Stephan W. Schill. ***The Multilateralization of International Investment Law***. Cambridge: Cambridge University Press, 2009. Pp. 490. $102.00. ISBN: 9780521762366.

Stephan Schill's book, *The Multilateralization of International Investment Law,* stands apart from the rest of the literature on international investment law which has burgeoned in the past few years. In contrast to most publications on the market, this volume, adapted from the author's Ph.D. thesis, does not attempt to summarize and systematize the developments in arbitral practice. Instead, it reveals an important and previously unexplored dimension of the investment treaty phenomenon by presenting an original vision of the landscape formed by more than 3,000 international investment agreements (IIAs). The author advances and substantiates the seemingly counter-intuitive thesis that these predominantly bilateral instruments do not result in chaotic fragmentation but, taken together, 'function analogously to a truly multilateral system' (at 15).

The book relies on the following main arguments to support this thesis (all reviewed in more detail below):

- IIAs are largely uniform in their structure and content and have produced certain fundamental principles of international investment protection;
- differences between individual IIAs of a particular country are in most cases levelled out by operation of the most-favoured-nation (MFN) treatment clauses;
- the lax definition of 'investor' in most IIAs allows natural and legal persons from unrelated (third) States to benefit from the IIA protection by means of corporate structuring;
- the reasoning patterns of arbitral tribunals adjudicating investor–state disputes suggest that they see the multitude of IIAs as part of a uniform regime (e.g., their frequent reliance on previous decisions based on wholly unrelated IIAs).

The author's assessment of the formally bilateral system as effectively a multilateral one immediately gives rise to the question why *genuine* multilateral investment negotiations have continuously failed – first in the 1960s (OECD), then in the late 1990s (OECD), and, most recently, in the early 2000s (WTO). The author addresses this question head-on in chapter II. Based on his careful study of the relevant negotiations, he explains the failure of the 1967 OECD Draft Convention on Protection of Foreign Property by the 'ideological divide between capital-exporting and capital-importing countries about the appropriate principles of foreign investment protection'. Indeed, no multilateral consensus on these issues could be expected at a time when the movement for the New International Economic Order was gathering momentum.

However, this ideological divide seems to have dissipated by the 1990s, when the Multilateral Agreement on Investment (MAI) was attempted, again under the auspices of the OECD. The failure of the MAI, as well as of the subsequent WTO investment agreement initiative, the author argues, was due to the complexities of multilateral negotiations with different parties seeking different exceptions and exemptions from general principles of investment protection. However, he notes that there was no disagreement about these general principles themselves.

The attempts to negotiate multilateral instruments served as crucial precursors to the modern BIT system. Indeed, BITs 'find their origins in multilateral aspirations and approaches' (at 69), most importantly the 1967 OECD Draft Convention, which had 'a harmonizing effect for the BIT programs of capital-exporting countries' (at 89). Having failed to negotiate a multilateral treaty, developed countries did not throw out the negotiating draft but used it for their bilateral agreements with capital-importing countries. This resulted in such a high level of BIT uniformity that it became possible 'to carve out principles that govern international investment relations' (at 69), namely scope of treaty application, principal standards of investment protection including non-discrimination, fair and equitable treatment, protection from direct and indirect expropriation, umbrella clauses and capital transfer provisions, and lastly the dispute settlement mechanism (all briefly examined in chapter III).

Importantly, Schill suggests that – after the end of the decolonization movement with its widespread expropriations and in the aftermath of the Cold War – these principles were accepted and even promoted by developing countries and transition economies. He points to a large number of BITs concluded *between* developing countries which incorporate exactly the same elements as earlier developed–developing country treaties. It is debatable whether this was due solely to an ideological shift, as the author suggests, or was partly a result of the unthinking use of the existing treaties by governments as templates for new ones, or the fact that in each country pair there is one which perceives itself as the capital exporter. The fact remains that BITs concluded by developing countries *inter se* are largely the same as the ones they have signed with developed economies.

