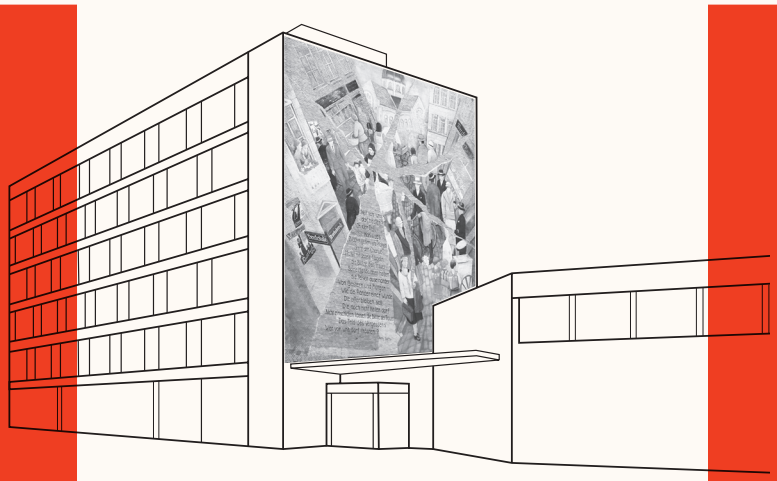

Karsten Nowrot

The Other Side of Rights in the Processes of Constitutionalizing International Investment Law: Addressing Investors' Obligations as a New Regulatory Experiment

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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Professor Dr. Karsten Nowrot, LL.M. (Indiana) is Professor of Public Law, European Law and International Economic Law at the School of Socio-Economics of the Faculty of Business, Economics and Social Sciences at the University of Hamburg, Germany. He is also an affiliated professor at the Faculty of Law at the University of Hamburg and serves as Deputy Director of the Master Programme "European and European Legal Studies" at the Institute for European Integration of the Europa-Kolleg in Hamburg.

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Fachgebiet Rechtswissenschaft
Fachbereich Sozialökonomie
Fakultät für Wirtschafts- und Sozialwissenschaften
Universität Hamburg
Von-Melle-Park 9
20146 Hamburg

Tel.: 040 / 42838 - 3521
E-Mail: Beate.Hartmann@uni-hamburg.de

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A. Introduction: Towards a Merger of Investors' Rights and Obligations in Investment Treaty Law*

The international legal framework on the protection of foreign investments has in particular since the beginning of the 1990s emerged as one of the most dynamic and practically important areas of international law in general and international economic law in particular. Essentially, this general rise of international investment law, especially in the form of treaty law,[1] can be regarded as the result of a transitional process from what might be labeled as "first generation" bilateral investment treaties concluded since the end of the 1950s to the "second generation" investment agreements entered into mostly in the 1980s, the 1990s as well as the beginning of the previous decade. This former transition period was overall characterized by an enhancement of the legal protection of foreign investors and their investment activities based on a broad political consensus recognizing these protective aims as the sole – or at least primary – purpose pursued by international investment agreements. This treaty practice, aimed at establishing and fostering an "international investment protection law" in the true sense of the term, saw the introduction of improved levels of substantive guarantees for investors as well as – and particularly noteworthy – also the stipulation of investor-state dispute settlement provisions that were far from common in older bilateral investment treaties.[2]

At present, we are again witnessing in the development of international investment law a major – and potentially even more fundamental – era of reformation or "reconceptualization".[3] Whereas the previous period first and foremost resulted in foreign investors having – particularly on the basis of access to effective international legal remedies – experienced a notable strengthening of their international legal protection and status, thereby also "marking another step in their transition from objects to subjects of international law",[4] the currently visible

* The contribution is based on presentations given by the author at the 6th Biennial Conference of the Asian Society of International Law in Seoul/Republic of Korea on 25 August 2017 as well as at the 78th Biennial Conference of the International Law Association in Sydney/Australia on 22 August 2018.

1 On the various different sources of international investment law see, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 12 *et seq.*; *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 398 (400 *et seq.*); *Salacuse*, The Law of Investment Treaties, 51 *et seq.*

2 On this last-mentioned issue see for example *Muchlinski*, Multinational Enterprises and the Law, 695 ("Early BITs did not cover the issue of disputes between the host state and the investor."); *Tietje/Sipiorski*, in: Bjorklund/Reinisch (eds.), International Investment Law and Soft Law, 192 (193, 205 and 217 *et seq.*); *Tietje/Nowrot/Wackernagel*, Once and Forever? The Legal Effects of a Denunciation of ICSID, 18 *et seq*.

3 On this perception see, e.g., *Puig/Shaffer*, American Journal of International Law 112 (2018), 361 ("The tide is turning. Ferment is in the air. Reform or even transformation of foreign direct investment governance appears on the way."); *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.").

4 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141 ("For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. […] By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law."); concerning the international legal status of foreign investors on the basis of investment agreements see also, e.g., *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145 ("The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested."); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008, paras. 167 *et seq.* ("In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. […] In the case of Chapter XI of the NAFTA, the

transitional phase from the already mentioned "second generation" of investment agreements to the rise of a new "third generation" of investment policies[5] that increasingly also finds its manifestation in treaty practice[6] is, quite to the contrary, first and foremost also characterized, and indeed largely dominated, 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[7] and, albeit closely related, by various efforts of states to regain some of their "policy space" vis-à-vis foreign investors.[8] In light of certain negatively perceived effects of the previously established framework of international investment protection,[9] it is by now ever more recognized among governments of industrialized and developing countries, practitioners and scholars alike, that at the level of designing investment agreements as well as in the realm of investor-state dispute settlement, the central challenge lawmakers and arbitrators are as of today faced with is to provide for an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors and the domestic and international steering capacity of host states to allow

Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them."); *Tietje*, The Applicability of the Energy Charter Treaty, 13 ("[…], Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT."); *Spiermann*, Arbitration International 20 (2004), 179 (185) ("It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law."); *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (825 *et seq.*); *Douglas*, The International Law of Investment Claims, 10 *et seq.* For a more critical perception see, e.g., *Reinisch*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 253 (262) ("Ultimately, the question whether investors are partial subjects of international law or not retains an artificial flavor.").

5 Generally on this perception see also, e.g., UNCTAD, World Investment Report 2018, Investment and New Industrial Policies, 2018, 95 *et seq.* ("new generation of IIAs"); 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 also already *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (230 *et seq.*).

6 See more recently on the trend towards renegotiating international investment agreements for example *Meyer/Park*, Journal of International Economic Law 21 (2018), 655 (657 *et seq.*).

7 Generally on these developments see for example UNCTAD World Investment Report 2017, Investment and the Digital Economy, 2017, 119 *et seq.*; 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.*

8 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.*; *Broude/Haftel/Thompson*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 527 *et seq.*; *Lee*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 131 *et seq.*; *Roberts*, American Journal of International Law 112 (2018), 410 *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.

9 On the respective perceptions see for example UN Human Rights Council, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 30 ("Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations."); *Van Harten*, Investment Treaty Arbitration and Public Law, 45 *et seq.*; *Butler/Subedi*, Netherlands International Law Review 64 (2017), 43 (46 *et seq.*); *Nowrot*, International Investment Law and the Republic of Ecuador, 18 *et seq.*

the later to pursue the promotion and protection of other (non-economic) public interest concerns like the protection of human rights and the environment, the promotion of public health, and the enforcement of internationally recognized labor and social standards.[10] As a consequence of these developments and in order to avoid a serious "backlash" against the international investment regime as a whole,[11] also a broader discussion on possible "counterweights" to investors' rights[12] is gaining momentum in recent years.

In the course of these efforts aimed at incorporating broader public interest concerns into international investment agreements, also the possibility to address the issue of investors' obligations in the respective investment treaty-making processes is increasingly among the regulatory options ever more seriously discussed and considered in this regard. In order to fully measure the quite innovative character of this approach, it seems appropriate to recall that the topic of obligations of investors has until recently not featured very prominently in the discussions on and policy approaches towards the international treaty regime dealing with the protection of foreign investments. As for example already indicated by the fact that most of the currently more than 2.940 bilateral investment treaties[13] are titled "Treaty Concerning the Promotion and Protection of Investments" or in line with some variations thereof, international investment law is traditionally – and also today – primarily concerned with the protection of foreign investors and their investments.[14] And indeed, in furtherance of these goals, most investment treaties so far still confine themselves to stipulating reciprocal obligations of the contracting state parties and do not impose any direct legal responsibilities on investors under international law.[15]

Admittedly, the overarching perception underlying the approach of incorporating investors' obligations into international investment agreements, namely the idea that private investors and other economic actors are – beyond their motive to make profit – expected and required to also contribute in the course of their business activities to the promotion and realization of broader public interest concerns like the protection of human rights, core labor and

10 See thereto also, e.g., UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 19 ("Typically, IIAs set out few, if any, responsibilities on the part of investors in return for the protection that they receive. One objective of IIA reform therefore is ensuring responsible investor behavior."); Guiding Principles for the African, Caribbean and Pacific Group of States (ACP) Countries' Investment Policymaking, jointly developed by the ACP Group and the UNCTAD Secretariat, ACP/85/037/17 Rev. 1 of 22 May 2017, 4 ("Principle 4: Balanced Rights and Obligations"), available on the internet under: <http://www.acp.int/content/joint-acp-unctad-guiding-principles-investment-policymaking-approved> (accessed 2 October 2018); as well as for example *McLachlan/Shore/Weiniger*, International Investment Arbitration, 23 *et seq.* ("A balance between the rights of investors and host States"); *Sornarajah*, Resistance and Change in the International Law on Foreign Investment, 348 *et seq.* ("Balanced treaties as the solution"); *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("there is a need to adjust the balance of interests between investors and host States"); *Bazrafkan/Herwig*, in: Ambrus/Rayfuse/Werner (eds.), Risk and the Regulation of Uncertainty in International Law, 237 (241 *et seq.*) ("Balancing investment protection and host state's right to regulate").

11 Generally thereto for example *Waibel/Kaushal/Chung/Balchin* (eds.), The Backlash Against Investment Arbitration – Perceptions and Reality, 2010; *Kaushal*, Harvard International Law Journal 50 (2009), 491 *et seq.*

12 See also for example *Tietje/Crow*, in: Griller/Obwexer/Vranes (eds.), Mega-Regional Trade Agreements, 87 (107 *et seq.*) ("Towards a Symmetrical System of International Investment Law"); *Peters*, Beyond Human Rights, 339.

