

Karsten Nowrot

International Investment Law
and the Republic of Ecuador:
From Arbitral Bilateralism to
Judicial Regionalism

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**International Investment Law and
the Republic of Ecuador:
From Arbitral Bilateralism to
Judicial Regionalism**

By

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A. Introduction: Ecuador's "Destroy & Rebuild"-Strategy towards International Investment Law*

Following more than two decades of unprecedented expansion based on an overall quite broad and stable consensus of the international community, the legal regime on the protection of foreign investments has more recently become – again – increasingly controversially debated. In this connection, the contemporary state of international investment law has not only given rise to concerns in the literature and policy fora with regard to, *inter alia*, an alleged bias of the current normative framework in favour of private investors as well as – closely related – an emerging perception of unduly restrictions on the host state's regulatory autonomy in furtherance of other public interests.¹ Rather, and even more notable, there are by now clear indications in state practice that an increasing number of countries assume a more cautious or even openly critical position on the presently predominant approach to the international legal protection of foreign investors. This applies in particular – albeit by far not exclusively – to the recently renewed suspicion displayed by many Latin American countries, which are among the primary drivers behind the “backlash” against the current international investment regime.²

It hardly needs to be emphasized that Latin America has for a variety of reasons traditionally – with the exception of a comparatively short *interludum* of economic liberalism in the 1990s – always been quite antagonistic to foreign investments in general and a preferential protection of foreign investors in particular.³ Nonetheless, the respective policies adopted by these countries are also currently far from following

* The contribution is based on a presentation given at the workshop “Solución de Controversias y Nueva Arquitectura Financiera Regional” organized by the Comisión Técnica Presidencial Nueva Arquitectura Financiera Internacional – Banco del Sur in Quito/Ecuador on 30-31 March 2010. I would like to thank Prof. Christian Tietje, Emily Sipiorski, Vania Preciado, Fredy Trujillo as well as the participants of the workshop, in particular Pedro Páez Pérez, for their support and their very valuable comments on the presentation and earlier versions of this paper.

¹ See Human Rights Council, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 30 (“Nevertheless, recent experience suggests that some treaty guarantees and contract provisions may unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations.”); as well as, e.g., *Van Harten*, Investment Treaty Arbitration and Public Law, 45 *et seq.*; *Miles*, Colorado Journal of International Environmental Law and Policy 21 (2010), 1 *et seq.*; *Yackee*, Suffolk Transnational Law Review 32 (2009), 303 *et seq.*; *Chung*, Virginia Journal of International Law 47 (2007), 953 *et seq.*; *Choudhury*, Vanderbilt Journal of Transnational Law 41 (2008), 775 *et seq.*

² On this perception see, e.g., *Waibel/Kaushal/Chung/Balchin*, in: *Waibel et al.* (eds.), The Backlash Against Investment Arbitration, xxxvii *et seq.*; *Mortenson*, Harvard International Law Journal 51 (2010), 257 (312 *et seq.*); *Kaushal*, Harvard International Law Journal 50 (2009), 491 *et seq.*; as well as in principle already the prediction made by *Paulsson*, ICSID Review – Foreign Investment Law Journal 10 (1995), 232 (257) (“Arbitration without privity is a delicate mechanism. A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash.”).

³ From the numerous literature, see recently *Salacuse*, The Law of Investment Treaties, 65 *et seq.*; *Montt*, State Liability in Investment Treaty Arbitration, 31 *et seq.*, each with further references.

anything close to a uniform pattern. Whereas Brazil has in general always abstained from entering into international treaty obligations aimed at the protection of foreign investors,⁴ other members of this region like Argentina have despite considerable objections and the discussion of possible alternative approaches⁵ apparently for the time being decided to remain in principle within the current international legal framework. Moreover, such diverse a circle of states as for example Cuba, Colombia, Venezuela, Mexico, Peru and Chile have even continued making new international commitments with regard to foreign investors under bilateral investment treaties (BITs) and free trade agreements (FTAs).⁶ However, aside from these comparatively static policy approaches, some countries in Latin America have more recently embarked on the – at least at first sight – somewhat bold venture of largely disconnecting themselves from the present normative ordering structure of international investment protection and are currently in the – not only from an academic perspective rather interesting – phase of initiating a discourse on possible constructive approaches to the reformation of international investment law including in particular also the respective dispute settlement mechanisms.

In addition to Bolivia,⁷ it is especially Ecuador which has in recent years emerged as one of the main opponents of the current state of international investment law in general and international investment arbitration in particular. Ecuador not only adopted an increasingly critical stance on this issue but has also – in contrast to many other Latin American countries – in fact already employed a variety of measures in the domestic and international realm that clearly signal this state's intention to exit the present system and to establish a new alternative scheme of international investment protection. This “destroy & rebuild”-strategy found one of its initial manifestations in a notice submitted on 29 October 2007 pursuant to Article 25 (4) ICSID Convention in which Ecuador announced its decision to no longer submit disputes over non-renewable resources to the jurisdiction of the Centre.⁸ In the following year, Ecuador suspended negotiations of new BITs and informed nine countries – Cuba, the Do-

⁴ *García-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (No. 2, 2009) (forthcoming); *Damon Vis-Dunbar*, Latin America's New Model Bilateral Investment Treaties, Investment Treaty News of 17 July 2008; *Gillman*, American Review of International Arbitration 19 (2008), 269 (285 *et seq.*).

⁵ See thereto specifically with regard to Argentina *Ryan*, University of Pennsylvania Journal of International Law 29 (2008), 725 (747 *et seq.*).

⁶ See thereto, e.g., UNCTAD, World Investment Report 2009, Transnational Corporations, Agricultural Production and Development, 2009, 71; *Fernando Cabrera Diaz*, Venezuela Consents to Arbitration in New BIT with Russia, Investment Treaty News of 15 July 2009; UNCTAD, World Investment Report 2008, Transnational Corporations and the Infrastructure Challenge, 2008, 65; *García-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (No. 2, 2009) (forthcoming).

⁷ On the respective actions taken by Bolivia in this regard since 2007 see, e.g., *Tietjel/Nowrot/Wackernagel*, Once and Forever?, 5 *et seq.*; as well as recently *Luke Eric Peterson*, As New Case Lands at ICSID, and Several More Loom, Bolivia Turns up the Heat on Arbitral System, Investment Arbitration Reporter 3 (No. 6, April 2010).

