

Vladlena Lisenco/Karsten Nowrot

**The 2018 Pridnestrovian Law
on State Support for
Investment Activities:
Some Thoughts on an
Investment Statute in a
Frozen Conflict Situation**

Rechtswissenschaftliche
Beiträge der
Hamburger Sozialökonomie

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Impressum

Kai-Oliver Knops, Marita Körner, Karsten Nowrot (Hrsg.)
Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

Vladlena Lisenco/Karsten Nowrot
The 2018 Pridnestrovian Law on State Support for Investment
Activities: Some Thoughts on an Investment Statute in a Frozen
Conflict Situation
Heft 26, September 2019

Bibliografische Information der Deutschen Bibliothek
Die Deutsche Bibliothek verzeichnet diese Publikations in der
Deutschen Nationalbibliografie;
detaillierte bibliografische Daten sind im Internet unter
<http://dnb.dnb.de> abrufbar.
ISSN 2366-0260 (print)
ISSN 2365-4112 (online)

Reihengestaltung: Ina Kwon
Produktion: UHH Druckerei, Hamburg
Schutzgebühr: Euro 5,-

Die Hefte der Schriftenreihe „Rechtswissenschaftliche Beiträge der
Hamburger Sozialökonomie“ finden sich zum Download auf der
Website des Fachgebiets Rechtswissenschaft am Fachbereich
Sozialökonomie unter der Adresse:

[https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/
koerner/fiwa/publikationsreihe.html](https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/koerner/fiwa/publikationsreihe.html)

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A. By Way of a Start: On the (Political) Abnormality and (Economic) Normality of Frozen Conflict Situations*

Although until now no generally recognized definition of “frozen conflicts” and their core criteria exists, such situations are in particular also frequently characterized by the emergence and continued presence of non-recognized or only partially recognized autonomous territorial entities.¹ These actors are also referred to as, among others, non-recognized states, state-like entities, quasi-states, entities short of statehood or stabilized de facto regimes.² Their origins often lie in a former (and currently inactive) internal or international armed conflict and/or only semi-successful secessionist movements. Respective examples are provided by the Republic of Abkhazia,³ the Republic of Artsakh (more commonly known as Nagorny-Karabakh),⁴ the Donetsk People’s Republic, the Luhansk People’s Republic as well as the Republic of South Ossetia,⁵ but also – outside of the post-Soviet realm – by the Republic of China (frequently referred to as Taiwan),⁶ the Republic of Somaliland⁷ and the Turkish Republic of Northern Cyprus.⁸

* The contribution is based on a presentation given by the authors at the expert workshop “The Role of International Investment Law in Armed Conflicts, Disputed Territories, and ‘Frozen’ Conflicts”, organized by the Institute for International Law of Peace and Armed Conflict at the Faculty of Law of the Ruhr University Bochum in Bochum/Germany on 1/2 March 2019.

- 1 Generally on the concept of frozen conflicts and its core characteristics see, e.g., *Grant*, Cornell International Law Journal 50 (2017), 361 *et seq.*; *Grant*, German Yearbook of International Law 59 (2016), 49 (64 *et seq.*).
- 2 Specifically on the concept of stabilized de facto regimes and their status under public international law see in particular *Frowein*, Das de facto-Regime im Völkerrecht, 1 *et seq.*; *Frowein*, De Facto Regime, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); as well as for example *Dahm/Delbrück/Wolfrum*, Völkerrecht, Vol. 1/2, 294 *et seq.*; *Schoiswohl*, Status and (Human Rights) Obligations of Non-Recognized *De Facto* Regimes in International Law, 206 *et seq.*; *Krajewski*, Völkerrecht, 144 *et seq.*
- 3 For further details on this territorial entity see, e.g., *Nußberger*, Abkhazia, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); *Nußberger*, Göttingen Journal of International Law 1 (2009), 341 (360 *et seq.*); *Mirzayev*, in: Walter/von Ungern-Sternberg/Abushov (eds.), Self-Determination and Secession in International Law, 191 *et seq.*; *Markedonov*, in: Bebler (ed.), “Frozen Conflicts” in Europe, 71 *et seq.*; *Wolff*, in: Caspersen/Stansfield (eds.), Unrecognized States in the International System, 147 *et seq.*
- 4 Concerning the situation and context of Nagorny-Karabakh see for example *Sterio*, German Yearbook of International Law 59 (2016), 81 *et seq.*; *Melnyk*, Nagorny-Karabakh, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); *Krüger*, in: Walter/von Ungern-Sternberg/Abushov (eds.), Self-Determination and Secession in International Law, 214 *et seq.*
- 5 On the Republic of South Ossetia see for example *Nußberger*, Göttingen Journal of International Law 1 (2009), 341 (351 *et seq.*); *Nußberger*, South Ossetia, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); *Luchterhandt*, Archiv des Völkerrechts 46 (2008), 435 (436 *et seq.*); *Waters*, in: Walter/von Ungern-Sternberg/Abushov (eds.), Self-Determination and Secession in International Law, 175 *et seq.*, each with further references.
- 6 Generally on the background and international legal status of Taiwan see for example *McGarry*, Chinese (Taiwan) Yearbook of International Law and Affairs 35 (2017), 99 (101 *et seq.*); *Ahl*, Taiwan, paras. 1 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019), with additional references.
- 7 See thereto for example *Schoiswohl*, Status and (Human Rights) Obligations of Non-Recognized *De Facto* Regimes in International Law, 95 *et seq.*; *Schmidt*, Somalia, Conflict, paras. 24 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019).
- 8 On the Turkish Republic of Northern Cyprus see, e.g., *Hoffmeister*, Cyprus, paras. 20 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); *Tani*, Asper Review of International Business and Trade Law 12 (2012), 119 *et seq.*; *Kontorovich*, Columbia Journal of Transnational Law 53 (2015), 584 (615 *et seq.*).

There are certainly different answers to the question as to the necessary elements and prerequisites of statehood under public international law in general⁹ – and whether they are fulfilled in a given case. Moreover, there are surely various possibilities to position oneself on the side of, or in fact potentially also somewhere between, the so-called “constitutive theory” and/or the “declaratory theory” in the in principle age-old and still ongoing discussion about the legal relevance and effects of the recognition of states in particular.¹⁰ Irrespective of these issues, however, the incontrovertible fact remains that for the time being, and probably for quite some time to come, these non-recognized autonomous territorial entities as being a common feature of frozen conflict situations are, from a political perspective, clearly more of an abnormality in an international system comprising mostly of recognized states.¹¹ Moreover, and again seen from a political standpoint, they are not only an anomaly, but often even perceived as something like “irritants” in the global community. The potential threat to international stability and security thereby results from their very existence as well as in particular from the possibility that the underlying frozen conflict with the territorially affected recognized country might again turn into an active armed conflict, theoretically at any moment.¹²

Nevertheless, in many other ways, and in particular also when viewed from an economic perspective, these non-recognized territorial entities usually present themselves as rather normal political communities: meaning, they are typically not more abnormal than the quite diverse members of the global community of recognized states.¹³ In order to support this perception, attention might for example be drawn to the reasons that speak in favor of also integrating these territorial regimes into the global economy and its legal order. In order to illustrate the arguments for a preferably close, because in principle mutual beneficial, relationship between non-recognized territorial entities on the one hand as well as the international economic system and its transboundary normative framework on the other hand, it seems useful to briefly

- 9 Generally on the elements of statehood from the perspectives of general theory of the state and of international law see for example *Jellinek*, *Allgemeine Staatslehre*, 394 *et seq.*; *Crawford*, *The Creation of States*, 37 *et seq.*; *Verdross/Simma*, *Universelles Völkerrecht*, §§ 378 *et seq.*; *Krajewski*, *Völkerrecht*, 136 *et seq.*; *Craven/Parfitt*, in: Evans (ed.), *International Law*, 177 (190 *et seq.*); *Orakhelashvili*, *Akehurst’s Modern Introduction to International Law*, 72 *et seq.*
- 10 For a more in-depth treatment of the issue of recognition of states including the relevance of the declaratory and constitutive theory of recognition see, e.g., *Crawford*, *Brownlie’s Principles of Public International Law*, 134 *et seq.*; *Talmon*, *British Yearbook of International Law* 75 (2004), 101 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 185 *et seq.*; *Orakhelashvili*, *Akehurst’s Modern Introduction to International Law*, 97 *et seq.*; *Grant*, *The Recognition of States*, 19 *et seq.*; *Henriksen*, *International Law*, 63 *et seq.*; *Hillgruber*, *European Journal of International Law* 9 (1998), 491 *et seq.*; *Epping*, in: Ipsen/Epping/Heintschel von Heinegg (eds.), *Völkerrecht*, § 7, paras. 160 *et seq.* Concerning the inconsistency of state practice relating to the legal effects attributed to the recognition of states see also for example *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Introduction and Part 1, 129 (“state practice is inconclusive and may be rationalised either way”); *Shaw*, *International Law*, 331 (“Practice over the last century or so is not unambiguous [...]”); *Klabbers*, *International Law*, 82; and *Warbrick*, in: Evans (ed.), *International Law*, 205 (249) (“it is conceded that the practice is not amenable completely to one explanation or the other, though each points to certain pragmatic conclusions which, ironically, may commend it to practitioners who otherwise resist grand theory”). Specifically on the role and relevance of recognition in the context of secessions see, e.g., *Oeter*, in: Walter/von Ungern-Sternberg/Abushov (eds.), *Self-Determination and Secession in International Law*, 45 *et seq.*, with further references.
- 11 See, e.g., *Caspersen*, in: Caspersen/Stansfield (eds.), *Unrecognized States in the International System*, 73 (78) (“More widespread recognition is needed for these entities to function as normal entities in the international system of sovereign states; [...]”); as well as specifically with regard to Taiwan *Charnovitz*, *Asian Journal of WTO and International Health Law and Policy* 1 (2006), 401 (423) (“Taiwan is an anomaly in international relations. It is a self-governing, stable, prosperous nation whose identity is sharply contested.”). Generally on the perception of the international system as still being primarily an inter-state system see for example *Shaw*, *International Law*, 4 *et seq.*; *Craven/Parfitt*, in: Evans (ed.), *International Law*, 177 (178); *von Arnould*, *Völkerrecht*, 20; for a more cautious view emphasizing the increasing importance of other actors in the international system see, however, already, e.g., *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 2 *et seq.*
- 12 On this perception see, e.g., *Bakke*, in: Caspersen/Stansfield (eds.), *Unrecognized States in the International System*, 90 *et seq.*; *Kolsto/Blakkisrud*, in: Caspersen/Stansfield (eds.), *Unrecognized States in the International System*, 110 *et seq.*
- 13 See thereto also already *Nowrot*, *Non-Recognized Territorial Entities in the Post-Soviet Space from the Perspective of WTO Law: Outreach to Outcasts?*, 6 *et seq.*

highlight two main aspects or dimensions of this relationship.

First, viewed from the external economic perspective of other territorial players in the international system, among them in particular recognized states and their private business actors, the respective territorial entities, including their populations and natural, human as well as other resources, not infrequently provide for valuable business opportunities. These opportunities exist, for example, in the form of additional consumers and thus market demands for imported products and services as well as in the form of places to profitably undertake foreign investments. Moreover, and particularly highlighting the in principle given desirability to integrate also the respective regimes into the transnational economic legal order, these transboundary business prospects by other countries and their economic actors should, from their perspective, preferably also be secured and stabilized on the basis of legal rules applying to transnational trade and investment transactions in order to, among others, facilitate a reduction of transaction costs.¹⁴

These expectations not only refer to, among others, the legal order of the World Trade Organization (WTO), well-known to be fundamentally aimed at ensuring legal certainty in international trade as a necessary prerequisite “to create the predictability needed to plan future trade”¹⁵ and for the optimal allocation of economic resources by its at present already 164 members, but also by private business actors to achieve the welfare-creating effects of international economic relations.¹⁶ They also first and foremost include the transnational normative framework dealing with foreign investments, since among the primary purposes pursued by this legal regime is the promotion as well as protection of foreign investments and thus the intention to create favorable conditions for investments and to stimulate private initiative on the basis of a stable, predictable and secure normative environment.¹⁷

14 Generally thereto, e.g., *Jackson*, *Journal of International Economic Law* 1 (1998), 1 (5) (“They [the legal rules of world trade and investment law] may provide the only predictability or stability to a potential investment or trade-development situation. Without such predictability or stability, trade and investment flows might be even more risky and therefore more inhibited than otherwise.”).

15 GATT Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, L/6175 - 34S/136, para. 5.2.2; see in this regard also, e.g., GATT Panel, *The United States Manufacturing Clause*, Report of the Panel adopted on 15/16 May 1984, L/5609-31S/74, para. 39 (“The Panel further noted that one of the basic aims of the General Agreement was security and predictability in trade relations among contracting parties.”); WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, para. 7.75 (“Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators.”); WTO, *Russia – Measures Concerning Traffic in Transit*, Report of the Panel of 5 April 2019, WT/DS512/R, para. 7.79; *Jackson*, *Journal of International Economic Law* 1 (1998), 1 (5); *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 3, paras. 14 *et seq.*; as well as Article 3.2 Dispute Settlement Understanding of the WTO: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”.

16 Specifically on the interests of private economic actors as mirrored in the purposes pursued by the WTO legal order see for example WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, para. 7.73 (“However, it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market place. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.”); *Tietje/Nowrot*, *European Business Organization Law Review* 5 (2004), 321 (327 *et seq.*), with further references.

17 See thereto as well as on other purposes pursued by international investment law for example *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, paras. 161 *et seq.*; *Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004, para. 81; *Dolzer/Schreuer*, *Principles of International Investment Law*, 22 (“Thus, the purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide stability and predictability in the sense of an investment-friendly climate.”).