13 UNCTAD, World Investment Report 2018, Investment and New Industrial Policies, 2018, 88.

14 On this perception see also for example *Salacuse*, The Law of Investment Treaties, 124 *et seq.*; *Salacuse*, The Three Laws of International Investment, 355 *et seq.*

15 See also, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 25 ("BITs give guarantees to investors but do not normally address obligations of investors, […]."); *Peters*, Beyond Human Rights, 340; *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 ("normally don't impose any obligations upon investors"); *Muchlinski*, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 346 (367); *Nowrot*, Ein notwendiger "Blick über den Tellerrand", 18; *Mbengue/Schacherer*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 547 (558 *et seq.*); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 61 ("Most IIAs are asymmetrical in that they set out obligations only for States and not for investors.").

social standards as well as the environment in the various societies in which they operate, is in principle far from entirely new. At the domestic level, the origins of the underlying concept of corporate social responsibility itself date back already some centuries ago.[16] With regard to its implications in the field of international investment relations, as early as in the 1770s no lesser person than *Edmund Burke* remarked on the activities of a distant predecessor to today's transnational corporations, the East India Company,[17] that "the prosperity of the natives must be previously secured, before any profit from them whatsoever is attempted".[18]

Within the international regime governing foreign investments itself, however, these concerns have been conventionally for the most part addressed in separate fora and on the basis of distinct steering approaches that remained outside of the realm of modern international investment law in the narrower sense of the meaning.[19] Whereas from the end of the 1950s onwards, the protection of foreign investors was and is explicitly enshrined in investment agreements in the form of legally binding obligations of the contracting state parties, the requirements of these private actors to contribute to the promotion of community interests had been, beginning in the 1970s, until recently more or less exclusively listed in soft law or other non-binding steering instruments and regimes like for example the OECD Guidelines for Multinational Enterprises, originally adopted by the OECD Ministerial Council and adhering governments on 21 June 1976 as an annex to the Declaration on International Investment and Multinational Enterprises and last updated in May 2011,[20] the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy as adopted by the ILO Governing Body on 17 November 1977 and most recently amended in March 2017,[21] the United Nations Global Compact, founded in 1999 at the initiative of the then UN Secretary-General *Kofi Annan*,[22] as well as the United Nations Guiding Principles on Business and Human Rights as endorsed by the UN Human Rights Council in its resolution 17/4 on 16 June 2011.[23]

16 See thereto for example ISO Advisory Group on Social Responsibility, Working Report on Social Responsibility, 30 April 2004, para. 1.

17 Generally on the chartered trading corporations as predecessors of modern transnational enterprises, see, e.g., *Carlos/Nicholas*, Business History Review 62 (1988), 398 (399 *et seq.*); *Kokkini-Iatridou/Waart*, Netherlands Yearbook of International Law 14 (1983), 87 (101 *et seq.*); *Eells*, Global Corporations, 242 *et seq.*; *Wallace*, The Multinational Enterprise, 15; *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. I/2, 246; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 106 *et seq.*, with further references.

18 Cited after: *Metcalf*, Ideologies of the Raj, 19. See also in this connection for example *Litvin*, Empires of Profit, 32 ("By dint of its size, the company [British East India Company] had become a symbol for reformers, a feature in the intellectual landscape of the eighteenth-century Britain against which emerging moral and political movements could position themselves.").

19 On this observation see also already *Salacuse*, Journal of Air Law and Commerce 50 (1985), 969 (1008); *Muchlinski*, in: Noortman/Ryngaert (eds.), Non-State Actor Dynamics in International Law, 9 (28 *et seq.*).

20 Reprinted in: I.L.M. 15 (1976), 969 *et seq.*; for the text of the updated OECD Guidelines as well as accompanying documents see OECD Guidelines for Multinational Enterprises, 2011, available at: <http://www.oecd.org/dataoecd/43/29/48004323.pdf> (accessed 2 October 2018). On the origins of the OECD Guidelines, their content as well as the more recent review process see *Huarte Melgar/Nowrot/Wang*, The 2011 Update of the OECD Guidelines for Multinational Enterprises, 5 *et seq.*; *Weidmann*, Der Beitrag der OECD-Leitsätze für multinationale Unternehmen zum Schutz der Menschenrechte, 172 *et seq.*, with numerous further references.

21 Reprinted in: I.L.M. 17 (1978), 422 *et seq.*; the current version of the ILO Tripartite Declaration of March 2017 is available on the internet under: <http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf> (accessed 2 October 2018). Generally thereto see, e.g., *Weilert*, Max Planck Yearbook of United Nations Law 14 (2010), 445 (464 *et seq.*).

22 Additional information on the United Nations Global Compact are available under: <www.unglobalcompact.org/> (accessed 2 October 2018). For a more detailed evaluation of this transnational steering regime, including its origins, institutional structure and the so-called "integrity measures" provided for, see for example the contributions in: *Rasche/Kell* (eds.), The United Nations Global Compact, 2010; and *Nowrot*, The New Governance Structure of the Global Compact, 5 *et seq.*, with further references.

23 Resolution 17/4 is reprinted in: Report of the Human Rights Council, UN Doc. A/66/53 (2011), 136 *et seq*. For the text of the Guiding Principles see Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Annex, UN Doc. A/HRC/17/31 of 21 March 2011.

It is indeed only in the course of the previous decade that we can see an emerging understanding that, first, foreign investors are – as a kind of *quid pro quo* for the legal protection they enjoy under investment agreements[24] – expected and required to contribute in the course of their business activities to the promotion and realization of other public interest concerns like the protection of human rights, core labor and social standards as well as the environment based on internationally recognized standards, and that, second, these expectations and obligations should be somehow addressed in international investment treaties as well as other sources of investment law themselves. The underlying reasons for the linkages between investment protection and investors' responsibilities being now increasingly emphasized, and thus for the idea of a merger of respective rights and duties in investment treaties gaining ground, are most certainly manifold. Thereby, in addition to the already mentioned and ongoing structural developments within the realm of international investment law aimed at a reformation or re-conceptualization of this transnational legal realm, most certainly also – from the perspective of investment law – "external" causes and influences have to be taken into account when assessing the reasons for the growing emphasis on obligations of investors.

Prominently among the external factors whose implications reach well beyond the rather specific realm of international investment relations are the growing importance of, and attention currently devoted to, the activities of non-state actors in the international system as well as the corresponding intensified discussion on whether and how to integrate them into the global legal order as addressees of rights, but especially also of responsibilities concerning the promotion of community interests.[25] In the present context, it is particularly noteworthy that among the different categories of non-state actors concerned, transnational corporations – the dominant type of foreign investors[26] – are literally at the center of these discourses. In order to illustrate this perception, one only needs to draw attention to the ever-growing literature on respective international obligations of transnational corporations[27] as well as numerous related initiatives, prominently among them the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights established by the UN Human Rights Council in its resolution 26/9 of 26 June 2014[28] that has

24 See, e.g., UNCTAD, Social Responsibility, UNCTAD/ITE/IIT/22 (2001), 5; *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 637 (643).

25 The contributions on the role played by non-state actors in international law are by now more than legion. See generally for example *Clapham*, Human Rights Obligations of Non-State Actors, 2006; *Alston*, in: Alston (ed.), Non-State Actors and Human Rights, 3 *et seq.*; *Nowrot*, Indiana Journal of Global Legal Studies 6 (1999), 579 *et seq.*; *Noortmann/Reinisch/Ryngaert* (eds.), Non-State Actors in International Law, 2015; d'Aspremont (ed.), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, 2011; *Klabbers*, in: Petman/Klabbers (eds.), Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi, 351 *et seq.*

26 See also, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32); *Kulick*, Global Public Interest in International Investment Law, 57.

27 On this perception see more recently, e.g., *Henriksen*, International Law, 82 ("a booming literature"). From the numerous contributions see for example *Ruggie*, Just Business – Multinational Corporations and Human Rights, 1 *et seq.*; *De Schutter*, in: Bekker/Dolzer/Waibel (eds.), Making Transnational Law Work in the Global Economy – Essays in Honour of Detlev Vagts, 245 *et seq.*; *Nowrot*, Philippine Law Journal 80 (2006), 563 *et seq.*; *Heinemann*, in: Fastenrath *et al.* (eds.), From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma, 718 *et seq.*; *Zerk*, Multinationals and Corporate Social Responsibility – Limits and Opportunities in International Law, 2006.

28 UN Human Rights Council, Resolution 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/RES/26/9 of 14 July 2014, para. 1 ("Decides to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises; […]."); concerning the activitites of this working group see subsequently for example Human Rights Council, Report on the First Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an Internationally Legally Binding Instrument, UN Doc. A/HRC/31/50 of 5 February 2016; Human Rights Council,

more recently – in July 2018 – published its first regulatory draft document entitled "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises".[29] Furthermore, the 1990s bore witness to numerous civil lawsuits in the domestic courts of many States against corporations based on alleged human rights violations committed by them while operating abroad or by their foreign subsidiaries, the best-known and most controversially discussed example being – or in light of recent judgments of the United States Supreme Court more accurately happened to be[30] – the respective claims brought in the United States under the Alien Tort Claims Act.[31]

These broader discourses and developments undoubtedly also exercise a considerable influence on the current policy shift in investment law. Indeed, even within the general discussions it is precisely the comparatively strong protection enjoyed by non-state economic actors on the basis of international investment agreements that is frequently referred to as indicating the need to also highlight the responsibilities of, and stipulate respective obligations for, foreign investors. To mention but one example, the following excerpt taken from the 2008 Report of the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, *John G. Ruggie*, vividly illustrates this proposition: "Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights. The more than 2,500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards […] At the same time, the legal framework regulating transnational corporations operates much as it did long before the recent wave of globalization."[32]

Report on the Second Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/34/47 of 4 January 2017; Human Rights Council, Report on the Third Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, UN Doc. A/HRC/37/67 of 24 January 2018; as well as for a preliminary assessment of this process Thielbörger/Ackermann, Indiana Journal of Global Legal Studies 24 (2017), 43 et seq.; Simons, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 48 et seq.; Catá Backer, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 105 et seq.; Deva, in: Deva/Bilchitz (eds.), Building a Treaty on Business and Human Rights, 154 *et seq*.

29 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Zero Draft of 16 July 2018, available on the internet under: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> (accessed 2 October 2018); see also already in this regard: Elements for the Draft Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights of 29 September 2017, available on the internet under: <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf> (accessed 2 October 2018).

30 See in particular more recently US Supreme Court, *Joseph Jesner et al. v. Arab Bank, PLC*, No. 16-499, judgment of 24 April 2018.

31 Generally thereto for example *Davis*, Justice Across Borders – The Struggle for Human Rights in U.S. Courts, 2008; *Joseph*, Corporations and Transnational Human Rights Litigation, 2004; *Felz*, Das Alien Tort Statute – Rechtsprechung, dogmatische Entwicklung und deutsche Interessen, 2017; *Koebele*, Corporate Responsibility under the Alien Tort Claims Act, 2009.

32 Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5 7 April 2008, paras. 12–13; see in this connection also, e.g., Human Rights Council, Business and Human Rights: Further Steps towards the Operationalization of the 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/14/27, 9 April 2010, paras. 20 *et seq*.; Human Rights Council, Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/11/13, 22 April 2009, paras. 30 *et seq*.; Human Rights Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, 19 February 2007, paras. 2 *et seq*.

