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„Are Bilateral Investment Protection Mechanisms Superior
to Multilateral Approaches?“

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1 Introduction

By using an economic approach this master thesis intends to shed a light on the question when and why states comply with international investment law. Further, it is examined whether bilateral or multilateral investment protection treaties constitute a more effective tool concerning compliance with the standards and provisions laid out in the treaty texts.

1.1 Overview

“Made in” – a mark indicating the country of origin of products, which triggers associations in most consumers. In fact, business research suggests that the “made in” mark does not solely generate a cognitive association with quality, but also affects emotions, identity, pride and autobiographical memories.¹ It seems reasonable to assume that most people are strongly affected when it comes to their home country.

However, some people confuse “made by” for “made in”. “Made in” does not necessarily mean that a domestic company uses home-grown raw materials in its production process. In today’s world foreign companies do not only import their products and services into other nations, but also establish subsidiaries in the respective market – an economic world characterized by foreign direct investments (FDI).

Today there are more than 70,000 multinational enterprises with more than 750,000 affiliates involved in cross-border economic activity.² Besides the business aspects, the importance of foreign direct investment for world economics seems undoubtable, too. In 2014 global FDI inflows were 1.23 trillion US-Dollars, total FDI stocks amounted to 26.04 trillion US-Dollars.³ After having experienced a decreasing trend as an aftermath of the 2008 economic crisis, FDI flows are expected to rise in the next three years.⁴ Nevertheless, FDI constitutes the largest form of external finance for developing economies.⁵ These figures underline that FDI has become an important indicator of world economics.

¹ See Verlegh & Steenkamp (1999), p. 523.

² See UNCTAD (2007a), p. 218.

³ See UNCTAD (2015), p. 13.

⁴ See UNCTAD (2015), p. X.

⁵ See World Bank (2007), p. 314.

But, surprisingly FDI is associated with political risks besides the operational risks from running a business. Foreign investments are prone to expropriation or any other form of governmental interaction of the host country which might derogate the value of their assets. Several domestic and international institutions and insurances have evolved over time to tackle these risks. The most interesting development in international law surely is the “Bilateral Investment Treaty” (BIT). Since the first treaty was signed in 1959, BITs have become the most prominent institution of investment protection and resemble the main source of international investment law.⁶ By the end of 2014 2,926 BITs were in place and virtually all countries maintain at least one BIT.⁷ Although standards of treatment laid out in BITs are much alike, attempts to establish a non-preferential multilateral framework have failed. The 1946 Havana Charter never came into force. In 1998 the negotiations over the Multilateral Agreement on Investment (MAI) were put to halt. The observation of the diffusion of the bilateral treaty approach while nations could not find consensus on a multilateral framework opens new possibilities for scientific examination.

1.2 Research Question

If the standards laid out in the treaties are supposedly equal: why do states prefer maintaining several bilateral agreements over entering into a single non-preferential multilateral agreement on investment? And from a law and economics perspective: How would bilateral and multilateral investment treaties compare *ceteris paribus*? Among other interesting fields of research such as the comparison of effectiveness in attracting additional FDI⁸, an important question concerning international investment agreements would be that of compliance. As Guzman (2002) states: “*Compliance is central to international law’s role in regulating the interaction of nations.*”⁹ Could a multilateral agreement on investment set a greater incentive to comply with the provisions agreed upon in the treaty than a set of BITs? Or are bilateral investment protection mechanisms superior to the multilateral approach?

As until today no comprehensive multilateral agreement has been concluded, the discussion on compliance must be of theoretical nature. This Master thesis can be attributed to the field of international law and economics. In brief international law and economics apply economic models or theory to matters of international law. The motivation behind doing so lies in the desire to better

⁶ See Sasse (2011), p. 45.

⁷ See UNCTAD (2015), p. 23.

⁸ A review of empirical studies on the link between BITs and FDI can be found in Sasse (2011), p. 69.

⁹ See Guzman (2002), p. 1830.

understand the effects of institutions of international law such as treaties, agreements, etc. concluded between sovereign nations. Although international trade law has received notable attention from law and economics scholars, the field's literature on international investment law remains scarce. The overview of international law and economics articles given in Sykes (2007) underlines this suspicion and shows that most papers deal with international trade law, but there is a growing literature on matters of international security¹⁰ and international investment law.¹¹

Legal scholars have yet to deliver a wholesome theory on when and why nations comply with their international obligations. Chayes and Chayes (1995) argue that “*foreign policy practitioners operate on the assumption of a general propensity of states to comply with international obligations*”¹². On one hand this general preference for compliance might explain why states comply with international law, but lacks explanatory power for cases, in which nations decide to violate their obligations. Secondly, Franck (1995) put forth a theory of international law known as legitimacy theory.¹³ The theory assumes that nations perceive a certain rightness of international law and therefore comply with their obligations. However, the theory lacks an explanation on why states care about the legitimacy of a certain set of rules. Thirdly, the consent theory predicts, that nations only honour international obligations, which they consent to.¹⁴ However, there are at least some security related treaties such as peace agreements, on which the use of force might overlap the character of consent in the conclusion of the treaty. All of the theories mentioned above carry a normative component and imply to a certain degree that nations “should” comply with their international obligations. The positive analysis of law is, however, a cornerstone of law and economics.

This master thesis follows a positive approach to compliance with international law developed in Guzman (2002) and Guzman (2008), which is based on rational choice theory. In short, it is assumed, that states are rational, self-interested and unitary actors, which seek to maximize domestic welfare – regardless of the wellbeing of other states.¹⁵ Briefly speaking, the framework

¹⁰ In fact, some examples given in the main part of this thesis are connected to security issues. Though international investment law and international security are in fact two different fields of research, the underlying rationale behind state behavior is much alike.

¹¹ See Sykes (2007), p. 759 ff.

¹² See Chayes & Chayes (1995), p. 3.

¹³ See Franck (1995), p. 706-759.

¹⁴ See Setear (1996), p. 139 ff.

¹⁵ In the sense of political economic tradition “the state” under this set of assumptions is comparable to an authoritarian social planner.

predicts, that it is costly for states to violate obligations of international law. Under certain conditions these costs induce compliance with an institution of international law.

The assumption of a unitary state stands in contrast to the economic principle of methodological individualism, which states that outcomes on a macro level are explained by individual choices made on a micro level.¹⁶ However, Posner (2007) argues that “*economics made much progress in modelling the interactions of business forms without peeking inside them but instead treating them as if they were individuals.*”¹⁷ Thus, in line with relevant literature, this master thesis deviates intentionally from methodological individualism and takes on a “black box”-approach to states.

The theoretical framework has been applied to bilateral investment treaties in Sasse (2011). This master thesis would like to extend the analysis of BITs, evaluate the costs of a hypothetical multilateral agreement on investment and then compare and evaluate systemic differences in the two approaches.

1.3 Structure

The paper is structured as follows: In a first step the basic terminology and definitions concerning foreign direct investment are presented. Using a simple game-theoretic model, it is argued that foreign direct investments constitute an economic time inconsistency problem. Naturally, foreign direct investors want to seek protection against the risk of getting their assets getting redistributed by the host government. International investment agreements are found to help solve the time inconsistency problem. Next, recent trends and figures concerning foreign direct investment and international investment agreements are summarized.

Secondly, the historical development of investment protection is presented. In line with literature three eras of investment protection are identified: the colonial, postcolonial and modern era of investment protection. Though, experiencing ups and downs in the course of time, the bilateral treaty approach liberalizing direct investments is now established as the most proliferated form of investment protection. Since the 1960s these so called bilateral investment treaties, which show a remarkable degree of uniformity, dominate international investment protection.

¹⁶ For a detailed examination of the meaning and background of the principle and its application in several sciences see for example Udehn (2002).

¹⁷ See Posner (2007), p. 136.

The following chapter introduces the reader to the standards and provisions, which can be found in international investment agreements. Firstly, bilateral investment treaties are examined. In line with relevant literature it is found that standards established in BITs in general are alike, but might differ in details. As a comprehensive multilateral agreement on investment has not been in place so far, the properties of multilateral investment treaties are analysed by examining provisions in two investment related treaties: The Energy Charter Treaty and the North American Free Trade Agreement. Furthermore, the last draft of the failed Multilateral Agreement on Investment is examined. It is shown that provisions in existing multilateral investment related treaties reflect BIT practise. Thus, a *ceteris paribus* comparison of multi- and bilateral treaties seems valid.

Subsequently, as already pointed out a law and economics theory of compliance with international law put forth by Guzman (2002) and Guzman (2008) is presented. As will be shown, most international interactions can be modelled as repeated Prisoner's Dilemmas. From a basic game theoretic analysis three mechanisms that are supposedly the driving forces for compliance with international law are identified: reciprocity, retaliation and reputation. In short the "Three R's" theory assumes states to be rational, welfare maximizing and unitary actors – a classic rational choice approach. If a nation decides to violate its obligations under international law, it might face costs in the three categories. Under certain conditions the anticipated costs of violation might lead to compliance – even if it seemingly stands in contrast to a nations' self-interest. Specific properties of the three R's framework for the multilateral case are then mentioned. Furthermore, it is argued that dispute resolution mechanisms included in some international agreements do not reconcile a mechanism different to the three R's.

Then the framework is used to evaluate the costs of international investment agreements. Firstly, the costs of violating BITs are examined. The section mainly reproduces the findings in Sasse (2011). Additional information is given, when needed. Then, the costs of violating multilateral agreements on investment are evaluated. Finally, it is examined whether or not bilateral investment agreements constitute a more effective tool in inducing compliance with investment treaties than the multilateral approach.

2 Foreign Direct Investment

2.1 Characteristics of Foreign Direct Investment

This master thesis intends to examine and evaluate the suitability of bi- and multilateral approaches of international investment protection concerning compliance. But, before focussing on the law and economics of such treaties it seems plausible to analyse characteristics of what the agreements intend to protect: foreign direct investment.

As reported by the Organisation for Economic Co-operation and Development (OECD), “foreign direct investment” refers to a “*category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a long lasting interest in an enterprise (direct investment enterprise) that is resident other than of the investor*”¹⁸ with the intent to harmonize national accounting. The International Monetary Fund (IMF) as well as the United Nations Conference on Trade and Development (UNCTAD) use the same definition.¹⁹

A “foreign direct investor” is defined as “*an entity (an institutional unit) resident in one economy that has acquired, either directly or indirectly, at least 10% of the voting power of a corporation (enterprise), or equivalent for an unincorporated enterprise, resident in another economy.*”²⁰ In general any kind of individual, group of related individuals, enterprise, group of related enterprises, government body, other forms of organisation or a combination of the mentioned can be foreign direct investor.

Long lasting interest in the foreign direct investment involves a significant control over managerial decision of the company by the foreign direct investor. A threshold of holding a minimum of 10% of voting power counts as evidence of long lasting control.²¹ The arbitrary threshold was introduced for practical purposes and intends to harmonize national accounting standards of measuring foreign direct investment – thus, it hardly follows an economic rational.²² Investment, which do not seek control over the acquired enterprise is referred to as foreign portfolio investment.²³

¹⁸ See OECD (2008), p. 48.

¹⁹ See UNCTAD (2007a), p. 245 & IMF (2009), p. 100 f.

²⁰ See OECD (2008), p. 51.

²¹ See OECD (2008), p. 48.

²² See Sasse (2011), p. 6.

²³ See OECD (2008), p. 48.

The word “economy” in the FDI context refers to an area, which is “*under the effective economic control of a single government*”²⁴ with a physical and legal dimension. This ensures, that an investor can de facto only be resident in one economic area.

A “direct investment enterprise”, in which the direct investor holds more than 50% of voting power is denoted as subsidiary. Investments equivalent to 10% - 50% voting power are considered associates. Quasi-corporation such as branches, in which the respective investor holds 100% of the voting power are also considered FDI.²⁵

For national accounting purposes FDI is often measured in FDI stocks and FDI flows. FDI stocks are the value of all FDI at a given point in time, while FDI flows refer to FDI flowing in country in a given period of time.

For the sake of completeness further classifications of FDI will be given in the following. In general the three categories of FDI are Mergers & Acquisitions (M&As), greenfield investment and brownfield investment. According to the OECD one can refer to an acquisition if “the acquiring company purchases the assets and liabilities of the target enterprise”²⁶. A merger takes place, when “*two (or more) companies agree to merge into a new single company*”²⁷. Greenfield investment refers to building new production or service facilities.²⁸ In contrast stands brownfield investment, which is characterized by renting or leasing already existing business structures.²⁹ However, in reality these lines of definition might be blurry. If for instance two or more foreign direct investors decide to form a joint venture, which itself immediately acquires a competitor, sets up a new production plant, but rents offices for its headquarter, the FDI carries characteristics of all before mentioned categories. But, the theoretical distinction yields in the motivation why the investment was made in the first place.

Types of FDI can be further classified from the perspective of the investor and from the point of view of the host country. The nature of direct investment can be either vertical, horizontal or conglomerate from the perspective of the investor. This classification was first introduced by Caves (1971). A horizontal investment is an expansion of the investors’ business on the same stage of the

²⁴ See OECD (2008), p. 48.

²⁵ See OECD (2008), p. 17 & p. 50-53.

²⁶ See OECD (2008), p. 227.

²⁷ See OECD (2008), p. 238.

²⁸ See O Huallachán & Reid (1997), p. 404.

²⁹ See Meyer & Estrin (2001), p. 577.

value chain.³⁰ This might include taking over a competitor or penetrating foreign markets by opening branches. Horizontal FDI is usually motivated by an intention to monetize more fully certain monopolistic or oligopolistic rents derived from firm specific assets like differentiated products or patents by expanding to foreign markets.³¹ Vertical FDI on the other hand is denoted as cross-border expansion of the investors' business along the value chain. Such expansions include adding stages to the production process that comes earlier (backward vertical FDI) or later (forward vertical FDI) than the businesses principal processing activity.³² Acquiring foreign suppliers or retailers would be examples for vertical FDI. According to Caves (1971) the main motivation for vertical FDI lies in risk management along the supply chain and hindering market entrance of possible new rivals. By for instance acquiring a foreign supplier of a scarce production input, risks concerning access to this good might decrease considerably. An investment is considered conglomerate, when the investor enters a new field other than its core business. The intentions behind forming a conglomerate lies in seeking diverse rents dependant on the form of expansion.

2.2 Time Inconsistency

From a business perspective investors generally face economic risks associated with the operation of the business. Foreign direct investors might suffer from additional political risks by operating in an international environment. Kobrin (1979) finds the definition established in Weston & Sorge's (1972) to be representative: "*Political risks arise from the actions of national governments which interfere with or prevent business transactions, or change the terms of agreements, or cause the confiscation of wholly or partially foreign owned business property.*"³³ Naturally, foreign direct investors are mainly concerned about a redistribution of their assets to the host government or third parties.³⁴ Most literature on the economics of FDI suggests that political risks constitute a time inconsistency problem.³⁵ Guzman (2009) states that a time inconsistency problem exists when "*a preferred course of action, once undertaken, cannot be adhered to without the establishment of some commitment.*"³⁶ In the context of FDI this means that once the foreign direct investor and the host state agree on certain conditions and the investment is sunk, the host state has an incentive to

³⁰ See Caves (1971), p. 4.

³¹ See Caves (1971), p. 10.

³² See Caves (1971), p. 10.

³³ See Kobrin (1979), p. 67.

³⁴ See Sasse (2011), p. 17.

³⁵ See i.e. Aisbett (2009), p. 395 ff. or Guzman (2009), p. 73 ff.

³⁶ See Guzman (2009), p. 78.

deviate from the promised course of action. Anticipating this behaviour the direct investor might hold-up investment or invest at a level below the optimum.

Game theory and the underlying assumption of rationality can help to illustrate what happens when players interact according to their intentions or preferences.³⁷ Thus, game theoretic examples will be given throughout this paper, which might illustrate dilemmas players face when dealing with foreign direct investment.

The problem of time inconsistency can be illustrated by a game of trust as in Sasse (2011).³⁸ As the model is simple, it does not make the claim to explain all varieties of foreign direct investment. However, it introduces the reader to the basic intuition behind the relations between the investor and the host country. A game of trust is a sequential distribution problem between at least two players.³⁹ The game involves a foreign direct investor and a potential host country. Rationality and complete information are assumed. In the first round the investor decides whether or not he is undertaking the investment. Payoffs of both players are zero, if the investor does not make the investment. If the investment is undertaken, the host country can decide to *confiscate* or to *accommodate* the investment. If the host country chooses to *accommodate*, both players receive their share of the cooperation benefits. The investor receives C_I , the host country gains C_h . Benefits for the investor are likely to be returns on investment. The host country might profit from positive spill-over effects or taxes from the investment. If the host country decides to confiscate at least some of the assets of the investor, the value to the host country of such an action is denoted as W_h . The remaining assets of the investment to the investor in the case of confiscation have a value of L_I . It is further assumed that $C_h > 0$, $W_h \geq 0$ and $C_I > L_I$. The extensive form of the game looks as follows:

³⁷ See Snidal (1985), p. 35.

³⁸ The following description of the game reproduces the findings in Sasse (2011), p. 18-22.

³⁹ The classic trust game called “the investment game” was first laid out in Berg et. Al (1995), p. 1-36. It is played as follows: In round one player A offers player B a share of her show-up fee. This amount of money is then tripled. In the second round player B has to decide how much money she returns to room A. One of the important conclusion the authors drew from the results of the experiment was, that self-interest alone could not explain the behavior of the participants of the experiment.

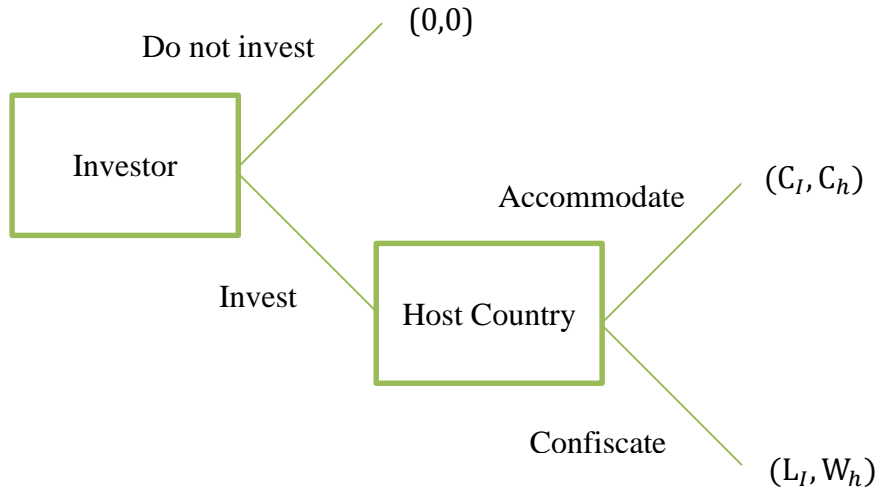


Figure 1: Time Inconsistency of FDI
Source: Sasse (2011), p. 19

The game can be solved by backwards induction⁴⁰. Hence, the analysis of the game starts with the last decision node in the game: the decision of the host country to *accommodate* or to *confiscate*. Logically, the Nash-equilibrium⁴¹ of the game depends on the values of the variables. If $W_h < C_h$, then the accommodation of the investment yields more profits for the host country. The investor anticipates the willingness to cooperate and plays invest. The equilibrium then would be (*invest/accommodate*) with respective payoffs. Sasse (2011) argues that in many cases the assumption $W_h > C_h$ holds.⁴² Then, the host country will play confiscate in the second round. Under rationality the investor anticipates this in the first round and decides depending on the value of L_I . If $L_I > 0$, the subgame perfect Nash-equilibrium⁴³ would be (*invest/confiscate*) with payoffs (L_I, W_h) . The equilibrium is Pareto-optimal, as a shift to (*invest/accommodate*) would benefit the investor, but lower the payoff of the host country from W_h to C_h . If $L_I < 0$, then the investor does not invest.⁴⁴ The equilibrium then would be (*do not invest/confiscate*). The payoffs of the subgame perfect Nash-equilibrium would amount to $(0,0)$. This is clearly Pareto-suboptimal, as both players

⁴⁰ For an illustration of the mechanism of backwards induction please refer to Gibbons (1992), p. 57-64

⁴¹ A useful definition of a Nash-equilibrium can be found in Gibbons (1992) p. 8-9: A Nash-equilibrium is a state, in which “each player's predicted strategy must be that player's best response to the predicted strategies of the other players.”

⁴² See Sasse (2011), p. 20.

⁴³ See Gibbons (1992), p. 95 citing Selten (1965): “A Nash Equilibrium is subgame-perfect if the players' strategies constitute a Nash equilibrium in every subgame”.

⁴⁴ The case $L_I = 0$ is left out here.

could achieve a higher payoff by playing (*invest/accommodate*). As the host country has no device to credibly commit to the accommodation strategy, an investment under the optimal level is the consequence – a time inconsistency as mentioned above.

According to Guzman (2009) time inconsistency problems in domestic settings can be avoided through contracting.⁴⁵ Assuming the contents of the contract are enforceable under domestic law, the agreement can be considered a credible commitment device and thus facilitate efficient investment. In the international setting of FDI Guzman (2009) argues that an agreement between an international investor and a potential host state is not a credible commitment device and thus, investors must seek other forms of insuring against political risks.⁴⁶

One possibility is to seek protection under international law. The term international law dates back to Jeremy Bentham, who refers to international law as “*principles of legislation in matters betwixt nation and nation [...]*”⁴⁷. Hynning (1956) and Guzman (2008) argue that the sources of international law are summarized in Article 38 of the statutes of the International Court of Justice (ICJ).⁴⁸ According to the article the scope of the ICJ comprises “(a) *international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.*”⁴⁹ Thus, the main sources of international law can be outlined as customary international law, international general principles and international treaties.⁵⁰

One can see that the game of trust of foreign direct investment would be more complex, if it was embedded in the context of international law. The word “international” implies that more than one state would be involved in the investment process. It seems reasonable to differentiate between third-party states and the home country of the foreign direct investor as players. Surely, also other investors play a role. Further, international law supposedly offers institutions as treaties and

⁴⁵ See Guzman (2009), p. 78-79.

⁴⁶ See Guzman (2009), p. 79.

⁴⁷ See Bentham (1879), p. 10.

⁴⁸ See Hynning (1956), p. 1135 ff.

⁴⁹ See Article 38 „Statute of the International Court of Justice“, available at: “<http://www.icj-cij.org/documents/?p1=4&p2=2>”, last checked: 23.09.2015.