Second, looking at the present issue from the internal economic and, equally important, also political perspective of the public authorities and the population of the non-recognized territorial entities in question, it seems appropriate to recall that a functioning, preferably prosperous, economy is of paramount importance in order to achieve and provide public services and other welfare gains for the population as well as to foster the social stability of the political community as a whole.¹⁸ While this finding certainly applies in principle equally to both recognized countries and stabilized de facto regimes, striving for economic stability and prosperity appears to be of particular importance for territorial entities that are still in the phase of seeking recognition by the international community of states. In the course of this endeavor as well as to enhance their chances of success, they often engage in imitating effective statehood, thereby conveying the message to the world that they have created viable and sustainable territorial entities with state-like and stable organizational structures worthy of international recognition.¹⁹

In addition, establishing and maintaining political and legal conditions for a prosperous economy might also have the desirable effect of reducing the economic dependence of the territorial regime in question on its respective patron state(s), the existence of which is a quite common feature of frozen conflict situations.²⁰ Furthermore, considering that economic activities and relations are today first and foremost, if not even by now almost inherently, also international and thus transboundary in character,²¹ with a stable and prosperous business environment in political communities therefore also being dependent upon a closer integration into the international economic system, it becomes obvious that the category of territorial actors here at issue, including their private commercial players, normally also have a strong interest in establishing and intensifying trade and investment relations with other countries; again preferably on the more stable and secure basis of transnational normative regulations in the realm of global trade and investment law.

Against this background, this contribution intends to describe and evaluate more specifically the particular investment law context of, and especially the respective regulatory approaches adopted by, another central territorial actor in one of the current “core examples of frozen conflicts”,²² namely the Pridnestrovian Moldavian Republic (more commonly known as Pridnestrovia or Transnistria) situated – depending on the perspective – east of, or in the east of, the Republic of Moldova. Thereby, particular attention will be devoted to the regulatory features and normative relevance of the Law of the Pridnestrovian Moldavian Republic on State Support for Investment Activities that more recently entered into force on 1 June 2018.²³ For this purpose, the following assessment is divided into four main parts.

18 On this issue specifically in the context of non-recognized territorial entities see for example *Kolstø/Blakkisrud*, *Europe-Asia Studies* 60 (2008), 483 (493 *et seq.*); *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 (79); *Isachenko*, *The International Spectator* 44 (No. 4, 2009), 61 *et seq.*

19 On this phenomenon or strategy see for example already *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 *et seq.*

20 See thereto, e.g., *Caspersen*, in: *Caspersen/Stansfield* (eds.), *Unrecognized States in the International System*, 73 (82 *et seq.*); *Kolstø/Blakkisrud*, *Europe-Asia Studies* 60 (2008), 483 (507).

21 On this perception see, e.g., *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, paras. 19 and 58 *et seq.*

22 *Grant*, *Cornell International Law Journal* 50 (2017), 361 (377). On the characterization of the case of Transnistria/Pridnestrovia as a frozen conflict see also, e.g., European Parliament, Study: The Transnistrian Issue: Moving Beyond the Status-Quo, by Stefan Wolff, EP/EXPO/B/AFET/FWC/2009-01/Lot1/41, October 2012, 6 (“Of all the post-Soviet conflicts, this conflict [over the Transnistrian region] is the one for which the label ‘frozen conflict’ had been the most fitting: in contrast to the conflicts over South Ossetia and Abkhazia in Georgia and the conflict between Armenia and Azerbaijan over the Nagorno-Karabakh territory, there has been considerably less violence since the conclusion of the ceasefire agreement in 1992. However, until recently, no tangible progress had been made either.”); *Molcean/Verständig*, in: *Cornell/Jonsson* (eds.), *Conflict, Crime, and the State in Postcommunist Eurasia*, 129; *Borgen*, *Oregon Review of International Law* 9 (2007), 477 (499).

23 Law of the Pridnestrovian Moldavian Republic No. 123-3-VI on State Support for Investment Activities of 8 May 2018, CA3 18-19.

In a first step, we will provide some useful background information on the case of Pridnestrovie with a particular focus, already suggested by the primary research interest of this contribution, on the current economic situation and the investment climate in this autonomous territorial entity (B.). The second part, primarily in order to illustrate the importance of the recently adopted Pridnestrovian investment statute, will be devoted to a brief evaluation of the current (ir)relevance of international investment treaties for foreign investors doing business in Pridnestrovie (C.). Against this background, the third and central section is intended to give a systematic overview and assessment of the notable regulatory features characterizing the 2018 Pridnestrovian investment law (D.). Based on the findings made in the third part, the contribution concludes, in a fourth step, with an attempt to evaluate the Pridnestrovian investment regime in light of the overall normative relevance of domestic investment statutes, thereby in particular also addressing the question whether frozen conflict situations are actually also exercising an influence on the content and regulatory approaches of investment codes adopted by concerned territorial actors (E.).

B. Where Are We Now?:

The Case and Context of Pridnestrovie and its Investment Climate

The origins of, and subsequent developments related to, the frozen conflict between Moldova and Pridnestrovie that also involves a number of other international actors, among them the Russian Federation, the Organization for Security and Co-operation in Europe (OSCE), the European Union (EU) and Ukraine, has been already quite extensively described, analyzed and narrated in scholarly publications as well as other sources.²⁴ Despite this by now more than considerable amount of academic literature and other documents, it is incontrovertible that the existence of, and evidence for, many alleged facts, details and causal links are still uncertain, disputed and controversially perceived; ultimately, as it is not infrequently the case, giving rise to a number of different narratives and counter-narratives. Furthermore, it seems appropriate to recall also in the context of this frozen conflict that “[t]here is always a perspective from which a story is told, which is never neutral”.²⁵ In other words, there is hardly, if ever, an entirely objective “view from nowhere” in narration.²⁶

24 From the numerous literature on this topic see, e.g. *Finck*, in: Hohmann/Joyce (eds.), *International Law's Objects*, 162 *et seq.*; *Borgen*, *German Yearbook of International Law* 59 (2016), 115 *et seq.*; *Bowring*, in: Walter/Ungern-Sternberg/Abushov (eds.), *Self-Determination and Secession in International Law*, 157 *et seq.*; *Belitser*, in: Bebler (ed.), “Frozen Conflicts” in Europe, 45 *et seq.*; *Hightower*, in: Franke/Guttieri/Civic (eds.), *Understanding Complex Military Operations – A Case Study Approach*, 46 *et seq.*; *Wolfschwenger*, in: Bellak/Devdariani/Harzl/Spieker (eds.), *Governance in Conflict – Selected Cases in Europe and Beyond*, 65 *et seq.* In addition, see also for example the quite detailed description provided by the European Court of Human Rights, *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004, paras. 28 *et seq.*

25 *Bianchi*, *Journal of International Dispute Settlement* 9 (2018), 28 (34) (“There is always a perspective from which a story is told, which is never neutral. The standpoint from which one looks at things determines what one sees. In other words, one’s perspective shapes the reality one experiences.”).

26 Generally thereto *Nagel*, *The View from Nowhere*, 3 (“This book is about a single problem: how to combine the perspective of a particular person inside the world with an objective view of that same world, the person and his viewpoint included.”).

Bearing in mind these limits as also inherent in all descriptions of, and narrations on, the frozen conflict over Pridnestrovie, we consider it for the purposes of the present analysis sufficient to provide our readers with a very brief – and most certainly also, like all others, not necessarily entirely objective – overview of the complex historical and political background, and then focus primarily on some recent facts and figures related to the Pridnestrovian economy.

Whereas it has occasionally been argued that the roots and real origins of the current frozen conflict can in fact be traced back a few centuries ago and while it is undoubtedly always important not to neglect the effects of distant historical developments, the more proximate and direct causes for the present situations actually relate to comparatively recent events and policies taking place in the transition period from the final stages of the Soviet “Perestroika” in the late 1980s over the collapse of the USSR to the dawn of the post-Soviet era in the beginning of the 1990s.²⁷ It could be said that the unfolding developments were particularly triggered by certain clear signs, increasingly visible towards the end of the 1980s, that the then Moldavian Soviet Socialist Republic (MSSR) aspired sovereign statehood. More specifically, the Supreme Soviet of the MSSR enacted legal regulations in the second half of 1989 making the Romanian language with its Latin script the official state language, thus effectively replacing the Russian language with its Cyrillic letters. In addition, the same body decided in April 1990 to adopt a new tricolor flag as well as a new national anthem that happened to be the same as that of Romania. Moreover, the MSSR proclaimed its sovereignty on 23 June 1990, thus effectively changing its status within the USSR.

These developments gave rise to increased concerns in parts of the population that the now apparently newly sovereign MSSR would in the foreseeable future attempt a (re-)unification with Romania, among them in particular the strong Russian minority in the territories east of the river Dnestr/Dniester or Nistru (Trans-Dniestria) as well as the Gagauz in the south of Moldova.²⁸ As a result, resistance movements emerged in Pridnestrovie as well as Gagauzia from 1989 onwards. Upon further escalation of the political tensions, Pridnestrovie, claiming the legitimate exercise of a right of external self-determination, declared on 2 September 1990 its independence from the MSSR and its new status as a republic within the USSR. Although this proclamation was never accepted by the political bodies of the later, it ultimately contributed to the first armed clashes between Moldovan armed forces and police forces on the one hand, and separatist paramilitaries on the other hand near the city of Dubosari in November 1990.

However, large-scale fighting only began at the end of 1991 and lasted until the middle of 1992. It was stopped as a result of a direct intervention of the Russian armed forces being stationed in Pridnestrovie at that time under the command of General *Lebed*. The fighting resulted in approximately one thousand persons killed and probably more than 100,000 refugees, mostly in the form of internally displaced persons. The fighting ended on 21 July 1992 with the conclusion of a ceasefire agreement between Moldova and Russia on the basis of what was then – and in principle still remains as of today – the *status quo* and foreseeing, among others, the establishment of a peacekeeping force including members of the Russian, Moldovan and Pridnestrovian armed forces. Furthermore, the agreement provided for an immediate cease-fire and the creation of a demilitarized security zone extending 10 kilometers from the Nistru on each side of the river, including the town of Bendery on the right bank. A set of principles for the peaceful settlement of the dispute was also announced, namely, respect for the sovereignty

27 On this perception see also, e.g., Association of the Bar of the City of New York (Special Committee on European Affairs), *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 2006, 14.

28 The Gagauz, a people of Turkish origin but Orthodox believers, constitute 3.5% of Moldova’s population. In 1995, the Gagauz Territorial Administrative Unit was established, granting this ethnic group considerable administrative and cultural autonomy and thus settling peacefully the respective separatist conflict that erupted in 1991.

and territorial integrity of Moldova, the need for a special status for Pridnestrovie, and the right of its inhabitants to determine their future in case Moldova were to unite with Romania. Some control mechanisms were also proposed, including the setting up of a Joint Control Commission.

As a consequence of this ceasefire agreement, Pridnestrovie was at least *de facto* effectively separated from the rest of Moldova. In addition, the fighting largely stopped, leading to the emergence of a frozen conflict situation. Ever since that time, there have been in the by now already twenty-seven years following these events numerous proposals and initiatives aimed at reaching a solution to the conflict that is acceptable to all actors involved. Thereby, a quite prominent role is played by the “Permanent Conference for Political Questions in the Framework of the Negotiating Process for the Transdnestrian Settlement”, also referred to as the “5+2 settlement process” (Moldova and Pridnestrovie as the direct parties to the conflict; the OSCE, the Russian Federation and Ukraine as mediators of the settlement; and the EU and the USA as observers).

More recently, towards the end of 2013, the Party of Socialists of the Republic of Moldova presented a new plan envisioning a quite far-reaching federal restructuring of this country with the aim to accommodate concerns and reservations on the side of Pridnestrovie. A similar project is at present promoted by the current Moldovan President, *Igor Dodon*, who suggests the creation of a federation comprising of three autonomous regions: Moldova, Pridnestrovie as well as Gagauzia. The project includes a bicameral parliament consisting of a senate and a house of representatives, a common government as well as a president directly elected jointly by the peoples from all three regions. Although the chances of successfully implementing these conceptual ideas are extremely difficult to predict, it is noteworthy that there appears to be more recently a general trend pointing towards an improvement in the bilateral relations between Moldova and Russia. More specifically, the appointment of the Russian Deputy Prime Minister *Dmitry Kozak* by the Russian President *Putin* as his “Representative for the Development of Commercial-Economic Relations with the Republic of Moldova” in July 2018 might, in light of respective developments in present-day Moldova and nevertheless with all due caution, be interpreted as a sign that the efforts and negotiations aimed at identifying and implementing a sustainable and mutually beneficial solution for this decades-long frozen conflict are currently gaining new momentum. *Kozak* is known for having promoted in 2003 the so-called “Kozak plan” for resolving the Pridnestrovian conflict on the basis of a federalization of Moldova, an idea that was at that time rejected by the Moldovan side.

Irrespective of what the future has in store for this autonomous territorial entity, Pridnestrovie with its territory of 4,163 square kilometers and a current population of approximately 470,000 people has in the course of its already twenty-nine years of existence as an independent actor established, at a quite early stage, a functioning governmental system based on the model of a presidential republic with its own constitution approved by a national referendum on 24 December 1995 and entering into force in January 1996, a developed financial and tax systems, a modern communication infrastructure, an army (which is actually larger than the Moldovan army), a police, a security service, a national flag, a coat of arms and an anthem. The head of Pridnestrovie is the President, elected for a term of five years, as the head of the country and the guarantor of the Constitution and laws of the country, who directs and coordinates the activities of all structures of state power, represents the country in international relations, and is the Commander-in-Chief of the armed forces. The supreme legislative and representative body of Pridnestrovie is the Supreme Council, elected for a term of five years by majority rule. The Supreme Council is headed by the Chairman of the Supreme Council, elected from among the deputies (a total of 43 deputies are elected).

