



Karsten Nowrot/  
Emily Sipiorski

**(De-)Constitutionalization  
of International  
Investment Law?:  
Narratives from Africa**

Rechtswissenschaftliche  
Beiträge der  
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# Contents

<b>A.</b>	<b>Introduction</b> .....	5
<b>B.</b>	<b>So Much More than Telling a Good Story: Some Insights on the “Narrative Constuction of Reality”</b> .....	7
<b>C.</b>	<b>Overcoming the Challenges of Global Constitutionalism: Narrating as the Basis of International Constitutionalization.</b> .....	10
<b>D.</b>	<b>A Unique Methodological Approach to Global Constitutionalism</b> .....	15
	I. Turning to Empirical Analysis for Analysing the State of the Law .....	16
	II. Challenges to the Empirical Approach of Questionnaires: Subject, Bias, and Methods .....	18
<b>E.</b>	<b>The African Perspective</b> .....	20
<b>F.</b>	<b>Conclusions</b> .....	21
	<b>References</b> .....	22



## A. Introduction\*

As for example more recently highlighted by *Ernst-Ulrich Petersmann*, the processes of transformation currently taking place in the realm of transboundary economic relations have given rise to a number of quite diverse and competing narratives of international economic law and its multilevel governance structures.<sup>1</sup> Prominently among them is the narrative of international economic law as an emerging global constitutional regulation, an approach that occasionally even perceives this field of the international legal order as being assigned the role of a “functional basis for a new era of international constitutionalization”.<sup>2</sup>

What holds true for international economic law as a whole, apparently also applies to a number of its sub-regimes like the WTO legal order and, more recently, in particular also to international investment law. With a view to our understanding of the transnational normative framework governing the protection of foreign investments, narratives are used to construct, to define and to create<sup>3</sup>. Moreover, and more specifically, international investment law has – for a variety of reasons – emerged more recently as a central normative “battleground” for competing narratives of global constitutionalization. There is presently a complex dialogue in and between the various narratives of international investment law that push towards and against global constitutionalization. Foreign investors, their host as well as home countries, arbitrators, “unseen” actors within the arbitral institutions, international organizations, transnational networks, treaty negotiators, academics, representatives of civil society, of trade unions and of investment-affected local populations such as indigenous communities, to name but a few relevant actors,<sup>4</sup> all contribute to the lines in these narratives.

Although it hardly needs to be recalled that there has been and continues to be a controversial debate on whether constitutionalism can even be regarded as an appropriate label and concept for normative regimes beyond the state,<sup>5</sup> at least on the basis of these narratives, it is clear that the language of constitutionalism has become part of the discourses, pleadings and decisions in the investment law context. This language is currently being ever more readily applied. On the one hand, we find for example the narrative that international investment agreements have created an “international ‘constitutional’ law for foreign investors”, with “obligations relating to subjects such as direct expropriation, indirect expropriation and ‘fair

\* The contribution is based on a presentation given by the authors at the Fourth Biennial Conference of the African International Economic Law Network (AfIELN), organized by the AfIELN and the Society of International Economic Law (SIEL), at Strathmore University School of Law in Nairobi/Kenya from 18 to 20 July 2019.

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

2 *Trachtman*, *University of Pennsylvania Journal of International Economic Law* 17 (1996), 33 (36); see also for example, and specifically with regard to the WTO, *Poiares Maduro*, in: Snyder (ed.), *Regional and Global Regulation of International Trade*, 49 (68) (“The WTO will probably be the front runner of global constitutionalism.”).

3 See, e.g., *Kulick*, in: Schill/Tams/Hofmann (eds.), *International Investment Law and History*, 41 *et seq.*; as well as for example *Brower*, *Santa Clara Journal of International Law* 9 (2011), 179 *et seq.*; *Cheng*, *Santa Clara Journal of International Law* 9 (2011), 215 *et seq.*; *Davitti*, *Human Rights Law Review* 12 (2012), 421 (423 *et seq.*).

4 See thereto also already for example *Nowrot/Sipiorski*, *Archiv des Völkerrechts* 55 (2017), 265 (294 *et seq.*).

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

and equitable' treatment [...] hav[ing] parallels in domestic constitutional and administrative law, and, at least in theory, offer a form of these protections as international constitutional law".<sup>6</sup> In addition to more general propositions supporting, and contributing to, the narrative that international investment law is in a process of constitutionalization like the perception that "[t]he door to constitutionalizing international investment protection has been opened",<sup>7</sup> also for example *Stephan W. Schill* has, again from an affirmative perspective, advanced the narrative that "international investment law can [...] be understood as serving a constitutional function for the emerging global economy. Like constitutions, they [investment agreements] restrict State action and, as part of an international public order, create and safeguard the interests of an international community in the functioning of the global economic system. Investment treaties comprise constitutional traits by establishing legal principles that serve as a yardstick for the conduct of States vis-à-vis foreign investors."<sup>8</sup>

On the other hand, it is well-known that the legal regime on the protection of foreign investments has more recently – again – become increasingly controversially perceived and debated, with opposition to the present treaty design now frequently being framed "in constitutional language".<sup>9</sup> Increasingly influential counter-narratives have started to emerge, perceiving the existence of mechanisms of international investor-state arbitration as contravening domestic constitutional principles like democracy and the rule of law, and thereby ultimately also as an obstacle to the creation of a just global constitutional order.<sup>10</sup>

The narrators of these counter-narratives as well as their affirmative listeners and readers would thus probably subscribe to the view that the idea of "bringing (domestic) constitutional law back in" is aimed at promoting and realizing, from the perspective of domestic law as well as public international law, processes of what might be referred to as a re-constitutionalization of a previous rather non-constitutional or even un-constitutional international legal regime governing the protection of foreign investments. To the contrary, those adhering to the previous rather dominant narrative of international investment law being for a number of decades in a process of global constitutionalization on the basis of, *inter alia*, constitutional-like substantive protection standards for foreign investor combined with effective international enforcement mechanisms in the form of investor-state arbitration proceedings would perceive the current policy shift as a development more appropriate characterized as international investment law in general and investor-state dispute settlement in particular entering a phase primarily shaped also by tendencies of global de-constitutionalization.<sup>11</sup>

In sum, there appears to be an increasingly recognized value for all the various different kinds of actors in the system to listen to the available narratives and in particular to create new ones, thereby also employing the language of constitutionalism.

6 *Lester*, *Journal of World Trade* 49 (2015), 211 (220 and 216).

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

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

9 *Schill*, *Journal of World Investment & Trade* 18 (2017), 1 (2).

10 See, e.g., *Sornarajah*, *Resistance and Change in the International Law on Foreign Investment*, 16 *et seq.*

11 On this perception see indeed already for example *Böttcher*, *Dekontitutionalisierungstendenzen im internationalen Investitionsschutzrecht*, 38 *et seq.*, 69 *et seq.* For the term de-constitutionalization itself in the global context see also already, e.g., *Klabbers*, *International Organizations Law Review* 1 (2004), 31 (52) ("yesterday's constitutionalization can be undone by today's (de-)constitutionalization"); *von Arnould*, in: Delbrück *et al.* (eds.), *Aus Kiel in die Welt: Kiel's Contribution to International Law*, 573 *et seq.*

Against this background and in an attempt to assess these phenomena, the present contribution intends to discuss and test the benefits of applying an empirical approach based on a narrative perspective to the multi-faceted issue of constitutionalization in the realm of international investment law. Thereby, it is guided by the assumption that global constitutional law is created through the relevant actors' social practices as observed in the presentation of related narratives and/or subscription to certain narrations.

For this purpose, we aim to approach this novel research topic in six main steps. The first section introduces the concept of narrative and its functions, thereby illustrating its usefulness for other academic disciplines including international legal scholarship (B.). The second part considers the benefits of applying a narrative perspective to the – for a variety of reasons – challenging issue of constitutionalization in public international law (C.). Part (D.) turns to the specific methodological approach of the research, namely the use of empirical methods to assess the progress towards constitutionalism in investment law, and the following part (E.) approaches the particular application of this research method to the African region. The final (F.) section offers some preliminary conclusions regarding the insights of this type of methodology and its usefulness in identifying the current narrative of the nature – current and reforming – of investor-state arbitration.

