

## *Focus: Investment Arbitration and Its Contribution to the Development of International Law*



### **Multilateral Principles in a Bilateral World**

#### *Mandatory or Consensual Multilateralism in International Investment Law?*

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#### **Abstract**

Multilateralism in international investment law is a multifaceted concept with a complex and eventful history. Multilateralism is a paradigm for international investment relations and is also present in the caselaw of investment arbitral tribunals, regardless of whether they consider bilateral or multilateral investment treaties. Indeed, in most cases, they interpret treaty provisions as part of a multilateral system. Further, multilateralism is present every time States act in concert with other States or consider other States' investors' legitimate interests.

It also emerges that, in some instances, multilateralism has become mandatory. For example, this is the case concerning sustainable development or climate change. In these areas, international law requires multilateralism. States are under an obligation

to co-operate for purposes of achieving or promoting multilateral solutions. However, concerning the international investment law context, such a concept is not present. The general assumption is that States' participation in multilateral practises is left to their discretion: it is voluntary or consensual. In this article, we question that assumption.

In this article, we offer a brief review of multilateral experiences in international investment law in the 20th century and provide an analysis of multilateralism in a historical context. Then we turn our attention to the current state of affairs to appreciate it in light of the past. Further, we discuss the future, and in particular, mandatory multilateralism in international law with respect to sustainable development. Here we identify the principles, which might justify mandatory multilateral approaches. Finally, we consider whether the principles justifying mandatory multilateralism in international law are applicable in the context of international investment law as well. We attempt to answer this question in the affirmative and point out further areas of research.

### Keywords

international law – international investment law – sustainable development – multilateralism – mandatory multilateralism – history – contextualism – international arbitration

## 1 Introduction

Multilateralism in international investment law is a multifaceted concept with a complex and eventful history. Perhaps it is that very history that renders this concept so rich in different meanings. After all, as argued by Nietzsche, “only that which has no history can be defined”.<sup>1</sup> Multilateralism is one paradigm for international investment relations.<sup>2</sup> That is the case, in particular, for international lawyers who represent the view that international investment law is a uniform legal field and discipline.<sup>3</sup> At the same time, and as things stand, the

1 NIETZSCHE, *On the Genealogy of Morals*, London, 2013, p. 81.

2 SCHILL, “Ordering Paradigms in International Investment Law: Bilateralism—Multilateralism—Multilateralization”, in DOUGLAS, PAUWELYN, and VIÑUALES (eds.), *The Foundations of International Investment Law*, Oxford, 2014, p. 109 ff., pp. 109–141.

3 See for example, SCHILL, *The Multilateralization of International Investment Law*, Cambridge, 2009; CHALAMISH, “The Future of Bilateral Investment Treaties: A de facto Multilateral Agreement?”, *Brooklyn Journal of International Law*, 2009, p. 303; MONTT, *State Liability*

content and primary sources of international law are multiple and often multilateral. They include treaties, which are international instruments, and customary international law. From an international coordination perspective the multilateral character of treaties is undisputable.<sup>4</sup> Perhaps, more interestingly, even bilateral treaties do contain provisions that reflect multilateral principles.<sup>5</sup> Customary international law is no doubt multilateral too: it arises from state practice and *opinio juris*.<sup>6</sup> Along the same lines, general principles of law (or internationally recognised general principles of law) are those shared by national legal systems worldwide.<sup>7</sup> Multilateralism is also present in the case law of international investment arbitral tribunals, regardless of whether they

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*in Investment Treaty Arbitration—Global Constitutional and Administrative Law in the BIT Generation*, London, Hart, 2009; SALACUSE, *The Law of International Investment Treaties*, Oxford, 2010; AVI-YONAH, “National Regulation of Multinational Enterprises: An Essay on Comity, Extraterritoriality, and Harmonization”, *Columbia Journal of Transnational Law*, 2003, p. 5; MUCHLINSKI, “The Rise and Fall of the Multilateral Agreement on Investment: Where Now?”, *The International Lawyer*, 2000, p. 34.

- 4 If one considers the distinction between unilateral and non-unilateral actions, multilateralism includes any form of potential non-unilateral action, as a result of joint activity by two or more States. This would cover the full spectrum of international co-operation from thin bilateralism to robust unilateralism. This reflects Keohane's nominal definition of multilateralism, which he defines as: “the practice of co-ordinating national policies in groups of three or more states”. KEOHANE, “Multilateralism: An Agenda for Research”, *International Journal*, 1990, p. 731. However, multilateralism has a qualitative dimension as well. In the words of Ruggie: “[...] what is distinctive about multilateralism is not merely that it coordinates national policies in groups of three or more states, which is something that other organizational forms also do, but that it does so on the basis of certain principles of ordering relations among those states.” RUGGIE, “Multilateralism – The Anatomy of an Institution”, *International Organization*, 1992, p. 567. On this point, see also CRIDDLE AND FOX-DECENT, “Mandatory Multilateralism”, *The American Journal of International Law*, 2019, p. 272. In this article, Criddle and Fox-Decent consider whether States in international law are always free to choose whether to participate in multilateral regimes. Their article suggests this is not always the case; they identify the principles supporting mandatory multilateralism and applies the latter to three controversies, namely: the South China Sea dispute, the United States' withdrawal from the 2015 Paris Agreement, and Bolivia's case against Chile in the International Court of Justice. In this article, we transpose that question in the context of international investment law.
- 5 For example, as suggested by Schill, MFN clauses do represent an element of a multilateral structure. SCHILL, *cit. supra* note 2, p. 121. Indeed, at the very least, depending on the words of the treaty, they do imply considering treatment granted to a third State.
- 6 Judge Read has defined customary international law as ‘the generalization of the practice of States’. *Fisheries (UK v Norway)*, Judgment of December 18, 1951, Judge Read, ICJ Reports, 1951, p. 191.
- 7 LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, 1927, p. 71. According to him: “[...] the actual will of States as evidenced by custom and treaty may, when necessary, be supplemented by such rules and principles as correspond to the nature

consider bilateral or multilateral investment treaties. Indeed, in most cases, they interpret treaty provisions as part of a multilateral system<sup>8</sup> – as they often refer to arbitral awards issued under the auspices of other treaties as persuasive authorities. Perhaps more importantly, multilateralism is present every time States act in concert with other States or consider other States' investors' legitimate interests.<sup>9</sup>

The same holds true in the context of international law – international investment law is one of its sub-fields or disciples (rather than being a branch or subordinate of international economic law). However, in that context, it is possible to observe a further development. That is, in some instances, multilateralism has become mandatory. For example, this is the case concerning sustainable development or climate change. In these areas, international law requires multilateralism. States are under an obligation to co-operate for purposes of achieving or promoting multilateral solutions. However, concerning the international investment law context, such a concept is not present. The

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of the legal relations between them, to rules of justice, and to general principles of law; and finally, that those general principles of law are for most practical purposes identical with general principles of private law.”

- 8 In the ongoing reforms discussion under UNCITRAL Working Group III, States agree that there is need for consistency in the case law of investment tribunals. In so doing, they confirm the multilateral character of the current investment regime. The interpretation of similar provisions in a consistent way does imply the existence of a multilateral framework. In most cases, this is present in the caselaw, even when there is a disagreement in terms of interpretative conclusions. See for example, *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction of January 29, 2004, para. 97. In the words of the Tribunal: “[A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State. Moreover, there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision. There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or jurisprudence constante, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.” On internal and external coherence in the context of international investment law, see for example ZARRA, “The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?”, *Chinese Journal of International Law*, 2018, pp. 137–185.
- 9 A good example of a multilateral approach is presented by the ongoing reform efforts under UNCITRAL Working Group III, which is considering potential procedural reforms of the current investment arbitration regime. On the reform discussions, see generally, LANGFORD et al., “Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions”, *The Journal of World Investment & Trade*, 2020.

general assumption is that States' participation in multilateral practises is left to their discretion: it is voluntary or consensual. In this article, we question that assumption. We consider whether any form of mandatory multilateralism is present or could be present, given the developments in international law concerning sustainable development.

