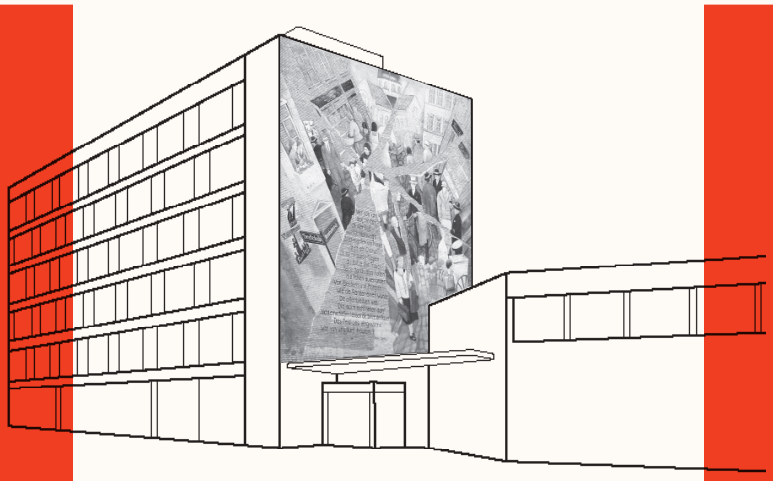

Karsten Nowrot

Of “Plain” Analytical Approaches and “Savior” Perspectives

Measuring the Structural Dialogues between Bilateral Investment Treaties and Investment Chapters in Mega-Regionals

Rechtswissenschaftliche
Beiträge der
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A. Introduction*

When asked to name a number of current mega-trends in the progressive development of the international economic legal order, one of the first issues that probably comes to the mind of most scholars and practitioners is the perception that regionalism is on the rise. And indeed, it hardly needs to be emphasized that in particular since the middle of the 1990s, for a variety of reasons numerous treaties establishing free trade zones as well as other bilateral and regional economic integration agreements have been concluded or are currently under negotiation. In order to illustrate the overall importance and consequences of these developments, let it suffice to draw attention to the fact that by now all of the at present 164 World Trade Organization (WTO) members are a party to at least one regional trade agreement (RTA);[1] and most of them have concluded considerably more than one of these types of arrangement. Already towards the end of the previous decade, the average WTO member had concluded regional trade agreements with roughly fifteen other countries.[2]

Admittedly it is currently the vertical relationship between the multilateral normative framework established by the WTO on the one hand and economic integration agreements containing so-called "WTO-plus" commitments on the other hand that still continues to dominate much of the scholarly discussions in this field.[3] Nevertheless, it is obvious that the sector coverage of many of these bilateral as well as regional treaties — following in addition a "WTO-extra" or "WTO-X" approach[4] in the form of "deep integration" agreements[5] — goes well beyond the economic aspects regulated in the WTO legal order by, among others, increasingly also including quite comprehensive investment chapters.[6] Among the oldest prominent examples in this regard is Chapter 11 of the North American Free Trade Agreement (NAFTA) signed by Canada, Mexico and the United States on 17 December 1992 and entering into force on 1 January 1994.[7] As a consequence, and to a certain extent confirming the logical conclu-

* The contribution is based on a presentation given by the author at the conference "Mega-Regionals and the Future of International Trade and Investment Law" organized by the Technische Universität Dresden on 23/24 October 2014.

1 See the respective information provided on the website of the WTO under: <https://www.wto.org/english/tratop_e/region_e/region_e.htm> accessed 5 December 2016 ("Following the notification of the RTA between Mongolia and Japan in June 2016, all WTO members now have an RTA in force.").

2 *Freund/Ornelas*, Regional Trade Agreements (World Bank Policy Research Working Paper 5314, May 2010), 2; *Bungenberg*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 269 (270).

3 The contributions on the vertical relationship between the WTO legal order and regional trade agreements are by now more than legion. See for example *Bhagwati*, Termites in the Trading System, 2008; *Nowrot*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 67 (126 *et seq.*); *Matsushita/Schoenbaum/Mavroidis/Hahn*, The World Trade Organization, 507 *et seq.*; *Bagwell/Mavroidis* (eds.), Preferential Trade Agreements, 2011; *Senti*, in: Cremona/Hilpold/Lavranos *et. al.* (eds.), Liber Amicorum for Ernst-Ulrich Petersmann, 441 *et seq.*, each with numerous further references.

4 Concerning the distinction between "WTO-plus" and "WTO-extra" see already *Horn/Mavroidis/Sapir*, The World Economy 33 (2010), 1565 (1567 *et seq.*); as well as WTO, World Trade Report 2011, The WTO and Preferential Trade Agreements: From Co-Existence to Coherence, 2011, 128 *et seq.*

5 Generally on the phenomenon of "deep integration" regional trade agreements see also, e.g., *Hoekman/Kostecki*, The Political Economy of the World Trading System, 502 *et seq.*; *Trebilcock/Howse/Eliason*, The Regulation of International Trade, 95 *et seq.*; *Melo Araujo*, European Yearbook of International Economic Law 5 (2014), 263 *et seq.*; *Melo Araujo*, The EU Deep Trade Agenda, 64 *et seq.*

6 On this perception see also, e.g., *Reinisch*, ICSID Review – Foreign Investment Law Journal 24 (2009), 416 (417) ("Many of the more recent PTAs contain investment chapters."); *De Mestral/Falsafi*, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements, 115 (117) ("we may well be seeing the end of RTAs that do not deal with investment issues at all"); *Fontanelli/Bianco*, Stanford Journal of International Law 50 (2014), 211 (213) ("One of the recurrent WTO-extra matters regulated by FTAs is the protection of foreign investments.").

7 Specifically on the normative framework of investment protection as stipulated in Chapter 11 NAFTA see for example *Puig/Kinnear*, ICSID Review – Foreign Investment Law Journal 25 (2010), 225 *et seq.*; *Nowrot*, in: Ehlers/Terhechte/Wolffgang/Schröder (eds.), Aktuelle Entwicklungen des Rechtsschutzes und der Streitbeilegung im Außenwirtschaftsrecht, 81 (85 *et seq.*); *Ranieri*, in: Trakman/Ranieri (eds.), Regionalism in International Investment Law, 400 *et seq.*, each with further references.

sion *quidquid de omnibus valet, valet etiam de quibusdam et singulis* (in the present context: whatever applies to the general level, also applies to its subdivisions), the phenomenon of regionalism appears to be also gaining increasing prominence in the sub-field of international economic law addressing the protection of foreign investors and their investments.[8] Against this background, the possible influence exercised by these developments on the processes of investment treaty-making in general and the potential manifestations of interactions between the investment chapters of respective regional trade agreements and the more traditional normative frameworks in the form of bilateral investment treaties (BITs) in particular are currently starting to attract unprecedented attention among practitioners and academics alike.[9]

Within — and at the same time further promoting — this overarching mega-trend towards regionalism in the law-making processes of the international economic system, a new and distinct development has recently been identified in the form of emerging so-called "mega-regionals", occasionally also referred to as "super-RTAs".[10] Although the novel term and concept of "mega-regionals" still awaits a precise as well as at least more or less generally accepted definition,[11] they mostly refer to certain economic agreements that are inter-regional in character in the sense of connecting different regions of the world and are concluded by a group of countries that together have a significant economic weight in current global trade and investment relations.[12] Among the respective preferential trade agreements frequently classified as mega-regional are the Trans-Pacific Partnership (TPP) signed by Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam on 4 February 2016, the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) on which negotiations have been concluded in February 2016 and which has been signed by the parties on 30 October 2016, the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013, the Regional Comprehensive Economic Partnership (RCEP) on which negotiations have been launched in 2012 by the ten member states of the Association of Southeast Asian Nations (ASEAN) and six other countries like China, India, Japan and Australia, as well as the proposed free trade agreement (that at the time of writing still lacked a more or less fancy name and

8 On the underlying "shift in treaty-making activity from BITs towards FTAs and other economic integration treaties that combine trade and investment liberalization" see already UNCTAD, World Investment Report 2008, Transnational Corporations and the Infrastructure Challenge, 2008, 17; as well as more recently for example UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 103 *et seq.* ("Regionalism on the rise"); *Bonnitcha*, Substantive Protection under Investment Treaties, 3 *et seq.*

9 See for example *Binder*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 71 ("Given the growing number of PTIAs (more than 300 in 2011) as well as of BITs (more than 2,800 in 2011), the likelihood of their interaction increases. This makes a scrutiny of interaction between PTIAs and BITs particularly important."); UNCTAD, The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?, IIA Issues Note No. 3, June 2013, 4 *et seq.*; *De Brabandere*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 37 *et seq.*; *Alschner*, Journal of International Economic Law 17 (2014), 271 *et seq.*; as well as already UNCTAD, Investment Provisions in Economic Integration Agreements, 2006, 132 ("The coexistence of an increasing number of EIIAs and other types of investment agreements inevitably gives rise to multiple interactions between investment rules at all levels."). From the perspective of political science see also for example *Tobin/Busch*, World Politics 62 (2010), 1 *et seq.*

10 See for example *Karmakar*, Rulemaking in Super-RTAs: Implications for China and India, Bruegel Working Paper 2014/03.

11 On this perception see also, e.g., *Draper/Lacey/Ramkolowan*, Mega-Regional Trade Agreements, 8 ("The term mega regional is used somewhat loosely.").

12 On these elements as well as for related characterizations of mega-regionals see, e.g., UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 118; *Pauwelyn/Alschner*, in: Dür/Elsig (eds.), Trade Cooperation – The Purpose, Design and Effects of Preferential Trade Agreements, 497 (512); *Draper/Lacey/Ramkolowan*, Mega-Regional Trade Agreements, 8; as well as *Opoku Awuku*, European Yearbook of International Economic Law 7 (2016), 615 (616) ("Megaregional trade and investment agreements merit attention because of their sheer size and their potential implications for trade and investments. These agreements are broad economic agreements among groups of countries that together have economic weight in negotiations and also at the world stage.").

abbreviation) officially negotiated between the EU and Japan since March 2013.