## **B. So Much More than Telling a Good Story: Some Insights on the “Narrative Construction of Reality”**

Narrative is omnipresent in life, but also in many academic disciplines. There seems to be more recently something like a narrative “turn” in a growing number of sciences.<sup>12</sup> Applying and combining some of the various respective characterizations suggested in the literature, a narrative can basically in abstract terms be described as a written, spoken and/or visual account, irrespective of its content, of events or phenomena, not infrequently connected in some sort of chronological order and presenting these events in a shaped, organized and often colored manner from a certain perspective or perspectives.<sup>13</sup>

Aside from this rather broad and inclusive definition, we submit that in particular when considering the aim to indicate and substantiate the usefulness of applying a narrative approach to the present context of assessing processes of (de-)constitutionalization in international investment law, it appears more appropriate to turn to and rely on the dimensions and functions attributed to and associated with narratives. In this regard, the French philosopher *Jean Paul Gustave Ricœur* rightly deserves – and frequently receives – particular attention. In the course

12 On this perception see, e.g., *Kohler Riessman*, *Narrative Methods for the Human Sciences*, 5 (“The concept of narrative has achieved a degree of popularity that few would have predicted when some of us, several decades ago, began working with stories that developed in research interviews and medical consultations.”).

13 For the most direct sources of this understanding see on the one hand *Della Sala*, *Narrative Form and Content in Post-National Governance*, 4 (“In simple terms, a narrative is the written, visual or spoken account of events or phenomena, connected in some sort of chronological order [...] What is important to underline here is what defines a narrative is not the content – this often distinguishes between different types of narratives (e.g., travel narratives, children’s stories, biography ...) – but the form. Narrative is above all else a structure or a form in the construction of events.”); as well as, for a quite similar definition, *Czarniawska*, *Narratives in Social Science Research*, 17. On the other hand see *Goldie*, *The Mess Inside – Narrative, Emotion and the Mind*, 2 (“A narrative or story is something that can be told or narrated, or just thought through in narrative thinking. It is more than just a bare annal or chronicle or list of a sequence of events, but a representation of those events which is shaped, organized, and coloured, presenting those events, and the people involved in them, from a certain perspective or perspectives, and thereby giving narrative structure – coherence, meaningfulness, and evaluative and emotional import – to what is related.”).

of his efforts to “inquire into the narrative function”, he sketched a “general theory of narrative discourse” that was initially intended to encompass “both the ‘true’ narrative of the historians and the ‘fictional’ narratives of storytellers, playwrights and novelists”.<sup>14</sup> However, this theory subsequently also exercised a considerable influence on the perception of narratives in other disciplines, including – albeit still comparatively modestly – in international legal scholarship.<sup>15</sup> Rejecting the view that “a story is necessarily bound to a strictly chronological order”, he claimed that “any narrative combines, in varying proportions, two dimensions: a chronological dimension and a non-chronological dimension”. The chronological or “episodic” dimension thereby mirrors a basic aspect that most people would typically associate with any proper narrative, namely the idea of a well-ordered and complete story.<sup>16</sup>

Yet, Ricœur emphasized that the activity of narrating does not merely comprise of “adding episodes to one another”. Such a narrow perception would “divest the narrative activity of its complexity and above all of its power to combine sequences and configurations”. At least equally important is the second narrative function or dimension of constructing “meaningful totalities out of scattered events” that enables the audience “to ‘grasp together’ successive events”. “The art of narrating, as well as the corresponding art of following a story” therefore requires, according to Ricœur, that “we are able to extract a configuration from a succession”.<sup>17</sup> This second configurational dimension as a constitutive element – and creative function – of narratives clearly indicates for Ricœur, referring also to conceptual ideas already developed by the American philosopher of history Louis O. Mink,<sup>18</sup> “that, in grasping together events in configurational acts, the narrative operation has the character of a judgement and more precisely of a reflective judgement in the Kantian sense of the term. To narrate and to follow a story is already to ‘reflect upon’ events with the aim of encompassing them in successive totalities”.<sup>19</sup>

The perception that even “the most humble narrative is always more than a chronological series of events”<sup>20</sup> by having and also exercising a constitutive and therefore creative, configurational function is widely recognized beyond literary theory and criticism.<sup>21</sup> It is in particular

14 Ricœur, in: Ricœur, *Hermeneutics and the Human Sciences*, edited and translated by John B. Thompson, 274.

15 See, e.g., more recently Windsor, *Leiden Journal of International Law* 28 (2015), 743 (746 *et seq.*).

16 Ricœur, in: Ricœur, *Hermeneutics and the Human Sciences*, edited and translated by John B. Thompson, 274 (278).

17 Ricœur, in: Ricœur, *Hermeneutics and the Human Sciences*, edited and translated by John B. Thompson, 274 (278-279).

18 Mink, *New Literary History* 1 (1970), 541 (547 *et seq.*).

19 Ricœur, in: Ricœur, *Hermeneutics and the Human Sciences*, edited and translated by John B. Thompson, 274 (279).

20 Ricœur, in: Ricœur, *Hermeneutics and the Human Sciences*, edited and translated by John B. Thompson, 274 (279).

21 See, e.g., Hillis Miller, in: Lentricchia/McLaughlin (eds.), *Critical Terms for Literary Study*, 66 (69) (“With fictions we investigate, perhaps invent, the meaning of human life. Well, which is it, create or reveal? It makes a lot of difference which we choose. [...] To say “create”, [...], presupposes that the world may not be ordered in itself or, at any rate, that the social and psychological function of fictions is what speech-act theorists call ‘performative’. A story is a way of doing things with words. It makes something happen in the real world: for example, it can propose modes of selfhood or ways of behaving that are then imitated in the real world. It has been said, along these lines, that we would not know we were in love if we had not read novels. Seen from this point of view, fictions may be said to have a tremendous importance not as the accurate reflectors of a culture but as the makers of that culture and as the unostentatious, but therefore all the more effective, policemen of that culture. Fiction keeps us in line and tend to make us more like our neighbors.”); White, *Critical Inquiry* 7 (1980), 5 *et seq.*; Brooks, *Yale Journal of Law & the Humanities* 18 (2006), 1 (24-25) (“Most important, perhaps, narratology postulates a fundamental distinction between events in the world and the ways in which they are presented in a narrative discourse, demonstrating that storytelling always attempts to give some shape and significance to life. [...] This distinction allows us to reflect on the many ways in which our tellings reorganize events to give them a certain inflection and intention, a point, and a particular effect on their hearers. The distinction leads to a further insight: often we as listeners or readers know ‘what happened’ in the world only through its tellings. We are always summoned to consider the possible omissions, distortions, rearrangements, moralizations, rationalizations that belong to any recounting. The more we study modalities of narrative presentation, the more we may be made aware of how narrative discourse is never innocent but always presentational and perspectival, a way of working on story events that is also a way of working on the listener or reader. In sum, narratology helps us to understand the reach of narrativity in human consciousness, but also to ‘denaturalize’ narratives, to show their constructedness, how

this second configurational dimension of storytelling that has resulted in narration becoming a kind of “travelling concept” in the world of science.<sup>22</sup> Whereas previously often perceived as an approach that was most appropriately assigned to literary studies and related fields, the research potential associated with the idea of a possible “narrative construction of reality”<sup>23</sup> and, against this background, the increasing awareness of the usefulness of narratology as a tool “to understand the reach of narrativity in human consciousness, but also to ‘denaturalize’ narratives, to show their constructedness, how they are put together and what we can learn from taking them apart”<sup>24</sup> were among the prime movers for the growing popularity of narrative perspectives.

This has been visible in recent decades in numerous academic disciplines, from anthropology and history to psychology and the social sciences. In the last mentioned context, the considerable attractiveness of *Ricœur*’s configurational dimension of narratives can be exemplified by more or less randomly chosen voices from political science highlighting the “critical role” played by narratives “in the construction of political behavior”<sup>25</sup> or attributing the importance of this approach to a “renewed interest in the role of ideas in shaping social order” and stressing the expediency of a recourse to narratives in order to “understand but also construct social phenomena”.<sup>26</sup> In addition, and this perception provides already a quite worthy and thus noteworthy transition to the methodological potential of the narrative perspective in public international law, *Friedrich Kratochwil* has recently emphasized the influential configurational function exercised by narratives for (our understandings of) the international system and its legal order: “Whatever the world community might be – a minimal *ordre public*, a practical association, or a value-based utopia – one thing seems clear: doctrines and actual practice often diverge widely and are only tenuously held together by metaphors, conceptual constructs, and narratives, instead of actual, settled practices.”<sup>27</sup>

