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978-0-521-76236-6 - The Multilateralization of International Investment Law

Stephan W. Schill

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THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW

Attempts at developing a theory of international investment law are complicated by the fact that this field of international law is based on numerous, largely bilateral treaties and is implemented by arbitral panels established on a case-by-case basis. This suggests a fragmented and chaotic state of the law, with different levels of protection depending on the sources and targets of foreign investment flows. This book, however, forwards the thesis that international investment law develops, despite its bilateral form, into a multilateral system of law that backs up the functioning of a global market economy based on converging principles of investment protection. In discussing the function of most-favored-nation clauses, the possibilities of treaty-shopping and the impact of investor-State arbitration with its intensive reliance on precedent and other genuinely multilateral approaches to treaty interpretation, it offers a conceptual framework for understanding the nature and functioning of international investment law as a system.

STEPHAN W. SCHILL is a senior research at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Formerly, he assisted the Honourable Charles N. Brower of 20 Essex Street Chambers, London in international commercial and investor-State arbitrations under various arbitral rules and clerked at the International Court of Justice. He is admitted to the bars in Germany and New York.

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P R E F A C E

International investment law is one of the fastest-growing and most vibrant fields of international law and dispute settlement today. It is both shaped by, and is shaping, the economic and social processes associated with globalization. In fact, it grows at a rate that makes authoring and publishing a book on international investment law an endeavor that evokes Achilles' footrace against the tortoise: an infinite struggle of catching up to a place and point in time that will be past present. Since the initial manuscript of this book was finalized in August 2008 the developments in arbitral jurisprudence, investment treaty making and scholarship have not paused. Instead, they have continued their exponential growth to now over 2,600 bilateral, regional and sectoral investment treaties and over 300 known investment treaty arbitrations that cover increasingly complex procedural and substantive issues and are accompanied by proliferating scholarship on various facets of international investment law. Although the most relevant subsequent developments in arbitral jurisprudence up to March 2009 have been worked into the book, in particular developments concerning the interpretation of most-favored-nation clauses, it can offer no more than a snapshot of where arbitral jurisprudence, investment treaty making and scholarship on international investment law currently stand, or will stand once this book courts for the attention of counsels and arbitrators in investment treaty disputes, scholars and students of international law and international relations, as well as officials in international organizations, domestic governments and non-governmental organizations active in the field.

While one of its core claims deals with the importance of arbitral jurisprudence for the interpretation and development of international investment law, the present book goes beyond a static perspective of investment jurisprudence and rather attempts to make a contribution towards developing a theory of international investment law that conceptualizes the dynamics of arbitral jurisprudence and investment treaty making. It concentrates on resolving one of the primary obstacles

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to developing a theory of international investment law, namely the apparently fragmented, disintegrated and chaotic state of the law that is embedded in numerous, largely bilateral treaties and implemented by arbitral tribunals which, established on a case-by-case basis, generate increasing jurisprudential inconsistencies. In analyzing investment treaty making and investment arbitration in a framework that focuses on bilateralism and multilateralism as institutional forms of international cooperation, the book argues that one can observe, despite the existing potential for fragmentation, convergence rather than divergence in this field of international law. In consequence, one can perceive of international investment law as a proper subsystem of international law and dispute resolution that provides a systematic legal framework for structuring, promoting and protecting investment activities in a global economic system that is based on largely uniform principles of investment protection and applies rather independently of the sources and targets of foreign investment flows. Elements of this thesis are the inclusion of most-favored-nation clauses, the possibilities of treaty-shopping through corporate structuring, and the contribution of investor-State dispute settlement through the intensive use of precedent and other genuinely multilateral approaches to treaty interpretation. The book therefore argues that investment treaties in their entirety function largely similar to a genuinely multilateral system and serve a constitutional function for the global economy by establishing institutions that enable economic actors to unfold their activities and to structure economic exchange in the field of foreign investment.