⁸ See also *Luke Eric Peterson*, Ecuador Wants ICSID to Stop Presiding over Mining and Energy Arbitration, Investment Treaty News of 30 November 2007; as well as generally on the regulatory content and purpose of Article 25 (4) ICSID Convention *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, A Commentary, Article 25, paras. 921 *et seq.*

minican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay – of the denunciation of the BITs concluded with them. Moreover, it announced its intention to propose comprehensive renegotiations of the respective BITs to another thirteen states.⁹ Furthermore, following a referendum on 28 September 2008, Ecuador's new constitution entered into force in October 2008 which, *inter alia*, requires the state to give certain priority to domestic over foreign investments (Article 339) and – subject to regional and sectoral exceptions – prohibits Ecuador from entering into international agreements under which it would have to cede sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the state and individuals or private corporations (Article 422).¹⁰ Against this domestic background, Ecuador – following the example of Bolivia's respective move made already in May 2007 – submitted a notice of denunciation of the ICSID Convention to the World Bank on 6 July 2009.¹¹ In accordance with Article 71 ICSID Convention, this withdrawal from ICSID became effective on 7 January 2010.¹² In addition, aside from initiating renegotiations of existing contracts in particular with a number of foreign oil companies,¹³ an intensive political debate is taking place since September 2009 on the possible termination by Ecuador of another thirteen BITs, among them the ones concluded with the United States, the United Kingdom, the Netherlands, Germany, Canada, France, Finland, Argentina and Chile.¹⁴

However, Ecuador has not only started its pullout from the present framework but appears also to be determined to participate in and contribute to the discourses at the regional level on an eventually more or less quite fundamental reformation of international investment law. In this regard, attention can for example be drawn to a decision adopted by the Energy Council of South America. This institution was founded in April 2007 and comprises of the ministers for energy, oil and related sec-

⁹ See UNCTAD, *World Investment Report 2008, Transnational Corporations and the Infrastructure Challenge*, 2008, 65; UNCTAD, *Recent Developments in International Investment Agreements (2008 – June 2009)*, IIA Monitor No, 3 (2009), 6; *Luke Eric Peterson*, Ecuador Will Denounce at least Nine Bilateral Investment Treaties, *Investment Treaty News* of 5 February 2008.

¹⁰ The text of the 2008 Constitution of Ecuador is available in Spanish at: <<http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>> (last visited on 26 April 2010). Specifically on the background, drafting history and regulatory content of Article 422 of the 2008 Constitution see also *Gillman*, *American Review of International Arbitration* 19 (2008), 269 (286 *et seq.*); *Viteri Torres*, *Transnational Dispute Management* 6 (Issue 4, December 2009), 38 *et seq.*; *Guzmán Pérez*, *Transnational Dispute Management* 6 (Issue 4, December 2009), 5 *et seq.*

¹¹ See thereto *Fernando Cabrera Diaz*, Ecuador Continues Exit from ICSID, *Investment Treaty News*, June 2009, 3; as well as by the same author, Ecuador Prepares for Life after ICSID, While Debate Continues over Effect of its Exit from the Centre, *Investment Treaty News*, September 2009, 3 and 7.

¹² On the controversially debated legal implications of a denunciation of the ICSID Convention see also *infra C.*

¹³ See thereto, e.g., *Fernando Cabrera Diaz*, Ecuador Continues Exit from ICSID, *Investment Treaty News*, June 2009, 3.

¹⁴ See United States of America Department of Commerce, *Doing Business in Ecuador: 2010, Country Commercial Guide for U.S. Companies*, available at: <www.buyusa.gov/ecuador/en/ccg.pdf>; Milbank, Tweed, Hadley & McCloy LLP, *Litigation: The Erosion BIT by BIT of Investment Protection in Ecuador*, 3 November 2009, available at: <www.milbank.com/NR/rdonlyres/2FDD8233-4902-4CD6-A401-E5D84DE90653/0/110309_Ecuador_Investment_Protection.pdf> (both last visited on 26 April 2010).

tors from eleven South American countries. The respective decision, adopted on 8 May 2008, envisions, *inter alia*, the drafting a South American energy treaty and the creation of working groups entrusted with the task of developing proposals for a new legal mechanism to settle investor-states disputes in the energy sector.¹⁵ Furthermore, the former Foreign Minister of Ecuador, *Fander Facioni*, suggested at the session of the General Assembly of the Organization of American States (OAS) in June 2009 the creation of a centre for dispute settlement under the auspices of the Union of South American Nations (UNASUR).¹⁶ Finally, the decisions adopted by the “Bolivarian Alliance for the Peoples of Our America” (ALBA) – an international organization founded in December 2004 by Venezuela and Cuba and currently comprising eight Latin American states including since June 2009 Ecuador – at its 7th summit on 16/17 October 2009 are worth noticing in this connection. In addition to creating a Unitary System of Regional Payments (SUCRE),¹⁷ the ALBA member states decided to establish a working group in order to discuss and design a regional centre for dispute settlement dealing in particular also with claims made by foreign investors.¹⁸ For the purpose of coordinating and advancing the debate on possible approaches to, *inter alia*, a new international investment framework including a modified dispute settlement mechanism as well as in order to represent Ecuador in these regional processes, the Ecuadorian President *Rafael Correa* has at the domestic level established through Presidential Decree No. 334 of 18 May 2007 the Presidential Technical Commission for the New Regional Financial Architecture, comprising of civil servants and other experts.

Against this background, this contribution is intended to analyse some international legal implications of Ecuador’s actions aimed at largely disconnecting itself from the present framework of international investment protection. Furthermore, some broader conceptual thoughts on the perspectives for the future design of international investment agreements in the Latin American context will be provided. For this purpose, the contribution has been divided into three main parts. The first part (B.) will be devoted to an identification and overview of the characteristics and importance of the currently predominant scheme of international investment protection including certain public interest challenges arising from the present design. In the second part (C.) some legal implications and thus possible short-term effects of Ecuador’s recent

¹⁵ Declaration of the First Energy Council of South America of 8 May 2008, available at: <www.pdvsa.com/interface.sp/database/fichero/free/3080/237.PDF> (last visited on 26 April 2010); *Fernando Cabrera Diaz*, South American Alternative to ICSID in the Works as Governments Create an Energy Treaty, *Investment Treaty News* of 6 August 2008.

