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IDEOLOGICAL, LEGAL AND EMPIRICAL FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW – A FEW OBSERVATIONS

Abstract

There seems to be little doubt in both practice and doctrine that international investment law presents a regime striving for, if not already achieving, substantive multilateralism and uniformity of applied principles, rules and interpretations. This article, however, takes another look at what can be described as the foundations of such a regime – international investment agreements – and in particular ideological, legal and empirical issues surrounding them. A number of observations thus made significantly problematize the assertion that international investment law was indeed made and expected to become a multilateralized, uniform edifice in a substantive sense.
Keywords: *international investment law, international investment arbitration, international conventions*

1. Introduction

There seems to be little doubt in both practice and doctrine that international investment law presents a regime striving for, if not already achieving, substantive multilateralism and uniformity of applied principles, rules and interpretations. This article, however, takes another look at what can be described as the foundations of such a regime – international investment agreements – and in particular ideological, legal and empirical issues surrounding them. The aim is not to offer a comprehensive account of the IIL development – this has been done in

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literature.[2] Rather, the goal is to focus on a number of problematic features of IIL's development and existing foundations that indicate that its current form and manner operation is nothing predestined or inevitable.

The primary aim is to problematize a number of the regime's foundations, specifically the IIAs. After focusing on particular ideological (section 2.), legal (section 3.) and IIA conclusion-related (section 4.) controversies, the argument is made that there was no firm support for expecting (at least from the perspective of a number of actors) that the foreign investment protection will necessarily coalesce into an autonomous legal regime characterized by the quasi-legislative nature of dispute-settlement or by the de facto multilateralization of its rules. Section 5. thus concludes.

2. Ideological controversies

The first issue of normative importance is the one of the ideological orientation of the IIAs themselves. Existence of a clear cut economic (if not broader socio-political) ideology that underpins the network of IIAs would certainly offer a good starting position for normatively orienting their interpretation in practice. It is indeed important that the study of IIL is placed in its proper policy and political context, particularly bearing in mind its chequered and turbulent past.[3] Identification of an unambiguous ideological pivot point would arguably reinforce the conclusion that ideological and legal struggle over the rules and standards in this area has been conclusively settled.[4]

There is indeed a strong argument to be made that, as a starting ideological point, IIAs fit the (neo)-liberal policy bill.[5] *Grosso modo,* their preambles call for the promotion and protection of private investment

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[2] Notably in C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Century*, University of California Press, Berkeley 1985 and K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, 2013.

[3] PT Muchlinski, „Policy Issues" in *The Oxford Handbook of International Investment Law* (eds. Peter Muhclinski, Federico Ortino, Christoph Schreuer), Oxford University Press, 2008, 5.

[4] See for earlier work suggesting this A. Gunawardana, J. E. Alvarez, „The Inception and Growth of Bilateral Investment Promotion and Protection Treaties", *American Society of International Law Proceedings*, 86/1992, 544, and more recently S. Hindelang, „Bilateral Investment Treaties, Custom and A Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited", *Journal of World Investment and Trade* 5/2004, 789.

[5] S.W. Schill, *The Multilateralization of International Investment Law*, Cambridge UniversityPress, 2009, 377.

as a path towards economic development.[6] In their essence, IIAs are seen to be credible instruments that curb potential state interference and protect private property,[7] particularly through the '*enlightened* standards for the treatment and taking of foreign investment'.[8] The newer IIAs are seen as the expression of a 1980's and 1990's backlash against the New International Economic Order (NIEO), as a generation of leaders emulating Thatcherism and not socialism came to power and 'Asian tigers' were seen as the trailblazers for stagnating African and South American economies.[9] IIAs were put in place to allow 'market forces to unfold'.[10] Yet, it seems possible to problematize and reassess these often repeated tenets in a number of ways, in particular the necessarily and permanently (neo)-liberal economic understanding of these instruments.

Firstly, it is questionable that the commitment to securing private (foreign) investment in itself is an indication of a specific prevailing economic ideology in a concluding State. Foreign investment is practically universally desirable, with historically rare and ultimately unsuccessful attempts at economic and investment autarchy. Perhaps it is not necessary to go further than the arguably only surviving examples of liberalism's direct opposites – regimes in Cuba and North Korea. Both have made continuous attempts (as did other former Communist countries)[11] to attract foreign investment (including conclusion of IIAs)[12] without at the same time making parallel wholesale changes in their economic systems. While, of course, these countries are rather exceptional and interpretation of their IIA obligations would still certainly not be conducted in accordance with the North Korean ideology of *Juche* or Marxism-Leninism, the point is

[6] See for early works P.O. Proehl, „Private Investments Abroad", *Journal of Public Law* 9/1960, 362, 364 and C.N. Brower, S.W. Schill, „Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?", *Chicago Journal of International Law* 9/2008-2009, 471, 489.

[7] As Salacuse notes, while the investment and market liberalization was not always specifically stated in the IIAs, that goal 'has clearly been in the minds of developed country negotiators and is sometimes reflected in background documents', J.W. Salacuse, „The Treatification of International Investment Law", *Law and Business Review of the Americas* 13/2007 155, 160.

[8] S.M. Schwebel, „The Overwhelming Merits of Bilateral Investment Treaties", *Suffolk Transnational Law Review* 32/2009, 263, 267 (emphasis added).

[9] D. Vagts, „Foreword to the Backlash against Investment Arbitration", in: *The Backlash Against Investment Arbitration: Perceptions and Reality* (eds. Michael Waibel *et al.*), Kluwer, Alphen aan den Rijn 2010, xxiv.

[10] S.W. Schill, 364.

[11] For the former Socialist Federative Republic of Yugoslavia, see S. Woodward, „The Political Economy of Ethno-Nationalism in Yugoslavia", *Socialist Register* 39/2009, 73, 85-90.