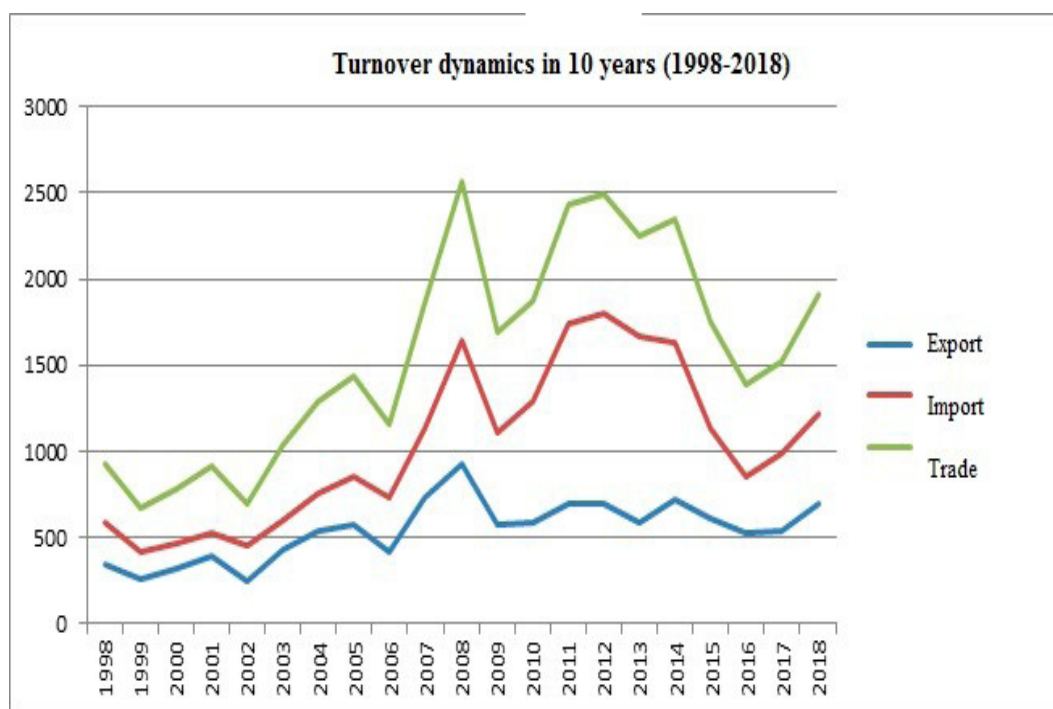
Moreover, this autonomous territorial entity has developed, originally on the basis of the respective resources existing in the former MSSR, an economic system that is currently first and foremost also characterized by international trade and investment relations. Thereby, in the beginning of the previous decade, the transition from a planned Soviet-style economy to an economic system also characterized by market elements was progressively implemented. Overall, Pridnestrovie can be considered as a developed industrial-agrarian region. Its economy is dominated by electric power, ferrous metallurgy engineering and metalworking, electrical, chemical, light industry, food industry, forestry and woodworking, printing as well as a building materials industry. The core of the industrial sectors of Pridnestrovie includes approximately 150 larger enterprises of various forms of ownership, with the largest production centers being the cities of Tiraspol, Bender and Rybnitsa. For 2018, the gross domestic product (GDP) amounted to more than 807 million Euro, an increase of 2.52% compared to 2017. The GDP structure was characterized by a clear dominance of the production sector (31%) and non-market services (27%), followed by trade (14%) and the agricultural sector (9%).

The foreign trade turnover of Pridnestrovie in 2018 amounted to a total of 1.913,2 million US-Dollars, of which the imports were worth 1.216 million US-Dollars and the exports amounted to 697 million US-Dollars.²⁹ According to the current customs statistics methodology, this figure is more than the figure for 2017 by \$ 394.2 million: exports increased by 30.3%, imports by 26.6%.

Transnistrian foreign trade, mln. USD



²⁹ According to data provided by the State Customs Committee of Pridnestrovie.



Among the main imported goods are primary energy, mineral fertilizers, agricultural machinery, paper, road and rail transport, household appliances and computers, cotton raw materials, industrial wood as well as consumer goods. The export structure is currently dominated by metals and metal products (36%), fuel and energy products (17%), foodstuffs and raw materials (16%), textile materials and products (9%) as well as footwear (6%). The main export destinations of Pridnestrovie are at present Moldova (30.4%), Ukraine (19%), Romania (15.9%), the Russian Federation (10.2%), Italy (6%), Germany (5.6%), Poland (3.7%) and Slovakia (1.9%).

Finally, and of particular relevance for the research focus of this contribution, Pridnestrovie has attracted foreign investments by investors from, among others, Russia, Italy, Germany, Romania, Austria, Bulgaria, Ukraine and Moldova with their production facilities involving, for example, agriculture, metalworking, pharmaceutical industry, women's footwear, as well as work shoes.

C. No Treaties, Nowhere: On the Current (Ir)Relevance of International Investment Agreements for Foreign Investors in Pridnestrovie

In order to illustrate the importance of the recently adopted domestic investment statute for foreign investors doing business in Pridnestrovie, it seems useful to briefly describe and evaluate the existing international legal framework of investment treaties – or lack thereof – applicable to this autonomous territorial entity. First of all, Pridnestrovie itself has not (yet) concluded any bilateral, regional or multilateral investment agreements with other countries. However, this finding should not give rise to the perception that this actor is lacking the necessary treaty-making power under public international law³⁰ to enter into respective treaty relations.

³⁰ Generally on the international legal capacity to conclude treaties see, e.g., *Jennings/Watts*, *Oppenheim's International Law*, Vol. I, Parts 2 to 4, 1217 *et seq.*; *Peters*, *Treaty Making Power*, paras. 2 *et seq.*, in: *Wolfrum* (ed.), *Max Planck*

Regardless of whether one considers it as an unrecognized state or merely as a stabilized de facto regime, there is a general consensus that territorial entities like Pridnestrovie – as at least partial subjects of international law – also enjoy in principle the capacity to conclude international (investment) agreements with states and certain other actors in the international system.³¹ This is *inter alia* illustrated by the example of Taiwan being a party to quite a number of bilateral investment treaties (BITs) and free trade agreements as well as, among others, being a member of the WTO.³² The fact that Pridnestrovie has yet to activate its treaty-making powers in practice thus first and foremost merely indicates that this actor and/or other countries have for political reasons abstained from entering into respective treaty relations. Moreover, if viewed from an international legal perspective, the possibility cannot entirely be ruled out that the motive of an alleged relevance, also in the present context, of the obligation of non-recognition³³ might contribute for the time being to the reluctance on the side of at least some third countries to conclude respective international economic agreements with Pridnestrovie.

Nevertheless, in light of this current absence of investment treaties concluded by Pridnestrovie itself, the question arises – and is indeed worth at least briefly addressing – as to the potential applicability of investment agreements concluded by other countries to certain foreign investors and investments in this territorial entity. In this regard, it seems helpful for the purposes of systemization to distinguish between two scenarios. The first of them assumes, based on the declaratory theory of the recognition of states,³⁴ that Pridnestrovie has – as a result of its declaration of independence on 2 September 1990 or subsequent developments such as the first independence referendum of 1 December 1991, the ceasefire agreement signed on 21 July 1992 or the second independence referendum of 17 September 2006 – acquired statehood and thus the status of a country under public international law. Adopting this perspective opens up the possibility to consider the legal relevance of in particular BITs ratified by Moldova and the former Soviet Union, applicable to those foreign investors whose home states have concluded respective agreements, by way of state succession.

Such a continuation of (investment) treaty obligations on the occasion of a succession of states, understood as the replacement of one country by another in the responsibility for the international relations of territory,³⁵ is in principle surely not only conceivable, but in

Encyclopedia of Public International Law, available under: <www.mpepil.com/> (last accessed 25 June 2019).

- 31 Concerning the treaty-making power of stabilized de facto regimes under international law see for example *Frowein*, De Facto Regime, paras. 3 and 8, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); *Verdross/Simma*, Universelles Völkerrecht, § 406; *Heuser*, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 49 (1989), 335 (338 *et seq.*); *Schoiswohl*, Status and (Human Rights) Obligations of Non-Recognized *De Facto* Regimes in International Law, 222 *et seq.*
- 32 On the international legal status of Taiwan and its treaty-making capacity see, e.g., *McGarry*, Chinese (Taiwan) Yearbook of International Law and Affairs 35 (2017), 99 (101 *et seq.*); *Ahl*, Taiwan, paras. 17 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (accessed on 25 June 2019); specifically with regard to the area of transboundary economic treaty relations see also for example *Lee*, European Yearbook of International Economic Law 8 (2017), 513 *et seq.*
- 33 Generally on the obligation of non-recognition under public international law see for example International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ-Reports 1971, 16 (54 *et seq.*); International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ-Reports 2004, 136 (200); International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ-Reports 2010, 403 (437 *et seq.*); *Crawford*, Brownlie's Principles of Public International Law, 145 *et seq.*; *Talmon*, in: Tomuschat/Thouvenin (eds.), The Fundamental Rules of the International Legal Order, 99 *et seq.*; *Frowein*, Non-Recognition, paras. 3 *et seq.*, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (last accessed 25 June 2019); *Orakhelashvili*, Akehurst's Modern Introduction to International Law, 100; *Shaw*, International Law, 347 *et seq.*
- 34 See thereto already briefly *supra* under A.
- 35 See Article 2 (1) lit. b of the Vienna Convention on Succession of States in respect of Treaties of 23 August 1978,

fact even considered to be the general rule in accordance with Article 34 (1) lit. a of the 1978 Vienna Convention on Succession of States in respect of Treaties in situations of secessions. Nevertheless, there seem to be at least two reasons to assume that caution is warranted in this regard in the case of Pridnestrovie, in particular in the relevant context of BITs. First, specifically concerning the possible succession of this territorial entity to prior BITs concluded by Moldova, it should be recalled that the first Moldovan BIT, namely the one concluded with the United States, actually only entered into force in November 1994. Consequently, it is only under the assumption that Pridnestrovie acquired statehood at a comparatively late stage of its emergence and existence as an autonomous territorial entity, such as on the occasion of the second independence referendum of September 2006, that the issue of state succession with regard to Moldovan BITs could at all be of potential practical relevance.

Second, and even more notable since applying equally to Moldovan BITs as well as those entered into by the former Soviet Union, a broad consensus exists among international legal scholars in light of relevant state practice that the general rule of automatic state succession with regard to multilateral and bilateral agreements as enshrined in Article 34 of the 1978 Vienna Convention on Succession of States in respect of Treaties currently does not reflect customary international law³⁶ and is even occasionally considered to be one of the reasons for the comparatively low number of ratifications of this normative ordering treaty.³⁷ To the contrary, it appears increasingly – and rightly – recognized in the admittedly only more recently intensified discussion³⁸ on the relationship between the general rules of public international law governing state succession and the international legal regime on the protection of foreign investments, that – in the absence of an at least tacit agreement to the contrary of all contracting parties concerned – new states are not automatically bound by BITs entered into by the predecessor state.³⁹ Consequently, under this first scenario a possible state succession with regard to treaties would also in the case of Pridnestrovie apply neither to Moldovan BITs nor to those investment treaties concluded by the former Soviet Union.

reprinted in: 1946 U.N.T.S. 3. See also, e.g., *Crawford*, *Brownlie's Principles of Public International Law*, 409; *Orakhelashvili*, *Akehurst's Modern Introduction to International Law*, 299.

- 36 On this perception see, e.g., *Crawford*, *Brownlie's Principles of Public International Law*, 423 *et seq.*; *Aust*, *Modern Treaty Law and Practice*, 321 *et seq.*; *von Arnould*, *Völkerrecht*, 46; *Klabbers*, *Leiden Journal of International Law* 11 (1998), 345 (348 *et seq.*); *Orakhelashvili*, *Akehurst's Modern Introduction to International Law*, 310-311; *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (326 and 334); *Dumberry*, *Leiden Journal of International Law* 28 (2015), 13 *et seq.*, each with further references.
- 37 On this perception see, e.g., *Vagts*, *Virginia Journal of International Law* 33 (1993), 275 (287-288); *O'Connell*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 39 (1979), 725 (733); *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (326).
- 38 Concerning the finding that this issue has only more recently started to attract scholarly attention, see for example *Dumberry*, *Arbitration International* 34 (2018), 445; *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (315).
- 39 See thereto, e.g., *European American Investment Bank AG (Austria) v. Slovak Republic*, UNCITRAL Arbitration, Award on Jurisdiction of 22 October 2012, paras. 79-81; *Dumberry*, *Journal of International Dispute Settlement* 6 (2015), 74 *et seq.*; *Dumberry*, *A Guide to State Succession in International Investment Law*, 33 *et seq.*; *Dumberry*, *Arbitration International* 34 (2018), 445 (461); see, however, for a more cautious assessment in this regard also *Tams*, *ICSID Review – Foreign Investment Law Journal* 31 (2016), 314 (334 *et seq.*).

The second scenario, obviously reflecting the currently still dominant perception of Pridnestrovie and its legal status in the international system,⁴⁰ presupposes that this territorial entity also as of today continues to form a part of Moldova. Already in light of the presumption stipulated in Article 29 of the 1969 Vienna Convention on the Law of Treaties as well as corresponding customary international law⁴¹ stating that a treaty is binding upon each contracting party in respect of its entire territory, it is under this second scenario in principle beyond any reasonable doubt that Moldovan BITs also apply to the territory of Pridnestrovie. This finding seems particularly true since Moldova – in notable contrast to its approach towards other treaties like the Convention on Cybercrime,⁴² the Convention on Information and Legal Cooperation concerning “Information Society Services”,⁴³ the International Convention for the Suppression of Acts of Nuclear Terrorism,⁴⁴ the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),⁴⁵ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)⁴⁶ – has in the present context of its BITs apparently not made any declarations intending to limit the territorial scope of application of the respective agreements.