⁵⁰ Though it seems tough to clearly distinguish between the categories. Let’s consider the example of The “Vienna Convention on the Law of Treaties”. As the name suggests the convention has the form of a treaty. But, it could be perceived as a codified custom and lays out provisions concerning international relations, which are now perceived as general principles of conduct between states.

enforcement mechanisms such as the International Court of Justice (ICJ). All the important players under international law will be presented and examined throughout this master thesis. Before introducing the reader to the history of institutions of international law, recent trends of FDI will be presented.

2.3 Trends & Figures

Despite the worldwide recovering trend of macroeconomic variables such as GDP, trade related measures or employment from the consequences of the financial crisis, which began in 2007, global foreign direct investment inflows dropped by 16% in 2014 compared to the previous year.⁵¹ Still, inflows were worth 1.23 trillion US-dollars, total FDI stocks amounted to 26.04 trillion US-dollars. Figure 1 indicates the development of FDI flows from the 1970s to 2014.

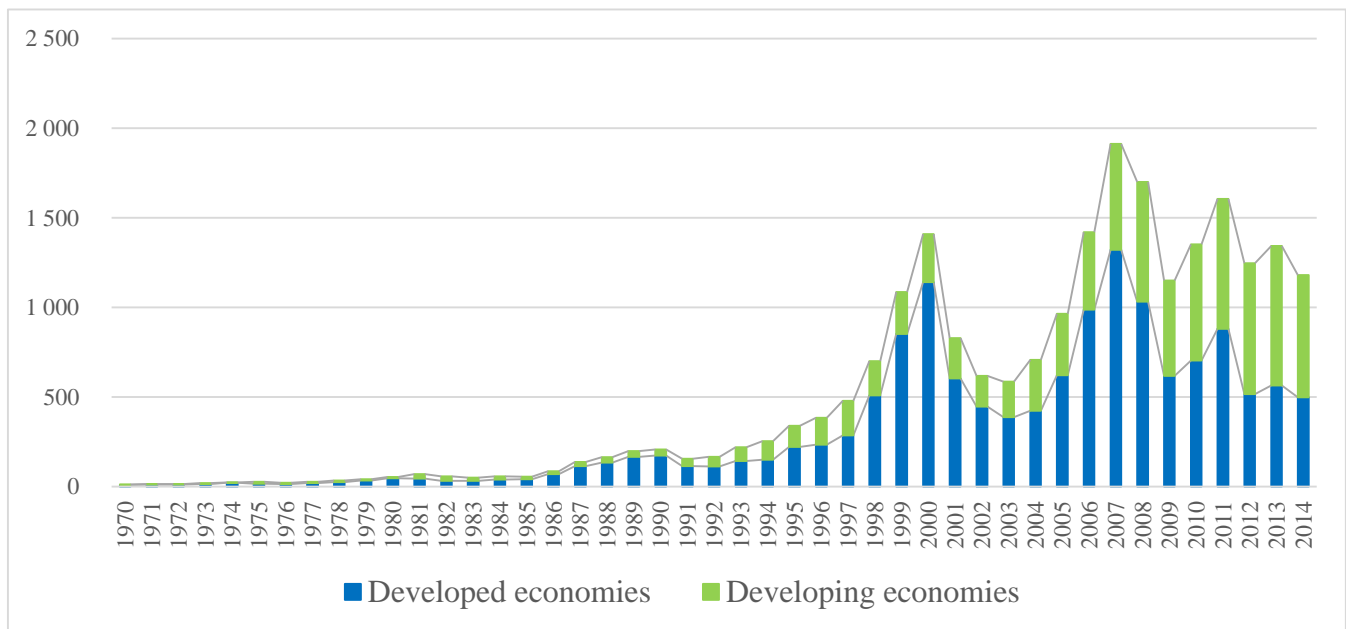


Figure 2: Inward Foreign Direct Investment Flows, Annual, 1970-2014, Billion US-D (current)
Source of Data: UNCTADSTAT

Historically, FDI was characterized by notable particular cases such as the investment of General Motors in the German car manufacturer Opel in 1929, but did not play a role in worldwide economic dynamics until the late 1980s due to the low volume of investments. As markets started to become more liberalized during the process of globalization and picked up pace after the fall of the iron curtain, FDI transformed from a marginal phenomenon to a significant variable of

⁵¹ See UNCTAD (2015), p. 2.

international economic relations. From 1991 to 2000 FDI flows grew exponentially up to a value of investment flows worth 1.42 trillion US-dollar. The dot-com bubble burst and the consequently arising worldwide economic recession lead to a fall in FDI flows by 55% in the years 2000 and 2001.⁵² After the decline, which reached its low in 2003 with FDI flows worth 0.6 trillion US-Dollar, FDI started to grow exponentially reaching an all-time high of annual investment worth 2 trillion US-Dollars. FDI significantly dropped afterwards due to the consequences of the 2007 financial crisis by 18% in 2008⁵³ and 37% in 2009⁵⁴. Since 2010 FDI was slowly recovering, but the amount of inflows remains volatile due to the “*fragility of the world economy, policy uncertainty for investors and elevated geopolitical risks*”⁵⁵.

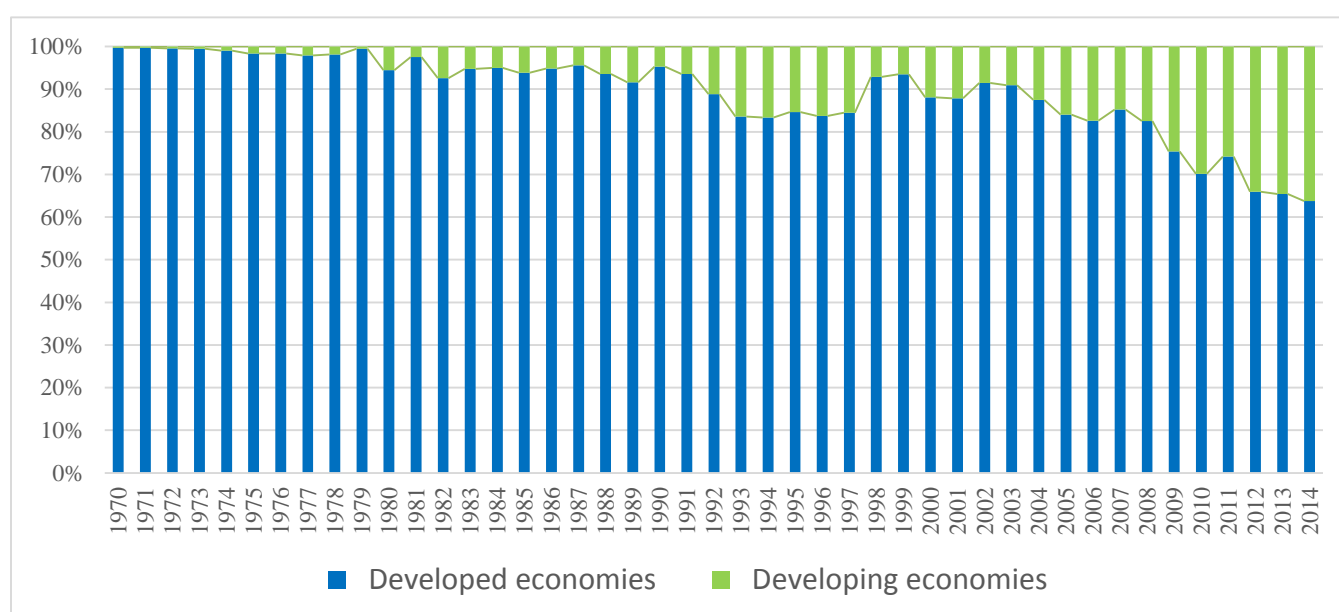


Figure 3: Outward Foreign Direct Investment Flows, Annual, 1970-2014, Share in Percent
Source of Data: UNCTADstat

Figure 3 indicates the kind of resident economy (home country) of foreign direct investors. One can see that historically investors from developed⁵⁶ countries are the main contributors to worldwide FDI flows. However, since the beginning of the 1990s the share of FDI stemming from

⁵² See UNCTAD (2001), p. 3.

⁵³ See UNCTAD (2009), p. 3.

⁵⁴ See UNCTAD (2010), p. 2.

⁵⁵ See UNCTAD (2015), p. 1.

⁵⁶ How the classification of the UNCTAD-reports is undertaken is outlined in the Annex of the “World Economic Situation and Prospects 2014” p. 143 ff. available at: “http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf”, last checked: 24.08.2015.

developing economies is on the rise. As for instance the share of worldwide FDI outflows in 2002 accounted for 7%, it surpassed 35% in 2014.

Today total FDI outflows coming from developing countries amount to 0.47 trillion US-Dollars. Investors resident in developed countries contribute 0.82 trillion US-Dollars. FDI outflows from transition countries accounted for 63 billion US-Dollars. Furthermore, 9 of the 20 largest investment emitting economies are classified developing and transition economies.⁵⁷

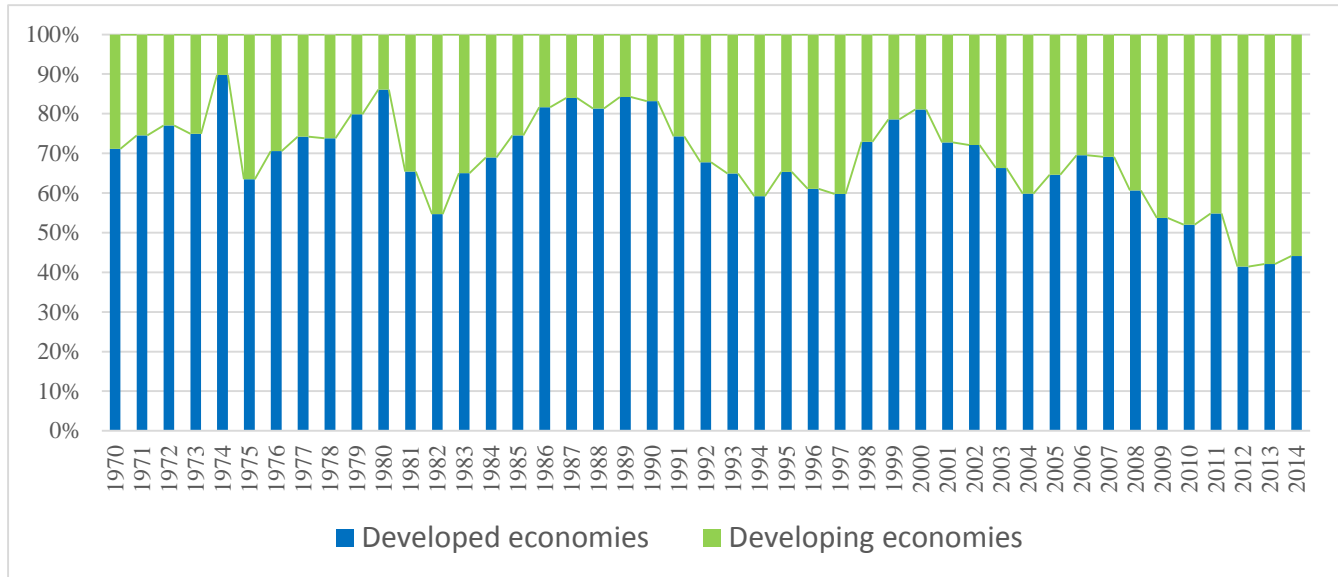


Figure 4: Inward Foreign Direct Investment Flows, Annual, 1970-2014, Share in Percent
Source of Data: UNCTADstat

Figure 4 shows the development of the share of FDI flows into developed and developing economies over time. Since the emergence of cross-border investments, FDI recipients or host countries were mainly developed economies. The peak in the share of investments undertaken in developed economies was reached in 1974 when 90% of all investments could be attributed to developed countries.

Although the share of FDI flows to developing countries was varying from 10% to up to 45% in the 1970s and 80s, a trend towards a rise in the share is only observable from 1990 onwards. The trend was mainly caused by new investment opportunities, which emerged as a consequence of the fall of the iron curtain and the liberalization of markets in former Soviet affiliated states.⁵⁸ From

⁵⁷ See UNCTAD (2015), p. 6.

⁵⁸ See Konoplyanik & Wälde (2006), p. 524.

1990 on the share of FDI into developing countries rose from 20% to over 55% in 2014. Recent FDI flows to transition countries fell by 52% to a value of 48 billion US-Dollars. Mainly, this can be explained by the absent investments undertaken in Russia, which faced a drop of investment flows of 70% in 2014.⁵⁹

Greenfield investments represent 57% of total FDI inflows in 2014 and were the predominant form of cross-border investments. In absolute terms this means 696 billion US-Dollar.⁶⁰ Greenfield investments amount to 399 billion US-Dollars, which is 32%.⁶¹ Conglomerate and brownfield investments in 2014 amounted to 135 billion US-Dollars, which is 11% of total FDI. The latest data on FDI stocks dates back to 2012. The majority of investments undertaken can be attributed to the service sector with 63% of worldwide FDI stocks. Manufacturing makes up 26% and 7% of FDI is undertaken in the primary sectors. 4% of all investments were unspecified. A further long term shift towards FDI in the service sectors can be expected.⁶²

Summary

After having examined the development of FDI over time, some conclusions can be drawn. Before the 1980s and the liberalization of markets to cross-border investment, FDI only played a minor role in international economics. Until today, international trade is the closest related measure to global economic integration due to its larger volumes. Since the 1980s however, FDI has become a notable factor in world economics and additionally has picked up pace after the liberalization of former Soviet affiliated economies. It can be observed, that FDI is a volatile economic measures, which reacts strongly to economic crisis. Historically, emitter and recipient of FDI were mostly developed economies. Since the 1990s also developing countries receive considerable amounts of FDI. Today developing countries receive more than half of all FDI flows. Since 2003 there is an observable trend towards investors from developing countries engaging in cross-border investment. Thus, economic borders have blurred and FDI is by far not exclusively used between developed countries. Most of FDI in recent years is considered Greenfield investment and is undertaken in the service sector. To summarize, FDI has become a diverse economic activity.

⁵⁹ See UNCTAD (2015), p. 18.

⁶⁰ See UNCTAD (2015), p. 18.

⁶¹ See UNCTAD (2015), p. 17.

⁶² See UNCTAD (2015), p. 18.

3 International Investment Agreements

3.1 A Brief History of International Investment Agreements

After having examined foreign direct investment, it seems insightful to give a short overview of the development of investment protection over the past centuries. This analysis puts its focus on capital exporting and developed countries. This is due to the fact shown in the previous chapter that historically mainly developed countries were emitter and recipient of FDI. In the 1990s developing countries entered the scene. Since then they have received significant FDI flows as well as investors resident in developing countries have started to engage in cross-border investment. In the eyes of the author a comprehensive analysis of the history of investment protection is given in Vandevelde (2009). The following sections is mainly based on his findings.

According to Vandevelde (2009) the world faced the biggest increase in the conclusion of new investments agreements from 1990 on. This date coincides with developing countries starting to play a significant role in cross-border investment. However, the first agreement touching aspects of international investment date back to the late 1880s.⁶³ Thus, for more than 140 years investors and states try to protect investments by contracting. Vandevelde (2009) differentiates between three eras with different characteristics.

First, the colonial era, which supposedly ended with the declaration of independence of a significant amount of colonies worldwide after the end of World War II. By then diplomatic or military approaches were the main protection devices of foreign direct investment. In the second phase, the postcolonial phase, which comprises the time after World War II until the fall of the iron curtain, political risks within the international community lead to the proliferation of bilateral international investment treaties between home and host countries. Since the end of the Cold War the global era predominates international investment according to Vandevelde. In brief, the proliferation of bilateral investment agreements continues and lead to a remarkable degree of uniformity of provisions in investment treaties, which will be shown in the following analysis of the three eras of investment protection.

According to Vandevelde (2009) international agreements were rarely used to protect foreign direct investment during the colonial phase of international investment protection. International economic

⁶³ See Vandevelde (2009), p. 3.

agreements were mostly revolved around establishing and facilitating international trade. However, some of the trade related treaties offered investment protection provisions to a certain degree. These agreements were mainly bilateral. The United States started to conclude treaties of “Friendship, Commerce and Navigation” (FCN) from the 18th century on. Though varying in details these agreements had the common purpose of establishing trade relations with the respective treaty partner.⁶⁴ Additionally, they contained provisions guaranteeing “*full and perfect protection*” to properties of nationals of one of the treaty partners.⁶⁵ The contained provisions on compensation in the case of expropriation and furthermore established the before mentioned most favoured nations and national treatment standards. One must note though, that “*the focus was on protecting property, as opposed to investment*”⁶⁶. Coyle (2012) states that early FCNs as in the colonial era did not include arbitration rights of the treaty partners - Dispute resolution mechanisms, which could be triggered by investors were not included in FCNs.⁶⁷ Guzman (2010) refers to international agreements without enforcement mechanisms as “soft law” – a category alike a declaration of will.⁶⁸ Other than by conclusion of bilateral treaties such as FCNs, which were rarely used outside the USA, the main source for norms concerning the protection of investment was customary international law. Following Vandevelde (2009) there are some doubts about the adequacy of the mechanism. Firstly, some countries – mainly Latin American nations – opposed to the idea that customary international law offered a minimum standard of treatment. Instead these countries adhered to the *Calvo Doctrine*, which basically entitled foreign investors to the same treatment and rights as domestic investors. Thus, international investors could only bring their claims to national courts.⁶⁹ Subsequently, the only mechanism of international law available to investors was diplomatic espousal. Vandevelde (2009) refers to espousal as a mechanism “*whereby an injured nationals’ country assumes the national’s claim as its own and presents the claim against the country that has injured the national.*”⁷⁰ This procedure, however, bears several disadvantages for investors according to Vandevelde (2009). Firstly, there is no obligations of the home country of the investor to espouse the claim. In economic terms, the state will unlikely be a perfect agent of the investors interests. In fact Vandevelde (2009) states that nations tend to refrain from espousing

⁶⁴ See Coyle (2012), p. 306-315.

⁶⁵ See Vandevelde (2009), p. 4.

⁶⁶ See Vandevelde (2009), p. 4.

⁶⁷ See Coyle (2012), p. 309-311.

⁶⁸ See Guzman & Meyer (2010), p. 171 ff.

⁶⁹ See Cremades (2004), p. 80.

⁷⁰ See Vandevelde (2009), p. 5.

claims from investors in fear of causing diplomatic disturbances.⁷¹ Sasse (2011) argues that individual claims of investors might not be important enough to cause the respective country to espouse a claim.⁷² Furthermore, even if the home country engages into a diplomatic dispute, the settlement is due to the terms of both countries – which might not meet the preferred outcome of the investor. Lastly, before any claim can be espoused, local remedies of the host countries must be exhausted to allow for espousal. This makes dispute resolution by espousal time consuming. It cannot be concluded, however, that espousal as a remedy to settle investment disputes has no value for the direct investor, but it carries considerable risks and costs.

To summarize, several aspects of international investment agreements were characteristic for the colonial phase of investment protection. Firstly, provisions of investment protection were embedded in more general bilateral treaties aiming at liberalizing trade. The network of treaties was limited in extend and international law often did not provide adequate protection of foreign direct investments. Next to none dispute resolution mechanisms were included in the treaties. Thus, Vandevelde (2009) concludes that military⁷³ or diplomatic approaches – such as espousal – were the main remedies for the resolution of investment related disputes.⁷⁴

The postcolonial era of investment protection agreements started with the end of World War II and lasted until the end of the Cold War, which was characterized by the fall of the iron curtain. Following Vandevelde (2009) three important events forged provisions and standards during this phase, which will be examined briefly in the following.

Vandevelde (2009) referring to Hoekman & Kostecki (1995) and Cameron (1997) states that the majority of victorious allies - except the Soviet Union and affiliated states – blamed protectionist trade policies for the pre-war economic depressions. Thus, a consensus favouring trade liberalization was predominating world economics.⁷⁵ In the end this consensus was institutionalized by the conclusion of the General Agreement on Tariffs and Trade (GATT) in 1947.⁷⁶ Concerning FDI, the Havana Charter, which included provisions on a multilateral approach

⁷¹ See Vandevelde (2009), p. 5.

⁷² See Sasse (2011), p. 80.

⁷³ Indeed the USA regularly intervened with military force when facing trade and investment related disputes in Latin America in the *Banana Wars* (1898-1933). Since Franklin Delano Roosevelt was elected president in 1933 the U.S. American foreign policy concerning Latin America was that of a *good neighbour* approach. See for instance Cronon (1959), p. 538 ff.

⁷⁴ See Vandevelde (2009), p. 6-7.

⁷⁵ See Vandevelde (2009), p. 6-7.

⁷⁶ See Vandevelde (2009), p. 7.

of liberalizing investment never came into force.⁷⁷ So, international trade started to become more liberalized, while the liberalization of FDI was put to a halt. This represents a break with investment protection in the colonial era, in which both trade and investment related issues were dealt with together.

Concerning bilateral approaches to investment protection Vandevelde (2009) states that the United States resumed to conclude FCNs from the End of World War II until the late 1960s. These second wave treaties offered innovation to some degree. The main change was that the treaty's scope was extended to corporate entities as opposed to the colonial era approach, which was protecting only properties of American citizens. This broadened the subject matter to all kinds of cross-border economic activity. Furthermore, provisions were included allowing state-state claims to be brought forward to the International Court of Justice. This extended the treaty partners' remedies in case of misaligned interpretation of the treaties clauses to a possible case in front of an international tribunal. However, investors' rights were not broadened.

The second event reshaping world economics was the picking up in pace of the process of decolonization after the end of World War II. By 1945 most Latin American colonies already gained independence from their colonial overlords.⁷⁸ However, many African and Asian colonies gained their independence shortly after the World War II. A notable example would be India, which gained independence in 1947.⁷⁹ According to Vandevelde (2009) the total number of countries more than tripled after World War II.⁸⁰ These countries tended to be protective over their new gained freedom and perceived the presence of foreign firms – FDI – as form of neo-colonialism, which in their perspective would lead to exploitation of their economic base. This meant additional political risks associated with cross-border investment due to the possibility of expropriation.

The formation of the Soviet Block represents the third event shaping world economics. According to Vandevelde (2009) the new communist oriented politics further fostered the risk of investing abroad. He states that socialist countries “*undertook massive expropriations of the private sector, including foreign-held assets.*”⁸¹ Moreover, the rise of communistic economies further

⁷⁷ This information was taken from the WTO website, available at:

“https://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm”, last checked: 24.08.2015.

⁷⁸ An interesting overview of independent and dependent nations can be found in the online map “The World in 1945”, available at: “<http://www.un.org/en/decolonization/pdf/world1945.pdf>”, last checked 24.08.2015.

⁷⁹ This information was taken from the National Portal of India, available at:

“http://knowindia.gov.in/knowindia/culture_heritage.php?id=7”, last checked: 24.08.2015.