Similar to solving Zeno's problems, the thesis of the multilateralization of international investment law is intended to shift the thinking about ordering paradigms in international investment law away from bilateral – and necessarily limited – rationales towards a more principled theory of international investment law and thereby attempts to explain the paradoxical tension between the fragmentation of sources and dispute settlement institutions, on the one hand, and the creation of convergence, on the other. This thesis, it is hoped, provides a conceptual framework for understanding the nature and functioning of international investment law as a genuine system of law and dispute resolution and offers solutions to numerous practical and theoretical problems regarding, *inter alia*, questions of treaty interpretation, of the use of sources in international investment law and regarding the relationship between arbitral tribunals and States. It may also form the basis for developing a *Rechtsdogmatik* of

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the principles of substantive international investment law and arbitration which can guide the decision-making of arbitral tribunals and investment treaty makers in a more principled way than solely relying on arbitral precedent, as largely is the case in the current investment jurisprudence and scholarship. Moreover, understanding international investment law as a multilateral order is not only a descriptive claim; it also expresses the normative claim that multilateralism is a sensible and desirable perspective that investment treaty makers and arbitral tribunals should adopt.

The present book is the product of my PhD research that I conducted since the summer of 2004. It was accepted, in April 2008, as an inaugural dissertation at Johann Wolfgang Goethe-Universität Frankfurt am Main. The initial idea for the topic formed during a placement in a law firm in Buenos Aires from February to April 2002 which confronted me, then a legal trainee at the Court of Appeals of Munich, with researching, in the midst of the Argentine financial crisis, for a memorandum on the conformity of some of Argentina's emergency measures with the German-Argentine bilateral investment treaty. Then, unlike today, the material on investor rights, such as fair and equitable treatment, full protection and security or the prohibition of indirect expropriations without compensation, was rather scarce: there was virtually no investment treaty jurisprudence around and the soon-to-come explosion of investment treaty arbitrations was hardly predictable. Then, international investment law seemed like exotic, but quiet waters to explore. It is thus all the more exciting to see the development this area of international law has embarked on over the past years.

My PhD research has benefitted from manifold professional, academic and personal experiences and thanks are due to the many friends, colleagues and mentors that have accompanied, supported and inspired me during these years. They are too numerous to mention and have helped, each in their own special way, to help the project go through. I owe special gratitude to my supervisor, Professor Dr. Armin von Bogdandy of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg for his support and constructive criticism, and his reiterated demands that a doctoral thesis needed to explain the functioning of law not only in terms of lawfulness and unlawfulness, but also in terms of its contribution to and interaction with the underlying social, economic and ideological reality. This often daunting challenge and his encouragement throughout the entire period have helped immensely to focus my research, thinking and analysis. Likewise, thanks are due to the other

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members of my examination committee, in particular Professor Dr. Dr. Rainer Hofmann for his enthusiastic report, and Professor Dr. Peter von Wilmowsky for chairing the committee.

Critical for my research was a two-year stay at New York University where I first pursued the LL.M. program in International Legal Studies and later finalized the original manuscript. NYU's academic community and unique program in international law, as well as working as a research assistant with Professor Benedict Kingsbury, were particularly forming. The stay was made possible by a Hauser Global Scholarship, by a scholarship of the Studienstiftung des deutschen Volkes under the European Recovery Program and by the Lovells Scholarship. Of invaluable support and intellectual stimulus was further the mentorship of the late Professor Dr. Thomas Wälde who personally, and through the many participants of the OGEMID listserv, has strengthened my interest in and understanding of international investment law. Finally, the last revisions and updates of the book have benefitted from a clerkship at the International Court of Justice with Judge Abdul G. Koroma and a further clerkship with the Honorable Charles N. Brower of 20 Essex Street Chambers, London, during which I gained unparalleled insights into the real world of investor-State arbitration.

All of the above have contributed to the fact that the thesis was awarded the Baker & McKenzie Prize for the best doctoral dissertation with an economic law background at Johann Wolfgang Goethe-Universität as well as an Otto Hahn Medal for outstanding scientific achievements. I am honored and humbled by these awards and am grateful to the sponsors, the Frankfurt office of Baker & McKenzie and the Max Planck Society. I hope that this book will prove to be stimulating and contribute to a deeper understanding and the further development of international investment law and arbitration in its pioneering times.