While none of these mega-regionals has entered into force yet and although many of them even still await a successful conclusion of their individual negotiation processes, all of them are envisioned or at least highly likely to, among other subjects, provide for a regulatory framework on foreign investments. In particular in case one considers mega-regionals as an at least in part also qualitatively new phenomenon in international economic law,[13] it thus appears to be potentially quite promising to take a closer look at the specific aspects of interactions between the respective investment chapters and the in principle by now already old-style treaty-making through the conclusion of BITs.[14] In light of this finding, the present contribution intends to approach this research issue in three main steps. The first section addresses the factual background and some of the underlying expectations shaping the present discussion on the relationship between investment chapters in mega-regionals and BITs (B.). In the second part an attempt will be made to systemize the various potential connections based on the identification of two main dimensions of interaction between mega-regionals and BITs (C.). Finally, the contribution will provide a kind of bird's-eye view and some tentative conclusions on the expected consequences of these interactions for the future development of — and scholarly research on — international investment law as a whole (D.).

B. Interactions between Mega-Regionals and BITs: Mapping the Factual and Expectational Background

When attempting to map and systemize the factual background and underlying expectations of the currently evolving debates on the interaction between investment chapters in mega-regionals and BITs, it seems useful to broadly distinguish between two main dimensions or perspectives. The first factual and expectational dimension, which might be referred to as the *short-term perspective*, is primarily focusing on the relationship between future mega-regionals and those BITs that are currently in force. Thereby, it is in particular concerned with the possibility of — and consequences arising from — overlaps of respective investment chapters with existing BITs between the negotiating parties. And indeed, such overlaps should not merely be regarded as a hypothetical scenario. This is already evidenced by the fact that a future entering into force of four out of the above mentioned five mega-regionals currently under negotiation alone might potentially result in overlaps with no less than 99 BITs and 54 other investment agreements presently in force between (some of) the respective parties.

According to more recent information compiled and published by the United Nations Conference on Trade and Development (UNCTAD), only the envisioned regional trade agreement between the EU and Japan does not face the issue of future treaty parallelism in the realm of investment protection. On the contrary, the entering into force of CETA could lead to an overlap with eight existing BITs. In addition, a successful conclusion of TTIP has the potential to result in nine respective overlaps, and an entry into force of TPP might even create overlaps with 14 BITs as well as 26 other investment agreements. Among the mega-regionals currently under negotiation, this "achievement" would only be outnumbered by the entering into force of RCEP, potentially resulting in respective overlaps with 68 current BITs and 28

13 See thereto also *supra* under B.

14 See in this connection also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 121 ("negotiators have to carefully consider the possible interactions between megaregional agreements and other investment treaties").

other investment agreements between some of the parties.[15] Even in light of the total number of currently more than 2.950 BITs and roughly 360 other investment agreements worldwide,[16] these almost 100 BITs and more than 50 additional investment-related treaties potentially affected by the successful conclusion of the four mega-regionals in question is already from a quantitative perspective incontrovertibly far from an insignificant amount. Furthermore, it is equally certain that clarifying their relationship with respective investment chapters in mega-regionals requires a closer look at a number of challenging legal issues.[17]

The second, *mid-term perspective*, being of relevance when assessing the factual and expectational background of the subject addressed by the present contribution, concerns the consequences of emerging mega-regionals for future BIT practice and investment treaty-making in general. Contrary to the first dimension, it thus centers on the interactions of the respective investment chapters with BITs "yet unborn". Overall, this perspective is first and foremost shaped by the perception that the regulatory approach stipulated in the investment chapters of mega-regionals could be seen as an interesting and important factor potentially influencing the negotiation processes and outcomes with regard to subsequent BITs concluded by individual parties with third countries as well as in particular also those agreed upon between two or more third countries. In order to further illustrate the underlying factual basis of these kinds of regulatory "spill-over effects" and the expectations associated with them, attention should at least briefly be drawn to two fundamental aspects.

On the one hand an assessment of the recently emerging scholarly discussions on mega-regionals clearly reveals that these treaties are not only often perceived as what might be characterized as a novel "league of their own" in the realm of international trade agreements.[18] Rather, they are also frequently considered as a new significant steering phenomenon in the global economic system as a whole with the regulatory content and approaches enshrined in the respective mega-regionals being likely to provide a decisive impetus for the future law-making processes at the bilateral, regional and multilateral level in those numerous fields of international economic law addressed by them. To mention but a few examples, *Simon Lester* and *Inu Barbee* have expressed the following view specifically with regard to TTIP: "Since the USA and EU make up almost half of the world GDP and 30% of total goods and services trade, any agreement both sides can come to on regulatory issues could help set the tone and trajectory of future regulatory cooperation efforts involving other parties."[19] *Gary Clyde Hufbauer* and *Cathleen Cimino-Isaacs* state that "the mega-regionals will dramatically alter trade and investment rules for a substantial share of world commerce conducted by each of the members".[20] In an analysis more recently published by *Peter Draper*, *Simon Lacey* and *Yash Ramkolowan* we can read the following observation: "These mega-regionals have the potential to reshape the global trading system. On the one hand, if successful they will establish new global norms and regulations that may find their way back into the WTO at some point in the future, and also into reciprocal FTAs with non-parties. […] [I]t will be difficult for outsiders to resist the regulatory wave."[21] *Caroline Henckels* argues that the "coverage of these agreements

15 On these numbers see UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 119.

16 UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 101.

17 See thereto also *supra* under C.

18 On this perception see, e.g., *Cottier*, Journal of International Economic Law 17 (2014), 671 (672) ("from the plurilateral days of GATT, to the multilateral rule based system, and today back to bilateralism and preferential trade agreements and newly emerging forms of plurilateral agreements, in particular the Trans-Pacific Partnership (TTP), the Transatlantic Trade and Investment Partnership (TTIP)"); *Anuradha*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 411 (413) ("gradual emergence of a new phase in trade agreements").

19 *Lester/Barbee*, Journal of International Economic Law 16 (2013), 847 (866).

20 *Hufbauer/Cimino-Isaacs*, Journal of International Economic Law 18 (2015), 679 (681).

21 *Draper/Lacey/Ramkolowan*, Mega-Regional Trade Agreements, 7.

and the influence of their negotiating parties mean that their provisions are likely to substantially influence future treaty design".[22] *Bryan Mercurio* states that "[o]nce coming into force, the TPP will have a significant effect not only on members but also upon countries external to the agreement".[23] *Daniel S. Hamilton* foresees the possibility that in particular TPP and TTIP could create "benchmarks for possible future multilateral liberalisation under the WTO".[24] In a recently published contribution by *Stephanie Schacherer* we find the following perception: "TTIP has the potential to be a game changer with respect to the regulation of almost all areas of the global economy, affecting its contracting parties and arguably the rest of the world."[25] *Azwimphelili Langalanga* and *Peter Draper* argue that "Mega-Regionals have the potential to reshape the global trading system. If successful, they will establish new global trade governance norms and regulations".[26] And *Thomas Cottier* predicts that "[c]urrent negotiations on the *Transpacific Trade Partnership* among eleven American and Asian countries (including Japan) and on the *Transatlantic Trade and Investment Partnership* between the United States and the European Union are likely to produce new and common templates which eventually inform further negotiations and even emerge into global standards."[27]

On the other hand it needs to be recalled that the treaty regime on the protection of foreign investments comprising of thousands of mostly bilateral and regional investment agreements has always been a quite fragmented normative system, especially if compared with other fields of international economic law such as world trade law as well as international monetary and financial law and the important roles occupied by multilateral agreements and global international organizations therein.[28] Despite the fact that scholarly contributions often first and foremost emphasize the structural interconnections and similarities among the provisions of BITs as well as other respective agreements[29] and, against this background, have occasionally

22 *Henckels*, Journal of International Economic Law 19 (2016), 27 (29).

23 *Mercurio*, European Yearbook of International Economic Law 7 (2016), 515 (524).

24 *Hamilton*, The International Spectator – Italian Journal of International Affairs 49 (2014), 81 (85).

25 *Schacherer*, Journal of International Economic Law 19 (2016), 628.

26 *Langalanga/Draper*, European Yearbook of International Economic Law 7 (2016), 571 (572).

27 *Cottier*, Journal of International Economic Law 17 (2014), 671 (675) (emphases in the original). See in this regard also for example the respective observations and predictions made by UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 118 *et seq.*; *Pauwelyn/Alschner*, in: Dür/Elsig (eds.), Trade Cooperation – The Purpose, Design and Effects of Preferential Trade Agreements, 497 (512); *Baumgartner*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 84 (89); *Trakman*, Journal of World Trade 48 (2014), 1 *et seq.*; *Hindelang/Krajewski*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 377 (383); *Gantz*, in: Bjorklund (ed.), Yearbook of International Investment Law & Policy 2012-2013, 569 (593) ("the significance of TPP for all parties (in particular the United States) is difficult to overstate"); *Cottier/Sieber-Gasser/Wermelinger*, in: Dür/Elsig (eds.), Trade Cooperation – The Purpose, Design and Effects of Preferential Trade Agreements, 465 (488) ("In this respect, the contents of the TTIP and the TTP are of particular interest: once these two mega-regionals have agreed to a certain regulatory structure, it will be hard for the rest of the world to maintain different regulations. It is thus likely that the TTIP and the TTP will influence multilateral regulation strongly in the future."); *Lim/Elms/Low*, in: Lim/Elms/Low (eds.), The Trans-Pacific Partnership, 3 ("The Trans-Pacific Partnership Agreement (TPP) has the potential to become a new model for preferential trade agreements (PTAs)."); *Gantz/Nielsen*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 367 (387); as well as for a slightly more cautious view *Barbee/Lester*, Latin American Journal of International Trade Law 2 (2014), 207 (214) ("In the end, the implications of the mega-regional approach, if successful, are not clear. Would success result in a world of competing mega-regions? Would they converge into a global agreement, or serve as the basis for multilateral talks? The effort being expended for these talks is enormous, but will they produce the desired benefits and produce a new 'high standard' model? The outcome remains to be seen.").

