aims of the host country, the more so if the boycott were internationally sanctioned? Equally where host country nationals use the "treaty haven" as a means of obtaining a procedural advantage not open to their local competitors by establishing a shell company, would it not be an interference with the efficient operation of the domestic market to privilege such local investors over others who may lack the resources and access to legal expertise to be able to do the same?

In addition, if international investment law is a true "global administrative law" then corporate claimants must act in a way that entitles them to the full protection of BITs. In particular Tribunals have made clear that they are prepared to lift the corporate veil where the corporate form may be abused as a means of disguising the true identity of the beneficiary of the business so as to avoid liability (ADC v Hungary 2008 para. 358). Equally in the Saluka Case, although the Tribunal applied a formal test of corporate nationality, it did note that,

"The Tribunal has some sympathy for the argument that a company which has no real connection with a State party to a BIT, and which is in reality a mere shell company controlled by another company which is not constituted under the laws of that State, should not be entitled to invoke the provisions of that treaty. Such a possibility lends itself to abuses of the arbitral procedure, and to practices of "treaty shopping" which can share many of the disadvantages of the widely criticised practice of "forum shopping." (*Saluka Investments BV v Czech Republic* 2006, para. 240)

Thus it is not clear that the advantages claimed for "treaty shopping" by Schill are as easily defensible as it might appear.

Finally, the idea that the nationality of capital does not matter to host countries is hard to defend except as an abstract economic notion. It ignores the complex relations between countries that might create conditions for foreign investment flows. These arise out of webs of influence, historical ties and cultural values that make communities highly sensitive to the origins of investors and investments (Dunning and Lundan 2008, ch. 18). Otherwise it would be hard to account for the myriad of nationality based rules and restrictions on who can actually own a business in a host country and for the periodic concerns about particular investors from particular countries, as was the case with Japanese takeovers of US firms in the 1990s or the more recent US national security concerns over proposed Middle Eastern and Chinese takeovers of US firms (Graham and Marchick 2006). In the UK the takeover of Cadburys by Kraft in 2009 created a groundswell of opinion that some kind of review process for foreign takeovers was necessary, as the US firm did not honour its initial pre-takeover pledges to keep open all of Cadbury's plants in the UK (HC 2010).

Furthermore, such a narrow, economic, reading of host country concerns leaves out the impact that demands for corporate social responsibility under national laws and international standards might have on FDI patterns and on the future content of BITs. It is possible that in the future some countries will include investor responsibilities in new generation BITs including human rights observance clauses

that apply both to the Contracting Parties and to investors from each Party.<sup>9</sup> Government boycotts or controls of firms on human rights grounds might be challenged by the use of “treaty haven” BITs that have no such provisions, even though the BITs of the host country and the actual home country of the investor might have provisions allowing for such regulatory action.

In addition Article 28 (9) of the COMESA Common Investment Area (CCIA Agreement) contains a significant innovation in IIA practice. It states that:

“A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages.” (CCIA Agreement 2007, Art 28 (9))

Such a balancing provision could be neutralized by recourse to a “treaty haven” agreement and would undermine a clearly accepted international obligation in agreements that might in future follow the COMESA Model. Thus corporate structuring can have a chilling effect on reform and development of more socially aware and balanced future agreements.

In any case it is open to states to determine how open their door will be to “treaty shopping” based claims. To limit treaty shopping, certain BITs use a “denial of benefits” clause. Thus the model BIT used by the United States, which also uses a control based test of nationality, permits the host country to refuse to extend treaty protection to investments owned by investors of the other Party if the investors do not have substantial business activities in the territory of the other Party or if the country of ultimate control does not have normal economic relations with the host country.<sup>10</sup> In addition it is not certain that the approach in *Tokios Tokeles* should be uniformly followed. For example in the tribunal in the NAFTA case of *Loewen v United States* suggested that, under NAFTA, for an international claim to be sustainable, diversity of nationality must exist between the claimant investor and the respondent state from the date of the inception of the claim to the date of resolution. Accordingly, where, as in that case, the reorganisation of the claimant company, due to its bankruptcy, caused it to lose its original Canadian nationality and to acquire US nationality, the international character of the claim disappeared (*Loewen v United States* 2003, paras. 223, 232-234, 255). The absence of any evidence that its controller, a Canadian national, retained any shares in the reorganised company was fatal to any personal claim he might have had under NAFTA (*Loewen v United States* 2003 para. 239) It should be noted that this is a NAFTA case and is not binding upon an ICSID Tribunal determining jurisdiction under any other IIA. In addition, under Article 25 (2) (a) of the ICSID Convention,

<sup>9</sup> For example the Norwegian draft Model BIT of 2007 contained a corporate social responsibility clause in Article 32.