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- 1919 June 28 Covenant of the League of Nations, UKTS 4 (1919); Blackstone's *International Law Documents*, 8th edn 1 30, 133
- 1945 June 26 Charter of the United Nations, 1 U.N.T.S. 16; Blackstone's *International Law Documents*, 8th edn 9
- 1945 June 26 Statute of the International Court of Justice, 1 U.N.T.S. 993; Blackstone's *International Law Documents*, 8th edn 30 282 n11, 283 n14, 297, 304, 326
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- 1950 Nov. 4 European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols, 213 U.N.T.S. 222; Blackstone's *International Law Documents*, 8th edn 44 198, 297
- 1957 March 25 Treaty Establishing the European Community, 298 U.N.T.S. 11; Blackstone's *International Law Documents*, 8th edn 30 149, 295–96, 357, 364
- 1958 June 10 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), 330 U.N.T.S. 38; UKTS 26 (1967), Cmnd 3655 46 n113, 242 n4, 255–56
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- 1985 Oct. 11 Convention Establishing the Multilateral Investment Guarantee Agency (entered into force April 12, 1988), 1508 U.N.T.S. 99 44, 47–49, 61
- 1987 Dec. 15 Agreement among the Governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments

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- 1989 Dec. 15 Fourth ACP-EEC Convention (Lomé Convention) (entered into force March 1, 1990), 29 I.L.M. 809 (1990) 92–93
- 1992 Sept. 22 Convention for the Protection of the Marine Environment of the North-East Atlantic, 32 I.L.M. 1069 (1993) 297–98
- 1992 Dec. 17 North American Free Trade Agreement (NAFTA) (entered into force January 1, 1994), 32 I.L.M. 296 and 695 (1993) 6 n21, 14 n42, 43, 53, 103 n133, 104, 140–41, 142, 143, 190, 208–9, 213 n36, n38, 214 n42, 265 n70, 268–75, 288 n35, 289, 309, 310 n97, 311–12, 317 n119, 319 n124, 332–33, 364, 374 n20
- 1994 Apr. 15 General Agreement on Tariffs and Trade, 1867 U.N.T.S. 187, 33 I.L.M. 1154 (1994); *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, p. 17, CUP/WTO (1999) 8, 32 n31, 34, 49–52, 179–80, 331 n156
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- 1994 Apr. 15 General Agreement on Trade in Services (GATS) 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994); *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, p. 284, CUP/WTO (1999)
- 1994 Apr. 15 Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, CUP/WTO (2006) 51–53, 183–84
- 1994 Dec. 17 Energy Charter Treaty (annex I of the Final Act of the European Energy Charter Conference), 34 I.L.M. 373 (1995) 43, 53, 98 n119, 223 n66, 311–12
- 2004 Aug. 5 Central America–Dominican Republic–United States Free Trade Agreement, available at: www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html 104 n141

Bilateral treaties

In addition to any sources indicated below, the texts of bilateral investment treaties can be found at www.unctadxi.org/templates/DocSearch_779.aspx

- 1954 Oct. 29 Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany (entered into force July 14, 1956) 7 UST 1839; TIAS 3593; 273 U.N.T.S. 3 148–50, 302
- 1959 Nov. 25 Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (entered into force April 28, 1962) 24 U.N.T.S. 6575 40, 61, 90 n86, 164 n155

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- 1984 Aug. 3 Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (entered into force July 28, 1989) 222 n63
- 1985 Apr. 29 Agreement between the People's Republic of China and the Government of the Kingdom of Denmark concerning the Encouragement and the Reciprocal Protection of Investments 66 n3
- 1985 Nov. 21 Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the 1985 Nov. 21 Promotion and Protection of Investments (entered into force February 7, 1986) 87 n84
- 1986 March 11 Treaty between the United States of America and the Arab Republic of Egypt concerning the Reciprocal Encouragement and Protection of Investments (entered into force June 27, 1992) 76 n32, 120, 229
- 1986 Apr. 12 Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria concerning the Reciprocal Encouragement and Protection of Investments (entered into force March 10, 1988) 222 n62
- 1986 May 15 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China concerning the Promotion and Protection of Investments (entered into force May 15, 1986), UKTS 33 (1986) 76 n28
- 1987 Sept. 2 Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the Encouragement and Reciprocal Protection of Investments (entered into force June 1, 1988) 84 n69
- 1987 Nov. 12 Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments (entered into force May 18, 1988) 167 n167, 168, 349 n207
- 1987 March 23 Treaty between the Federal Republic of Germany and the Republic of Bolivia concerning the Promotion and Mutual Protection of Investments (entered into force November 9, 1990) 201 n11
- 1988 Aug. 27 Agreement between Japan and the People's Republic of China concerning the Encouragement and Reciprocal Protection of Investment (entered into force May 14, 1989) 77 n34
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- 1991 Nov. 14 Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment (entered into force October 20, 1994) 76 n31, 143–44, 171, 201 n11, 202, 230 n99, 311, 312–13, 345, 352–54
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