28 On this perception see, e.g., UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 105 ("The current IIA regime is known for its complexity and incoherence, gaps and overlaps."); *Kurtz*, in: Sacerdoti/Acconci/Valenti *et al.* (eds.), General Interests of Host States in International Investment Law, 104 (105) ("highly diffuse with no real common institutional core"); *Kurtz*, The WTO and International Investment Law, 41 ("the failure of the ITO marked a fundamental shift away from multilateralism in the coverage of investment issues"); *Nowrot*, in: Justenhoven/O'Connell (eds.), Peace Through Law, 187 (206); *Wu*, in: Douglas/Pauwelyn/Viñuales (eds.), The Foundations of International Investment Law, 169 *et seq.*; *Pauwelyn*, ICSID Review – Foreign Investment Law Journal 29 (2014), 372 (373 *et seq.*), with further references.

29 See, e.g., more recently *Collins*, International Investment Law, 28 ("While there are now several thousand of these

even advanced the idea of a multilateralization of international investment law on the basis of these thousands of BITs,[30] a closer inspection of the detailed regulations stipulated in a larger number of different investment agreements reveals the incontrovertible fact that these treaties have always displayed considerable variations and are thus not following anything even close to a uniform template.[31] Quite to the contrary, a valid argument could indeed be made that the diversity among the treaty texts of BITs and other related treaties has more recently actually further increased[32] as a result of the current era of reformation or "reconceptualization";[33] a transition phase from what might be labeled "second generation" investment agreements aiming at establishing and fostering an "international investment protection law" in the true sense of the phrase to a new "third generation" of investment treaties[34] that is first and foremost also characterized by intensified efforts in all parts of the world to progressively develop the international legal basis of investment protection with a view to fostering its contribution to the realization of sustainable development objectives[35] and, albeit closely related, by various efforts of states to regain some of their "policy space" vis-à-vis foreign investors.[36]

bilateral investment treaties, they tend to contain the same or largely similar provisions, which is one of the reasons that international investment law can be studied as a reasonably coherent field of law."); *Alschner/Skougarevskiy*, Journal of International Economic Law 19 (2016), 561 (565) ("First of all, in spite of investment law's fragmentation into thousands of agreements, investment treaties share a common set of core provisions couched in standardized language."). For a rather critical account of this predominant approach in the literature see for example *Allee/Peinhardt*, World Politics 66 (2014), 47 (48) ("Yet the existing empirical literature on BITs continues to treat these investment agreements as homogenous, despite strong reasons to believe otherwise.").

30 See in particular *Schill*, The Multilateralization of International Investment Law, 15 *et seq*., with further references.

31 See, e.g., *Manger*, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements, 76 (87) ("It is immediately obvious that there is considerable variation across BITs and across time."); *Alvarez*, The Public International Law Regime Governing International Investment, 30 ("these treaties vary in terms of the specific rights provided"). On some important areas of variation across investment agreements see more recently for example *Allee/Peinhardt*, World Politics 66 (2014), 47 (48 *et seq.*), with further references.

32 On this perception see also, e.g., *Jacob*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 81 (83) ("What one can state with confidence is that there is a noticeable drift at the moment towards more diverse regulation within this area of international activity."). See in this connection also the observation made in UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 114 ("The past years brought an increasing dichotomy in investment treaty making: […].").

33 *Miles*, in: Lewis/Frankel (eds.), International Economic Law and National Autonomy, 295 *et seq.*; *Mann*, Lewis and Clark Law Review 17 (2013), 521 *et seq*. See also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 126 ("The IIA regime is undergoing a period of reflection, review and reform.").

34 Generally on this perception see also, e.g., UNCTAD, Investment Policy Framework for Sustainable Development, 2015 Edition, 12 *et seq.* ("new generation of investment policies"); *Spears*, Journal of International Economic Law 13 (2010), 1037 *et seq*. Specifically on the differences between first, second and third generation investment agreements see already *Nowrot*, Journal of World Investment and Trade 15 (2014), 612 (620 *et seq.*).

35 Generally on these developments see for example UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 1 *et seq.*; UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 89 *et seq.*; *VanDuzer/Simons/Mayeda*, Integrating Sustainable Development into International Investment Agreements, 2012; the contributions in *Cordonier Segger/Gehring/Newcombe* (eds.), Sustainable Development in World Investment Law, 2011; as well as *Dubava*, in: Cremona/Hilpold/Lavranos *et. al.* (eds.), Liber Amicorum for Ernst-Ulrich Petersmann, 389 *et seq.*; and *Nowrot*, Journal of World Investment and Trade 15 (2014), 612 *et seq.*

36 See, e.g., *Tietje*, ICSID Review – Foreign Investment Law Journal 24 (2009), 457 (461) ("The need for a 'policy space' for governments, i.e. autonomy in national policy-making without constraints by international law and particularly international investment protection law, is one of the most significant consequences of the proliferation of investment law and the fragmentation of international law in general. We are currently witnessing discussions about the necessary policy space in the area of foreign investment, on both the national and international levels."). See also for example *Griebel*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 106 *et seq.*; *Nowrot*, in: Justenhoven/O'Connell (eds.), Peace Through Law, 187 (195 *et seq.*); as well as the quite comprehensive analyses by *Titi*, The Right to Regulate in International Investment Law, 32 *et seq*.; and *Mouyal*, International Investment Law and the Right to Regulate, 8 *et seq.*, each with numerous further references.

With several initiatives aimed at drafting and concluding a comprehensive multilateral investment agreement having failed in the previous seven decades[37] and no new serious attempt in this regard currently in sight,[38] one has to bear in mind that the phenomenon of regionalism in general and of mega-regionals in particular is in the realm of international investment law frequently perceived quite differently from the appraisement it usually receives from the perspective of world trade law. In the quite centralized international trade law regime, the rise of regionalism is commonly seen as a shift away from multilateralism as manifested in the WTO legal order.[39] Quite to the contrary, the conclusion of regional integration agreements with investment chapters is, from the perspective of the rather decentralized global investment law order, in general often considered as a kind of "stepping stone towards a more multilateral approach" and thus towards consolidation in this fragmented legal field.[40]

In light of these two aspects — the perception of mega-regionals as a new important steering phenomenon in the international economic system on the one side and the fragmented character of the international investment treaty regime as well as the different perception of regional trade agreements resulting from this feature on the other side — it is not too far-fetched to presume that, and thus hardly surprising if, the emergence of mega-regionals is from the mid-term perspective of international investment law usually first and foremost also regarded as a new and quite promising opportunity for a kind of mega-consolidation in this decentralized field of international economic law.[41]

37 For a more detailed account of these initiatives *Dattu*, Fordham International Law Journal 24 (2000), 275 *et seq.*; *Schill*, The Multilateralization of International Investment Law, 31 *et seq.*; *Gwynn*, Power in the International Investment Framework, 43 *et seq.*; *Ziegler*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 187 (190 *et seq.*).

38 See also for example *Sornarajah*, The International Law on Foreign Investment, 81 ("the project to devise a multilateral treaty has floundered"); *Subedi*, International Investment Law, 77 ("the idea of concluding a global treaty on foreign investment is still some way off"); *Dolzer/Schreuer*, Principles of International Investment Law, 11.

39 See thereto already the references *supra* in footnote 3.

40 *Bungenberg*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 269; see also for example *Alschner*, Journal of International Economic Law 17 (2014), 271 (273).

41 See thereto also *infra* C.II.2.

C. How to Reduce Interactional Complexity?: Systemizing Potential Interfaces of Mega-Regionals and BITs

If we continue to apply the approach of reducing the existing complexities of the topic of this contribution by way of systemization[42] also with regard to the various potential interactions between investment chapters in mega-regionals and BITs themselves, the two factual and expectational dimensions as discussed above[43] arguably correspond — from a legal as well as legal policy perspective — to two main levels or dimensions of interaction that might be appropriately termed applicability-oriented perspective on the one hand and content-oriented perspective on the other hand.

I. Applicability-Oriented Perspective: Addressing the Issue of Potentially Overlapping Investment Agreements

The first of them considers the respective interrelationships from an applicability-oriented perspective and is primarily concerned with regulatory approaches to be stipulated in or externally applied to mega-regionals for the purpose of addressing the issue of existing — and thus potentially overlapping — BITs between some of the parties. Adopting this applicability-oriented perspective, one can broadly identify two principal options for current and future mega-regional treaty-making.

1. Parallelism

The regulatory style of parallelism is basically characterized by the explicit or implicit establishment of a situation of normative co-existence between the investment-chapters at issue and the other investment agreements concluded by the parties. It thus allows for the continued validity of the respective BITs in parallel with provisions of the mega-regional. A respective example in treaty-making practice is provided by Article 1.2 (1) (b) of the TPP,[44] stipulating that "[r]ecognising the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms: […] in relation to existing international agreements to which that Party and at least one other Party is party, its existing rights and obligations with respect to that other Party or Parties, as the case may be".[45]

This kind of "parallelism" with regard to investment provisions still appears to be the dominant approach in current treaty practice of regional trade agreements as a whole.[46] Nevertheless, the resulting creation of new additional overlaps of investment agreements applicable between the parties does not only — from an overarching structural perspective — add another treaty layer to the already at present quite decentralized network of international investment

42 Generally on this underlying purpose pursued by approaches of systemization or categorization see, e.g., *Luhmann*, Kölner Zeitschrift für Soziologie und Sozialpsychologie 19 (1967), 615 (618 *et seq.*); as well as already *Bruner/Goodnow/Austin*, A Study of Thinking, 12 ("A first achievement of categorizing has already been discussed. By categorizing as equivalent discriminable different events, the organism *reduces the complexity of its environment*.") (emphasis in the original).

43 See *supra* under B.

44 See, however, also on the (bilateral) approach adopted by Australia aimed at terminating its existing BITs with, among others, Mexico, Peru and Vietnam following the entry into force of the TPP *Voon/Mitchell*, ICSID Review – Foreign Investment Law Journal 31 (2016), 413 (427).

45 The text of TPP is for example available under <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text> accessed 5 December 2016.