⁸⁰ See Vandevelde (2009), p. 11 FN 47.

⁸¹ See Vandevelde (2009), p. 11.

strengthened the before mentioned beliefs that international investment and free markets per se would be exploitative. In fact this opinion got a political voice by the early 1970s when newly independent countries and socialist or communist countries gained a numerical majority in the UN General Assembly. The votes were then used to pass the “Declaration of a New International Economic Order (NIEO)”⁸², which basically granted the host country of FDI full and permanent sovereignty within their territory, including the right to expropriation. Paragraph 4e for instance states that every nation has total control over resources and economic activities within its borders and “[...] in order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State.” A suitable compensation should then be paid according to national law – a backlash for the protection of FDI by international law.

As a response to elevated risks associated with cross-border investment and possible insufficient compensation in the event of expropriation, developed countries created the Bilateral Investment Treaty (BIT). As the use of military force was prohibited by the UN Charter, which was adopted after the end of World War II and the discourse in customary international law changed in a way disfavours investors’ rights, treaties seemingly became the best remedy of international law to protect investors’ rights.⁸³ The first BIT was concluded between Germany and Pakistan in 1959.⁸⁴ A detailed outline of the most important standards and obligations imposed on the treaty partners can be found in the following section.

Vandeveld (2009) makes six notable observations concerning the conclusion of BITs. Firstly, he states that BITs were uniform in content and focussed solely on investment. This stands in contrast to the approach of the colonial era, in which trade and investment were perceived as a common issue. Secondly, BITs were mostly concluded between a developed and developing economy. This reflects the before mentioned fear of expropriation in the newly independent and socialist states. Thirdly, developing had the intention to attract FDI by the conclusion of BITs. By signing a BIT, willing countries wanted to commit to a certain set of actions in favour of foreign investments and

⁸² See “Declaration on the Establishment of a New International Economic Order”, available at: “<http://www.un-documents.net/s6r3201.htm>”, last checked: 24.08.2015.

⁸³ See Vandeveld (2009), p. 13.

⁸⁴ See “Treaty for the Promotion and Protection of Investments between Pakistan and the Federal Republic of Germany”, available at: “http://www.iisd.org/pdf/2006/investment_pakistan_germany.pdf”, last checked: 02.09.2015.

thus, send a signal of openness to capital markets. Fourthly, the main motivation behind signing BITs for developed countries was to have investments of nationals abroad protected in the territory of the respective treaty partner. Fifthly, the host country of FDI – in most cases the developing country – had to shoulder most of the obligations. Formally, the treaty text assumed the same obligations to both contracting parties, but investments were mainly one directional – from the developed country to the developing country. Sixthly, standards and formulations of BITs were similar to those included in post-war FCNs.⁸⁵

One important innovation over FCNs, however, was the inclusion of investor-state arbitration clauses in BITs from 1965 on. This became possible with the foundation of the International Centre for Settlement of Investment Disputes (ICSID)⁸⁶, an international court solely created for investor-state arbitration which is affiliated with the World Bank. During the colonial era and early⁸⁷ postcolonial era, investors had to rely on diplomatic or military intervention of their respective home countries. After the foundation of the ICSID foreign direct investors were able to directly bring their claims forward to international arbitration. As the home country did not have to take part in the dispute resolution process, the provisions in BITs depoliticized investment related disputes. Vandevelde (2009) concludes that investment protection was placed “*in the realm of law rather than politics*.”⁸⁸

To summarize, some notable changes concerning investment protection could be observed in the postcolonial era. Firstly, trade and investment were then considered separate issues. Whereas, trade became more liberalized and institutionalized, cross-border investment was perceived as exploitative by former colonies and countries affiliated with the Soviet Union. As a consequence attempts to establish multilateral standards of investment protection failed. By the time customary international law did not offer well-enough protection, BITs were introduced. In short BITs were concluded to promote foreign direct investment by a reciprocal promise of fair treatment of foreign investors originating from the respective treaty partner. They can be seen as the successor of FCNs, but offered one important innovation: after the foundation of ICSID in 1965, they granted investors

⁸⁵ See Vandevelde (2009), p. 14-17.

⁸⁶ See “ICSID Convention, Regulations and Rules”, available at:

“https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf”, last checked: 02.09.2015.

⁸⁷ 1945-1965.

⁸⁸ See Vandevelde (2009), p. 18-19.

the right to initiate international arbitration in case of perceived unfair treatment. It was said that investment related dispute resolution depoliticized and became a matter of law.

The global era of investment protection began by the end of the 1980s and lasts until today. The changes in the political and economic environment lead to a number of profound differences to the postcolonial era. Firstly, provisions covering investment and trade related issues were interweaved in economic treaties – like in the colonial era. Vandevelde (2009) for example mentions that the Uruguay Round of GATT negotiations, which resulted in the foundation of the World Trade Organization (WTO)⁸⁹, extended the scope of WTO jurisdiction to investment-related issues.⁹⁰ An illustration of the argument can be found in Article I, 2. (c) of Annex 1b⁹¹, which explicitly defines a trade in service as the supply of a service “*by a service supplier of one member, through commercial presence in the territory of any other member.*” In theory any FDI in the service sector could fall under this definition and could be subject to WTO jurisdiction.

Secondly, the world experienced a boost in the conclusion of BITs. Sachs & Sauvant (2009) state that by 1989 386 BITs were signed, in the years 1990 to 2005 2,000 BITs were concluded.⁹² According to Vandevelde (2009) two main reasons caused this development. Firstly, the fall of the Soviet Block discredited most of the alternatives to an open market based economy. Further, he states that the debt crisis of the 1980s⁹³ hindered the access of developing countries – mostly in Latin America – to private capital markets. As a consequence private capital was also sought in the form of FDI.⁹⁴ Both of the causes entailed a structural break in the attitude of developing countries towards foreign direct investment within their territories. Whereas, in the postcolonial era, investment was perceived as an exploitative intrusion in the economical integrity by least developed countries (LDCs), FDI was an alternative source of income and foreign currency.⁹⁵ Vandevelde (2009) goes one step further and states that developing countries “*rushed to attract foreign direct investment by demonstrating their support of market capitalism in general and a secure investment climate in particular.*”⁹⁶

⁸⁹ See “Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations”, available at: “https://www.wto.org/english/docs_e/legal_e/03-fa.pdf”, last checked: 02.09.2015.

⁹⁰ See Vandevelde (2009), p. 20.

⁹¹ See “General Agreement on Trade and Services” Article I, 2. (c), available at: “https://www.wto.org/english/docs_e/legal_e/26-gats.pdf”, last checked: 02.09.2015.

⁹² See Sauvant & Sachs (2009), p. XXXIV.

⁹³ A sophisticated analysis of the political impacts of the debt crisis can be found in Remmer (1991), p. 777 ff.

⁹⁴ See Vandevelde (2009), p. 22.

⁹⁵ See Vandevelde (2009), p. 23.

⁹⁶ See Vandevelde (2009), p. 23.

Concerning the provisions in BITs, UNCTAD (1998) states that they remained rather unchanged with respect to the postcolonial era – at least for BITs concluded before the publication of the study.⁹⁷ UNCTAD (2007b) concludes for BITs concluded between 1999 and 2006: *“This study has shown that BITs concluded since the late 1990s continue to have a structure and a content similar to those of earlier BITs.”*⁹⁸

It can be said, that the bilateral treaty approach to investment protection became the most proliferated form. In the late 1990s yet another attempt to establish a multilateral framework of investment protection – the Multilateral Agreement on Investment⁹⁹ - failed due to the opposition of developed countries. Therefore, Vandevelde postulated abolishment of any resentments against foreign direct investment and its protection must be viewed with caution. Besides bilateral treaties also regional agreements proliferated in numbers. UNCTAD (2015), states that in recent years more and more countries engage in regional and sub-regional agreements of economic integration covering also investment issues. According to their calculation more than 90 countries are involved in negotiations of five important treaties: Trans-Pacific Partnership (TPP), Transatlantic Trade and Investment Partnership (TTIP), Regional Comprehensive Economic Partnership (RCEP), Tripartite and PACER Plus.¹⁰⁰ A well-known example for multilateral agreements covering also investment issues would be the European Community (EC), which by ratification of the Maastricht Treaty¹⁰¹ in 1993 evolved into the European Union (EU).

Without going into detail, the EU stands exemplary for a myriad of treaties concluded after the beginning of the global era covering among other things trade and investment related issues, resembling the before mentioned intermingling of trade and investment.

To summarize, the global era of investment protection was characterized by at least two structural breaks in the global political environment. The first changing event was the collapse of the Soviet Union by the end of the 1980s. Secondly, numerous developing countries had difficult access to private lending during the 1980s due to a severe debt crisis. Both events helped triggering a shift towards positivity towards market based economies and foreign direct investment. Developing

⁹⁷ See UNCTAD (1998), p. 1 ff.

⁹⁸ See UNCTAD (2007b), p. 141.

⁹⁹ A draft of the treaty text is available at: “<http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>”, last checked: 02.09.2015.

¹⁰⁰ See UNCTAD (2015), p. 23.

¹⁰¹ See Treaty on European Union, available at: “http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf”, last checked: 02.09.2015.

countries started to liberalize their domestic market and started competing for foreign capital. One important to signal openness and the willingness to protect foreign direct investment was to conclude BITs. While their content remained nearly unchanged to the postcolonial era, their popularity grew in numbers. Today they are the most proliferated form to protect foreign direct investment. However, investment protection clauses can be found in a number of trade related treaties on a bilateral and multilateral level. Investment and trade are nowadays seen as complements of economic integration. In that sense Vandevelde (2009) concludes that investment protection nowadays is more comparable to the colonial rather than the postcolonial era.¹⁰²

Summary

This subchapter tried to outline the history of investment protection. Following the approach of Vandevelde (2009) three eras were identified: the colonial, postcolonial and the global era of investment protection. Historically military or diplomatic interventions of the home country of a foreign investors were the only effective remedies of settling an investment related dispute. After the end of World War II a hostile investment climate arose in newly independent former colonies and states affiliated with the Soviet Union. As a response to the elevated risks, developed countries started taking on a treaty approach to investment protection. Over the last decades bilateral investment agreements became the most proliferated form of treaty. The content of BITs did seemingly not significantly change over time. Several attempts to conclude a multilateral agreement on the treatment of foreign investors failed. However, in recent years there is a notable trend towards regional agreements of economic integration, which among other things cover investment related issues. However, virtually all regional agreements are preferential.

This chapter was intended to give a short overview over investment protection policy in international law. The contents might not only raises the question why countries are on the one hand willing to conclude bilateral agreements and on the other hand refrain from establishing a multilateral framework, but also what the differences in effect would be.

3.2 The Content of International Investment Agreements

As already stated, more than 3,000 bilateral investment treaties have been signed since 1959. The question then arises, if it is valid to generalize all BITs for comparison. The previous chapter already suggested, that BITs and IIAs in general are alike. The following section in this paper tries

¹⁰² See Vandevelde (2009), p. 34.

to emphasize the similarity of the agreements by briefly¹⁰³ analysing the content and form of BIT practise. As there has never been a comprehensive multilateral agreement in place, cases of specific agreements concerning the protection of investment will be given. The motivation for doing so, is firstly to try to give evidence on the idea that standards in BITs do not vary significantly from another and thus can be generalized for further discussion. Secondly, the cases are supposed to demonstrate, that standards of treatment and formalities are alike those that can be found in BITs. In the end, the only significant difference will be the multi- or bilateral nature of the agreements, on which the discussion on the ceteris paribus comparison of effectiveness in inducing compliance will be based on.¹⁰⁴

3.2.1 Bilateral Investment Treaties

Bilateral Investment Treaties are state-state contracts between two sovereigns with the goal of creating “*favourable conditions for investment by nationals and companies of one party in the territory of the other, and increased prosperity.*”¹⁰⁵ According to Muchlinski (2009) most BITs and IIAs follow a similar pattern.¹⁰⁶

BITs usually start with a preamble. Most preambles to BITs and other IIAs put emphasize on the desirability of deeper economic integration between the contracting parties through the improved investment climate established in the treaty. The Austrian Model BIT for instance states that one objective of concluding the agreement is the desire to: “*strengthen their ties of friendship and to greater economic co-operation between them with respect to investment [...]*”¹⁰⁷ Some BITs define specific branches, in which investments enjoy protection or state public policy goals such as protecting the environment.¹⁰⁸ The Austrian Model BIT for example refers to the principles of the UN Global compact.¹⁰⁹

The next passages usually contain general provisions and define the scope of application, with respect to the subject matter, territory, temporal effect and covered entities. Concerning the subject

¹⁰³ One could write a whole paper on each of the standards.

¹⁰⁴ The similarity of BITs and multilateral approaches might give rise to the suspicion that BITs already constitute a quasi-multilateral framework. However, it must be noted and will be shown later in this paper that tribunal decisions in BIT cases do not refer to previously made rulings. Thus, the net of standards is similar but not sufficient to be referred to as multilateral.

¹⁰⁵ See Vandevelde (1998), p. 629.

¹⁰⁶ See Muchlinski (2009), p. 38.

¹⁰⁷ See Austrian Model BIT (2010), p. 1.

¹⁰⁸ See Muchlinski (2009), p. 38.

¹⁰⁹ See Austrian Model BIT (2010), p. 2.

matter, it is a primary content to define the kinds of investments, which the treaty supposedly comprises. According to Muchlinski (2009) most treaties give broad asset-based definitions to investment, which also tend to include non-physical forms such as intellectual property rights. The broadness of definition is motivated by the interest to include forms of investments which might arise in the future.¹¹⁰ The contracting parties can also restrain the scope of investment protection to certain sectors. International law per se does not oblige a sovereign state to automatically adopt admit direct inward investment. Thus, according to Muchlinski (2009), two forms of treaty practises in BITs of countries trying to attract FDI arise: a “controlled entry” and a “full liberalization” approach. Agreements following the controlled entry approach, emphasize the treaty partners’ right to regulate or to hinder inward investment. A full liberalization approach would be equivalent to an open door policy concerning FDI. The majority of agreements follows the controlled entry approach.¹¹¹

Moreover, the applicability of the provisions of the BIT to investments made prior to the signing, conclusion and ratification of the agreement must be defined. Most treaties also include all investments already undertaken prior to the date of signature.¹¹²

After having clarified the subject matter BITs usually define the covered persons and entities. The protection of BITs affects investors. Mainly natural person and corporate entities, who possess a link to the nationality with the home contracting country enjoy this protection. Whereas the identification of the nationality of a natural person is generally proven by a reference to a countries citizenship or residence, the attribution of nationality of a corporate entity can be tackled in several ways. Muchlinski (2009) states that nationality of a corporation can be either identified by “*the place of incorporation, the location of registered office or seat of the company, or by reference to the nationality of the controlling interest in the company.*” All forms of identification mechanisms are used in todays’ BITs.

Further, the territorial and temporal application must be clarified. Most BITs apply to all territories of both treaty partners.¹¹³ However, the scope of the treaty might be limited by each contracting parties on their behalf. This might be of importance, if one country desires to limit investments concerning offshore resources. The date of entry into force can also be determined according to the

¹¹⁰ See Muchlinski (2009), p. 39.

¹¹¹ See Muchlinski (2009), p. 40-41.

¹¹² See Muchlinski (2009), p. 42.

¹¹³ See Muchlinski (2009), p. 42.

will of the treaty parties. Usually, BITs enter into force “*upon the exchange of instruments of approval or ratification, or upon reciprocal notification that the relevant constitutional requirements of each contracting party have been fulfilled, or a set date after such notification [...]*”¹¹⁴ BITs are generally concluded with an expiration time of ten years.¹¹⁵ However, the length of treaty duration can be determined freely by the parties. Usually, each party may terminate the engagement in the treaty with one year’s written notice.¹¹⁶

After having defined the scope and the applicability of the treaty, standards of treatment to be applied to investors and investments are usually covered. One can distinguish between general standards of treatment, which define general norms of conduct with foreign investors in the host country and specific treatment standards, which intent to set standards of treatment for particular issues.¹¹⁷ General standards of treatments can further be grouped into absolute standards and relative standards of treatment. Absolute standards are non-contingent norms of treatment.¹¹⁸

The two most frequently found absolute standards are “fair and equitable treatment” and “full protection and security” of the investment. Both standards supposedly establish a minimum standard of treatment of investor and investments by the host country in general. There is some degree of variation to the wording of the standards – the Austrian Model BIT (2010) extends the standard by a time component, requiring “*fair and equitable treatment and full and constant protection and security*”¹¹⁹ On the other hand the German model BIT (2008) only requires: “[...] *fair and equitable treatment as well as full protection [...]*”¹²⁰ While the terms are self-defining in general, the question how the clauses are applied to specific situations is still subject to frequent discussion in the literature.¹²¹ In some treaties those standards are combined with a “non-discrimination” imperative.¹²²

Relative standards of treatment define the standards of conduct concerned investments and investors agreed upon in BITs with respect to treatment granted to other investors or investments.¹²³

¹¹⁴ See Muchlinski (2009), p. 45.

¹¹⁵ See Muchlinski (2009), p. 45.

¹¹⁶ See UNCTAD (2007b), p. 20.

¹¹⁷ See Vandevelde (1988), p. 202.

¹¹⁸ See UNCTAD (2007b), p. 28.

¹¹⁹ See Austrian Model BIT (2010), Article 3 (1), p. 3.

¹²⁰ See German Model BIT (2008), Article 2 (2), p. 5.

¹²¹ See Muchlinski (2009), p. 46.

¹²² This, however, corresponds more to a relative standard, because by definition a reference point is needed to discriminate against something.

¹²³ See UNCTAD (2007b), p. 28.

The standards contained in nearly all BITs are “national treatment” and “Most-Favoured-Nation” (MFN). The national treatment standard requires that a foreign investor or foreign investment shall not receive a treatment less favourable than that granted to domestic investors of investments from the host country.¹²⁴ According to Muchlinski (2009) both de jure and de facto discrimination against a foreign direct investor with respect to a national of the host country would be sufficient to base a claim on.¹²⁵

UNCTAD (2007b) defines the MFN standard as follows: “*The MFN treatment standard means that investments or investors of one contracting party shall receive a treatment no less favourable than the treatment the latter grants to investments or investors of any other third country.*”¹²⁶ Thus, the foreign investor covered by the respective BIT is not only protected against discrimination with respect to domestic investors, but also with respect to any other foreign direct investor. This standard might, however, stand in contrast to other agreements concluded by the host country. Especially tax related or other economic commitments made by the host country might interfere with the MFN clause contained in BITs. Until this day it remains unclear, under what conditions these interference enables claims to be brought forward. Fietta (2005) for instance finds decisions on the application of the MFN clauses by international investment arbitration inconsistent.¹²⁷ Egli (2007) finds that decisions by tribunals over the interpretation of the clause are case specific and no general approach can be derived without further clarification.¹²⁸ Thus, it can be concluded that the clause means non-discrimination de jure, but not necessarily de facto.

In addition, 40 % of all BITs contain “observance of obligation” clauses. These provisions are also referred to as “umbrella clauses”. The observance of obligation provision necessitates “*the host country in general to observe all obligations that it has entered into with an investor or an investment by an investor of the other contracting party.*”¹²⁹ Until today it remains uncertain these clauses can have an effect.¹³⁰ In theory, it may comprise “*any interference which might be caused by either a simple breach of contract or by administrative or legislative acts.*”¹³¹ According to

¹²⁴ See UNCTAD (1999) p. 1 ff. or UNCTAD (2007b), p. 33 ff.

¹²⁵ See Muchlinski (2009), p. 50.

¹²⁶ See UNCTAD (2007b), p. 38.

¹²⁷ See Fietta (2005), p. 131 ff.

¹²⁸ See Egli (2007), p. 1045 ff.

¹²⁹ See Bernasoni-Osterwalder & Hoffmann (2012), p. 8.

¹³⁰ See UNCTAD (2007b), p. 74.

¹³¹ See Dolzer & Stevens (1995), p. 82.

Muchlinski (2009) decisions by international tribunals on the extent of the effect of umbrella clauses are case specific and it would go too far to derive a general interpretation of the clause.¹³²

As mentioned above BITs also define standards of treatment for particular circumstances. Muchlinski (2009) identifies the following matters as commonly laid out in BITs: free transfer of payments, compensation in the case of losses due to an armed conflict or internal disorder, compensation for expropriation and other specific standards.¹³³

Clauses allowing for the free transfer of funds are intended to enable the investor to freely transfer capital out of the jurisdiction of the host country. This might play an important role, if the investor decides to withdraw her investment.¹³⁴ According to UNCTAD (2007b) transfer provisions try to find a balance between granting the investor the right to freely transfer fund concerning her investment and providing the host country with remedies control potentially damaging capital flows. In times of crises LDCs might find the remedy of capital controls in their interest as a method to prevent capital flight.¹³⁵ However, capital controls are not necessarily connected with developing countries. Due to a variety of reason also many developed countries introduced capital controls such as Cyprus and Iceland¹³⁶ or Greece¹³⁷. Most BITs pursue a liberal approach to transfer of funds, but add some exceptions to it.¹³⁸ The Austrian Model BIT (2010) for instance allows capital controls, if the transfer stands in contrast to regulations on bankruptcy, insolvency or have criminal background.¹³⁹

The majority of BITs contain provisions providing compensation in the case of losses due to armed conflict or internal disorder.¹⁴⁰ It must be noted that the clauses do not establish an absolute right for compensation, but provide for treatment according to the national and MFN treatment standard.¹⁴¹

¹³² See Muchlinski (2009), p. 54-59.

¹³³ See Muchlinski (2009), p. 61.

¹³⁴ See Muchlinski (2009), p. 59.

¹³⁵ See UNCTAD (2007b), p. 56.

¹³⁶ See “Finanzieller Ausnahmezustand in Zypern“, available at:

“<http://www.sueddeutsche.de/wirtschaft/bankenkrise-finanzieller-ausnahmezustand-auf-zypern-1.1635433>”, last checked: 03.09.2015.

¹³⁷ See “Krise in Griechenland: Banken zu, Auszahlungen begrenzt - was das bedeutet“, available at:

“<http://www.spiegel.de/wirtschaft/soziales/griechenland-banken-geschlossen-was-bedeutet-das-a-1041098.html>“, last checked: 03.09.2015.

¹³⁸ See Muchlinski (2009), p. 59.

¹³⁹ See Austrian Model BIT (2010), Article IX (4), p. 6.

¹⁴⁰ See Muchlinski (2009), p. 61.

¹⁴¹ See UNCTAD (2007b), p. 52.