¹⁶ *Fernando Cabrera Diaz*, ALBA Moves Forward with Plan to Create Regional Investment Arbitration Alternative to ICSID at 7th Summit, *Investment Treaty News*, November 2009, 4.

¹⁷ See Foundation Charter of the Unitary System of Regional Payments (SUCRE) of 17 October 2009, an unofficial English translation being available at: <<http://portalmre.rree.gov.bo/cumbre/LinkClick.aspx?fileticket=ndGiGtx-kbs%3D&tabid=73&mid=425>> (last visited on 26 April 2010).

¹⁸ *Fernando Cabrera Diaz*, ALBA Moves Forward with Plan to Create Regional Investment Arbitration Alternative to ICSID at 7th Summit, *Investment Treaty News*, November 2009, 3 *et seq.*; on previous activities in the Latin American context since 2001 aimed at the establishment of a regional structure for dispute settlement in the investment context see *Guzmán Pérez*, *Transnational Dispute Management* 6 (Issue 4, December 2009), 7 *et seq.*

policy responses to these public interest challenges are evaluated. Finally, the third part (D.) includes some thoughts on potential medium-term alternatives enjoyed by Latin American countries to initiate and implement a reformation of the international legal framework on investment protection. In this connection, it will be argued that the adoption of a regional investment agreement including the creation of a Latin American court of investment law – although appearing at first sight a rather ambitious (and not only to many foreign investors probably suspicious) alternative – can in the medium-term perspective be considered as an acceptable, politically feasible and thus viable option to facilitate a reconciliation, on modified terms, between countries like Ecuador and the international legal regime on the protection of foreign investments.

B. Legal and Political Background

I. Characteristics and Importance of the Current Framework of International Investment Law

Following a decades-long period characterized by divergent perceptions of as well as polarized debates on the content and development of the international legal framework on the protection of foreign investments,¹⁹ international investment law has in particular since the beginning of the 1990s emerged as one of the most dynamic and practically important fields of international law in general and of international economic law in particular.²⁰ The reasons for the considerably enhanced significance of this legal regime are manifold, making it impossible to deal with them in details in the course of this contribution. Essentially, the general rise of international investment law can be attributed to three interrelated and mutually reinforcing factors. First, the regulatory object of this area of law, the undertaking of foreign investments, has

¹⁹ See, e.g., *Barcelona Traction Case*, 1970 I.C.J. 3, 47 *et seq.* (Feb. 5) (“Considering the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding corporations, which are often multinational, [...], it may at first sight appear surprising that the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane. Nevertheless, a more thorough examination of the facts show that the law on the subject has been formed in a period characterized by an intense conflict of systems and interests.”); as well as the judgment of the U.S. Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 *et seq.* (1964) (“There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state’s power to expropriate the property of aliens. [...] It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.”). Generally on the different phases in the development of international investment law in the 20th century see for example *Salacuse*, *The Law of Investment Treaties*, 78 *et seq.*; *Lowenfeld*, *International Economic Law*, 467 *et seq.*; *Schill*, *The Multilateralization of International Investment Law*, 25 *et seq.*; *Vandeveldde*, in: *Sauvant/Sachs* (eds.), *The Effect of Treaties on Foreign Direct Investment*, 3 *et seq.*

²⁰ On this perception see, e.g., *Dolzer/Schreuer*, *Principles of International Investment Law*, 2 (“Since 1990, however, the field of foreign investment law has expanded dramatically.”); *Salacuse/Sullivan*, *Harvard International Law Journal* 46 (2005), 67 (“International investment law has undergone a remarkable transformation in a relatively short time.”).

gained enormous factual importance in recent decades.²¹ While for example in 1973, the worldwide total inflow of foreign direct investments amounted to merely \$ 25 billion, the respective number has risen in 2008 alone to more than \$ 1.690 billion.²² A second important aspect concerns the remarkably strengthened and expanded normative framework of substantive investment law. Thereby, the present regime on the protection of foreign investments comprises a conglomerate of various interconnected legal instrument and sources.²³ Prominently among them are for example agreements directly concluded by foreign investors, predominantly transnational corporations,²⁴ with the respective host state in connection with the undertaking of foreign direct investments. Due to their hybrid character among the normative steering instruments of international economic law as vividly expressed by the label ‘state contracts’, these agreements have already from the end of the nineteenth century onwards received considerable attention in legal practice and literature.²⁵ However, the current normative ordering structure of international investment law is clearly dominated by treaty law. In this connection, the at present already more than 2.670 BITs constitute the public international law “backbone” of this legal regime.²⁶ In addition, more than 270 other international agreements provide for investment provisions, among them bilateral and regional economic integration agreements like Chapter 11 of NAFTA, Chapter 10 of CAFTA-DR or the Chapters 10 of the free trade agreements concluded by the United States with Chile and Oman, as well as multilateral-sectoral conventions such as the Energy Charter Treaty.²⁷ Although being, in the absence of a comprehen-

²¹ See *Dolzer/Schreuer*, Principles of International Investment Law, 2 (“The financial volume of foreign investment today clearly surpasses the amounts involved in foreign trade.”); as well as, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection, 17 (19); *Dunning/Lundan*, Multinational Enterprises and the Global Economy, 17 *et seq.*

²² UNCTAD, World Investment Report 2009, Transnational Corporations, Agricultural Production and Development, 2009, 3; in the year 2007 the financial volume reached an all-time high of \$ 1.979 billion, see *ibid.*, 3. for the respective data from 1973 see *Salacuse/Sullivan*, Harvard International Law Journal 46 (2005), 67 (71).

²³ *Reinisch*, in: Tietje (ed.), Internationales Wirtschaftsrecht, 346 (348); *Tietje*, in: Ehlers/Schoch (eds.), Rechtsschutz im Öffentlichen Recht, 63 (70); as well as on the perception that the distinction between international and domestic law as well as the classical separation between public and private law is becoming blurred in current international investment law *Dolzer/Schreuer*, Principles of International Investment Law, 3.