[12] Cuba has 39 BITs in force (and 19 more signed) with countries from all across the globe. See *http://investmentpolicyhub.unctad.org/IIA/CountryBits/52#iiaInnerMenu* for details. It has also enacted the latest incarnation of its Foreign Investment Act in 2014, guaranteeing considerable incentives and substantive protections.

still there – desiring FDI or even concluding IIAs does not equal automatic across the board acceptance of any particular economic ideology.

Secondly, even under the assumption that entering into an IIA meant accepting a very particular economic vision at a particular point in time, it is highly questionable if this would mean adherence to the same vision *ex tunc ad infinitum*. As will be revisited in section 1.3.3. below, the diffusion of BITs was given an immense impulse by coordinated efforts of international organizations, Western governments and private arbitration industry.[13] The subtle or less subtle pressures to conclude BITs as part of loan conditions[14] and the UNCTAD 'speed-dating' sessions for mass BIT signings[15] might indeed suggest that conclusion of BITs was seen by all those involved as an entry ticket into the contemporary economic logic of the neo-liberal Washington Consensus.[16] But what happens is that (or any other) consensus stops being accepted as such?[17] How can, in other words, IIAs cope with the need to interpret their (broad) provisions in an evolutionary manner?[18] Saying that IIAs are somehow excluded from the evolving interpretation would not only be doctrinally questionable, but also beg the question when the canon of their (ideological/teleological) interpretation was irrevocably entrenched. Was it in 1959 or 1991 or in 2008? There would hardly seem to be a satisfying answer.

Thirdly, and relatedly, it is hard to establish that any sort of sufficiently clear and precise economic 'gospel' ever existed so as to provide the interpretational guidance and tie-break solutions in the proverbial 'hard' cases. Following the 'multilateralization' premise, the same ideological underpinning would have to be assumed for IIAs concluded among more than 150 States participating in the regime, forming countless pairs of treaty signatories. Arguably, from the earliest phase of the IIA era, the lack of any universally acceptable ideological

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[13] L.N. Skovgaard Poulsen, „Bounded Rationality and the Diffusion of Modern Investment Treaties", *International Studies Quarterly* Vol. 58, 1/2014, 1 and S. Jandhyala, W.J. Henisz, E.D. Mansfield, „Three Waves of BITs: The Global Diffusion of Foreign Investment Policy", *Journal of Conflict Resolution* 55/2011, 1047, 1054-55.

[14] Z. Elkins, A.T. Guzman, B.A. Simmons, „The Diffusion of Bilateral Investment Treaties, 1960-2000", *International Organization* 60/2006, 811, 833.

[15] L. N. Skovgaard Poulsen, 11.

[16] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1054.

[17] As is argued, the scrutiny and shift of policies away from the Washington Consenus puts the whole rationale of IIL into question. See in that sense G. Van Harten, „Investment Rules and the Denial of Change", *University of Toronto Law Journal* 60/2010, 893, 899.

[18] See P.T. Muchlinski, „Towards a coherent international investment system: key issues in the reform of international investment law", in: *Prospects in International Investment Law and Policy: World Trade Forum* (eds. Roberto Echandi, Pierre Sauvé), Cambridge University Press, 2013, 413-414.

underpinning to the treaties was evident to those in the field. Writing as early as 1960, Proehl states:

> [h]owever, experiences with earlier proposals for multilateral treaty protection for investments have already indicated rather clearly that the capital-importing nations are unwilling to go along with an agreement which commits them to an 'open-end' investment system and puts ultimate control over any segment of national economic life beyond governmental reach by reason of treaty right. Our sound and stable way of doing business cannot simply be extended by fiat to the underdeveloped countries. It cannot be unilaterally imposed nor less than freely accepted.[19]

It is equally unlikely that this has universally changed over the course of intervening decades. Despite thousands upon thousands of treaties signed, as Calamita notes, 'these treaties in the main did a poor job of creating or articulating a political settlement on the underlying debate with respect to the appropriate standard of treatment of foreign investors.'[20]

Finally, the commitment to certain key tenets of treatment and property protection by a host State as embodied in an IIA does not allow concluding that *exceptions* to these tenets are likewise conclusively settled.[21] The broadness and yet appealing superficial appearance of these provisions makes them almost impossible to disagree with as a matter of principle. A State announcing beforehand (even implicitly) that it will not treat investors fairly or will not pay anything for what it expropriates is indeed (especially today) a rather difficult one to find. But at the same time, this does not mean that adherence to a broad commitment to protection of investments and property necessarily implies agreement

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[19] P.O. Proehl, 364 (footnotes omitted). See also generally K. J. Vandevelde, „The Political Economy of a Bilateral Investment Treaty", *American Journal of International Law* 92/1998, 621.

[20] N.J. Calamita, „The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions"" in *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (eds. Jeffrey Jowell, J Christopher Thomas, Jan van Zyl Smit), Bingham Centre for the Rule of Law, Singapore Academy of Law, Singapore 2015, 110. See also in a similar vein P. T. Muchlinski (2008), 17 and M. Waibel, A. Kaushal, L.K.H. Chung, C. Balchin, „The Backlash against Investment Arbitration: Perceptions and Reality", in: *The Backlash Against Investment Arbitration: Perceptions and Reality* (eds. Michael Waibel *et al.*), Kluwer, Alphen aan den Rijn 2010, xlvii.