The potential benefits of applying a narrative perspective – thereby also recognizing the constructive and configurational function attributed to narrations – to public international law and the related discourses, are noticeable and surely worth the effort of taking a closer look in the future.<sup>28</sup> And indeed, as more recently stated by *Andrea Bianchi*, “one wonders” in light of the “plethora of potential insights [...] why more attention has not been paid to narrative and narrativity in international legal scholarship”.<sup>29</sup> If we are willing to perceive public international law also as a social practice, including a practice of communications based on language, aimed at providing ordering structures for the international system by assigning rights and responsibilities, then the research devoted to this legal realm, as articulated for example by *Michelle L. Burgis-Kasthala*, must focus not only on “the normative implications of this language – the rules, but also [on] the ways in which this language is generated *within specific contexts*” and is applied in the form of narratives and counter-narratives

they are put together and what we can learn from taking them apart.”). See, however, also for a more cautious view *Carr*, *History and Theory* 25 (1986), 117 *et seq.*

- 22 On the term and underlying perception see *Hyvärinen/Hatavara/Hydén* (eds.), *The Travelling Concepts of Narrative*, 2013.
- 23 See from the perspective of psychology, *Bruner*, *Critical Inquiry* 18 (1991), 1 *et seq.*; as well as from the perspective of legal scholarship for example *Baron*, *Southern California Law Review* 67 (1994), 255 (261) (“A strong theme of the storytelling movement is that stories are used to ‘construct’ our world.”); as well as more recently also *Saab*, *Narratives of Hunger in International Law*, 32 *et seq.*
- 24 *Brooks*, *Yale Journal of Law & the Humanities* 18 (2006), 1 (25).
- 25 *Patterson/Renwick Monroe*, *Annual Review of Political Science* 1 (1998), 315-316.
- 26 *Della Sala*, *Narrative Form and Content in Post-National Governance*, 3.
- 27 *Kratochwil*, *The Status of Law in World Society*, 167.
- 28 See thereto also already *Nowrot/Sipiorski*, *Archiv des Völkerrechts* 55 (2017), 265 (272 *et seq.*), with additional references.
- 29 *Bianchi*, *International Law Theories*, 296.

“by its principal interlocutors: judges, advocates, academics, law students, and practitioners in government and civil society”.<sup>30</sup> Such a context-conscious understanding of the normative structures as well as the normatively relevant interactions in the global system supports the view that public international law is not only determined and influenced by its authoritative legal texts and legal doctrine, but also by narratives created and told by a variety of different actors.<sup>31</sup>

### C. Overcoming the Challenges of Global Constitutionalism: Narrating as the Basis of International Constitutionalization

In order to illustrate the substantial benefits of applying such a narrative perspective also in the present context of global constitutionalism, it seems useful to start by briefly recalling three of the main challenges that the idea and concept of a constitutionalization of international law has always been and is also currently faced with.

First, there is as of yet no consensus on whether “the numerous constitutionalist stories that are currently being told within international legal scholarship”<sup>32</sup> have, or even should have, doctrinal value for legal practice. That said, a considerable number of legal scientists involved in the debates and research on transboundary constitutionalization most certainly also – or even primarily – engage in a positive law analysis aimed at determining and assessing constitutional principles, norms, procedures as well as institutional settings in the contemporary normative structures beyond the state. This approach perceives constitutionalization as legal processes in the real world and might thus appropriately be referred to as the “doctrine perspective”. However, we also find the – far from uninfluential – understanding that global constitutionalism does not refer to, and is not concerned with, a set of certain positive legal rules and organizational arrangements in the transnational normative realm, but should best be regarded as a “mindset”, with the constitutional vocabulary used in the respective discourses and narratives being indicative of a “programme of moral and political regeneration”,<sup>33</sup> a perception of an “imaginative” dimension of global constitutionalism<sup>34</sup> that can consequently be termed “mindset perspective”.<sup>35</sup>

Second, and applying to both the mindset as well as the doctrine perspectives, since already the term constitution itself is devoid of any specific and generally recognized meaning in public international law,<sup>36</sup> it hardly comes as a surprise that also the debate on the potential

30 *Burgis-Kasthala*, *European Journal of International Law* 25 (2014), 677 (690).

31 On this perception see, e.g., *Bianchi*, *Journal of International Dispute Settlement* 9 (2018), 28 (33).

32 *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 346.

33 *Koskeniemi*, *Theoretical Inquiries in Law* 8 (2007), 9 (18); see also, e.g., *id.*, 31 (“Thinking of constitutionalism as a mindset instead of as architecture implies a kind of Copernican turn in legal theory. Mere constitutional architectonics, as Kelsen was to experience personally, provides a poor guarantee for freedom.”).

34 See thereto, e.g., *Angeli*, *Global Constitutionalism* 6 (2017), 359 *et seq.* On the distinction between “constitutionalism as doctrine” and “constitutionalism as imagination” see also already *Walker*, in: *Avbelj/Komárek* (eds.), *Constitutional Pluralism in the European Union and Beyond*, 17 *et seq.*

35 For a rather critical account of what is referred to here as the “mindset perspective” see *Peters*, in: *Orford/Hoffmann/Clark* (eds.), *The Oxford Handbook of the Theory of International Law*, 1011 (1017) (“Some variants of constitutionalism beyond the state are extremely diluted, when constitutionalism is considered not as a matter of positive norms and ‘doctrine’, but (only) as a discourse and a vocabulary with a symbolic value, as a constitutionalist ‘imagination’.”); as well as in principle also already *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 5 (“we do feel the need to make clear that all the talk about constitutionalization does not exist only in the minds of academic lawyers”).

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

constitutionalization of this legal realm “suffers from the great variety of meanings assigned to the key terms”;<sup>37</sup> a finding that more recently have given rise to the perception of a “global constitutional cacophony”.<sup>38</sup> This quite obvious, since often documented, definitional inflation and corresponding lack of even a basic common understanding of what the constitutionalization of international law precisely is about does not merely amount to a deplorable theoretical finding but has most certainly also practical repercussions for the operability of global constitutionalism as a research topic. This has lately for example been quite vividly described by *Vassilis P. Tzevelekos* and *Lucas Lixinski*: “We all know that raising a hypothesis or asking a question is the basis for building a thesis. Yet, what we, international law lawyers, are missing is the tools that will enable us to actually try and answer that question, and validate or reject the hypothesis. What is a constitution? What is constitutionalism? Is there a constituent power in the decentralized structure of international law – other maybe than all states together (the idea of the international community) and nobody in particular? [...] How is a constitution found in such a system?”<sup>39</sup>

Third, closely related to the last-mentioned aspect and applying in particular to the doctrine perspective, the idea and concept of a constitutionalization of international law are faced with the challenge of how to objectively – and thus authoritatively – identify constitutional principles, norms and institutional structures in the global legal order and to distinguish them from other, non-constitutional rules in the international system.<sup>40</sup> Admittedly, this practical task could be comparatively easily achieved if global constitutionalism would, as forcefully argued for example by *Bardo Fassbender*,<sup>41</sup> refer to and focus on the Charter of the United Nations as the only legal manifestation of a written constitution of the international community. Nevertheless, the overwhelming majority of international legal scholars occupying themselves with this concept do not start from the assumption of a single codified document representing the world constitution but – rightly – perceive global constitutional law to comprise a considerable

37 *Peters*, in: Orford/Hoffmann/Clark (eds.), *The Oxford Handbook of the Theory of International Law*, 1011 (1015); see also for example *Shinar*, *Global Constitutionalism* 8 (2019), 12 (14); *Oeter*, in: Blome *et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (24) (“As already mentioned, an abounding strand of literature is looking for phenomena of ‘constitutionalization’ across the entire range of international law. There is, however, neither a clear definition nor a robust consensus of what constitutes ‘constitutionalization’. The use of the term varies a lot, and its meanings are far from evident.”); *Oeter*, in: Justenhoven/O’Connell (eds.), *Peace Through Law*, 83 (85) (“we do not exactly know what characteristics really make up ‘constitutionalisation’, ending up in a rather fuzzy use of the concept”); *Bianchi*, *International Law Theories*, 59 (“extreme variety of orientations and sensibilities that characterize this strand of scholarship”); *Krajewski*, *Völkerrecht*, 49; *Schwöbel*, *International Journal of Constitutional Law* 8 (2010), 611 (634) (“a complex and multidimensional debate”); *Krieger*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 75 (2016), 439 (443); *Neves*, in: Blome *et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 169 (171) (“This inflation in the use of the term has led to considerable vagueness, and ‘constitution’ has begun to lose much of its historical, normative, and functional meaning.”); *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 25 (“Indeed, several ideas about international constitutionalism are floating around.”).