- 40 See for example UN GA Res. 72/282, Complete and Unconditional Withdrawal of Foreign Military Forces from the Territory of the Republic of Moldova, UN Doc. A/RES/72/282 of 26 June 2018; European Court of Human Rights, *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, para. 34; see thereto also, e.g., *Borgen*, German Yearbook of International Law 59 (2016), 115 *et seq.*; *Bowring*, in: Walter/Ungern-Sternberg/Abushov (eds.), *Self-Determination and Secession in International Law*, 157 *et seq.*
- 41 Vienna Convention on the Law of Treaties of 23 May 1969, reprinted in: 1155 U.N.T.S. 331. On the status of Article 29 of this agreement as also reflecting customary international law see, e.g., *Sanum Investments Ltd. v. The Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction of 13 December 2013, para. 220; *von der Decken*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, Article 29 VCLT*, para. 3; *Happ/Wuschka*, *Journal of International Arbitration* 33 (2016), 245 (256); *Kennedy*, *International and Comparative Law Quarterly* 65 (2016), 741 (747).
- 42 See Declaration contained in a letter from the Ministry of Foreign Affairs and European Integration of Moldova and in the instrument of ratification deposited on 12 May 2009, available under: <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/declarations?p_auth=qAYdMSkb&_coconventions_WAR_coeconventionsportlet_enVigueur=false&_coconventions_WAR_coeconventionsportlet_searchBy=state&_coconventions_WAR_coeconventionsportlet_codePays=MOL&_coconventions_WAR_coeconventionsportlet_codeNature=4> (last accessed 25 June 2019) (“In accordance with Article 38, paragraph 1 of the Convention, the Republic of Moldova specifies that the provisions of the Convention will be applied only on the territory controlled effectively by the authorities of the Republic of Moldova.”).
- 43 See Declaration contained in the instrument of ratification deposited on 19 March 2010, available under: <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/180/declarations?p_auth=qAYdMSkb> (last accessed 25 June 2019) (“According to Article 11 of the Convention, the Republic of Moldova declares that, until the full re-establishment of its territorial integrity, the provisions of the Convention will be applied only on the territory controlled effectively by the authorities of the Republic of Moldova.”).
- 44 See the Declaration made on the Occasion of the Ratification on 18 April 2008, available under: <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&clang=_en> (last accessed 25 June 2019) (“Until the full re-establishment of the territorial integrity of the Republic of Moldova, the provisions of the Convention will be applied only on the territory controlled effectively by the authorities of the Republic of Moldova.”).
- 45 See the Notification on Exclusion of Territories in accordance with Article 70 ICSID Convention made by Moldova on the occasion of depositing its instrument of ratification on 5 May 2011, available under: <<https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST92>> (last accessed 25 June 2019) (“Following Article 70 of the Convention, the Republic of Moldova specifies that the provisions of the Convention shall be applied only on the territory effectively controlled by the authorities of the Republic of Moldova.”).
- 46 See the relevant part of the Declaration contained in the instrument of ratification deposited on 12 September 1997: “The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally definitively resolved.” Thereto as well as on the (very limited) legal relevance of this declaration see in particular European Court of Human Rights, *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Decision on Admissibility of 4 July 2001, p. 11 and 19 *et seq.*; *Schabas*, *The European Convention on Human Rights, Article 57 ECHR*, p. 938.

Despite this conclusion, however, there appear to exist again at least two arguments in favor of assuming that this general applicability of Moldovan BITs is only of very limited practical relevance for foreign investors doing business in Pridnestrovia. First, a valid and convincing argument can be made that any acts adopted by Pridnestrovian public authorities that allegedly violate protection standards benefiting foreign investors under Moldovan BITs are not attributable to Moldova and thus cannot give rise to a successful claim for compensation in investment arbitration proceedings initiated by foreign investors against this country under one of its BITs. This finding is based on the international legal regime on state responsibility as in principle also applicable to investment treaty relations,⁴⁷ in particular the rules concerning the (non-)attribution of conduct of insurrectional and secessionist movements to the state at issue as for example at least implicitly enshrined in Article 10 of the 2001 Articles on State Responsibility developed by the International Law Commission (ILC) and also reflecting customary international law.⁴⁸

Second, attention might be drawn and recourse taken to the concept of estoppel in the present context. It is submitted that a sound argument can be made that a foreign investor who has previously, knowingly and intentionally, established close (contractual) contacts with Pridnestrovian public authorities against the presumed or even explicit will of the Moldovan government is prevented from subsequently invoking the protection granted under Moldovan BITs and from initiating dispute settlement proceedings against Moldova. Estoppel constitutes a well-recognized general principle of law in the sense of Article 38 (1) lit. c Statute of the International Court of Justice.⁴⁹ Against this background, the applicability of this concept in the modern context of treaty-based investor-state arbitration is in principle beyond reasonable doubt,⁵⁰ already when taking into account that also this legal regime “cannot be read and interpreted in isolation from public international law and its general principles”.⁵¹

Finally, also under this second scenario, the question again arises as to the potential relevance of BITs concluded by third countries to foreign investors in Pridnestrovia. This applies in particular to Russian BITs. Since its 2004 judgment in the case of *Ilascu and others v. Moldova and Russia*, it is well-known that the European Court of Human Rights has consistently held that, first and factually, Pridnestrovia’s “high level of dependency on Russian support provided a strong indication that the Russian Federation continued to exercise effective control and a decisive influence over the Transdniestrian authorities”⁵² as well as that, second and normatively, in light of these findings, and since the ECHR can also apply extraterritorially in cases where a contracting party exercises effective control over an area outside its national

47 On this finding, in particular concerning the rules on attribution at issue in the present context, see, e.g., *Crawford*, ICSID Review – Foreign Investment Law Journal 25 (2010), 127 (132 *et seq.*); *Paparinskis*, European Journal of International Law 24 (2013), 617 (627 *et seq.*); *Hepburn*, American Journal of International Law 112 (2018), 658 (679).

48 See Draft Articles on Responsibility of States for International Wrongful Acts, with Commentaries, in: Yearbook of the International Law Commission 2001, Vol. II, Part Two, 50 *et seq.*, with additional references.

49 Generally on the concept of estoppel in public international law see for example International Court of Justice, *Case Concerning the Temple of Preah Vihear* (Cambodia v. Thailand), ICJ-Reports 1962, 6 (32 *et seq.*); *Cheng*, General Principles of Law as Applied by International Courts and Tribunals, 143 *et seq.*; *Crawford*, Brownlie’s Principles of Public International Law, 406 *et seq.*

50 See also, e.g., *Sipiorski*, Good Faith in International Investment Arbitration, 197; *Nowrot/Sipiorski*, The Law and Practice of International Courts and Tribunals 17 (2018), 178 (191-192); *Kulick*, European Journal of International Law 27 (2016), 107 (112 *et seq.*).

51 *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78; see also, e.g., *Urbaser S.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1200.

52 European Court of Human Rights, *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, para. 36; see also already in particular *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004, paras. 28 *et seq.*, 311 *et seq.*, 376 *et seq.*

territory,⁵³ applicants alleging a violation of one of their rights and freedoms under this human rights treaty taking place in Pridnestrovie are within the jurisdiction of Russia in the sense of Article 1 ECHR.⁵⁴ However, this jurisprudence initially only allows for the conclusion that foreign investors in Pridnestrovie benefit from international legal protection under the ECHR, including the right to property under Article 1 of Protocol No. 1 to the ECHR,⁵⁵ and are in this regard with certain chances of success entitled to initiate proceedings in Strasbourg against Moldova and in particular also Russia.

Despite cautious pleas to the contrary,⁵⁶ it seems – already in light of a literal interpretation of the relevant provisions – at least doubtful whether this line of reasoning could also be taken recourse to in order to establish an extraterritorial scope of application of investment treaties. Whereas the respective jurisprudence of the European Court of Human Rights is based on a broad reading of the phrase “within their jurisdiction” under Article 1 ECHR, at least most, if not all, BITs – including investment treaties signed by Russia⁵⁷ – as well as the already above-mentioned Article 29 of the 1969 Vienna Convention on the Law of Treaties employ the different and arguably considerably narrower term “territory”,⁵⁸ thus requiring a territorial nexus between the investment and the territory of the respondent host state⁵⁹ and consequently

- 53 Generally thereto *Schabas*, The European Convention on Human Rights, Article 1 ECHR, p. 100 *et seq.*, with further references.
- 54 European Court of Human Rights, *Case of Ilascu and others v. Moldova and Russia*, Application No. 48787/99, Judgment of 8 July 2004, paras. 311 *et seq.*, 376 *et seq.*; as well as subsequently for example *Case of Ivantoc and others v. Moldova and Russia*, Application No. 23687/05, Judgment of 15 November 2011, paras. 116 *et seq.*; *Case of Catan and others v. Moldova and Russia*, Application Nos. 43370/04, 8252/05, and 18454/06, Judgment of 19 October 2012, paras. 103 *et seq.*; *Case of Mozer v. Moldova and Russia*, Application No. 11138/10, Judgment of 23 February 2016, paras. 96 *et seq.*; *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, paras. 36 *et seq.*
- 55 See thereto for example more recently European Court of Human Rights, *Case of Sandu and others v. Moldova and Russia*, Application Nos. 21034/05 and seven others, Judgment of 17 July 2018, paras. 63 *et seq.* Generally on this issue see also, e.g., *Ruffert*, German Yearbook of International Law 43 (2000), 116 *et seq.*
- 56 See, especially in the context of Crimea, the argumentation by *Happ/Wuschka*, Journal of International Arbitration 33 (2016), 245 *et seq.*
- 57 See for example the BIT between Russia and Sweden of 19 April 1995, available under: <<https://investmentpolicyhub.unctad.org/IIA/country/175/treaty/2852>> (last accessed 25 June 2019), in particular the definition of “territory” provided for in its Article 1 (4): “The term ‘territory’ shall mean the territory of the Kingdom of Sweden or the territory of the Russian Federation, as well as those maritime areas, such as an exclusive economic zone and a continental shelf, adjacent to the outer limit of that territorial sea of the respective State, over which it exercises, in accordance with international law, sovereign rights and jurisdiction for the purposes of exploration, exploitation and conservation of natural resources.” For a quite similar approach see also, e.g., Article 1 (5) of the Russia-Singapore BIT of 27 September 2010, available under: <<https://investmentpolicyhub.unctad.org/IIA/country/175/treaty/2847>> (last accessed 25 June 2019).
- 58 On this perception, specifically with regard to Article 29 of the 1969 Vienna Convention on the Law of Treaties, see also already for example *Costelloe*, International and Comparative Law Quarterly 65 (2016), 343 (347) (“Indeed, the commentary to what became Article 29 strongly suggests that extraterritorial application falls outside the scope of this provision. Similarly, where a bilateral or multilateral treaty contains a clause specifying its applicability with respect to the ‘territory’ of one of the contracting states, the use of this term again appears to assume, in line with accepted principles of interpretation under the VCLT and general international law, that the reference is to territory to which the State can claim legal title.); *id.*, 358 (“Neither Article 29 nor its commentary mentions territory over which a State exercises *de facto* authority, yet which is not legally part of that State’s territory. However, the use of the term ‘territory of each party’ in Article 29 seems to reflect the understanding that only territory which is *de jure* part of a State is included. The same holds true for the term ‘territory of another State’ in Article 15 VCST. Here, too, the obvious implication is that the provision applies only to *de jure* territory. These unqualified provisions simply do not address a situation of extra-territorial application, though they do not exclude such a possibility. It would be straining the text to an impermissible extent to read into these provision an exception to the otherwise only *de jure* character of ‘territory’, since that term cannot by itself sustain a reading that includes annexed territory and, in fact, that is not what these provisions were designed for.”) (emphases in the original); *Dumberry*, Journal of International Dispute Settlement 9 (2018), 506 (515); *Karagiannis*, in: Hollis (ed.), The Oxford Guide to Treaties, 305 (318 *et seq.*); *von der Decken*, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, Article 29 VCLT, paras. 34 *et seq.*
- 59 Generally on this issue see, e.g., *Knahr*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 590 *et seq.*, with further references.

excluding the possibility of an extraterritorial applicability of respective BITs based on considerations of an alleged effective control over an area outside of the contracting party's national territory. In the context here at issue – and in particular unlike the circumstances underlying the current discussions on the situation in Crimea and its implications for the realm of international investment treaties⁶⁰ – the authors are not aware of anybody claiming that Pridnestrovie is at present a part of the Russian Federation, thus excluding the applicability of Russian BITs. In sum, there appear to be at present no investment treaties that could be of practical relevance for, and in particular grant effective international protection to, foreign investors and their respective activities in Pridnestrovie.

D. The 2018 Pridnestrovian Law on State Support of Investment Activities: Identifying and Assessing Some Notable Regulatory Features

The lack of pertinent BITs or other investment treaties⁶¹ as well as the rather meager normative layer of relevant customary international law in particular in the form of the vague and disputed international minimum standard⁶² that arguably applies to and obliges also territorial entities beyond the state, both serve as clear indications for the practical relevance of other sources of law for foreign investors in Pridnestrovie. Among them are contractual arrangements concluded between respective public authorities and investors as well as the domestic legal system of the host state or, for that matter perhaps more accurately, the host entity. While specific aspects of foreign investment projects are most certainly subject to various national laws and regulations, Pridnestrovie has – in the same way as the majority of countries and other economies in the world⁶³ – more recently adopted a domestic investment statute that now provides a central legal regime for undertaking and operating investments in this territorial entity and, already in light of this qualification, thus deserves taking a closer look at.