²⁴ See *Nwogugu*, RdC 153 (1976), 167 (214); *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 343 *et seq.*

²⁵ See, e.g., *Texaco Overseas Petroleum Company et al. v. Government of the Libyan Arab Republic*, I.L.M. 17 (1978), 1 (15 *et seq.*); *In the Matter Revere Copper and Brass Inc. and Overseas Private Investment Corporation*, I.L.R. 56 (1980), 258 (275 *et seq.*); as well as from the numerous contributions on this issue *Dolzer/Schreuer*, Principles of International Investment Law, 72 *et seq.*; *Muchlinski*, Multinational Enterprises and the Law, 577 *et seq.*; *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 339 *et seq.*

²⁶ UNCTAD, World Investment Report 2009, Transnational Corporations, Agricultural Production and Development, 2009, 32. The first BIT ever was signed on 25 November 1959 between the Federal Republic of Germany and Pakistan. Generally on the development and current predominance of BITs in the framework of international investment law see, e.g., *Salacuse*, The Law of Investment Treaties, 3 *et seq.*; *Dolzer/Schreuer*, Principles of International Investment Law, 18 *et seq.*

²⁷ UNCTAD, World Investment Report 2009, Transnational Corporations, Agricultural Production and Development, 2009, 33; see also, e.g., UNCTAD, Investment Provisions in Economic

sive multilateral agreement, from a formal perspective a quite fragmented area of international economic law, the substantive provisions on, *inter alia*, expropriation, fair and equitable treatment, national treatment, most-favoured nation treatment and full protection and security as stipulated in the numerous international investment treaties are overall largely standardized,²⁸ thus constituting a quite comprehensive core of at least in principle undisputed material protection standards for foreign investors.

Finally, a third factor which has undoubtedly strongly contributed to the current importance of international investment law is the increased effectiveness of and recourse to the legal regime on the settlement of international investment disputes. Although a handful of investment-related disputes have been brought by the investor's home state for example to the International Court of Justice²⁹ and despite the fact that at least most of the international investment treaties also contain arbitration clauses for the settlement of disputes between the contracting states themselves, it is well-known that the currently most common mechanism in this regard is investment arbitration in the form of mixed dispute settlement directly between host states and foreign investors, among them mainly transnational corporations.³⁰ Thereby, it should be recalled that this type of investment dispute settlement mechanism is not an entirely new phenomenon on the international scene. Certain predecessors can be found as early as in medieval times³¹ and thus prior to the evolution of the modern international system as – from an admittedly quite Eurocentric perspective – commonly connected with the Peace Treaties of Westphalia in 1648.³² However, in light of the various challenges – in particular, but not exclusively, for the foreign investor – connected with traditional means of dispute settlement such as diplomatic protection or proceedings in the domestic courts of the host state,³³ also the modern practice of in-

Integration Agreements, 2006; *Salacuse*, *The Law of Investment Treaties*, 97 *et seq.*; as well as on the relevance of a number of WTO agreements for the protection of foreign investments *Beviglia Zampetti/Sauvé*, in: Guzman/Sykes (eds.), *Research Handbook in International Economic Law*, 211 (252 *et seq.*).

²⁸ See, e.g., *Schill*, *The Multilateralization of International Investment Law*, 11 *et seq.* and *passim*; *Beviglia Zampetti/Sauvé*, in: Guzman/Sykes (eds.), *Research Handbook in International Economic Law*, 211 (215); *Salacuse*, *The Law of Investment Treaties*, 126 *et seq.*; *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 26; *Muchlinski*, in: Sauvants/Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment*, 37 (38); *Montt*, *State Liability in Investment Treaty Arbitration*, 2.

²⁹ See, e.g., *Anglo-Iranian Oil Co. Case*, 1952 I.C.J. 93 (July 22); *Barcelona Traction Case*, 1970 I.C.J. 3 (Feb. 5); *Eletronica Sicula S.p.A. (ELSI) Case*, 1989 I.C.J. 15 (July 20); *Case Concerning Ahmadou Sadio Diallo*, I.C.J., Judgment on Preliminary Objections of 24 May 2007.

³⁰ See only *Reinisch*, in: Binder *et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 894 (916) (“Investment arbitration has experienced an enormous boom in the late 1990s which continues in the first decade of the 21st century.”); specifically on the predominance of transnational corporations as claimants in investor-state arbitration proceedings *Tietje*, in: Tietje (ed.), *International Investment Protection*, 17 (32).

³¹ See thereto for example *Braun*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 491 (503 *et seq.*). For the even more ancient roots of international investment law itself, see *Salacuse*, *The Law of Investment Treaties*, 80 *et seq.*

³² See, e.g., *Delbrück*, *Swiss Review of International and European Law* 11 (2001), 1 (2 *et seq.*); *Nourot*, *Global Governance and International Law*, 14 *et seq.*, with further references.

³³ See thereto for example *Dolzer/Schreuer*, *Principles of International Investment Law*, 211 *et seq.*; *Muchlinski*, in: Binder *et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 341 *et seq.*; *Schill*, in:

vestor-state arbitration can be traced back already to the 1930s.³⁴ Nevertheless, it was – again – in particular since the beginning of the 1990s that the overwhelming acceptance of these proceedings and a number of structural changes resulted in an enhanced effectiveness of as well as recourse to investor-state arbitration, thus ultimately leading to the current prominence of this mechanism for the settlement of international investment disputes.

Whereas respective investment disputes were previously largely administered and decided on an *ad hoc* basis, increasing recourse has more recently been taken to institutionalized forms of arbitration, in particular on the basis of the ICSID Convention, but also for example under the framework of the International Chamber of Commerce, the Permanent Court of Arbitration, the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce or – albeit without an institutional structure – on the basis of the UNCITRAL Arbitration Rules.³⁵ In addition, these developments have in recent years been accompanied by a fundamental shift concerning the legal basis for investor-state arbitration. In the past the necessary consent to arbitration³⁶ was typically given by the host state and the foreign investor by way of an arbitration clause in a respective state contract or in the form of a *compromis* concerning a dispute which has already arisen. To the contrary, the relevant arbitration clauses are now commonly stipulated in the international investment agreements concluded between the home and the host states, first and foremost among them the numerous BITs.³⁷ As a consequence, although arbitration clauses in state contracts between the host state and the private investor are still quite common,³⁸ during “the last 10 years most cases were brought on the basis of treaty provisions”.³⁹

Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 29 (33 *et seq.*); *Reinisch/Malintoppi*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 691 (694 *et seq.*, 712 *et seq.*).