As argued in the previous chapter, one of the main motivations of capital exporting economies was the desire of treaty based protection of their residents' cross-border investments in developing countries. Thus, practically all BITs contain clauses on compensation in the case of expropriation or nationalization.¹⁴² Instead of explicitly prohibiting the seizing of foreign assets, the treaty partners are given the right to take if it fulfils certain conditions. UNCTAD (2000) states that, one can refer to as lawful taking, if the act serves a public purpose, is non-discriminatory with respect to national treatment and MFN clause and upon the payment of compensation.¹⁴³ There are several categories and forms of expropriation. Most BITs refrain from clarifying the definition of expropriation or nationalization, thus, it remains unclear, which cases of state intervention fall in the categories. It can further be differentiated between direct and indirect expropriation and nationalization¹⁴⁴. In general direct expropriation is "*a taking by a host country which destroys the ownership rights of an investor in its tangible or intangible assets.*"¹⁴⁵ Indirect expropriation is generally referred to, if a state issues any kind of "*indirect measures that have the effect of neutralizing the value of the investors' assets, while leaving their formal ownership intact.*"¹⁴⁶ Two broad categories of indirect takings are creeping expropriation and regulatory takings. Examples of creeping expropriation could be a state interference in the appointment of managers or the refusal for access to raw material or labour, whilst formally not changing the ownership status of the investment.¹⁴⁷ Regulatory takings are changes in the domestic regulatory framework are, which might impair the value of a cross-border investment.¹⁴⁸ The differentiation between the two in practice is in some cases blurry. For instance, arbitrary taxation of an investor might also be the result of a creeping process of changes in the regulatory framework, thus carrying characteristics of both subcategories of indirect expropriation. According to Muchlinski (2009) the question under what conditions direct or indirect expropriation fulfils the lawful taking conditions has yet to be sufficiently answered by the literature and tribunal decisions.¹⁴⁹ Thus, a general distinction between legitimate governmental regulation and compensable takings cannot be demarked and seems to be a case-specific decision.

¹⁴² See Muchlinski (2009), p. 61.

¹⁴³ See UNCTAD (2000), p. 11.

¹⁴⁴ In the following only the term "expropriation" will be used.

¹⁴⁵ See UNCTAD (2000), p. 12.

¹⁴⁶ See Muchlinski (2009), p. 63.

¹⁴⁷ See UNCTAD (2000), p. 12.

¹⁴⁸ See UNCTAD (2000), p. 12.

¹⁴⁹ See Muchlinski (2009), p. 63.

Concerning the modalities of payment of compensation it can be said that most BITs demand “prompt, adequate and effective” payment. The method of determination of the value of compensation and specific conditions such as the date of exchange rate are mainly not clarified in the treaty and are mainly subject to arbitration.¹⁵⁰

Some BITs further contain clauses on other specific standards. Few treaties contain “host country operational measures” (HCOM). Such clauses oblige the foreign direct investor to fulfil certain performance requirements in a variety of fields related to the economic activity.¹⁵¹ The most frequently used HCOMs concern obligations to hire a certain amount of local personnel, to integrate local products and raw materials into the business of the investor and the obligation to export a certain fraction of their products.¹⁵² Other treaties – such as the Austrian Model BIT (2010) further include provisions on transparency, labour safety and environmental issues.¹⁵³

As stated in the previous chapter BITs originated from US-American FCNs. One innovation over these colonial era agreements lie in the inclusion of investor-state arbitration. As stated, this trend started in 1965, when the ICSID was established. According to Muchlinski (2009) today all model treaties contain clauses allowing for investor-state and state-state arbitration.¹⁵⁴ For interstate dispute settlement two procedures are used in all BITs: negotiation and ad-hoc arbitration. Usually, contracting parties are encouraged to settle disputes by negotiation. If the parties cannot reach a consensus on the terms of settlement, arbitration can be initiated by one of the parties.¹⁵⁵ The most common approach is to form a three-member tribunal. Each contracting party appoints the third person as chairman of the tribunal. The appointment procedure is mostly subject to a time limit defined in the treaty. The decision of the tribunal is reached by majority of votes. Procedural rules are mainly determined by the tribunal itself, but some BITs explicitly refer to the United Nations Commission on International Trade Law (UNCITRAL) rules to apply.¹⁵⁶

As stated BITs concluded between 1959 and 1965 did not contain clauses on investor-state arbitration. However, the creation of the ICSID fostered the proliferation of such provisions. Nowadays all current model agreements contain an ICSID clause.¹⁵⁷ Franck (2005) shows that

¹⁵⁰ See Muchlinski (2009), p. 61-63.

¹⁵¹ See UNCTAD (2001), p. 7 ff.

¹⁵² See UNCTAD (1998), p. 67 ff.

¹⁵³ See Austrian Model BIT (2010), Articles IV, V & VI.

¹⁵⁴ See Muchlinski (2009), p. 65-66.

¹⁵⁵ See Muchlinski (2009), p. 66.

¹⁵⁶ See Muchlinski (2009), p. 66.

¹⁵⁷ See Muchlinski (2009), p. 67.

more recent BITs also allow the investor to choose from a variety of options which dispute settlement institution to choose. Among the most frequently used systems are the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and the United Nations Commission on International Trade Law (UNCITRAL).¹⁵⁸ If possible, however, negotiation and consultation should be the preferred remedies of dispute settlement.

The chapter on the content of BITs and IIAs tried to outline the main features of BITs. The state-state treaties are intended to create a favourable environment for foreign direct investors by reciprocal granting special rights to foreign investors. Briefly, the agreements consist of three parts: general provisions, standards of treatment and arbitration. Though, following a common trend in general provision, BITs do sometimes vary concerning specific issues included in the treaty. In line with the literature, it was found that standards of treatment implemented in the treaties offer a remarkable degree of uniformity. While the wording of the clauses might differ in detail, the standards used in the agreement can be considered similar. Concerning arbitration clauses it was found that virtually all treaties contain clauses allowing for state-state and investor-state arbitration. While the institutions referred to in the treaty text might differ, the procedure laid out in the provisions seem much alike. However, there is a significant degree of uncertainty concerning the specific application of the provisions and standards. It might be concluded that treaty text are alike, but it might be too soon to generalize norms from specific cases. In general one can conclude that BITs are similar in content and form, but might vary in specific aspects. Then three questions remain to be answered: Firstly, if BITs are comparable to a certain degree, is the comparability high enough for a generalization? Secondly, are multilateral treaties sufficiently comparable for a generalization? Thirdly, are standards and provisions in BITs and multilateral agreements congruent in such a way, that it allows for a *ceteris paribus* analysis?

On the first question. UNCTAD (2007b) states that the proliferation of BITs resulted in a greater variety of approaches to specific matters, but basic structure and contents still bear a remarkable degree of similarity.¹⁵⁹ The less recent UNCTAD (1998) confirms this view for BITs concluded in the Mid 1990s.¹⁶⁰ Vandevelde (2009) observes that the content of BITs did not significantly change over time.¹⁶¹ Hallward-Driemeier (2009) states that “*BITs vary across countries, but they generally*

¹⁵⁸ See Franck (2005), p. 1541.

¹⁵⁹ See UNCTAD (2007b), p. 143.

¹⁶⁰ See UNCTAD (1998), p. 1 ff.

¹⁶¹ See Vandevelde (2009), p. 23.

*share similar features [...]*¹⁶² On the other hand the previous chapter has shown that there is at least some concern about the total uniformity of BITs.

However, most studies do not seem to be too concerned about this issue. Virtually all empirical studies, which are mostly focussed on finding a link between the conclusion of BITs and FDI or other macroeconomic variables, do not differentiate between different treaty approaches. The first empirical study on the effect of BITs on FDI can be found in UNCTAD (1998).¹⁶³ Using a time-series approach, the authors find a weak link between a BIT signed and FDI flows. However, the variable introduced for BITs signed is binary. Thus, either a country has signed a BIT or not makes a difference, but it is not differentiated with respect to the content. Hallward-Driemeier (2009) delivers another aggregated analysis of the effect of BITs on FDI.¹⁶⁴ However, the study admits, that the complexity of cataloguing BITs led to the decision to choose BITs as binary variable.¹⁶⁵ An overview of the empirical literature on BITs can be found in Sasse (2011).¹⁶⁶

To summarize, relevant literature – especially empirical papers – has treated BITs as equal. Though other papers find a degree of variation in the content of BITs it seems reasonable to state that BITs in general are alike. In the next section the multilateral approach to the protection of investment will be presented. After having examined the properties of such an agreement, it will be evaluate whether or not multilateral approaches can be treated as equal as well.

3.2.2 Multilateral Investment Treaty

As is the case of BITs a multilateral investment protection treaty intends to create favourable conditions for investments by investors of one party in the territory of the other and foster reciprocal prosperity. In general multilateralism can be defined as “*the practice of coordinating national policies in groups of three or more states, through ad hoc arrangement or by means of institutions.*”¹⁶⁷ Under this definition also the chapters on investment of regional agreements such as the currently negotiated TTP or TTIP would be considered multilateral, as at least three states are involved in the negotiations. However, in the case of investment treaties the main feature distinguishing a multilateral approach from all others is that it is non-preferential. According to

¹⁶² See Hallward-Driemeier (2009), p. 352.

¹⁶³ See UNCTAD (1998), p. 40 ff.

¹⁶⁴ See Hallward-Driemeier (2009), p. 349 ff.

¹⁶⁵ See Hallward-Driemeier (2009), p. 361 FN 20.

¹⁶⁶ See Sasse (2011), p. 69-73.

¹⁶⁷ See Keohane (1990), p. 731.

Turrini & Urban (2008) state that a non-preferential agreement is in principle open to every country, which has the intention to enter the treaty.¹⁶⁸ This stands in contrast to the practice in BITs and virtually all regional agreements, which usually do not include the possibility of other states to join in the agreements. As mentioned in the section about the historical development of investment protection by international law, there have been two failed attempts to conclude such a non-preferential agreement: The Havana Charter in 1946 and the Multilateral Agreement on Investment in 1998.

So far, there has not been a comprehensive non-preferential investment agreement in place. Thus, the following section introduces the reader to two examples, which are closely related. Firstly, the Energy Charter Treaty which is a non-preferential agreement with the intention to liberalize cross-border investments in the energy sector. Secondly, the North American Free Trade Agreement will be presented, which grants exclusive rights within the territory of its signatories to foreign direct investors subject to the jurisdiction of another member state.

3.2.3 The Energy Charter Treaty

The Energy Charter Treaty (ECT) is a multilateral agreement aimed at liberalizing and harmonizing international trade, investment, transit and efficiency matters in the energy sector. Along with the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects the Energy Charter was signed on the 17.12.1991 in The Hague.

According to the provisions in the treaty, it entered into force after 30 members ratified the agreement in April 1998. In the very same month a trade amendment was adopted to bring trade regulations in the ECT into line with WTO rules. By April 2015 48 sovereigns among them Germany, Japan, Austria, France, the United Kingdom and Turkey had signed and ratified the agreement. Australia, Belarus, Iceland and Norway have not ratified the agreement yet. Russia was one of the founding members of the Energy Charter, but revoked their engagement in 2009.¹⁶⁹

Part III, articles 10 to 17 cover the standards of promotion, protection and treatment of FDI. In addition, article 26 contains provisions concerning investor-state arbitration. Konoplyanik & Wälde (2006) state that the design of the clauses on investment protection were mainly based on the practice of BITs and can be considered as the multilateral investment treaty with the widest

¹⁶⁸ See Turrini & Urban (2008), p. 1024.

¹⁶⁹ This information was taken from the energy-charter website available at: “<http://www.encharter.org/index.php?id=61>“, last checked: 22.04.2015.

scope in place.¹⁷⁰ Under the treaty, property is protected against direct and indirect expropriation by the obligation to pay “*full, prompt and effective compensation*”¹⁷¹ – which is equivalent to the before mentioned “hull rule” of international investment protection. Article 10 (1) defines the so called umbrella clause as it puts a duty on each contracting party to “*observe any obligations it has entered into with an investor or an investment of an investor of any other contracting party*”. Furthermore, the very same paragraph obliges contracting parties to a “*fair and equitable treatment*” to investments of investors. In articles 21, 22 and 23 the national treatment standard is outlined.¹⁷² Thus, the ECT applies more or less the same standard protection standards in BITs.

Besides state-state arbitration, which is implemented in article 27, the ECT also allows for investor-state arbitration. Under article 26 (4) (a-c) investors can bring claims related to the protection standards either to ICSID, UNCITRAL arbitration or might initiate proceedings at the Stockholm Chamber of Commerce. With 23 claims brought forward by investors under the ECT, Khobér (2010) finds that the number of cases remains rather low.¹⁷³

In general one can conclude that protection standards implemented in the ECT do not significantly differ from those in BITs or other investment related treaties.

3.2.4 The North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) is a regional agreement intended to liberalize trade and investment between the United States, Mexico and Canada. Together with two side agreements on cooperation in the fields of labour standards and environmental protection, the free trade area became effective on 01.01.1994.

NAFTA itself has not entered any trade or investment related agreements yet. This stands in contrast to other free trade such as the Association of South-East Asian Nations (ASEAN), the common market in South America (MERCOSUR) and since the implementation of the treaty of Lisbon also the European Union, which are using the mandate given by its members to conclude investment related treaties.¹⁷⁴

¹⁷⁰ See Konoplyanik & Wälde (2006), p. 528.

¹⁷¹ See chapter III, article 13, paragraph (1a) in “Energy Charter Treaty”, available at: “http://www.encharter.org/fileadmin/user_upload/document/EN.pdf”, last checked 21.06.2015.

¹⁷² See Konoplyanik & Wälde (2006), p. 535-536.

¹⁷³ See Khobér (2010), p 153-154.

¹⁷⁴ This information was taken from the online database of “International Investment Agreements by Country Grouping”, available at: “<http://investmentpolicyhub.unctad.org/IIA/IiasByCountryGrouping#iiaInnerMenu>”, last checked: 22.06.2015.

Chapter XI of the NAFTA agreements covers investment related issues. Part (a) establishes standards of treatment of investments and investors, part (b) contains provisions on dispute settlement.¹⁷⁵ As Gantz (2003) states, standards and proceedings are based on US-American BIT practise.¹⁷⁶ Equivalent to the ECT, NAFTA protects investors by warranting compensation in accordance with the before mentioned Hull rule in the case of direct or indirect expropriation.¹⁷⁷

According to article 1115 ff. NAFTA as well as the ECT allows for state-state and investor-state arbitration. Under article 1120 1 (a-c) investors can bring forward claims under the ICSID convention or UNCITRAL rules. According to the ICSID database, which also comprises UNCITRAL cases, 20 cases have been filed since the beginning of the free trade area.

The provisions concerning investment in the NAFTA treaty are much alike the approach undertaken in most BITs. As in the case of the ECT, the use of arbitration appears to be sparse, which again hints at a high recognition of the treaty and thus a decent compliance.

In contrast to the ECT, the investment protection clauses in NAFTA do not include an umbrella clause – thus, they do not emphasize the sanctity of the investor-state agreements. Articles 1102 and 1103 establish the national treatment as well as a most-favoured nation standard. Under NAFTA an investor can expect “fair and equitable treatment” by the contracting parties. Investment supposedly enjoy “full protection and security” as stated in article 1105. In line with Sasse (2011) it can be concluded that provisions roughly resemble the standards implemented in most BITs.¹⁷⁸

Summary

The chapter on international investment agreements was intended to introduce the reader to a remedy of international law to resolve the economic time inconsistency problem of foreign direct investment: international investment agreements. Firstly, the history of IIAs was analysed. In the course of time a bilateral treaty approach has become the most proliferated one. On the other hand several attempts to establish a non-preferential multilateral framework on investment protection with alike contents have failed. From a law and economics perspective this odd observation raises the question on how the two approaches would compare to another. This master thesis intends to evaluate the differences with respect to matters of compliance. In order to conduct a *ceteris paribus*

¹⁷⁵ See Chapter XI of the North American Free Trade Agreement, available at: “<https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>“, last checked: 22.06.2015.

¹⁷⁶ See Gantz (2003), p. 693.

¹⁷⁷ See Gantz (2003), p. 695-697.

¹⁷⁸ See Sasse (2011), p. 45.

analysis it must be ensured that BITs and the multilateral agreement on investment are at least alike to conduct a valid examination. It was found that the BITs in general are much alike among another, but might differ in details. Therefore and in line with literature, this master thesis assumes BITs to be equal. Then paradigmatic evidence on the alikeness of agreements similar to a multilateral treaty of investment was given. Thus, this paper assumes that differences of investment treaties with respect to the multi or bilateral nature of the agreement can be analysed *ceteris paribus*.

4 A Theory of International Law – The Three R's

BITs are the most prevalent kind of treaty among all International Investment Agreements. Nevertheless, there is a recent trend to regional and mega-regional agreements like TTIP, currently negotiated between the European Union and the United States of America (US). Still, there has never been a comprehensive multilateral set of rules on investment in place.¹⁷⁹ As pointed out in previous sections, negotiations over the Multilateral Agreement on Investment were brought to halt in 1998.

This chapter would like to add to the discussion on why bilateral approaches might be preferred over establishing one multilateral investment protection framework or vice versa. Therefore, the following assesses similarities and differences of bilateral and multilateral agreements in general and attempts to show under which circumstances one or the other might be more effective in changing the treaty partner's payoff in such a way, that neither side deviates from the agreement. In a next step the framework identified will be applied to investment treaties.

The starting point of the analysis is a setting, in which international law has supposedly no influence on the actions of nations. From there the rational choice based theory "the Three R's" on how international law can affect a state's behaviour introduced by Andrew Guzman in "*How International Law Works: A Rational Choice Approach*" will be derived to analyse compliance issues. Following his thoughts, violating international law and subsequently international investment treaties implicates costs in three categories: reputation, reciprocity and retaliation – the three R's of compliance. In line with the theory the three dimensions are the only mechanisms, which ensures compliance with international law. In the next step differences concerning these mechanisms with respect to bilateral and multilateral agreements in international law will be stated. In the following subchapter the costs of breaching BITs on the basis of the three R's will be assessed. This part basically resembles, but also augments the findings, of an analysis undertaken by Sasse (2011) in "*The Economic Impact of Bilateral Investment Treaties*". In short it is found that direct costs, reciprocity and retaliation are neglectable cost categories. However, there might be considerable reputational costs when breaching BITs. It also seems important to assess the influence of dispute settlement mechanisms included in the agreements. It is found that these institutions do not constitute a different mechanism to the three R's, but can enhance their efficacy.

¹⁷⁹ See Kurtz (2002), p. 713.

Then characteristics of multilateral agreements with respect to the three R's framework will be examined. Reciprocity and retaliation supposedly have a smaller effect on the compliance decision of a state than in the bilateral case. But, reputational losses from violating an agreement can indeed be more severe in a multilateral scenario – especially, when the dispute resolution mechanism implemented in such a treaty is similar to the mechanism implemented in the WTO.

4.1 The Three R's: Reputation, Reciprocity, Retaliation

“Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”¹⁸⁰

In a rational choice model, thus in a world of self-interested rational players, it seems reasonable to assume that a country only cooperates, if the payoff derived from cooperation is superior to gains from solo efforts. But, if cooperation only depends on the outcome of the state's underlying utility maximisation process, the effect of treaties in international law remains doubtful. In line with rational choice theory this can only be the case, if the agreements inherit some costs, that otherwise would have been absent and affect the underlying cost-benefit analysis.

The quote at the beginning of the chapter makes one thing clear: nations are unlikely to act randomly when they comply with or violate international law – they have all the information they need to form a proper decision. If they observe their obligations it seems reasonable that information obtained is used to determine their tactic and strategy for interactions with other players and institutions – thus, what they do appears intentional. From modifying simple games and relaxing assumptions the basis for a setting will be set, in which international law is likely to affect the behaviour of states.¹⁸¹

For the sake of completeness of analysis two Prisoners' Dilemmas will be presented and examined as a basis of the “three R's” framework. In the first scenario two nations have concluded a treaty which prohibits both parties to use satellite based weapon systems.¹⁸² One might question how arms treaties and investment agreements relate and what insights can be gained by analysing military related examples. According to Guzman (2008) arms treaties represent the clearest form

¹⁸⁰ A quote by Henkin (1979) cited in Guzman (2002) p. 1842 FN 79.

¹⁸¹ The original example stems from Guzman (2002). Values given in table 1-3 are from said paper. Payoffs from table 4 and 5 represent the illustrations in Guzman (2008).

¹⁸² This approach aims at the bilateral case of international cooperation. However, players can also modelled as “home country” and “rest of the world”, thus also giving the examples some explanatory power for the multilateral case.

of prisoner's dilemma in international relations.¹⁸³ Furthermore, military examples allow for settings, in which the mechanisms can be clearly distinguished from another. As the following sections are intended to illustrate the three separate mechanisms inducing compliance with international law, trying to avoid interdependencies between the concepts, exemplary military conflicts offer a good way to do so. As will be shown in the application on bilateral investment and multilateral investment agreements, interdependencies in investment related agreements are significant. Coming back to the example of the prohibition of using a satellite based weapon system, the countries simultaneously decide whether to comply with or violate the agreement. Payoffs are given in the table below:

		Country 2	
		Comply	Violate
Country 1	Comply	5,5	2,6
	Violate	6,2	3,3

Table 1: Payoffs "Bad State of Nature"
Source: Guzman (2002), p. 1842

This game represents a classic static Prisoner's Dilemma. In such situations both parties prefer the other player complying with the treaty whilst violating themselves. This sounds reasonable within the example, as it means being able to use the weapon, whereas the other state decides on not using it – giving the violator a clear advantage over the other. The second best option is that both parties comply with what they agreed on, thus leading to a situation in which both parties abstain from using the weapon system. The least desirable outcome for both players would be, if they both decided on using the satellites.

The “*well known*”¹⁸⁴ Nash-equilibrium as Sasse (2011) states, is (*violate, violate*). Guzman refers to this kind of international setting as “the bad state of nature”¹⁸⁵

Before turning to the second scenario it is important to note at this stage, that it is assumed throughout the paper that international agreements presented are consensual.¹⁸⁶ One might argue,

¹⁸³ See Guzman (2008), p. 30.

¹⁸⁴ See Sasse (2011), p. 67.

¹⁸⁵ See Guzman (2002), p. 1843.