In order to provide a systematic overview and evaluation of the notable regulatory features characterizing the Law of the Pridnestrovian Moldavian Republic on State Support for Investment Activities, which entered into force on 1 June 2018, it is useful to recall that these host country's legislative acts are often said to pursue two overarching purposes: to encourage and to control foreign investments.⁶⁴ While this perception is most certainly not entirely incorrect, we submit that one can also, more specifically and thus more accurately, distinguish between six main functions exercised by domestic investments statutes like the respective Pridnestrovian

60 On this discussion see for example *Happ/Wuschka*, *Journal of International Arbitration* 33 (2016), 245 *et seq.*; *Dumberry*, *Journal of International Dispute Settlement* 9 (2018), 506 *et seq.*, with additional references.

61 See thereto *supra* under C.

62 Generally on this standard and its possible normative elements see, e.g., *Dumberry*, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, 61 *et seq.*, 96 *et seq.*, with numerous further references.

63 See for example UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 2 (“UNCTAD research finds that at least 108 countries have an investment law.”). See in this connection also the regularly updated UNCTAD database on domestic investment laws under: <<https://investmentpolicyhub.unctad.org/InvestmentLaws>> (last accessed 25 June 2019).

64 See for example *Salacuse*, *The Three Laws of International Investment*, 90; UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 2; *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 44; *Burgstaller/Waibel*, *Investment Codes*, para. 2, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, available under: <www.mpepil.com/> (last accessed 25 June 2019).

legal regime of 2018, namely to define the relevant economic actors and business transactions (I.), to provide a public law-based normative steering framework for investments (II.), to establish the institutions and procedures for administering investments (III.), to provide for means aimed at promoting and facilitating investments (IV.), to ensure legal protection for investors and their investments (V.), as well as to foresee venues and procedures for the settlement of investment disputes (VI.).

I. Definition of Covered Investments and Investors

Supporting the view that national investment laws and international investment treaties not infrequently contain quite similar provisions,⁶⁵ the overwhelming majority of the respective domestic statutes – in the same way as, among others, BITs – include stipulations defining or at least further specifying the relevant types of business transactions as well as the economic actors concerned.⁶⁶ This also applies to the 2018 Pridnestrovian investment statute. Thereby, the definition of “investment” stipulated in Article 2 (1) lit. a and lit. b of this statute, focusing on the establishment of a new business entity under Pridnestrovian law or the acquisition of long-term interests in an existing enterprise, follows the – compared to a broad asset-based approach – more limited enterprise-based approach. This approach characterizes roughly one-third of all currently existing domestic investment laws⁶⁷ as well as in the realm of international investment treaties or models thereof, among others, Article 1611 of the former 1988 Canada-United States Free Trade Agreement⁶⁸ and Article 1 (4) of the 2015 Indian Model BIT⁶⁹. Article 1 (2) lit. a and lit. b further limits the material scope of application by excluding certain types of investments, among them those in non-profit organizations as well as respective business transactions for educational, charitable, scientific or religious purposes.⁷⁰ To the contrary, Article 2 (1) states in its last sentence that investments can be domestic and foreign; thus indicating that the 2018 Pridnestrovian investment statute belongs to the majority of related domestic legal regimes⁷¹ that do not address foreign investors only, but apply to both foreign and domestic

65 On this perception see, e.g., UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 2.

66 See thereto *Hepburn*, *American Journal of International Law* 112 (2018), 658; *Potestà*, *Arbitration International* 27 (2011), 149 (150); UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 4.

67 UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 4; generally on the approach of an enterprise-based definition of investments see also, e.g., UNCTAD, *Key Terms and Concept in IIAs: A Glossary*, 2004, 96 *et seq.*; UNCTAD, *International Investment Agreements: Key Issues*, Vol. I, 2004, 195. On the various issues related to the notion of investment in international investment law see generally for example *Bischoff/Happ*, in: *Bungenberg/Griebel/Hobe/Reinisch* (eds.), *International Investment Law*, 495 *et seq.*; *Lim/Ho/Paparinis*, *International Investment Law and Arbitration*, 210 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 60 *et seq.*; *Schefer*, *International Investment Law*, 69 *et seq.*

68 Canada-United States Free Trade Agreement of 2 January 1988, available under: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/united_states-etats_unis/fta-ale/background-contexte.aspx?lang=eng> (last accessed 25 June 2019).

69 See India’s Model Bilateral Investment Treaty of 28 December 2015, available under: <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>> (last accessed 25 June 2019); see thereto also, e.g., *Ranjan/Singh/James/Singh*, *India’s Model Bilateral Investment Treaty: Is India Too Risk Averse?*, 17 *et seq.*; *Hanessian/Duggal*, *ICSID Review – Foreign Investment Law Journal* 32 (2017), 216 (217-218).

70 Generally on the underlying issue see, e.g., *Konrad*, in: *Bungenberg/Griebel/Hobe/Reinisch* (eds.), *International Investment Law*, 555 *et seq.*

71 See thereto UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 2.

investors. The notion of “investor” itself is further specified for the purposes of the 2018 Pridnestrovian investment statute in its Article 2 (2), adopting the quite common broad regulatory approach of including both natural persons as well as juridical persons.⁷²

II. Public Law-Based Normative Steering Framework for Investments

Unlike at least most traditional BITs and other international investment agreements, national investment laws do not focus exclusively or even primarily on investment protection. Rather, adopting a much broader regulatory approach,⁷³ one of their central functions is the establishment of what might appropriately be referred to as an overarching public law-based normative steering framework for undertaking and operating this type of business transactions that is also aimed at controlling and channeling investment projects in, as well as for the benefit of, the country or other territorial entity at issue.⁷⁴ In this regard, there seem to be at least four regulatory aspects worth highlighting in the present context of the 2018 Law of the Pridnestrovian Moldavian Republic on State Support for Investment Activities.

First, similar to most domestic investment statutes,⁷⁵ Article 3 (2) and (3) stipulates certain sector-specific entry restrictions for organizations with foreign investments, a term that is defined in Article 2 (3) as a commercial entity in which a foreign investor owns at least 30 percent of the capital. Adopting a kind of “negative list” approach, Article 3 (2) prohibits respective organizations with foreign investments from carrying out certain activities explicitly deemed to be of strategic importance for the national defense and security. This includes the development, manufacturing, sales, storage and transportation of weapons and ammunition (lit. a), the production and sale of narcotic drugs and other substances that are hazardous to health (lit. b), the importation, manufacturing, planting and sale of substances and crops containing narcotic, toxic and psychotropic substances (lit. c) as well as the treatment of patients and animals suffering from dangerous diseases (lit. d)⁷⁶. Viewed from a global comparative perspective, this list is especially remarkable for its brevity. In other words, the number of prohibited sectors and business activities seems to be quite limited and furthermore does not apply to foreign investments below the threshold of 30 percent of the capital, thus indicating a quite liberal approach with regard to the entry and establishment of foreign investments in Pridnestrovia.

Nevertheless, the following Article 3 (3) foresees, again in the interest of national defense and security, a second layer of restrictions applying to those organizations with foreign investments in which foreign nationals or foreign legal persons own 50 percent or more of the shares. These economic entities are, in addition to restrictions provided for in Article 3 (2), also prevented from business activities such as the operation of gas and oil pipelines, power lines (except for telecommunication lines), heat supply networks and water supply (lit. b),

72 Generally on the scope of application *ratione personae* of investment instruments see, e.g., *Schefer*, International Investment Law, 135 *et seq.*; *Reed/Davis*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 614 *et seq.*; *Dolzer/Schreuer*, Principles of International Investment Law, 44 *et seq.*

73 On this finding see also already for example *Bonnitcha*, Investment Laws of ASEAN Countries: A Comparative Review, 4.

74 Generally on this finding see also, e.g., *Salacuse*, The Three Laws of International Investment, 89 *et seq.*; *Hepburn*, American Journal of International Law 112 (2018), 658 (662-663).

75 UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 5; *Salacuse*, The Three Laws of International Investment, 92 *et seq.*

76 Article 3 (2) lit. d furthermore specifies that the diseases at issue are determined according to a list established and issued by the government of Pridnestrovia.

the organization and conducting of gambling and betting (lit. c), the preparation of radio and television programs as well as publishing activities (lit. d), and the operation of public transportation networks (lit. e). However, the final sentence of Article 3 (3) stipulates two notable exceptions to this rule, stating that these restrictions do not apply to, first, business entities whose shares have been acquired by foreign investors in the course of a privatization of state-owned property or, second, to corporations whose shares are owned by individuals that are residents of, and legal persons that are duly incorporated in, the Russian Federation.

It is in particular this last-mentioned stipulation granting preferential treatment to residents and juridical persons of a single country on a unilateral basis outside the context of regional economic integration regimes that seems to be, at a minimum, a very rare if not unique provision in the global context of domestic investment statutes and appears to be, already against this background and at least at first sight, quite remarkable. Thereby, it should be recalled that, viewed from a legal perspective, such a regulatory approach is not objectionable since most-favored-nation (MFN) treatment⁷⁷ is neither included as a protection standard for foreign investors in the 2018 Pridnestrovian investment statute, nor a rule of general customary international law⁷⁸ that would arguably also bind Pridnestrovie. Nevertheless, and seen from a political perspective, this stipulation surely serves as a clear reminder that we are dealing here in the case of Pridnestrovie with a frozen conflict situation generally characterized by not infrequently involving the existence of a so-called patron state⁷⁹ and that this context also needs to be taken into account when assessing the regulatory content of individual legislative acts adopted by actors involved in this frozen conflict.

Second, exercising governmental control over investment activities that credibly takes into account also important aspects like the interests on the side of investors in legal certainty as well as foreseeability and proportionality of governmental conduct and thus ultimately observance of central elements of the rule of law requires, among others, a transparent stipulation of the supervisory competences bestowed upon public agencies in this regard as well as of the applicable sanctions regime in cases of non-compliance with statutory or contractual obligations on the side of investors. As far as the 2018 Pridnestrovian investment statute is concerned, respective legislative determinations are for example enshrined in Article 21, providing for a quite detailed account of the Authorized Investment Agency's powers to monitor the compliance of investors with the terms and conditions of the respective investment agreements concluded between the investor and respective public authorities in the sense of Article 2 (10) of the statute. Furthermore, to mention but two additional examples, Article 22 stipulates the prerequisites for a mutually agreed, and in particular also for a unilateral, early termination of these investment agreements prior to the expiration date, whereas Article 23, complementing this provision, includes a listing of the legal consequences arising from a respective termination of an investment agreement.

The third aspect of the present public law-based normative steering framework briefly worth drawing attention to concerns the stipulation of investors' obligations; a regulatory approach that has *de lege lata* until now not gained widespread recognition in the realm of investment treaty practice.⁸⁰ Yet, it is increasingly recognized at the level of domestic invest-

77 Generally on this protection standards in the context of international investment law see for example *Reinisch*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), *International Investment Law*, 807 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 206 *et seq.*; *Suleimenova*, *MFN Standard as Substantive Treatment*, 63 *et seq.*, each with further references.

78 On the last-mentioned finding see, e.g., *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, § 1, para. 93; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 234 *et seq.*

79 See thereto already *supra* under A.

80 Generally thereto, e.g., more recently *Nowrot*, *The Other Side of Rights in the Processes of Constitutionalizing*

ment statutes.⁸¹ This trend is further confirmed by the 2018 Pridnestrovian investment law that explicitly enshrines in its Article 4 (2) respective obligations of investors. That said, this provision confines itself to stipulating the most commonly stated obligation of these economic actors to comply with the existing legislation of Pridnestrovie (lit. a) as well as to fulfill the obligations of the respective contractual agreement with the Pridnestrovian government (lit. b). It is thus abstaining from legislating more specific, and potentially more far-reaching, (corporate social responsibility) obligations of these business actors to 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 social standards, consumer interests as well as the environment.⁸²

Fourth and finally, the channeling function of national investment legislation often finds its manifestation in affirmative specifications of those economic sectors and activities in which the undertaking of investments is particularly welcomed by the country or other territorial entity at issue.⁸³ And indeed, respective normative guidance for potential investors is also provided in the present context by the distinction between so-called “priority investment projects” and other investment activities that forms one of the central steering elements of the 2018 Pridnestrovian investment statute. Article 2 (2) defines a priority investment project for the purposes of this legislation in rather abstract terms as measures involving an investment in the creation of a new production facility in Pridnestrovie. More specifically and with regard to the type of priority activities covered by this category, Article 14 (2) states from an export-oriented perspective that all activities of Pridnestrovian legal entities whose share of exports in the course of a priority investment project accounts for a minimum of 90 percent of the total sales revenue qualify as priority activities. In addition, Article 14 (3) stipulates that – regardless of the share of exports – all activities in the industrial sectors and the agroindustry shall, with certain exceptions as laid down in this provision as well as in the subsequent paragraph 4, qualify as a priority activity for the purposes of a priority investment project. As we shall see in subsequent sections, this distinction between priority investment projects and other (non-prioritized) investment undertakings can very well be considered as one of the defining elements, if not even *the* defining element, of the 2018 Pridnestrovian investment statute’s overall regulatory structure.

III. Institutions and Procedures for the Administration of Investments

Already in light of the fact that the effective implementation of a normative steering regime aimed at promoting and regulating investment activities usually necessitates some form of institutional and procedural administrative framework, it is hardly surprising that the 2018

International Investment Law: Addressing Investors’ Obligations as a New Regulatory Experiment, 5 *et seq.*, with numerous further references.

81 See for example UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 8; Nowrot, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1154 (1170 *et seq.*).

82 For a critical view on this reluctant regulatory attitude see generally for example UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 11 (“While the above findings can only provide a first overview, a preliminary conclusion is that most investment laws seem to lag behind in the latest developments in investment policymaking. Most of them give relatively little attention to sustainable development, do not contain many investor obligations, and remain silent as regards corporate social responsibility.”).