A sceptic would point out that BITs are not identical, especially if one compares a first-generation BIT concluded in the 1980s or 1990s, of five to seven pages in length, with modern IIAs, which sometimes approach 50 pages (particularly those concluded by Canada and the United States). Schill acknowledges these differences but insists that they do not undermine the validity of the argument and that all, or practically all, BITs converge as far as the principal elements of investment treaties are concerned. Further, the author sees the MFN principle as the key instrument that evens out differences in the level of protection offered by individual treaties, and thereby multilateralizes the system of international investment law (chapter IV). MFN clauses prevent states from making preferential concessions to investors from particular states (except where this possibility is preserved by a special proviso, e.g., relating to economic unions), which means that the best treatment available under any BIT must be granted to all investors covered by other BITs.

Schill relies on the 'multilateralizing' function of MFN to argue that it should serve to import not only more favourable substantive protections and procedural provisions but also – and this in contrast to the prevailing arbitral practice – to widen the jurisdictional provisions of a BIT by incorporating a broader consent to arbitration from a third-party treaty.[1] Even though such interpretation would indeed advance the cause of multilateralization, many states have contested

[1] The author limits the thrust of MFN only by denying it applicability to the *scope* of a base treaty. According to this limitation, MFN may not be used, e.g., to import a laxer definition of an investment or investor from a third-party treaty (at 144–146).

it by explicitly providing in their recent IIAs that the MFN provision does not encompass dispute-settlement matters (jurisdictional and procedural alike).[2]

Thinking further about the IIA landscape as a multilateral system, one could point out that there are countries without a single BIT in force (Brazil is the best-known example), while others have very few (Ireland has one). However, 'multilateral' need not mean 'universal', and it is normal to have outsider countries. And, as Schill explores in chapter V, by concluding even one BIT, a state may be considered to have joined the multilateral system. This is because the effect of a typical BIT is not limited to a specific bilateral relationship. Due to the flexibility of the 'nationality' requirement, most BITs allow 'corporate structuring' of an investment which allows a person or company to receive protection of a BIT that they consider most beneficial for their purposes (or of the only BIT that is available). Thus, 'any investor from virtually any country is capable of opting into virtually any BIT regime' (at 238). One could, of course, ask whether this is true multilateralism and not simply opportunistic 'free-riding' by those who are not entitled to BIT protection. Indeed, in more recent IIAs this 'treaty shopping' trend has been countered by many countries through denial-of-benefits clauses and by tightening the definition of legal entities.

Perhaps even more significantly, as the author explains in the same chapter, BITs cover both direct and indirect owners of an investment, thereby effectively entitling any shareholder in the (often long) ownership chain to claim BIT protection. This potentially leads to a multiplication of applicable investment treaties if the shareholders have different nationalities (provided that each of the relevant countries has a BIT with the host state). In practice, a host government will not know all relevant shareholder nationalities in advance, and this obliges it to act in conformity with the investment treaty which has the most far-reaching obligations.

Chapter VI, entitled 'Multilateral Enforcement of International Investment Law', discusses *inter alia* how arbitral tribunals sitting in individual cases contribute to the formation of global investment law. The argument is quite simple – given the vagueness of many important BIT obligations (primarily fair and equitable treatment but also full protection and security and indirect expropriation), tribunals do not simply apply the law to the facts but 'join States as primary rule makers' by adopting a 'gap-filling' and 'norm-generative' function. Given that the abovementioned uncertainties are common to most, if not all, investment treaties, the way they are resolved in relation to a particular BIT impacts on the interpretation of BITs generally, including unrelated third-party BITs.

The interpretation theme continues in chapter VII, which shows how the idea of multilateralism reappears in the interpretative approaches of arbitral tribunals. According to Schill, tribunals' argumentative structures point towards the existence of an *overarching body of international investment law* despite its fragmentation in bilateral treaties. The chapter dissects the phenomenon of 'inter-award dialogue' and the widespread practice of citing and following earlier awards (the author's review of existing case law and interpretative techniques employed is quite impressive). The fact that tribunals routinely refer to other arbitral decisions based on wholly unrelated IIAs is portrayed as a sign that tribunals perceive international investment law as a *uniform and coherent* body of law.