[21] As sometimes noted, there is the issue of the State 'striving for the public good, however imperfectly.' (M. Waibel *et al.*, xlvii) that simply cannot be ignored. Paraphrasing Karl Llewelyn, Salacuse notes the 'continuing conflict between the legal form imposed by investment treaties and host governments legitimate right to regulate in response to the demands of life.' J. W. Salacuse (2007), 166.

on the exceptions to this protection. This is particularly so regarding the 'older generation' BITs (characterised by cursory provisions) which still form an immense part of existing BITs.[22] But even the newer ones with more specific exceptions and carve-outs, as Mills points out, have not done a particularly good job in clarifying the issues.[23]

Put simply, even the developed Western capitalist democracies which are rightfully seen as the progenitors of the IIL foundations for most of its history, differ so significantly in their approaches to market economy that it would be illusory to believe the IIAs concluded by them implied a single, uniform model of 'free market capitalism'. As Fritz Scharpf stated it the context of the EU:

> […]the economic, institutional, cultural and political heterogeneity of European states is extreme. […] In effect, not only the German model of capitalism is, in Wolfgang Streeck' words 'parochial' and cannot be generalised, but the same qualification also applies in principle to all non-liberal models of capitalism and the welfare state.[24]

Likewise, the evolution of a particular economy and its needs over time cannot be ignored. As was again recognized from the dawn of the IIA era, the measures that developing countries must take may be seen as unacceptable in a mature economy – yet they were quite acceptable to those mature economies in their earlier stages.[25] Can it be said that there is anything so definite in the content of IIAs that prevents different readings of the underlying economic logic depending on the particular host State, its level of development and particular circumstances?

That does not seem to be the case. While particular specificities cannot completely take over so as to justify whatever measure a State has taken, it is also correct to say that history did not end in 1991. It keeps posing economic and political challenges of different magnitude to

[22] As Vandevelde argued, the IIAs were almost universally silent on such issues as various facets of a market failure (restrictive business practices, taxes, subsidies etc.) K. J. Vandevelde, 640-641.
[23] See generally A. Mills, „Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration", *Journal of International Economic Law*, 14/2011, 469.
[24] F. W. Scharpf, „After the Crash: A Perspective on Multilevel European Democracy", *European Law Journal* 21, 2015, 384, 395.
[25] P. O. Proehl, 365. A. A. Shalakany, „Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism", *Harvard International Law Journal*, 41, 2000, 419, 465-468. See also D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*, Cambridge University Press, Cambridge 2008 on the earlier phase of US economy and its far more permissive approach to public interest expropriation.

practically every country participating in the IIL regime.[26] Saying that the same, clear and precise economic dictum underlies thousands of *bilateral* instruments between vastly differing treaty parties – providing at the same time reliable guidance for interpretation – seems highly doubtful. It is exactly this bilateral nature of arrangements that will be examined next, with a focus on further challenges that it poses for a uniform and '*de facto* multilateral' edifice of the IIL.

3. Legal controversies – multilateralism *via* bilateral treaties?

The dense network of IIAs that undergirds the IIL regime is bilateral to a vast extent. The number of plurilateral agreements in this field (often measured on the fingers of both hands) is statistically negligible when compared to the total number of IIAs. This, of course, does not represent an accurate picture in terms of importance of these agreements otherwise. Agreements such as NAFTA (Chapter 11) and Energy Charter Treaty (Part III) have, for example, played a very prominent role in the development of IIL in terms of generating ISDS jurisprudence.

Yet, the fact remains that we are facing a largely bilateral framework of operation. This fundamentally differs, *inter alia,* from the IIL's perhaps 'closest relative' – the international trade law regime, embodied in the WTO and its set of agreements. It is worth noting that WTO multilateralism is also an aspect deemed so critical that the reappearance of even plurilateral trade frameworks (such as mega-regionals) has been received with dismay and fears about the (fragmented) future of the legal regulation of world trade.

Can such a fundamental difference be waived away in terms of legal consequences – i.e. can both regimes be seen as 'equally multilateral' regardless of their different treaty bases? For some authors there is little doubt in this regard. According to Sauvant, the IIL is an even stronger regime than WTO law.[27] For others, a legal 'glue' for the whole regime can be found in the operation of the MFN clauses. As Schill suggests:

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[26] As Alvarez noted in 2005, it was 'premature to suggest that history is over and that old north-south divisions […] cannot reemerge […].' J. E. Alvarez, „The Emerging Foreign Direct Investment Regime", *American Society of International Law Proceedings*, 99, 2005, 94, 96. Somewhat presciently in the light of events to come, he also noted that '[n]otably, the FDI regime has not yet been tested by a major crisis […]. It is not yet clear how much of a bite the BITs will actually have when push comes to shove.' *Ibid*. See also M. Waibel *et al*., xlvii – xlviii.

[27] K.P. Sauvant, „Foreword", in: *Yearbook on International Investment Law & Policy 2012-2013* (ed. Andrea K. Bjorklund), Oxford University Press, Oxford 2014, xxxv.

> MFN clauses not only multilateralize the level of substantive investment protection, but also have a multilateralizing impact on dispute settlement procedures available to foreign investors. […] MFN clauses, therefore, create a uniform regime for the protection of foreign investors in any given host State independent of the investor's nationality.[28]

Another common argument for overcoming the bilateral character of IIAs is the sufficient similarity of wording of substantive provisions that would make differing interpretations unacceptable from the viewpoint of consistency and predictability. The wording which is so similar, the argument goes, points toward an implicit striving for multilateral interpretation and regime building.

Both of the said arguments doubtlessly have merit. It is however possible to problematize them to a certain extent. Interestingly enough, they seem to (at least partially) contradict each other. Speaking in terms of substantive provisions, the fact that there is a need and readiness to resort to MFN suggests that provisions are dissimilar enough to warrant differing interpretations. Substantive standards of treatment are not, as is often cautioned, really uniform despite their often similar language. It is also perhaps questionable how useful the MFN clauses actually are outside the relatively straightforward cases of very specific provisions that clearly differ among two IIAs. The culprit in that sense is again the recurring issue of the broad wording of these instruments. It remains highly doubtful if a variation in a used phrase - which does not have a previously settled meaning in any case - is sufficient to trigger the MFN mechanism. For example, is 'reasonable' different from 'appropriate' and how? Which one is necessarily more favourable? Such distinctions arguably can become relevant due to the accumulation of jurisprudence through the 'output' of the IIL's dynamic element, but they do not seem on their own to have critical intrinsic value or decisively contribute to seeing a bilateral framework as a multilateral one.