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

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

40 On the rightly held perception that the constitutionalization of public international law necessarily requires such a distinction see, e.g., *Peters*, *Beyond Human Rights*, 437 (“distinction between two layers of norms in international law, namely international constitutional law on the one hand (including international human rights) and ordinary international law on the other hand (including ordinary or simple individual rights)”; as well as, phrased from a different perspective, *Peters*, *The Merits of Global Constitutionalism*, *Indiana Journal of Global Legal Studies* 16 (2009), 397 (403) (“If all (international) law is somehow constitutionalized, then nothing is constitutional. The explicative power of the concept would be reduced to zero.”).

41 See, e.g., *Fassbender*, *Chinese Journal of International Law* 15 (2016), 489 (509 *et seq.*); *Fassbender*, in: Lang/Wiener (eds.), *Handbook on Global Constitutionalism*, 265 *et seq.*; *Fassbender*, *Columbia Journal of Transnational Law* 36 (1998), 529 *et seq.*; *Fassbender*, *The United Nations Charter as the Constitution of the International Community*, 77 *et seq.* See thereto also for example *Payandeh*, *Internationales Gemeinschaftsrecht*, 45 *et seq.*, with additional references.

variety of written and unwritten rules and principles of public international law.<sup>42</sup>

Against this background, however, in a setting characterized by the lack of a global constitution codified in a single canonical document as well as by the absence of an at least easily recognizable global *pouvoir constituant*,<sup>43</sup> but nonetheless also by an obvious need to perceive constitutionalization as describing more than merely processes of an increased legalization of the international system,<sup>44</sup> the question arises as to the appropriate rules of constitutional recognition<sup>45</sup> in order to fulfill the above mentioned task of determining, based on an objective standard, constitutional rules and principles of public international law, thereby separating them from norms that do not belong to this category.

In addition, the matter is further complicated by the dominant view among scholars of (domestic) constitutional law that – contrary to a perception prominently advanced for example in Article 16 of the French Declaration of Human and Civic Rights of 26 August 1789<sup>46</sup> – there are neither issues that necessarily have to be addressed and regulated in a constitution nor those that cannot be incorporated in such a document.<sup>47</sup> In other words, the members of a political community are basically free to decide on the – distinguished and/or trivial – content of their respective constitution. In light of this finding, one cannot escape the conclusion that the undoubtable fact that “good” constitutions typically exercise certain functions and that these functions characteristically correspond to certain legal concepts enshrined therein – a reasoning that is frequently taken recourse to by scholars sympathetic towards international constitutional law<sup>48</sup> – serves, at most, as an indication of, but is ultimately in itself insufficient to objectively identify, the specific content of a world constitution at any given time.

It is submitted here that adopting a narrative approach, in particular relying on the configurational and thus constitutive dimension of storytelling, can assist in the necessary search for

- 42 On this perception see for example *Peters*, in: Orford/Hoffmann/Clark (eds.), *The Oxford Handbook of the Theory of International Law*, 1011 (1016); *Bhandari*, *Global Constitutionalism and the Path of International Law*, 2016, 2 *et seq.*; *Wheatley*, *The Democratic Legitimacy of International Law*, 2010, 187; *Kotzur*, *Goettingen Journal of International Law* 4 (2012), 585 (589); *Klabbers*, in: Kammerhofer/D’Aspremont (eds.), *International Legal Positivism in a Post-Modern World*, 264 (267) (“absence of a written constitution or other positive sources of constitutionalism”); *Walter*, *German Yearbook of International Law* 44 (2001), 170 (173); *Oeter*, in: Blome *et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (22) (“Most writings on global constitutionalism are not on the question how we can achieve a ‘global constitution’, in the sense of a written document constituting a global polity with a uniform institutional system – a dream that for some scholars is more a nightmare than positive utopia. Global constitutionalism starts from a different angle.”); *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 23 (“Either way, it is less than plausible to nominate existing treaties as candidate global constitutions.”); and *id.*, 25 (“no single document can be considered to represent the constitution of international society”).
- 43 *Tomuschat*, *Recueil des Cours* 281 (1999), 9 (88); *Kotzur*, *Goettingen Journal of International Law* 4 (2012), 585 (592); *von Bogdandy/Goldmann/Venzke*, *European Journal of International Law* 28 (2017), 115 (129) (“the dazzling question of a *pouvoir constituant* in world society”); for a more in-depth evaluation of this question see also, e.g., *Niesen*, in: Lang/Wiener (eds.), *Handbook on Global Constitutionalism*, 222 *et seq.*; *Patberg*, *International Journal of Constitutional Law* 14 (2016), 622 *et seq.*; *Thornhill*, *Global Constitutionalism* 5 (2016), 405 *et seq.*, each with further references.
- 44 See for example *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 8; *von Bogdandy*, *Harvard International Law Journal* 47 (2006), 223 (241); *Oeter*, in: Blome *et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (24); *Bernhardt*, in: Hestermeyer/König/Matz-Lück *et al.* (eds.), *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum*, Vol. II, 1369 (1376); *Grimm*, in: Dobner/Loughlin (eds.), *The Twilight of Constitutionalism?*, 3 (9).
- 45 Generally on the concept of rules of recognition and their functions in legal systems see *Hart*, *The Concept of Law*, 91 *et seq.*
- 46 “Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.” Article 16 of the Declaration of Human and Civic Rights of 26 August 1789, available under: <[http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/cst2.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf)> (last accessed 10 December 2019).
- 47 For a quite comprehensive treatment of this issue see *Waldhoff*, *Der positive und der negative Verfassungsvorbehalt*, 7 *et seq.*, with numerous further references.
- 48 See for example *Peters*, in: Orford/Hoffmann/Clark (eds.), *The Oxford Handbook of the Theory of International Law*, 1011 (1015 *et seq.*).

an appropriate solution to address and overcome all of these three main challenges that the idea and concept of a constitutionalization of international law is faced with. More specifically, we argue that global constitutional law is basically whatever the relevant actors in the international system consider as global constitutional law through their social practices, in particular by way of presenting related narratives and/or subscribing to respective narrations. Recognizing that this comparatively bold proposition appears to be neither self-explaining nor at least at first sight at least to all readers entirely convincing, we would like to make, in an attempt to illustrate and substantiate some of the underlying considerations of our approach, three main observations.

First, it seems appropriate to recall that the preceding and overarching question of how to recognize legal norms as norms, has itself already occasionally been answered in precisely the same way as suggested here. According to *Brian Z. Tamanaha*, law “is whatever people recognize and treat as law through their social practices”, thereby acknowledging the competence of “any member of a given group” to “identify what law is, as long as it constitutes a conventional practice” and as long as the minimum threshold is met that “sufficient people with sufficient conviction consider something to be ‘law’”.<sup>49</sup> This idea of what might be described as a connection between the existence of a norm and its reference in social practices like narratives can be allied to a perception advanced by *Niklas Luhmann*, namely the view that “norms are only [real] when they are quoted explicitly or implicitly”,<sup>50</sup> which has been also taken recourse to for example by *Gralf-Peter Calliess* and *Peer Zumbansen* in their analysis of the “complex structure of norm-creation in the transnational arena”,<sup>51</sup> a topic which is obviously somewhat related to the present enquiry.

Furthermore, and bearing an at least equally close relationship to the topic discussed here, some scholars have applied this empirical approach to identify normativity not only in connection with recognition of human rights in the international legal order,<sup>52</sup> but first and foremost also with regard to the quite thorny issue of a suitable law versus non-law distinction in public international law.<sup>53</sup> In particular, *Joost Pauwelyn* has developed the approach of what he labels “law as belief” that deserves some attention: “This indeterminacy is puzzling and may lead some to conclude that the vagueness and difficulty to define what is international law (ie the absence of clear rules of recognition) implies that international law may not be law in the first place [...]. Rather than reverting to this old debate of whether international law is law,

49 *Tamanaha*, *A General Jurisprudence of Law and Society*, 2001, 166-167; see also, e.g., *Tamanaha*, *Sydney Law Review* 30 (2008), 375 (396) (“Law is a ‘folk concept’, that is, law is what people within social groups have come to see and label as ‘law’.”).

50 *Luhmann*, *Law as a Social System*, 82. Generally on the respective relationship between empiricism and normativity in this connection see also, e.g., *Möllers*, *Die Möglichkeit der Normen*, 127; as well as the observation by *Kitcher*, *Kant’s Thinker*, 218 (“To qualify as a norm, a rule must be used normatively by a subject.”).