[2] There may be limits to how far an MFN clause can go in levelling out differences between treaties even in respect of substantive protections. E.g., supposing a particular country has two treaties, one including a general exceptions provision (relating to environmental measures, protection of public morals, etc.) and the other without it. Would the MFN clause of the first treaty effectively erase the specifically negotiated exceptions on the grounds that they result in larger room for manoeuvre for the host state and, accordingly, in less favourable treatment of investors?

In a somewhat counter-intuitive twist, the author also shows that, even when tribunals issue *conflicting and incoherent* decisions, they *still* respect multilateral rationales. Often, when taking a conflicting decision, arbitrators take particular care to distinguish the case at hand from earlier cases on the facts, or explain their divergence by reference to the wording of a specific treaty. These strategies illustrate the perception of international investment law as a unified system. Notably, the author does not call on tribunals to disregard differences in the wording of investment treaties, which sometimes represent material 'divergence[s] from the general treaty practice and its multilateral aspirations' (at 362).

Schill recognizes the value of coherence, which he identifies as the second – alongside the unity of legal sources – essential attribute of a multilateral system. He argues that the lack of coherence in investment arbitration is primarily due to the lack of a standing judicial body to adjudicate on all disputes, and the absence of an appeals mechanism and *stare decisis* rule. These features being inherent in any truly multilateral arrangement, this is precisely where one of the major weaknesses of the current system lies.

In the concluding chapter, in addition to summarizing the book's main findings, the author sets out his forecast and proposals. He opines that while the existing system of investment treaties is unlikely to change fundamentally in the foreseeable future, certain improvements are in order. He suggests, in particular, rebalancing the power of tribunals in favour of states. This would entail defining tribunals' standard of review of state action more narrowly, in order to leave states a larger margin of appreciation. Another idea would be to concretize the normative content of substantive investor rights, through a comparative-law approach (to which Schill has already tangibly contributed by editing a volume on the subject[3]). In this process, it is important to prevent dominance of market considerations over the legitimate interests of host states. The author calls for a 'reasonable balance' between public and private interests, which could be achieved by reference to the principle of 'proportionality'. These are progressive suggestions which should be welcomed.

An attempt to give a comprehensive view of reality always runs the risk of it turning into a Procrustean bed, where the creator of a particular model stretches or gives a spin to existing facts or prefers to ignore the facts which do not fit into the model proposed. In this case, the author has deftly evaded this fate – the book does not shy away from possible counterarguments. Of course, it still contains a fair amount of generalization, and not all existing elements and developments in treaty-making practice fit into the model (consider denial-of-benefits clauses which prevent corporate structuring from taking advantage of BIT protections, or an increasing trend to limit the scope of the MFN obligation) but the general thrust of the argument appears to reflect reality in a neat and logical way.

To the main substantive conclusion of the book – that bilateralism does not *counter* multilateralism but rather is a movement *towards* multilateralism – one may add that the development of international investment law though bilateral treaties has allowed for experimentation. Recent IIAs display much more variation with respect to the scope and content of substantive obligations compared with agreements concluded throughout the 1990s. This experimentation should allow for a more balanced multilateral investment treaty, if one is ever to be concluded.

A distinctive feature of the book is that it is not limited to traditional legal analysis, but is grounded in the broader social, economic, and ideological reality. In doing so, the author has relied upon an impressive range of literature from related fields such as law and economics and international relations. As a result, he manages cleverly and harmoniously to combine a big-picture view with a detailed analysis of BIT provisions and arbitral practice. The drafting style is exceptionally clear.

[3] S. Schill (ed.), *International Investment Law and Comparative Public Law* (2010).

It was obviously not the author's intention to produce a reference book for arbitration practitioners which they could readily use when drafting their next submission. Rather, this wide-ranging analysis offers longer-term rewards by significantly advancing the understanding of the foundations, rationales, structure, and operation of the current system of international investment law.

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