Multilateralism is not universally accepted: some authors argue that it may undermine a libertarian internationalism, which has been prevalent for the better part of the second half of the twentieth century.<sup>10</sup> Such debates pertain particularly to international affairs and discussion of the role of global institutions. We focus our discussion on international investment law and hence will not debate the two paradigms.

Section 2 offers a brief review of multilateral experiences in international investment law in the 20th century. The purpose of this section is to provide an analysis of multilateralism in historical context. In Section 3, we discuss the current state of affairs with a view of understanding it in light of the past. In Section 4, we discuss the future, and in particular, mandatory multilateralism in international law with respect to sustainable development. Here we identify the principles, which might justify mandatory multilateral approaches.

Further, we consider whether the principles justifying mandatory multilateralism in international law are equally applicable in the context of international investment law. We answer this question in the affirmative. In Section 4, we conclude by summarising our argument.

## 2 Multilateralism's Historical Trajectories

In this section, we consider multilateralism in international investment law in historical context. This section is descriptive and simply aims at tracing the trajectories of multilateralism. Our review starts from the period following the Second World War. Studying multilateralism before that period is relevant; however, it goes well beyond the scope of this article. Also, we simply consider how the interpreters of that period discuss multilateralism. Rather than define multilateralism and look for it in history, we do the opposite. We look at documents and authors at the time and see how they perceive and discuss multilateralism.<sup>11</sup>

<sup>10</sup> See DRUZIN, and IKENBERRY, "The End of the Liberal International Order?", *International Law Affairs*, 2018.

<sup>11</sup> We employ a contextualistic approach along the line of Skinner's approach, see generally SKINNER, "Meaning and Understanding in the History of Ideas", *History and Theory*, 1969, p. 3.

## 2.1 *Multilateralism in the 20th Century*

We thus start our analysis in the 1950s, where we find a consensus between capital-exporting and capital-importing countries concerning the need and desire of economic development for less developed areas.<sup>12</sup> The answer to such a need was twofold: a flow of capital-exporting States' public funds;<sup>13</sup> and private international investments, i.e. foreign direct investment ("FDI"). At the same time, there appeared to be agreement on the need for an inevitable favourable investment climate.<sup>14</sup> Brandon summarised this point in his lecture to the International Law Conference – held in London and chaired by Fitzmaurice on 26 October 1957.<sup>15</sup> For the success of investment in underdeveloped areas, two were the 'essentials': "Firstly, an adequate and continuous availability of capital – both public and private – from the more developed countries, including within this context not only investment capital but also managerial and technical skills. Secondly, a welcoming attitude on the part of the less developed countries".<sup>16</sup>

12 See for example United Nations Secretary-General, Information Concerning International Economic Assistance for the Less Developed Countries, UN Doc. E/3047, 1957, para. 5, in which "under-developed countries" "have been defined to include all countries in Africa, except the Union of South Africa, in North and South America, except Canada and the United States and in Asia, except Japan". This survey considers the magnitude and geographical distribution of countries bilateral assistance to under-developed countries; it also indicates each country's contributions to international governmental agencies engaged in the economic assistance to under-developed countries. On the concept of economic development in general in this period, see BUCHANAN and ELLIS, *Approaches to Economic Development*, New York, 1955, pp. 3–22; LEIBENSTEIN, *Economic Backwardness and Economic Growth*, New York, 1957, pp. 7–14; HIGGINS, *Economic Development*, New York, 1959, pp. 3–24.

13 On public aids, see United Nations Secretary-General, Information Concerning International Economic Assistance for the Less Developed Countries, UN Doc. E/3047, 1957. On private investment flow, see United Nations Secretary-General, *The International Flow of Private Capital 1956–1958*, UN Doc. E/3021, 1959.

14 BRANDON, "Legal Deterrents and Incentives to Private Foreign Investments", *Grotius Society Transactions*, 1957, p. 41; BRANDON, "Survey of Current Approaches to the Problem", in *The Encouragement and Protection of Investment in Developing Countries*, International & Comparative Law Quarterly Supplement, 1962; FATOUROS, "Legal Security for International Investment", in FRIEDMANN and PUGH (eds.), *Legal Aspects of Foreign Investment*, Boston, 1959, p. 699; MILLER, "Protection of Private Foreign Investment by Multilateral Conventions", *American Journal of International Law*, 1959, p. 375; METZGER, "Multilateral Conventions for the Protection of Private Foreign Investment", *Journal of Public Law*, 1960, p. 133; FATOUROS, "An International Code to Protect Private Investment", *Toronto University of Law Journal*, 1961, p. 78.

15 See, BRANDON, *cit. supra* note 14, p. 39.

16 *Ibid.*

Availability of public capital could take the form either of humanitarian/political aid or proper investment by capital-exporting States. However, the emphasis was more on private investment and FDI, of which the former would seem only complementary. This was, for example, the position of the United Kingdom, according to which: "[...] it is through the investment of privately owned funds in the Commonwealth that the United Kingdom has made in the past and should continue to make its most valuable contribution to Commonwealth Economic development".<sup>17</sup>

In these years, the United States and the United Kingdom directed most of the investment flow towards Canada and Latin America, which amounted to circa 5 billion dollars.<sup>18</sup> With almost no increase of investment flow in other areas, the discourse focused on how to increase investments towards areas like Asia, Africa, the Middle and Far East.<sup>19</sup> A number of international bodies suggested that a more favourable investment climate would have been necessary to reach such an objective.<sup>20</sup> At its Ninth Session on 21 December 1954, the UN General Assembly made a number of recommendations to countries which wished to attract foreign private capital. For example, according to one of them, those countries should:

<sup>17</sup> UK Command Paper No. 237 (July 1957), para 17 as cited by Brandon, *cit. supra* note 14, p. 40.

<sup>18</sup> On United States' investment flow see U.S. Department of Commerce, Survey of Current Business, August 1957; on United Kingdom's investment flow see Economic and Social Council, Financing of Economic Development – The International Flow of Private Capital, UN Doc. E/3021, 1957, p. 22.

<sup>19</sup> BRANDON, *cit. supra* note 14, p. 41. In the words of the President of the International Finance Corporation at its first Annual Meeting: "If private investment is to spread and grow to its full potential, it is important, on the one hand, that there should be an increasing understanding by the governments and the peoples of the developing countries of what private business is and how it operates; and on the other hand, a recognition by business of its responsibilities as well as its essential rights. The long-term mutuality of interest needs to be kept in mind – the worthy motives and rights of all parties deserve respect. For the country desiring the benefits which can flow from vigorous, expanding private business, I consider the prime essential to be the development of an attitude of friendliness and co-operation, rather than of suspicion and obstruction. This may sound too obvious to mention, yet we see too many examples of legislation, regulations and administration which reflect, at the best, mere tolerance to business, and frequently actual hindrance." International Finance Corporation, Board of Governors, Summary Proceedings, Annual Meeting of the Board of Governors, 1956, p. 10.

<sup>20</sup> See for example, Economic and Social Council, Economic Development of Under-Developed Countries, International Flow of Private Capital for The Economic Development of Under-Developed Countries – Memorandum by Secretary General on Action Taken to Stimulate the International Flow of Private Capital, UN Doc. E/2546, 1954, pp. 24–30. This is the case for example of the World Bank, p. 24 and the International Monetary Fund, p. 30.