46 See thereto also UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 105 *et seq.*; *Alschner*, Journal of International Economic Law 17 (2014), 271 (279 and 298).

law,[47] thereby making it in the eyes of many scholars and practitioners even more multifaceted as well as vulnerable to inconsistencies[48] — a concern that has been recently reiterated also specifically with a view to the conclusion of mega-regionals.[49] Rather, and closely related to the aforementioned aspect, it is by now well-known that this phenomenon of parallelism also gives rise to a number of legal issues when trying to cope with the challenges resulting from the necessary coordination of the two — or in some cases even more — different investment treaty regimes in force between the parties and thus also potentially applicable to a specific investment dispute.[50]

With the aim of avoiding normative inconsistencies in the form of contradictions, these coordination challenges apply in particular to the differences in the individual substantive protection standards for foreign investors and their investments as stipulated in the applicable agreements at issue. In order to identify the available coordination tools under public international law, two legal regimes are particularly worth drawing attention to. The first one comprises of the customary international law on treaties as well as the 1969 Vienna Convention on the Law of Treaties (VCLT).[51] Already in light of the relevant norms of general public international law, among them in particular Article 30 (2) VCLT as well as for example the Articles 42 (2) and 54 (a) VCLT,[52] the second legal regime to be taken into account is the specific investment agreement in question. And indeed, while BITs often remain silent on the question of overlapping investment treaties, a number of regional trade agreements that provide for investment chapters explicitly stipulate respective conflict clauses,[53] also known as compatibility clauses, by *inter alia* reaffirming the obligations of the parties under other investment agreements or international treaties in general,[54] stating that the provisions of the agreement shall prevail over future investment agreements concluded between some of the parties,[55] requiring that the higher standard of investment protection prevails[56] or stipulating that the parties, in the event of inconsistencies, shall enter into consultations with the aim of resolving them[57].

47 See thereto also already *supra* under B.

48 On this perception see, e.g., UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 106 *et seq.* ("Parallelism is also at the heart of systemic problems of overlap, inconsistency and the concomitant lack of transparency and predictability arising from a multi-faceted, multi-layered IIA regime. It adds yet another layer of obligations and further complicates countries' ability to navigate the complex spaghetti bowl of treaties and pursue a coherent, focused IIA strategy."); *Lee*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 131 (150 *et seq.*); UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 114.

49 UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 121 *et seq.*

50 For a more in-depth discussion of these legal challenges specifically with regard to overlapping investment agreements see for example more recently *Alschner*, Journal of International Economic Law 17 (2014), 271 *et seq.*; *Binder*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 71 *et seq.*; as well as already UNCTAD, Investment Provisions in Economic Integration Agreements, 2006, 132 *et seq.*

51 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) UNTS 1155, 331. Specifically on the customary international law status of the means of treaty interpretation as stipulated in the Articles 31 to 33 VCLT see also for example *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 296; *Weeramantry*, Treaty Interpretation in Investment Arbitration, 24.

52 On the customary international law status of these provisions see for example *Kohen/Heathcote*, in: Corten/Klein (eds.), The Vienna Convention on the Law of Treaties, Vol. II, Article 42, paras 7 *et seq.*; *Chapaux*, in: Corten/Klein (eds.), The Vienna Convention on the Law of Treaties, Vol. II, Article 54, para. 4.

53 Generally on this type of treaty provisions see, e.g., *Matz-Lück*, Treaties, Conflict Clauses, paras 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (April 2006), available under: <www.mpepil.com/> accessed 5 December 2016; *Aust*, Modern Treaty Law and Practice, 194 *et seq.*

54 See, e.g., Article 25 of the Agreement between Japan, the Republic of Korea and China for the Promotion, Facilitation and Protection of Investment of 13 May 2012; Article 4 of the Agreement between the EFTA States and Singapore Establishing a Free Trade Area of 26 June 2002.

55 See for example Article 32.3 of the Investment Agreement for the COMESA Common Investment Area of 23 May 2007.

56 On this approach in investment treaty practice see, e.g., Article 16 of the Energy Charter Treaty of 17 December 1994.

57 See for example Article 2 (3) of Chapter 18 (Final Provisions) of the Agreement Establishing the ASEAN-Australia-New

In particular in the absence of those conflict clauses, attention needs to be drawn also in the present context to the relevance of normative guiding principles under general public international law addressing the issue of interactions between different treaty regimes. In light of the general presumption against normative conflict recognized in international law,[58] a prominent position in this regard is occupied by the so-called principle of "systemic integration" or "harmonious interpretation" as enshrined in Article 31 (3) (c) VCLT, requiring that when interpreting a treaty "any relevant rules of international law applicable in the relations between the parties" have also to be taken into account.[59] Furthermore, especially in those cases where inconsistencies in the substantive standards for investment protection for example between investment chapters in mega-regionals and BITs cannot be resolved by this means of treaty interpretation,[60] those rules of general public international law that deal with respective treaty norm conflicts in the narrow sense of the meaning[61] come into play, among them the *lex posterior* rule as codified in Article 30 (3) and (4) VCLT,[62] that more recently gained some prominence in the context of investment arbitration proceedings dealing with the legal status of intra-EU BITs concluded between member states prior to their accession to the EU,[63] as well

Zealand Free Trade Area of 27 February 2009.

58 See thereto from the realm of international dispute settlement practice for example WTO, *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel of 2 July 1998, WT/DS54, 55, 59, 64/R, para. 14.28; WTO, *Turkey – Restrictions on Imports of Textiles and Clothing Products*, Report of the Panel of 31 May 1999, WT/DS34/R, paras 9.92 et seq.; as well as, e.g., *Jenks*, British Yearbook of International Law 30 (1953), 401 (427 *et seq.*); *Jennings/Watts*, Oppenheim's International Law, Vol. I, Parts 2 to 4, 1275; *Pauwelyn*, Conflict of Norms in Public International Law, 240 *et seq.*; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 563; *Finke*, in: Tams/Tzanakopoulos/Zimmermann (eds.), Research Handbook on the Law of Treaties, 415 (421).

59 Generally on this provision see, e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by *Martti Koskenniemi*, UN Doc. A/CN.4/L.682 of 13 April 2006, paras 410 *et seq.*; *Gardiner*, Treaty Interpretation, 289 *et seq.*; *Dörr*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 31, paras 89 *et seq.*; specifically on the function of this means of interpretation in the context of international investment law see for example *Wälde*, in: Binder/Kriebaum/Reinisch *et al.* (eds.), Essays in Honour of Christoph Schreuer, 724 (769 *et seq.*); *Ascensio*, ICSID Review – Foreign Investment Law Journal 31 (2016), 366 (380 *et seq.*).

60 Specifically on the respective limits of the interpretative rule of Article 31 (3) (c) VCLT in the context of interactions between investment agreements see *Alschner*, Journal of International Economic Law 17 (2014), 271 (296 *et seq.*); *Binder*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 71 (77).

61 On the underlying distinction between a narrow and a wide notion of conflict of treaties see, e.g., *Matz-Lück*, Treaties, Conflicts between, paras. 5 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (December 2010), available under: <www.mpepil.com/> accessed 5 December 2016; Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by *Martti Koskenniemi*, UN Doc. A/CN.4/L.682 of 13 April 2006, paras 21 *et seq.*; *Pauwelyn*, Fragmentation of International Law, para. 38, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (September 2006), available under: <www.mpepil.com/> accessed 5 December 2016.

62 For a general account of this provision see for example *Odendahl*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 30, paras 21 *et seq.*; see also, e.g., *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/3, 692 *et seq.*; *Ranganathan*, in: Tams/Tzanakopoulos/Zimmermann (eds.), Research Handbook on the Law of Treaties, 447 (454 *et seq.*), each with numerous further references. Specifically on the relevance of Article 30 VCLT in the context of international investment law see more recently, e.g., *Orakhelashvili*, ICSID Review – Foreign Investment Law Journal 31 (2016), 344 *et seq.*

63 See for example *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012, paras 4.182 *et seq.*; *Reinisch*, Legal Issues of Economic Integration 39 (2012), 157 (174 *et seq.*). Generally thereto as well as on the legal issues arising in connection with intra-EU BITs see also, e.g., *EUREKO B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, paras 57 et seq., 217 *et seq.*; *Eastern Sugar B.V. v. Czech Republic*, UNCITRAL ad hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, paras 115 *et seq.*; *Söderlund*, Journal of International Arbitration 24 (2007), 455 *et seq.*; *Wehland*, International & Comparative Law Quarterly 58 (2009), 297 *et seq.*; *Burgstaller*, Bungenberg/Griebel/Hindelang (eds.), International Investment Law and EU Law, 55 (71 *et seq.*); *Hindelang*, Legal Issues of Economic Integration 39 (2012), 179 *et seq.*; *Yotova*, in: Baetens (ed.), Investment Law within International Law, 387 *et seq.*; *Mariani*, in: Sacerdoti/Acconci/Valenti *et al.* (eds.), General Interests of Host States in International Investment Law, 265 *et seq.*

as — outside the realm of the VCLT — for example the maxim of *lex specialis*.[64]

In addition, the regulatory approach of parallelism in investment treaty law clearly also has the potential to result in interactions between investment chapters of mega-regionals and BITs in the context of state-state and — from a practical perspective considerably more important — investor-state dispute settlement mechanisms as by now frequently stipulated in the respective investment treaty regimes. In order to illustrate the coordination challenges arising in this regard, let it suffice to draw with UNCTAD attention to the fact that parallel investment agreements "may create situations in which a single government measure could be challenged by the same foreign investor twice, under two formally different legal instruments";[65] a possibility that in fact has unfortunately already become real in the practice of international investment arbitration.[66] In order to avoid such parallel or successive, and thus multiple investment arbitration proceedings resulting from overlapping investment agreements as well as the risk of inconsistent or even contradictory arbitral awards arising from them, a number of respective agreements include among their dispute settlement provisions so-called "waiver clauses".[67] A prominent example is Article 1121 (1) (b) NAFTA, stipulating that a foreign investor may submit a claim against the host state to arbitration only if "the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party". Quite similar provisions are also expected to be included in the investment chapters of some mega-regionals as for example illustrated by Article 9.21 of TPP and Article 8.22 of CETA[68].