51 *Calliess/Zumbansen*, *Rough Consensus and Running Code – A Theory of Transnational Private Law*, 124 (“According to Luhmann, the generation of norms is subject to the *logic of remembering and forgetting*, ie the selectivity of the communication process, by which some communicative offers for connection are accepted through reference by subsequent communications and others simply fall into oblivion. [...] It follows that general principles of law and norms of ‘soft law’ have their life breathed into them in the very moment of their being referenced in legal discourse, for example in real-life contracting or dispute resolution, which ultimately renders them into ‘hard code’. The legal process so understood is characterized by a collapsing of the otherwise distinct notions of creation (legislation) and recognition (adjudication): norms are *condensed and confirmed* in the enduring process of legal discourse”) (emphases in the original).

52 See in particular *Uruena*, *No Citizens Here: Global Subjects and Participation in International Law*, 117 (“Briefly put, then, this section assumes that human rights are whatever is understood as human rights.”). See in this regard also, from the perspective of comparative literature, on the close interrelationship between narrations in the form of novels and the development of international human rights law *Slaughter*, *Human Rights, Inc. – The World Novel, Narrative Form, and International Law*, 45 *et seq.*

53 See in this connection for example also the quite approving review of *Tamanaha’s* approach in *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 111-112.

this indeterminacy offers another possibility: Given the vagueness of what makes a norm a norm of international law, could it be that ultimately it is the collectivity of observers, participants, and stakeholders including scholars and tribunals – and not just the intentions of the original parties – that determines whether something is international law depending, more particularly, on whether a critical mass of this collectivity – whose constituent elements may have varying weights – accepts, beliefs, says, or advocates that it is? If so – and whether we like it or not – what makes something international law may well be the belief that it is such. Or, to put it more bluntly, as soon as enough people accept and believe that something is law, it becomes law.”<sup>54</sup>

Moreover, and now already very closely related to the present research issue, one can detect an approving acknowledgement of close linkages between the existence of an international constitutional norm and its reference in social practices like narratives and thus of the need for an empirical approach to identify constitutional normativity in the transnational realm occasionally also already in the international legal discourses on global constitutionalism itself. *Stefan Oeter*, for example, has more recently emphasized that “[i]t does not make sense to talk about the ‘constitutional’ nature of norms, principles and institutions if they are not more than the product of ‘*pouvoirs constitués*’, set in a given institutional framework by constituted actors without any participation of society at large. Constitutional norms and principles derive their dignity and force – if they deserve the expression in a genuine sense – from the overall normative consensus that underpins them.”<sup>55</sup> Consequently, the “paradigm of constitutionalism – if taken seriously – forces us to look to the perceptions, practices and reactions of societies as the basic level of normative discourses and any process of emerging constitutional patterns and practices”.<sup>56</sup> From a more methodological perspective, these findings suggest, *Oeter* stresses, that the constitutionalization of international law should be considered “as a *practice category* and therefore as a phenomenon to be assessed through empirical observation”.<sup>57</sup>

Second, if we briefly turn our attention to parallel developments and approaches in the realm of domestic constitutional law, it is rather telling that in the legal literature on the respective situation in countries without a single codified constitution like the United Kingdom as well as in those discussions, for example taking place in the United States, that are aimed at identifying constitutional norms outside the respective canonical document, not infrequent recourse is taken to the recognition by the relevant state and non-state actors of the constitutional quality of the norms in question. To mention but three examples, *Karl N. Llewellyn* considered it necessary for constitutional norms outside the written constitution to be “regular in occurrence among the relevant actors, whenever the occasion arises” as well as that “the overwhelming bulk of passive participants, or relevant non-participants, must allow of its occurrence”.<sup>58</sup>

*John Gardner* states that with regard to the documents and conventions that make up the constitution of the United Kingdom, “[t]heir constitutional effect is not determined by how they are created but rather by how they are received, by their treatment in either the customs

54 *Pauwelyn*, in: *Pauwelyn/Wessel/Wouters* (eds.), *Informal International Lawmaking*, 125 (140).

55 *Oeter*, in: *Blome et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (29).

56 *Oeter*, in: *Blome et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (31).

57 *Oeter*, in: *Blome et al.* (eds.), *Contested Regime Collisions – Norm Fragmentation in World Society*, 21 (29); see also, e.g., *Wiener/Oeter*, *International Journal of Constitutional Law* 14 (2016), 608 (609) (“a closer look tells us that whether the typical phenomena that are described as instances of constitutionalization actually do lead to something akin to constitutional quality remains a question to be answered through empirical research”).

58 *Llewellyn*, *Columbia Law Review* 34 (1934), 1 (29); see also *id.*, 29 (“The actors, and any non-actors in a position to block or modify action, must *feel* that the way or institution is not subject to abrogation or material alteration. They need not feel that it is right or wise [...] if they are clear that it is permanent. But in the normal case the two feelings coincide.”) (emphasis in the original).

or the decisions of certain law-applying officials”.<sup>59</sup> In addition, *William N. Eskridge* and *John Ferejohn* require that the respective constitutional rules “‘stick’ in the public culture”<sup>60</sup> and that consequently, “[t]he key to super-statuedom is acceptance in public culture. That cannot be mandated, nor is it earned exactly. It is a trial-and-error process which, when successful, creates its own gravitational field.”<sup>61</sup> These exemplary findings might very well be considered at least an indication that the empirical approach to identify the constitutional quality of a norm can also serve as an appropriate rule of recognition in order to assess a constitutionalization of public international law.

Third, as already indicated, the narrative approach suggested here enables us to adequately address all of the three main challenges that the idea and concept of global constitutionalism is faced with. Adopting a narrative perspective largely relieves us from developing a predefined, abstract and theoretical concept of global constitutionalism – and in particular from reaching a broader consensus on it in the scientific community – without at the same time sacrificing the operability of this idea as a research topic, because it allows us to initially rely in this regard on, and refer to, the identification and assessment of constitutional vocabulary in the social interactions like narratives of the relevant actors.

Furthermore, in the same way as the present empirical approach to determine constitutional normativity connects the existence of an international constitutional norm and its reference in social practices, it also bridges and reconciles the existing “mindset” and the “doctrine” perspectives on global constitutionalism. It is inspired and guided by the understanding that the term constitutionalization is not to be regarded – from a kind of bifocal perspective – as describing “legal processes in the real world of law” on the one hand and as labelling “the accompanying discourses” on the other hand.<sup>62</sup> Rather, taking recourse to the configurational and constitutive dimension of narrations, it should be considered as describing legal processes in the real world of law constituted, and thus initiated and sustained, by social practices such as narratives and discourses of the relevant actors.

Finally, we argue that the empirical approach based on a narrative perspective can be regarded as an objective method to distinguish between possible constitutional law and norms of a non-constitutional character in the international legal order. Thus, it also offers a suitable solution to address the fundamental rule of recognition problem of global constitutionalism.

#### **D. A Unique Methodological Approach to Global Constitutionalism**

This research paper, and the larger related project, approaches global constitutionalism in international investment law through the application of a form of empirical analysis. In short, questionnaires have been sent and collected from a number of individuals active in the field of international investment law, including academics, practitioners, government representatives, individuals working for civil advocacy, and arbitrators. The questionnaire consists of three intentionally broad questions, envisioned to grasp the direction and intersection of international

59 *Gardner*, Can There Be a Written Constitution?, Oxford Legal Studies Research Papers 17/2009, 5; see also, e.g., *Bellamy*, Political Constitutionalism, 5 (“the constitution is identified with the political rather than the legal system”).

60 *Eskridge/Ferejohn*, Duke Law Journal 50 (2001), 1215 (1216).

61 *Eskridge/Ferejohn*, Duke Law Journal 50 (2001), 1215 (1230); for a related view see also, e.g., *Schauer*, in: Levinson (ed.), Responding to Imperfection – The Theory and Practice of Constitutional Amendment, 145 (153 and *passim*); *Tushnet*, in: Rosenfeld/Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, 217 (222) (“the rule of recognition resides in social practices”).

62 *Peters*, in: Orford/Hoffmann/Clark (eds.), The Oxford Handbook of the Theory of International Law, 1011.

investment law and global constitutionalism. It is devised as a starting point for beginning to hear the developing narrative within the investor-state arbitration system. While analysing empirical results, the research necessarily also considers the impacts of scholarship focused on the legitimacy crisis within the system. In particular, as UNCITRAL has convened a special group on the issue of reform in Investor-State Dispute Settlement,<sup>63</sup> and accompanying working groups have developed out of this highly public discussion of academics and practitioners,<sup>64</sup> these narratives are considered an element of the larger discussion but can also be critically analysed as impacting the individual narratives intended to be collected in the research.