“re-examine, wherever necessary, domestic policies, legislations and administrative practices with a view to improving the investment climate; avoid unnecessary burdensome taxation; avoid discrimination against foreign investment; facilitate the import by investors of capital goods, machinery and component materials needed for new investment; make adequate provisions for the remission of earnings and repatriation of capital”.<sup>21</sup>

In line with the recommendation above, the literature of the time pointed out a number of risks international investment may encounter in ‘underdeveloped’ countries.<sup>22</sup> Above all and most prominently, expropriation – direct or indirect – without adequate or with inadequate compensation represents the main risk.<sup>23</sup> As a result of this preoccupation, different solutions were already in place.<sup>24</sup> Concerning multilateral approaches, we identify discussions at different levels on three potential options: an investment code, an insurance organisation, and an arbitration convention.<sup>25</sup>

21 UN General Assembly, Resolution 824(IX)(1954), UN Doc. A/RES/824(IX), 1954.

22 As summarised by FATOUROS: “Foreign enterprises operating in underdeveloped countries are today subject to a high degree of government control, direct or indirect. The entry of foreign capital often depends upon the approval of the government of the country of investment and the business activities of aliens or of foreign owned corporations are in many cases severely limited. The existence of exchange controls makes the repatriation of the foreign investor’s capital or earnings difficult or, sometimes, impossible. And the possibility of expropriation, of the taking over of the whole enterprise by the government of the host country, with inadequate or no compensation, is always present. The businessmen of the capital-exporting countries are therefore reluctant to invest in the underdeveloped areas, unless the expected profits are high enough to compensate them for the risks they are taking. The chief underlying cause of the insecurity of private investment is the general political and economic instability which prevails in most underdeveloped countries and is one of the causes as well as one of the effects of their underdevelopment”. FATOUROS, *cit. supra* note 14, p. 78; see generally BRANDON, “Legal Deterrents and Incentives to Private Foreign Investments”, *cit. supra* note 14, p. 41; BRANDON, “Survey of Current Approaches to the Problem”, *cit. supra* note 14, p. 2; FATOUROS, “Legal Security for International Investment”, in FRIEDMANN and PUGH (eds.), *cit. supra* note 14, p. 699; METZGER, *cit. supra* note 14, p. 133.

23 See BRANDON, “Legal Deterrents and Incentives to Private Foreign Investments”, *cit. supra* note 14, p. 43.

24 Solutions included: introducing legislation granting a minimum of legal protection and incentives to foreign investors; offering insurance to foreign investors on the part of capital-exporting States; concluding bilateral treaties providing for the protection of foreign investment. On these solutions, see FATOUROS, “Legal Security for International Investment”, in FRIEDMANN and PUGH (eds.), *cit. supra* note 14, p. 699.

25 These three solutions were being discussed together in most cases, by literature and States in multilateral settings. On this point, see for example, ST JOHN, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences*, Oxford, 2018, p. 70.



Concerning an investment code, there were different proposals.<sup>26</sup> However, the Draft Convention on Investments Abroad (“Abs/Shawcross Draft”) was, by far, the most influential one.<sup>27</sup> This draft results from the efforts of two exceptional figures with personal experience in expropriation cases, namely Herman Abs<sup>28</sup> and Lord Shawcross.<sup>29</sup> In particular, the Abs/Shawcross Draft incorporated an earlier draft convention prepared by the German Society – under the chairmanship of Herman Abs – and another draft convention written by a group of lawyers – under the chairmanship of Lord Shawcross.<sup>30</sup> Following their merge – and despite the lack of support from the respective governments<sup>31</sup> – the Abs/Shawcross Draft officially became an intergovernmental Draft Convention on the Protection of Foreign Property in November 1962,<sup>32</sup> when it was submitted to the OECD Council.

Also, it is noteworthy that the draft aspires, as aptly noted by Brandon, to codify “the generally accepted rules of international law, and at the same time, establish a system of international arbitration which would ensure the rapid and final settlement of disputes between sovereign states and private parties”.<sup>33</sup>

26 BRANDON, “Recent Measures to Improve the International Investment Climate”, *Journal of Public Law*, 1960. He discusses different proposals, which are the proposal in the Council of Europe of an investment statute and guarantee fund for development in African States; and a British Parliamentary Group’s Commission concerning a World Investment Convention.

27 UNCTAD, *International Investment Instruments: A Compendium – Volume V*, 2000, p. 300. For a contemporary commentary of it, see GEORG SCHWARZENBERGER, “The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary”, *Journal of Public Law*, 1960.

28 Herman Abs, at the time, was the Chairman of Deutsche Bank. An analysis of this figure goes beyond the scope of this article. Suffice it to say that historians consider him a very complex figure, who has been involved in expropriations both as expropriator and expropriatee. See LOTHAR GALL, “Hermann Josef Abs and the Third Reich: ‘A Man for all Seasons’?”, *Financial History Review*, 1999, pp. 147–202; HAROLD, *The Deutsche Bank and the Nazi Economic War against the Jews: The Expropriation of Jewish-Owned Property*, Cambridge, 2001; ST JOHN, *cit. supra* note 25, p. 79. Abs’ writings on investment protection include, for example: ABS, “The Safety of Capital”, in DANIEL, *Private Investment: The Key to International Industrial Development; A Report of the San Francisco Conference, October 14–18*, New York, 1957; ABS, *Proposals for Improving the Protection of Private Foreign Investments*, Rotterdam, 1958.

29 Lord Shawcross, Chief Prosecutor for the United Kingdom at the Nuremberg Trials, has served as director at Shell between 1959 and 1972; ST JOHN, *cit. supra* note 25, p. 84. In terms of expropriation experience, he was involved as counsel in the Abadan Refinery Case. See MOSTAFA, *Oil, Power, and Principle: Iran’s Oil Nationalization and Its Aftermath*, New York, 1992.

30 BRANDON, *cit. supra* note 26, p. 127.

31 See ST JOHN, *cit. supra* note 25, pp. 80–88.

32 *Ibid.*, p. 87.

33 BRANDON, *cit. supra* note 26, p. 128.

The generally accepted rules of international law relevant in this regard were: *pacta sunt servanda*, protection against expropriation without compensation, non-discrimination of aliens. In line with this, the draft provided for fair and equitable treatment, protection against expropriation without compensation, most-favoured nation treatment, which had 'a broad basis in the practice of civilized states and the findings of international tribunals'.<sup>34</sup> In so doing, its purpose is incorporating principles which are, in essence, multilateral, since they derive from State practice.

Further, it aimed at creating a system of neutral arbitration, which would have allowed investors to bring claims directly to States.<sup>35</sup> In the drafting of these provisions, Sir Elihu Lauterpacht's contributions were particularly significant. Above all, the idea of a "right of direct recourse to some international remedial processes" is perhaps the most relevant one. Such a notion is line with his father's concept of international law, according to which the individual is the ultimate unit of international law.<sup>36</sup> Sir Elihu promoted the draft before the OECD between 1960–1967. As a result, the OECD transposed his idea in OECD Draft.

Despite American opposition and the British more ambiguous hesitance towards the draft, the latter was sent to capital-importing States for consultation purposes.<sup>37</sup> In the meantime, Germany and Switzerland's support for the draft started vacillating. They had been simultaneously negotiating Bilateral International Treaties ("BITS") and realised that it was easier to reach the desired protection by concluding such treaties.<sup>38</sup> By 1965, within the OECD, it was clear that BITS would replace the draft. In 1966, States decided to agree on a non-binding resolution acknowledging their agreement on the draft's principles – with Turkey and Spain abstaining from the resolution.<sup>39</sup>

34 ABS and SHAWCROSS, "The Proposed Convention to Protect Foreign Investment: A Round Table", *Journal of Public Law*, 1960, p. 119. In general, on the draft, see SCHWARZENBERGER, *cit. supra* note 27, p. 147. On the key role Sir Elihu Lauterpacht played in shaping the dispute settlement provisions, see CHERNYKH, "The gust of wind: The unknown role of Sir Elihu Lauterpacht in the drafting of the Abs-Shawcross Draft Convention", in SCHILL, TAIMS, HOFFMAN (eds.), *International Investment Law and History*, Cheltenham, 2018, pp. 239–284.

35 However, it should be noted that these provisions were optional. That is, even if the draft had been signed and ratified, States would have had to consent to arbitration.

36 See CHERNYKH, *cit. supra* note 34, p. 279; LAUTERPACHT, "The World Bank Convention on the Settlement of International Investment Disputes", in LALIVE and FREYMOND (eds.), *Recueil d'études de droit international en hommage à Paul Guggenheim*, 1998, p. 664; LAUTERPACHT, "International Law and Private Foreign Investment", *Indiana Journal of Global Legal Studies*, 1997, p. 274.