³⁴ *Salacuse*, *The Law of Investment Treaties*, 372 *et seq.*; *Nelson*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 555 (557 *et seq.*); *Reinisch*, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, 801 (805).

³⁵ See thereto, e.g., *Tietje*, in: Ehlers/Schoch (eds.), *Rechtsschutz im Öffentlichen Recht*, 63 (73 *et seq.*); *Dolzer/Schreuer*, *Principles of International Investment Law*, 222 *et seq.*; as well as specifically for a comparison of investor-state arbitrations under ICSID and the UNCITRAL Rules of Arbitration recently *Jagusch/Sullivan*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 79 *et seq.*

³⁶ Generally thereto for example *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 830 *et seq.*

³⁷ *Tietje/Nowrot/Wackernagel*, *Once and Forever?*, 19; on the stipulation of investor-state arbitration clauses in the great majority of the current BITs see also UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends and Investment Rulemaking*, 2007, 100 *et seq.*; *Muchlinski*, in: *Sauvant/Sachs* (eds.), *The Effect of Treaties on Foreign Direct Investment*, 37 (67 *et seq.*); *Salacuse*, *The Law of Investment Treaties*, 137 *et seq.*

³⁸ *Böckstiegel*, *Arbitration International* 23 (2007), 93 (99).

³⁹ *Schreuer*, in: Hofmann/Tams (eds.), *The International Convention on the Settlement of Investment Disputes (ICSID)*, 15 (20); see also, e.g., *Tietje*, *Internationales Investitionsrecht im Spannungsverhältnis*, 9; *Diehl*, in: *Reinisch/Knahr* (eds.), *International Investment Law in Context*, 7 (17).

Already the quantitative development of investment arbitration proceedings on the basis of the ICSID Convention,⁴⁰ the currently most important forum for the settlement of investment disputes,⁴¹ vividly illustrates the considerable dynamics and effectiveness that characterizes the present international investment regime as a result of the legal recognition of direct access by investors to effective international remedies. Whereas during the whole period from 1966 – the year the ICSID Convention entered into force – until 1993 only 27 investment arbitration proceedings took place under this framework, since 1998 at an average one new case per month is being registered with ICSID.⁴² As of April 2010, a total of 185 proceedings were concluded with 130 cases still pending.⁴³ Concerning the involvement of Ecuador as defendant in these proceedings, as of December 2008 this country has or had been a party in a total of 14 cases with four new cases filed in 2008 alone. From a global perspective, Ecuador has thus by that date occupied – behind Argentina (48 cases), Mexico (18 cases) and the Czech Republic (15 cases) – the fourth place in the list of host states facing known investment treaty claims.⁴⁴ In addition, at least one further investment treaty claim was launched in September 2009 against Ecuador by *Chevron* with the dispute being arbitrated under the UNCITRAL Arbitration Rules.⁴⁵

II. Normative Consequences and Challenges Arising from the Present Design of International Investment Law

The expanding scope of application of international investment law as well as the notably increased effectiveness and dynamization that this area of international economic law has experienced in particular as a result of the currently quite firmly estab-

⁴⁰ The same applies probably to the development of – albeit still often confidential – investor-state arbitrations for example at the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of International Arbitration or on the basis of the UNCITRAL Arbitration Rules, see *Reinisch*, in: Binder *et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 894 (896). By the end of 2008, the cumulative number of known treaty-based investor-state arbitrations had reached 317, see UNCTAD, *World Investment Report 2009, Transnational Corporations, Agricultural Production and Development*, 2009, 34; as well as UNCTAD, *Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1* (2009), 2 (“Of the total 317 known disputes, 201 were filed with ICSID (or the ICSID Additional Facility), 83 under the United Nations Commission on International Trade Law (UNCITRAL), 17 with the Stockholm Chamber of Commerce, five with the International Chamber of Commerce and five were ad hoc. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration and one was administered by the Permanent Court of Arbitration. In four cases, the applicable rules are unknown so far.”).

⁴¹ *Dugan/Wallace/Rubins/Sabahi*, *Investor-State Arbitration*, 50; *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 830 (831).

⁴² *Tietje*, in: Ehlers/Schoch (eds.), *Rechtsschutz im Öffentlichen Recht*, 63 (74).

⁴³ As of 26 April 2010; for subsequent developments in this regard see the respective information on the ICSID website at: <<http://icsid.worldbank.org/ICSID/Index.jsp>> (last visited on 26 April 2010).

⁴⁴ UNCTAD, *Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1* (2009), 3 and 13.

⁴⁵ See thereto *Damon Vis-Dunbar*, *Chevron Launches Investment-Treaty Claim against Ecuador*, *Investment Treaty News* of 2 October 2009.

lished enforcement mechanisms of investor-state arbitrations have most certainly considerable repercussions on the legal relationship between the host state and the foreign investor.

On the one side, it needs to be emphasized in this connection that the possibility of direct access to international mixed arbitration not only serves as a clear indication of the quite prominent role played by foreign investors such as in particular transnational corporations in the enforcement processes – and thereby also the progressive development⁴⁶ – of international investment law. Rather, the more recent developments in the field of investor-state arbitration also illustrate the increasing normative recognition of these non-state actors within the international legal framework as a whole. While it is already for some time controversially discussed whether corporations and other foreign investors are under certain circumstances able to acquire the status of partial, derivative subjects of international law on the basis of state contracts concluded with host states,⁴⁷ the above mentioned structural changes in the scheme of and legal basis for the settlement of investment disputes further indicate the emergence of a respective international legal status. Thereby, contrary to a view occasionally to be found in the literature,⁴⁸ the ICSID Convention itself does not support this proposition. Article 25 (1) ICSID Convention stipulates the specific additional consent of the parties to the dispute – the host state and the investor – as one of the necessary requirements for establishing jurisdiction of ICSID for investor-state arbitration.⁴⁹ Since the investor has thus on the basis of the ICSID Convention alone no unconditional legal entitlement to initiate respective dispute settlement proceedings, it

⁴⁶ It should be recalled that in particular institutionalized dispute resolution as being increasingly taken recourse to also in the realm of international investment law is generally regarded not only as a means of law-application and -enforcement, but is itself frequently also a mechanism of law-making and thus a “most important fact in the development of international law”, see generally *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I/1, 41; as well as, e.g., *Lauterpacht*, *The Development of International Law*, 155 *et seq.*; *Boyle/Chinkin*, *The Making of International Law*, 263 *et seq.*; and *Trachtman/Moremen*, *Harvard International Law Journal* 44 (2003), 221 (223) (“control over litigation entails a degree of control over the type of law that is made”). Specifically on the respective role played by corporations in international investment law *Sornarajah*, *International Law on Foreign Investment*, 4 (“The multinational corporations themselves must be seen as distinct bases of power capable of asserting their interests through the law. [...] It is a fascinating effect that through the employment of private techniques of dispute resolution, they are able to create principles of law that are generally favourable to them.”); *Tully*, *Corporations and International Lawmaking*, 271.