¹⁸⁶ See Guzman (2008), p. 60.

that mechanisms in coercive agreements are significantly different to those of consensual ones due to power asymmetries present. Under the present understanding of international law a treaty is considered coercive, if a threat of force against a country or its representative or unlawful use is involved.¹⁸⁷ Technically, under this definition of coercion a number of treaties might be considered as coercive. One example might be the Hay–Bunau-Varilla Treaty concluded between the U.S. and Panama in 1903. It allowed the U.S. to build the Panama Canal and charge passing fees.¹⁸⁸ By the time Panama declared independence from Colombia at the urging of the U.S. and was in definite need for strong allies in the region. Thus, one can identify some form of coercion in the deal of granting the property right of constructing the Panama Canal in return for military protection. But, the question remains, whether distinguishing between coercive and consensual agreements matters in analysing compliance. According to Guzman (2008) it does not play a significant role as in both cases the main interest is whether, an international agreement generates some compliance pull in comparison to a situation, in which the treaty was absent.¹⁸⁹ This can be undertaken for both cases. Thus, one can conclude that any mechanism identified for inducing compliance must have the same effects on consensual and coercive agreements.¹⁹⁰ In that sense, the assumption of consensual treaties can be relaxed. The second scenario – “the Good State of Nature” – resembles a different version of a Prisoner’s Dilemma. Within the means of our example now it turned out that the satellite system would have been proven not helpful for military needs.¹⁹¹ The adjusted payoffs are given in the table below:

¹⁸⁷ See Article 50 and 51 in the “Vienna Convention of the Law of Treaties”, available at: “<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>”, last checked 05.05.2015.

¹⁸⁸ See „Hay-Bunau-Varilla Treaty“, available at: “http://avalon.law.yale.edu/20th_century/pan001.asp”, last checked 05.05.2015.

¹⁸⁹ See Guzman (2008), p. 63.

¹⁹⁰ See Guzman (2008), p. 63.

¹⁹¹ See Sasse (2011), p. 68.

		Country 2	
		Comply	Violate
Country 1	Comply	10,10	6,8
	Violate	8,6	4,4

Table 2: Payoffs "Good State of Nature"
Source: Guzman (2002), p. 1843

The difference to the former example is, that the dominant pure strategy for both parties is compliance, which likely leads to the Nash-equilibrium (*comply, comply*).

According to Guzman (2002) the simple “two states of nature” model satisfies the assumption of states observing their international obligations at all times, mentioned above, and is one approach to explain compliance and violation of international agreements. Basically, states are likely to honour their obligations stemming from international law, if it coincides with their general policy goals. A violation is most probably going to take place in cases, in which the payoff of deviation from a concluded treaty is inferior to the cooperative strategy. As Guzman states: “*In neither case does the existence of an international agreement affect behaviour*”¹⁹². Therefore, also the efficacy of investment treaties as a subgroup might be questioned.¹⁹³

However, some observations in international relations can be made, which seemingly are at odds with the predictions of the static Prisoners’ Dilemma approach and the hypothesis of international law being of no use. The most important of them are the diverse international agreements and treaties which have been negotiated and concluded in the course of history until today. UNCTAD (2014) for instance states that the total number of agreements on protection of investment amounted to 3,236 in 2013.¹⁹⁴ This number let alone seems vast, but it covers only few of the agreements touching economic aspects of international cooperation – themselves only representing a fraction of all cooperative agreements covering diplomatic, military, environmental, etc. aspects. So, the question remains unanswered, why countries conclude agreements, if they do not influence their payoffs after all. If it indeed did not matter in the cost-benefit analysis, there would be no reason

¹⁹² See Guzman (2002), p. 1843.

¹⁹³ To be more precise Sasse (2011) only mentions BITs in his assessment. However, his argument is that BITs are a subgroup of international law. This is also true for any multilateral investment protection agreements.

¹⁹⁴ See UNCTAD (2014), p. 114.

to waste resources on negotiations and maintaining any international agreements. Guzman (2002) argues further, that countries would not invoke any international court. International dispute settlement, however, is chosen quite frequently.¹⁹⁵

Moreover, Simmons (2000) argues that the article containing general obligations to the member states of the IMF significantly changes how a nation deals with its current account.¹⁹⁶ But, if observations in real-life international relations hints at an efficacy, at least at the margin, of international law, then the question remains how it could be explained within the framework of our Prisoner's Dilemma.

If the game took place in a domestic setting, Guzman (2002) argues, it would be possible to ensure compliance by introducing provisions to the contract¹⁹⁷ obliging a violating to pay damages in the case of violation.¹⁹⁸ Subsequently a third player must be introduced to the model: courts, which adjudicate, determine the damage payments and control the compliance with the rulings. Furthermore it must be assumed, that the conflicting parties unconditionally obey the jurisdiction of the court. The validity of this assumption in an anarchic setting was famously confirmed by Nozick (1974), who shows that submission to rulings of a third party might be in the best interest of all.¹⁹⁹

Assuming this kind of effective domestic law enforcement of the chapter containing the violation clauses and a damage payment high enough, it might induce compliance in the satellite weapon example. In order to change equilibria damages must affect payoffs such a way that cooperation becomes the dominant strategy of the game.

For that to happen, consider the following. Let's assume a violator had to pay a damage D to the court, if it decided to breach the agreement. Let's further denote, that the other parties' payoff is not affected by the courts' decision. Payoffs change to the following²⁰⁰:

¹⁹⁵ See Guzman (2002), p. 1844.

¹⁹⁶ See Simmons (2000), p. 832 ff.

¹⁹⁷ In the following the characteristics of contracts and treaties are assumed to be equal.

¹⁹⁸ See Guzman (2002), p. 1844.

¹⁹⁹ See Nozick (1974), p. 1 ff.

²⁰⁰ Only the "bad state of nature" is considered here, as compliance is already the dominant strategy in the "good state of nature" in the absence of contracting.

		Country 2	
		Comply	Violate
Country 1	Comply	5,5	2,6-D
	Violate	6-D,2	3-D,3-D

Table 3: Payoffs Damage Payments in a Domestic Setting
Source: Guzman (2002), p. 1848

Cooperation becomes the dominant strategy for player one, if the expected payoff of playing “*comply*” is greater than the one from playing “*violate*”. Hence, the necessary condition for compliance becoming the dominant strategy for player one can be reformulated as: $(5+2) > (6-D) + (3-D)$. A simple transformation yields: $D > 1$. Thus, the damage payment required for cooperation becoming the dominant strategy for player one must be greater than one unit of D. Due to symmetry of the game this is also true for player two. The adjusted payoffs then would shift the games’ equilibrium to (*comply, comply*).

As mentioned above the extension of the model by introducing contracts depends on accurate law enforcement. With respect to the context of international agreements, it could be argued, however, that courts in international law lacks coercive enforcement.²⁰¹ Hence, a rational choice model in which international law is supposed to matter – and this paper holds this view – must contain a different mechanism explaining its efficacy.²⁰²

It might be, that the mechanism reveals itself, if we look at aspects of time. Surely, there are international interactions, which are best represented in a static environment, but most of the state-state relations are characterized by repeated interactions, which might yield diverse outcomes.²⁰³ An argument in favour of this statement is that countries, which violate in the present, not only undermine cooperation today but also hinder their ability to credibly commit to promises in the future.²⁰⁴ According to Guzman (2008) this hints at a mechanism, which can be held accountable for the example presented in the following section: the Anti-Ballistic Missile Treaty (ABM) between the United States (US) and the former Soviet Union (USSR).

²⁰¹ See Sasse (2011), p. 67.

²⁰² See Guzman (2002), p. 1844.

²⁰³ Guzman (2008) refers to this as the “*repeated nature of interactions*”, i.e. p. 32.

²⁰⁴ See Guzman (2008), p. 32.

The agreement was concluded in 1972 by former U.S. president Richard Nixon and Leonid Brezhnev, by then leader of the USSR.²⁰⁵ It was the outcome of a series of both multi- and bilateral arms control agreements including the Strategic Arms Limitation Treaty I and II, the Non-Proliferation Treaty and the Limited Test Ban Treaty, which had been negotiated in the 1960s and 70s. It basically obliged both parties to limit the use of anti-ballistic weapon system, putting the two superpowers at the same military level. It was hoped to prevent a costly and destabilizing arms race, and hinder any perceived security threats to arise.²⁰⁶

According to Guzman both sides could potentially benefit from the arms control, if both countries complied with the treaty. However, a one-sided violation of the agreement could increase the payoff for the deviating party. Sure, any side would prefer deploying the ABM system whilst the other party refrains from doing so. Additionally to that, the party sticking to its promises might face a situation, in which its second strike capability might have been undermined and catching up might be costly. So, a one-sided violation does not only increase the payoff of the deviating party but also harms the party complying with the agreement. Thus, playing “*comply*” is dominated by “*violation*”. This is another classic Prisoner’s Dilemma as the highest joint payoff would be achieved by mutual cooperation, but unilateral defection is the dominant strategy. In this setting, the ABM treaty might be perceived as an attempt to shift equilibrium to compliance.²⁰⁷

The model presented above would predict a failure of the attempt due to two reasons. Firstly, Guzman says there is no system of courts and law enforcement in place like in the domestic example with damage payments. Article XIII in the treaty is intended to promote implementation and obliges parties to “*establish [...] a Standing Consultative Commission*”. The responsibilities of this commission most probably lack the legal capacity of a domestic court. Secondly, and most important the model states, that international law does not matter. A treaty would be perceived as an unnecessary “*exchange of promises*” – expecting violation frequently.²⁰⁸

A historical analysis however yields that the agreement was honoured by both parties for considerable time²⁰⁹ and Guzman goes as far as to say that this observation cannot be explained by

²⁰⁵ See “Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems” available at: “<http://fas.org/nuke/control/abmt/text/abm2.htm>”, last checked 08.04.2015.

²⁰⁶ For the paragraph see Guzman 2008, p. 30 f.

²⁰⁷ See Guzman (2008), p. 30 f.

²⁰⁸ See Guzman (2008), p. 32.

²⁰⁹ Indeed the treaty was cancelled in 2002 – way after the end of the Cold War.

a one-shot Prisoners' Dilemma.²¹⁰ In his theory, which I will use for the evaluation of bilateral and multilateral investment protection, the repeated nature – the ongoing negotiations during the 60s and 70s – generated a mechanism, which can be held accountable for inducing cooperation: the interest of both nations for future negotiations.

It could be argued, that any violation in the course of the 60s and 70s would have undermined the final conclusion of the ABM treaty. Therefore, it fits the observation and is in line with rational choice theory to assume that players value both present and future cooperation in repeated games. How the player in question values in comparison to future payoffs resembles the economic concept of discounting. It basically states that an expected payoff in future periods can be anticipated today, if it is multiplied by a discount factor. Though the discussion of discounting originated as early as the times of Adam Smith, Samuelson (1937) was the first paper to formalize the concept.²¹¹ He derives that anticipated future payoffs in discrete time models must be deducted by a factor $1/(1+r)^k$ in every k^{th} period of time ahead.²¹² In principal the formula allows for three cases: values of $r < 0$ suggest, that the player prefers future payoffs over present rewards. If $r = 0$ the player is indifferent between the future and present. For values $r > 0$ the player values present payoffs more than anticipated future gains. Economic theory suggests, that rational players value present payoffs more than costs and benefits in future periods.²¹³

According to Guzman (2008) at least three enforcement mechanisms can be identified analysing a repeated setting, which allows for discounting. First of all, he states that a unilateral deviation from the treaty would most likely trigger violation of the other party in the following periods – thus, leading to the well described non-cooperative equilibrium and the lowest possible joint payoffs. Guzman refers to the withdrawal sanction mechanism as (1) reciprocity. Secondly, both parties seemingly complied with the agreements to make their future promises more credible. Secondly, a violator might be punished by some form of (2) retaliatory action. A party deviating from an agreement today, might for instance be subject to economic or diplomatic sanctions – a tool commonly observed in international relations. Sanctions in our context are assumed to bear direct

²¹⁰ See Guzman (2008), p. 32.

²¹¹ See Frederick et al. (2002), p. 355.

²¹² See Samuelson (1937), p. 155 ff.

²¹³ See Frederick et al. (2002), p. 351 ff.

costs for the party introducing them.²¹⁴ A country with a (3) reputation²¹⁵ to honour its international obligations might find it easier to commit to promises made in the future and thus make cooperation – if so desired – more feasible. In our setting it seems unlikely that, let’s say the US would enter any form of further arms treaty, if a Russian breach in a pre-stage became provable.

This example for bilateral security policy might be perceived as too specific to serve as the foundation for a wholesome theory of the mechanisms behind international law. However, Guzman states, that the analysis can also be applied to the multilateral case and might be used to explain cooperation with all subfields of international law.²¹⁶ Furthermore, it could be argued that the U.S. and USSR would also cooperate in the absence of a treaty – meaning that they are facing a “good state of nature”. This might actually be the case. However, the frequent observed interaction with international law as already been stated, gives room to the suspicion that most international interactions are best rendered by the “bad state of nature”. This might emphasize the efficacy of international law.

How the three mechanisms identified might work in the context of the ABM treaty can be illustrated by an extension of the stylized Prisoner’s Dilemma. As before it will not be distinguished between soft and hard international law. The payoffs of the static game are given in the table below:

		Soviet Union	
		Comply	Violate
United States	Comply	100,100	-50,200
	Violate	200,-50	80,80

Table 4: Payoffs of the ABM Treaty Prisoner’s Dilemma
Source: Guzman (2008), p. 31

As in the previous examples, the strong incentive for unilateral deviation of the players leads the players to violate the agreement and induces the Nash-equilibrium (*violate, violate*). To indicate the efficacy of international law, we must now account for future benefits and costs derived from today’s action. Thus, let us assume, the prisoner’s dilemma is now repeated in a framework with

²¹⁴ See Sasse (2011), p. 77.

²¹⁵ The concept of reputation is closely related to economic discounting, as will be discussed in the following paragraphs.

²¹⁶ See Guzman (2008), p. 31.

discrete time periods. In line with the concept of discounting in rational choice theory introduced above, players prefer gains today over payoffs realized in the future. The formula for the discount rate was $1/(1+r)^k$ for every k^{th} period ahead in time. Let r be denoted as the discount rate of the US and the USSR. Technically one might assume the discount rates of the states to differ from one another. According to the argumentation assuming a constant r has no influence on the results of the analysis.²¹⁷ Each gain realized in a period closer to today is preferred over a more distant future, as the whole term converges to 0 as k increases. Every state supposedly knows its own discount rate and estimates the discount rate of the other player on the basis of the observed behaviour. The estimation can be perceived as the “reputation” of a state. It should be noted, that the simplified game only illustrates the mechanism and does not claim to be formally complete. As already mentioned discounting is the anticipation of future payoffs today. This fits the observation, that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”²¹⁸ This allows for at least three possible scenarios. If both players decided to violate the agreement, each would get the payoff of 80 for defection times the discount rate in each period. Thus, gains for breach are $80 + 80/(1+r) + 80/(1+r)^2 + \dots = 80(1+r)/r$. If the parties decide for cooperation throughout each round, payoffs change to $100 + 100/(1+r) + 100/(1+r)^2 + \dots = 100(1+r)/r$. It is clear that the cooperative payoff are higher for each r greater than 0. However, there is a strong incentive for unilateral deviation from compliance. In our model deviation will be punished by the other party. Thus, this strategy yields the payoff of a one sided deviation in the first round and a shift to the (*violation, violation*)-gains for the rest of the game. Payoffs then amount to: $200 + 80/(1+r) + 80/(1+r)^2 + \dots = 120 + 80*(1+r)/r$. As each party knows the consequences of their decision in the first round and the associated payoffs of each action are assumed to stay constant over time, payoffs can be illustrated in one figure:

²¹⁷ See Guzman (2008), p. 37.

²¹⁸ A quote by Henkin (1979) cited in Guzman (2002), p. 1842 FN 79.

		Soviet Union	
		Comply	Violate
United States	Comply	$100(1+r)/r$; $100(1+r)/r$	$80*(1+r)/r-130$; $120+80*(1+r)/r$
	Violate	$120+80*(1+r)/r$; $80*(1+r)/r-130$	$80(1+r)/r$; $80(1+r)/r$

Table 5: Payoffs of the ABM Treaty Including Valuation of the Future
Source: Guzman (2008), p. 39

The matrix indicates, that for some values of $(1+r)/r$ compliance dominates one sided defection. This is the case, when $100(1+r)/r > 120+80*(1+r)/r$. Some calculus reveals $r > 0.2$. So, if any r satisfies this condition, meaning that a player at least is indifferent between 1.2 units of payoff in the future and 1 unit of payoff today, compliance becomes the dominant strategy. These findings represent the so called “Folk Theorem”²¹⁹, first published in Friedman (1971), which states, that under a certain valuation of future payoffs of both players in repeated games, every feasible outcome of the game becomes a subgame-perfect Nash equilibrium.

This stylized repeated Prisoners’ Dilemma indicates how international law – better said the related mechanisms – can affect behaviour of states. This is even possible in a setting of rational player as they have to consider the reputational, reciprocal and retaliatory consequences of their behaviour today on their ability to credibly commit to promises in the future and possible diminished payoffs due to sanctions. Thus, if a country is interested in international cooperation, it somehow has to signal its willingness to honour its international obligations to the rest of the world – it needs to develop a reputation fitting its interests.

How reciprocity works can be illustrated by relaxing the assumption of strategic interaction of the player.²²⁰ In the example above, if any player deviates, she will be punished by a reciprocal

²¹⁹ See Gibbons (1992), p. 89, supra note 16: „The original Folk Theorem concerned the payoffs of all the Nash equilibria of an infinitely repeated game. This result was called the Folk Theorem because it was widely known among game theorists in the 1950s, even though no one had published it. Friedman's (1971) Theorem concerns the payoffs of certain subgame-perfect Nash equilibria of an infinitely repeated game, and so strengthens the original Folk Theorem by using a stronger equilibrium concept - subgame-perfect Nash equilibrium rather than Nash equilibrium.”

²²⁰ The economic intuition in the example of the prisoners’ Dilemma was not given by Guzman (2008).

withdrawal from the obligation until the rest of the game.²²¹ This strategy called “grim-trigger” was first put forward by Friedman (1971) and states that a violator, who deviates once, will be punished by the other player in the remaining periods of the game – regardless of any efforts made by the initial violator to re-enter into cooperation. However, also other strategies seem feasible. For instance a “tit-for-tat”²²², meaning a prior violation of one player will be punished by defection by the other in the following period, a prior cooperative behaviour will be rewarded by cooperation in the following round. Of course also other strategies seem plausible. The chosen strategy of the player then represents roughly the concept of reciprocity. Though one party might signal sticking to a certain strategy as a response to a set of action of the other, it remains uncertain whether or not the player will really act accordingly. Thus, it must be noted, that the credibility of a signal concerning a player’s strategy also depends on her reputation. If for instance the US violates the obligations of the ABM treaty it seems implausible that the USSR will perceive any future promises about compliance in the field as credible.²²³ This also hints at the interaction of three R’s on another.

Resuming to an assumed grim-trigger strategy of both parties, retaliatory sanctions can be illustrated in the model. This can be done by introducing sanction terms into the payoffs of each player. Let’s call the costs imposed on a defecting party by the other player as costs from sanctioning (CSV), which lower her payoff in any way. As stated above retaliatory sanctions are said to be also costly for the sanctioning party. Further, let’s assume every sanction has a stronger effect on the initial violator than on the sanctioning side. Thus, meaning $0 < CSS \leq CSV$. In a similar fashion to the case of reputational damages it can be concluded, that there are at least some pairs of CSS and CSV, for which sanctions effectively shifts the equilibrium of the game to (*comply, comply*).

Summary

At a first glance on issues of international law modelled by static Prisoner Dilemmas it seemed that nations only honour their international obligations, if they are in line with their general policy goals – international law seemingly had no influence on the behaviour of the states. This presumption however is at odds with the observation that countries frequently enter bilateral and multilateral international agreements. In a domestic setting, the cooperative equilibrium in the Prisoner’s Dilemma can be achieved by introducing courts, which adjudicate, are able to award damage

²²¹ See Friedman (1971), p. 1 ff.

²²² See Axelrod (1984), p. 1 ff.

²²³ If the assumption on constant payoffs is relaxed, this statement might lose some validity.

payments and control their ruling. This of course can only be a valid statement, if states obey the authority of the courts. It was shown, however, that international law lacks the coercive enforcement power of domestic law and thus contracting in static games cannot explain compliance in international law. Relaxing the assumptions on the game, three dimensions of costs of breaching international agreements were identified as the driving forces for compliance in international law. The first mechanism can be illustrated by introducing time aspects to the games. Then it becomes clear, that under certain valuation of future payoffs - illustrated by introducing discount rates - cooperation might become the dominant strategy for the players involved. The estimate of the discount rate is referred to as the willingness of the other player to honour its obligations in the future. If a country decides to violate, it might be more difficult for her to enter agreements in the future. These losses related to the breach are referred to as reputational costs. Relaxing strategic assumptions of the players, another mechanism called reciprocity was found to have possible effects on a state's behaviour. Finally, retaliatory sanctions, costly for violator and the sanctioning party, might be the consequence of a breach. The three R's are supposedly the only mechanisms inducing compliance with international law. This will determine the framework of the analysis of the efficacy of bilateral and multilateral investment treaties. In the following the properties of the three R's will be assessed more thoroughly.

4.1.1 Reciprocity

The easiest intuition behind reciprocity is, that if one party breaches an agreement, she might face the costs of the other party revoking her engagement in the obligations of the agreement. A good illustration is given in article 60 (1) of the Vienna Convention on the Law of Treaties: "*Material breach of a bilateral treaty by one or the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.*"²²⁴

An interesting example for the effect of reciprocity is the multilateral "Declaration on the Conduct of Parties in the South China Sea" from 2002.²²⁵ It was signed by China, Malaysia, the Philippines and several other nations neighbouring the South China Sea and regulates the conduct of territorial disputes. It mainly states that countries refrain from territorial expansion in the area. In article five

²²⁴ See "Vienna Convention on the Law of Treaties", available at: "<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>", last checked: 22.04.2015.

²²⁵ See "Declaration on the Conduct of Parties in the South China Sea", available at: "<http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>", last checked: 02.04.2015.

of the treaty it says: “*The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.*” In spring 2015 China started to heap up sand at coral reefs to create artificial islands to use as navy bases – thus, trying to expand their territory and therefore violating the agreement.²²⁶ After China having violated the agreement, the question remains whether other countries will continue to comply in the future. This is interesting, as the implicit threat of reciprocal sanctions mentioned earlier did not succeed in preventing China from deviating.

This might have two reasons. Firstly, China might have perceived the possible reciprocal reactions of the contract partners as costless. This seems plausible as territorial claims and expansions are often the basis for military conflicts. It is doubtful that any of the partner states inhibits a preference for or the capability of engaging in military disputes with China. The second reason might be the lack of credibility of the threat. China out-powers the other members of the treaty by far. However, the rest of the partners are alike and comparable in terms of economic and military power. If another partner of the contract revokes from its obligations as a reaction to China’s violation, it might face severe consequences from the remaining parties. China foresees these disputes and thus perceives any threat of reciprocal sanction as unlikely.