The role of the dynamic element further gains importance if the lack of potential analogies is taken into account. The '*de jure* bilateral-turning- *de facto* multilateral' dynamic of IIL does not seem to have a clear counterpart elsewhere in public international law. A somewhat analogous situation might exist with bilateral extradition treaties – yet the lack of any de-localised dispute settlement seems to prevent any sort of transnational regime of extradition law emerging. Similar issue arises with double

[28] S. W. Schill, 366.

taxation treaties.[29] All this adds weight to the *sui generis* character of IIL development, thus raising further questions if its developmental path was indeed inevitable and is irreversible in all regards.

Even under the assumption that all IIA provisions were identical, it would still be far from settled that their 'multilateralized' interpretation was necessary. If these treaties are indeed *leges speciales* in the matter of investor-State regime aimed at differing from the pre-existing 'universal' law on the topic (whatever its content and merits/demerits might be),[30] it would seem that a reversal towards universalism would have to be more than lightly justified. The 'autonomous legal system'[31] of each IIA is limited or ignored altogether by such a reversal. The canon of interpretation in international law, as embodied specifically here by VCLT Articles 31 and 32, simply does not support the critical step of introducing a previous interpretation of an unrelated bilateral agreement to aid and guide the interpretation of a provision of the IIA on which a dispute at hand is based. It is the very lack of such a rule that has prompted practitioners and academics, such as Gary Born, to propose the introduction of a new rule in that regard – in order to formally legalise a practice that seems to be prevalent and yet on murky legal grounds.[32] While all the problematic aspects of such proposals cannot be addressed here,[33] their very existence is indicative of a certain discomfort regarding the bilateral foundations of IIL.

This discomfort can arguably only be accentuated when taking into account the unmitigated failure of the attempt to formally multilateralize the IIL rules in the form of Multilateral Agreement on Investment (MAI). The OECD-led attempt to formulate a multilateral agreement that would build upon the common denominators of existing IIAs ended without agreement in 1996, in the whirlpool of NGO protests, poor political management of the process, lukewarm business support and lack of

[29] See generally E.A. Baistrocchi, „Patterns of Tax Treaty Disputes: A Global Taxonomy“, in *A Global Analysis of Tax Treaty Disputes* (ed. Eduardo A. Baistrocchi), Cambridge University Press, Cambridge 2017 (Forthcoming) on the limited and necessarily court-led attempt to provide the uniform meaning of terms found in tax treaties.

[30] See generally on this B. Kishoiyian, „The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law“, *Northwestern Journal of International Law & Business*, 14, 1993-1994, 327 and A. Gunawardana, J. E. Alvarez, 548-550.

[31] A. Stone Sweet, F. Grisel, „The Evolution of International Arbitration: Delegation, Judicialization, Governance“, in *International Arbitration and Global Governance: Contending Theories and Evidence* (eds. Walter Mattli, Thomas Dietz), Oxford University Press, Oxford 2014, 30.

[32] Gary Born, Should Investment Treaties Have Their Own Rules of Interpretation?, *http://kluwerarbitrationblog.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation/*, last visited 2 October 2016.

[33] See for some preliminary remarks Velimir Živković, Rethinking Interested Parties in ISDS: The case of 3rd States, *http://kluwerarbitrationblog.com/2015/12/03/rethinking-interested-parties-in-isds-the-case-of-3rd-states/*, last visited 10 October 2016.

definite will among participating States.[34] For some, it was 'doomed' as it was an effort to 'replace the regulatory sovereignty of governments with absolute standards of investor protection'.[35] The resistance to MAI, it has to be noted, was coming even from key countries that would have been expected to push vigorously for it within OECD and beyond.[36]

It would be wrong to assume MAI efforts demonstrated a complete lack of agreement among OECD countries involved. A large number of issues were successfully negotiated before the collapse.[37] But it seems highly implausible to suggest that failure to fully agree even between 'like-minded' OECD countries, followed by a similar failure of WTO efforts, plays no role in normatively assessing the practice of IIL regime building. The failure to specifically agree simply has to account for something and is arguably more meaningful than if the attempt had never even occurred.[38]

The issue of what the states 'have been comfortable' with, or simply what they actually agreed to when concluding IIAs is thus an important one. Going beyond the ideological and legal aspects of the IIA network development, it is warranted to delve into more 'subjective', consent-related issues surrounding IIA conclusion. Discussing at both theoretical and empirical level what at least some states (could have) wanted and were aware of when entering into IIAs seems warranted when thinking about how the regime of IIL is to operate in normative terms.

4. Controversies surrounding IIA conclusion

The issue tackled in this section can also be phrased as the one of 'legitimate expectations' of States when entering into IIAs. To anyone with even a passing knowledge of the area, the concept of investor's 'legitimate expectations' in ISDS jurisprudence is impossible to miss. It is however desirable to re-orient the lens towards the States as well –

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[34] R. Geiger, „Multilateral Approaches to Investment: The Way Forward", in: *The Evolving International Investment Regime: Expectations, Realities, Options* (eds. Jose E. Alvarez *et al.*), Oxford University Press, Oxford 2011, 159-160 and D. Schneiderman, 174-175. See also generally J. Kurtz, „NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment", *Melbourne Journal of International Law* 3/2002, 214.

[35] R. Geiger, 160.

[36] On the situation in Canada, see D. Schneiderman, 196-197.

[37] See D. Schneiderman, 174-175 and generally R. Stumberg, „Sovereignty by Substraction: The Multilateral Agreement on Investment", *Cornell International Law Journal*, 31, 1998, 491.

[38] See in this sense, for example, J. J. Saulino, J.S. Kallmer, „The Emperor Has No Clothes: A Critique of the Debate over Reform of the ISDS 'System'", *Transnational Dispute Management* 11/2014, 2.

the same 'masters of the treaties' from whom, arguably, the rights of the investors stem from in the first place.

It is also warranted for this discussion to distinguish between the expectations relating to the operation of IIL as a regime, particularly in the ISDS sphere from the expectations that IIAs will translate into increased FDI flows – something that remains empirically controversial. The key question is if the States concluding the IIAs, both developed and developing ones, and primarily during the pre-ISDS explosion era of 2000's, could have expected (and thus fully rationally consented to) the IIL regime as it stands today? Could have a relatively homogenous, self-referencing, strongly enforced regime of foreign investment protection been legitimately expected based on all the surrounding circumstances?