64 On the *lex specialis* maxim and its applicability as a rule aimed at solving conflicts between treaties in international law see, e.g., *Borgen*, in: Hollis (ed.), The Oxford Guide to Treaties, 448 (466 *et seq.*); *Boyle/Chinkin*, The Making of International Law, 252 *et seq.*; *Michaels/Pauwelyn*, in: Broude/Shany (eds.), Multi-Sourced Equivalent Norms in International Law, 19 (33 *et seq.*); Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by *Martti Koskenniemi*, UN Doc. A/CN.4/L.682 of 13 April 2006, paras 56 *et seq.*; see however also *Matz-Lück*, Treaties, Conflict Clauses, para. 3, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (April 2006), available under: <www.mpepil.com/> accessed 5 December 2016 ("the existence and extent of international customary law providing for a *lex posterior* or a *lex specialis* rule are disputed") (emphases in the original); as well as for rather critical account *Klabbers*, International Law, 56. For an overview of additional rules and maxims potentially applicable to treaty norm conflicts see for example *Odendahl*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 30, para. 2, with further references.

65 UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 106.

66 See in particular the *de facto* parallel proceedings involving the same investment dispute in the cases *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration, Final Award of 3 September 2001; and *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL Arbitration, Final Award of 14 March 2003; see thereto also for example *Brower/Sharpe*, Journal of World Investment 4 (2003), 211 *et seq.*; *De Ly et al.*, Journal of World Investment and Trade 6 (2005), 59 *et seq.*; *Reinisch*, International Courts and Tribunals, Multiple Jurisdiction, paras 16 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (April 2011), available under: <www.mpepil.com/> accessed 5 December 2016.

67 On this type of provisions see also, e.g., *Cremades/Madalena*, Arbitration International 24 (2008), 507 (531 *et seq.*); *Alschner*, Journal of International Economic Law 17 (2014), 271 (291 *et seq.*); *Wehland*, ICSID Review – Foreign Investment Law Journal 31 (2016), 576 (582 *et seq.*).

68 Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, Council of the European Union, Doc. 10973/16 of 14 September 2016. For the respective annexes, decisions etc. attached and adopted in the context of CETA see for example the information provided unter: <http://www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/> accessed 5 December 2016.

In the absence of respective waiver clauses in the investment agreements themselves, other legal coordination tools available under general public international law and having at least a certain potential to also prevent multiple investment arbitration proceedings include the principle of *lis pendens* applicable in the context of parallel proceedings[69] and the concept of *res judicata* providing normative guidance in those situations involving the initiation of subsequent proceedings.[70] Finally, attention should also be drawn in this regard to the principle of comity. Although its status under current public international law suffers from some uncertainties and despite the fact that it does not prevent multiple proceedings *per se*, applying comity to parallel or successive investment arbitration proceedings might at least assist in mitigating the negative and undesirable consequences potentially arising in such contexts.[71]

Already this comparatively brief overview of some of the coordination challenges resulting from parallelism in investment treaty practice clearly indicates that this regulatory approach gives rise to a considerable number of quite remarkable, complex and controversially perceived legal issues. This is also precisely the reason why these questions and the underlying normative concepts have at all times, and in particular more recently, attracted significant attention among legal scholars and practitioners alike. Nevertheless, for the purposes of the present contribution it seems appropriate to recall two notable aspects. First, the need to coordinate overlapping treaty regimes and the legal concepts associated with this task are obviously not unique to the relationship between investment chapters in mega-regionals and BITs. Rather, they have so far been discussed — and indeed arise to the same extent — in connection with interactions between investment chapters in "ordinary" regional trade agreements and BITs as well as, more generally, with regard to conflicts between international treaties and competing jurisdiction of international courts and tribunals. Second, it is at the time of writing not certain whether, in addition to the already above mentioned Article 1.2 (1) (b) of TPP, also other mega-regionals currently under negotiation will adhere to the regulatory option of parallelism and thus provide for a situation of normative co-existence between their envisioned investment chapters and other investment agreements by the parties. Quite to the contrary, however, a high degree of certainty exists that the future parties to at least two of the respective mega-regionals will not adopt this approach but take recourse to a regulatory option that might be labeled as inter-regional consolidation.

69 On the principle of *lis pendens* and the respective challenges involving its application to international investment arbitration proceedings see for example *Reinisch*, The Law and Practice of International Courts and Tribunals 3 (2004), 37 (48 *et seq*.); *Cremades/Madalena*, Arbitration International 24 (2008), 507 (509 *et seq.*); *Wehland*, The Coordination of Multiple Proceedings in Investment Treaty Arbitration, 167 *et seq.*

70 For a general account of this principle in public international law see, e.g., *Shany*, The Competing Jurisdictions of International Courts and Tribunals, 245 *et seq*.; *Dodge*, Res Judicata, paras. 3 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (January 2006), available under: <www.mpepil.com/> accessed 5 December 2016; *Shaw*, International Law, 71 *et seq.* Specifically on its potential in the realm of investment arbitration proceedings see for example *Wehland*, The Coordination of Multiple Proceedings in Investment Treaty Arbitration, 167 *et seq*.; as well as from the perspective of arbitral practice more recently the discussion of this concept in *Apotex Holdings Inc./ Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, paras 7.1 *et seq.*

71 See thereto *Shany*, The Competing Jurisdictions of International Courts and Tribunals, 260 *et seq*.; *Shany*, Regulating Jurisdictional Relations between National and International Courts, 166 *et seq*.; *Binder*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 71 (79); *Wehland*, ICSID Review – Foreign Investment Law Journal 31 (2016), 576 (586 *et seq.*); *Crawford*, Chance, Order, Change: The Course of International Law, 298 *et seq.*

2. Inter-Regional Consolidation

Contrary to parallelism, this approach of *inter-regional consolidation* of investment agreements — as being from an applicability-oriented perspective the second principal option for mega-regional treaty-making — distinguishes itself through the avoidance of new respective treaty overlaps by terminating the existing BITs between (some of) the parties. In this regard, attention might be drawn to the possibility of terminations by tacit consent of the parties as implied from the conclusion of a later treaty relating to the same subject-matter in accordance with Article 59 (1) VCLT;[72] a provision that also — in the same way as Article 30 VCLT[73] — recently received considerable attention in connection with investment arbitration proceedings assessing the validity of intra-EU BITs concluded between member states prior to their accession to the EU.[74] Furthermore, respective endings of investment treaty relationships first and foremost also can take place — and in fact in practice increasingly do take place[75] — by explicit mutual consent of the parties as recognized by Article 54 (b) VCLT.

A vivid example in the realm of mega-regionals is provided by CETA. This mega-regional is intended to replace and thus terminate — with immediate effect — the eight existing BITs previously concluded by EU member states with Canada in accordance with Article 30.8 (1) CETA and the respective Annex 30-A to the agreement. Article 30.8 (1) stipulates in this regard that "[t]he agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement". Other examples for this regulatory approach aimed at an inter-regional consolidation of investment agreements, albeit outside the category of mega-regionals in the narrower sense, can be found in Article 20 (1) of the investment chapter (in connection with an annex still to be prepared by the parties) of the free trade agreement between the EU and Vietnam[76] as well as in Article 9.10 (1) in connection with Annex 9-D (listing 12 BITs) of the free trade agreement between the EU and Singapore.[77]

The regulatory method of investment treaty consolidation as manifested in these provisions is obviously a consequence of the new exclusive competences enjoyed by the EU in the field of foreign direct investments under Article 207 TFEU since the entry into force of the Treaty of Lisbon in December 2009 and the reformed external investment policy of the EU vis-à-vis third countries resulting from this transfer of public powers to this supranational organization. Although the EU member states that, taken together, currently still account for

72 Generally on the regulatory content of this provision see, e.g., *Giegerich*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 59, paras 8 *et seq.*, with numerous further references.

73 See thereto already *supra* under C.I.1.

74 See, e.g., *Eastern Sugar B.V. v. Czech Republic*, UNCITRAL ad hoc Arbitration, SCC No. 088/2004, Partial Award of 27 March 2007, paras 156 *et seq.*; *Oostergetel and Laurentius v. Slovak Republic*, UNCITRAL ad hoc Arbitration, Decision on Jurisdiction of 30 April 2010, paras 72 *et seq.*; *EUREKO B.V. v. Slovak Republic*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, paras 231 *et seq.*; as well as *Reinisch*, Legal Issues of Economic Integration 39 (2012), 157 (159 *et seq.*).

75 This approach finds its manifestation, among others, in Annex 10-E of the free trade agreement concluded between Australia and Chile (entered into force 6 March 2009 and terminating the BIT concluded between the parties on 9 July 1996). Additional respective stipulations include Article 9.17 of the Republic of Korea−Peru free trade agreement (entered into force 1 August 2011), Article 10.20 of the free trade agreement between Peru and Singapore (entered into force 1 August 2009) as well as already Article 21.4 of the free trade agreement concluded by Chile and the Republic of Korea (entered into force 1 April 2004). See thereto also, e.g., *Voon/Mitchell/Munro*, ICSID Review – Foreign Investment Law Journal 29 (2014), 451 (452); *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (247 *et seq.*).

76 EU-Vietnam Free Trade Agreement, agreed text as of January 2016, available under <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437> accessed 5 December 2016.

77 EU-Singapore Free Trade Agreement, authentic text as of May 2015, available under <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> accessed 5 December 2016.

more than 1,300 bilateral agreements and thus almost half of the world's BITs[78] are not *per se* required to terminate their extra-EU BITs with third countries,[79] these numerous treaties will eventually and progressively be replaced by investment agreements of the EU. Against this background, also the ongoing EU negotiations with the United States on TTIP as well as on related agreements with *inter alia* India, Thailand, Malaysia, China, Tunesia and Morocco are, if successful, highly likely to result in the termination of numerous extra-EU BITs and their replacement by investment chapters in regional integration agreements[80] or potentially also stand-alone investment treaties.