37 See ST JOHN, *cit. supra* note 25, p. 89.

38 *Ibid.*

39 *Ibid.*

States did not sign and ratify the OECD Draft, hence its failure. However, we should note here that, at the time, one could already find discussions in the literature on how BITs would create a multilateral treaty system. Brandon's words in 1957 are clear:

"[...] [S]ince these treaties each contain the same general provisions, it is submitted that they may be regarded as a method whereby conventional international law may be evidenced by a quasi-multilateral treaty system composed of a series of bilateral treaties containing substantially similar terms and one party common to each".<sup>40</sup>

Also, according to Hyde, such treaties might be considered as reflecting international law rules – i.e. multilateral rules accepted by States. In other words, in his view, States included in those treaties what "those parties supposed to be the requirement of international law, rather than special concessions or undertakings involving commitments which that law did not call for".<sup>41</sup> Similarly, Boas suggested that the OECD Draft's principles "might serve as a restatement and a clarification of the international law on the subject of the treatment of foreign property and find their way into bilateral agreements and foreign investment laws".<sup>42</sup> Without a doubt, this is what happened in the years to come. Indeed, since then, at different points in time, one can see that the OECD Draft has had a significant impact on the way States approach and draft their BITs.<sup>43</sup>

A multilateral investment code did not receive much consensus from States, as seen above. On the contrary, States did endorse the creation of a multilateral insurance organisation during the 1960s.<sup>44</sup> However, such a consensus did not lead to the creation of an insurance organisation at the time.<sup>45</sup> Only in 1988,

40 BRANDON, "Legal Deterrents and Incentives to Private Foreign Investments" *cit. supra* note 14, pp. 45–46.

41 HYDE, *International Law Chiefly as Interpreted and Applied by the United States*, Boston, 1951, p. 714.

42 BOAS, "The O.E.C.D. Draft Convention on the Protection of Foreign Property", *Common Market Law Review*, 1963, p. 289.

43 See for example, DENZA and BROOKS, "Investment Protection Treaties: United Kingdom Experience", *International & Comparative Law Quarterly*, 1987, p. 910; GUDGEON, "United States Bilateral Investment Treaties", *International Tax & Business Law*, 1986, p. 111; SCHILL, *cit. supra* note 3, p. 39.

44 On States' consensus on this proposal see ST JOHN, *cit. supra* note 25, p. 99.

45 For a chronological review of the events leading to the creation of MIGA, see SHIHATA, "Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA", *ICSID Review – Foreign Investment Law Journal*, 1986, p. 17.

172 States concluded the Multilateral Guarantee Agency (“MIGA”),<sup>46</sup> whose purpose was “to encourage the flow of investments for productive purposes among member countries”. Its insurance covers most investment risks, including, for example, expropriations and damages from war and civil unrest. Such a convention has been signed and ratified by a significant number of States, and it represents a successful multilateral initiative, which has created an international insurance framework.

An arbitration convention represents another expression of multilateralism in the 20th century. Contemporary to the attempts concerning a multilateral investment code, discussions were undergoing as to the possibility of concluding an arbitration convention. In this sense, one can point to the UN Progress Report by the Secretary-General in 1960.<sup>47</sup> This report underlines some solutions to address the “real problem”, namely the lack of “an effective forum in which to enforce [investors’ rights]”.<sup>48</sup> In particular, it suggested solutions to this issue “in view of the doubts regarding the practicality of the [OECD drafts]”.<sup>49</sup> The primary alternative solution was an “international agreement limited to arbitration” for investor-state disputes and creating an arbitral institution. It also referred to the possibility of creating a multilateral framework through concluding bilateral treaties. In particular, it noted that:

“Where a government has different policies vis-à-vis investments from different capital-supplying countries, bilateral instruments might offer a more acceptable solution than multilateral agreements. Indeed the latter may conceivably develop from the emergence of a growing network of bilateral agreements or within the framework of a regional organisation”.<sup>50</sup>

In the literature of the time, Brandon agreed with the report’s considerations, considering the possibility of concluding an arbitration convention separately

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46 On the MIGA, see generally, ALSOP, “The World Bank’s Multilateral Investment Guaranty Agency”, *Columbia Journal Transnational Law*, 1986; CHATTERJEE, “The Convention Establishing the Multilateral Investment Guarantee Agency”, *International & Comparative Law Quarterly*, 1987; SHIHATA, *cit. supra* note 45, p. 17; SHIHATA, “The Multilateral Investment Guarantee Agency”, *RCADI*, Vol. 203, 1986, p. 487; SHIHATA, “The Multilateral Investment Guarantee Agency (MIGA) and the Legal Treatment of Foreign Investment”, *RCADI*, Vol. 203, 1987, p. 95; SHIHATA, “MIGA and Foreign Investment”, *The International Lawyer*, 1988; SCHILL, *cit. supra* note 3, p. 48.

47 United Nations Secretary-General, *The Promotion of the International Flow of Private Capital – Progress Report*, UN Doc. E/3325, 1960, para 200.

48 *Ibid.*

49 *Ibid.*, para. 203.

50 *Ibid.*, para. 206.

from a multilateral agreement a viable solution.<sup>51</sup> As for the possibility of creating a multilateral framework through bilateral treaties, Brandon had somehow already put forward such a proposal in 1957.<sup>52</sup>

In this context, the World Bank became involved with an arbitration convention,<sup>53</sup> and in 1961, Broches presented the first official proposal.<sup>54</sup> Unlike the OECD Draft, States received more favourably the idea of an arbitration convention under the auspices of the World Bank.<sup>55</sup> As a result, in 1965, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") opened for signature.<sup>56</sup>

This multilateral convention created the International Centre for Settlement of Investment Dispute ("ICSID"), an international organisation and an arbitration institution administering investment arbitrations between investors and States. In particular, Broches worked on a system of arbitration with treaty-based consent, domestic-law consent, and contract-based consent.<sup>57</sup> By including consent to ICSID arbitration either in treaties – bilateral and multilateral – domestic laws and contracts, States would allow investors to bring claims against host States.

Furthermore, States have attempted other multilateral approaches to international investment law at the end of the 20th century. In particular, this was the case in two contexts, namely international trade and once again OECD.

51 BRANDON, *cit. supra* note 26, p. 128.

52 BRANDON, *cit. supra* note 14, p. 45.

53 See ST JOHN, *cit. supra* note 25, pp. 131–140. In particular, St John suggests that the World Bank was involved with the idea of an arbitration convention before the Progress Report of the UN secretary General in 1960. Here, we should also note that St John has shown that the following individuals were involved in drafting the first version of the convention: Aron Broches, Georges Delaume, Elihu Lauterpacht, Clifford Hynning, George Haight, L. Sandberg, and John Blair.

54 ICSID, *History of the Convention: Documents Concerning the Origin and the Formulation of the Convention in English*, Volume 11, Part 1, 1970, SecM 61–192.

55 *Ibid.*, SecM 62–68 p. 13, point 17.

56 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, entered into force 14 October 1966.

57 On this point see, PARRA, *The ICSID Convention: A History*, Oxford, 2017, p. 51; ST JOHN, *cit. supra* note 25, p. 151. On the ICSID Convention, see PARRA, *The ICSID Convention: A History*, Oxford, 2012; PARRA, "Participation in the ICSID Convention", *ICSID Review*, 2013, pp. 169–78; PARRA, "Black's Bank' and the Settlement of Investment Disputes", in *Practising Virtue: Inside International Arbitration*, CARON, SCHILL, SMUTNY, and TRIANTAFILOU, Oxford, 2015; PARRA, "Remembering Aron Broches", *Investment Claims*, 2016; BALTAG, "The ICSID Convention: a successful story – the origins and history of the ICSID", in BALTAG (ed.) *ICSID Convention after Fifty Years: Unsettled Issues*, The Netherlands, 2017, pp. 1–24.