⁴⁷ See thereto, e.g., *Texaco Overseas Petroleum Company et al. v. Government of the Libyan Arab Republic*, I.L.M. 17 (1978), 1 (17); *Böckstiegel*, *Der Staat als Vertragspartner ausländischer Unternehmen*, 186 *et seq.*; *Ijalaye*, *The Extension of Corporate Personality*, 221 *et seq.*; *Tomuschat*, *RdC* 281 (1999), 9 (154).

⁴⁸ See for example *Gutto*, in: *Snyder/Sathirathai* (eds.), *Third World Attitudes towards International Law*, 275 (285) (“The Convention provides almost full international legal personality to the TNCs.”).

⁴⁹ See also the respective statement in the preamble of the ICSID Convention that “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed under any obligation to submit any particular dispute to conciliation or arbitration”; as well as, e.g., *Lowenfeld*, *International Economic Law*, 537 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 223; for a comprehensive evaluation of the consent requirement as stipulated in Article 25 ICSID Convention see *Schreuer/Malintoppi/Reinischl/Sinclair*, *The ICSID Convention, A Commentary*, Article 25, paras. 374 *et seq.*

has rightly been emphasized that this treaty itself does not amount to a recognition of international legal personality of foreign investors like transnational corporations.⁵⁰

However, a different conclusion appears to be justified in those cases in which the host state has already given its consent to investment arbitration on the basis of an international agreement in such a way, that it only depends on the investor whether to accept this legally binding offer by, *inter alia*, instituting investment arbitration proceedings.⁵¹ A respective treaty-based legal entitlement to take recourse to investor-state arbitration – and thus the allocation of direct subjective rights to private investors under international law⁵² – is today frequently stipulated in the arbitration clauses of BITs. Whereas in this connection, however, the existence of a respective legal entitlement depends largely upon the specific wording of the arbitration clauses of the individual BIT in question,⁵³ also an increasing number of other international agreements include a binding consent of the contracting parties to investor-state arbitration. In the realm of regional economic integration agreements, Article 1122 NAFTA, the Articles 10.17 *et seq.* CAFTA-DR, Article 6.21 (4) of the Comprehensive Economic Cooperation Agreement between India and Singapore, Article 10.16 of the United States-Oman Free Trade Agreement, Article 32 *et seq.* ASEAN Comprehensive Investment Agreement, Article 10.16 of the United States-Chile Free Trade Agreement as well as Article 9 of the Protocol of Colonia for the Promotion and Reciprocal Pro-

⁵⁰ See, e.g., *Hobe*, *Praxis des Internationalen Privat- und Verfahrensrechts* 22 (2002), 249 (251); *Tietje*, in: Tietje (ed.), *International Investment Protection*, 17 (32); *Schwartzmann*, *Private im Wirtschaftsvölkerrecht*, 95.

⁵¹ On the admissibility of this approach see, e.g., *Generation Ukraine Inc. v. Ukraine*, ICISD Case No. ARB/00/9, Award of 16 September 2003, para. 12.2; *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 830 (837).

⁵² See, e.g., *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145 (“The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of *their treaty rights* by directly bringing action against the State in whose territory they have invested.”) (italic emphasis added); *Lauterpacht*, *Indiana Journal of Global Legal Studies* 4 (1997), 259 (274); *Tietje/Szodruch*, *Zeitschrift für Bankrecht und Bankwirtschaft* 19 (2007), 498 (501); *Braun*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 491 (495 *et seq.*); *Spiermann*, *Arbitration International* 20 (2004), 179 (185) (“It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law.”). However, this perception is far from undisputed. On the respective doctrinal debate see also, e.g., *Douglas*, *The International Law of Investment Claims*, 10 *et seq.*; *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 61 *et seq.*; *Klabbers/Peters/Ulfstein*, *The Constitutionalization of International Law*, 251 *et seq.*

⁵³ See, e.g., *Dolzer/Schreuer*, *Principles of International Investment Law*, 242 (“Not all references to investor-state arbitration in BITs constitute binding offers of consent by the host state.”); see, however, in this connection also on the potentially relevant issue of a possible procedural dimension of the most-favoured-nation clauses stipulated in BITs for example *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/17, Decision on Jurisdiction of 25 January 2000; *Gas Natural SDG v. Argentina*, ICSID Case No. ARB/03/10, Decision on Jurisdiction of 17 June 2005; *Salini Costruttori SpA & Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 15 November 2004; as well as, e.g., *Santiago Tawil*, in: Binder *et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 9 *et seq.*; *Acconi*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 363 (387 *et seq.*); *Tietje/Nourot/Wackernagel*, *Once and Forever?*, 30, with further references.

tection of Investments in the MERCOSUR⁵⁴ serve as notable examples in this regard. The same applies at the multilateral-sectoral level to Article 26 (3) lit. a of the Energy Charter Treaty which stipulates in connection with mixed settlements of investment disputes that “each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation”. The in principal unconditional recognition of a right to initiate investment arbitration proceedings against the host state creates a clear international legal entitlement for private investors like transnational corporations, thus “marking another step in their transition from objects to subjects of international law”.⁵⁵