Another, albeit closely related, external factor worth mentioning is the increasingly important role played by civil society groups on the international scene. While previously largely absent from the evolution of the normative structure on foreign investments, NGOs are more recently also actively involved in, and concerned with, the rule-making and enforcement processes in this area of law, with calls as well as suggestions for an international regulation of foreign investors being quite high on their agenda.[33] A telling early example is the "Model International Agreement on Investment for Sustainable Development", published by the International Institute for Sustainable Development (IISD) already in April 2005 that provides, *inter alia*, for a quite extensive list of investors' obligations.[34]

In light of these findings, the present contribution intends to present some thoughts on the current state and future potential of these public interest obligations of investors as a normative ordering idea and comparatively new regulatory experiment in the realm of international investment law, thereby particularly drawing attention on the one hand to recent investment policy and treaty-making practice as well as, on the other hand, to the relationship of this responsibility-oriented approach with – and embedment in – the processes of global constitutionalization perceived to be unfolding also in the international legal framework on the protection of foreign investments. In the following, an attempt will be made to approach this research subject in three main steps and by way of adopting three different perspectives. The first section adopts a substantive law perspective and identifies the different manifestations of investors' obligations in current international investment agreements (B.). In a subsequent second step, adopting an enforcement perspective, the approaches to this comparatively new regulatory experiment in, as well as its implications for, the realm of international investment dispute settlement are addressed (C.). Finally, in the third part an attempt will be made to evaluate the issue of investors' obligations from the perspective of global constitutionalism (D.).

33 Generally concerning the importance of NGOs as a contributing factor to the current policy shift in investment law see also, e.g., *Muchlinski*, in: Alvarez/Sauvant (eds.), The Evolving International Investment Regime, 30 (33 *et seq.*).

34 The text of the IISD Model Agreement is for example available under: <http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf> (accessed 2 October 2018); see also, e.g., *Malik*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 565 *et seq.*

B. Substantive Law Perspective: Identifying and Systemizing Investors' Obligations in International Investment Agreements

The international legal framework on the protection of foreign investments comprises first and foremost of treaty law. The currently more than 2.940 bilateral investment treaties together with roughly 380 other international agreements that provide for investment provisions[35] constitute the public international law "backbone" of this legal regime. In light of this finding, it is hardly surprising that this contractual source of investment law also occupies a prominent position in the current discourses on, and practical approaches to, the issue of investors' obligations. Thereby, in order to conceptualize the respective proposals and their implementation in investment treaty practice from a systematic perspective, it is helpful to distinguish between three different types of legal obligations of investors, namely direct obligations of conduct, indirect obligations of conduct as well as provisions signaling a commitment to corporate social responsibility by the contracting parties.[36]

I. The (Still) Rare: Stipulating Direct Obligations of Conduct for Foreign Investors

The first category in this regard concerns legal obligations of investors as explicitly stipulated and directly addressed to them in bilateral investment treaties and other investment agreements. Although at first sight probably the most expected and natural approach in light of common regulatory techniques, this normative steering method has *de lege lata* until now not gained anything even close to widespread recognition in investment treaty practice. This observation does not imply that the inclusion of investors' obligations in investment agreements is without precedent. Early examples can be found in a number of regional treaties concluded by developing countries since the 1980s. The Community Investment Code of the Economic Community of the Great Lakes Countries, signed on 31 January 1982, stipulates in its Article 19 that any authorized investor benefiting from the economic, financial and tax advantages under the regime established by this agreement shall agree to, and is thus required to, *inter alia*, "respect and ensure staff rights", "establish and keep to a programme for training local manpower and promoting the advancement of managerial staff who are nationals of the member countries of the Community" as well as "see to the protection of the environment".[37] In addition, the Articles 17 and 19 of the Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990 list a number of obligations incumbent upon multinational enterprises and their subsidiaries. Among them are the duties to "produce goods of acceptable quality at competitive prices", to supply information concerning the ownership of the shares, to "refrain from entering into restrictive

35 UNCTAD, World Investment Report 2018, Investment and New Industrial Policies, 2018, 88.

36 See thereto in principle also already *Nowrot*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1154 (1160 *et seq.*).

37 Community Investment Code of the Economic Community of the Great Lakes Countries of 31 January 1982, reprinted for example in: UNCTAD, International Investment Instruments: A Compendium, Vol. II, 1996, 251 *et seq.*

business practices" and to contribute to a "Special Development Tax".[38]

More recently, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, adopted on 22/23 May 2007, states in its second part – tellingly titled 'rights and obligations' – in Article 11 the objectives of the agreement "to provide COMESA investors with certain rights in the conduct of their business within an overall balance of rights and obligations between investors and Member States".[39] In this regard, the treaty stipulates in its Article 13 initially merely the largely undisputed obligation of foreign investors to "comply with all applicable domestic measures of the Member State in which their investment is made", a provision which for example is also included in Article 8 of Annex 1 of the Southern African Development Community (SADC) Protocol on Finance and Investment as approved by the SADC Summit in Lesotho on 18 August 2006 and amended on 31 August 2016[40] as well as in Article 11 of the bilateral investment treaty concluded between Argentina and Qatar on 6 November 2016[41].

More noticeable and specific, however, Article 16 of the 2007 COMESA Investment Agreement also proscribes in connection with the issue of movement of labour that, while investors have in principle the right "to hire technically qualified persons from any country", they are required to "accord a priority to workers who possess the same qualifications and are available in the Member State or any other Member State" of COMESA. Furthermore, and again in the geographical context of Africa, the Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS that was signed on 19 December 2008 and entered into force one month later on 19 January 2009[42] stipulates in its Chapter III ("Obligations and Duties of Investors and Investments") a quite notable number of direct obligations of conduct. Among them are the requirement of foreign investors "to strive through their management policies and practices, to contribute to the development objectives of the host States and the local levels of government" under Article 11 (3), the duty to conduct environmental and social impact assessments of planned investments (Article 12), the obligation to refrain from involvement in corrupt practices in accordance with Article 13 as well as the normative expectation to establish and maintain "liaison processes" with local communities under Article 15 (3). In addition, Article 14 (2) of the ECOWAS Supplementary Act stipulates that foreign investors "shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental or social obligations, to which the host State and/or home State are Parties".

38 Charter on a Regime of Multinational Industrial Enterprises in the Preferential Trade Area for Eastern and Southern African States of 21 November 1990, reprinted for example in: UNCTAD, International Investment Instruments: A Compendium, Vol. II, 1996, 427 *et seq.*

39 Investment Agreement for the COMESA Common Investment Area of 22/23 May 2007, available on the internet under: <http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagreecomesa.pdf> (accessed 2 October 2018).

40 Southern African Development Community (SADC), Agreement Amending Annex 1 (Co-operation on Investment) of the Protocol on Finance and Investment, as signed by the Heads of State or Government of SADC Member States in the Kingdom of Swaziland on 31 August 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3383> (accessed 2 October 2018).

41 Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar of 6 November 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3706> (accessed 2 October 2018).

42 Economic Community of West African States (ECOWAS) Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS of 19 December 2008, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3547> (accessed 2 October 2018).

This provision is supplemented and concretized by Article 14 (3), foreseeing that foreign investors shall not "by complicity with, or in assistance with others, including public authorities, violate human rights in times of peace or during socio-political upheavals", as well as by Article 14 (4), requiring that investors shall act in accordance with the fundamental labour standards as enshrined in the ILO Declaration on Fundamental Principles and Rights at Work as adopted on 18 June 1998[43].

Another quite remarkable example – and obviously inspired by the above-mentioned ECOWAS Supplementary Act – for the presence of direct obligations of conduct in the current investment treaty-making processes is provided by the bilateral investment agreement concluded between Morocco and Nigeria on 3 December 2016.[44] Article 14 of this investment treaty requires foreign investor, in the respective pre-establishment phase, to conduct environmental as well as social impact assessments of their potential investments and, in this regard, to apply the precautionary principle to their environmental assessment screening processes. Article 17 stipulates a prohibition of investors to engage in practices of corruption and Article 19 requires these actors to "meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices" (lit. a) as well as to establish local community liaison processes in accordance with internationally accepted standards (lit. b). Furthermore, Article 18 of the agreement states in the realm of post-establishment obligations that investments have to maintain an environmental management system (paragraph 1), that investors "shall uphold human rights in the host state" (paragraph 2), that they act in accordance with core labour standards (paragraph 3) and do not "manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties" (paragraph 4). In addition, a number of countries like for example Ghana and Botswana[45] as well as more recently India[46] and international organizations like SADC[47] and the African Union[48] have included respective provisions on investors' obligations in their model bilateral investment treaties and related guiding instruments.

From a broader perspective, these few examples already further support the for valid reasons overwhelmingly shared perception that modern public international law does no longer recognize any kind of *numerus clausus* of international legal subjects, but constitutes also in this regard an increasingly encompassing, open and thus inclusive system.[49]

43 ILO Declaration on Fundamental Principles and Rights at Work of 18 June 1998 (Annex revised 15 June 2010), available on the internet under: <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (accessed 2 October 2018).

44 Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria of 3 December 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3711> (accessed 2 October 2018). See thereto also, e.g., *Gazzini*, Investment Treaty News, Volume 8, Issue 3, September 2017, 3 *et seq.*

45 See thereto *Alschner/Tuerk*, in: Baetens (ed.), Investment Law within International Law, 217 (228).

46 See Chapter III of India's Model Bilateral Investment Treaty of 28 December 2015, available on the internet under: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560> (accessed 2 October 2018); on this aspect of the 2015 model agreement see also, e.g., *Hanessian/Duggal*, ICSID Review – Foreign Investment Law Journal 32 (2017), 216 (225); as well as generally *Ranjan/Anand*, Northwestern Journal of International Law & Business 38 (2017), 1 *et seq.*; *Nedumpara*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 188 *et seq.*

47 SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, Articles 10 *et seq.*, available on the internet under: <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (accessed 2 October 2018).

48 Articles 19 *et seq.* Draft Pan-African Investment Code, African Union Commission, Economic Affairs Department, December 2016, in: United Nations Economic and Social Council, Draft Pan-African Investment Code, UN Doc. E/ECA/CM/50/1, AU/STC/FMEPI/MIN/1(III) of 8 February 2017.

49 See thereto also already, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32);

Consequently, there are in general also no systematic objections to an incorporation of private entities like foreign investors in the international legal order as addressees of obligations enshrined in investment treaties. In other words, stipulating direct legal obligations of conduct for this category of non-state actors in respective international agreements is, from the point of view of general public international law, undoubtedly a possible and admissible option when discussing potential regulatory techniques aimed at ensuring an appropriate balance in the realm of investment treaty practice between the legal protection granted to foreign investors on the one side and their responsibilities towards the societies in which they operate on the other side. And indeed, it is also precisely this first type of investors' obligations that has in particular in recent years attracted considerable attention and support in the literature as well as in the practice of certain international bodies. Among the wide range of legal responsibilities proposed and discussed in this regard are substantive and procedural obligations aimed at the protection of human rights, core labour and social standards as well as the environment, but also duties ensuring fair competition, providing for non-financial reporting, preventing corruption and even obligations of a more active character like requirements to contribute to the host States' economic development.[50]

In the realm of civil society and its increasing occupation with the issues of investors' obligations, it is in particular the alternative approach adopted by the already mentioned IISD Model International Agreement on Investment for Sustainable Development that has received quite positive responses.[51] This applies in particular also to its comprehensive stipulation of direct obligations of conduct for foreign investors in Part Three of the Model Agreement. The respective legal responsibilities include, *inter alia*, compliance with the laws and regulations of the host State in accordance with Article 11, conducting in the pre-establishment phase a social and environmental impact assessment as stipulated in Article 12, refraining from corruption (Article 13), promotion of human rights and core labour standards in line with Article 14 as well as disclosure of information under Article 15.

