

## CONTENTS

<i>Preface</i>	xiii
<i>List of figures</i>	xvii
<i>Table of treaties, draft instruments, and related documents</i>	xviii
<i>Table of cases</i>	xxv

## I Introduction: globalization and international investment law 1

A	International investment law as a building block of the global economy	3
B	International investment law, economic ideology and hegemony	6
C	The choice between bilateralism and multilateralism	8
D	Investment treaties – instruments of bilateralism or elements of a multilateral system?	11
E	The multilateralization of international investment law on the basis of bilateral treaties	15
F	The course of the argument	19

## II The dynamics of multilateralism and bilateralism in international investment relations 23

A	The state of international investment law until 1945	25
1	Customary international law	25
2	Treaty rules	28
(a)	Treaties of friendship, commerce, and navigation	29
(b)	Treaties establishing equality of opportunity in certain territories	30
B	The failures of multilateralism I: 1945–1974	31
1	The Havana Charter – 1948	32
2	OECD Draft Convention on the Protection of Foreign Property – 1967	35
C	The rise of bilateral and regional investment treaties	40
D	Limited success of multilateralism: ICSID and MIGA	44
1	The International Centre for Settlement of Investment Disputes (ICSID)	45

2	The Multilateral Investment Guarantee Agency (MIGA)	47
E	The failures of multilateralism II: 1990–2004	49
1	Earlier attempts to introduce investment issues into the GATT/WTO	50
2	The OECD Multilateral Agreement on Investment (MAI) – 1998	53
3	Multilateral investment rules in the WTO: Doha – Cancun – and beyond	58
F	Conclusion	60
<b>III</b>	<b>Treaty negotiation and multilateralization of international investment law</b>	<b>65</b>
A	The standard content of bilateral investment treaties	70
1	The scope of application of BITs	71
2	Substantive investor rights conferred under BITs	74
(a)	Non-discrimination, national treatment and MFN treatment	76
(b)	Fair and equitable treatment and full protection and security	78
(c)	Protection against direct and indirect expropriation	81
(d)	Umbrella clauses	84
(e)	Capital transfer provisions	86
3	Dispute settlement mechanisms under BITs	87
B	The dynamics of treaty negotiation: the creation of homogeneous treaty texts	88
1	The entrenchment of bilateralism in multilateral settings	89
(a)	The use of model treaties	90
(b)	Multilateral draft conventions as guidance for model BITs	91
(c)	Multilateral treaties as frameworks for BITs	92
2	Uniformity of investment rules and transaction costs	93
3	Uniformity of investment rules and North–South hegemony	98
C	Multilateralism and the specific interest in uniform investment rules	106
1	Investment cooperation, comparative advantage and competition in a global market	108
2	Multilateral investment rules and negative externalities	112
3	Multilateral investment rules and international relations	115
D	Conclusion	117
<b>IV</b>	<b>Multilateralization through most-favored-nation treatment</b>	<b>121</b>
A	Historical and doctrinal background of MFN clauses	126
1	The structure of MFN clauses	126
2	The historical development of MFN clauses	129

## CONTENTS

ix

3	Codification on MFN clauses by the International Law Commission	134
B	Multilateralizing substantive investment protection	139
1	Importing more favorable investor rights	140
2	Limits to the operation of MFN clauses	142
(a)	Explicit restrictions of the scope of application of the MFN clause	142
(b)	Restrictions to MFN clauses based on the scope of application of the basic treaty	144
3	Circumventing restrictions of MFN treatment	146
C	Multilateralizing procedural investment protection	151
1	Circumventing admissibility-related access restrictions to investor-State dispute settlement	152
(a)	Shortening waiting periods: <i>Maffezini v. Spain</i>	153
(b)	Multilateralizing benefits without extending disadvantages: cherry-picking in <i>Siemens v. Argentina</i>	156
(c)	Subsequent arbitral jurisprudence	160
2	Struggling to base jurisdiction on MFN clauses	163
(a)	<i>Salini v. Jordan</i>	165
(b)	<i>Plama v. Bulgaria</i>	166
(c)	Subsequent jurisprudence	168
(d)	Acceptance of basing jurisdiction on MFN clauses: <i>RosInvest Co v. Russia</i>	172
D	Multilateralizing arbitral jurisdiction	173
1	MFN clauses and treaty interpretation	174
2	International jurisprudence supporting a broad application of MFN clauses	177
3	The object and purpose of investment treaties	180
4	Equal competition and investor-State dispute settlement	180
5	Jurisdiction and compliance with treaty obligations	182
6	Must the State's consent to arbitrate be "clear and unambiguous"?	184
7	MFN clauses and treaty-shopping	187
8	MFN treatment and public policy restrictions	188
E	Conclusion: MFN treatment – securing the future of multilateralism	193
V	<b>Multilateralization and corporate structuring</b>	<b>197</b>
A	Shareholder protection in international investment law	200
1	Companies incorporated in the host State	201
2	Minority shareholder protection	202
3	Indirect investments in multilevel corporate structures	204
4	The scope of protection of shareholders	209
5	Multilateralization of investment protection through shareholder protection	217
B	"Hiding behind the corporate veil": corporate structuring and corporate nationality	221