In the context of international trade,<sup>58</sup> evidence of these attempts is present in the conclusion of the Agreement on Trade-Related Investment Measures ("TRIMs"),<sup>59</sup> the General Agreement on Trade in Services ("GATS"),<sup>60</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").<sup>61</sup> In all these examples, however, the focus on investment matters is somewhat limited. Indeed, the TRIMs is limited to "investment measures related to trade in goods only".<sup>62</sup> The GATS, though it facilitates access to foreign markets and foreign investment, only applies to matters in case of specific commitment by a State.<sup>63</sup> The TRIPS limits its protection to only one aspect of foreign investment activities, namely intellectual property.<sup>64</sup>

Further, at the First Ministerial Meeting in Singapore in 1996, it was decided not to provide "a mandate for future negotiations"<sup>65</sup> on investment matters in the WTO's context – despite developed countries' persistence.<sup>66</sup> In reaction to this decision, several developed countries decided to change forum for such discussions and went back to the OECD,<sup>67</sup> intending to negotiate the Multilateral Agreement on Investment ("MAI").<sup>68</sup> Despite its similarities with BITs in terms of protection offered to investors and dispute settlement provisions, the MAI represented another failure of multilateralism in the 20th century, partly because the OECD was perceived by some as being controlled by

58 See generally SCHILL, *cit. supra* note 3, p. 50; DATTU, "A Journey from Havana to Paris: The Fifty-Year Quest for the Elusive Multilateral Agreement on Investment", *Fordham International Law Journal*, 2000, p. 275.

59 Agreement on Trade-Related Investment Measures, adopted 15 April 1994, entered into force 1 January 1995.

60 General Agreement on Trade in Services, adopted 15 April 1994, entered into force 1 January 1995.

61 Agreement on Trade-Related Aspects of Intellectual Property Rights, adopted 15 April 1994, entered into force 1 January 1995.

62 Article 138. This agreement has been criticised for this limitation. See SCHILL, *cit. supra* note 3, p. 51; DATTU, *cit. supra* note 58, p. 291; CIVELLO, "The TRIMs Agreement: A Failed Attempt at Investment Liberalization", *Minnesota Journal of Global Trade*, 1999, p. 97.

63 SCHILL, *cit. supra* note 3, pp. 51–52

64 *Ibid.*

65 World Trade Organization, Ministerial Declaration, WT/MIN(96)/DEC, adopted December 13, 1996, para. 20.

66 SCHILL, *cit. supra* note 3, p. 52; BURT, "Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization", *American University of International Law Review*, 1997, p. 1049.

67 DATTU, *cit. supra* note 58, p. 295.

68 On the MAI, see for example, CANNER, "The Multilateral Agreement on Investment", *Cornell International Law Journal*, 1998, pp. 657–682; RAINER, "Towards a Multilateral Agreement on Investment", *Cornell International Law Journal*, 1998, pp. 467–476; DALY, "Investment Incentives and the Multilateral Agreement on Investment", *Journal of*

developed countries and as not having adequate participation from developing countries. Continuing disagreement between States, coupled with opposition from the public – expressed by several NGOs – contributed to such a result.<sup>69</sup>

## 2.2 *Multilateralism in the 21st Century in International Investment Law*

Having described multilateralism in the past, here we move to consider multilateralism at present. In doing so, we are interested in identifying its contemporary expression in international investment law and the legal discourse concerning it.

As mentioned above, in the 1960s, while discussing a multilateral investment code, States started concluding bilateral investment treaties, in which the protection of investment was the primary goal.<sup>70</sup> Since then, they have created an investment treaty regime by concluding more than 3500 agreements – including BITS, a few plurilateral investment treaties, and free trade agreements providing an investment protection chapter (“IIAs”).<sup>71</sup> These treaties generally contain similar clauses, which resemble the provisions of the OECD Draft. In most cases, they also include dispute settlement provisions.

The prevalent use of treaties of a bilateral character, unsurprisingly, has raised the question of whether a system or network of international investment law is conceivable or one has to consider each treaty separately.<sup>72</sup> On this question, one can identify two competing positions. On the one hand, some

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World Trade, 1998, pp. 5–26; BAUMGARTEN, “The Demise of the Multilateral Investment Agreement on Investment”, *Colorado Journal of International Environmental Law and Policy*, 1990, pp. 40–47.

69 SCHILL, *cit. supra* note 3, p. 55.

70 VANDEVELDE, “A Brief History of International Investment Agreements”, *University of California Davis Journal of International Law and Policy*, 2005, p. 166.

71 See the comprehensive list of International Investment Agreements (“IIAs”), most of which are in force, at <https://investmentpolicy.unctad.org/international-investment-agreements> (last accessed on 17 May 2021).

72 On BITS and customary international law, see for example, LOWENFELD, “Investment Agreements and International Law”, *Columbia Journal of Transnational Law*, 2003, p. 123; SCHWEBEL, “Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law”, *Proceedings of the American Society of International Law*, 2004, p. 27; HINDELANG, “Bilateral Investment Treaties, Custom and a Healthy Investment Climate—The Question of Whether BITS Influence Customary International Law Revisited”, *Journal of World Investment & Trade*, 2004, p. 789; ALVAREZ, “A BIT on Custom”, *New York University Journal of International Law & Politics*, 2009, p. 17; SORNARAJAH, *The International Law On Foreign Investment*, Second edition, Cambridge, 2004, pp. 205–213; YACKEE, “Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality”, *Fordham International Law Journal*, 2009, pp. 1550–1552; PORTERFIELD, “An International Common Law of Investor Rights?”, *University of Pennsylvania Journal of International Law*, 2006, p. 79.



argue that there is no multilateral order<sup>73</sup> and each bilateral or multilateral agreement creates a micro-system for its signatories. It is posited that there is an “unstructured process of privatised legal entrepreneurship which seeks to further a professional interest in developing an extensive, investor friendly, regime of BITs.”<sup>74</sup> According to this view, there is no evidence that the mass of international investment agreements is other than a “relatively uncoordinated system of bilateral, regional and plurilateral instruments.”<sup>75</sup> Furthermore, according to this view, there are no “generalised rules” concerning international investment law. Generalised rules would imply customary rules, and the entirety of international investment agreements would not create such rules.

On the other hand, some consider international investment law as a uniform system, or at least a network of treaties. The main representative of this view is, without a doubt, Professor Schill. In support of this argument, he points out that there appears to be an undergoing process towards accepting multilateralism as a paradigm.<sup>76</sup> In his view, treaty-making and investment arbitration case law would support this argument. Concerning treaty-making, he refers to an argument he has put forward, for the first time, in his work *The Multilateralization of International Investment Law*. In this book, he points out that historically, the similarities between international investment agreements result from capital-exporting States’ intention to create a multilateral framework.<sup>77</sup> In substance, we can consider this position in terms of continuity with the legal discourse contemporary to the OECD Draft discussion. It reflects an argument, which, for the first time, the UN Progress Report by the Secretary-General put forward in 1960, as shown above.

Furthermore, we identify multilateral approaches for purposes of reforming the investment arbitration regime. Such approaches are evident under UNCITRAL Working Group III (“WGIII”). In particular, these solutions are the introduction of: a) Multilateral Permanent Court, namely a two-tiered standing court, which would replace the current system;<sup>78</sup> or b) an appellate system,

73 As a representative of this view, see for example, MUCHLINSKI, “Corporations and the Uses of Law: International Investment Arbitration as a ‘Multilateral Legal Order’”, Oñati Socio-Legal Series, 2011, p. 1.

74 *Ibid.*, p. 1.

75 *Ibid.*, p. 7.

76 SCHILL, *cit. supra* note 2, pp. 109–141.

77 SCHILL, *cit. supra* note 3, p. 40. Of course it can be argued that DOUGLAS in his book, *The International Law of Investment Claims*, Cambridge, 2009, which is drafted as a restatement of international law, effectively also espouses this view.