Despite these proposals and the by now in principle almost generally recognised need to introduce at least some changes to the traditional normative framework on international investments in order to retain or provide for an adequate counterbalance to the legal protection enjoyed by foreign investors, the incontrovertible fact remains that most countries are still more than reluctant to stipulate respective direct obligations of investors in international agreements. This overall rather reserved attitude does not merely reflect a lack of political will, skepticism towards respective innovations and probably a so far quite successful resistance from the side of the business community.

Nowrot, Indiana Journal of Global Legal Studies 6 (1999), 579 (621).

50 UNCTAD, Development Implications of International Investment Agreements, IIA Monitor No. 2 (2007), 6 ("Such obligations may be merely passive, that is, an obligation to refrain from activity of a certain type, such as activity that would violate human or labour rights, damage the environment, or constitute corruption. The obligations, however, could also be active in nature, such as an obligation to make a development contribution."); UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 61 *et seq.*; *Sornarajah*, The International Law on Foreign Investment, 174 *et seq.*, 263 *et seq.*, 275; *Hang*, Fordham International Law Journal 37 (2014), 1215 (1259 *et seq.*); *Hepburn/Kuuya*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 589 *et seq.*; *Krajewski*, Human Rights in International Investment Law, 8-9; *Sheffer*, Denver Journal of International Law and Policy 39 (2011), 483 (507 *et seq.*); *Choudhury*, University of Pennsylvania Journal of International Law 38 (2017), 425 (463 *et seq.*).

51 See in this regard for example *Jacob*, International Investment Agreements and Human Rights, 40 ("considerable achievement"); *Muchlinski*, in: Alvarez/Sauvant (eds.), The Evolving International Investment Regime, 30 (59) ("the IISD Model Agreement offers a useful, though by no means uncontroversial, step forward"); for further perceptions see also, e.g., *Malik*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 565 (577 *et seq.*).

Rather, it can also be attributed to certain substantive and procedural challenges connected with the implementation of such a regulatory approach in treaty practice.

From a substantive law perspective the complex issues arise which standards on precisely what concerns should be included in international investment treaties as binding obligations of investors as well as how detailed the respective provisions need to be phrased in order to provide for a workable guidance for these actors' conduct. In addition, the relationships between these stipulations in investment agreements and, first, the domestic law standards of the host States as well as, second, other more specific international legal regimes on, for example, the protection of human rights and the environment as well as the promotion of core labour and social standards would need to be addressed.[52] A mere incorporation by reference of existing international agreements on respective issues – an approach well-known from other areas of international economic law as, *inter alia*, evidenced by Article 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in the realm of the WTO[53] – would ultimately amount to an unreflected application to private persons and entities of obligations originally addressed to states only and thus might not adequately take into account the distinctive challenges and need for modifications resulting from such a regulatory technique in light of the different spheres of responsibility of, and means available to, governmental and non-state actors respectively. As rightly emphasized in the literature, providing feasible and acceptable answers to all these substantive questions in practice has most certainly the potential to considerably complicate and prolong the negotiating and drafting processes on new bilateral or regional – not to mention multilateral – investment agreements.

However, the idea of including direct obligations of conduct for foreign investors in international treaties does not only give rise to substantive law issues. Equally important is the procedural question how respective obligations should be enforced. Traditional investment treaty regimes proceed on the conceptual basis of stipulating obligations of the host states to guarantee certain standards of protection that can in turn be enforced by foreign investors of other contracting parties through the respective investor-state dispute settlement clauses. This currently still predominant treaty approach does not – and obviously doesn't need to – provide any procedures for the enforcement of investors' obligations. In order to be effective, incorporating respective direct legal responsibilities thus first and foremost also requires a decision on, and inclusion of, new enforcement venues, another step that would considerably modify the normative structure of investment agreements.[54] That said it is not implied that respective proposals have not yet been made and even occasionally implemented in investment treaty practice.[55] Rather, this finding merely illustrates another obstacle that is very likely to have contributed to the presently still clearly visible reluctance of most countries to stipulate direct obligations of investors in international agreements. Thereby, it also explains why, despite the more recently recognized need for a certain reformation of investment law, states in general have until now in investment treaty practice primarily taken recourse to more indirect approaches when dealing with the issue of investors' responsibilities. To them the analysis now turns.

52 See also for example *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 3 (37 *et seq.*); *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 637 (681 *et seq.*); *Jacob*, International Investment Agreements and Human Rights, 36 *et seq.*

53 Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted for example in: *Tams/Tietje* (eds.), Documents in International Economic Law, 260 *et seq.*

54 *García-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (2009), 464 (484) ("It seems that the most difficult task would be to device the enforcement mechanisms for those obligations […].").

55 See thereto also *infra* under C.

II. The (More) Common: Regulating Indirect Obligations of Conduct

Among these regulatory techniques is the inclusion of what might be characterised as indirect obligations of conduct for foreign investors. This second category refers to provisions in international investment treaties that do not stipulate obligations as directly addressed to investors but require the contracting parties to the agreements to consider and adopt measures aimed at regulating as well as guiding the behaviour of these private actors. For example, Article 72 of the Economic Partnership Agreement between the CARIFORUM States and the European Union and its member States, titled "behaviour of investors", foresees that the parties "shall cooperate and take, within their own respective territories, such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that" investors comprehensively abstain from engaging in corruptive business practices (lit. a), act in accordance with core labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work (lit b), do not "manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements" signed and ratified by the parties (lit. c) as well as "establish and maintain, where appropriate, local community liaison processes" (lit. d).[56] Furthermore, the Investment Agreement for the COMESA Common Investment Area provides in its Article 7 (2) lit. d that the CCIA Committee shall be responsible for "making recommendations to the Council on any policy issues that need to be made to enhance the objectives of this Agreement". Thereby, it explicitly refers to "the development of common minimum standards relating to investment in areas such as" environmental and social impact assessments, labour standards, respect for human rights and corruption.

In addition, this category of indirect obligations also encompasses respective provisions whose scope of application does cover, but is not limited to the behaviour of foreign investors. To mention but one example, Article 11 of the bilateral investment treaty between Japan and Myanmar of 15 December 2013 stipulates that "[e]ach Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations".[57]

III. The (Dominant) Gentle: Including Provisions Signaling a Commitment to Corporate Social Responsibility

The third type of stipulations worth highlighting in the present context are provisions in investment agreements that signal a commitment to corporate social responsibility by the contracting parties. It is in particular this regulatory approach that is gaining ground in current treaty practice.[58] Thereby, a number of agreements emphasize the importance of these issues in their preambles.[59]

56 Economic Partnership Agreement between the CARIFORUM States and the European Union and its Member States, reprinted in: Official Journal of the European Union, No. L 289/I/3 of 30 October 2008.

57 Agreement between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalization, Promotion and Protection of Investment of 15 December 2013, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/105/treaty/2155> (accessed 2 October 2018).

58 On this perception see also already UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 119-120; *Hepburn/Kuuya*, in: Cordonier Segger/Gehring/Newcombe (eds.), Sustainable Development in World Investment Law, 589 (601 *et seq.*).

59 Generally on the functions and importance of preambles from the perspective of treaty interpretation, see for example

Among them is the bilateral investment treaty between Austria and Kosovo of 22 January 2010 whose preamble expresses the "belief that responsible business behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries" and takes "note of the principles of the UN Global Compact".[60] The preamble of the bilateral investment treaty concluded by China and Tanzania on 24 March 2013 states that the contracting parties encourage investors to respect corporate social responsibility.[61] Furthermore, the free trade agreement between Albania and the EFTA States of 17 December 2009, as amended by a protocol of 18 September 2015, for example, includes in its preamble the intention of the parties to acknowledge "the importance of good corporate governance and corporate social responsibility for sustainable development", and, in this regard, to affirm "their aim to encourage enterprises to observe internationally recognized guidelines and principles in this respect, such as the OECD Guidelines for Multinational Enterprises, the OECD Principles of Corporate Governance and the UN Global Compact".[62] In addition, the bilateral investment treaty concluded between Iran and Slovakia, signed on 19 January 2016 and entered into force on 30 August 2017, emphasizes in its preamble the determination of the contracting parties to "promote corporate social accountability".[63]

Other bilateral investment treaties and free trade agreements even provide in their operational sections specific provisions asking the parties to encourage corporations – and thus the primary type of foreign investors – to fulfil the societal expectations in connection with their business conduct. A vivid example is provided by Article 14 of the bilateral investment treaty concluded between Canada and Mongolia on 8 September 2016 and entered into force on 24 February 2017: "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies."[64]

ICJ, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Judgment of 17 December 2002, ICJ Reports 2002, 625 (652, para. 51); ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; *Gardiner*, Treaty Interpretation, 205 *et seq.*; *Dörr*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 49. Specifically in the context of investor-state dispute settlement see for example *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.4.4.

60 Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kosovo of 22 January 2010, available on the internet under: <https://www.ris.bka.gv.at/.../COO_2026_100_2_726968.pdfsig> (accessed 2 October 2018). See also, e.g., *Reinisch*, in: Brown (ed.), Commentaries on Selected Model Investment Treaties, 15 (21).

61 Agreement between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments of 24 March 2013, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/42/treaty/990> (accessed 2 October 2018).

62 Free Trade Agreement between the Republic of Albania and the EFTA States of 17 December 2009, as amended by the Protocol amending the Free Trade Agreement between the Republic of Albania and the EFTA States, signed on 18 September 2015 and entered into force on 1 June 2017, available on the internet under: <http://www.efta.int/free-trade/Free-Trade-Agreement/Albania> (accessed 2 October 2018).

63 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3633> (accessed 2 October 2018).

64 Agreement between Canada and Mongolia for the Promotion and Protection of Investments of 8 September 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/country/35/treaty/3698> (accessed 2 October 2018).

In addition, Article 11 of the bilateral investment treaty between Nigeria and Singapore of 4 November 2016 stipulates that "Singapore reaffirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by Singapore" (paragraph 1), and that "Nigeria is to encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies such as statements of principles that have been endorsed or are supported by Nigeria. These principles address issues such as labour, the environment, public health, human rights, community relations and anti-corruption" (paragraph 2).[65] Article 5 (2) of Chapter 9 (Investment) of the Pacific Agreement on Closer Economic Relations (PACER Plus) concluded on 14 June 2017 between Australia, New Zealand as well as twelve Pacific island states, namely the Cook Islands, the Federated States of Micronesia, the Independent and Sovereign Republic of Kiribati, the Republic of Nauru, Niue, the Republic of Palau, the Republic of the Marshall Islands, the Independent State of Samoa, Solomon Islands, the Kingdom of Tonga, Tuvalu, and the Republic of Vanuatu, holds that "[t]he Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party".[66]

Related stipulations are also enshrined, *inter alia*, in Article 9.17 of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) concluded on 8 March 2018 between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam,[67] in Article 16 of the bilateral investment treaty between the Hong Kong Special Administrative Region of the People's Republic of China and the Republic of Chile of 18 November 2016,[68] in Article 816 in the investment chapter of the free trade agreement between Canada and Colombia that entered into force on 15 August 2011,[69] in Article 7 of the new Dutch Model BIT adopted by the Dutch government on 19 October 2018,[70] in Article 24 of the already mentioned investment agreement between Morocco and Nigeria, in Article 12 of the bilateral investment treaty signed on 6 November 2016 by Argentina and Qatar,[71] in Article 14 of the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol of 7 April 2017,[72] in Article 15 of the investment cooperation and facilitation agreement signed

65 Investment Promotion and Protection Agreement between the Government of the Federal Republic of Nigeria and the Government of the Republic of Singapore of 4 November 2016, available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3705> (accessed 2 October 2018).