Guzman (2008) gives another example, in which the sole mechanism of reciprocity might lack credibility: The International Convention on Civil and Political Rights. Among other provisions, the treaty obliges its signatories to ban *ex post facto* application of criminal law (Article 15). Let’s assume one country – Guzman takes Russia as an example – felt tempted to violate the contract. Then it remains doubtful, if any of the other signatories, let’s say New Zealand, would react themselves by reciprocal renunciation of the agreement. In our model the reason for that is, that the decision of Russia to participate in the contract and comply with or violate it is unlikely to affect New Zealand’s payoffs. As Guzman states: “*There is no circumstance in which a violation by Russia would constitute a reason for New Zealand to change its domestic policies on the question.*”²²⁷ He then goes further and states that even if reciprocity played any role and New

²²⁶ See “Südchinesisches Meer: China baut Landebahn auf künstlicher Insel”, available at: “<http://www.spiegel.de/wissenschaft/technik/china-baut-landebahn-auf-kuenstlicher-insel-fiery-cross-reef-a-1029278.html>“, last checked: 22.04.2015.

²²⁷ See Guzman (2008), p. 45.

Zealand decided to violate as a reaction to Russian behaviour, this reaction would have no impact on Russia's payoff.²²⁸

Occasions in which the threat of reciprocal revocation from a treaty as a reaction to violation of the obligations might work are armistice agreements²²⁹. In military conflicts these agreements fall in the time between ceasefires and the eventual peace deal. They are supposed to stop fight between the battling powers and thus are meant to provide an acceptable environment for any peace negotiations. The easiest intuition behind these is a: "If you resume shooting at me, I will fire back." During the conclusions of such armistice agreements troops are probably still on alert and facing each other at the battle fronts, making the threat credible. Thus, it would lead to a costly resumption of the war for the violating party. Hence, it probably affects the payoffs of the players and the subsequent compliance/violation decision. A good illustration might be the armistice in the Korean War in 1953. After a proposal for such an agreement had been put forth by India, officials of both sides signed an armistice bringing the fights to an end at the 38th parallel and establishing a demilitarized zone there in July 1953. On this basis peace was finally concluded in November 1953 leading to a separation of Korea in two countries. As both parties abstained from resuming into battle, the armistice might have actually affected payoffs and thus compliance/violation decisions of the parties.

4.1.2 Retaliation

Retaliation comprises sanctions imposed or actions undertaken to intentionally punish a violator of international law.²³⁰ According to Guzman they can be of economic, diplomatic or military nature.²³¹ One could also think of other sanctions such as an excessive extraction or pollution of water from a country upstream a common river, which supplies two or more countries with fresh water.²³²

²²⁸ See Guzman (2008), p. 45.

²²⁹ Technically an armistice agreements is not considered a treaty in international law, but as *modus vivendi*. However, this might be sufficient to illustrate a case, in which reciprocity might be the driving force behind compliance with an agreement.

²³⁰ See Guzman (2008), p. 46 ff and Sasse 2010, p. 77.

²³¹ See Guzman (2008), p. 34.

²³² Instances of potential threats in 2015 concerning water could be the Nile (Egypt vs. Ethiopia), Euphrates (Turkey vs. Syria vs. Iraq) or Jordan (Israel vs. Jordan).

These sanctions are usually costly for the violator²³³, but also for the retaliating state.²³⁴ To illustrate the mutual costs, one can look at the example of the Russia-Ukraine-Crisis. In the course of the disputes between pro-Russian separatist in Ukraine, which escalated in 2014, the European Commission issued an arms embargo, asset freezes and visa bans on Russia and Russian citizens which are suspected for supporting the rebels.²³⁵ As a reaction Russia restricted food imports from member states from the European Union. On one hand this imposed costs and welfare losses to the Russian Federation and its inhabitants due to increased food prices and frozen foreign assets as intended by the EU. A good illustration for that is the dramatic devaluation of the Russian currency in the last year assessed in an online article. However, the author also states that the declining price for oil cause for Russia's economic deterioration – thus I do not want to overestimate the power of the EU.²³⁶

On the other hand the sanctions imposed costs on export oriented companies of the European agricultural and arms sector. One can conclude that the initial sanction is costly for both sides.

This raises the question for Guzman, why retaliatory sanctions are even considered by rational acting states. The answer lies within reputational benefits to the retaliating state. For Guzman a *“retaliating state is communicating to the violating state and, potentially, to other states, that it will react when its legal rights are compromised. If successful, the act of retaliating will enhance the retaliating state's reputation as one that punishes a violator.”*²³⁷ In terms of our model this could increase the expected costs of violation for other states engaging in international agreements with the retaliating state. Guzman calls this the accumulation of *“reputational capital”*²³⁸. In a nutshell, using retaliatory sanctions is the outcome of the cost-benefit analysis including possible reputational gains in the rational choice model.

Other than accumulating reputational capital retaliating actions are intentionally used to persuade violating partners of an agreement to re-establish compliance with the treaty. A sanction can be seen as an expensive investment today with the goal of enforcing future compliance of the violating state. A retaliatory sanction is only effective if the violating state acknowledges that an ongoing

²³³ See Sasse (2011), p. 77.

²³⁴ See Guzman (2008), p. 46.

²³⁵ See “Factsheet - EU restrictive measures” available at:

“http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf”, last checked: 02.04.2015.

²³⁶ See “The Cold War is back, and colder”, available at: “<http://www.news.com.au/finance/economy/the-cold-war-is-back-and-colder/story-e6frflo9-1227159436375>”, last checked: 03.04.2015.

²³⁷ See Guzman (2008), p. 46.

²³⁸ See Guzman (2008), p. 46.

violation of the contract will be punished by further sanctions. The rationale behind a violating party returning to compliance is to avoid future costs.²³⁹

Judging on the basis of the former two paragraphs retaliatory sanctions or threats of sanctions seem to be the best way to ensure compliance. Nevertheless, there are some limitations to the efficacy of the mechanism. Firstly, Sasse (2011) notes that – leaving military intervention aside – possible sanctions must be available in the set of actions.²⁴⁰ He illustrates this argument with a trade embargo between two countries. This economic measure can only work, if there is a positive trade volume between the retaliating country and the target country of the sanctions.²⁴¹ It has been said before, that a threat of sanctions must be credible to achieve compliance. As Guzman (2008) says, the costs of a sanction on the retaliating state, however, only offers a low incentive for an optimal level of sanctioning – leading to a sanctioning below the efficient level. The same is true for a costly development of a reputation for punishing violation.²⁴²

4.1.3 Reputation

Reputation can be defined “*as a judgment about an actor’s past behaviour used to predict the future behavior.*”²⁴³ Sasse (2011) refers to it as the “*ability and willingness of a state to honour its international commitments*”.²⁴⁴ The two components of a state’s reputation by other players are the judgment of their past behaviour and the subsequent predictions about their future conduct. With every interaction in international law (compliance or violation) a state can build up a distinctive reputation. This can be achieved by every decision on either complying with or violating international obligations, it sends a signal to other players and demonstrates (un)willingness to comply with their promises. Subsequently other players take this behaviour into account when building up their expectations about that player’s future moves and adjust their own beliefs accordingly. For the beginning let’s assume there is only a dichotomy between good and bad reputation. A state with a good reputation is expected to rather honour its international obligations, whereas, a bad reputation is established by mainly non-complying.²⁴⁵

²³⁹ See Guzman (2008), p. 46.

²⁴⁰ See Sasse (2011), p. 77.

²⁴¹ See Sasse (2011), p. 77.

²⁴² See Guzman (2008), p. 47.

²⁴³ See Miller (2003), p. 42.

²⁴⁴ See Sasse (2011), p. 76.

²⁴⁵ See Guzman (2008), p. 34.

A good reputation of a state will make cooperation easier and cheaper, as the partners will be more likely to believe future promises. On the other hand, if states tend to breach their contracts, cooperation with other states in the future might be harder. It has to be noted here, that the words “good” and “bad” somehow imply a morality in the behaviour of a state.²⁴⁶ Guzman argues, that there is no such thing and a “bad” reputation might as well be the outcome of the cost-benefit analysis and thus fit the preferences of the acting state.²⁴⁷

The conduct of a state today, determines its reputation tomorrow. Thus, Sasse (2011) concludes, that reputation only matters in repeated interactions.²⁴⁸ The rationale behind that lies in the discounting of expected gains – a standard assumption in economics. The choice whether to breach or to comply with a concluded agreement is determined by the expected gains from that action.

Guzman (2008) states, that if an observing state had all the information about the expected gains and the discount factor of the utility function of the observed subject, it could perfectly predict its behaviour. Therefore he concludes, that reputation can only matter in the case of asymmetric information between states.²⁴⁹ Sasse (2011) finds this assumption to be realistic as it fits observations in real-life international politics and diplomacy.²⁵⁰

²⁴⁶ Morality in consequentialist positive economics lies in the assumption made, not in the outcomes observed.

²⁴⁷ See Guzman (2008), p. 41.

²⁴⁸ See Sasse (2011), p. 76.

²⁴⁹ See Guzman (2008), p. 34.

²⁵⁰ See Sasse (2011), p. 77.

Summary

The “three R’s” framework introduced by Guzman (2002) and Guzman (2008) is a rational choice theory attempting to explain why states comply with international law. It assumes states to be self-interested rational actors in the international community and suggests that states only comply with international law, if the benefits of doing so outweighs the associated costs. This implies there is no internal preference for compliance in the utility function. Thus, international commitments themselves can only affect a state’s behaviour, if it causes some costs for the participating parties, which would not be present otherwise. Guzman identifies the cost-categories as reputation, reciprocity and retaliation – the three R’s.

4.2 Specific Characteristics in the Multilateral Case

Concluding multilateral agreements can have significant advantages over maintaining several bilateral treaties. Guzman (2008) argues that they might help achieving uniformity in standards, economics of scale might be realized in enforcement mechanisms and multilateral negotiations potentially offer greater variety of trade-offs implemented in the final agreement.²⁵¹ Furthermore he states, that multilateral agreements might help states overcoming collective action problems, if public goods are addressed – whereas series of bilateral treaties are supposed to fail to address these problems. Pahre (1994) for instance shows formally that in a setting of indefinitely iterated Prisoner’s Dilemmas a voluntary supply of public goods can be achieved more easily through multilateralism.²⁵² Then his approach goes further than the folk theorem, which basically states, that under a certain valuation of future payoffs of both players in repeated Prisoner Dilemmas, every feasible outcome of the game becomes a subgame-perfect²⁵³ Nash equilibrium.

On the other hand Olson (1968) states: “[...] *rational, self-interested individuals will not act to achieve their common or group interest.*” Thus, giving room for potential free rider problems and confirming economic theory, in which a country might like to benefit from a collective action but prefers others to bear the costs.

In general one has to be careful with general statements about the efficacy of multi- vs. bilateral approaches. If multilateral cooperation was never superior to bilateral cooperation, the question

²⁵¹ See Guzman (2008), p. 64.

²⁵² See Pahre (1994), p. 326 ff.

²⁵³ See Gibbons (1992), p. 95 citing Selten (1965): in repeated games “[...] *a Nash Equilibrium is subgame-perfect if the players’ strategies constitute a Nash equilibrium in every subgame*”.

remains, why there was a trend towards multilateral diplomacy and international law especially in the last century (i.e. GATT, WTO and UN).²⁵⁴ Nevertheless, if multilateral approaches were always preferred, then it is an odd observation, that there are so many bilateral investment treaties in place whilst the MAI failed.

As already stated, the “three R’s” can also explain multilateral cooperation, but there are some distinct characteristics in the multilateral case. In the following I would like to give differences of multi- and bilateral approaches with respect to three R’s.

4.2.1 Reciprocity

In the multilateral context Guzman (2008) expect the cost mechanism of reciprocity to be as effective as in the bilateral case – with the notable exception of agreements concerning public goods.²⁵⁵

It has been stated that multilateral agreements are likely to overcome issues which require collective action better than bilateral approaches. In line with Guzman (2008) it was argued that the advantages lie in the possibility of better internalization of costs and benefits of the issue. Thus, rational players might in some cases prefer multilateral over bilateral problem solving. The very same argument, however, is also the cause why reciprocity as a mechanism to induce compliance is likely to be less effective in the multilateral case than in bilateral approaches.

For illustration let’s assume some considerable number of nations agree on limiting the emissions of their domestic industries in order to improve air quality. Further, it must be assumed that states prefer a clean air over a situation with high pollution. It takes a fixed amount of total emissions reduced to ensure clean air. But, no country alone would be able to afford measures, which satisfy the fixed amount. Especially, as each country can only reduce emissions within their own borders, whereas they face losses resulting from emissions stemming from other countries. Thus, international cooperation is required to tackle the problem. As already stated a rational government then would have an incentive to deviate from the agreement in order to enjoy the clean air while not having to regulate their industries and hence gaining a competitive advantage. This however only holds, if the agreement will be concluded regardless of the country signing it or not. Subsequently a threat of reciprocal withdrawal from the contract would not be credible to a

²⁵⁴ See Ruggie (1992), p. 584.

²⁵⁵ See Guzman (2008), p. 66.

potential violator as it would impose even more costs on the remaining parties of the agreement and in that sense weaken the purpose of the treaty. As a result, the incentive to comply decreases for every signatory and Guzman (2008) is likely right to conclude that “*reciprocity is unlikely to prove an effective tool to sustain compliance in a multilateral treaty aimed at a public goods problem.*”²⁵⁶

According to Guzman (2008) the WTO dispute resolution mechanism is a good illustration for a situation, in which reciprocity might be effective in inducing compliance in a multilateral setting. The “Understanding on Rules and Procedures Governing the Settlement of Disputes”²⁵⁷ (DSU) was agreed on by WTO members in the Uruguay Round of multilateral trade negotiations in 1994 with the intention to clarify rules of WTO dispute settlement and speed up the litigation process. If in the process a country is found to violate WTO rules by any dispute settlement body and does not implement rules and recommendations of such panels, then “*compensation and the suspension of concessions [...] are temporary measures*” for the claimant.²⁵⁸ If a compensation and suspension is not forthcoming, then the same article entitles claimants for further retaliatory sanctions.²⁵⁹

There was a case in which the WTO body for dispute resolution found that the European Communities violated WTO law in restricting imports of beef containing certain growth hormones from the US and Canada. Subsequently the WTO authorized the two claimants to suspend some of their trade obligations in return.²⁶⁰

All in all reciprocity is expected to work as well as in the bilateral case – but only in the absence of a public goods.

4.2.2 Retaliation

Retaliatory sanctions might in theory have as drastic consequences as in the bilateral case. Nevertheless, the problem of free riding – like in the case of multilateral reciprocity – is present and might reduce the credibility of any retaliatory threats. Basically, the threat of a multilateral sanction resembles a situation in which every country would like to benefit from the impact

²⁵⁶ See Guzman (2008), p. 65.

²⁵⁷ See “Understanding on Rules and Procedures Governing the Settlement of Disputes” available at: “https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf”, last checked: 19.04.2015.

²⁵⁸ See ID, article 22 (1).

²⁵⁹ See Anderson (2002), p. 123 f.

²⁶⁰ See Guzman (2008), p. 65.

imposed on a violator, but would be even better off, if the other nations beared the costs of the action.

However, according to Guzman (2008) the collective action problem can be overcome in certain situations of contract breach. The credibility of a multilateral sanction might for instance increase for agreements putting obligations to signatories towards the other signatories. There are at least four different scenarios. Firstly, a single country might violate its obligations towards (1) one other country or (2) a group of signatories²⁶¹. Secondly, a group of countries might be in breach with provisions in the multilateral contract with respect to (3) one country, (4) a different grouping of signatories.²⁶² Following Guzman (2008) scenarios (2) – (4) are all subject to the mentioned collective action problems such as freeriding and consequently less effective in inducing compliance than in the bilateral case. However, if a violation only affects one player, as in scenario (1) the problem might collapse to a situation equal to a bilateral breach. Then a threat of retaliation would be – *ceteris paribus* – equally credible to a threat in a bilateral agreement. In this case retaliation is as effective as if it were a bilateral problem in the first place.²⁶³

A good example for agreements of such a design are the already discussed WTO sanctions mechanisms. In the means of our model one can summarize that the WTO dispute settlement process allows for reciprocal measures in the first step and if this does not deliver feasible outcome, then in a second step authorizes for retaliatory sanctions – this of course is only an option, if the party in question continuously refuses to comply with the recommendations or rulings given by the WTO dispute settlement body. For Guzman (2008) other trade related examples of multilateral agreements with such provisions are the North American Free Trade Agreement or the Dominican Republic-Central America Free Trade Agreement. Also in other field of multilateral international law such as the Geneva Convention Relative to the Treatment of Prisoners of War or the Vienna Convention on Diplomatic Relations obtain similar characteristics.²⁶⁴

Furthermore, Guzman (2008) argues that agreements with prevalent power asymmetries will face lower collective action problems. His argument goes that a powerful country in an agreement

²⁶¹ A group in this case means at least two countries. The maximum amount of group members is determined by the amount of total signatories minus the violating state.

²⁶² In reality there might be more possible scenarios. A country/grouping might for instance be in breach with one provision towards one country/grouping.

²⁶³ See Guzman (2008), p. 66-67.

²⁶⁴ See Guzman (2008), p. 67-68.

fetches a great share of the benefits of an agreement. Then the incentive to efficiently retaliate increases and makes retaliatory threats more credible.²⁶⁵

Drezner (2000) empirically assesses the impact of diverse cooperation settings on the efficacy of economic sanctions and finds that a sanction in a setting of multilateral cooperation, can be more effective than unilateral measures, if it enjoys sufficient support from the international institution. This provides some limited evidence on the efficacy of retaliatory sanctions depending also on the design of the institution in question.²⁶⁶

In the end retaliation or the threat of retaliatory sanctions is supposed to be less effective in the multilateral case than in a bilateral setting. But, there are factors possibly reducing free rider problems. Furthermore, there are cases – specific multilateral agreements with dispute settlement which break down multilateral retaliation problems into bilateral ones – in which the efficacy of multilateral treaties is equal to the effectiveness in the bilateral case.

4.2.3 Reputation

The mechanisms behind reputational costs from breaching bilateral and multilateral agreements supposedly do not differ significantly from one another. If what we consider reputation of a state is a private belief of other players, it should not matter whether the agreement in question is bilateral or multilateral. However, there might be spillover effects of the private beliefs of one party about another state to third parties. These might be severe, if the third party maintains treaties with the party in question.

Guzman (2008) argues that agents in a multilateral treaty might learn quicker about violation and thus might adjust their beliefs quicker.²⁶⁷ However, this depends on the design of the agreements dispute settlement mechanism. If there is an internal communication channel, which informs every signatory before any information is given to the public, then this is true. However, through the internet and its ad-hoc capability of sharing information with everyone in the world, signatories are not necessarily the first ones who obtain the information.

All in all no clear general statement about the effectiveness of reputation in the bilateral and multilateral context can be made as in some occasions the one might work better and vice versa.

²⁶⁵ See Guzman (2008), p. 67.

²⁶⁶ See Drezner (2000), p. 73 ff.

²⁶⁷ See Guzman (2008), p 72.

4.3 Dispute Resolution Mechanisms

In the three R's framework compliance is induced by costs imposed on a contract partner in the case of violation. But, there is a fine line between violating the provisions in question and interpreting them differently. Dispute resolution mechanisms are intended to resolve any interstate disputes within international law. In an economic sense the use of dispute resolution clauses increases the total costs of contract breach and following the logic of the three R's fosters compliance.²⁶⁸ There are two possible effect on the rationale of the involved parties. On the one hand including such provisions might increase compliance, thus, providing a benefit to the parties. On the other hand the application of the clauses imposes costs.²⁶⁹ As dispute resolution mechanisms play a role in compliance with international law it seems plausible to analyse its effects regarding international investment treaties.

In general dispute resolution mechanisms can come in various forms. It certainly is adequate to say, that most international agreements do not specify mechanisms, on how to settle any disputes concerning the reading of treaty clauses.²⁷⁰ Other agreements – such as the before mentioned ABM treaty – include communication channels like committees to give parties the opportunity to exchange views on provision readings, expressing doubts about compliance with the agreement or to ensure progress made regarding the progress of the application of the treaty. Other agreements implement court-like institutions or refer the parties in dispute to already established international courts.

Investment treaties usually include dispute resolution mechanisms. Bernasconi-Osterwalder and Johnson (2011) for instance state that “*Most investment treaties now include provisions establishing a mechanism for settling disputes between investors and host states.*”²⁷¹ Dispute resolution clauses usually refer to established international investment courts. Most BITs for instance allow investors and states to choose among a variety of options to start dispute resolution such as the ICC, the SCC and the UNCITRAL.²⁷² The Austrian Model Bit from 2010²⁷³ for instance allows investors under article 14 (1) (i-iv) to call ICSID, ICC and UNCITRAL tribunals.²⁷⁴ As laid

²⁶⁸ See Guzman (2002b), p. 306.

²⁶⁹ See Guzman (2002b), p. 306.

²⁷⁰ See Guzman (2008), p. 50.

²⁷¹ See Bernasconi-Osterwalder & Johnson (2011), p. 31.

²⁷² See Franck (2005), p. 1541.

²⁷³ See “Draft Agreement for the Promotion and Protection of Investment between the Republic of Austria and ...”, available at: “<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2849>”, last checked: 22.04.2015.

²⁷⁴ See Austrian Model BIT (2010), article 14 (1) (i-iv).

out in the chapter on the history of international investment agreements investors had to first exhaust national legal remedies to seek diplomatic protection by their home land. Since the ICSID was founded in 1965 investors and the countries in question maintain a BIT, investors have been able to bring their claims directly forward to international tribunals. So, when assessing the costs related to investment protection treaties, it seems a necessity to evaluate the efficacy of international dispute resolution mechanisms. The question remains whether these provisions offer an enforcement mechanism in addition to the three R's. Guzman (2008) states "*International courts and international rules calling for compliance or enforcement, though they likely play a role, cannot by themselves be said to offer an explanation of how international law promotes cooperation*"²⁷⁵ Coming back to the example of the one-shot Prisoner's Dilemma, one might as well argue, that not only domestic courts but also international tribunals could issue damage payments. The argument, however, was that they most probably lack the necessary enforcement.²⁷⁶

The second argument by Guzman (2008) on why international courts might fail to induce compliance lies in their infrequent appears. He states, that the panels of GATT and its successor WTO have dealt with only 650 cases in over 60 years, this itself being considerably lower than the 8,000 cases filed to the European Court of Human rights – another international tribunal. In comparison: In 2013 there were 35,184 final rulings in domestic Austrian courts alone.²⁷⁷ Concerning BITs Guzman's statements must be relativized. He cites UNCTAD (2004) stating a number of 160 known cases filed. However, in 2013 this number had more than tripled to 568 cases according to UNCTAD (2014) – the figure experiencing exponential growth from 1987 on.²⁷⁸

If the enforcement mechanism of tribunals is not effective in inducing compliance itself, one might ask why rational acting states specify these institutions in their agreements at all and more importantly what justifies their long term existence.²⁷⁹ The answer can be found in the rulings.