## 1. Turning to Empirical Analysis for Analysing the State of the Law

Engagement with empirical analysis has gained ground in the past years in the study of (international) law in general<sup>65</sup> and international investment law in particular.<sup>66</sup> Applying the method to the evolving sphere of international investment law holds significant value from several perspectives. Most profoundly impacting the application of international investment law, the legitimacy crisis continues to plague its reputation.<sup>67</sup> In their recent overview of the application

63 See United Nations Convention on International Trade Law, Working Group III, Investor-State Dispute Settlement Reform, available under: <[http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html)> (last accessed 10 December 2019).

64 Academic Forum on Investor-State Dispute Settlement, Geneva Centre for International Dispute Settlement, available under: <<https://www.cids.ch/academic-forum>> (last accessed 10 December 2019) (identifying six significant concerns as part of the legitimacy crisis, including costs, duration, lack of consistency and coherence in relevant legal issues, incorrectness of decision-making, diversity issues, independence of arbitrators).

65 See generally, *Lawless/Robbenolt/Ulen*, *Empirical Methods in Law*, 2016; *Engel*, *Empirical Methods for the Law*, 2 (noting that “To their credit, many of the legal scholars intrigued by the empirical turn of their discipline took the methodological challenge seriously and were adamant on living up to the highest technical standards.”); *Eisenberg*, *Journal of the American Statistical Association* 95 (June 2000), 665 (667) (predicting in 2000 that “[o]ne can confidently forecast increasing use of law-related empirical and statistical analysis.”); *McConville*, in: *McConville/Hong Chui* (eds.), *Research Methods for Law*, 280 *et seq.*

66 *Malcolm Langford/Daniel Behn/Laura Létourneau-Tremblay*, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, ISDS Academic Forum Working Group 7 Paper, 15 March 2019, 46, available under: <[https://www.cids.ch/images/Documents/Academic-Forum/7\\_Empirical\\_perspectives\\_-\\_WG7.pdf](https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf)> (last accessed 10 December 2019) (“The main challenges are access to all relevant data (e.g., all final awards, including on compensation), modelling challenges in explaining outcomes (e.g., capturing all determinants of arbitral behavior), and scope (the empirical research community is small in relation to the number and range of empirical questions being asked). Moreover, evaluative challenges remain – it was not always clear whether there was normatively or empirically a problem even when researchers overcome epistemological problems.”); *Franck*, *North Carolina Law Review* 86 (2007), 1 *et seq.*; *Franck*, *Harvard International Law Journal* 50 (2009), 435 *et seq.*; *Kapeliuk*, *Cornell Law Review* 96 (2010), 47 *et seq.*; *Alschner/Skougarevskiy*, *Journal of International Economic Law* 19 (2016), 561 *et seq.*; *Hafner-Burton/Victor*, *Journal of International Dispute Settlement* 7 (2016), 161 *et seq.*

67 *Behn*, *Georgetown Journal of International Law* 46 (2015), 363 (367) (noting that “At its most fundamental level, the legitimacy debates in international investment treaty arbitration produce a critical perspective as to whether or not foreign investment disputes should be resolved by international arbitral tribunals at all.”); *Brower/Schill*, *Chicago Journal of International Law* 9 (2009), 471 (“Such legitimacy concerns affect not only dispute-settlement institutions as a whole, but also inform the self understanding and the work of those who decide disputes on the international level – in other words, international judges and arbitrators.”). For authors pointing specifically to the issue of bias see for example, *Schultz/Dupont*, *European Journal of International Law* 25 (2014), 1147 *et seq.*; *Donaubauer/Neumayer/Nunnenkamp*, *Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience*, Kiel Working Paper No. 2074, 2017; *Franck*, *Fordham Law Review* 73 (2005), 1521 (1625) (stating already in 2005 “[i]f investment treaty arbitration is to fulfill its promise, mechanisms must be implemented to promote greater sensitivity to the public interest and to minimize the risk of inconsistent decisions.”); *Langford/Behn/Fauchald*, in: *Aalberts/Gammeltoft-Hansen* (eds.), *The Changing Practices of International Law*, 70 (101) (referencing the reassessment by state of the “actual and perceived utility of the treaties” in this area of international law); regarding withdrawal from the system as a symptom of the legitimacy crisis, see *Lavopa/Barreiros/Bruno*, *Journal of International Economic Law* 16 (2013), 869 *et seq.*; *Peinhardt/Wellhausen*, *Global Policy* 7 (2016), 1 *et seq.*

of empirical research methods to the ISDS reforms, *Langford, Behn, and Létourneau-Tremblay* systematically highlight the role of empirical research in the growing understanding of aspects of the reforms, recognizing the “epistemological challenges: some issues are understudied, others issues are difficult to study, and results can be challenging to interpret or compare across time.”<sup>68</sup>

Moreover and with relevance to the value of empirical analysis of narrative perspectives, the structure of the regime as created through the intricate network of bilateral agreements between two sovereign states translates into substantive changes that are slow to implement and realize. To take advantage of that delay, analysing the current reality through diverse analytical methods could allow for more profound understanding of the needed approaches and changes to the construction of agreements. Applying an empirical analysis to the system enables another approach, potentially enlightening the understanding of where improvement could be achieved and how the system can be better understood.

While the research is empirical in its scope of analysing responses from individuals in the field, it ventures beyond the classic comfort in empirical analysis of numbers and hard data. By focusing on narrative, the empirical side of the analysis draws on the particular repetition of phrases and concepts, the reliance on a perspective to attempt to explain and rationalize the transformations in the system.

Significant energy in legal scholarship is necessarily pushed towards the study of primary sources of law and analysis of judicial or arbitral opinions. This type of legal analysis mirrors the approach taken in judicial disputes: lawyers analysing the law to achieve the best results for their client. It is the method every law student learns as part of their legal education,<sup>69</sup> and that necessarily translates into legal scholarship. Legal analysis itself, however, does not need to be similarly limited by the primary approaches to law in judicial disputes. Although these approaches are undoubtedly essential for the effective study and analysis of law, expanding beyond traditional legal analysis aids scholars, lawyers, and policy-makers in achieving a better form of law. This proposed method does not intend to disregard the most core methods for understanding the international legal system, however, by expanding the research methods available, a more complete picture of the realities of the international investment system can be identified.

68 *Malcolm Langford/Daniel Behn/Laura Létourneau-Tremblay*, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, ISDS Academic Forum Working Group 7 Paper, 15 March 2019, 2, available under: <[https://www.cids.ch/images/Documents/Academic-Forum/7\\_Empirical\\_perspectives\\_-\\_WG7.pdf](https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf)> (last accessed 10 December 2019) (further indicating that “[t]he rise of larger datasets is generating better testing of statistical significance and observation of long-term trends and the widening of the methodological palette (with experimental, computational and qualitative approaches) permits scholars to address new questions. The field remains, however, nascent.”).

69 See for example, *Bast/Hawkins*, *Foundations of Legal Research and Writing*, 2012; *Smith*, *Legal Research and Writing*, 1996.

## 2. Challenges to the Empirical Approach of Questionnaires: Subject, Bias, and Methods

There are significant challenges to be confronted with an empirical approach in law, particularly through the use of self-devised questions.<sup>70</sup> Foremost, as trained legal scholars, few of us are properly trained in empirical research methods coming out of political science, sociology, economics, or other social sciences. More specifically with respect to international investment law, the continued respect for confidentiality in the proceedings can pose a noted challenge to conducting a thorough empirical analysis.<sup>71</sup> The growing discussion on the value of transparency within the field,<sup>72</sup> highlighted in particular in recent free trade agreements,<sup>73</sup> but also in other international treaties<sup>74</sup> and soft law instruments,<sup>75</sup> however, indicates that there may be increased opportunity for scholars to categorize and construct data analysis in a larger empirical context.

Moreover, global constitutionalization as a point of departure for the study of international investment law, as discussed above, is dynamic, slippery in its form, and difficult to pinpoint definitively the scope.<sup>76</sup> Like any emerging concept of international law, those studying the realization of these ideals approach it with biases and pre-set notions of what is implied in the amorphous form of global constitutionalization. The questions necessarily hold the bias of us as researchers, inquiring into any possible overlaps with constitutionalism. While those biases no doubt continue to influence the analysis of empirical data, collecting data from others involved in the field, embodied with their own perspectives and approaches to constitutionalization, the research is ideally structured to not be similarly over-burdened by the bias. Therefore, the questionnaire was created with the intention of leaving broad, open space for respondents to reach their own conclusions about the intersection between global constitutionalism and the ongoing reforms and discussions in international investment law. Certainly, this neutrality

70 *Engel*, *Empirical Methods for the Law*, 2 (indicating that “applying the tried and tested empirical tools of empirical social sciences, and using their standards for evaluating such evidence, will not always fit the legal research question. Rather than just adhering to the standards developed by other empiricists, empirical legal scholars should go back to the rationale behind the methodological choices made by the social sciences. Ultimately it is not the methods that are critical, but the research questions.”).