66 Pacific Agreement on Closer Economic Relations (PACER Plus) of 14 June 2017, available on the internet under: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/pacer/pacer-plus-full-text/> (accessed 2 October 2018).

67 For the text of this agreement and its annexes see the information under: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/> (accessed 2 October 2018).

68 The text of the agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3717> (accessed 2 October 2018).

69 Canada-Colombia Free Trade Agreement of 21 November 2008, available on the internet under: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/fta-ale/background-contexte.aspx?lang=eng> (accessed 2 October 2018).

70 Dutch Model BIT of 19 October 2018, available on the internet under: <https://www.lexology.com/library/detail.aspx?g=c5bb3ed4-08ea-440e-9a77-43deff073842> (accessed 28 November 2018).

71 For the text of this bilateral investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3706> (accessed 2 October 2018).

72 The text of the protocol is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/treaty/3772> (accessed 2 October 2018).

between Brazil and Suriname on 2 May 2018[73] and in Article 14 of the respective international investment treaty concluded by Ethiopia and Brazil on 11 April 2018.[74]

Furthermore, in a Joint Declaration concerning Guidelines to Investors attached to the Association Agreement between Chile and the European Union as well as its Member States of 18 November 2002, the contracting parties "remind their multinational enterprises of their recommendation to observe the OECD Guidelines for Multinational Enterprises, wherever they operate".[75] Article 8.17 of the free trade agreement between Australia and Peru signed on 12 February 2018 states that "[e]ach Party encourages enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party".[76] Moreover, attention should in this connection also be drawn to the already quantitatively potentially quite far-reaching implications resulting from the fact that the European Parliament in its resolution on the future European international investment policy of 6 April 2011 "asks the Commission to include, in all future agreements, a reference to the updated OECD Guidelines for Multinational Enterprises" and "[r]eiterates, with regard to the investment chapters in wider FTAs, its call for a corporate social responsibility clause and effective social and environmental clauses to be included in every FTA the EU signs".[77]

Although this last mentioned type of provisions does not envision any legally binding obligations for foreign investors, it already is surely noteworthy in the present context for its explicit recognition of investors' public responsibilities and the importance attached to them by the contracting parties.[78] The creation of certain linkages as a result of these developments between the previously largely separated realms of international investment agreements and the protection of investments enshrined therein on the one side and societal expectations on the conduct of investors on the other side is another obvious indication that the idea of a merger of investors' rights and responsibilities is slowly but steadfastly gaining momentum in investment treaty practice.

73 The text of the agreement is available on the internet under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3815> (accessed 2 October 2018). Generally on this new type of Brazilian investment agreements see for example *Muniz/Duggal/Peretti*, ICSID Review – Foreign Investment Law Journal 32 (2017), 404 *et seq.*; *Sanchez Badin/Morosini*, in: Morosini/Sanchez Badin (eds.), Reconceptualizing International Investment Law from the Global South, 218 *et seq.*; *Gabriel*, Conflict Resolution Quarterly 34 (2016), 141 *et seq.*; *Monebhurrun*, Journal of International Dispute Settlement 8 (2017), 79 *et seq.*

74 For the text of this investment treaty see: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/3816> (accessed 2 October 2018).

75 Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, of 18 November 2002, available on the internet for example under: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/> (accessed 2 October 2018).

76 Australia-Peru Free Trade Agreement of 12 January 2018, available on the internet under: <http://dfat.gov.au/trade/agreements/not-yet-in-force/pafta/full-text/Pages/fta-text-and-associated-documents.aspx> (accessed 2 October 2018).

77 European Parliament Resolution on the future European international investment policy, 2010/2203(INI), 6 April 2011, paras. 27-28; see also, e.g., European Parliament resolution on corporate social responsibility in international trade agreements, 2009/2201(INI), 25 November 2010; European Parliament resolution on EU-Canada trade relations, P7_TA(2011)0257, 8 June 2011, paras. 8, 11 and 12; European Parliament resolution on EU-China negotiations for a bilateral investment agreement, P7_TA(2013)0411, 9 October 2013, para. 33.

78 See also, e.g., UNCTAD, World Investment Report 2011, Non-Equity Modes of International Production and Development, 2011, 120 ("such clauses nevertheless serve to flag the importance of CSR in investor–State relations, which may also influence the interpretation of IIA clauses by tribunals in investor–State dispute settlement cases, and create linkages between IIAs and international CSR standards"); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 62-63.

C. Enforcement Perspective: Investors' Obligations and International/Domestic Investment Dispute Settlement

Most certainly, the idea of investors' responsibilities does not involve issues of substantive law alone. This concept also entails a strong procedural dimension by giving rise to the questions where and by which means respective obligations can be enforced. Thereby, it is first and foremost the possible approaches to this issue in, as well as its implications for, the currently predominant regime of international investment dispute settlement that are of particular interest from the perspective of investment treaty law. Whereas other regulatory approaches aimed at providing for what is perceived as a more balanced and thus more appropriate investment treaty regime like the specification of the scope of application of the traditionally often rather broadly phrased and thus quite indeterminate substantive protection standards[79] can in principle be quite easily integrated in, and thus do not fundamentally alter, the system of investor-State arbitration, a different finding appears to be warranted in particular concerning the inclusion of direct obligations of conduct for foreign investors in investment agreements.

Already in light of the fact that until now very few investment treaties proscribe respective direct obligations, it is not surprising that this issue has hardly been dealt with in the practice of investment arbitration. This does not imply that the conduct or rather "misconduct" of investors is not increasingly taken recourse to by investment tribunals when determining whether a specific investment is covered by the scope of application of an investment agreement or whether the host State has actually violated a protection standard enshrined therein. However, it needs to be emphasised that the respective legal consequences of "investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentation or the dissimulation of true ownership" as already for some time quite intensively discussed in arbitral practice,[80] and the implications of other forms of "unconscionable conduct" on the side of the foreign investor,[81] do not concern direct investors' obligations in the narrow sense of the meaning. Rather, they more closely resemble, in the context of international investment law, behavioural expectations being incumbent upon investors on the basis of the principle of good faith,[82] a violation of which does not give rise to compensation, but "merely" results in a legal disadvantage with the investor forfeiting the protection under the respective investment

79 See thereto for example *Echandi*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 3 (12 *et seq.*); *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 *et seq.*

80 *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, para. 104; see also, e.g., *World Duty Free Company Ltd. v. Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, paras. 138 *et seq.*; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, paras. 112 *et seq.*; *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 181 *et seq.*; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100 *et seq.*; as well as from the literature for example *Douglas*, ICSID Review – Foreign Investment Law Journal 29 (2014), 155 *et seq.*; *Diel-Gligor/Hennecke*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 566 *et seq.*; *Brower/Ahmad*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 455 *et seq.*; *Lorz/Busch*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 577 *et seq.*, each with further references.

81 *Azinian et al. v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award of 1 November 1999, reprinted in: I.L.M. 39 (2000), 537 (553 *et seq*.); see also for example *Muchlinski*, International and Comparative Law Quarterly 55 (2006), 527 (536 *et seq*.).

82 On the principle of good faith as the basis of these behavioural expectations see also, e.g., *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100, 106 *et seq*.; *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008, para. 144.

agreement[83] or, alternatively, might be taken into account in calculating the damages to be awarded to the claimant investor.[84]

Nevertheless, another indirect approach particularly in the form of counterclaims initiated by the host country in investor-State arbitration proceedings[85] has also occasionally been suggested with regard to the enforcement of investors' direct obligations of conduct as stipulated in investment agreements. For example the already mentioned 2005 IISD Model International Agreement on Investment for Sustainable Development foresees in its Article 18 that, *inter alia*, a host or home State may raise a breach of an investor's obligation under Article 13 (anti-corruption) as an objection to jurisdiction of an investment tribunal (lit. a), that "[w]here a persistent failure to comply with Articles 14 or 15 is raised by the host state defendant or an intervener in a dispute settlement proceeding under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim" (lit. d), and that a "host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement [by an investor]" (lit. e).

In addition, it should be recalled in the present context that, according to more recent international arbitral practice, even in the absence of specific provisions allowing counterclaims by the respondent host states, this approach might under certain circumstances nevertheless legitimately also be taken recourse to in the enforcement of investors' obligations. In the case of *Urbaser et al. v. Argentina*, arising like so many other investment disputes in the wake of the Argentinian financial and economic crisis at the end of the 1990s, Argentina apparently for the first time filed a counterclaim against the foreign investors based on an alleged violation of the claimants' supposed human rights obligations in connection with the provision of access to water to the local population.[86] Relying on a comparatively broad reading[87] of the relevant provisions of Article 46 ICSID Convention[88] and of Article X of the bilateral investment treaty

83 See thereto also already for example *Tietje*, in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 63 (88); *Nowrot*, International Investment Law and the Republic of Ecuador, 40. Generally on this issue also, e.g., *Tamada*, in: Gal-Or/Ryngaert/Noortmann (eds.), Responsibilities of the Non-State Actor, 203 (213 *et seq.*).

84 On the last-mentioned approach see more recently *Bear Creek Mining Company v. Peru*, ICSID Case No. ARB/14/21, Award of 30 November 2017, Partially Dissenting Opinion of Philippe Sands, paras. 4 *et seq.* See thereto also *Krajewski*, Human Rights in International Investment Law, 6-7. See in this connection also Article 23 of the of the new Dutch Model BIT, adopted by the Dutch government on 19 October 2018: "Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises.".

85 Generally on counterclaims in international investment arbitration see, e.g., *Clodfelter/Tsutieva*, in: Yannaca-Small (ed.), Arbitration under International Investment Agreements, 417 *et seq.*; *Waibel*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1212 (1235 *et seq.*); *Hoffmann*, ICSID Review – Foreign Investment Law Journal 28 (2013), 438 *et seq.* Specifically on the importance of this approach for the effective incorporation of non-economic public interest concerns into the realm of investor-state dispute settlement proceedings see also more recently *Schill/Djanic*, ICSID Review – Foreign Investment Law Journal 33 (2018), 29 (52 *et seq.*).

86 *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 36-37.

