Stephan W Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009), ISBN 978-0-521-76236-6, 451 pages

REVIEWED BY CHESTER BROWN*

The emergence of international investment law has been one of the more striking developments in the international legal order in the past decade, and it has become one of the most dynamic and vibrant fields of public international law. The first bilateral investment treaty ('BIT') was signed between Germany and Pakistan in 1959, and the United Nations Conference on Trade and Development ('UNCTAD') has reported that, as at the end of 2011, there were 2833 BITs in existence,[1] in addition to a growing number of regional multilateral treaties, such as the *North American Free Trade Agreement*[2] and the *Energy Charter Treaty*.[3] Over a relatively short space of time, there have been rapid developments in both the interpretation and application by arbitral tribunals of the substantive obligations on states under these treaties, and the treaty-making practices of states. UNCTAD also reports[4] that there have been over 450 known claims under BITs and multilateral investment treaties, with most claims being referred to international arbitration under the auspices of the International Centre for Settlement of Investment Disputes or the *UNCITRAL Arbitration Rules*.[5]

The book under review is entitled *The Multilateralization of International Investment Law*. The background to this contribution by Stephan Schill, Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law at the University of Heidelberg, is that there are two principal features of the investment treaty regime which might be thought to result in the 'fragmentation' of international investment law (p 11), or at least a lack of conformity in how such treaties are interpreted and applied. The first of these is that the overwhelming majority of investment treaties are BITs, rather than multilateral treaties, and only apply as between the two States Parties to the treaty. This gives rise to the possibility that investment treaties might be formulated differently and impose different obligations on the States Parties. The second feature is that disputes under investment treaties are typically determined by ad hoc arbitral tribunals, which are only constituted to deal with individual disputes, and from which there is only limited

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* Professor of International Law and International Commercial Arbitration, Sydney Law School, University of Sydney.

1 UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), 84.

2 Signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994).

3 Signed 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

4 UNCTAD, 'Latest Developments in Investor-State Dispute Settlement', *IIA Issues Note No 1* (April 2012), 1.

5 *As revised in 2010*, GA Res 65/22, UN GAOR, 65th sess, 57th plen mtg, Agenda Item 77, UN Doc A/RES/65/22 (10 January 2011).

recourse (for instance, by way of annulment), which could result in substantial inconsistency in the interpretation and application of investment treaties.

Against this backdrop, Schill's monograph provides a fascinating analysis of how the international investment regime is, in practice, deeply multilateral, rather than bilateral, in nature. As he explains:

> [I]nvestment treaties in their entirety function largely similar to a genuine multilateral system and serve a constitutional function for the global economy by establishing institutions that enable economic actors to unfold their activities and structure economic exchange in the field of foreign investment (p xiv).

He notes that 'what one can observe is a convergence, rather than a divergence, in structure, scope and content of existing investment treaties' (p 11). Schill observes that this convergence is 'surprising' in light of the historic 'failure' of multilateral investment treaties, as well as the greater flexibility offered by bilateralism 'in tailoring international obligations to the specific relationship between the two States' (p 11). Yet the conclusion of bilateral treaties has arguably had 'the effect of resulting in a system that possesses very similar, if not the same, essential features as a multilateral system' (p 16), consisting of 'generally applicable rules and principles, just as if these rules were enshrined in a formal multilateral treaty' (pp 16–17).

Schill's claim as to the multilateral nature of international investment law is twofold. First, it involves a 'descriptive claim' that it is possible to understand international investment law as 'a sub-system of international law that progresses on the basis of bilateral treaties towards a universal system which is not based on specific reciprocity, but orders investment relations objectively on the basis of general principles' (p 17). Second, the claim is normative in that 'multilateralism rather than bilateralism should inform the application and interpretation of investment treaties' (p 17).

After a historical chapter (ch II), which outlines the history and development of international investment law, Schill develops his thesis through a series of chapters that address various features of international investment law. These are the negotiation of BITs based on similarly worded 'model texts', which were heavily influenced by the multilateral draft treaties that were not adopted (particularly the *Abs-Shawcross Draft Convention* of 1959[6] and the *OECD Draft Convention* of 1967[7]) (ch III); the existence of the most-favoured-nation clause ('MFN clause') in the vast majority of BITs, which is one of the normative bases for the multilateralisation of international investment law (ch IV); the possibility of corporate restructuring — also known as 'nationality planning' or 'treaty shopping' — to take advantage of (more favourable) investment protection (ch V); the existence of a procedural mechanism in most BITs to enforce the obligations on host states, namely investor-state arbitration, which provides for a form of 'multilateral law-making' (ch VI); and, finally, the contribution of the jurisprudence of investor-state arbitration to the

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6 *Draft Convention on Investments Abroad* in United Nations Conference on Trade and Development, *International Investment Instruments: A Compendium V* (United Nations, 2000) 395.