This is important as every new emerging regime necessarily institutionalises new priorities and, critically, new bias of those actors and experts (such as arbitrators) operating within it.[39] As long as bias is 'well established, widely known, and resonates in the community to which the institution speaks'[40] this is not a problem. Potential redeeming quality if this is not the case is a level of political control over the regime – something that, however, is largely absent in PIL sub-regimes and tends to strengthen the role of functional experts.[41] As Buchanan and Keohane state: 'It is not enough that that the relevant actors agree that *some* institution is needed; they must agree that *this* is the institution that is worthy of support.'[42]

It is, with a degree of simplification, possible to identify two 'schools' of thought on the subject of IIA conclusion. One can best be described as the one of 'rational choice', in the sense that it presents the narrative of a generally rational approach of States IIA conclusion, with sufficiently clear understanding of aims, potential benefits and arising liabilities. A different view is one presented by what has been dubbed the 'bounded rationality' narrative, which seriously problematizes such assumptions.

4.1. *'Rational choice'*

While allowing for certain differences, the crucial point of agreement of those authors within the 'rational choice' camp is that the IIA conclusion was a rational response to the unsatisfactory state of investor-

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[39] M. Koskenniemi, „The Fate of Public International Law: Between Technique and Politics“, *The Modern Law Review*, 70, 2007, 1, 5-6. See also A. Shalakany, 465-468.
[40] M. Koskenniemi, 6.
[41] *Ibid*., 9.
[42] A. Buchanan, R.O. Keohane, „The Legitimacy of Global Governance Institutions“, in: *Legitimacy in International Law* (eds. Rüdiger Wolfrum, Volker Röben), Springer, Berlin-Heidelberg 2008, 29.

State international law pre-1959, a response which aimed at ensuring clearness and consistency and was put into place with general awareness of the cost-benefit calculus that accompanied entering into the IIAs.[43] Portraying the process of IIA conclusion as a response to uncertainty undeniably has appeal and is plausible in that regard. As Salacuse puts it, from a legal side of things, it was an attempt to provide rules which were 'complete, clear, specific, uncontestable, and enforceable'.[44] But it can also be legitimately seen as a political choice. According to Calamita, the added goal was 'reducing the likelihood of renewed disagreement with respect to the content or existence of protections in customary international law',[45] an important goal in the age of the New International Economic Order battles.

It should be noted that he stated goal of clarity and specificity is not *necessarily* marred by the open-textured nature of the substantive provisions. Not only that such provisions in themselves can be a rational choice in face of uncertainty about future developments, they are also something widespread in international treaty-making. As is sometimes remarked – a treaty is a 'disagreement reduced to writing'.[46] This all potentially indicates that States were not necessarily any less rational about IIAs than they were about other concluded treaties – further implying that they could perhaps rationally expect the burgeoning of the IIL regime based on those provisions.

The said rationality is arguably most emphasised in the work of Elkins, Guzman and Simmons.[47] According to them, the proliferation of BITs is propelled in good part by the competition among potential host countries for credible property rights protections that investments require.[48] BITs are therefore viewed by hosts and investors as devices that raise expected return on investment by assuming government is making a credible commitment to treat foreign investment 'fairly' – thereby provided 'competitive edge' in attracting capital especially for those

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[43] The most important works in this general vein are A. T. Guzman, „Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties", *Virginia Journal of International Law*, 38, 1998, 639 and Z. Elkins, A.T. Guzman, B.A. Simmons.
[44] J. W. Salacuse, „The Emerging Global Regime for Investment", *Harvard International Law Journal*, 51, 2010, 427, 439.
[45] N. J. Calamita, 111.
[46] P. Allot, „The Concept of International Law", *European Journal of International Law*, 10, 1/1999, 31, 43. See also in similar vein M. Koskenniemi, 11.
[47] Z. Elkins, A.T. Guzman, B.A. Simmons; J. W. Salacuse (2007), 158-161 follows the same basic idea of rationality, although not necessarily with the similarly strong emphasis on the competitiveness aspect.
[48] Z. Elkins, A.T. Guzman, B.A. Simmons, 812.

States with known low credibility.[49] BITs raise ex post cost of reneging on contracts by reducing the ambiguity of the host government obligations and making a clear statement with much greater reputational costs if later reneging.[50]

Perhaps the most critical assumption for the purposes of the present discussion is however the one that a decision to sign a BIT *always* involves an assessment by the host of the expected benefits of attracting FDI outweighs the *sovereignty costs*.[51] Simply put, this presupposes that sovereignty costs could be known in advance, and that the operation of the IIA enforcement mechanism in that sense could have been rationally foreseen.

While there are certainly other aspects of rational behaviour that can explain IIA 'explosion',[52] the focus on rational and informed competitiveness with other capital-importing States is argued to provide best explanations at least for developing countries.[53] It can also explain, according to Guzman, the collective resistance portrayed by the NIEO activity and the piecemeal acceptance of IIAs on the other hand. As for the position of the developed countries, the rationality seems clear enough – it was a rational response to the emerging resistance of newly independent countries. While the existing PIL rules were still unclear, in comparison to newly proposed NIEO concepts they were likely to be a far more protection-friendly set. In that sense, 'rational choice' theorists also suggest host countries are 'price-takers' with respect to the terms of treaties – they realize that they must compete with others and therefore cannot demand changes to the core provisions of the treaties.[54] Whether or not developed states could have from their side be more aware how the protection regime will operate does not seem to be specifically addressed, but if the assumption of knowing sovereignty costs applies to developing

[49] *Ibid*., 822-823.

[50] *Ibid*., 823.

[51] *Ibid*., 825. Similar assumption of availability of full information for 'hard-nosed' negotiations seems to be present in J. J. Saulino, J.S. Kallmer, 5.