This regulatory approach is frequently perceived as a laudable policy option contributing to a process of consolidation with regard to the quite fragmented as well as increasingly multifaceted regime of international investment law and thereby also essentially avoiding the above mentioned normative coordination challenges associated with parallelism.[81] That said, one nevertheless cannot help but notice — and it should thus not be left unmentioned — that the approach of inter-regional consolidation gives rise to its own rather complex and until now largely unanswered legal questions. Prominent among them is the issue whether the termination clauses stipulated in the overwhelming majority of BITs also apply to these cases of mutually agreed terminations with immediate effect as being characteristic for the approach of inter-regional consolidation. In this regard, it is worth recalling that almost all bilateral and many other investment agreements include respective provisions stipulating minimum periods of application.[82] The time frame for this initial fixed term of application normally varies from five years like in the case of Article 47 (1) Energy Charter Treaty to 15 years as for example stipulated in Article 9 (2) of the BIT between China and Norway.[83] Occasionally, this initial validity period even covers a timespan of up to 30 years. Such stipulations can be found, *inter alia*, in Article 15 (1) of the BIT between Malaysia and the United Arab Emirates of 11 October 1991 and in Article 15 (1) of the respective agreement concluded between Finland and Kuwait of 10 March 1996. These clauses establishing initial minimum periods — as well as those providing only for the possibility of "end-of-term terminations"[84] — can be qualified as stipulating a temporary prohibition on the (unilateral) termination of the investment agreement

78 UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 85; UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 100 *et seq.*

79 On the respective legal framework under secondary Union law see Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 Decem ber 2012 Establishing Transitional Arrangements for Bilateral Investment Agreements between Member States and Third Countries, OJ L 351/40. Generally on the treaty-making powers of the EU in the field of foreign direct investments and the debate over the legal status of extra-EU BITs see for example *Dimopoulos*, EU Foreign Investment Law, 2011; *Eeckhout*, EU External Relations Law, 62 *et seq.*; *Bungenberg*, in: Broude/Busch/Porges (eds.), The Politics of International Economic Law, 133 *et seq.*; as well as the contributions in *Bungenberg/Griebel/Hindelang* (eds.), International Investment Law and EU Law, 2011; and *Bungenberg/Reinisch/Tietje* (eds.), EU and International Investment Agreements, 2013.

80 See, e.g., UNCTAD, The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?, IIA Issues Note No. 3, June 2013, 2 *et seq.*

81 On this perception see for example UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 112 ("Megaregional agreements could consolidate and streamline the IIA regime and help enhance the systemic consistency of the IIA regime, provided they replace prior bilateral IIAs between the parties […]."); UNCTAD, World Investment Report 2013, Global Value Chains: Investment and Trade for Development, 2013, 105 *et seq.*; UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 121 *et seq.*; *Alschner*, Journal of International Economic Law 17 (2014), 271 (273 *et seq*.).

82 Generally thereto *Harrison*, Journal of World Investment and Trade 13 (2012), 928 (933 *et seq.*); *Pohl*, Temporal Validity of International Investment Agreements, 7 *et seq.*

83 See also, e.g., *Salacuse*, The Three Laws of International Investment, 400 ("Investment treaties generally provide that they shall be in force for 10 or 15 years."); UNCTAD, International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal, IIA Issues Note No. 4, June 2013, 3.

84 See thereto UNCTAD, International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal, IIA Issues Note No. 4, June 2013, 3; *Pohl*, Temporal Validity of International Investment Agreements, 7 *et seq.*

in question.[85] Furthermore, and at least equally noteworthy in the present context, BITs also usually include provisions addressing the consequences arising from a respective termination. Generally speaking, these so-called "survival clauses" grant foreign investors the possibility to continuously benefit from the respective substantive protection standards — and the frequently given availability of access to international legal remedies — in respect of investments made prior to the date of expiry of the agreement for a certain period of time after the termination becomes effective.[86] Aimed at preventing denunciations with immediate effect, these clauses are common to most — albeit not all[87] — bilateral investment agreements. To mention but one example, Article XIV of the 1990 BIT between Canada and Poland, one of the agreements to be terminated with immediate effect once CETA enters into force, proscribes in its relevant parts that "[i]n respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles I to XIII inclusive of this Agreement shall remain in force for a period of twenty years".

Whereas an argument can be made that even broadly phrased provisions stipulating minimum periods of application and providing for survival clauses are only applicable to unilateral denunciations of investment agreements and generally do not cover terminations based on the mutual consent of the contracting parties,[88] it needs to be born in mind that this issue has only recently been identified as one of the "open questions" in the field of international investment law.[89] The respective discussions in the literature are currently gaining momentum albeit with as yet nothing even close to a consented perception in sight.[90] For the time being it thus remains to be seen whether these types of provisions have the potential to create a situation of a rather long kind of "temporary" parallelism of investment chapters in mega-regionals and respective BITs even in those cases where the treaty parties have opted for inter-regional consolidation.

85 *Harrison*, Journal of World Investment and Trade 13 (2012), 928 (934).

86 Generally on this rather unique type of provisions see, e.g., *Lavopa/Barreiros/Bruno*, Journal of International Economic Law 16 (2013), 869 (878 *et seq.*); *Bolivar*, in: Trakman/Ranieri (eds.), Regionalism in International Investment Law, 162 *et seq.*; *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (241 *et seq.*).

87 A rare example of a BIT stipulating an initial minimum period of application but no survival clause is provided by the respective agreement between Egypt and Latvia of 24 April 1997.

88 See thereto *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (254 *et seq.*).

89 UNCTAD, International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal, IIA Issues Note No. 4, June 2013, 4 Fn. 10 ("open question"); *Ripinsky*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 593 (620) ("a debatable issue not yet tested in arbitral practice"); *Roberts*, Harvard International Law Journal 55 (2014), 1 (23) ("ongoing controversies"); *Lekkas/Tzanakopoulos*, in: Tams/Tzanakopoulos/Zimmermann (eds.), Research Handbook on the Law of Treaties, 312 (317 Fn. 27) ("interesting problems").

90 The issue itself has already been raised, albeit without receiving further treatment, for example by *Wälde*, Arbitration International 26 (2010), 3 (16) ("it is not clear what the situation of an investor who invested on the basis of an existing BIT would be if both governments agreed to end the treaty, and even less clear what the impact of an agreed termination of the treaty would be on an ongoing case"); and *Volterra*, ICSID Review – Foreign Investment Law Journal 25 (2010), 218 (220) ("What happens if two State parties to an investment treaty decide to terminate the treaty with no continuing effect, and they make that agreement as between themselves, as of the moment they reach the agreement? Are there any continuing rights that accrue to the investor? It is hard to see how there would be."). For a subsequent more in-depth evaluation of the applicable legal framework see, e.g., *Voon/Mitchell*, Journal of International Economic Law 14 (2011), 515 (523 *et seq.*); *Harrison*, Journal of World Investment and Trade 13 (2012), 928 (941 *et seq.*); *Braun*, Ausprägungen der Globalisierung, 168 *et seq.*; *Lavopa/Barreiros/Bruno*, Journal of International Economic Law 16 (2013), 869 (881 *et seq.*); *Sourgens*, Santa Clara Journal of International Law 11 (2013), 335 (379 *et seq.*); *Voon/Mitchell/Munro*, ICSID Review – Foreign Investment Law Journal 29 (2014), 451 *et seq.*; *Peters*, Jenseits der Menschenrechte, 288 *et seq.*; *Roberts*, Harvard International Law Journal 56 (2015), 353 (403 *et seq.*); *Voon/Mitchell*, ICSID Review – Foreign Investment Law Journal 31 (2016), 413 (423 *et seq.*); *Wackernagel*, The Twilight of the BITs?, 11 *et seq.*; *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (245 *et seq.*).

II. Content-Oriented Perspective: Assessing the Effects of Mega-Regionals on Future BIT-Making

The second main analytical approach worth drawing attention to in connection with an evaluation of the potential interactions between investment chapters in mega-regionals and BITs considers these interrelationships from a *content-oriented perspective*. It mainly focusses on the possible influence exercised by — or to be expected from — mega-regionals on the structural design and content of the substantive rules of investment promotion and protection as well as the procedural provisions establishing dispute settlement mechanisms in BITs. In this regard one can again distinguish between two basic levels of analysis that might be characterized as the "plain" analytical approach and the "savior" approach respectively.

1. "Plain" Analytical Approach: Measuring Mutual Influences Among Equals

As part of the content-oriented perspective, the level and focus of analysis that is referred to here as the *"plain" analytical approach* is first and foremost concerned with the specific mutual influences of investment chapters in mega-regionals on future BIT-making — and vice versa. And indeed, the need for and benefits of such an analytical approach are quite obvious considering the fact that, despite the fragmented character of the global system of investment agreements, it is beyond reasonable doubt that investment treaty-making in general hardly if ever takes place in a kind of "information vacuum" on the side of the negotiating parties.

Although one should not underestimate the considerable differences between the numerous individual investment agreements[91] and bearing in mind that the content of these treaties has been, and continues to be, shaped by the specific "political, economic and legal contexts in which they are negotiated",[92] ever since time began in November 1959 with the conclusion of the first BIT between Germany and Pakistan, these agreements have also mutually influenced each other with regard to their — most certainly progressively developing — structure as well as the specific content and wording of their provisions.[93] In addition, the regulatory content of the first generation of BITs was itself inspired by the well-known Abs-Shawcross Draft Convention of April 1959[94] which in turn borrowed from the treaties of friendship, commerce and navigation first introduced into practice already in the 18th century.[95] The terms of these and later BITs themselves, including respective updates of the treaty texts, have subsequently exercised a considerable influence on the structure and content of the first investment chapters to be included in regional trade agreements; among them in particular also Chapter 11 of NAFTA whose innovative features as well as the experiences made with this agreement in arbitral practice afterwards again informed new bilateral treaties, refined and updated model

91 See thereto already *supra* under B.

92 *Vandevelde*, U.C. Davis Journal of International Law and Policy 12 (2005), 157 (193).

93 Generally on this perception see also, e.g., *Marboe*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 229 (232 *et seq*.); *Schill*, in: Douglas/Pauwelyn/Viñuales (eds.), The Foundations of International Investment Law, 109 (116 *et seq*.); *Schill*, The Multilateralization of International Investment Law, 88 *et seq*., with further references.