87 On this perception see also already for example *Edward Guntrip*, *Urbaser v. Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration, EJIL: Talk!, 10 February 2017, available under: <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/> (accessed 2 October 2018); *Abel*, Brill Open Law 2018, 1 (9-10). For an apparently more narrow understanding of the legal requirements to be fulfilled by an admissible counterclaim see, e.g., *Sergei Paushok et al. v. Mongolia*, UNCITRAL Arbitration, Award on Jurisdiction and Liability of 28 April 2011, paras. 684 *et seq.*; *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Arbitration, Decision on Jurisdiction over the Czech Republic's Counterclaim of 7 May 2004, paras. 61 *et seq.*

88 Generally on the requirements stipulated in this provision see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 46, paras. 1 *et seq.*

concluded between Argentina and Spain of 3 October 1991,[89] the arbitration tribunal indeed found that it has jurisdiction to deal with Argentina's counterclaim,[90] thus sending to interested host states the encouraging message that initiating counterclaims based on an alleged infringement of (human rights) obligations by foreign investors are not in principle inadmissible in the realm of investor-state arbitration proceedings. That said, a lasting challenge the award in *Urbaser et al. v. Argentina* is faced with, however, concerns the issues that, first, the underlying bilateral investment treaty between Argentina and Spain was not only devoid of any specific provisions allowing counterclaims but also did not explicitly stipulate any responsibilities for foreign investors, and that, second, the legal reasoning advanced by the members of the investment tribunal in order to substantiate the existence of respective (human rights) obligations on the side of private economic actors concerned[91] is quite far from being something even close to convincing.[92] But that is another story.

At least equally important from the enforcement perspective is the observation that respective provisions explicitly allowing counterclaims by host states can in current treaty practice indeed also be found in some of the until now still comparatively few investment agreements that actually overtly stipulate direct obligations for investors. To begin with, Article 28 (9) of the 2007 Investment Agreement for the COMESA Common Investment Area states in this connection: "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages." The same applies for example to Article 18 of the 2008 ECOWAS Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS titled "Relations of Investor's Liability to Dispute Settlement" and stipulating, among others, in its paragraph 4 that "[a] host Member State may initiate a counterclaim before any tribunal established pursuant to this Supplementary Act for damages resulting from an alleged breach of the Supplementary Act". In the realm of non-binding guiding instruments, attention can and should be drawn in this regard to, *inter alia*, Article 19 (3) of the 2012 SADC Model Bilateral Investment Treaty Template as well as to Article 43 of the African Union's Draft Pan-African Investment Code of December 2016 proscribing that "[w]here an investor or its investment is alleged by a Member State party in a dispute settlement proceeding under this Code to have failed to comply with its obligations under this Code or other relevant rules and principles of domestic and international law, the competent body hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award" (paragraph 1) as well as that "[a] Member State may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Code for damages or other relief

89 The text of this agreement is available under: <http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/154> (accessed 2 October 2018).

90 *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 1143 *et seq.*

91 See *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, paras. 1182 *et seq.*; on this reasoning see also for example *Crow/Lorenzino Escobar*, Boston University International Law Journal 36 (2018), 87 (95 *et seq.*).

92 For a critical evaluation of the tribunal's argumentation in this regard see also already, e.g., *Edward Guntrip*, *Urbaser v. Argentina*: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration, EJIL: Talk!, 10 February 2017, available under: <https://www.ejiltalk.org/urbaser-v-argentina-the-origins-of-a-host-state-human-rights-counterclaim-in-icsid-arbitration/> (accessed 2 October 2018); *Abel*, Brill Open Law 2018, 1 (11 *et seq.*); *Krajewski*, Human Rights in International Investment Law, 4 *et seq.*; *Nowrot*, in: Krajewski (ed.), Staatliche Schutzpflichten und unternehmerische Verantwortung, 3 (17 *et seq.*).

resulting from an alleged breach of the Code" (paragraph 2).

From the perspective of traditional international investment law, the attractiveness of this more indirect approach that primarily relies on counterclaims initiated by the host country lies undoubtedly in its procedural connectivity and thus the possibility to incorporate it in the present system of investor-state arbitration.

However, there obviously exist potentially also more far-reaching and advanced procedural options on how to enforce investors' direct obligations of conduct in the realm of international investment arbitration and beyond, the implementation of which would admittedly often require certain modifications of the currently predominant framework of investment dispute settlement. Among them is the possibility to grant host states a right to actively initiate respective proceedings against foreign investors, an approach so far uncommon under investment treaties and even in the practice of contract-based investor-state arbitration still quite rarely taken recourse to.[93] Furthermore, it has even sporadically been proposed in the literature to also consider the option of providing for standing of, *inter alia*, individuals, juridical persons and indigenous communities in the host states to launch respective claims for compensation against foreign investors – in the fora of international investment arbitration proceedings – based on an alleged violation of obligations imposed on them in an investment agreement.[94] Although undoubtedly a rather innovative idea to cope with the challenge of how to ensure access to effective remedial processes for other actors negatively affected by an investment,[95] it appears, considering the reluctance displayed by states in this regard as well as in light of a number of other obstacles,[96] currently quite unlikely that this approach will acquire a prominent position in the international enforcement regimes established by investment treaty law any time soon.

While the door to legal remedies in the form of access to international investment arbitration proceedings for societal actors in the host countries that are negatively affected by the conduct of foreign investors thus seems to be currently not really wide open, recent investment treaty practice, in particular in the African context, reveals the emergence – and possible rise – of a regulatory approach that relies on the still not infrequently overlooked or neglected steering potential of the foreign investors' home countries. A vivid example to illustrate this comparatively new approach is provided by Article 20 of the bilateral investment treaty concluded between Morocco and Nigeria in December 2016: "Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state".[97] A related provision can be found in the 2008 ECOWAS

93 On the limited number of cases in which the host state acted as claimant in contract-based investor-state arbitration proceedings see, e.g., *Toral/Schultz*, in: Waibel *et al.* (eds.), The Backlash Against Investment Arbitration, 577 (589 *et seq*.); *Laborde*, Journal of International Dispute Settlement 1 (2010), 97 *et seq.*

94 See for example *Weiler*, Boston College International and Comparative Law Review 27 (2004), 429 (437 *et seq*.); *Chalamish*, Brooklyn Journal of International Law 34 (2009), 303 (351).

95 Generally on the underlying fundamental issue of providing individuals and groups affected by foreign investments with adequate access to justice, see also, e.g., *Francioni*, in: Dupuy/Francioni/Petersmann (eds.), Human Rights in International Investment Law, 63 (71 *et seq*.).

96 See thereto for example *Mann*, International Investment Agreements, Business and Human Rights, 14 ("In the view of this author, such an approach is illusory, given the costs of international arbitration processes in many cases, and the difficulties in mounting such cases before tribunals designed for commercial law purposes rather than enforcement of legislation or obligations against corporations.").

97 On this provision see also already, e.g., *Gazzini*, Investment Treaty News, Volume 8, Issue 3, September 2017, 3 (4) ("The final innovation is the provision on the investor liability before the tribunals of the home state, which may have a considerable impact on domestic litigation against investors – especially multinational companies – and help overcome jurisdictional hurdles and most prominently the *forum non conveniens* doctrine. This can be considered as an important development from the standpoint of the responsible conduct of investments, the redress of wrongful doings and the role of the home state."); as well as UNCTAD, UNCTAD's Reform Package for the International Investment Regime, 2017, 63.

Supplementary Act whose Article 29 stipulates that "[h]ome States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of investors for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Member States. […]."[98] Furthermore, Article 7 (4) of the new Dutch Model BIT adopted by the Dutch government on 19 October 2018 states that "[i]nvestors shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state". In addition, to mention but one further example, Article 19 (4) of the 2012 SADC Model Bilateral Investment Treaty Template includes a quite similar stipulation: "In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement."[99]

In the same way as for example Article 4 (2) of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions,[100] these provisions require the contracting state parties to provide for an extraterritorial application of their domestic laws to the activities of their private business actors while operating abroad. The regulations at issue thus establish, in addition to the national courts of the host state, also the domestic judicial bodies of the home states of foreign investors as suitable and potentially promising *fora* for the enforcement of investors' obligations at the initiative of individuals and other societal actors that have been negatively affected by the conduct of respective foreign investors.

98 See also on the stipulation of investor liability in the courts of the host state the provision of Article 17 of the 2008 ECOWAS Supplementary Act: "Investors shall be subject to civil actions for liability in the judicial process of their host State for acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host State.".

99 See also, again, concerning the respective stipulation of investor liability in the courts of the host state Article 19 (3) of the 2012 SADC Model Bilateral Investment Treaty Template: "In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.".

100 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997, available on the internet under: <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (accessed 2 October 2018). Article 4 (2) of the Convention includes the following stipulation: "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, […].".

D. Constitutional Perspective: Possible Interactional Consequences of Stipulating Investors' Obligations for the Processes of Global Constitutionalization in International Investment Law

Against the background of this increasing practical relevance of the concept of investors' obligations in modern investment treaty-making processes, the question arises – and seems indeed worth exploring – as to the possible implications and interactional consequences of this normative ordering idea as well as comparatively new regulatory experiment for the processes of global constitutionalization. Although it hardly needs to be recalled that – at an admittedly quite abstract level – there has been and continues to be a controversial debate on whether constitutionalism can even be regarded as an appropriate label and concept for normative regimes beyond the state,[101] evaluating the issue of investors' treaty obligations also from such a constitutional perspective appears to be justified as well as potentially promising already in light of the well-known fact that – at least according to a substantial number of voices in the legal literature – the phenomenon of global constitutionalism is far from confined to the rules and concepts of general public international law. Rather, the scholarly diagnosis of processes of constitutionalization in the international legal order is not infrequently also, among others, applied to the international normative frameworks governing transboundary economic transactions.

As more recently highlighted and analyzed for example by *Ernst-Ulrich Petersmann*, the processes of transformation of transnational economic relations, mainly as a consequence of the developments commonly referred to as economic globalization in particular since the second half of the 1980s, have given rise to a number of quite diverse and competing perceptions of international economic law and its multilevel governance structures as a whole.[102] Prominently among them is the narrative of international economic law as an emerging global constitutional regulation,[103] an approach that occasionally even perceives this segment of the international legal order as being assigned the role of a "functional basis for a new era of international constitutionalization"[104] and "the front runner of global constitutionalism"[105].

101 From the truly many contributions on this issue see, e.g., *Fassbender*, The United Nations Charter as the Constitution of the International Community, 58 *et seq.*; *Rosenfeld*, European Journal of International Law 25 (2014), 177 *et seq.*; *Frowein*, Berichte der Deutschen Gesellschaft für Völkerrecht 39 (2000), 427 *et seq.*; *Preuß*, in: Dobner/Loughlin (eds.), The Twilight of Constitutionalism?, 23 *et seq.*; *de Wet*, International and Comparative Law Quarterly 55 (2006), 51 *et seq.*; *Bernhardt*, in: Hestermeyer/König/Matz-Lück *et al.* (eds.), Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum, Vol. II, 1369 *et seq.*; *Schwöbel*, Global Constitutionalism in International Legal Perspective, 89 *et seq.*; *Grimm*, Constellations 12 (2005), 447 *et seq.*; *Kumm*, European Journal of International Law 15 (2004), 907 (930); *Cottier/Hertig*, Max Planck Yearbook of United Nations Law 7 (2003), 261 *et seq.*; *Walter*, German Yearbook of International Law 44 (2001), 170 *et seq.*, each with further references.