78 UNCITRAL, Submission from the European Union and its Member States, UN Doc. A/CN.9/WG.III/WP.159/Add.1, 2019.

which would be hearing/deciding appeals.<sup>79</sup> Reform discussions derive from the necessity to address different issues. Among them is inconsistency, on which WGIII is particularly focussing. The focus is, of course, on unjustified inconsistency in cases, for instance, “where the same investment treaty standard or same rule of customary international law was interpreted differently in the absence of justifiable ground for the distinction”.<sup>80</sup> The issue of unjustified inconsistency implies that regardless of the bilateral/multilateral character of treaties, one should interpret the same treaty standards and customary law rules consistently.<sup>81</sup> In doing so, it accepts that such rules and standards do relate to each other, hence there should be an inevitable convergence of meaning, absent any ground which would suggest otherwise. Finally, the authors of this article have also represented the view of the need for multilateral approaches in a Policy Brief prepared for the 2020 T20 which was also

79 UNCITRAL, Submission from the Government of China, UN Doc. A/CN.9/WG.III/WP.177, 2019.

80 UNCITRAL Working Group III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, UN Doc. A/CN.9/935, 2018, para 21.

81 We use here the term consistency as a synonym of coherence. On consistency, see ARATO, BROWN, ORTINO, “Parsing and Managing Inconsistency in Investor-State Dispute Settlement”, Brooklyn Law School Legal Studies Research Paper no. 631, 2020, p. 4; DIEGLIGOR, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration*, Leiden, 2017, p. 105; BROWER and SHARPE, “Multiple and Conflicting International Arbitral Awards”, *Journal of World Investment*, 2003, p. 211; CRAWFORD, “Similarity of Issues in Disputes Arising under the Same or Similarly Drafted Investment Treaties”, in GAILLARD and BANIFATEMI (eds.), *Precedent in International Arbitration*, New York, 2008, pp. 97–103; KAUFMANN-KOHLER, “Is Consistency A Myth?”, in GAILLARD and BANIFATEMI (eds.), *Precedent in International Arbitration*, New York, 2008; DIMSEY, *The Resolution of International Investment Disputes: Challenges and Solutions*, Utrecht, 2008, pp. 35–100; SCHREUER, “Coherence and Consistency in International Investment Law”, in ECHANDI and SAUVÉ (eds.), *Prospects in International Investment Law Cambridge*, 2013, pp. 391–402; DOLZER, “Perspectives for Investment Arbitration: Consistency as a Policy Goal?”, in ECHANDI and SAUVÉ (eds.), *Prospects in International Investment Law Cambridge*, 2013, pp. 403–410; HARHAY, “Investment Arbitration in 2021: A Look to Diversity and Consistency”, *Southwestern Journal of International Law*, 2011, pp. 89–102; REINISH, “The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration”, in BUFFARD (ed.), *International Law between Universalism and Fragmentation*, Leiden, 2008 p. 107; SCHREUER, “Revising the System of Review for Investment Awards”, *BIICL Paper* 1, 2009, pp. 1–8; TAMS, “An Appealing Option? The Debate about an ICSID Appellate Structure”, *Essays in Transnational Economic Law*, 2006, pp. 17–23; ARATO et al., *Working Group No 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues: Concept Paper on Issues of ISDS Reform*, 2019, p. 1 ff.; RIDI, “Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement”, in GÁSPÁR-SZILÁGYI, BEHN LANGFORD, Cambridge, 2020, p. 121–148.

endorsed and submitted to the G20.<sup>82</sup> In particular, the policy brief advocates the need for a holistic reform agenda and multilateral consensus building, supported by a new institution.

### 3 Mandatory Multilateralism in International Investment Law

In this section, we answer the question set at the beginning. That is, whether we can identify mandatory multilateralism in the field of international investment law, given that in most instances multilateralism appears to be consensual and voluntary. Before answering such a question, we need to define mandatory multilateralism. In particular, we refer to “multilateralism” from an international coordination perspective, which includes more than three States. “Mandatory” implies a lack of discretion on the States’ part.

In our view, mandatory multilateralism has always been present in the field of international investment law to a certain extent, even if not in a manifest fashion. In support of this argument, we rely on history, and in particular on the multilateral principles under customary international law underlying international investment agreements States have started concluding in the 1960s. In our view, those principles – mandatory insofar as part of customary international law – are clear manifestations of creeping mandatory multilateralism.

Furthermore, in international law, it is possible to identify mandatory multilateralism in other areas. We briefly discuss mandatory multilateralism concerning sustainable development. We argue that international law might require mandatory multilateralism in international investment law with respect to matters concerning sustainable development. A limitation would apply here: we do not discuss the requirements of this mandatory multilateralism. We focus more on the conceptual foundations of this argument.

#### 3.1 *Mandatory Multilateralism in International Investment Law – Customary International Law Rules*

Here we consider more specifically whether we can identify mandatory multilateralism in international investment law. We answer this question in the affirmative by drawing attention to past and present practices.

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82 See, MISTELIS et al., “Reforming investor-state dispute settlement and promotion of trade and investment co-operation”, G20 Insights, November 22, 2020 | Last updated: December 10, 2020, available at [https://www.g20-insights.org/policy\\_briefs/reforming-investor-state-dispute-settlement-and-promotion-of-trade-and-investment-co-operation/](https://www.g20-insights.org/policy_briefs/reforming-investor-state-dispute-settlement-and-promotion-of-trade-and-investment-co-operation/) (last accessed on 20 May 2021).

First, mandatory multilateral rules constitute the backbones of the international investment law regime. It was so even before States started concluding international investment agreements.<sup>83</sup> In support of this argument, we consider the Abs/Shawcross Draft insofar it included mandatory multilateral rules. Those rules were: *pacta sunt servanda*, protection against expropriation without compensation, non-discrimination of aliens and their property. For instance, when Brandon examined the draft, he concluded that it included those principles.<sup>84</sup> Similarly, Schwarzenberger's critical commentary considered to what extent the draft reflected customary international law. In his view, it included the principles referred above. For example, Article I incorporated the definition of property rights in international law.<sup>85</sup> Also, it included the minimum standard of treatment under international law – expressed by “the positive obligation to ensure the ‘most constant protection and security’ for property.”<sup>86</sup> Furthermore, Article II reflected the principle of *pacta sunt servanda*. In international law, States are under an obligation to comply with their undertakings towards investors.<sup>87</sup> Article IV included the protection against expropriation without compensation.<sup>88</sup>

83 Admittedly, in the context of the United Nations General Assembly, during the 1970s, there were attempts to exclude the element of compensation for expropriation from customary international law. However, these attempts were unsuccessful. On this point, see, for example, ALVAREZ, *cit. supra* note 72, p. 39; SCHILL, *cit. supra* note 3, pp. 37–38.

84 See BRANDON, *cit. supra* note 26, pp. 129–130. Similarly, he reached the same conclusions with respect to the reports of the Council of Europe and the British Parliamentary Group for World's Government Commission; SCHWARZENBERGER, *cit. supra* note 27, p. 147.

85 SCHWARZENBERGER, *cit. supra* note 27, p. 152; for discussions on expropriation at the time, see for example WORTLEY, *Expropriation in Public International Law*, Cambridge, 1959.

86 SCHWARZENBERGER, *cit. supra* note 27, p. 153.

87 SCHWARZENBERGER, *cit. supra* note 27, pp. 154–155. Of course, on this point, he noted that the draft did not provide for the exhaustion of local remedies, which it represented a derogation from international law. However, this consideration does not exclude that, in essence, Article II reflected the principle of *pacta sunt servanda*.

88 SCHWARZENBERGER, *cit. supra* note 27, p. 156. CHENG, *General Principles of Law*, London, 1953, p. 37. Here we have to note that Schwarzenberger correctly pointed out the omission of the “public interest” element in the provisions concerning expropriation under international law.