Whereas on the one side the foreign investors have – particularly on the basis of access to effective international legal remedies – experienced in recent years a notable strengthening of their legal status, the question arises on the other side as to the consequences resulting from these comparatively new developments for the regulatory autonomy enjoyed by the host states. Although a number of congruent interests of investors and host states do in fact exist, international investment law has with regard to its overarching scheme always primarily been shaped and influenced by a certain tension between the economic interests pursued by investors and the necessary “policy space” of host states.⁵⁶ In this connection, it is frequently and rightly emphasized in the literature that the enhanced normative effectiveness of international investment law – in the same way as for example of the legal regime established by the WTO⁵⁷ – has led to a growing influence of international economic law on the content and shape of domestic legal standards and administrative actions as well as thus, more generally, to increased constraints on the regulatory autonomy of (host) states.⁵⁸

The “privatization” of international law enforcement in the realm of investment protection plays undoubtedly – as for example also evidenced in other areas such as the regional human rights regimes in Europe and the Americas – a key role in the respective dynamization of a legal regime. Nevertheless, these quite far-reaching conse-

⁵⁴ As of April 2010, the last mentioned Protocol of Colonia, signed on 17 January 1994, is still awaiting its entry into force.

⁵⁵ See in particular with regard to the legal regime established by the Energy Charter Treaty *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141 (“For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. [...] By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.”); see also, e.g., *Tietje*, The Applicability of the Energy Charter Treaty, 13 (“Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT”); *Happ*, Schiedsverfahren zwischen Staaten und Investoren, 138 *et seq.*; as well as generally *Lauterpacht*, *Indiana Journal of Global Legal Studies* 4 (1997), 259 (274).

⁵⁶ See, e.g., *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 5 *et seq.*; *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming); *Salacuse*, *The Law of Investment Treaties*, 37 *et seq.*; *Krajewski*, *Wirtschaftsvölkerrecht*, para. 536.

⁵⁷ See thereto as well as on the respective normative consequences *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, 145 (171 *et seq.*, 206 *et seq.*).

⁵⁸ See for example *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 10 *et seq.*; *Dolzer*, *New York University Journal of International Law and Politics* 37 (2005), 953 *et seq.*; *Dolzer*, in: *Deppenheuer et al.* (eds.), *Festschrift für Josef Isensee*, 61 (65 *et seq.*); *Krajewski/Ceysens*, *Archiv des Völkerrechts* 45 (2007), 180 *et seq.*

quences are not exclusively to be attributed to the increased recognition of direct access by foreign investors to international arbitration. Rather, these effects can more accurately be described as resulting from processes of mutual reinforcements of procedural and substantive law factors. In the realm of substantive investment law, attention needs to be drawn in this regard to the fact that the arbitral practice is currently no longer primarily confronted with the classical types of direct expropriations or large-scale nationalizations, but rather with cases involving the protection against indirect expropriation as well as the guarantee of fair and equitable treatment as also being stipulated in most modern BITs and other international investment agreements. Both are quite broad, with regard to their regulatory content still controversially discussed and thus somewhat elusive stipulations.⁵⁹ And both have, *inter alia*, by setting certain standards for domestic administrative procedures, in particular in light of the occasionally quite far-reaching understanding of some arbitration tribunals developed a considerable potential to codetermine certain segments of the domestic legal orders of host states.⁶⁰

It hardly needs to be emphasized that stipulating restrictions on the “policy space” of host states on the basis of international legal obligations and thus providing conditions of legal certainty for foreign investors are among the central – and in principle indispensable – purposes of international investment agreements. However, it also has to be re-called in this connection, that the regulatory autonomy enjoyed by host states is very far from being merely an end in itself. Rather, it is first and foremost a means to pursue – and indeed even finds its justification and legitimation exclusively in the

⁵⁹ On the inconsistent treatment of the issue of indirect expropriation, in particular with regard to its distinction from legitimate regulatory measures, see, e.g., *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of 30 August 2000, para. 111; *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 116 (“The government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; [...]”); *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 255 (“It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.”); and *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 189, 195 (“In order to establish whether State measures constitute expropriation under Article IV(1) of the Bilateral Treaty, the Tribunal must balance two competing interests: the degree of the measure’s interference with the right of ownership and the power of the State to adopt its policies. [...] With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed.”). Concerning the possibility obligations arising from the guarantee of fair and equitable treatment, see for example *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 154; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 27 August 2009, paras. 176 *et seq.*; and *Merrill & Ring Forestry L.P. v. Canada*, UNCITRAL Arbitration, Award of 31 March 2010, paras. 182 *et seq.* Generally on these two protection standards also, e.g., *Dolzer/Schreuer*, *Principles of International Investment Law*, 92 *et seq.*, 119 *et seq.*; *Salacuse*, *The Law of Investment Treaties*, 218 *et seq.*, 297 *et seq.*

⁶⁰ *Tietje*, *Internationales Investitionsrecht im Spannungsverhältnis*, 11 *et seq.*; *Kaushal*, *Harvard International Law Journal* 50 (2009), 491 (525 *et seq.*).

pursued of – the promotion and protection of public interest concerns, among them for example human rights, development needs, environmental issues as well as social and labour standards. In light of the enhanced effectiveness and considerably expanded scope of application of international investment law, the possibility of disputes increasingly arises which involve impairments of economic interests of foreign investors covered by respective protection standards of international investment agreements that are justified by the host state in question under recourse to public interest concerns like the protection of human rights. And indeed, considering the rising number of investor-state arbitrations, it is hardly surprising that respective constellations have already materialized in practice. Argentina, to mention but one example, is in currently pending ICSID arbitration proceedings in connection with privatizations in the water sector justifying the termination of water and sewage concessions granted to foreign investors, *inter alia*, by highlighting its international legal obligations arising from the human right to water.⁶¹

In light of these findings, it becomes obvious that – at the level of designing international investment agreements as well as in the realm of investor-state arbitration proceedings – the central challenge lawmakers and arbitrators 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 on the one side and the domestic steering capacity of host states for the protection and promotion of public interest concerns on the other side.⁶² It is submitted that probably everybody involved in and affected by international investment law would readily subscribe to this rather general conclusion. To the contrary, it is precisely the underlying issues of how to achieve and of what exactly constitutes an appropriate balance between host states and foreign investors as well as in particular the question whether the current predominant approach in this area of law has achieved or is even capable of achieving a respective proper equilibrium, that are at the heart of the at present again increasingly controversial debate on the current situation of and future perspectives for the international legal regime on the protection of foreign investors.