Assuming a lack of coercive enforcement, rulings might only have an informational character. For Guzman (2008) there are two possible ways in which the information generated by international courts might be of use – affect the payoff – of states. Firstly, decisions of tribunals could diminish

²⁷⁵ See Guzman (2008), p. 49.

²⁷⁶ See Sasse (2011), p. 67.

²⁷⁷ See „Gerichtliche Kriminalstatistik 2013 Österreich“, p. 16, available at: „http://www.statistik.at/dynamic/wcmsprod/ideplg?IdcService=GET_NATIVE_FILE&dID=166917&dDocName=077470“, last checked: 20.04.2015.

²⁷⁸ UNCTAD (2014), p. 124.

²⁷⁹ The International Court of Justice for example was founded in 1945 and still exists up to today.

uncertainty in the context of the provision in dispute – thus, helping to clarify obligations and possible claims on the article in question for both parties. If both sides share a common understanding of the matter, then, the ruling might assist in settlement. The goal of ICSID tribunals for instance is to settle conflict rather than sanctioning any party.²⁸⁰ It seems plausible that standing international courts such as the European Court of Justice can be more effective in clarifying, because judges are assigned for a longer period of time and frequently consult rulings from former cases – giving the awards the character of a settled law. As a consequence uncertainty surrounding norms and interpretation of provisions in treaties can possibly be reduced by international courts.²⁸¹

So far, courts were assumed to serve as a kind of mediator between the parties helping to find consent. If the assumption is relaxed and courts also might intent to sanction a deviation from law, then the rulings might serve in a different way. For a sanction-like character of the rulings courts, according to Guzman (2008), must be able to effectively distinguish between states breaking the law and law abiding nations.²⁸² A public declaration of finding a state guilty or not guilty gives investors and other states the chance to adjust their beliefs about the party in question. As in the three R's the consequences might again be of reputational, reciprocal and/or retaliatory nature.

It is important to note that either of the functions hardly appear in pure form and most international rulings have both mediatory and sanctioning character.²⁸³ Sometimes one function might dominate the other. If the information on the awards remains confidential, then the ruling itself might “*serve the interests of settlement rather than sanctioning*.”²⁸⁴ Furthermore, if the tribunal chosen is under significant control by the parties – let's refer to these kinds as “dependent” – compliance is expected to be higher than for independent courts. The reason behind that might be that both parties can resist the issuance of any rulings they dislike. The judge in place might foresee this and negotiate to a certain degree of consent between the parties. Thus, a ruling of dependent courts resembles more a settlement agreement than a classic sanction. On the other hand there are awards given in independent courts, which in theory do not require any level of consent. In a setting of rational players, one might expect compliance rates with awards not requiring consent to be lower

²⁸⁰ Chapter 1, section 1, Article 1 (2) states: “*The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.*”

²⁸¹ See Guzman (2008), p. 52.

²⁸² See Guzman (2008), p. 52.

²⁸³ See Guzman (2008), p. 52-53.

²⁸⁴ See Guzman (2008), p. 53.

than in the case of dependent courts. As there is no coherent intention and outcome among international courts, one has to be careful taking compliance rates with the awards issued as a measure for the effectiveness of the success of a court.²⁸⁵ Still, this might be the only measure at hand.

Posner and Yoo (2005) confirm this hypothesis partially and argue that international courts can only be effective in terms of compliance, if they act in the interest of the states, which created them and state that international adjudication is a relatively disintegrated mechanism. They further state that “*when particular adjudicators and tribunals act against the interest of states, states can pressure them or stop using them without bringing down the whole system.*” This is also the reason for them finding depending courts – as in the case of many BITs – to be more effective than independent courts such as the European Court of Justice.²⁸⁶ On the other hand Helfer & Slaughter (2005) find independent courts to be the more effective tool. They argue, that the three courts with the highest compliance rates are all of independent nature.²⁸⁷ Concerning the absolute compliance with international courts Posner & Yoo (2005) find that it amounts to 44.94 % in the analysed courts.²⁸⁸

One difficulty in drawing conclusion from the empirics lies in the difficult separation of effects. The two opposing studies examine two sets of courts on the basis of descriptive statistics. But, the courts most probably do not only differ in the degree of dependence on the goodwill of claimant and defendant, but also in other significant aspects. These differences might as well explain the variation in compliance rates. A *ceteris paribus* analysis like a simple ordinary least squares regression would be one of the appropriate approaches to isolate the effects of dependence on compliance with rulings. To the knowledge of the author such a study has not been conducted yet. As a consequence, the argument, that rulings of dependent courts are increasing the chances of compliance is of a rather theoretical nature.

A brief analysis of the experiences made concerning compliance with international awards in the course of the Argentinian great depression from 1998 – 2002 might help understanding the non-efficacy hypothesis in the context of BITs. According to Feldstein “*an overvalued fixed exchange (rate locked at one Peso per Dollar since 1991) and an excessive amount of foreign debt were the*

²⁸⁵ See Guzman (2008), p. 53.

²⁸⁶ See Posner & Yoo (2005), p. 72-73.

²⁸⁷ See Helfer & Slaughter (2005), p. 901 ff.

²⁸⁸ See Posner & Yoo (2005), p. 53.

proximate causes for the Argentinian crisis.”²⁸⁹ Briefly speaking, the then introduced protectionist policy on investment to tackle the crisis gave rise to a number of claims on obligations of several BITs maintained by Argentina. Starting in 1997 Argentina has been responding to 51 ICSID cases dealing with claims from BITs – that is roughly 10 % of the total cases conducted by ICSID panels since 1965.²⁹⁰ Unfortunately, no estimate of the total expected damages to be paid due to ICSID rulings could be found. But, Goodman (2007) states that bondholder claims in general might be worth more than 100 billion US-Dollars. This might help illustrate how significant the damage payments can be for the Argentinian economy – if enforced properly.

According to Lin (2012) this seems not to be the case as the Argentinian government basically ignores its obligations derived from the awards and prolongs damage payments by excessive use of requesting stay of enforcement under article 54 of the ICSID-convention.²⁹¹ He argues, that in fact Argentina brings upon the annulment proceedings in “*each and every adverse ICSID-award.*”²⁹² Based on the public bankruptcy announcement of the Argentinian government and the Rosatti Doctrine, an active political guideline from a former Argentinian Minister of Finances stating that a ruling of a tribunal cannot be valued more than decisions of Argentinian domestic courts, Goodman (2007) concludes that Argentina will most likely not comply with any adverse awards.²⁹³

The ICSID convention, however, contains a passage allowing enforcement of its rulings in other signatory states. Chapter IV, section 6, article 54(1) says: “*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*”²⁹⁴ The provision then would allow claimants to force the compensation included in the ICSID ruling for instance by seizing assets. This a complex and costly process and a not very promising effort for the investors though.²⁹⁵ According to Lin (2012) the US has recently started

²⁸⁹ See Feldstein (2002), p. 8 ff.

²⁹⁰ This information was taken from the online database of ICSID, available at: “<https://icsid.worldbank.org/apps/ICSIDWEB/cases>”, last checked: 12.04.2015.

²⁹¹ See Lin (2012), p. 1 ff.

²⁹² See Lin (2012), p. 7.

²⁹³ See Goodman (2007), p. 449 ff.

²⁹⁴ See ICSID convention, chapter IV, section 6, article 54(1).

²⁹⁵ In 2012 an American hedge funds successfully seized a ship from the Argentinian Marine worth 10 Million US-Dollars in a Ghanaian port – the amount claimed, however, amounts to over 1.6 billion US-Dollar. Thus, the efforts can only be seen as a signal as the assets do not nearly cover the debt. (available at:

to vote against any further loans to Argentina in IMF councils – in that sense the non-compliance of the awards making cooperation more difficult for Argentina – and hence concludes that costs through rulings are mostly of reputational character.²⁹⁶

The example of Argentina then delivers some exemplary evidence on the hypothesis that the enforcement mechanism of international tribunals itself might not affect state behaviour, but might increase the associated reputational costs for future cooperation from non-compliance with the award.

Following the argumentation of this subchapter, international tribunals do not reconcile a mechanism differing from the three R's. Then an efficacy of the tribunals concerning affecting the costs associated with breaching BITs must also be undertaken by using the three R's framework. With respect to reciprocity, it seems unlikely, that any signatories withdraw their engagement in the ICSID convention as a result of another country not complying with ICSID awards – thus also any reciprocal threats seem not credible. Though, retaliatory actions might play a role, it can be considered an "ultima ratio" in this context. A country must be affected by non-compliance of a third party for them to put costly sanctions on the deviating nation. Let's assume the country thinking about imposing sanctions is the home country of the investor bringing the claim to a tribunal – a situation which might tempt a country to set up sanctions. In a way this country would have two disadvantages: first it has to bear the costs of the investor not being compensated by the country unwilling to follow the ruling and second the costs of the sanction. Hence, it does not seem efficient to set up sanctions in settings of investment arbitration.

Considering reputation, we have to revisit the findings above. It was said, that if decisions of courts were kept confidential, they would serve a rather mediatory function. In line with Franck (2005) settlement procedures and awards are usually kept confidential due to their commercial nature, with the notable exception of American and Canadian model BITs, which contain transparency clauses in the recent versions.²⁹⁷ This might hint at a rather informational nature of rulings of investment related international courts. Then one can presume, that the rulings are there to clarify interpretation of the provisions in BITs. However, as many awards and other important procedural

<http://www.spiegel.de/wirtschaft/soziales/us-hedgefonds-beschlagnahmt-marineschiff-aus-argentinien-a-859494.html>", last checked: 12.04.2015).

²⁹⁶ See Lin (2012), p. 1.

²⁹⁷ See Franck (2005), p. 1539 ff.

resources of the cases remain confidential, the ruling can only act clarifying to the claimant and defendant.

If not published, the intention of the rulings cannot lie in the establishment of a worldwide coherent reading of provisions of BITs and thus clarifying standards for all investors and signatories of BITs. Though most documents remain unknown for the public, the information publicly available still might carry some costs associated with breaching the agreement.²⁹⁸ Investors and other countries might perceive a considerable number of pending cases over a significant time span as an indicator for the country in question unwilling to come to consent with investors. Indeed, Allee & Peinhardt (2011) find evidence, that countries defending in pending ICSID cases face significant FDI losses – if they lose the dispute, the losses are even greater.²⁹⁹

Such a behaviour might generate a negative spillover effect on a countries access to financial markets. Lin (2012) finds evidence that ignoring the rulings might have indirect influences on the access to World Bank funding or international credit.³⁰⁰ All in all, dispute mechanisms concerning BITs as of now do not pose a great threat to a countries reputation, but in extreme cases – such as Argentina – the awards might have drastic implications.

As already stated, the number of cases dealing with claims arising from a perceived breach of BITs is likely to increase in the course of the following years – coinciding with a rising public concern. This might lead to a pressure on claimants, defendants and tribunals to publish resources of the processes. This then might amplify the costs associated with rulings.

Summary

The theory introduced in the previous sections suggests that international law only affects a state's behaviour if the treaty carries additional costs, which would otherwise be absent. In line with Guzman (2008) three type of costs associated with breaching investment agreements were identified: reciprocal, retaliatory and reputational. These costs were found to be similar for the bilateral and multilateral case, but reciprocal and retaliatory costs might not work as well in the multilateral setting. It was attempted to show that dispute resolution mechanisms included in international law do not resemble a different category of costs additional to the three R's. It was found, however, the informational character of the rulings might work as an amplifier for reputational costs.

²⁹⁸ Most databases for instance offer only basic information on the cases

²⁹⁹ See Allee & Peinhardt (2011), p. 429.

³⁰⁰ Lin (2012), p. 2.

5 The Costs of Investment Agreements

The previous chapters have introduced the reader to the characteristics and economics FDI and its protection under institutions of international law. Further, it was shown, that states comply with their obligations stemming from international law, if breaching an agreement is costly in three categories: reciprocity, retaliation and reputation. This set the framework of examining whether bilateral or multilateral investment treaties constitute a more effective tool to induce compliance with the standards and provisions laid out in the treaty texts.

As investment agreements in general are concluded with the purpose of mutually promoting FDI and protecting investor rights, a violation must generate some costs to a deviating party in order for the treaty to be an effective tool.³⁰¹ In the following section costs associated with such agreements will be presented and examined with respect to direct costs and costs of violation of the treaty. Firstly, the analyses for bilateral investment treaties will be conducted. Most of the costs could also be attributed to the multilateral case, which will be shown in a second step. But, there are some substantial differences, which allow for comparison of the costs of both the bilateral and multilateral approach with respect to compliance.

5.1 Costs of Bilateral Investment Treaties

Before turning to the application of the three R's framework, let me give some insights in some the more general costs associated with BITs. It is worth noting that the mere fact of concluding a BIT generates some direct costs for the signatories. BITs are state-state treaties. Two countries interested in signing an investment treaty have to appoint delegations with members of the respective authorized institutions, they have to negotiate the contents of the BIT and eventually sign the treaty. The contracts have to be ratified by the respective representative body – assuming the negotiating states are based on democratic ideas – before entering into force. If expiration of the BIT is included in the final treaty, the process starts from the beginning after the date agreed on, if so desired by the parties. This process of course might differ between countries and BITs. In this sense the costs associated with concluding are comparable to those of any other state-state treaty.

³⁰¹ See Sasse (2011), p. 78.

But, there are some facilitating factors, which lessen the direct costs of closing a BIT. Sasse (2011) states that the existence of model BITS, which have been mainly created and used by capital-exporting countries or country groupings causes the negotiations of BITs to be less complex than those of other international agreements. Furthermore, he mentions, that the UNCTAD supports developing countries with technical and advisory assistance, sometimes even hosting the negotiations.³⁰²

In line with Sasse (2011) the costs appear to be “*manageable even for countries with limited resources.*”³⁰³ Overall, direct costs should not have prevented a lot of countries from entering into BITs.

5.1.1 Reciprocity

The concept of reciprocity suggests that a country might – if it serves its needs – withdraws compliance from a contract as a reaction to a detected deviation of the other party. A reciprocal threat can only be effective in inducing compliance, if it is perceived as credible by the other party. The efficacy of a termination of reciprocity in general is determined by the amount of costs imposed on the original violator.

In the context of BITs reciprocity cannot play a big role due to the purpose of the agreement. Rational players do conclude BITs to attract FDI through the promise of investment protection and to have residential investors’ rights protected. In line with Sasse (2011) it can be argued that a rational country would most likely not refrain from the benefits derived from general investment protection due to an individual case.³⁰⁴ Furthermore, it seems unlikely that states reverse their promise to protect foreign investment, if there is only the slightest possibility of capital flight.

However, there might be extreme cases, in which a country’s best response to a violation is to terminate the agreement. Take for instance an expropriation of an investor from country A by country B. Let’s assume country A wants to send a signal to potential investments, that country B does not provide a stable investment environment. If it is further assumed that there are no other considerable investments in country B left to be protected under the BIT, than benefits of the signal might actually outweigh the costs from not enjoying the promise of ongoing investment protection.

³⁰² See Sasse (2011), p. 79.

³⁰³ See Sasse (2011), p. 79.

³⁰⁴ See Sasse (2011), p. 79-80.

Then again country A might as well use other communication channels to warn its resident investors about potential expropriation risks in country B without touching the BIT.

Also other extreme cases might be possible. If a country has the intention to introduce protectionist policies or to expropriate a certain investor, which probably will be perceived as a breach with the BIT, it would gladly take a violation of the other party as a reason to terminate the investment protection agreement. Sasse (2011) finds that “*investment flows are very often asymmetric.*”³⁰⁵ Then investment stock must be sufficiently large to be valued more than the associated costs of such behaviour.

It must be noted here, that the government most likely is not a perfect agent for the investor. Thus, further diminishing the effectiveness of reciprocity in the context of BITs.

In general it can be said, that reciprocity is most likely not the driving force behind compliance with BITs.

5.1.2 Retaliation

Retaliatory sanctions were identified as measures undertaken to intentionally punish derivation from international agreements and mostly try to force them back into compliance. In contrast to reputational or reciprocal sanctioning, retaliatory behaviour also imposes costs on the punisher. There is a wide range possible forms of punishment including economic, diplomatic and military sanctions. As stated in Sasse (2011) retaliation might not matter much in the context of BITs.³⁰⁶ He argues that the interest of individual investors might just not be important enough for governments to step into costly action – especially if they are not perfect agents for the investor.

Furthermore, there are considerable costs for the party sanctioning. Investment related sanctioning such as discrimination against an investor stemming from the original violator state might trigger cumbersome arbitration processes. Moreover, economic sanctions in other fields such as tariffs or import restrictions would likely cause WTO proceeding and seem not feasible.³⁰⁷

Though military intervention caused by economic interest cannot be ruled out completely, it seems unlikely that a breach of a BIT alone might trigger such measures. It would even hardly explain any form of costly diplomatic consequences – violation of BITs might just not be important enough.

³⁰⁵ See Sasse (2011), p. 80.

³⁰⁶ See Sasse (2011), p. 80.

³⁰⁷ See Sasse (2011), p. 80.

These findings, however, are again based on the presumption made in Sasse (2011) that states are not perfect agents for residential investors. It might as well be that a home country of an expropriated investor perceive the expropriation as a direct attack on the integrity of the countries' foreign policy and react with harsh diplomatic measures. Such actions might also be justified by a state striving for a pure reputation for punishing violation of agreements concluded.

In total the effects of retaliatory sanctions on compliance with BITs seems neglectable and subsequently threats of such nature do not seem credible.

5.1.3 Reputation

If the efficacy of reciprocal and retaliatory sanctions is found to be insignificant for inducing compliance with BITs, then reputational costs from breaching them must – at least in the three R's framework – cause the observed compliance with the agreements. Reputation was defined as state's willingness and ability to enter international agreements and comply with obligations derived from them. Other players base their expectations about future promises of a country on its behaviour today. The expectations will be adjusted in every significant case of interaction with international law of the respective country. This implies an information asymmetry between the state in question and other players. In that sense a country can build up a certain reputation. If it tends to comply with its obligations other player might include this in the process of forming beliefs about future behaviour and thus make cooperation for the country more accessible. However, also a reputation for sole actions might be in line with a countries' preference – hence, reputation is not a question of morality, but the outcome of a rational cost-benefit analysis of a nation.

Bilateral investment treaties are usually concluded between sovereign entities, however, mainly investors benefit. Thus, it should be differentiated between reputation vis-à-vis other states and reputation vis-à-vis investors.³⁰⁸

Concerning the reputation vis-à-vis other states it can be said that the costs of violating BITs in place are limited to the extent this behaviour affect the beliefs of other related to entering and complying with international agreements. All areas of international cooperation could be affected in theory, but it seems reasonable to assume that its effect on investment related issues are the strongest – other fields of economic cooperation might also be touched. However, one can hardly expect a breach of BITs to have significant effects on the ability of a country to conclude and

³⁰⁸ See Sasse (2011), p. 80.

maintain for example human rights agreements. Furthermore, the level of efficacy of a violation on the belief function is supposedly stronger on treaty partners or politically near countries than on more distant third parties. However, this might be relativized in the case of a country repeatedly violating the same standards in BITs. Then, other countries – regardless of their contract status and relation to the country in question – might as well draw the conclusion that the nation in question is willing to give up profits from long term cooperation for short term payoffs.³⁰⁹

In general reputational sanctions of third party states and/or treaty partners bear considerable costs on a country, who violates BITs. This most probably induces compliance to a certain degree. But the impact of these costs is (a) limited by the ability of the action to trigger adjustment of beliefs of other parties and (b) differs from case to case.

In terms of reputational sanctions vis-à-vis investors, it should be noted here, that states signing BITs most likely prefer to have a good standing with investors. Though a contracting for diplomatic reasons cannot be ruled out completely, economic interests seem to be the driving force for conclusion of such agreements as they are meant to signal an investor friendly climate and, therefore, aim at attracting and sustaining FDI. Nevertheless, the rise of model BITs used in negotiations might lead to the suspicion that capital exporting countries propose BITs to considerably weaker trade partners in a “take-it-or-leave-it” fashion as a package combined with economic aid in other fields – in that sense force the country in question into signing the treaty.³¹⁰ However, asymmetries in power need to be excessive to force a sovereign nation to do anything. Furthermore, it was already argued, that for analysing compliance it does not matter whether the agreement is consensual or coercive. As an example for a coercive investment agreement Guzman (2008) names the conclusion of the Investment Framework Agreement between Afghanistan and the US in 2004. By the time, and some might argue that this is the case up to today, Afghanistan relied heavily on the US and thus any choice to enter an agreement cannot be rendered by free choice.³¹¹ Thus, in some of cases with similar power asymmetries diplomatic considerations might play a significant role in the process of entering investment protection agreements.

In line with Sasse (2011) it must be stated that an investor will “*reduce, discontinue or hold back their investment when the government acts in a manner that derogates the investment.*” – regardless

³⁰⁹ See Sasse (2011), p. 80-81.

³¹⁰ A search in the UNCTAD-database shows that there are 63 model BITs used in negotiations. However, this number also includes obsolete model BITs from the past.

³¹¹ See Guzman (2008), p. 60.

of a BIT in place. Then it must be assessed if there are some reputational costs generated by the treaties additional to the costs of the actual derogation.

It seems logical that investors and potential investors perceive the act of derogation – as more severe than the breach of the BIT. However, only the breach of the BIT allows the affected investors to bring claims to international arbitration and demand damage payments. Nevertheless, given the uncertainty about the outcome of the arbitration and its enforcement, which will be discussed in the next subchapter, an investor hardly prefers expropriation with a subsequent litigation process over not being expropriated.

One can say that there are certainly some reputational associated with the violation of BITs. These are mainly caused by the informational character of awards in BIT arbitration. Most costs related with breaching BITs are associated with the derogation of capital itself rather than the treaty.