71 See for example *Puig*, *European Journal of International Law* 25 (2014), 387 (390).

72 See generally, *Delaney/Magraw*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 721 *et seq.*, with further references.

73 See, e.g., Article 8.36 of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ EU L 11/23 of 14 January 2017; Article 14.31 of the Indonesia-Australia Comprehensive Economic Partnership Agreement, signed on 4 March 2019, available under: <<https://dfat.gov.au/trade/agreements/not-yet-in-force/iacepa/iacepa-text/Pages/default.aspx>> (last accessed 10 December 2019).

74 See for example, United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, opened for signature 17 March 2015.

75 See, e.g., International Bar Association, *Consistency, Efficiency, and Transparency in Investment Treaty Arbitration*, Report, November 2018; as well as UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (1 April 2014); see thereto also *Euler/Gehring/Scherer* (eds.), *Transparency in International Investment Arbitration – A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, 2015.

76 *Mogami*, in: Suami/Peters/Vanoverbeke/Kumm (eds.), *Global Constitutionalism from European and East Asian Perspectives*, 29 (noting that “The notion of global or international constitutionalism [...] has never been unidirectional. Its definition and description have always caused trouble for both global constitutionalists and their critics.”); *Mogami*, *Japanese Yearbook of International Law* 55 (2012), 371 (373-376) (dividing global constitutionalism between the descriptive/cognitive and normative/prescriptive); *Fassbender*, *Columbia Journal of Transnational Law* 36 (1998), 529 *et seq.*; *Tomuschat*, in: United Nations (ed.), *International Law on the Eve of the Twenty-First Century – Views from the International Law Commission*, 37 *et seq.*; *Dupuy*, *Max Planck Yearbook of United Nations Law* 1 (1997), 1 *et seq.*

represents an ideal of empirical research that is impossible to fully achieve.<sup>77</sup> While the empirical approach is intended to be balanced, we thus acknowledge that levels of bias weigh into the conclusions.

The broad form of the questions, however, holds additional challenges. Notably some respondents felt incapable of answering the questions as they considered them unconstrained and not clarified by formal definitions of global constitutionalism. There were also concerns regarding the implied connections between the questions, forcing a relationship between ongoing changes in the field of investment law and the theme of the project. The form of empirical research has necessarily exposed itself to these types of criticisms. Overtly defining global constitutionalism would have severely limited the breadth of responses. The respondents' own understanding and conceptualization of global constitutionalism is a necessary element of perceptions of its incorporation and relevance to the field of international investment law. We as researchers, however, acknowledge that this wide field granted for interpretation could result in less than accurate conclusions in our final analysis of the empirical research.

Moreover, while the respondents are intended to be balanced representatives from different areas of international investment law, those answering the questionnaires were by the majority academics. There are several reasons for this density of academic responses. First, as researchers and academics ourselves, others in the university setting tend to be our main contacts both professionally and at conferences. In addition, academics are possibly more interested in the subject of the research and thus potentially more aware of the concept of global constitutionalism – a largely academic exercise. Although the original list of individuals to be contacted was more balanced, those responding to the questionnaire was not. The imbalance of responses leaves the empirical conclusions in the vulnerable position of being the opinions of those studying the field of investment law rather than those representing clients in disputes or challenging its legitimate basis as a system of international dispute resolution. Drawing conclusions from only one sphere of the discipline is imprecise but nonetheless exposes certain tendencies.

Furthermore, our research intends to identify tendencies towards global constitutionalism in general as well as regional variations. This latter aspect of the research proves no doubt to be highly imprecise as many individuals working in the field are not limited to understanding the regime from a particular 'regional' interpretation. Despite having been educated or practiced within a particular jurisdiction or region, the overwhelming global nature of international investment law implies that issues cross and perceptions of the field are melding. This interaction is, of course, a necessary element of recognizing an impact by global constitutionalism on the field, but its consequences on the research may be both positive and negative. Should similar policy issues be identified by respondents regardless of their domestic legal connections, this proves, in many ways, that there are dramatic tendencies toward a more globalized constitutional theme within the practice of investment law. But, constitutionalism is necessarily understood differently in different regional contexts.<sup>78</sup> For the field to have already become

77 *Moosa*, *Journal of Economic Methodology* 25 (2018), 1 (2) ("Result variability is a conduit to the expression of bias, in which case the objective of going on a quest for the truth is subverted by the urge to express bias. Confirmation bias is the tendency to avoid rejecting a prior belief, whether in searching for evidence, interpreting it, or recalling it from memory. It relates the misconception that one's opinions are the product of years of rational and objective analysis, but the truth is that these opinions are the result of years of paying attention to information that confirms prior beliefs while ignoring information that challenges these beliefs. As a result, research findings may be reported in a selective manner."); see also earlier concerns with bias in economics research, *Leamer*, *American Economic Review* 73 (1983), 31 *et seq.*

78 See, for example, *Chang/Thio/Tan/Yeh*, *Constitutionalism in Asia – Cases and Materials*, 2014; *Nolte/Schilling-Vacaflor* (eds.), *New Constitutionalism in Latin America – Promises and Practices*, 2012; *von Bogdandy/Mac-Gregor/Morales Antoniazzi/Piovesan* (eds.), *Transformative Constitutionalism in Latin America – The Emergence of a New Ius Commune*, 2017; *Dixon/Ginsburg* (eds.), *Comparative Constitutional Law in Latin America*, 2017; *Smirnova/Thornhill*,

so global that these subtle or more defined differences cannot be identified, it may suggest that this research has arisen too late. If the regional differences can no longer be identified, then the assumption can be taken that there are strong global tendencies that may evolve into a constitutional nature – thus, requiring a different approach to the research question. On the other hand, the failure to identify regional voices may indicate a deficiency in the questionnaire. Perhaps the wording of the questionnaire itself has narrowed the possibility for ‘regional voices’ to emerge. Moreover, from a structural perspective, the limited number of questionnaires received further restricts the ability to fully identify certain regional voices.

The empirical method chosen, however, rather than allowing definitive conclusions about the movement of global constitutionalist principles within international investment law, demonstrates both the uncharted potential for the interaction with expanding empirical methods in international law and the valuable research that can be framed in this context. This research operates as a starting point for this type of research within the international investment law context.

## E. The African Perspective

The African influence on international economic law generally is significant, and its role in the development of international investment law was present from the beginning.<sup>79</sup> As African states approach the changes in the field of investment law,<sup>80</sup> this dialogue is essential for understanding the full picture of requirements for an innovative system of investment protection. Failing to unite the perspectives from the global community will be a failure in constructing investment law for the future.

The questions presented to respondents were structured to elicit a wide base of responses on issues regarding the relationship between global constitutionalism and international investment law. The first question asked about the most pressing issues facing international investment law, the second asked whether those issues could be linked to global constitutionalism, and the third question requested a more general response on the issue of global constitutionalism. The respondents in the African region indicated an interest in the intersection between international investment law and democracy, an apparent critique on the initial purposes of investment law to instil rule of law for investors. There was also an increased concern for parallel proceedings, reflecting the issues that have occasionally arisen with seats in Angola<sup>81</sup> and

Comparative Sociology 15 (2016), 747 *et seq.*; Tuori, European Constitutionalism, 2015; Weiler/Trachtman, North-western Journal of International Law & Business 17 (1997), 354 *et seq.*; Graber, A New Introduction to American Constitutionalism, 2013; Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism, 1995; An-Na'im, African Constitutionalism and the Role of Islam, 2006; Sahle (ed.), Democracy, Constitutionalism, and Politics in Africa: Historical Contexts, Developments, and Dilemmas, 2017.

79 See for example, *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974; *Brower/Daly*, in: Menaker (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity*, 503 *et seq.* (indicating the importance of several African arbitrators and the role of ICSID negotiations in Addis Ababa).

80 *Schlemmer*, ICSID Review – Foreign Investment Law Journal 31 (2016), 167 (190) (noting South Africa's decision to renegotiate its first wave investment treaties); Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria of 3 December 2016, available under: <<http://investmentpolicyhub.unctad.org/IIA/treaty/3711>> (last accessed 10 December 2019).