102 *Petersmann*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 74 (2014), 763 (764 *et seq.*).

103 See thereto for example *Petersmann*, Constitutional Functions and Constitutional Problems of International Economic Law, 210 *et seq.* and *passim*; *Petersmann*, in: von Bogdandy/Mavroidis/Mény (eds.), European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann, 383 *et seq.*; *Petersmann*, Loyola of Los Angeles Law Review 37 (2003), 407 *et seq.*; *Stoll*, in: Cremona *et al.* (eds.), Reflections on the Constitutionalisation of International Economic Law – Liber Amicorum for Ernst-Ulrich Petersmann, 201 *et seq.*; *Nettesheim*, in: Classen *et al.* (eds.), „In einem vereinten Europa dem Frieden der Welt zu dienen …" Liber amicorum Thomas Oppermann, 381 (389 *et seq.*); *Tietje*, in: K. Dicke *et al.* (eds.), Weltinnenrecht – Liber amicorum Jost Delbrück, 783 (794 *et seq.*); *Tietje/Nowrot*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 9 *et seq.*

104 *Trachtman*, University of Pennsylvania Journal of International Economic Law 17 (1996), 33 (36).

105 See, specifically with regard to the WTO, *Poiares Maduro*, in: Snyder (ed.), Regional and Global Regulation of

In light of these findings with regard to the normative order of the international economic system as a whole, it is in principle hardly surprising that also a number of distinct narratives related to global constitutionalism have emerged that are specifically focusing on respective developments in a number of its sub-systems. This applies not only for example to the multilateral normative framework governing world trade as established by the WTO legal order,[106] but in particular more recently first and foremost also to the field of international investment law.

The increasing prominence of perceptions and voices identifying and emphasizing the existence of processes of global constitutionalization in this area of transnational law finds its manifestation, *inter alia*, in the view, albeit presented with a strong critical undertone, that the present international legal framework on the protection of foreign investments "mimics functions performed by the national constitutional systems of capital-exporting states".[107] In particular international investment treaties "[l]ike constitutions, […] are difficult to amend, include binding enforcement mechanisms together with judicial review and oftentimes are drawn from the language of national constitutions".[108] Furthermore, and again with a certain trace of skepticism concerning these developments, we find the perception that international investment agreements have created an "international 'constitutional' law for foreign investors",[109] with "obligations relating to subjects such as direct expropriation, indirect expropriation and 'fair and equitable' treatment […] hav[ing] parallels in domestic constitutional and administrative law, and, at least in theory, offer a form of these protections as international constitutional law".[110] In addition to more general and more affirmative propositions supporting, and contributing to, the narrative that international investment law is in a process of constitutionalization like the perception expressed by *Peter Behrens* already more than one decade ago that "[t]he door to constitutionalizing international investment protection has been opened",[111] also for example *Stephan W. Schill* has, again from an affirmative perspective, advanced the narrative that "international investment law can […] be understood as serving a constitutional function for the emerging global economy. Like constitutions, they [investment agreements] restrict State action and, as part of an international public order, create and safeguard the interests of an international community in the functioning of the global economic system. Investment treaties

International Trade, 49 (68) ("The WTO will probably be the front runner of global constitutionalism.").

106 On the respective narratives, but also its critics, see, e.g., *Cass*, The Constitutionalization of the World Trade Organization, 3 *et seq*.; *Tietje*, in: Prieß/Berrisch (eds.), WTO-Handbuch, A.II., paras. 24 *et seq*.; *Trachtman*, in: Lang/Wiener (eds.), Handbook on Global Constitutionalism, 395 *et seq.*; *Stoll*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 57 (1997), 83 *et seq*.; *Petersmann*, in: Kennedy/Southwick (eds.), The Political Economy of International Trade Law – Essays in Honor of Robert E. Hudec, 32 *et seq*.; *Hilf*, Berichte der Deutschen Gesellschaft für Völkerrecht 40 (2003), 257 *et seq*.; *Duvigneau*, Aussenwirtschaft 56 (2001), 295 *et seq*.; *Wahl*, in: Eberle/Ibler/Lorenz (eds.), Der Wandel des Staates vor den Herausforderungen der Gegenwart – Festschrift für Winfried Brohm zum 70. Geburtstag, 191 (202 *et seq*.); *Howse/Nicolaïdis*, in: Porter *et al.* (eds.), Efficiency, Equity, and Legitimacy, 227 *et seq*.

107 *Schneiderman*, in: Gill/Cutler (eds.), New Constitutionalism and World Order, 165 (172).

108 *Schneiderman*, in: Gill/Cutler (eds.), New Constitutionalism and World Order, 165 (172); see also already *Schneiderman*, Constitutionalizing Economic Globalization, 4 ("The investment rules regime is constitution-like, however, in many of these ways."); *Schneiderman*, Constellations 8 (2001), 521 (523) ("The investment rules regime can be likened to a new form of constitutionalism"); *Schneiderman*, Law and Social Inquiry 25 (2000), 757 (764) ("constitution-like rules"); as well as more recently *Schneiderman*, European Yearbook of International Economic Law 7 (2016), 23 ("It is indisputable that investment treaty norms will have their analogues in typical constitutional orders of capital-exporting states."). For a quite similar perception see also, e.g., *Cutler*, Indiana Journal of Global Legal Studies 23 (2016), 95 (99 *et seq*.).

109 *Lester*, Journal of World Trade 49 (2015), 211 (220) ("There was never any public debate on the implications of creating international 'constitutional' law for foreign investors. That is not how these agreements were presented – the emphasis was instead on the 'protection' and 'promotion' of foreign investments – but that is what they are.").

110 *Lester*, Journal of World Trade 49 (2015), 211 (216).

111 *Behrens*, Archiv des Völkerrechts 45 (2007), 153 (178); see also in this regard *Tams*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 229 (251); *Braun*, Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht, 279.

comprise constitutional traits by establishing legal principles that serve as a yardstick for the conduct of States vis-à-vis foreign investors."[112]

Thereby, it seems also noteworthy that it is first and foremost the regulatory approach of international investment arbitration in general – occasionally perceived as "one of the most progressive developments in international law and relations in the history of international law"[113] and as "undoubtedly one of the most vibrant mechanisms of international dispute settlement to date"[114] – and the direct as well as normatively secured access to international legal remedies granted to non-state actors in the form of private foreign investors in particular that has repeatedly been highlighted as a central indication for the emergence of global constitutionalization in the field of international investment law,[115] with the respective investment arbitration tribunals not only regarded as offering access to justice in conformity with the requirements of the rule of law,[116] but occasionally even been considered as "international 'constitutional' courts".[117] This view could be – and in fact not infrequently also is – based on the underlying narrative that international investor-state arbitration proceedings have emerged as an important legal arena for the interpretation, application and contestation[118] of fundamental constitutional norms in a transboundary context, prominently among them the various requirements deriving from the rule of law[119] and the appropriate level of protection granted to property rights of foreign investors against state actions amounting to direct or in particular also indirect expropriation;[120] concepts and legal guarantees that we are told to fulfil a genuine

112 *Schill*, The Multilateralization of International Investment Law, 373; see also, e.g., *Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1817 (1834 *et seq*.); and *Braun*, Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht, 266.

113 *Schwebel*, International Arbitration 32 (2016), 1.

114 *Kulick*, in: Kulick (ed.), Reasseration of Control over the Investment Treaty Regime, 3.

115 See for example *Afilalo*, New York University Journal of International Law and Politics 34 (2001), 1 (32) ("The lynchpin of constitutionalization is the gradual emergence of private party access to an effective system of remedies for Treaty breaches: […]."); *Tams*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 229 (231 and 250); *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 251; *Braun*, Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht, 267 *et seq*.; *Petersmann*, International Economic Law in the 21st Century, 288 *et seq*.; *Tietje*, in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 63 (75); *Stone Sweet/Grisel*, in: Dupuy/Francioni/Petersmann (eds.), Human Rights in International Investment Arbitration, 118 *et seq*.; *Böttcher*, Dekonstitutionalisierungstendenzen im internationalen Investitionsschutzrecht, 34 *et seq*.; as well as, albeit more cautiously, *Hindelang*, in: Hanns Martin Schleyer-Stiftung (ed.), Globale Wirtschaft – Nationale Verantwortung: Wege aus dem Druckkessel, 94 (95). See, however, in this connection also concerning the possibility of, and need for, a reformation of the mechanism of investor-state dispute settlement based on a "constitutional law framework" *Schill*, Journal of International Economic Law 20 (2017), 649 *et seq.*

116 *Schill*, European Yearbook of International Economic Law 7 (2016), 309 (313 *et seq*.); *Schill*, in: Kalicki/Joubin-Bret (eds.), Reshaping the Investor-State Dispute Settlement System, 621 (631); see in this connection also, e.g., *Reinisch*, in: Pazartzis *et al.* (eds.), Reconceptualising the Rule of Law in Global Governance, Resources, Investment and Trade, 291 (292 *et seq*.).

117 *Lester*, Journal of World Trade 49 (2015), 211 (212); see also, e.g., *Montt*, State Liability in Investment Treaty Arbitration, 12 ("investment treaties delegate jurisdiction of constitutional character to arbitral tribunals").

118 On the concept of contestation and its relevance also in the context of the formation, recognition and application of norms see in particular *Wiener*, A Theory of Contestation, 3 *et seq*.

119 See for example *Jacob/Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 700 (710 *et seq*.); *Vandevelde*, New York University Journal of International Law and Politics 43 (2010), 43 (49 *et seq*.); *Tietje*, in: Giegerich (ed.), Internationales Wirtschafts- und Finanzrecht in der Krise, 11 (22); *Schultz/Dupont*, European Journal of International Law 25 (2014), 1147 *et seq*.; *Bonnitcha*, Substantive Protection under Investment Treaties, 133 *et seq*. See also, albeit from a quite critical perspective, *Cutler*, Indiana Journal of Global Legal Studies 23 (2016), 95 (104) ("The standard rationale for constitutionalizing investment protections in legal agreement mirrors more general beliefs that the enhanced rule of law is basically good for business.").