94 The text of this draft convention is for example reprinted in: *Tams/Tietje* (eds.), Documents in International Economic Law, 358 *et seq*. See thereto also, e.g., *Schwarzenberger*, Journal of Public Law 9 (1960), 147 *et seq.*

95 On this perception see for example *Alschner*, Goettingen Journal of International Law 5 (2013), 455 (457) ("On the historical front, FCN treaties inspired the terms of the *Abs-Shawcross Draft Convention*, upon which the first BITs were modeled.") (emphasis in the original); *Vandevelde*, U.C. Davis Journal of International Law and Policy 12 (2005), 157 (172) ("the protections provided by the BITs were similar to those that had been provided in the modern FCNs concluded by the United States").

BITs such as the 2012 US Model BIT[96] and the content of later investment chapters incorporated into agreements establishing free trade zones.[97]

Finally, already a cursory look at the structural interconnections between some of the mega-regionals concluded or currently under negotiation and other existing investment agreements reveals that these findings concerning mutual inspirations and impacts also apply to, and find their manifestation in, the regulatory approaches and provisions enshrined in their respective investment chapters. At least the substantive provisions (albeit not the investor-state dispute settlement mechanism) enshrined in the investment chapter of CETA, for example, appear to be strongly influenced by current Canadian BIT practice[98] as evidenced by a considerable number of similarities when compared with the 2004 Model Foreign Investment Promotion and Protection Agreement of Canada[99] as well as more recently concluded investment agreements like the BIT signed by this country and Nigeria on 6 May 2014, the respective treaty that entered into force between Benin and Canada on 12 May 2014, the BIT between Canada and Mali signed on 28 November 2014, the agreement between Canada and Serbia that entered into force on 27 April 2015 as well as the BIT between Canada and Hong Kong/China signed on 10 February 2016.

In addition, already for example in light of the consultation document published by the European Commission in March 2014[100] at the start of the EU online public consultation on investment protection and investor-to-state dispute settlement in TTIP[101] as well as taking into account the European Union's proposal for investment protection and resolution of investment disputes in TTIP published on 12 November 2015,[102] it appears almost certain that — in addition for example to the 2012 US Model BIT and the recent BIT practice of EU member states — first and foremost also the negotiations on CETA will exercise a notable influence on the treaty text of this mega-regional.[103] To mention but one further example, the investment chapter of the TPP (Chapter 9) seems to be first and foremost informed by an updated version of the NAFTA approach as well as — obviously to a certain extent related — the current US Model BIT.[104]

96 The currently applicable 2012 US Model BIT is for example reprinted in: *Tams/Tietje* (eds.), Documents in International Economic Law, 432 *et seq*. See generally thereto *Caplan/Sharpe*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 755 *et seq.*; *Di Rosa/Yamane Hewett*, in: Bjorklund (ed.), Yearbook of International Investment Law & Policy 2012-2013, 595 *et seq*.

97 For an earlier account of these influences exercised by the NAFTA investment regime see, e.g., *Kinnear/Hansen*, U.C. Davis Journal of International Law and Policy 12 (2005), 101 (110 *et seq.*); see also more recently for example *Berger*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 297 *et seq*.

98 See also, e.g., *Markus Krajewski*, Kurzgutachten zu Investitionsschutz und Investor-Staat-Streitbeilegung im Transatlantischen Handels- und Investitionspartnerschaftsabkommen (TTIP) im Auftrag der Bundestagsfraktion Bündnis 90/Die Grünen, 1 May 2014, p. 3, available under <www.gruene-bundestag.de/fileadmin/media/gruenebundestag_de/Veranstaltungen/140505-TTIP/Kurzgutachten_Investititionsschutz_TTIP_Endfassung_layout.pdf> accessed 5 December 2016; *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 (95 *et seq.*).

99 Generally thereto for example *Lévesque/Newcombe*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 53 *et seq*.

100 European Commission, Public Consultation on Modalities for Investment Protection and ISDS in TTIP, available under <http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf> accessed 5 December 2016.

101 On these consultations see, e.g., the concluding report by the European Commission, Commission Staff Working Document: Report, Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final of 13 January 2015, available under <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf> accessed 5 December 2016.

102 European Union's proposal for Investment Protection and Resolution of Investment Disputes in TTIP published on 12 November 2015, available under <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> accessed 5 December 2016.

103 See also, e.g., *Hufbauer/Cimino-Isaacs*, Journal of International Economic Law 18 (2015), 679 (682).

104 On this perception see also for example already UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 114; *Chaisse*, in: Lim/Elms/Low (eds.), The Trans-Pacific Partnership, 147 (148); *Draper/Lacey/Ramkolowan*, Mega-Regional Trade Agreements, 29; *Fontanelli/Bianco*, Stanford Journal of International Law 50

What characterizes this "plain" analytical approach in the context of mega-regionals is in particular the fact that it does not perceive this type of treaties in general, and their investment chapters in particular, as an indication for a paradigmatic shift or as a kind of *primus inter pares* in the realm of international investment law. Rather, this approach sees and analyses investment chapters in future mega-regionals as a "normal" component of the international normative framework on foreign investment whose regulatory approaches have been first and foremost also inspired by the content of previously concluded investment agreements and who, if successful, will themselves — as one among a number of potentially relevant sources and factors — contribute to a certain extent to investment treaty-making in the future. And indeed, it is precisely this underlying and in principle comparatively modest perception of mega-regionals as a noteworthy, but upon closer inspection rather ordinary development in the field of international investment law that results in the "plain" analytical approach usually not being adopted and referred to in scholarly debates on the topic of what has been labeled here as content-oriented interactions.

2. "Savior" Approach: The Emergence of Mega-Regionals as the Message of Salvation for International Investment Law

Rather, the emergence of mega-regionals has given new impetus and prominence to a second analytical focus within the content-oriented perspective that might be appropriately termed as the *"savior" approach*. Concerning its underlying perception, this analytical approach to the interactions between investment chapters in mega-regionals and BITs is predominantly shaped by the factual and expectational background of the mid-term perspective as already discussed above.[105] The "savior" approach experiences international investment law as a normative regime suffering from considerable fragmentation and the negative consequences associated with it; a legal system that is in need of salvation in the form of consolidation. Against this background, mega-regionals and their investment chapters are perceived as a new and significant steering phenomenon in the international economic system that has first and foremost also the potential of — and thus offers a fresh "promising" opportunity for — promoting coherence as well as convergence in the realm of international investment agreements; thereby substantially contributing to the desired process of multilateralizing international investment law as a whole.

The idea and perception of investment chapters in mega-regionals as a kind of potential "great leap forward" on the way to a multilateral world investment order is for example mirrored in the UNCTAD World Investment Report 2014, stating that "[o]nce concluded, these [agreements] are likely to have a major impact on global investment rule making and global investment patterns. […] Negotiations of megaregional agreements may present opportunities for the formulation of a new generation of investment treaties that respond to the sustainable development imperative."[106] Furthermore, *Filippo Fontanelli* and *Giuseppe Bianco* recently predicted in particular with a view to TPP and CETA that "[w]ith the proliferation of treaties that involve the major global economic powers and follow the same template, the hypothesis of a multilateral instrument would not seem so distant or hard to explore".[107] *Anna Joubin-Bret* observes that "[g]iven its sheer number of participating countries and the uniformity of

(2014), 211 (234); *Henckels*, Journal of International Economic Law 19 (2016), 27 (29); *Alschner/Skougarevskiy*, Journal of International Economic Law 19 (2016), 561 (584).

105 See *supra* under B.

106 UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 118 and 121.

107 *Fontanelli/Bianco*, Stanford Journal of International Law 50 (2014), 211 (234).

the approaches to high standards of investment liberalization and protection by the countries negotiating the TPP, it is clearly a possible stepping stone that could serve as a basis for a multilateral platform".[108] *Steffen Hindelang* and *Markus Krajewski* state that "[m]ega regional agreements […] would certainly provide a new driver for regulating investment protection by means of public international law", with their emergence even raising "the question of the potential and the desirability of a renewed attempt towards the multilateralization of investment protection".[109] *Julien Chaisse* argues that the "TPP is a vital test from the perspective of innovations in investment rule-making".[110] An analysis just published by *Leon E. Trakman* advances the view that "[t]he potential of the TPP to grow into a Multilateral Investment Agreement (MIA) is significant. […] TPP investment supporters conceive of it as a template for replication in other regions, possibly leading to a new MIA to replace the agreement that failed at the end of the 1990s."[111] *Stephanie Schacherer* observes that "mega-regionals are due to their economic size potential, rule-setters for the future shape of substantive and procedural international investment standards".[112] *Marc Bungenberg* foresees that "the TPP-chapter on investment might develop further into a new plurilateral investment agreement that could also attract further States".[113] And *Daniel S. Hamilton* argues that "[a] US-EU investment agreement as part of the TTIP could also strengthen international investment law, and serve as a model for investment agreements worldwide".[114]

Faced with an increasing number of predictions and expectations of this kind, two main questions arise that deserve to be at least briefly addressed in this contribution. First: Is such a scenario of multilateralization of international investment law through mega-regionals likely to evolve in the foreseeable future? Even assuming that at least some of the current and future negotiation processes on mega-regionals will ultimately proof to be successful, it is far from clear that the entering into force of these agreements will result in a broad *de facto* consolidation of the global investment treaty regime. In the same way as there have always been in the evolution of investment treaty law certain more influential and exemplary investment agreements like Chapter 11 of NAFTA and more "persuasive" model BITs such as previously for example the German Model BIT, currently the 2012 US Model BIT and in the future potentially also some kind of EU Model BIT,[115] it is already in light of the number of countries participating in the negotiation processes to be presumed that the investment chapters of some mega-regionals will make a notable contribution to and thus have an impact on future investment treaty-making at large. Nevertheless, it needs to be emphasized that there is at present no certainty whether current and future mega-regionals under negotiation will adopt identical or at least quite similar regulatory approaches in their investment chapters. Quite to the contrary, already the rather divergent approaches towards the concept of investor-state dispute settlement stipulated in the Articles 9.18 et seq. TPP on the one hand and in the Articles 8.18 et seq. CETA on the other hand and thus the emergence of a situation that has recently been described as "US versus EU

108 *Joubin-Bret*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 289 (294).
109 *Hindelang/Krajewski*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 377 (383).
110 *Chaisse*, in: Lim/Elms/Low (eds.), The Trans-Pacific Partnership, 147 (148).
111 *Trakman*, Journal of World Trade 48 (2014), 1 (1 and 2).
112 *Schacherer*, Journal of International Economic Law 19 (2016), 628 (649).
113 *Bungenberg*, in: Hofmann/Schill/Tams (eds.), Preferential Trade and Investment Agreements, 269 (275).
114 *Hamilton*, The International Spectator – Italian Journal of International Affairs 49 (2014), 81 (92).
115 Generally on the practical importance of model BITs in international investment law see, e.g., *Clodfelter*, ICSID Review – Foreign Investment Law Journal 24 (2009), 165 *et seq.*; *Salacuse*, The Three Laws of International Investment, 360 *et seq.*; *Newcombe*, in: De Mestral/Lévesque (eds.), Improving International Investment Agreements, 15 (19 *et seq.*). Specifically on the possible development and content of a respective EU Model BIT see for example *Hoffmeister/Alexandru*, Journal of World Investment and Trade 15 (2014), 379 *et seq.*

Leadership in Global Investment Governance"[116] illustrate that mega-regional negotiations might, and in current treaty-making practice in fact do, also result in the adoption of rather different and competing regulatory mechanisms in the realm of international investment law.