As we already alluded to, States did not sign the Abs/Shawcross Draft – which became the OECD Draft<sup>89</sup> – for a variety of reasons.<sup>90</sup> However, the OECD Draft's failure did not jeopardise or undermine the existence of the principles above. Brandon considered this point when commenting on the Abs/Shawcross Draft. He specifically referred to capital-exporting States' fear of jeopardising customary law rules by negotiating them in a multilateral convention. In his view, that was not an issue. In his words:

“First, there would be no question of negotiating customary rules. They exist and are generally accepted. Second, since the object of the exercise is to improve the investment climate, if investors would prefer to see the customary rules conventionalized-and there is no objection from the standpoint of the capital-importing countries-why should the governments of the industrialised countries not agree?”<sup>91</sup>

Indeed, when States realised that they would not sign a multilateral treaty, they also considered whether such a failure would have impacted on the relevant customary international law;<sup>92</sup> the acceptance in principle of the draft was aimed at avoiding any such consequences.<sup>93</sup>

89 On the relationship between the Abs/Shawcross draft and the OECD Draft, see CHERNYKH, *cit. supra* note 34, pp. 280–284. As already mentioned, Sir Elihu Lauterpacht was involved in the work of the OECD Draft as well. For example, he answered a question as to whether a limited acceptance of the draft would have weakened the customary international law concerning foreign investments. He replied that: “I do not think concern about the effect of non-acceptance of the relevant rules of customary international law should be allowed to influence the decision whether or not to open the Convention for ratification. To my mind, considerations which are so theoretical or, if real, so marginal in their effect, should not be permitted to obscure the undoubted advantage of extending the network of compulsory jurisdiction links between States in matters affecting property. In my estimate, it would be a positive, even though slight, gain if the Convention were to become operative between even as few as two States”, *cit. supra* note 34, p. 283.

90 See BRANDON, *cit. supra* note 26, p. 128.

91 Amongst them was for example, the fear of being on the receiving end of claims before arbitral tribunals – which was expressed by UK officials with respect to the Shawcross draft. See ST JOHN, *cit. supra* note 24, p. 86. Also, the US did not welcome the focus of the draft on substance, See ICSID, *cit. supra* note 54, p. 16, point 17.

92 ST JOHN, *cit. supra* note 25, p. 95, where she referred to a 1963 letter to the Swiss Government arguing that if the Draft failed, it would degrade investment protection because it could be concluded that the draft did not codify existing norms of international law.

93 *Ibid.* For some consideration on the relationship between customary international law and U.N. resolutions see for example, ROUCOUNAS, “Engagements parallèles et contradictoires”, RCADI, Vol. 206, 1987, paras. 343–347.

These rules are part of customary international law; hence, they are of a mandatory character. They apply regardless of their inclusion in a treaty.<sup>94</sup> For this reason, they fall within the realm of the prohibition of unilateralism.<sup>95</sup> States cannot derogate from them unless otherwise agreed in a treaty. This conclusion is in line, for example, with Kelsen's idea of sovereign equality – which is the cornerstone of the international legal order – according to which “[s]overeignty in the sense of international law can mean only the legal authority or competence of a State limited and limitable only by international law and not by the national law of another State”.<sup>96</sup> As a corollary of their mandatory character, States are under an obligation to coordinate their policies with respect to those principles.<sup>97</sup> In our view, this instance would clearly represent a form of mandatory multilateralism from an international co-operation perspective.

Furthermore, States have incorporated these mandatory multilateral rules in a growing and evolving international investment agreement network – either in bilateral or multilateral treaties. Despite going beyond the scope of this article, in our view, the argument above also reinforces the idea of multilateralism as an ordering paradigm in international investment law, which Schill convincingly argues.<sup>98</sup> Indeed, focusing on the underlying principles of international agreements, the logical conclusion is that there is a mandatory multilateral framework under relevant customary international law norms. Concerning optional treaty standards – such as national treatment or most-favoured-nation clauses – the conclusion is similar: those provisions derive from certain general principles. This consideration allows assimilating, from a conceptual perspective, different provisions across multiple treaties.

94 See for example, AKEHURST, “Custom as a Source of International Law”, *British Yearbook of International Law*, 1974–5, pp. 24–26. For a critical view on this, see BRADLEY and GULATI, “Withdrawing from International Custom”, *Yale Law Journal*, 2010, p. 202. In response to Bradley and Gulati, see for example, BRILMAYER and TESFALIDET, “Treaty Denunciation and ‘Withdrawal’ from Customary International Law: An Erroneous Analogy with Dangerous Consequences”, *Yale Law Journal*, 2011.

95 See for example, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, para. 63. In the words of the ICJ: “[...] by their very nature, [customary rules] must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour”.

96 KELSEN, “The Principle of Sovereign Equality of States as a Basis for International Organization”, *Yale Law Journal*, 1944, p. 208.

97 On the hierarchy of international law norms, see for example’ ROUCOUNAS, *cit. supra* note 93, at paras. 275–279 and more in general ROUCOUNAS, *A Landscape of Contemporary Theories of International Law*, Leiden, 2019, at pp. 316 and 358.

98 SCHILL, *cit. supra* note 2.

Of course, different wording might correctly lead to varying interpretations of these provisions. However, it does not exclude the existence of a multilateral network of principles of international investment law and an ensuing dialogue amongst treaties.<sup>99</sup> The current reform discussions under the auspices of UNCITRAL Working Group III confirm this argument. Indeed, States consider consistency fundamental concerning the same treaty standards and customary international law rules' interpretation. Thus, they impliedly accept the existence of this multilateral framework of principles – either under international law or treaties – and the existence of a dialogue amongst those instruments.

### 3.2 *Mandatory Multilateralism in International Investment Law Concerning Sustainable Investment*

Most pertinently, international law, in some instances, would require mandatory multilateralism. This consideration applies to different areas, of which we have selected one. In particular, we refer to sustainable development. In international investment law, the legal discourse has been increasingly focussing on it, for good reasons.

Intending to contribute to the debate, in this section, we consider whether, from a conceptual perspective, it is arguable that international law requires mandatory multilateralism beyond customary international law norms in the field of international investment law with respect to sustainable development. In order to avoid any possible doubt, we refer to mandatory multilateralism from an international co-operation perspective. That is, the question is whether international law requires States to co-operate and thus prohibits unilateralism. We attempt to argue that since international law requires mandatory multilateral co-operation between States on matters concerning sustainable development, such a co-operation would be equally mandatory in international investment.

Our analysis's starting point is the increasing trend – in international investment law – to recognise the relevance of sustainable development and environmental protection. This trend is evident in the literature,<sup>100</sup>

99 See, for example, *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award of September 11, 2007, para. 367, where the Tribunal observed, for example, that the principle of non-discrimination is underlying National treatment and Most-Favoured-Nation Treatment.

100 See for example, SCHRIJVER, "The Rise of Sustainable Development in International Investment Law", in QUAYLE, *Yearbook of International Law*, 2020, pp. 297–314; BEHARRY and KURITZKY, "Going Green: Managing the Environment through International Investment Arbitration", *American University International Law Review*, 2015, p. 383; BUTLER and SUBEDI, "The Future of International Investment Regulation: Towards a World Investment Organisation?", *Netherlands International Law Review*, 2017, pp. 43–72;



treaties,<sup>101</sup> and case law.<sup>102</sup> For example, Baltag aptly points out that the reform of the international investment regime is underway.<sup>103</sup> In particular, she notes that there is a shift in recent treaties from investment protection towards investment regulation.<sup>104</sup> This change can take different forms. For example, as noted by Chi, States can incorporate sustainable development provisions in the preamble of international investment treaties, both substantive and procedural.<sup>105</sup> The relevance of these measures is undeniable. Indeed, the

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CHI, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*, London, 2018; ICC, "Business Charter for Sustainable Development—Business Contributions to the UN Sustainable Development Goals", Doc. No 213/18-13, 2015; MARLEY, "The Environmental Endangerment Finding in International Investment Disputes", *New York University Journal of International Law and Politics*, 2014, p. 1003; SANDS and PEEL, *Principles of International Environmental Law*, Cambridge, 4th edition, 2018. SANDS, "International Courts and the Application of the Concept of Sustainable Development", *Max Planck Yearbook of United Nations Law Online*, 1999, p. 389; SANDS, "International Courts and the Application of the Concept of Sustainable Development", *Max Planck Yearbook of United Nations Law Online*, 1999; SUBEDI, *International Investment Law: Reconciling Policy and Principle*, London, Third edition, 2016; VASANI and ALLEN, "No Green without More Green: The Importance of Protecting FDI through International Investment Law to Meet the Climate Change Challenge", *European Investment Law*, 2020, pp. 3–39.

101 See for example, Comprehensive Economic and Trade Agreement between EU and Canada ('CETA'), adopted 30 October 2016; Comprehensive and Progressive Agreement for the Trans-Pacific Partnership ('CPTPP'), adopted 8 March 2018, entered into force 30 December 2018, see Chapters 20 on environment and 23 on development.