5.2 The Costs of Multilateral Investment Agreements

It seems reasonable to presume that the conclusion of a multilateral agreement on the protection on investment imposes considerable costs on its signatories. In contrast to the bilateral case there are more than two parties trying to find consent on provisions in the agreement. Thus, the underlying coordination problem is most definitely a complex one to resolve.

Kurtz (2002) analyses the chances of a multilateral agreement on investment in the future. The paper identifies two difficulties, which might be hard to overcome during the course of negotiations. First, he points out that needs of the capital exporting and developing countries must be balanced. Capital exporting countries will probably favour liberalized approaches in the final agreement, whereas developing countries might prefer protectionist aspects.³¹² Of course this is a generalized statement and reality might differ from this simple dichotomy, but it illustrates, that finding consent between these two positions is hardly achieved with ease. Secondly, due to the experiences of Argentina made with investment arbitration, less developed countries in the negotiation process might oppose comprehensive arbitration system implemented in the final agreement. In that sense not only does the number of players in the negotiation complicate coordination of interests, but also fundamental disparities in views might complicate the conclusion

³¹² See Kurtz (2002), p. 713 ff.

of a multilateral treaty. A series of bilateral treaties than might seem more efficient with respect to direct costs than a multilateral approach.

On the other hand it was argued that economics of scale might be realized in multilateral negotiation processes. In theory this argument holds. For illustration imagine a multilateral agreement with 100 signatories. If a series of equivalent bilateral treaties were supposed to have the same coverage, countries would have to conclude 4,950³¹³ treaties. This is not a profound argument, but under this aspect it seems reasonable to presume that the conclusion of one multilateral agreement might be less costly than entering a series of bilateral treaties in theory. However, this is only a valid statement, if a consent between all parties can be achieved in the first place. The differences in interests of the relevant seem hard to overcome.

All in all one can say that direct costs in theory are probably lower in the multilateral case than in a series of bilateral treaties. Nevertheless, as great disparities between relevant parties might arise, the negotiation process of a multilateral agreement face substantial burdens.

5.2.1 Reciprocity

It was found that in the context of BITs reciprocity can only play a minor role in inducing compliance in extreme cases.

In the multilateral case it seems unlikely that the threat of reciprocal withdrawal from the contract induces compliance of other states. Firstly, a nation hardly will refrain from the benefits towards its investors in other states. Secondly, even if the potential investment agreement included passages allowing for temporary suspension of obligations towards the violating state such as in the case of WTO. Temporary suspension would mean then to discriminate against foreign direct investors stemming from the country, which originally violated the treaty. It does not seem credible that an award by any investment related court would allow for this kind of punishment towards investors, if it is the home country, which violated the agreement – especially, if the state is not a perfect agent for the investor. Even if there were such rulings, a discrimination would probably cause other investors to withdraw their capital. This stands contrary to the purpose of the investment agreement.

In general it can be said that reciprocity probably imposes less costs in the multilateral than in the bilateral case. Thus, the mechanism will probably have neglect able effects on compliance.

³¹³ Calculated from the formula: $\frac{n!}{(n-k)!*k!} = \binom{n}{k}, \frac{100!}{(100-2)!*2!} = \binom{100}{2} = 4,950.$

5.2.2 Retaliation

It was found that retaliatory sanctions are not effective in the context of BITs. The argument given was that the interests of an investors alone might not be important enough to cause any sanctions. The economic intuition behind the identified irrelevance is that states most likely are acting as perfect agents for their domestic investors. These arguments can also be valid in the multilateral case.

In contrast to bilateral treaties a multilateral sanction mechanism might further suffer from substantial free rider problems. If a multilateral sanction mechanism was in place, all signatories – or at least signatories involved in FDI in the country in question – would benefit from a sanction, but prefer others to bear the costs. This probably prevents efficient sanctioning. Moreover, the argument from reciprocity concerning the likelihood of awards authorizing states to retaliate against the original violator might fail, as the states are not perfect agents for the investors.

In total retaliation is supposed to be less effective in the multilateral case than in a bilateral setting. Together with the findings for multilateral reciprocity this confirms Guzman's (2008) suspicion that *“both reciprocity and retaliation are more effective enforcement mechanisms for bilateral than for multilateral agreements.”*³¹⁴

5.2.3 Reputation

In the bilateral context reputation was identified as the driving force behind the compliance with BITs.

Concerning reputation vis-à-vis investors it was stated that investors probably are more concerned about the act of derogation of their capital than about the country violating its agreements. However, other investors might obtain additional information through what is published about cases negotiated at investment related arbitration courts. Still, critical information, which might support states in evaluating the case, is rarely published.

With respect to reputation vis-à-vis other states it was found that reputational costs in BITs induce compliance to the degree a violation is able to trigger adjustment of the belief of other parties. In a multilateral agreement it seems reasonable to assume, that the signatories care for compliance of

³¹⁴ See Guzman (2008), p. 63.

other parties. Therefore, reputational losses in the multilateral agreement might be higher than in a series of bilateral treaties.

However, it was also found in the bilateral case that the reputational losses with respect to BITs are generated by awards of the ICSID or other investment related arbitration courts. Nevertheless, the ruling of the panels are rarely published and the information stays private to the parties in dispute. This hinders an effective use of the awards for adjusting beliefs about the party in question.

It can be argued that these awards would be more effective, if all information was published. This, however, stands in contrast to the policy of most arbitration courts. Further, other enforcement mechanisms of international law, which higher the reputational stakes of being in breach with them are a possibility of better compliance.

All in all reputational damages in the multilateral case are comparable to those in BITs. The reputation vis-à-vis other states might suffer from breach of multi- rather than bilateral approaches. The reputation vis-à-vis other investors is supposedly equal to the bilateral case. Still it can be argued that if a more transparent dispute resolution mechanism was implemented, reputational damages from breach would be amplified. If a multilateral agreement sticks to mechanisms like implemented in ICSID, then reputational damages are supposedly equal to the bilateral case.

6 Conclusion

Though foreign direct investment has become an important factor in the integration of the economic world, literature in law & economics on the topic remains to be expanded. This master thesis intended to compare bilateral and multilateral investment protection agreements with respect to their compliance inducing properties.

To do so, the reader was first introduced to basic characteristics surrounding foreign direct investment. After having defined main terms of FDI, classifications of FDI and main motivations were presented. In a next step it was argued that foreign direct investors are prone to risks additional to operational risks of running the business: political risks of operating in an international environment. Political risks were found to be risks associated with expropriation or any other kind of action intending to derogate the value of the investment undertaken by the government of the host country. The economic problem behind political risks of FDI is that of time inconsistency. Once the investment is sunk, the host country has an incentive to expropriate. Rational investors foresee this possible intervention in their investment. The consequence was found to be an investment under the optimal level because the government cannot credibly commit to promised investment climate. Among other devices, international law is one approach to mitigate risks associated with FDI. It was found that the main sources of international law are customary international law, international general principles and international treaties.

Then the development of FDI determinants over the last 30 years was analysed. It was argued that before the 1980s FDI did only play a minor role in international economics. Since then, FDI has followed a volatile positive trend. Today FDI is an important indicator for global economic integration. Historically, FDI was an activity from multinational enterprises between developed countries. Since the 1990s also firms from developing economies start investing abroad as well as developing countries receive considerable amounts of FDI.

In the next steps, international treaties as a way to solve the time inconsistency problem of foreign direct investment were introduced. Firstly, the history of IIAs was examined. In line with literature three eras of investment protection were identified: the colonial, the post-colonial and the modern era. In the colonial era interests of investor were mainly protected by diplomatic intervention of the home country. However, the United States started to conclude a series of bilateral soft law treaties – a first attempt to introduce treaties as a protection mechanism in international investment

law. Due to significant changes in the global political and investment environment, the risks of cross-border investment in the post-colonial era increased. As in theory military intervention was prohibited by the statutes of the United Nations and customary international law changed to a less favourable standard of treatment of foreign investors, capital exporting countries sought other forms of protecting their investors. However, negotiations over the Havana Charter, a multilateral non-preferential investment agreement, did not bring fruitful outcomes. On the other hand, bilateral preferential investment agreements – so called BITs – proliferated. After the foundation of ICSID, virtually all BITs included clauses on investor-state arbitration – now property rights granted under treaties were enforceable. The fall of the iron curtain heralded the start of the modern era of investment protection. From then on the success story of BITs started to pick up pace. Today BITs are the most proliferated form of investment protection agreement. However, preferential regional investment agreements are on the rise. Negotiations over a non-preferential multilateral agreement on investment – the MAI – were once again put to halt. So, the question arose how the bilateral and multilateral approach would compare in theory. This thesis intended to shed a light on the question whether the bilateral or the multilateral approach would compare with respect to compliance.

To conduct a *ceteris paribus* analysis of investment treaties with respect to bilateral and multilateral aspects, the likeness of the treaties had to be examined. Firstly, BITs were analysed. In line with literature it was found that the treaties follow a similar pattern: (1) scope and applicability, (2) standards of treatment and (3) arbitration. Concerning (1) scope and applicability it was found that BITs in general are alike, but might vary in details. (2) Standards of treatment were found to be “fair and equitable treatment”, “full protection and security”, national treatment, most-favoured nation, free transfer of funds and compensation in the case of expropriation. Although a small degree of variety exists, virtually all BITs establish these standards – differences of the treaties are mainly terminological. Nearly every BIT in force nowadays includes alike clauses on clarifying state-state and investor-state arbitration. It was found that BITs are in general alike, but might differ in specific matters. However, literature on BITs has given evidence that these differences might be neglectable. From then on the thesis generalizes BITs as one.

Then multilateral agreements were examined. Usually, multilateralism refers to an agreement with three or more signatories. In the case of investment agreements another factor comes into play: non-preferentiality. As so far no comprehensive multilateral agreement has been in place, two

examples of agreements are given, which are considered similar: The Energy Charter Treaty and chapter XI of the North American Free Trade Agreement. The ECT is a non-preferential multilateral agreement on liberalizing investments in the energy sector. Chapter XI of the free trade agreement NAFTA contains the provisions on investment of the preferential regional agreement, which as well intends to foster cross-border investment. It is found, that provisions found in the two agreements basically mirror the standards established in BIT practise. This paradigmatic evidence suggests that a multilateral agreement on investment in the sense of this paper would be much alike BITs. Though some doubts might prevail, a *ceteris paribus* analysis of bilateral and a multilateral investment agreement seems to be valid.

Then a law and economics theory of international law introduced in Guzman (2002) and Guzman (2008) was derived and presented. States were assumed to be rational, self-interested and unitary actors – a classic rational choice approach. It was argued that international interaction is best modelled by a Prisoners' dilemma. Allowing only for static games it seemed that nations do only comply with their international obligations if they were in line with their general policy goals. Furthermore, the lack of coerciveness of courts of international law further questioned the effectiveness of international law. Thus, international law supposedly had no effect on the payoff of the states. Relaxing the assumptions of the model, three costs that nations face when breaching international law were identified as the driving force behind compliance with international law: The three R's. The first mechanism was revealed after the introduction of dynamic games. It was argued that under a certain valuation of the future, cooperation might become the dominant strategy for rational players. In other words, if states decide to breach international law today, they might find entering into other institutions of international law harder. This mechanism was referred to as (1) reputation. Relaxing the assumptions on the strategies of the players, it was argued, that states also might face costs of a reciprocal revocation of the engagement of other parties. The game-theoretic intuition behind (2) reciprocity was found to be a tit-for-tat. Lastly, a violator of international law might face costs of (3) retaliation. Retaliatory sanctions are actions undertaken to intentionally punish a violator. It must be noted, that sanctions are costly for the violator, but also for the retaliating state. It was then argued, that due to free rider problems retaliatory sanctions are less effective in the multilateral case.

Before applying the model to the case of investment agreements, the paper tried to show that dispute resolution mechanisms in international law do not constitute a mechanism different from

the three R's. However, an expected rising number of decisions of arbitration courts might raise the reputational costs of violating international investment agreements.

In a next step the three R's framework was applied to international investment law and the costs of investment agreements were evaluated.

Firstly, BITs were examined. Direct costs of bringing a BIT into force were found to be insignificant. Due to the design and the intentions of the treaty a threat or the actual reciprocal revocation from the BIT, seems not credible. As interests of an individual investor might not be important enough for the home country also retaliation is found not to be the driving force behind compliance with BITs. The interest of a single investor might not be important enough for a diplomatic intervention of the home state. Reputation was found to be the driving force behind compliance with BITs. Concerning the reputational sanctions vis-à-vis other states it was argued that breaching BITs can have effects on the ability to enter future economic agreements. If one assumes that a state, which entered into a BIT also prefers to maintain other international agreements of economic integration, the consequences of a breach of a BIT might be severe. Regarding the reputation vis-à-vis investors it was argued that the act expropriation itself is perceived as more severe than the breach of the BIT. However, only a BIT endows the foreign direct investor with the property right to bring forward claims to international arbitration.

Then the costs of a multilateral investment agreement were evaluated. It was argued that direct costs of negotiating a single non-preferential multilateral agreement on investment would most likely be lower than concluding a network of BITs offering the same scope. Due to free rider problems in multilateral agreements, reciprocity was found to be a less effective mechanism than in the case of BITs. The same argument holds for retaliation, which most likely prevents efficient sanctioning. However, all the mechanism above were found to be next to insignificant in the case of BITs. Thus, direct costs, reciprocity and retaliation can be neglected in the comparison of multi- and bilateral approaches of investment protection.

Concerning the reputational losses vis-à-vis other states it was said that a breach of single non-preferential treaty on investment protection will probably, but not necessarily, be perceived as more severe than the violation of BITs. The validity of this statement depends on the importance of the treaty: If the contents of the treaty were perceived as a generally accepted norm in international law – as in contrast to BIT practise – the breach of a multilateral agreement causes more

reputational damages to the violator than in the case of BITs and vice versa. Vis-à-vis other investors no differences to the bilateral case were found.

Hence, the discussion concerning compliance with bilateral and non-preferential multilateral international investment agreements can be narrowed down to reputational matters – at least following the approach of this master thesis. For reputational sanctions to be effective, the stakes of a treaty must be high, identification methods of breach optimized and awards of international arbitration courts respected. BITs and the associated dispute resolution mechanisms do only partly fulfil these criteria. Hence, countries like Argentina still solely comply with international obligations when it is in line with their general policy goals. But, a multilateral agreement on investment mirroring the contents of BITs unlikely works better considering compliance. On the other hand, the number of arbitration cases has skyrocketed in recent years and is expected to rise further in the future. Eventually, the readings of the tribunals will find their way into customary international law. So far, however, rulings are rather decided on case specific characteristics than general norms. Certainly, the public discussion about institutions of international investment law has affected and will influence the design of future investment agreements and dispute resolution mechanism. Just recently the EU commission has reacted to public concerns about the inclusion of ICSID clauses in the TTIP negotiation draft and proposed to establish a new “international investment court”.³¹⁵ The new institution is supposed to make investment related disputes more transparent to the public and have legislative features. Even though the idea is still in the early stages of development the turn in thought indicates a step towards putting reputational stake to international investment law – with positive effects on overall compliance. This advance in the discussion about the design of regional investment agreements, might also give rise to renewed negotiations over a multilateral framework of investment protection. A balanced and lawful incorporation of the needs of investors, stakeholders and national interests into international investment law would not only foster compliance with such a multilateral agreement, but also contribute to global economic integration.

³¹⁵ See “TTIP-Streit um Schiedsgerichte: EU-Kommission schlägt neues Handelsgericht vor“, available at: <http://www.spiegel.de/wirtschaft/soziales/ttip-eu-kommission-schlaegt-neues-handelsgericht-vor-a-1053264.html>“, last checked 28.09.2015.

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Appendix 1: Abstract

Over the past decades bilateral investment treaties (BITs) have become the most proliferated form of protecting foreign direct investments under international law against governmental interventions derogating the value of the investment. Since the first BIT was signed in 1959 nearly 3,000 of such treaties have been concluded. Until today the agreements have remained similar in form and the standards of treatment established by the treaty text are much alike. Regional agreements on investment protection have become more popular, too. Nevertheless, all attempts to establish a non-preferential multilateral agreement on investment have failed. This observation opens new possibilities for research in law and economics. This master thesis puts the focus on the question whether or not a multilateral agreement would constitute a more effective mechanism concerning compliance than the bilateral approach. After introducing the reader to basic concepts surrounding foreign direct investments, it is argued that agreements between investors and host countries are prone to economic time inconsistency problems. Institutions of international law can help securing an optimal level of investment. Then the history of international law as a device for investment protection is examined. The focus of the examination is put on BITs and treaties, which show comparable features to a theoretical multilateral agreement. Subsequently, the framework to tackle the research question is presented. The theory of “the Three R’s of Compliance with International Law” assumes states to be rational, unitary and self-interested players. Following the logic of the model, states comply with their international obligations if a breach induces costs in three categories: reputation, reciprocity and retaliation. A cost-analysis, which applies the model to international investment agreements shows that on the one hand reciprocity and retaliation have only neglectable effects on the behaviour of nations. On the other hands breaching investment agreements might bear severe reputational costs for the violator. It is argued that a non-preferential multilateral agreement with strong reputational mechanisms might indeed foster more compliance than an equivalent network of BITs. However, the validity of this statement depends on the transparency and lawfulness of the incorporated dispute resolution mechanisms in the multilateral framework.

Appendix 2: Zusammenfassung

Bilaterale Investitionsschutzabkommen (BITs) sind in den letzten Jahrzehnten zur am weitesten verbreiteten Form des Schutzes für ausländische Direktinvestoren vor staatlichen Eingriffen, die den Wert von Investitionen vermindern könnten, geworden. Knapp 3.000 dieser Verträge wurden seit der Unterzeichnung des ersten BITs im Jahre 1959 erfolgreich verhandelt. Bis heute folgen die Staatsverträge einem ähnlichen Muster und die Standards, die durch die Vertragsklauseln aufgestellt werden, gleichen sich stark. Auch regionale Abkommen erfreuen sich immer größerer Beliebtheit. Trotzdem sind bisher alle Verhandlungsversuche über ein multilaterales Investitionsschutzabkommen gescheitert. Aus der rechtsökonomischen Perspektive stellt sich aus dieser Beobachtung unter anderem die Frage, welche Unterschiede es zwischen den beiden Ansätzen geben würde. Die vorliegende Masterarbeit beschäftigt sich in erster Linie damit, inwiefern sich Multilateralismus in Investitionsschutzabkommen auf deren Einhaltung durch die Vertragspartner auswirken würde. Nach einer Einleitung, die den Leser in Grundkonzepte rund um ausländische Direktinvestitionen einführt, wird festgestellt, dass Vereinbarungen zwischen Investoren und Empfängerland der Direktinvestition einem ökonomischen Zeitinkonsistenzproblem unterliegen. Institutionen des Völkerrechts können dabei helfen, effiziente Investitionsvolumina sicherzustellen. Nach einer rechtsgeschichtlichen Erläuterung des Investitionsschutzes unter Völkerrecht, wird der Fokus der Untersuchung auf BITs und Staatsverträge, die einem multilateralen Abkommen, am nächsten kommen, gelegt. Daraufhin wird eine Rational-Choice-Theorie die als Untersuchungsrahmen für die Problemstellung dieser Arbeit dient, vorgestellt. Die Theorie der „Drei R“, die Staaten als rationale, unitäre und nutzenmaximierende Akteure beschreibt, identifiziert drei Kostenkategorien, die Staaten tragen, falls sie gegen Obligationen aus dem Völkerrecht verstoßen: Reputation, Reziprozität und Vergeltung. Eine Anwendung des Modells auf Investitionsschutzverträge zeigt, dass Reziprozität und Vergeltung keine signifikanten Auswirkungen auf das Verhalten von Staaten haben. Nationen, die gegen Investitionsschutzabkommen verstoßen, können aber bedeutende Reputationsverluste erleiden. Ein multilaterales Abkommen, dass mit starken Reputationsmechanismen versehen ist, könnte durchaus mehr positiven Einfluss auf die Einhaltung der Vertragsstandards induzieren als ein äquivalentes Netz aus BITs. Das hängt allerdings davon ab, ob in das multilaterale Abkommen implementierte Streitschlichtungsmechanismen des Völkerrechts transparent gestaltet sind und einen mehr rechtsgebenden Charakter haben.

Appendix 3: Eidesstattliche Erklärung

Ich erkläre hiermit an Eides Statt, dass ich die vorliegende Arbeit selbstständig und ohne Benutzung anderer als der angegebenen Hilfsmittel angefertigt habe. Die aus fremden Quellen direkt oder indirekt übernommenen Gedanken sind als solche kenntliche gemacht. Die Arbeit wurde bisher in gleicher oder ähnlicher Form keiner anderen Prüfungsbehörde vorgelegt und auch noch nicht veröffentlicht.

A handwritten signature in blue ink, appearing to read 'F. Zosche'.

Wien, am 21.10.2015

Appendix 4: Lebenslauf

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Staatsangehörigkeit	Deutsch
Geburtsdatum	26.06.1988

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|--|---|
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Siemensstraße 90, 1210 Wien, Österreich</p> <p>Technologie – Interne Kommunikation</p> <p>Praktikant</p> |
| <ul style="list-style-type: none"> • Datum (von – bis) • Name und Adresse des Unternehmens • Tätigkeitsbereich oder Branche • Beruf oder Funktion • Sonstiges | <p>25.08.2010 – 01.02.2013</p> <p>nextplant UG (haftungsbeschränkt),
Luisenstraße 53, 10117 Berlin, Deutschland</p> <p>Biotechnologie, Gartenbau</p> <p>Geschäftsführender Gesellschafter / Kaufmännischer Leiter</p> <p>Erfolgreiches Fundraising „EXIST-Gründerstipendium“ in Höhe von 100.000 EUR,
Branchenaward „TASPO 2012“ in der Kategorie „Gartenbauneugründung des Jahres“</p> |
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- Art der Veröffentlichung Online-Tutorial
- Link http://www.humboldt-innovation.de/de/ectopic.html?mCtrl=Topic&mOp=View&m_EducationCorner%5BtopicID%5D=83&m_EducationCorner%5BsubTopicID%5D=84
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Theodor-Heuss Gymnasium,
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SPRACHLICHE KOMPETENZEN

Muttersprache

Deutsch

Weitere Sprachen

- Kenntnisstand

Englisch
Sehr Gut (UNICERT II, Note: 1,3)

• Kenntnisstand

Spanisch
Gut

• Kenntnisstand

Italienisch
Grundkenntnisse

TECHNISCHE FÄHIGKEITEN UND KOMPETENZEN

Intuitiver Umgang mit EDV,
Office (Word, Excel, Access),
Erstellen von Internetseiten mit Content-Managementsystemen (Typo 3, Wordpress),
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