[52] Z. Elkins, A.T. Guzman, B.A. Simmons, 819.

[53] Z. Elkins, A.T. Guzman, B.A. Simmons, 841-842 suggests that such explanation has strong theoretical foundation and is most consistently supported by data. For a more nuanced, but important look on competitiveness and emulation, see also S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1049-1052 and 1065. See also P. Ranjan, „Indian Investment Treaty Programme in Light of Global Experiences", *Economic and Political Weekly*, Vol. 45, 2010, 68-70.

[54] Z. Elkins, A.T. Guzman, B.A. Simmons, 822. See similarly T. Allee, C. Peinhardt, „Delegating Differences: Bilateral Investment Treaties and Bargaining Over Dispute Resolution Provisions", *International Studies Quarterly*, Vol. 54, 1/2010, 22-24 and more generally B. A. Simmons, F. Dobbin, G. Garrett, „Introduction: The International Diffusion of Liberalism", *International Organization*, 60, 2006, 781.

states, the same assumption would presumably apply (if not more) to developed ones.

4.2. *'Bounded rationality'*

The 'rational choice' of States when entering into the IIAs can be questioned at both the theoretical and empirical level. The questionable nature of rationality extends to both the expectations of increased FDI and to how the IIL will be enforced in practice. A closer scrutiny of a number of claims and tenets of the 'rational choice' approach seems to lead to a conclusion that a considerable number of States engaged, at best, in wishful thinking more than a cost-benefit analysis with anticipated sovereignty costs fully included.

The expectation of increased FDI as a result of IIA conclusion would arguably be rational in face of consistent and convincing evidence of causation, or at least some form of correlation between the two events. It has been already mentioned and is relatively often discussed in theory that any such evidence is not present, as studies are on the whole inconclusive.[55] But more importantly, one should not fall into a trap of anachronism. When the tidal waves of IIA conclusion were the strongest, those same studies were not actually available. Measuring of these correlations seems to be a relatively recent phenomenon, arguably inspired to a considerable extent by the backlash against IIL, and the need to set the record straight on the issue if IIAs are actually 'doing anything'. Two other factors seem to have been more relevant at least for a number of capital-importing countries. One is simply a form of confirmation bias, as in the readiness to believe in anecdotal evidence that IIAs will indeed increase FDI.[56] The second one is emulation – the strive to 'compete' with other capital-importing countries by concluding IIAs seems to have been more alike to herd-like emulation out of fear that they will somehow be left behind, regardless of whether or not IIAs indeed prove beneficial.[57] Whether selective belief, fear and peer pressure lead to 'rational choice' is indeed highly debatable.

The case for 'rational choice' regarding expectation of increased FDI is further weakened by the lack of factual backing for some of the key assumptions put forward by its theorists. Perhaps critically, it is far

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[55] See generally P. Karl Sauvant E. Lisa Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*, Oxford University Press, Oxford 2009.

[56] L. N. Skovgaard Poulsen, 3-4.

[57] L. N. Skovgaard Poulsen, 4. See also O. Chung, „The Lopsided International Law Regime and Its Effect on the Future of Investor-State Arbitration", *Virginia Journal of International Law*, 47, 2007, 953, 962.

from clear that States lacked credible means of guaranteeing security of property to foreign investors. As discussed in detail by Jason Yackee, investment contracts were not only known but widely used and strictly enforced by international tribunals, resulting in a number of famous arbitral awards.[58] Portraying IIAs as a revolutionary tool in that regard is at least questionable.

But equally, if not more, the rationality regarding understanding of IIAs legal and regime-building implications is suspect from a theoretical viewpoint when considering the wording of the IIAs themselves, as well as the legal situation preceding and surrounding them. It seems highly suspect that either developed or developing countries could have predicted how the IIA provisions will indeed be put into practice and whether or not they might emerge into a homogenous regime.[59] If, for example, one could suggest that States would have relied on international law rules to help in their interpretation, not only the 'ephemeral' nature of law preceding IIAs is an immediate obstacle,[60] but it concurrent development as well. In the *Barcelona Traction* case, the ICJ remarked regarding investor-State relations that (in 1970) no generally accepted rules in the matter have crystallized on the international plane. But even 13 years later, (then) Judge Rosalyn Higgins commented that state liability in the context of the regulatory state is a newer theme for international law.[61] It is perhaps only after the US-Iran Tribunal activity was in full swing that development took place within the PIL sphere,[62] although that occurred roughly quarter of a century after the IIAs appeared on the scene.

But even if there were concurrent PIL developments, to see their effect regarding ISDS there would have to have been cases to test them.

[58] See generally J.W. Yackee, „Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality", *Fordham International Law Journal*, 32, 2009, 1550. See also L. N. Skovgaard Poulsen, 4.

[59] See generally on this G. Van Harten, M. Loughlin, „Investment Treaty Arbitration as a Species of Global Administrative Law", *European Journal of Interantional Law,* 17, 1/2006, 121, 150 and G. Kahale III, „Is Investor-State Arbitration Broken?", *Transnational Dispute Management* 9/2012, 20-21. See also A. T. Katselas, „Exit, Voice, and Loyalty in Investment Treaty Arbitration", in *The Role of the State in Investor-State Arbitration* (eds. Shaheeza Lalani, Rodrigo Polanco Lazo), Brill Nijhoff, Leiden 2015, 212-213.

[60] J. W. Salacuse, N. P. Sullivan, „Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain", *Harvard International Law Journal*, 46, 2005, 67, 68. See also specifically on this P.O. Proehl, 367-368.

[61] As cited in S. Mont, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation*, Hart Publishing, Oxford 2012, 8. This was not helped, as noted by Van Harten and Loughlin, by the fact that states were simply reluctant to refer investment disputes to the ICJ. G. Van Harten, M. Loughlin, 128.

[62] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford 2012[2], 244.