83 See thereto *Salacuse*, The Three Laws of International Investment, 95-96.

Pridnestrovian investment law – like many other domestic investment statutes⁸⁴ – also includes provisions establishing public agencies and other bodies as well as specific procedures for the administration of investments. From an institutional perspective, the two main governmental agencies created in order to fulfill these administrative tasks are the Investment Board and the Authorized Investment Agency.

In accordance with Article 2 (11), the Investment Board presents itself as a collective body established by the Pridnestrovian government in order to coordinate the activities related to the undertaking and operation of investments in this territorial entity. Subsequently, Article 20 (2) provides further details on the composition of this committee. Chaired by the Deputy Chairman of the Pridnestrovian government, it comprises of six additional members, among them two other representatives of the Government, three representatives of the Supreme Council (the parliamentary assembly) as well as one representative of the Central Bank. The specific functions and competences of the Investment Board in the processes of public investment administration are not codified in a single provision. Rather, they can be derived from various different stipulations in the 2018 investment statute. Its responsibilities include, for example, involvement in the examination of and decisions regarding applications for investment incentives under Article 12 (4), Article 18 (2) and (3), the decision on whether to apply the guarantee of legislation stability as foreseen in Article 16 (5), a participation in the processes prior to the signing of contractual agreements with investors in accordance with Article 20 as well as a central role in decisions on the early termination of respective investment agreements under Article 22 (5) and (6).

The second governmental agency referred to in the 2018 Pridnestrovian investment law is the Authorized Investment Agency as designated by the government under Article 2 (12) and being entitled to involve specialists from other governmental bodies as well as external advisors and experts in accordance with Article 2 (12) as well as Article 10 (1). As indicated by Article 20 (2), the Investment Agency is envisioned to assist the Investment Board in its work by, among others, gathering and preparing the information and documents for the meetings of the later body. In addition, albeit to a certain extent related to these support functions, the tasks entrusted to the Investment Agency concern in particular the direct interactions with, and assistance for, prospective and established investors in Pridnestrovia. In this regard, this agency serves as the addressee of investors' applications for investment incentives under Article 12 (1) and (4) as well as of applications for the guarantee of legislation stability in the sense of Article 16 (4), is involved in the preparation of contractual investment agreements in accordance with Article 20 (4) and provides a considerable number of advice and support services for investors as further specified in form and content in Article 10 (2) to (5). Furthermore, other competences and responsibilities of the Authorized Investment Agency include the monitoring of compliance by investors with the terms and conditions agreed upon in investment contracts under Article 21 as well as an involvement in the processes potentially leading to an early termination of these investment agreements in accordance with Article 22 (4) and (5).

Viewed from a procedural perspective, it seems noteworthy – albeit far from unknown in the global realm of domestic investment statutes⁸⁵ – that the 2018 Pridnestrovian investment law does not contain a general procedure for the registration or other types of governmental involvement in the undertaking of investments. Moreover, in particular the stipulation enshrined

84 On this finding see also, e.g., UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 6; *Salacuse*, *The Three Laws of International Investment*, 106 *et seq.*

85 See UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 6.

in Article 3 (1), whereby investors have the right to invest in any object and type of entrepreneurial activities except as otherwise provided by this investment statute, seems to allow the conclusion that this legal regime in principle does not foresee a specific requirement for especially also foreign investors to register or seek approval from governmental authorities prior to undertaking a respective investment. Rather, the specific procedures for the administration of investments that are included in the 2018 Pridnestrovian investment law are predominantly concerned with priority investment projects,⁸⁶ namely, aside from applications for the guarantee of legislation stability in the sense of Article 16 (4), in particular the application process for investment incentives in accordance with Article 12, the respective process leading to the signing of an investment contract between the investor and the Pridnestrovian government under Article 20 as well as the administrative procedure concerning an early termination of such an agreement in accordance with Article 22.

IV. Promotion and Facilitation of Investment

As already indicated by the full name, “Law of the Pridnestrovian Moldavian Republic on State Support for Investment Activities”, of the statute at issue and further confirmed by Article 1 (1), stating that this law establishes procedures for providing special state guarantees and incentives for investment activities, the promotion and facilitation of investments undoubtedly presents itself, contrary to the common regulatory approach of BITs and other investment treaties, as the central objective of this legal regime. It thereby primarily serves the purpose, emphasized in Article 9 (1), of increasing production capabilities in Pridnestrovia by creating new manufacturing enterprises and jobs as well as by advancing the skills of the workforce. In light of this finding, it seems hardly surprising that also a clear majority of the provisions of the 2018 Pridnestrovian investment law address the issues of promoting and facilitating investments.⁸⁷

In line with the stipulation included in Article 9 (2), the individual measures foreseen in this regard can be broadly systemized by distinguishing between three different categories of regulatory approaches. The first type of provisions is intended to facilitate the undertaking and operationalization of investments by establishing procedures and arrangements conducive to enable special and simplified interactions between prospective and established investors on the one hand and state authorities on the other hand. Aside from, *inter alia*, the option, granted to certain types of investors under Article 19, to maintain accounting records and submit financial statements solely in accordance with common international financial reporting standards such as the United States Generally Accepted Accounting Principles (US-GAAP) or the International Financial Reporting Standards (IFRS standards) issued by the International Accounting Standards Board (IASB) of the IFRS Foundation,⁸⁸ the most obvious manifestation of this regulatory approach is the reference to a so-called “one-stop shop” in Article 10 (2) to (5) as

⁸⁶ See thereto already *supra* under D.II.

⁸⁷ On a possible distinction between regulatory measures aimed at promoting investments on the one hand and those facilitating investments on the other hand see UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 9. Generally on these purposes pursued by domestic investment statutes see also *Salacuse*, The Three Laws of International Investment, 99 *et seq.*

⁸⁸ Generally on the IASB see, e.g., *Rost*, in: Tietje/Brouder (eds.), Handbook of Transnational Economic Governance Regimes, 367 *et seq.*, with further references.

a single point of contact for investors who implement priority investment projects⁸⁹ to receive assistance from the Authorized Investment Agency.

The institutional and procedural concept of a “one-stop shop” is until now only rarely foreseen in domestic investment statutes,⁹⁰ but for example well-known in the context of the EU Services Directive.⁹¹ The incorporation of this institutional feature in the Pridnestrovian investment law, whose practical importance can hardly be over-emphasized, serves as a clear indication that this legal regime is guided by the idea of investment facilitation in a comprehensive sense to the obvious benefit of particularly foreign investors. This perception is further supported by the guarantee of government transparency in accordance with Article 7 (1) and (2), stipulating that the Pridnestrovian state authorities will make publicly available all laws and regulations affecting the interests of investors and shall provide in principle open access to additional information to these business actors upon their request. Such a legal assurance and procedure are surely quite common at least in countries governed by the rule of law. Nevertheless, they are until now only seldom to be found in domestic investment statutes.⁹²

The underlying aim of the second category of provisions being of relevance in the present context is the promotion and encouragement of investments on the basis of offering of fiscal, financial and other incentives to investors who implement priority investment projects. Article 11 foresees three types of investment incentives that prospective investors are entitled to apply for under the 2018 Pridnestrovian investment law. Among them is the possibility of grants-in-kind from the government to the investor under Article 15, a measure that might refer to, among others, the free use of land plots, buildings, machinery and vehicles in the sense of Article 15 (3). Furthermore, another investment incentive available for priority investment projects that include the establishment of new production facilities concerns fiscal benefits in the form of temporary exemptions from taxes and other charges like corporate income tax, land tax, and social tax, the details of which are laid down in Article 17. Finally, the investment statute also foresees the right of investors to apply for financial incentives in the form of direct investment subsidies granted on a free-of-charge and non-repayable basis in accordance with Article 18.

The third type of provisions envisioned under Article 9 (2) to serve the purpose of contributing to the promotion and facilitation of investments are characterized by the stipulation of legal guarantees for investment activities (lit. a). While the regulations that fall into this third category are undoubtedly first and foremost also legislated with the intention to encourage new investments, and whereas this underlying motive surely applies to both investment treaties and domestic investment statutes, the respective substantive and procedural investment protection standards are commonly – and in principle rightly – dealt with separately from the issues of investment promotion and facilitation. Following this general conceptual and analytical trend, the respective stipulations are also in the present context the subjects of the two subsequent sections.⁹³

89 See thereto already *supra* under D.II.

90 See the respective finding in UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 9.

91 See Article 6 of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, OJ EU L 376/36 of 27 December 2006.

92 See thereto UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 10.

93 See *infra* under D.V. and D.VI.

V. Legal Protection for Investors and their Investments

As for example already indicated by the fact that most of the currently more than 2,930 BITs⁹⁴ are titled “Treaty Concerning the Promotion and Protection of Investments” or in line with some variations thereof, international investment treaty law is traditionally – and also today – primarily concerned with the protection of foreign investors and their investments.⁹⁵ To the contrary, investment protection has never been the sole or at least dominant function of domestic investment statutes whose content overall tend to be inspired by considerably broader regulatory approaches.⁹⁶ That said, many national investment laws also contain – already in the interest of investment promotion⁹⁷ – certain provisions that are quite similar to the substantive protection standards enshrined in BITs and other investment treaties.⁹⁸

This finding also applies to the 2018 Pridnestrovian investment law. Admittedly, this legal regime – in the same way as most of the other currently existing investment statutes⁹⁹ – does not openly include guarantees of fair and equitable treatment,¹⁰⁰ of MFN treatment¹⁰¹ as well as of full protection and security¹⁰² to foreign investors as commonly found in international investment treaties. However, it explicitly foresees in particular the protection of investments in case of expropriation (Article 8) and legal guarantees in connection with the transfer of funds (Article 6). It thus adopts an approach that finds itself in principle again in conformity with the majority of domestic investment laws.¹⁰³

With regard to the guarantee of investors’ property rights, Article 8 distinguishes between expropriations as the result of a conversion of property owned by individuals and private legal persons into state property (nationalizations) on the one hand and requisition of private property on the other hand.¹⁰⁴ While both types, in order to be lawful, have to be provided for by law in accordance with Article 8 (1), the regulation on lawful nationalizations in Article 8 (2) is at least equally noteworthy for the requirements it does not mention in this regard as for those conditions that it explicitly stipulates. Contrary to what is probably now part of customary

94 UNCTAD, World Investment Report 2019, Special Economic Zones, 2019, 99.

95 On this perception see also for example *Salacuse*, The Law of Investment Treaties, 124 *et seq.*

96 See thereto already *supra* under D.II.

97 See *supra* under D.IV.

98 On this finding see also already *McLachlan/Shore/Weiniger*, International Investment Arbitration, 44; *Hepburn*, American Journal of International Law 112 (2018), 658.

99 UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 6 *et seq.*; *Bonnitcha*, Investment Laws of ASEAN Countries: A Comparative Review, 4; *Parra*, ICSID Review – Foreign Investment Law Journal 7 (1992), 428 (435).

100 Generally on this protection standard in international investment law see, e.g., *Bonnitcha*, Substantive Protection under Investment Treaties, 143 *et seq.*; *Dolzer/Schreuer*, Principles of International Investment Law, 130 *et seq.*; *Jacob/Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 700 *et seq.*

101 See thereto also already *supra* under D.II.

102 On the legal guarantee of full protection and security in international investment law see generally for example *Dolzer/Schreuer*, Principles of International Investment Law, 160 *et seq.*; *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, § 8, paras. 56 *et seq.*; *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 (96 *et seq.*); *Schefer*, International Investment Law, 360 *et seq.*

103 See UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 6 *et seq.*; *Parra*, ICSID Review – Foreign Investment Law Journal 7 (1992), 428 (437 *et seq.*); *Hepburn*, American Journal of International Law 112 (2018), 658; *Burgstaller/Waibel*, Investment Codes, para. 29, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (last accessed 25 June 2019).

104 It seems worth emphasizing that expropriation of land ownership, often an important issue also in the realm of international investment law, is of merely marginal relevance in the context of Pridnestrovie since, in accordance with Article 5 of the 1996 Pridnestrovian Constitution, all land is in the exclusive ownership of the state with citizens and foreign investors being entitled to land use only on a short-term or long-term lease basis.

international law,¹⁰⁵ Article 8 (2) does explicitly require neither that – unlike the stipulation in Article 8 (3) concerning requisitions – the state measure at issue serves a public purpose nor that it must not be discriminatory. Furthermore, although this provision foresees that investors shall be compensated for the losses incurred as a consequence of the expropriatory act and that the compensation shall be paid within a period of eighteen months, it is somewhat conspicuously silent on the other two elements of the (in-)famous “Hull formula”, namely the issues of adequate and effective compensation.¹⁰⁶ In this regard, the 2018 Pridnestrovian investment law appears to belong to the – in fact quite populous – class of domestic investment statutes that foresee some “flexibility” in the calculation of compensation.¹⁰⁷ In particular, a comparative reading of Article 8 (2) and the provision on requisition in Article 8 (3) might allow the conclusion that adequate compensation in cases of nationalizations under Article 8 (2) is not always envisioned to be equivalent to the market value of the expropriated investment.¹⁰⁸ This requirement is explicitly stipulated only with regard to the scenario of requisitions under Article 8 (3). Aside from this condition applicable to the valuation and calculation of compensation, Article 8 (3) furthermore requires that requisition of investors’ property shall only be permissible, first, in the event of natural disasters, accidents, epidemics, epizootics and other extreme circumstances, as well as, second, in the public interest, and, third, on the basis of a lawful decision taken by state authorities. Finally, it seems worth drawing attention to the fact that Article 8 of the 2018 Pridnestrovian investment law, in line with roughly 80 percent of the currently existing domestic investment statutes,¹⁰⁹ confines its scope of application to direct expropriations. The legislative act thus excludes indirect expropriations¹¹⁰ and thereby avoids, among others, the quite “thorny” issue well-known from the realm of investment treaties of articulating and specifying the difference between indirect expropriation and legitimate regulatory measures in furtherance of general welfare purposes.¹¹¹

The legal guarantees in connection with the transfer of funds under Article 6 address and take into account a fundamental concern for foreign investors when making an investment abroad.¹¹² In the same way as respective stipulations in most other domestic investment statutes, the provision starts out in Article 8 (1) lit. a with a general right of investors to transfer abroad proceeds resulting from their investments, followed by a non-exhaustive list of examples of legitimate, and thus covered, transactions and purposes. Nevertheless, the provision also reflects the recognized need to balance the at times diverging interests of host territories and

105 On this perception see, e.g., *Dolzer/Schreuer*, Principles of International Investment Law, 99-100; *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 (1018).