102 Cases related to sustainable development, for example, are: *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2, Award of November 30, 2017; *Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award of May 4, 2017; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability of December 14, 2012; Interim Decision on Environmental Counterclaim of August 11, 2015; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of December 8, 2016; *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award of December 6, 2016; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Award of October 14, 2016; *Philip Morris Brands SàRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of July 8, 2016; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award of April 4, 2016; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability of March 17, 2015; *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award of October 4, 2003.

103 BALTAG, "From investment promotion and protection to investment regulation", *Columbia FDI Perspectives*, 2020, p. 1.

104 *Ibid.*, p. 2.

105 CHI, *cit. supra* note 100, Part 2.

international investment law regime must “go beyond mere investment/investor protection to a more comprehensive set of objectives”.<sup>106</sup>

However, here we do not intend to focus on how desirable these objectives are. Instead, we want to explore whether it is arguable that international law does require States to co-operate in international investment law with respect to matters concerning sustainable development. The first point we should note is that there are cases in which international law requires co-operation between States. This is the case, for example, with resources, which international law considers “commons”. The concept of global commons applies in different contexts, such as “common areas”, “common heritage”, or “common concerns” of mankind.<sup>107</sup> For example, high seas under the UN Convention on the Law of the Sea (“UNCLOS”) are commons. As a result, States are under an obligation to co-operate for the conservation and management of living resources in the high seas; and establish, through negotiation, multilateral frameworks to guarantee the sustainable exploitation of fisheries and living resources.<sup>108</sup> The concept of common areas also concerns outer space, which includes the moon and other celestial bodies. In light of this, States, under the Treaty on Outer Space<sup>109</sup> must co-operate by giving due regard to the “corresponding interests of all States”.<sup>110</sup>

Furthermore, we should note that under the Rio Declaration on Environment and Development,<sup>111</sup> States have to co-operate “in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystems”. Similarly, the UN Framework Convention on Climate Change provides the “widest possible co-operation by all countries and their participation in an

106 In a recent policy paper, we have submitted that the reformed international investment system should cover “sustainable development, dispute prevention, environmental protection, and protecting SME investments”. See, MISTELIS et al., “Reforming Investor-State Dispute Settlement and Promotion of Trade And Investment Co-operation”, G20 Insights, 2020, note 82.

107 On this point see CRIDDLE and FOX-DECENT, *cit. supra* note 4, p. 280; BRUNNÉE, “Common Areas, Common Heritage, and Common Concern”, in BODANSKY, BRUNNÉE and HEY (eds.), *The Oxford Handbook Of International Environmental Law*, Oxford, 2007 p. 550; BRUNNÉE, “International Environmental Law: Rising to the Challenge of Common Concern?”, Proceedings of the 114th ASIL Annual Meeting, 2006, pp. 307–310.

108 UN Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, Art. 118.

109 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, adopted 27 January 1967, entered into force 10 October 1967, Art. 11.

110 *Ibid.*, Art. IX.

111 Rio Declaration on Environment and Development, adopted 14 June 1992, UN Doc. A/CONF.151/26, Principle 7.

effective and appropriate international response”.<sup>112</sup> Such a duty of co-operation finds support in the international jurisprudence of the ICJ with respect to sustainable development as well.<sup>113</sup>

To the extent that sustainable investment is interwoven with international investment – which is directly related to economic development<sup>114</sup> – in principle, one could argue that the same duty of co-operation might arise in international investment law. To explain and support this view, we employ Criddle and Fox-Decent’s interpretative theory concerning mandatory multilateralism in international law.<sup>115</sup> In their article, *Mandatory Multilateralism*, they argue that manifestations of mandatory multilateralism – such as the ones we have briefly considered above – can be explained by the principles of sovereign equality and joint stewardship. The corollary of this argument would be that mandatory multilateralism is “an emerging institutional feature of international law that brings the institutions of international law into the deepest conformity possible with its fundamental normative principles”.<sup>116</sup>

In particular, concerning common resources and sustainable development more in general, they point out the relevance of the concept of joint stewardship. This idea provides “a framework for apprehending cases where the care of a common concern is expressly consigned (usually via treaty) to multiple parties”.<sup>117</sup> In its essence, this concept applies when global commons

<sup>112</sup> UN Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994.

<sup>113</sup> *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports, 1997, p. 78, para. 141; *North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands and Federal Republic of Germany v. Denmark)*, Judgment of 20 February 1969, ICJ Reports, 1969, pp. 46–47, para. 85; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports, 2010, para. 184.

<sup>114</sup> *Ibid.*, *Gabčíkovo-Nagymaros Project*, para. 140. The ICJ did not consider the relationship between investment and sustainable development. However, it did consider the relationship between economic development and sustainable development. In the words of the ICJ: “Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.”

<sup>115</sup> CRIDDLE and FOX-DECENT, *cit. supra* note 4, p. 280.

<sup>116</sup> *Ibid.*, p. 287.

<sup>117</sup> *Ibid.*, p. 298.

are at stake and its function is two-fold: it prohibits a State unilateral assertion over a global common and it requires States to negotiate in good faith with regards to its collective use.<sup>118</sup> Accordingly, for the purpose of arguing that international law requires mandatory multilateralism in international investment law, we would need to identify multilateral treaties on global commons – which might enter in contact or interaction with international investment law. For example, the UN Framework Convention on Climate Change<sup>119</sup> – which we mentioned above – would fall within that definition. Therefore, it would be arguable, in principle, that international law might require in certain cases a duty to co-operate in international investment law – unless we want to deny the potential relationship/interference between investments and common resources.

#### 4 Concluding Remarks

Multilateralism, very much like pluralism of norms, is embedded in the architecture of international investment law. Even before the conclusion of international investment agreements, it was already there – in few, limited but well defined, mandatory multilateral rules. During the 1960s, multilateralism's dimensions involved the project of a multilateral treaty on investment protection, an investment insurance organisation, and an arbitration convention – yet only the last two survived. Simultaneously, those few multilateral rules were being incorporated in bilateral treaties, which States considered apt to replace a multilateral treaty.

During the 1970s, the existence of those few mandatory multilateral rules was contested but eventually confirmed. Between 1980–2000, other attempts to create a multilateral treaty were made, yet they failed. By 2010, multilateralism was a paradigm that would assist international lawyers and academics in making sense of a system constituted of norms deriving by general principles but contained in different treaties – with potentially different wording. In 2021, multilateral approaches to procedural aspects appear the only viable solutions to ensure consistency of interpretation of those provisions.

In sketching multilateralism's conceptual change, this article has tested a general assumption on multilateralism. That is, States' participation in multilateral practises is left to their discretion: it is primarily consensual and

<sup>118</sup> *Ibid.*

<sup>119</sup> Paris Agreement to the United Nations Framework Convention on Climate Change, 12 December 2015, entered into force 4 November 2016.

voluntary. This article has questioned that assumption and pointed out that a form of mandatory multilateralism has always been present in international investment law, at the very least as a creeping mandatory multilateralism. Then, we considered whether it is possible to argue and justify the extension of mandatory multilateralism, whether creeping or outright, to sustainable development matters in international investment law. We have attempted to answer that question in the affirmative by employing Criddle and Fox-Decent theory on mandatory multilateralism in international law.

At the outlook of this article, we also wish to identify – as areas for future research – a few other prominent manifestations of emerging or creeping mandatory multilateralism in international investment law. These would include, *inter alia*, the multilateral dimension of the rule of law, international condemnation of corruption and bribery, and the requirement that business respect human rights and the safeguarding of the right to state to regulate. The very fact that mandatory multilateralism is creeping does not undermine its existence or significance: it merely presents the surmountable challenge of having to engage in the intellectual and practical exercise of identifying its parameters and content. At the same time, mandatory multilateralism does not require universal acceptance of its content: it suffices to establish that States, international organisations and other stakeholders voluntarily accept the existence of the multilateral norms and make steps to either consensual follow them or at the very least not breach them.