What sometimes seems to be overlooked in literature is that IIAs did not start including arbitration-based ISDS provisions some 10 years after the first BIT, and ICSID heard its first case (non-BIT based, to be clear) only in 1972. As some authors suggest, up until the first BIT-based arbitration – *AAPL v Sri Lanka* (occurring in 1990, 31 year after the first BIT) it was questionable if these treaty-based tribunals were truly envisioned to be investor-state (as opposed to state-state) dispute settlers at all.[63] As is noted, IIAs and ISDS truly languished in obscurity for many years, spatially and temporally dispersing the arrival of important information about the potential costs of BITs.[64]

Both the more general research on treaty conclusion, and that aimed particularly at BITs, seem to point to conclusions of limited or 'bounded' rationality of governments when entering into IIAs. This can be argued at least (but certainly not exclusively) on the capital-importing States' side. On a more general note, it is empirically doubtful that it is possible to identify State as speaking with one voice and mind in concluding a treaty, and that rigorous cost-benefit analysis precedes such a conclusion. As Marti Koskenniemi puts it succinctly, '[t]ry to find out the national position on a matter and you will hear different answer depending on whom you ask'.[65] The reality of treaty-making is a heterogenous picture, with different ministries, conflicting motives and often spontaneous reactions to events.[66] In developing countries, the additional problem is the often-present lack of expertise in international (investment) law in general.[67] Furthermore, bureaucratic staff turnover is often excessively high, which obstructs learning and specialization.[68]

On top of these constraints, the various subtle and less subtle forms of pressure aimed at IIA conclusion also hardly helped the capital-importing States in conducting a rational cost-benefit analysis. As previously mentioned, promotion of IIAs (especially during the 1990's boom) was a coordinated effort of international organizations, multilateral agencies, Western governments and the private arbitration

[63] J. Pauwelyn, „At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How it Emerged and How It Can Be Reformed“, *ICSID Review*, 29, 2014, 372, 397.

[64] O. Chung, 954 and L. N. Skovgaard Poulsen, E. Aisbett, „When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning“, *World Politics* 65/2013, 273, 274.

[65] M. Koskenniemi, 28.

[66] B. Simma, D. Pulkowski, „Of Planets and the Universe: Self-contained Regimes in International Law“, *European Journal of International Law* 17/2006, 483, 489 and J. J. Saulino, J.S. Kallmer, 4.

[67] L. N. Skovgaard Poulsen, 6.

[68] See generally M. Busch, E. Reinhardt, G. Shaffer, „Does Legal Capacity Matter? A Survey of WTO Members“, *World Trade Review* 8/2009, 559. One similar example in that regard is the lack of awareness of existing obligations among different departments, resulting in legislative drafting that directly contravenes even sufficiently clear IIA obligations. See P. Ranjan, 71-73.

industry.[69] Examples varied from 'speed-dating' IIA conclusion sessions organised by UNCTAD to different pressures on States with balance-of-payments problems in need of loans.[70] An example of an arguably unequal bargaining position regarding IIAs is the effective mirroring of developed countries templates, despite the availability of less stringent models.[71] The negotiation process was often reduced to a 'take it or leave it' type of deal – described sometimes as an 'intensive training seminar' for the representatives of the other party.[72] As Alvarez noted as early as 1992, these relationships reflect 'hardly a voluntary, uncoerced transaction'.[73]

Perhaps by far the most informative empirical look at IIA conclusion is offered by the research conducted by Lauge Skovgaard Poulsen, as well as in cooperation with Emma Aisbett. In short, Skovgaard Poulsen and Aisbett lay out the theoretical framework of the 'bounded rationality' hypothesis, where State actually conduct a cost-benefit analysis (or even merely become aware of IIAs they 'rationally' concluded) only after being subject to an investment claim.[74] The empirical testing of this proposition was conducted through 30 interviews with officials from 13 developing countries worldwide.[75] While taking into account the limits of such a study, and potentially different learning processes for developed countries,[76] what has been revealed is a clear lack of actual understanding on the side of key IIA negotiators regarding the potential effects of these agreements in terms of State liability to be imposed through ISDS.

While the States had a genuine desire for economic improvement through FDI, this was coupled with overly optimistic views which were not supported by corrective data of any sort.[77] Coupled with the system's dormancy, the effect was that potential risks of IIAs were largely ignored until the State was 'hit' with an ISDS claim.[78] The interviews with the negotiators confirmed a prevailing opinion that IIA conclusion would not lead to practical implications, as these have been perceived as merely diplomatic gestures.[79] Importantly, the countries included were not from the least developed or even developing list – they included South Korea,

[69] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1054-55; L. N. Skovgaard Poulsen, 1.
[70] Z. Elkins, A.T. Guzman, B.A. Simmons, 833 and 840. See also generally B. A. Simmons, F. Dobbin, G. Garrett.
[71] L. N. Skovgaard Poulsen, 1-2.
[72] O. Chung, 958.
[73] A. Gunawardana, J. E. Alvarez, 552. See also D. Schneiderman, 62.
[74] See generally L. N. Skovgaard Poulsen, and L. N. Skovgaard Poulsen, E. Aisbett.
[75] L. N. Skovgaard Poulsen, E. Aisbett, 281.
[76] *Ibid.*, 275.
[77] L. N. Skovgaard Poulsen, 5 and L. N. Skovgaard Poulsen, E. Aisbett, 296 and 301.
[78] *Ibid.*
[79] L. N. Skovgaard Poulsen, E. Aisbett, 282-283.