7 *Draft Convention on the Protection of Foreign Property* (OECD, Publication No 15637, December 1962).

multilateral system, as well as the role played by de facto 'precedents' established in the case law of arbitral tribunals (ch VII).

In his discussion of the use of model BITs, Schill is right to observe that 'the convergence of treaty texts of many capital-exporting countries finds its origin in national model treaties that serve as a basis for negotiation', and also that 'the convergence among the various national model treaties is based on their common historic pedigree', in particular the *Abs-Shawcross Draft Convention* and the *OECD Draft Convention* (p 89).

Schill also notes that alternative model texts — such as the United Nations *Code of Conduct on Transnational Corporations*,[8] the Asian-African Legal Consultative Committee's various Models, or texts prepared by non-governmental organisations — have had little influence on the treaty practice of states (pp 95–8). This may be so, but in recent years a number of states (and supranational organisations) have reached policy decisions on international investment law which have arguably impacted on the degree of uniformity from one BIT to another. For instance, the United States Model BITs of 2004 and 2012 are arguably quite different from its Models of, say, 1987, 1991 and 1992, on which many of the United States' current BITs are based. The more recent model texts are more elaborately formulated, and also contain express carve-outs for matters such as taxation, environmental protection, and national security. Another ongoing development faced by member states of the European Union ('EU') is that they must consider whether they can maintain their intra-EU BITs, which would see their investment relations with each other limited to the protections provided by EU law. Closer to home, in the *Gillard Government Trade Policy Statement*,[9] Australia announced that it will no longer seek to include investor-state dispute settlement provisions in future bilateral or regional investment agreements. It can therefore be said that cracks are beginning to appear in the previous picture of broad convergence.

In what is perhaps the book's core chapter, dealing with the MFN clause (ch IV), Schill reviews the arbitral practice on the question whether the MFN clause can be invoked by investors to circumvent admissibility-related access restrictions to investor-state dispute settlement, such as the requirement found in some BITs that an investor must first seek to resolve any dispute before the local courts of the host state of the investment prior to commencing investor-state arbitration (pp 152–63). Schill argues that it is possible to speak of 'a generally accepted arbitral jurisprudence holding that MFN clauses are capable of circumventing admissibility-related restrictions, which do not concern the consent to arbitrate, but rather other procedural access restrictions to arbitration', so long as the MFN clause in question does not exclude this (p 161). This fits with Schill's general argument that 'absent any clear indications to the contrary, MFN clauses should be applied broadly to incorporate any more favourable treatment, independent of whether it concerns substantive or procedural matters' (p 194). This is a broad position to take, and one which has met much resistance from states, many of which now include an 'anti-*Maffezini* provision' in new BITs, as Schill himself acknowledges (p 160). In addition, a more recent

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8 GA Res 45/186, UN GAOR, 45th sess, 71st plen mtg, UN Doc A/RES/45/186 (21 December 1990).

9 *Trading Our Way to More Jobs and Prosperity* (April 2011) DFAT <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

arbitral award casts much doubt on the validity of the approach of the earlier tribunals.[10] (It is easy to comment with the benefit of decisions issued subsequent to the publication of Schill's book, although the award in the *ICS Inspection and Control Services* case inevitably will have provided food for thought for those who espouse the broad view of MFN clauses.)

But these observations are in no way intended to detract from the unquestionable value of this volume. Schill's thoughtful and thorough analysis of the regime established by the network of BITs is groundbreaking. It not only makes an excellent contribution in offering a general theory of international investment law, but also describes significant practical implications for the interpretation and application of BITs. In a field where much of the secondary literature is merely descriptive or reactive (or both), Schill's deep consideration of the issues offers a fresh perspective, and it is to be warmly welcomed into the literature.

[10] *ICS Inspection and Control Services Ltd (UK) v The Argentine Republic* (Award on Jurisdiction, Permanent Court of Arbitration, PCA Case No 2010-9, 10 February 2012) [274]–[317].