<sup>10</sup> For example, article 17 of the US-Rwanda BIT 2008 provides that: “1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.”

diversity of nationality need only exist under the ICSID Convention at the date the parties consent to the claim being brought and not at the date of its resolution. However the decision in *Loewen* does stress the need to maintain a distinction between disputes of a purely national character, which should be settled before national bodies, and genuine international disputes (Muchlinski 2007, p. 730).

The above cases on corporate nationality suggest that more attention needs to be paid in the drafting of definitions of “investor” to actual foreign control and to the possibility of treaty shopping that a formal reading of place of incorporation tests creates. It may suggest that tests based on actual control and effective economic links with the country of incorporation may be of importance in this regard.

## 6. Concluding remarks

This paper has sought to provide an evidence based critique of the notion that, through investor-State arbitration a new “multilateral international investment law” based on “global administrative law” principles is being developed. On the contrary what actually exists is rather less. If it is a “system”, it is one that is characterised by a complex and diverse set of IIAs with dispute settlement provisions that offer different methods of dispute settlement on the basis of the specific agreement. It has certainly offered opportunities for enterprising lawyers, acting as arbitrators, to develop interpretations of BITs that suit the interests of their private sector clients. In addition, as noted in relation to the issue of corporate structuring, specialist lawyers have created a method of expanding the classes of claimants and types of claims in ways never imagined by the negotiators of IIAs. In this sense there is certainly an element of convergence between tribunals and a degree of emergent uniformity of approach and interpretation centered on an “investor rights” view of IIAs.

However, there is now also a realization among some arbitrators that a degree of retrenchment is required so that host countries continue to accept the legitimacy of this process. There are many examples of awards that do try to balance the interests of investors and the interests of host countries in pursuing legitimate regulatory aims (See further Muchlinski 2006). The *TSA Case* discussed above is another example. Indeed international investment law must be more inclusive in its aims and purposes and aim to ground itself in a more pluralistic conception of the interests at stake. In this regard it is hard not to agree with the claim that greater use of proportionality analysis on the part of tribunals should be encouraged. However the problem also lies with first generation BITs and their exclusive investor protection orientation. They need replacing with more socially balanced agreements that recognise the highly sensitive interaction of public and private interests that foreign investment raises. In this regard the current work of John Ruggie as the UN Secretary General’s Special Representative on Business and Human Rights is of major significance. He is not only considering issues such as the role of human rights in IIAs but also questions of responsible contracting in investment contracts between foreign investors and governments.<sup>11</sup> It is hard to imagine that this work will never influence the development of the IIA universe.

In this regard, significant reforms will be impossible to undertake if international investment lawyers and arbitrators, wedded to the logic of the first generation agreements, will use their entrepreneurial and professional skills to structure

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<sup>11</sup> John Ruggie’s work is accessible at <http://www.business-humanrights.org/SpecialRepPortal/Home>

investments, and interpret agreements, in such ways as to undermine legitimate socially oriented changes in IIA provisions, or side-step legitimate social regulatory goals of host countries. There is a risk that adding a social aspect to IIAs will be seen as going against the intent and purpose of such agreements and lawyers interested in their private client's position may resist. It would also prevent the emergence of a true multilateral law on international investment that actually fulfills the criteria of a multilateral system of international ordering as posited by Ruggie. Without a rebalancing of rights and duties between investors, home and host countries, and communities affected by foreign investment flows and projects, this seems an unachievable goal. Here the advocates of "global administrative law" have much to contribute to the debate on how to develop a more social dimension to new generations of IIAs, how to balance the rights and duties of the various stakeholders, and on how to persuade the existing cadre of international investment lawyers that this is also in their professional interests - after all even a socially pluralistic agreement will need interpreting!

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