Czech Republic and Chile.[80]

To illustrate with one example among a number of others, the Advocate-General of Pakistan, the country which signed the very first BIT, upon receiving the Swiss investor's BIT claim in 2001 (starting the *SGS v Pakistan* case) had to Google what a BIT was.[81] There was practically no trace of Pakistan-Switzerland BIT negotiations and of the ratification process, coupled with a fact that there was no copy of the BIT either in Pakistan's possession, so a copy from Switzerland had to be procured.[82] The fact that by 2001 there has been a number of initiated claims globally and Pakistan was thus made explicitly aware about the potency of the treaties made little difference in actually appreciating their importance. Perhaps the crowning example of the dismal level of attention given to IIA conclusion is Mali. In the process of concluding a BIT with South Africa, Mali returned the signed template of the proposed BIT by email without even putting the name of the country in the blank field in the beginning of the document.[83]

Similar points have been raised, for example, by Christoph Schreuer in his capacity as an expert witness in the *Wintershall* case. When asked about the level of awareness about the contents of BITs by the States concluding them, Professor Schreuer stated that:

> [...] many times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of a model, and are put forward on the occasion of state visits when the heads of states need something to sign, and the typical two candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural co-operation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, if you can call it that, say that, 'We had no idea that this would have real consequences in the real world'[84]

The actual learning about what IIA provisions meant, and how the IIL is now operating as a regime, often came only after a State was subject

[80] L. N. Skovgaard Poulsen, 8-10.
[81] *Ibid.*
[82] *Ibid.*
[83] Ibid, 10.
[84] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14 (Award of 8 December 2008), para. 85.

to a claim. This is confirmed by South African,[85] Indian[86] and Pakistani[87] experiences – they all resulted in moratoriums and halting of further IIA conclusion, at least before a systematic review and analysis was conducted. But even more generally, analysis of behaviour of 138 countries shows strong support for hypothesis that when a country is subject to at least 1 BIT claim it reduces its participation in the BITs conclusion process considerably, and that this effect is over and above any effect that might exist from observing claims against other countries.[88] These findings thus provide robust evidence of 'highly narcissistic' learning about the risk of treaty claims,[89] something that seems increasingly recognized in literature.[90] For some authors, no language seems off limits in explaining the full impact of bounded rationality:

> [i]n far too many cases, those negotiating the treaties had little idea of the *monster* they were creating in the form of unclear provisions that could be molded by international arbitral tribunals set up pursuant to the treaties' arbitration provisions into a set of state obligations far beyond what the negotiators intended.[91]

5. Conclusion

The conclusions necessarily imply important caveats. The sheer number of IIAs, the often fundamentally asymmetrical power of the parties involved, and specific circumstances of conclusion prevent a 'single cause' explanation for IIA diffusion, wording, bilateral nature, or underlying economic ideology.[92] It would be hard to claim that factors influencing a conclusion of an IIA in 1959 and 2009 were identical.

But, regardless of that, some larger scale conclusions can be offered. The broad wording and open-textured character of both preambles and substantive provisions of IIAs generally points toward realization of a free market economy with a protection of property rights from unabated State *fiat*. Arguably, however, these same provisions do a remarkably

[85] L. N. Skovgaard Poulsen, 11.
[86] See generally P. Ranjan.
[87] L. N. Skovgaard Poulsen, E. Aisbett, 281.
[88] *Ibid.*, 292.
[89] *Ibid.*, 296 and 301.
[90] S. Jandhyala, W.J. Henisz, E.D. Mansfield, 1056; A. T. Katselas, 212-213; M. Waibel *et al.*, xlvi.
[91] G. Kahale III, 20 (footnotes omitted, emphasis added).
[92] See in similar vein L. N. Skovgaard Poulsen, 2; B. Allee, C. Peinhardt, 22-24; W. Shan, „From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law", *Northwestern Journal of International Law & Business* 27/2007, 631, 659-664.

poor job of going beyond the level of a 'principle' to a level of a 'rule', in particular when it comes to exceptions to property protection (protection which is, comparatively speaking, never absolute) and the universally acknowledged right of States for measures in collective, societal interest. This arguably leaves considerable leeway to investment arbitrators in how this 'gap' is to be approached, not least in terms of methodology – a 'one-size-fits-all' or a pluralistic, context-dependent view?

Furthermore, the understanding that the edifice of IIL is largely built on bilateral foundations should provide a form of a cautionary restraint, an additional reason to justify and legitimize further substantive harmonization on more than just 'similarity of wording'. The lack of a multilateral framework, and a sound failure in agreeing one, should at both legal and normative levels provide an incentive for thorough and transparent reasoning by arbitrators as to why an 'treaty-overarching framework'[93] is indeed generated by the bilateral network.

Finally, there is the issue of the questionable character of the rational consent to IIAs in particular and IIL as a regime in general, regarding at least a considerable number of participating States. This should arguably result in a further significant pause before proclaiming offered substantive interpretations of IIAs as self-evident or the only way possible. At least, justifying these interpretations as expected by states when entering the regime should be seriously questioned. To be sure, the argument is not that contract law doctrines (such as duress or mistake) should be employed, potentially tainting the legal validity of IIAs - as indeed no State has even attempted to do. In summary, the (at least relatively) shaky foundations of the IIL regime opened the path for its dynamic element – ISDS - to provide (for better or worse) the key engine of its development. The normative aspect thus gains in importance. For the IIL operation to remain legitimate, it would have been important for these considerations to be taken into account

[93] S. W. Schill, 367.

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IDEOLOŠKI, PRAVNI I EMPIRIJSKI TEMELJI MEĐUNARODNOG INVESTICIONOG PRAVA – NEKOLIKO ZAPAŽANJA

Rezime

Čini se da se u praksi i doktrini ne dovodi u pitanje da režim međunarodnog investicionog prava teži (ili već ostvaruje) multilateralizam i uniformnost supstantivnih principa, pravila i tumačenja. Cilj ovog članka je novi osvrt na ono što bi se moglo nazvati temeljima takvog režima – međunarodne sporazume o zaštiti stranih investicija – i pogotovo na ideološke, pravne i empirijski istražene kontroverze koje ih okružuju. Nekoliko zapažanja u ovom pogledu u značajnoj meri dovode u pitanje stav da je međunarodno investiciono pravo bilo inicijalno formulisano i stoga očekivano kao multilateralni i uniformni režim u supstantivnom smislu.

Ključne reči: međunarodno investiciono pravo, međunarodna investiciona arbitraža, vladavina prava.