81 *Sebastian Perry*, “Arbitrators Sued in Angolan Diamond Dispute”, *Global Arbitration Review* (27 February 2014), available under: <<http://globalarbitrationreview.com/news/article/32448/arbitrators-sued-angolan-diamonddispute/>> (last accessed 10 December 2019).

Nigeria<sup>82</sup>. Finally, those responding to the survey from the African region considered global constitutionalism a potentially “innovative” approach to the issues currently plaguing international investment law.

Including the ‘African voice’ in international economic law should not be a deliberate exercise. Yet, deliberate recognition of this voice appears necessary to ensure that the particular perspective and situation on the African continent is fully incorporated into the broader scope of international economic law.<sup>83</sup> This is particularly true with respect to a subject such as global constitutionalism that has more overtly European origins.<sup>84</sup> Regional initiatives to define that voice in Asia, Latin America as well as Africa are essential in the current structure of international economic law. With respect to Africa – as in true of any regional perspective – the diversity on the continent implies a variety of perspectives on global constitutionalism and its relationship with the field of investment law.

While this perspective may prove overly broad for identifying specific tendencies in the narratives of constitutionalism in the field of international investment law, the approach ensures an inclusionary voice. Moreover, it should be fully disclosed that the perspectives are limited. Many sovereign states in the region are not represented in the empirical findings and the number of responses in general is well below the requisite number to produce a balanced picture of the region. Instead of acting as definitive results, this research should be regarded as an initial sketch of future approaches to the study of international investment law specifically and international law more generally.

## F. Conclusions

This research creates a starting point for the use of alternative methods of empirical analysis in investment law. By implementing a system of analysis beyond the comfort zone of lawyers and legal scholars, the research exposes itself to substantial criticism. The approach, however, begins a much-needed process of discovery of the broader narratives that direct, guide, and mould the developments of the legal system. Any attempt to systematically create and organize a collective narrative – or rather a collection of narratives – enlightens the past, present, and future of the system, full of its bias, (mis)conceptions, and constructed realities. In essence, the research leaves bare and exposes the complexities of the voice within the narrative and the inherent challenge to empirical classifications, but in doing so, sheds a level of understanding on the ongoing processes of change in international investment law.

82 *Esso Exploration and Production Nigeria Limited and Shell Nigeria Exploration and Production Company Limited v. Nigerian National Petroleum Corporation*, Award dated 24 October 2011, available under: <[http://globalarbitrationreview.com/cdn/files/gar/articles/Esso\\_and\\_Shell\\_v\\_NNPC\\_final\\_award\\_2011.pdf](http://globalarbitrationreview.com/cdn/files/gar/articles/Esso_and_Shell_v_NNPC_final_award_2011.pdf)> (last accessed 10 December 2019); see also *Sebastian Perry*, “Nigerian Oil Fight Heads to US”, *Global Arbitration Review* (13 November 2014), available under: <<http://globalarbitrationreview.com/news/article/33164/nigerian-oilfight-heads-us/>> (last accessed 10 December 2019).

83 *Laryea/Sucker*, in: *Laryea/Madolo/Sucker* (eds.), *International Economic Law – Voices of Africa*, 1 (6) (noting that their aim for the book is to “assist, even if in a small way, in the development of an African voice, whether for influencing future developing of IEL [international economic law] or, simply, in deepening African understanding of IEL for its better use.”).

84 See, significantly, *Vidya Kumar*, *Towards a Constitutionalism of the Wretched: Global Constitutionalism, International Law and the Global South*, *Völkerrechtsblog*, 27 July 2017, available under: <<https://voelkerrechtsblog.org/towards-a-constitutionalism-of-the-wretched/>> (last accessed 10 December 2019) (indicating that “what makes Global Constitutionalism merely a reiteration of various modes of liberalism (i.e. liberal constitutionalism, liberal internationalism and liberal humanitarianism) is both its refusal to recognise the role of the West in the production of global inequality between the Global North and South and its deeply held belief in the fundamental irrelevance of neo/colonialism in the *present* global legal order as well as in the past.”).

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# Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie

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Bislang erschienene Hefte

## Heft 1

*Felix Boor*, Die Yukos-Enteignung. Auswirkungen auf das Anerkennungs- und Vollstreckungssystem aufgehobener ausländischer Handelsschiedssprüche

## Heft 2

*Karsten Nowrot*, Sozialökonomie als disziplinäre Wissenschaft. Alternative Gedanken zur sozialökonomischen Forschung, Lehre und (Eliten-) Bildung

## Heft 3

*Florian Hipp*, Die kommerzielle Verwendung von frei zugänglichen Inhalten im Internet

## Heft 4

*Karsten Nowrot*, Vom steten Streben nach einer immer wieder neuen Weltwirtschaftsordnung. Die deutsche Sozialdemokratie und die Entwicklung des Internationalen Wirtschaftsrechts

## Heft 5

*Karsten Nowrot*, Jenseits eines abwehrrechtlichen Ausnahmecharakters. Zur multidimensionalen Rechtswirkung des Widerstandsrechts nach Art. 20 Abs. 4 GG

## Heft 6

*Karsten Nowrot*, Grundstrukturen eines Beratungsverwaltungsrechts

## Heft 7

*Karsten Nowrot*, Environmental Governance as a Subject of Dispute Settlement Mechanisms in Regional Trade Agreements

## Heft 8

*Margaret Thornton*, The Flexible Cyborg: Work-Life Balance in Legal Practice

## Heft 9

*Antonia Fandrich*, Sustainability and Investment Protection Law. A Study on the Meaning of the Term *Investment* within the ICSID Convention

## Heft 10

*Karsten Nowrot*, Of “Plain” Analytical Approaches and “Savior” Perspectives: Measuring the Structural Dialogues between Bilateral Investment Treaties and Investment Chapters in Mega-Regionals

## Heft 11

*Maryna Rabinovych*, The EU Response to the Ukrainian Crisis: Testing the Union’s Comprehensive Approach to Peacebuilding

## Heft 12

*Marita Körner*, Die Datenschutzgrundverordnung der Europäischen Union: Struktur und Ordnungsprinzipien

## Heft 13

*Christin Krusenbaum*, Das deutsche Krankenversicherungssystem auf dem Prüfstand – Ist die Bürgerversicherung die ultimative Alternative?

## Heft 14

*Marita Körner*, Age Discrimination in the Context of Employment

## Heft 15

*Avinash Govindjee/ Judith Brockmann/ Manfred Walser*, Atypical Employment in an International Perspective

## Heft 16

*Cara Paulina Gries*, Gesetzliche Barrieren bei der Integration von geduldeten Flüchtlingen in den deutschen Arbeitsmarkt

## Heft 17

*Karsten Nowrot*, Aiding and Abetting in Theorizing the Increasing Softification of the International Normative Order - A Darker Legacy of Jessup’s *Transnational Law*?

## Heft 18

*Matti Riedlinger*, Das CSR-Richtlinie-Umsetzungsgesetz: Implementierung von Corporate Social Responsibility Berichtspflichten in nationales Recht

## Heft 19

*Karsten Nowrot*, “Competing Regionalism” vs. “Cooperative Regionalism”: On the Possible Relations between Different Regional Economic Integration Agreements

## Heft 20

*Karsten Nowrot*, The 2017 EU Conflict Minerals Regulation: An Effective European Instrument to Globally Promote Good Raw Materials Governance?

**Heft 21**

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

**Heft 22**

*Karsten Nowrot/Emily Sipiorski*, Arbitrator Intimidation and the Rule of Law: Aspects of Constitutionalization in International Investment Law

**Heft 23**

*Karsten Nowrot*, European Republicanism in (Legitimation) Action: Public Participation in the Negotiation and Implementation of EU Free Trade Agreements

**Heft 24**

*Karsten Nowrot*, Non-Recognized Territorial Entities in the Post-Soviet Space from the Perspective of WTO Law: Outreach to Outcasts?

**Heft 25**

*Marita Körner*, Beschäftigtendatenschutz im Geltungsbereich der DSGVO

**Heft 26**

*Vladena 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 27**

*Marita Körner*, Die Rolle des Betriebsrats im Beschäftigtendatenschutz

**Heft 28**

*Nadia Kornioti/Karsten Nowrot*, Looking Back to Learn for the Future?: The Work of the ILA on the Issue of Human Rights in Times of Emergency in the 1980s

**Heft 29**

*Marita Körner*, Der Betriebsrat als datenschutzrechtlich verantwortliche Stelle