106 Generally on these requirements concerning compensation in cases of expropriation see for example *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, § 8, paras. 65 *et seq.*; *Sornarajah*, The International Law on Foreign Investment, 492 *et seq.*

107 See thereto UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 7.

108 Generally on this issue see for example *Marboe*, Calculation of Compensation and Damages, 43 *et seq.*; *Marboe*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 1057 *et seq.*, with further references.

109 UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 7.

110 On the distinction between direct and indirect expropriations see, e.g., *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 (970 *et seq.*); *Dolzer/Schreuer*, Principles of International Investment Law, 101 *et seq.*

111 See thereto for example *Bücheler*, Proportionality in Investor-State Arbitration, 125 *et seq.*; *Schefer*, International Investment Law, 234 *et seq.*; *Kriebaum*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 959 (971 *et seq.*); *Nowrot*, Journal of World Investment & Trade 15 (2014), 612 (628 *et seq.*).

112 On this perception see, e.g., *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 239; *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, § 8, para. 82; as well as for a more detailed assessment also *Kern*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 870 (871 *et seq.*).

investors by foreseeing certain limitations to the right to transfer of funds.¹¹³ Thereby, Article 6 (1) lit. a initially clarifies that respective transactions are only permitted once the investors have honored their tax obligations and other compulsory payments; an approach that finds itself in conformity with many other domestic investment statutes.¹¹⁴ However, contrary to many other investment treaties and national investment laws stipulating specific other limitations like cases where creditors' rights are at risk or cases of serious balance-of payments difficulties, Article 6 (1) lit. a furthermore subjects the right to transfer in a rather comprehensive way to the existing legislation of Pridnestrovie. Such a regulatory approach used to be particularly prominent for example in a number of BITs concluded by China in the 1980s and in principle allows a change in the host territory's laws at any time.¹¹⁵ Consequently, it grants to investors in essence only the comparatively modest protection against transfer restrictions that violate the host territory's laws and regulations.¹¹⁶

Unlike a considerable number of other domestic investment statutes as well as most international investment treaties, the 2018 Pridnestrovian investment law does not explicitly include a guarantee of national treatment for foreign investors.¹¹⁷ Nevertheless, such a general right of foreign investors, most certainly subject to exceptions and qualifications as stipulated in the statute itself, to be accorded a treatment no less favorable than that which is accorded by Pridnestrovian public authorities to investments of domestic investors might arguably be inferred from the stipulation enshrined in Article 4 (1), stating that (foreign and domestic) investors have equal rights. Even if one is not willing to follow this argumentation, it seems appropriate to recall that the mere fact that a certain right or legal guarantee is not included in an investment statute does not mean that a territorial entity does not offer it to foreign investors on the basis of its constitution or other legislative acts.¹¹⁸ This finding also applies to Pridnestrovie. In fact, Article 5 (1) states that all investors, domestic and foreign, are enjoying full and unconditional protection of their rights and interests as ensured by the Pridnestrovian Constitution, by other laws and regulation as well as – with a view to a possible future – by international treaties concluded and ratified by this territorial entity. This provision is also noteworthy for the fact that it stipulates in its paragraph 2 an entitlement for investors to compensation for damages caused by illegal actions or omissions of Pridnestrovian public authorities. It thus establishes – or hints at the existence of – a kind of Pridnestrovian “state liability law” to the benefit of domestic and foreign investors.

A final provision that also deserves attention in the present context of investment protection under the 2018 Pridnestrovian investment statute is the “stabilization clause” included in Article 16. Whereas Article 5 (3) merely guarantees to all investors the – at least in theory largely self-evident – stability of the content of investment agreements concluded between the investor and respective public authorities except for amendments by mutual consent, Article

113 Generally thereto *Kern*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), *International Investment Law*, 870 (872 and 878); *Dolzer/Schreuer*, *Principles of International Investment Law*, 212-213.

114 UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 8.

115 However, at least investors implementing priority investment projects are potentially protected against subsequent legislative changes on the basis of the guarantee of legislation stability under Article 16, at least as long as one does not consider Article 6 to be *lex specialis* as far as limitations on the transfer of funds are concerned.

116 See generally on this regulatory approach and its consequences UNCTAD, *International Investment Arrangements: Trends and Emerging Issues*, 2006, 39; *Kern*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), *International Investment Law*, 870 (878-879); *Dolzer/Schreuer*, *Principles of International Investment Law*, 214.

117 Generally on the protection standard of national treatment in international investment law see for example *Reinisch*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), *International Investment Law*, 846 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 198 *et seq.*; *Collins*, *International Investment Law*, 96 *et seq.*

118 See thereto already UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 6.

16 provides those investors who implement priority investment projects¹¹⁹ with the option to rely on a considerably more far-reaching stabilization clause. In general, this type of provisions is aimed at providing stability and predictability for investors, with the consequences of, among others, reducing their transaction costs, by largely exempting them for a certain and often quite long period of time from those subsequent legislative amendments in the host state that might negatively affect their business environment and their profit expectations.¹²⁰ Stabilization clauses were for many decades a quite common element of state contracts as well as of many domestic investment statutes. More recently, however, these provisions are increasingly critically perceived due to the constraints imposed by them on the regulatory autonomy of host states in furtherance of other public interest concerns.¹²¹

Viewed against this background, the regulatory approach enshrined in Article 16 provides for a quite balanced and politically as well as legally sound solution to the complex issue of stabilization clauses. On the one hand, it guarantees in its paragraph 1 the stability of the business environment for investors in the event of legislative changes in Pridnestrovie with the procedure for requests aimed at applying this guarantee in cases of a deterioration of the business environment being established and detailed in its paragraphs 4 and 5. Overall, these stipulations grant investors quite far-reaching legal protection. On the other hand, Article 16 (2) exempts certain legislative changes from the substantive scope of application of this stabilization clause, in particular as far as labor legislation, the regulation of minimum wages and salaries as well as laws on pricing is concerned. Based on this differentiated steering approach, the provision thus enables the host territory, in the present case Pridnestrovie, to exercise, without additional legal constraints, its regulatory competences in order to effectively promote and protect also other public interest concerns of its population.

VI. Settlement of Investment Disputes

No assessment of a normative steering instrument in the realm of investment law would be complete without at least a word – and usually much more than that – on its dispute settlement mechanisms or lack thereof. On the one hand, the increased effectiveness of, and recourse to, the legal regime on the settlement of investment disputes, in particular in the form of international investment arbitration between foreign investors and host states in recent decades, is a central factor that has undoubtedly strongly contributed to the current importance and global visibility of international investment law and illustrates the significance of this issue in the eyes of many foreign investors as well as other actors. On the other hand, it is equally well-known that it is first and foremost this concept of international investor-state arbitration and its implementation in practice that has more recently been quite critically perceived and thereby continues to be a key element in a development that resulted in the legal regime on the protection of foreign investments as a whole being now – again – increasingly controversially debated. And indeed, as well as further supporting the central importance of this issue, one of

119 See thereto already *supra* under D.II.

120 Generally on stabilization clauses and their context see, e.g., *Dolzer*, *Petroleum Contracts and International Law*, 191 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 82 *et seq.*; *Besch*, in: *Bungenberg/Griebel/Hobe/Reinisch* (eds.), *International Investment Law*, 93 (106 *et seq.*), with numerous further references

121 For a quite comprehensive discussion of these issues see more recently in particular *Gjuzi*, *Stabilization Clauses in International Investment Law – A Sustainable Development Approach*, 2018; see also, e.g., *Frank*, in: *Feichtner/Krajewski/Roesch* (eds.), *Human Rights in the Extractive Industries*, 111 *et seq.*

the few features of domestic investment statutes that has attracted already for quite some time a certain scholarly attention is the design of their respective dispute settlement provisions, in particular the interpretation of the arbitration clauses not infrequently enshrined therein.¹²²

The central provision in the 2018 Pridnestrovian investment law addressing the issue of dispute settlement appears to be, at least at first sight, Article 24 bearing the title “Resolution of Investment Disputes”. However, a closer look at this regulation from a systematic perspective reveals that its scope of application is limited by the definition of “investment dispute” under Article 2 (5), stipulating that this term only covers a dispute arising in connection with the contractual obligations of the investor and respective public authorities on the basis of an investment agreement in the sense of Article 2 (10). In other words, Article 24 seems to be confined to investment contracts and thus does not cover, among others, disputes between investors and Pridnestrovian public authorities that concern the interpretation and application of other domestic laws and regulations, including the 2018 Pridnestrovian investment statute itself.

Within its scope of application, Article 24 (1) foresees that investment disputes shall preferably be resolved through negotiations or in accordance with the (alternative) dispute resolution procedure that has been agreed by the parties in their investment contract. This provision is thus essentially referring to the dispute settlement venues and mechanisms consensually determined by the investor and the Pridnestrovian government in the specific state contract. And indeed, also the current “Standard Bilateral Investment Agreement on Investing and the Provision of Investment Preferences within the Implementation of the Investment Priority Project” adopted by the Pridnestrovian government in May 2018 envisions in its paragraph 9 (2) that “[i]n the event that disagreements and disputes cannot be resolved by the Parties within one month by negotiation, these disputes shall be resolved by the Parties in ...”.¹²³ It thus allows and expects the parties to determine respective venues and procedures that can be domestic or international in character.

In case the investment dispute at issue cannot be resolved in accordance with the means foreseen in Article 24 (1), the following Article 24 (2) stipulates that it shall be settled either in the domestic Pridnestrovian courts or before those courts and tribunals that are determined by the parties in their investment contract. This provision thus again primarily refers to the consensual decision on appropriate domestic or international dispute settlement venues and procedures as included in the state contract. Whether this regulatory approach grants foreign investors direct access to effective international legal remedies on the basis of an unconditional prior consent to transboundary arbitration on the side of Pridnestrovia depends, first, on the individual dispute settlement venues and mechanisms chosen by the parties to the agreement as well as, second, most certainly on the specific wording of the respective arbitration clause.

In addition, the 2018 Pridnestrovian investment statute itself explicitly foresees the option of a recourse to domestic as well as international courts and tribunals in two scenarios. First, as already indicated in the previous section,¹²⁴ Article 16 provides investors implementing priority

122 See for example *Parra*, ICSID Review – Foreign Investment Law Journal 7 (1992), 428 (444 *et seq.*); *Parra*, ICSID Review – Foreign Investment Law Journal 12 (1997), 287 (314 *et seq.*); *Potestà*, Arbitration International 27 (2011), 149 *et seq.*; *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, Article 25, paras. 392 *et seq.*; *Dolzer/Schreuer*, Principles of International Investment Law, 256 *et seq.*; *Waibel*, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), International Investment Law, 2015, 1212 (1225 *et seq.*); as well as *Burgstaller/Waibel*, Investment Codes, para. 31, in: Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, available under: <www.mpepil.com/> (last accessed 25 June 2019) (“Of particular interest are the dispute settlement provisions [...]”).

123 Standard Bilateral Investment Agreement No. ... on Investing and the Provision of Investment Preferences within the Implementation of the Investment Priority Project, Annex No. 1 to the Decree of the Government of the Pridnestrovian Moldavian Republic No. 159 of 18 May 2018.

124 See already *supra* under D.V.

investment projects¹²⁵ with the option to rely on a quite far-reaching stabilization clause and to apply, in situations of an alleged deterioration of the business environment, for a guarantee of legislation stability in the sense of Article 16 (4). In case this application is rejected by the competent Investment Board, Article 16 (5) stipulates that this executive decision can be contested by the investor in the courts, including courts with international jurisdiction. Thereby, the last-mentioned option of recourse to international courts and tribunals is not further specified in Article 16 (5). Nevertheless, a systematic reading of this provision suggests, also in the interest of practicability, that this option again depends on the respective determination of dispute settlement venues agreed upon in the specific investment contract.

Second, Article 8 (3) grants investors the right to initiate a judicial or quasi-judicial review of the determination of the market value of their requisitioned property, used as a basis to specify the amount of compensation to which the owner is entitled. Concerning suitable dispute settlement venues, this provision foresees access to domestic Pridnestrovian courts, national courts of other countries as well as international courts and tribunals. However, the last two options are again – and this time explicitly – dependent upon a respective determination made in the individual investment contract. In Article 8 we find once more one of those provisions that are at least as remarkable for what they not stipulate than for the regulations they include. It is noteworthy, that Article 8 confines the explicit access to legal remedies to the comparatively narrow issue of the determination of the market value of requisitioned property. It thus excludes not only a judicial review of the legality of the requisition itself but in particular also of the lawfulness of, including the appropriate amount of compensation to be paid in connection with, nationalizations in the sense of Article 8 (2)¹²⁶.