120 *Stoll/Holterhus*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 339 (353) ("From a constitutional perspective, the proximity between the protection of foreign investors and a right to property comes to mind immediately."). Generally on the guarantee of property rights for foreign investors as the basis of investment agreements see, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 98 *et seq*.; *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 *et seq*.

constitutional function by placing legal limits on the regulatory authority of state actors to the benefit of private subjects and are stipulated in investment agreements parallel to those fundamental constitutional principles well-known from the institutional ordering at the domestic level.[121] Against this background, the content of this quite influential narrative can be vividly summarized with the following words from *Stephan W. Schill*: "In these cases, investment arbitration is functionally equivalent to domestic constitutional litigation in reviewing a state measures under norms that are consubstantial with those in constitutional law."[122]

Despite this substantial and continuously growing visibility of scholarly diagnoses of emerging processes of constitutionalization in the international legal framework on the protection of foreign investments, the incontrovertible fact and challenge remains at least for the time being that, since already the term constitution itself is devoid of any specific and generally recognized meaning in public international law,[123] also the debate on the potential constitutionalization of this legal realm "suffers from the great variety of meanings assigned to the key terms";[124] a finding that more recently have even given rise to the perception of a "global constitutional cacophony".[125] This quite obvious, since often documented, definitional inflation and corresponding lack of a precise and universally shared common understanding of what the constitutionalization of international law precisely is about does not merely amount to a deplorable theoretical finding but has most certainly also practical repercussions for the operability of global constitutionalism as a research topic. This has lately for example been quite vividly described by *Vassilis P. Tzevelekos* and *Lucas Lixinski*: "We all know that raising a hypothesis or asking a question is the basis for building a thesis. Yet, what we, international law lawyers, are missing is the tools that will enable us to actually try and answer that question, and validate or reject the hypothesis. What is a constitution? What is constitutionalism? Is there a constituent power in the decentralized structure of international law – other maybe than all states together (the idea of the international community) and nobody in particular? […] How is a constitution found in such a system?".[126]

121 On this perception and narrative see again for example *Schill*, The Multilateralization of International Investment Law, 373; *Schneiderman*, in: Gill/Cutler (eds.), New Constitutionalism and World Order, 165 (172).

122 *Schill*, Journal of World Investment & Trade 18 (2017), 1 (4); see also for example *Montt*, State Liability in Investment Treaty Arbitration, 15 ("conceptualising investment treaty law as a form of global constitutional law").

123 On this finding see also, e.g., *Kleinlein*, Nordic Journal of International Law 81 (2012), 79 (106).

124 *Peters*, in: Orford/Hoffmann/Clark (eds.), The Oxford Handbook of the Theory of International Law, 1011 (1015); see also for example *Oeter*, in: Blome *et al.* (eds.), Contested Regime Collisions – Norm Fragmentation in World Society, 21 (24) ("As already mentioned, an abounding strand of literature is looking for phenomena of 'constitutionalization' across the entire range of international law. There is, however, neither a clear definition nor a robust consensus of what constitutes 'constitutionalization'. The use of the term varies a lot, and its meanings are far from evident."); *Oeter*, in: Justenhoven/O'Connell (eds.), Peace Through Law, 83 (85) ("we do not exactly know what characteristics really make up 'constitutionalisation', ending up in a rather fuzzy use of the concept"); *Bianchi*, International Law Theories, 59 ("extreme variety of orientations and sensibilities that characterize this strand of scholarship"); *Krajewski*, Völkerrecht, 49; *Schwöbel*, International Journal of Constitutional Law 8 (2010), 611 (634) ("a complex and multidimensional debate"); *Krieger*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 75 (2016), 439 (443); *Neves*, in: Blome *et al.* (eds.), Contested Regime Collisions – Norm Fragmentation in World Society, 169 (171) („This inflation in the use of the term has led to considerable vagueness, and 'constitution' has begun to lose much of its historical, normative, and functional meaning."); *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 25 ("Indeed, several ideas about international constitutionalism are floating around.").

125 *Mac Amhlaigh*, Global Constitutionalism 5 (2016), 173 *et seq*.

126 *Tzevelekos/Lixinski*, Leiden Journal of International Law 29 (2016), 343 (348); see also for example *Diggelmann/Altwicker*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 68 (2008), 623 (641) ("in the absence of a universally accepted or applicable concept of 'constitution', the question of empirical adequacy arises").

These major conceptual challenges associated with the normative ordering idea of global constitutionalism notwithstanding, whose origins and possible solutions cannot be subjected to a more thorough analysis in the course of the present contribution,[127] it seems with all due caution fair to say that there is nevertheless at least something like a growing consensus emerging among an already notable number of legal scholars that processes of constitutionalization in the realm of public international law should be, and in fact are, characterized, at a minimum, by two central elements or developments respectively. First, there is by now substantial agreement that the existence of global constitutionalism presupposes as one of its essential elements the evolution of an international legal order that is more and more independent of the will and interests of individual states, with its substantive norms and law-making as well as law-realization processes increasingly focusing on the implementation of community interests and thus being oriented towards the promotion of global public goods.[128]

Second, another important characteristic often closely linked to the normative ordering idea of a constitutionalization of public international law is the enhanced inclusiveness of the respective transnational normative framework and its regulatory processes, in particular as far as non-state actors like corporations, civil society groups and most certainly also individuals are concerned.[129] Consequently, global constitutionalism assumes on the one hand the desirability and necessity of providing for formal and informal opportunities for all powerful, affected, and interested actors – governmental as well as in particular also non-governmental – to participate in the respective transnational law-making and law-realization processes in the international system. On the other hand, albeit closely related to this first mentioned guiding image, processes of constitutionalization beyond the state are also finding their expression and manifestation in the increasing normative recognition of non-state actors within the international legal framework as at least partial subjects of international law; first and foremost on the basis of establishing legal entitlements for them directly under public international law.

However, the preoccupation of global constitutionalism with the normative incorporation of non-state actors into the global legal order, preferably on the basis of their recognition as subjects of international law, is by far not only focusing on processes aimed at an international legal empowerment of these players by bestowing them with rights and other normative entitlements. Rather, already in light of the other major feature of global constitutionalism – the increasing orientation of the international legal order towards the promotion of global public goods – it seems ultimately hardly surprising that the processes of constitutionalizing public international law are first and foremost also concerned with the issue of responsibility.

127 See, however, in this connection for a novel approach aimed at providing for a suitable solution to these challenges taking recourse to an empirical inquiry based on a narrative perspective more recently *Nowrot/Sipiorski*, Archiv des Völkerrechts 55 (2017), 265 *et seq.*

128 On the inherent connection between processes of global constitutionalization and the necessary orientation of public international law towards the realization of community interests see for example *Tietje*, in: Prieß/Berrisch (eds.), WTO-Handbuch, A.II., para. 24; *Tietje*, Deutsches Verwaltungsblatt 118 (2003), 1081 (1088); *Bryde*, Der Staat 42 (2003), 61 (63 *et seq.*); *Thürer*, in: Thürer/Aubert/Müller (eds.), Verfassungsrecht der Schweiz, 37 (42 *et seq.*); *Ruffert*, Globalisierung als Herausforderung, 39; *Fassbender*, in: Münkler/Fischer (eds.), Gemeinwohl und Gemeinsinn im Recht, 231 (241 *et seq.*, 249 *et seq.*); *Scheyli*, Konstitutionelle Gemeinwohlorientierung im Völkerrecht, 204 *et seq.*; *Tams*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 229 (231); *Nowrot*, Global Governance and International Law, 15; *Nowrot*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 57 (58 *et seq.*).

129 On this important feature of global constitutionalism see, e.g., *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 153 *et seq.*, in particular *ibid.*, 153 ("The concept of an international community suggests inclusiveness, and therefore tends to favour rather than to hinder the inclusion of non-state actors."); *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 462 *et seq.*; *Tams*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 229 (231).

Viewed from this global constitutional perspective, the importance attached to responsibility is primarily based on the perception that an optimal promotion and protection of international community interests presupposes that preferably all influential governmental and non-state actors in the international system develop and share a sense of responsibility for the common good.[130] Although it has frequently – and rightly – been emphasized that the pursuit of individual or sectoral interests and the realization of the common good are in principle far from mutually exclusive, it is nevertheless equally certain that the orientation towards profit maximization as being at least one of the primary motives of the activities of corporations and other foreign investors – in the same way as the frequent 'single-issue orientation' of NGOs – does not always guarantee in itself that their economic and political activities adequately contribute to the promotion of community interests.[131] Furthermore, in order to facilitate and secure the necessary practice of developing this sense of responsibility, the processes of constitutionalizing public international law foresee and are guided by the ordering idea that influential non-state actors should be normatively integrated into the transnational legal order also in the sense of being addressees of obligations under public international law to promote and protect the realization of global community interests like human rights, core labour and social standards as well as the environment. In sum, these findings indeed support the proposition that the various different governmental and non-governmental "members of the constitutional community [essentially also] form a transnational community of responsibility".[132]

Against this background, it seems now possible to make with some degree of confidence (and hopefully persuasion) a reasonably convincing case for the existence of a relationship and possibly even interdependency between, first, the processes of constitutionalization in public international law and, second, the regulatory approach of investors' obligations in modern investment treaty law; a relationship that is first and foremost also characterized by mutually reinforcing impulses and effects. On the one hand, the obviously increasing practical relevance of stipulating also obligations for foreign investors in international investment agreements and thus the growing importance attached to the idea of a merger of investors' rights and responsibilities serves as a clear indication for the existence and influence of processes of global constitutionalization in the current progressive development of the transnational normative framework dealing with the protection of foreign investments. On the other hand, the ongoing discussions on the potential constitutionalization of the transboundary legal order in general and international investment law in particular as well as the more specific ordering ideas and steering concepts, such as the importance of promoting and protecting global community interests as well as the issue of responsibility, that regularly go along with these perceptions and narratives of global constitutionalism are also themselves having the effect of further fostering and strengthening the steering approach of investors' obligations and, as demonstrated

130 On this perception see, e.g., *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 156-157 ("On the other hand, the irregular international status of corporations, and also of NGOs, is pernicious because it leaves space for the exploitation of their power for self-interested goals to the detriment of the public good and of affected individuals. In this respect, the formalization of the status, e.g. of business actors, would engender legal clarity and containment, which is laudable from a constitutionalist perspective."); and *ibid.*, 250-251 ("[B]usiness does not yet and should not acquire any legitimate expectation to participate in international law-making unless the business actors specifically demonstrate their commitment to the public interest."); *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (840-841).

131 See thereto also for example *Abbott/Snidal*, in: Mattli/Woods (eds.), The Politics of Global Regulation, 44 (59 *et seq.*).

132 *Klabbers/Peters/Ulfstein*, The Constitutionalization of International Law, 261. Generally on the concept of a transnational community of responsibility see also for example already *Nowrot/Wardin*, Liberalisierung der Wasserversorgung in der WTO-Rechtsordnung, 48 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts, 57 (97 *et seq.*); *Tietje*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 1 (65-66).

above,[133] in particular also its ever-more given practical relevance in current bilateral as well as regional investment treaty-making processes.

E. Outlook

The issue of investors' public obligations towards the societies in which they operate is unlikely to vanish from the discourses on and practice of international investment law any time soon. Closely intertwined with, and stimulated by, the broader discussions on how to integrate non-state actors into the normative structure of the international system, numerous developments justify the conclusion that this subject has emerged as an important component of the current processes aimed at what can be qualified as no less than a reformation of this area of law by rebalancing the rights and obligations of states and investors. Against this background, the present contribution was not only intended to provide some insights into this comparatively new and innovative trend in investment treaty-making, but first and foremost also to illustrate possible implications and interactional consequences of this normative ordering idea as well as comparatively new regulatory experiment of investors' obligations for the processes of global constitutionalization perceived to be taking place also in the realm of international investment law. Whether the publication has succeed in this undertaking is – as always and rightly – to be judged by its readers.

133 See thereto already *supra* under B.

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