Furthermore, attention should in this context also be drawn to the in principle undeniable fact that there are by now clear indications in state practice that international investment law as a whole, or at least with regard to certain aspects, has become — again — increasingly controversial.[117] This applies in particular — albeit by far not exclusively as illustrated by the current examples of South Africa and Indonesia[118] — to a number of Latin American countries' display of recently renewed suspicion in this regard.[119] Against this background, at least a certain amount of caution seems to be warranted when perceiving investment chapters in mega-regionals as a — or even the — new basis for processes of multilateralizing the global legal regime on the protection of foreign investments.[120]

Second, and at least equally fundamental, the question arises whether a respective *de facto* or even *de iure* multilateralization in the realm of investment agreements initiated by the emergence of mega-regionals would be a desirable development in the first place. Already the mere fact that such a question is brought forward in the present context might seem surprising — or even irritating — to some readers. This could be even more so the case in light of the until now clearly dominant, albeit not always explicitly stated, assumption that a fragmented regime such as current international investment law suffers from disorder and would in the interest of its continued effectiveness and viability as well as its long-term survival thus obviously benefit from sustained efforts aimed at a centralization in the form of multilateral normative ordering structures.[121] Nevertheless, a legitimate argument can be made — and has indeed also recently quite forcefully been made by *Joost Pauwelyn* — that "a high degree of formal centralization and global control are not indispensable for a regime to emerge and thrive".[122] Quite to the

116 *Schill*, Journal of World Investment and Trade 17 (2016), 1 ("With these starkly contrasting visions about the future of ISDS, it is probably no exaggeration to say that we are at a historic juncture regarding the future structure of investment governance. While the United States, as indicated by TPP, favors in essence a continuation of the loosely institutionalized system of one-off arbitration, although with additional safeguards and subject to transparency, Europe aims at building new institutions. Whose approach will succeed is not only a matter of bargaining power on both sides of the Atlantic; it will be key to whose vision for governing international investment relations is more attractive at a global level."); see also *Schill*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 115 (120 *et seq*.); *Kleinheisterkamp/Skovgaard Poulsen*, European Yearbook of International Economic Law 7 (2016), 527 *et seq.*; as well as *Schacherer*, Journal of International Economic Law 19 (2016), 628 *et seq.*

117 On this perception see for example the respective observations by *Schreuer*, in: Reinisch/Knahr (eds.), International Investment Law in Context, 3 (5) ("The future of investment arbitration is by no means certain. The enthusiasm of States, especially those that have been on the losing side in several major cases, has been severely dampened. Even former champions of investors' rights, such as the United States, have lost much of their eagerness after finding themselves in the role of respondents."); *Sornarajah*, European Yearbook of International Economic Law 7 (2016), 209 *et seq.*; as well as, e.g., *Salacuse*, The Law of Investment Treaties, 19 ("Thus, despite the fact that the international investment regime is founded on 3,300 treaties solemnly concluded by some 180 different states, one cannot assume that it will endure."); *Vadi*, Analogies in International Investment Law and Arbitration, 64 *et seq*.; *Sornarajah*, Resistance and Change in the International Law on Foreign Investment, 45 *et seq.*; *Miles*, European Yearbook of International Economic Law 7 (2016), 273 *et seq.*

118 See thereto UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 114; *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (234 *et seq.*).

119 *Nowrot*, International Investment Law and the Republic of Ecuador, 5 *et seq.*, with further references.

120 See in this regard also for example *Hindelang/Krajewski*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 377 (383) ("Could mega-regional agreements such as TPP and TTIP, with investment chapters including ISDS, become the nucleus of a (new attempt towards a) multilateral investment protection agreement? For the time being, no such initiative has been launched and there are no governments or international organizations openly pursuing such an agenda. This does not seem surprising. In light of the legitimacy crisis and the many challenges international investment law is currently facing and the general fatigue of States with multilateralism, the situation remains too fragile and unpredictable to expect bold calls for new multilateral initiatives on investment law.").

121 On this perception see also already *supra* under B.

122 *Pauwelyn*, ICSID Review – Foreign Investment Law Journal 29 (2014), 372 (375); see also *Pauwelyn*, in: Douglas/

contrary, the character of international investment law as a "complex adaptive system" and the dynamic stability associated with this feature might actually be "major advantages or positive qualities that one should, to some extent, nurture"[123] because they enable this legal regime — through decentralized interactions and continued updating and fine-tuning of individual agreements — to "constantly adapt to the needs of all the constituencies that it affects"[124] and thereby to largely escape the tendencies of stagnation currently visible in other fields of public international law.[125]

Referring to this alternative perspective does not necessarily imply that one has to agree uncritically with all of its findings. However, considering its fresh and, in the positive sense of the meaning, thought-provoking account of the structure and development of international investment law, it is at least worth drawing attention to, in particular against the background of the newly intensified discussion on the need for and benefits of a multilateral centralization of the normative regime on international investment protection in light of the emergence of mega-regionals. The truth itself, it can safely be presumed, lies probably — as it is not infrequently the case — somewhere in the middle.

Pauwelyn/Viñuales (eds.), The Foundations of International Investment Law, 11 (13).

123 *Pauwelyn*, ICSID Review – Foreign Investment Law Journal 29 (2014), 372 (381); see also, e.g., *Moranis*, Arbitration International 32 (2016), 81 (110) ("Individual investment agreements are laboratories for the regime. […] The regime can adapt through changes in its constituent parts and may do so rapidly in light of the ease of bilateral negotiations.").

124 *Alvarez*, New York University Journal of International Law and Politics 42 (2009), 17 (80); see also *Pauwelyn*, ICSID Review – Foreign Investment Law Journal 29 (2014), 372 (375 *et seq.*); *Pauwelyn*, in: Douglas/Pauwelyn/Viñuales (eds.), The Foundations of International Investment Law, 11 (13 *et seq.*), with further references.

125 See thereto for example *Pauwelyn/Wessel/Wouters*, European Journal of International Law 25 (2014), 733 *et seq.*, with further references.

D. Outlook: Some Expected Interactional Consequences for the Future of International Investment Law

The underlying approach adopted in the present contribution has been largely dominated by an identification and evaluation of different specific perspectives on, divergent expectations with regard to, and deviating perceptions of the position occupied by investment chapters in mega-regionals in their interfaces with other investment agreements, among them in particular BITs. Following this pattern, the concluding outlook will finally, from an overarching perspective, draw attention to and summarize some of the consequences to be expected from these interactions for the future development of — and scholarly research on — international investment law as a whole. Once more, and thus one last time, it again appears to be useful to distinguish also in this regard between two different levels or perspectives.

Viewed from a *legal policy perspective*, and thus from a kind of "macro" level of analysis, the present contribution has attempted to illustrate that the emergence of mega-regionals with investment chapters has at the same time resulted in a recurrence of in principle quite old hopes and expectations with regard to the realization of an intensified multilateralization of the international investment treaty regime.[126] Irrespective of whether such predictions are rather premature and thus whether mega-regionals will in fact be able to at least partially meet these underlying expectations, it seems not too far-fetched to presume that it is precisely these questions that will trigger a considerable amount of scholarly research in the near future and might potentially even dominate the academic discussions on mega-regionals from the perspective of international investment law.

At the "micro" level, adopting a *legal dogmatic perspective*, the analysis has identified various specific normative issues and challenges under public international law arising in connection with the interactions between mega-regionals and BITs. Not all of these legal questions — resulting in particular from parallelism, but potentially also emerging if the treaty parties have opted for inter-regional consolidation — are entirely new and most of them are not confined to the realm of international investment agreements. However, it can be assumed — already in light of the quantitative dimension of mega-regionals — that the practical importance of these issues and thus also the scholarly attention devoted to addressing them will further increase in the near future. In addition, it should not be left unmentioned that some of the new legal issues, prominently among them the scope of application of survival clauses in cases of mutually agreed terminations with immediate effect,[127] are not merely technical matters of "micro"-size but give rise to quite fundamental and challenging questions about what competences the contracting (governmental) parties in fact retain after entering into treaties aimed at the protection of non-governmental actors such as private foreign investors;[128] questions still in need to be appropriately resolved with future answers given in this connection being highly likely to shape — and thus to have a considerable impact on — our understanding of international investment law as a whole.

126 See *supra* under B. and C.II.2.

127 See *supra* under C.I.2.

128 See thereto also, e.g., *Alvarez*, The Public International Law Regime Governing International Investment, 418 ("How much power do or should Governments retain once they establish treaties to protect investors' settled or legitimate expectations against their own actions and have accepted the competence of third-party arbitrators to decide such matters?"); *Roberts*, Harvard International Law Journal 55 (2014), 1 (70) ("it implicates fundamental, but unresolved, questions about what rights have been retained by home and host states acting individually and the treaty parties acting collectively").

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