Nevertheless, with regard to the last-mentioned issues as well as regarding other disputes between investors and Pridnestrovian public authorities that concern the interpretation and application of domestic laws and regulations, including the 2018 Pridnestrovian investment statute itself, access to judicial remedies – at least before the domestic courts of Pridnestrovie – might arguably be indirectly inferred from the general guarantees of legal protection for investors under Article 5 (1) and (2). Furthermore, and specifically referring to expropriations in the form of nationalizations in accordance with Article 8 (2), a valid argument can be made, that respective legislative measures potentially affect the guarantee of legislation stability under Article 16. Therefore, they would enable those investors that implement priority investment projects to seek protection, ultimately including access to dispute settlement mechanisms, under Article 16 (4) and (5). This implies that one does not consider Article 8 (2) to be *lex specialis* as far as nationalizations are concerned.¹²⁷

In sum, the provisions on the settlement of investment disputes as enshrined in the 2018 Pridnestrovian investment statute, in the same way as those included in the majority of the other domestic investment laws currently in force,¹²⁸ do not offer a unilateral advance consent by Pridnestrovie to international arbitration for foreign investors. However, as implied in particular by its Article 8 (3) and Article 24, the statute at least acknowledges the possibility of

125 See thereto already *supra* under D.II.

126 See thereto already *supra* under D.V.

127 Generally on this issue, albeit referring to stabilization clauses included in state contracts, see for example *Dolzer/Schreuer*, Principles of International Investment Law, 98 (“Even clauses in agreements between the host state and the investor that freeze the applicable law for the period of the agreement (‘stabilization clauses’) will not necessarily stand in the way of a lawful expropriation.”).

128 See UNCTAD, Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment, Investment Policy Monitor, Special Issue, November 2016, 10; see also for example specifically with regard to the situation in ASEAN countries *Bonnitcha*, Investment Laws of ASEAN Countries: A Comparative Review, 4 (“no ASEAN country grants advance consent to investor-state arbitration in its investment law”).

recourse to international dispute settlement venues and procedures in cases in which the investor and the Pridnestrovian government have agreed to respective mechanisms in their investment contract. Furthermore, the investment law, at least in certain scenarios, also recognizes the right of investors to have access to judicial remedies in domestic courts.

E. By Way of a Conclusion: Measuring the 2018 Pridnestrovian Investment Law in Light of the Normative Importance of Domestic Investment Statutes – “Same Same But Different” Due to a Frozen Conflict Situation?

It has been more recently not infrequently emphasized that domestic investment statutes have until now – with the possible exceptions of the content and legal effects of their arbitration clauses¹²⁹ as well as questions related to their overall normative character as “ordinary” domestic laws or rather as unilateral acts under public international law¹³⁰ – attracted comparatively little attention in the legal literature,¹³¹ especially in light of the considerable and by now almost unmeasurable number of publications devoted to BITs, investment chapters in regional economic integration agreements as well as other international investment treaties. This scholarly focus is to a certain extent understandable and hardly surprising; it is well-known that the international legal framework on the protection of foreign investments comprises primarily of treaty law. The currently more than 2930 BITs together with some 385 other international agreements that include investment-related provisions¹³² constitute already for a number of decades the central normative “backbone” of this legal regime.

Nevertheless, the times appear to be changing also in this regard. International investment law has more recently entered a phase of reformation and reconceptualization¹³³ that is primarily characterized by various efforts of states to regain some their “policy space” vis-à-vis foreign investors and to stress the importance of regulatory autonomy of host states in order to allow them to pursue the promotion and protection of other public interest concerns such as sustainable development.¹³⁴ The specific policy responses so far suggested or already imple-

129 See thereto already *supra* D.VI.

130 On this debate see, e.g., *Caron*, in: Arsanjani/Cogan/Sloane/Wiessner (eds.), *Looking to the Future – Essays on International Law in Honor of W. Michael Reisman*, 649 *et seq.*; *Hepburn*, *American Journal of International Law* 112 (2018), 658 (667 *et seq.*).

131 On this perception see for example UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, Investment Policy Monitor, Special Issue, November 2016, 11 (“Investment laws have so far received relatively little attention in current discussions about the policy framework for investment”); *Bonnitcha*, *Investment Laws of ASEAN Countries: A Comparative Review*, 4 (“There is surprisingly little published research on national investment laws.”); *Hepburn*, *American Journal of International Law* 112 (2018), 658 (659) (“Despite the significance of FILs [foreign investment laws] for the international investment regime and for international law more generally, they have received remarkably little attention.”).

132 UNCTAD, *World Investment Report 2019, Special Economic Zones*, 2019, 99.

133 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.*; *Nowrot*, *International Investment Law and the Republic of Ecuador*, 6; *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.”).

134 On this perception 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

mented in this regard most certainly vary considerably from country to country. Nevertheless, there is currently a clear and global tendency by states to either renegotiate and replace existing agreements with new treaties that “down-grade” the legal position previously enjoyed by foreign investors by, among others, stipulating new constraints to the substantive protection standards and by limiting the access to international dispute settlement mechanisms or even to unilaterally terminate their bilateral investment treaties altogether¹³⁵ and to substitute the previous investment treaty protection by adopting new domestic investment statutes. South Africa is a well-known example for the last-mentioned investment policy approach.¹³⁶

As a result of these developments, the importance of BITs and other investment treaties as normative steering instruments for investors and host states is to a certain extent declining, while at the same time the significance of other sources of law in the international investment regime is – again – on the rise. This applies for example to so-called “state contracts” concluded between foreign investors and host state authorities, but in particular also to national investment laws that provide for domestic legal frameworks specifically addressed also to the undertakings of foreign investors.

Aside from these global tendencies, their underlying motives and their normative consequences, we can identify in the context of this contribution another type of scenarios as well as alternative set of reasons – so far much less noted and appreciated in scholarly writings – that also indicate the continued and potentially even growing importance of state contracts and especially also domestic investment statutes in the international economic system. It concerns the situation of autonomous territorial entities that have emerged – and are likely here to stay – as the result of frozen conflicts and that, primarily for political reasons unrelated to economic aspects in the narrow sense, have abstained from signing, or have due to a lack of potential treaty partners been until now unable to conclude, BITs or other investment treaties.¹³⁷ It is first and foremost also in the context of these territorial actors, and the present case of Pridnestrovie serves as a vivid example in this regard, that we see an investment policy approach that, voluntarily or involuntarily, substitutes international investment treaty regimes by relying on state contracts and domestic investment statutes, thereby contributing to the persistent or even rising relevance of these alternative sources of transnational investment law.

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.*); *Nowrot*, in: Rensmann (ed.), *Mega-Regional Trade Agreements*, 155 (161); 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.

135 Generally on this current trend in international investment treaty-making and -unmaking see for example UNCTAD, *World Investment Report 2018, Investment and New Industrial Policies*, 2018, 88 (“Investment treaty making has reached a turning point. The year 2017 concluded with the lowest number of new international investment agreements (IIAs) since 1983, signalling a period of reflection on, and review of, international investment policies. Moreover, for the first time, the number of effective treaty terminations outpaced the number of new IIA conclusions.”); UNCTAD, *Investment Policy Monitor*, Issue 20, December 2018, 5 (“During the reporting period [May to October 2018], [...] at least eleven terminations of BITs took effect [...]”); UNCTAD, *World Investment Report 2019, Special Economic Zones*, 2019, 100 (“In parallel with the conclusion of IIAs, the number of IIA terminations continued to rise: [...]”); *Nowrot*, in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law*, 227 (230 *et seq.*).

136 See UNCTAD, *Investment Policy Monitor*, Issue 20, December 2018, 4. For a more in-depth assessment of the new South African Protection of Investment Act that came into effect on 13 July 2018 and its investment policy context see, e.g., *Forere*, in: Morosini/Sanchez Badin (eds.), *Reconceptualizing International Investment Law from the Global South*, 251 *et seq.*

137 On the in principle undisputed (investment) treaty-making capacity of these autonomous territorial actors under public international law see already *supra* under C.

A final question that potentially arises in this regard – and seems worth addressing in particular bearing in mind the primary research focus of this contribution – concerns the influence possibly exercised by the existence of frozen conflict situations on the regulatory approaches and content of domestic investment statutes. In other words and more specifically, are the investment laws adopted by unrecognized territorial entities in frozen conflicts notably different from respective legal steering instruments of recognized countries? One might for example presume that the, compared to “ordinary” state actors, frequently more peculiar political and security context of these territorial entities somehow also finds its manifestation in certain regulatory approaches enshrined in their local normative frameworks dealing with domestic and transboundary economic relations. In addition, to mention but one further example, one could image that stabilized *de facto* regimes more often decide to introduce particularly foreign investment-friendly legislation in order to compensate for the possible “economic costs of non-recognition”¹³⁸ and, in this connection, especially to overcome potential reservations on the side of foreign investors.¹³⁹

In the course of this contribution, this complex issue cannot be addressed in something even close to a comprehensive way; in particular, as far as the identification of findings is concerned that might legitimately be considered representative and thus in principle applicable to all, or at least the majority, of the unrecognized territorial entities currently existing in the international system. In the end, all of these different territorial regimes in frozen conflict situations are in many ways quite unique actors, each being influenced by its own specific political and economic context, and, after all, we have confined ourselves to taking a closer look “merely” at the case of Pridnestrovie. Nevertheless, with regard to the specific investment law context of Pridnestrovie, the analysis undertaken in this contribution allows for at least two notable findings that might also potentially be helpful for possible future research dealing with this question on a much broader empirical scale.

First, there seems to be only one stipulation in the 2018 Pridnestrovian investment statute that has very few, if any, pendants in the global realm of domestic investment codes and can, moreover, legitimately be interpreted as mirroring, and being considerably influenced by, the frozen conflict situation of Pridnestrovie. The provision at issue is Article 3 (3) granting preferential treatment to residents and legal persons of a single country, namely the Russian Federation, on a unilateral basis;¹⁴⁰ thereby indicating the important role played by Russia as the patron state of Pridnestrovie.¹⁴¹ Aside from this rather unique stipulation, however, there are no regulatory features enshrined in this domestic investment statute whose existence can be attributed to the specific political and security context of a frozen conflict situation. In particular, also the sector-specific entry restrictions for foreign investments stipulated in the interest of national defense and security in Article 3 are, if viewed from a global perspective, rather reflecting a comparatively liberal investment policy approach¹⁴² and are thus far from indicative of being motivated by a more peculiar security environment.

Second, and despite this last-mentioned finding, the 2018 Pridnestrovian investment statute overall does not distinguish itself by being an extraordinary or even excessively foreign investment-friendly piece of legislation. Admittedly, and in addition to its quite liberal approach

138 Pegg, *International Society and the De Facto State*, 43.

139 On the possibility of such reservations see for example the perception expressed by Caspersen, in: Caspersen/Stansfield (eds.), *Unrecognized States in the International System*, 73 (82) (“Their lack of recognition and precarious position makes them [unrecognized states] highly unattractive to foreign investors [...]”); as well as by Kolstø/Blakkisrud, *Europe-Asia Studies* 60 (2008), 483 (505) (“foreign investors will be wary of dealing with the separatists”).

140 See thereto already *supra* under D.II.

141 Generally on the phenomenon of patron states in the context of frozen conflict situations see already *supra* under A.

142 See thereto also already *supra* under D.II.

towards the admission of foreign investments, this legal regime is undoubtedly characterized by a strong focus on investment promotion and facilitation as for example evidenced by the concept of a “one-stop shop” as a single point of contact for investors as well as the quite remarkable and far-reaching investment incentives foreseen in the Article 15 *et seq.*¹⁴³ However, the substantive and procedural protection standards stipulated in the statute¹⁴⁴ are, at best, in line with the respective regulatory approaches that can be found in many other domestic investment laws, and surely cannot legitimately give rise to an accusation of the 2018 Pridnestrovian investment statute being unduly one-sided and partial in favor of investors’ interests. The same applies most certainly to the provisions on the settlement of investment disputes.¹⁴⁵

Thereby, it seems important to emphasize that these findings are not meant to be understood as indicating regulatory deficits of this legal regime. Rather, they initially merely reveal that the features of the 2018 Pridnestrovian investment law are not primarily motivated by an attempt to compensate for possible “economic costs of non-recognition”. Moreover, and quite to the contrary, they also serve as an illustration that the design of this domestic investment law seems to be guided by overall progressive, quite well-adjusted and thus modern regulatory approaches that find themselves in conformity with current global trends in investment policy- and law-making. After all, it is by now increasingly recognized among governments of industrialized and developing countries, practitioners and scholars alike, that at the level of designing international and domestic investment laws as well as in the realm of investor-state dispute settlement mechanisms, the central challenge lawmakers and other relevant actors are as of today ever more faced with is to provide for an appropriate and thus acceptable balance between the legally-protected economic interests of foreign investors and the domestic steering capacity or policy space of host states to allow the later to pursue the promotion and protection of other public interest concerns to the benefit of their populations and global public goods.¹⁴⁶

These findings bring us at last, at the end of this contribution, again to the perception introduced already at the very beginning of it. The fact that the 2018 Pridnestrovian investment statute, if evaluated from a global comparative perspective, ultimately presents itself – with very few exceptions – as a rather normal domestic investment law, further supports the view that non-recognized autonomous territorial entities like Taiwan or Pridnestrovie, despite being something of an anomaly in the international inter-state system, are usually rather normal political communities, in particular also as far as economic aspects are concerned. And, in the same way as most other political communities, they want to attract foreign investments without, however, unduly compromising their policy space and regulatory autonomy in order to also pursue the promotion and protection of other public interest concerns.

143 See already *supra* under D.IV.

144 For a more detailed evaluation see *supra* under D.V.

145 See thereto also already *supra* under D.VI.

146 See thereto also, e.g., UNCTAD, World Investment Report 2019, Special Economic Zones, 2019, 104 *et seq.*; 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.”); *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/Ryn-gaert/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”).

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Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

ISSN 2366-0260 (print) / ISSN 2365-4112 (online)

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