1	Defining corporate nationality	221
2	Assuming third-country nationality	224
3	Dual nationals and corporate structuring	228
4	Protecting host State reinvestments	230
5	Corporate structuring and treaty-shopping	234
C	Conclusion	236
<b>VI</b>	<b>Multilateral enforcement of international investment law</b>	<b>241</b>
A	Investment treaty arbitration as a compliance mechanism	243
1	Bilateralism in traditional international law compliance structures	244
(a)	The mediation of foreign investors through an inter-State prism	245
(b)	Structural insufficiencies of diplomatic protection	247
(c)	Distinction between State and investor interests	248
2	The empowerment of investment tribunals	249
(a)	The investor's right to seek damages	250
(b)	The limited influence of States on the arbitral process	252
(c)	Limited review of arbitral awards	253
(d)	Recognition and enforcement of arbitral awards	255
3	Multilateralizing investment protection through investor-State arbitration	256
B	Investment treaty arbitration as a mechanism for resolving uncertainty in international investment relations	261
1	The vagueness of investor rights	263
2	The dissolution of rule making and rule application	266
3	NAFTA digression: the effectiveness of notes of interpretation	268
(a)	The impending threat of institutional conflict: <i>Pope &amp; Talbot v. Canada</i>	269
(b)	Post- <i>Pope &amp; Talbot</i> : dynamic adjustments of customary international law	273
C	Conclusion	275
<b>VII</b>	<b>Multilateralization through interpretation: producing and reproducing coherence in investment jurisprudence</b>	<b>278</b>
A	The potential for inconsistencies in investment treaty arbitration	281
1	Incoherence and fragmentation in international dispute resolution	282
2	Fragmentation in international investment law: multiplicity of sources, multiplicity of proceedings	285
3	Arbitration: an embryonic institutional design	287
4	The non-existence of <i>stare decisis</i> in international investment law	288
5	Conclusion	293

Cambridge University Press

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

Stephan W. Schill

Table of Contents

[More information](#)

## CONTENTS

xi

B	Interpretation methods and the unity of the system's sources	293
1	Bilateralism and multilateralism in treaty interpretation	294
	(a) Bilateralism in treaty interpretation	295
	(b) Multilateralism in treaty interpretation	298
2	Multilateralization through cross-treaty interpretation in investment arbitration	305
	(a) The use of third-country BITs of the contracting States	305
	(b) The use of wholly unrelated third-country BITs	308
3	The use of model treaties in interpretation	312
4	Teleological interpretation of BITs	314
5	Conclusion	319
C	The system's operative unity: the emergence of a system of <i>de facto</i> precedent in investment treaty arbitration	321
1	The functions of precedent in concurring awards	324
	(a) Analogizing with earlier decisions	324
	(b) Precedent as a means of clarification of BIT provisions	326
	(c) Abbreviation of reasoning	328
	(d) The creation of <i>de facto stare decisis</i> : precedent and standard setting	330
	(e) Transfer of the law-making function from States to tribunals	332
	(f) Conclusion	338
2	Unity of investment law and conflicting decisions	339
	(a) Cases of open dissent	341
	(b) Distinction of facts as an instrument to uphold unity	347
	(c) Reconciling conflicts through conflict rules	350
	(d) Unity in investment jurisprudence by concealing dissent	352
3	Conclusion	355
D	Conclusion: the emergence of a system of international investment law through interpretation	357
<b>VIII</b>	<b>Conclusion: multilateralization – universalization – constitutionalization</b>	<b>362</b>
A	Summary: the multilateralization of international investment law	364
B	Toward a universal regime of investment protection	369
C	The constitutional function of international investment law	372
	<i>Bibliography</i>	379
	<i>Index</i>	410