Far from being limited to the Latin American context, this debate is global in character. Thereby, it is from a structural perspective in particular the challenges aris-

⁶¹ See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *amicus curiae* of 19 May 2005, para. 19 (“The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.”); on this as well as other examples see also UNCTAD, Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No. 2 (2009), 8 *et seq.*; Peterson, Human Rights and Bilateral Investment Treaties, 27 *et seq.*; Kriebaum, *Journal of World Investment & Trade* 10 (2009), 653 *et seq.*; Thielbörger, in: Dupuy/Francioni/Petersmann (eds.), *Human Rights in International Investment Law*, 487 (493 *et seq.*); Krajeuski, in: Ehlers/Wolffgang/Schröder (eds.), *Rechtsfragen internationaler Investitionen*, 103 *et seq.*

⁶² See also, e.g., UNCTAD, *Development Implications of International Investment Agreements*, IIA Monitor No. 2 (2007), 6.

ing from the current institutional design of investor-state arbitration which have more recently given rise to concerns among states, stakeholders and academics.⁶³ In addition to the problem of inconsistent decisions frequently – and at least to a certain extent rightly – associated with the present system of arbitration tribunals which considerably limits the predictability of the outcome of future cases for states and investors,⁶⁴ it is especially the quite broad delegation of competences to individual investment tribunals who are authorized and required to interpret and thus clarify very indeterminate legal terms such as fair and equitable treatment or the distinction between indirect expropriation and legitimate regulatory measures that has received increasing attention. This is especially the case since in the course of their adjudicatory tasks, investment tribunals thus also have to decide on the existence and scope of the public policy discretion enjoyed by the host states as well as conflicting international legal obligations under other regimes like human rights law. In light of these findings as well as the potentially far-reaching political and financial consequences of tribunal decisions, the question ‘who decides’ – well-known also from the domestic context⁶⁵ – and thus also the issues of qualification and in particular ‘backgrounds’ as well as the preconception (*Vorverständnis*) of arbitrators become ever more important and subject to public scrutiny.⁶⁶ In addition and from a broader perspective, it is increasingly and rightly questioned whether the currently still quite close structural orientation of investor-state arbitration on the model and concepts of international commercial arbitration adequately reflects the differences between these two types of dispute settlement.⁶⁷ This applies in particular to the kinds of interests involved. Whereas commer-

⁶³ See thereto also for example the respective observations by *Schreuer*, in: Reinisch/Knahr (eds.), *International Investment Law*, 3 (5) (“The future of investment arbitration is by no means certain. The enthusiasm of States, especially those that have been on the losing side in several major cases, has been severely dampened. Even former champions of investors’ rights, such as the United States, have lost much of their eagerness after finding themselves in the role of respondents.”); *Salacuse*, *The Law of Investment Treaties*, 14 (“Thus, despite the fact that the international investment regime is founded on 3,000 treaties solemnly concluded by some 180 different states, one cannot assume that it will endure.”); as well as, e.g., *Choi*, *Journal of International Economic Law* 10 (2007), 725 (740); *Ryan*, *University of Pennsylvania Journal of International Law* 29 (2008), 725 (745 *et seq.*).

⁶⁴ Generally on the issue of inconsistency by the arbitral tribunals when deciding similar issues *Reinisch*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 113 (115 *et seq.*); *Wells*, in: *ibid.*, 341 (342); *Tams*, *An Appealing Option?*, 18 *et seq.*; *Tietje*, *Internationales Investitionsrecht im Spannungsverhältnis*, 17 *et seq.*; *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming).

⁶⁵ Out of the numerous contributions on this issue, see for example the by now already classical treatises by *Bickel*, *The Least Dangerous Branch*, 1 *et seq.*; *Esser*, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 1970.

⁶⁶ See thereto, e.g., *van Aaken*, *Finnish Yearbook of International Law* 17 (2006), 91 (124 *et seq.*); *Tietje*, *Internationales Investitionsrecht im Spannungsverhältnis*, 18; *Peterson*, *Human Rights and Bilateral Investment Treaties*, 45; *Peterson*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 483 (484, 486 *et seq.*); *Van Harten*, *Investment Treaty Arbitration and Public Law*, 122 *et seq.*, 167 *et seq.*; *Jacob*, *International Investment Agreements and Human Rights*, 25 *et seq.*; as well as the recent in-depth assessment by *Park*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 189 *et seq.*

⁶⁷ See thereto for example recently *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming) (“However, the disputes that arise under the international law of foreign investment are unique in terms of the subjects and the objects. The interpretation of con-

cial arbitration is primarily concerned with competing private interests, investor-state arbitration typically involves first and foremost also public interests, or – in other words – requires investment tribunals to adjudicate on the existence of as well as weight to be attached to respective public interests in the case at issue.⁶⁸ Furthermore and closely connected to this finding, the fact that investor-state arbitration proceedings – again following the model of commercial arbitration – are still predominantly governed by the principle of confidentiality is more and more regarded as inappropriate, especially in light of the far-reaching consequences of and public interest concerns involved in these dispute settlement mechanisms.⁶⁹

Against this background, it is hardly surprising that larger segments of the international community have more recently already introduced a number of measures in order to cope with these challenges.⁷⁰ To mention but a few examples, at the multilateral level the NAFTA Free Trade Commission (FTC) has – in exercise of its competence of authoritative treaty interpretation under Art. 2020 NAFTA – already from 2001 onwards paved the way for several clarifications aimed at specifying the fair and

cepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators. Because of that the use of concepts borrowed from international commercial arbitration need to be reconsidered for purposes of foreign investments. It has been said that international arbitration is similar to local arbitration just as sea lions are similar to jungle lions: just in the name. The same can probably be said of investment arbitration and international commercial arbitration. Whereas in the former issues of international law and public policy and the interests of sovereign States are frequently present in the latter that is rarely the case.”)

⁶⁸ See, e.g., *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 18; *Salacuse*, The Law of Investment Treaties, 354 *et seq.*; *Van Harten*, in: Waibel *et al.* (eds.), The Backlash Against Investment Arbitration, 433 (434 *et seq.*); *Werner*, in: Dupuy/Francioni/Petersmann (eds.), Human Rights in International Investment Law, 115 (116); *Choudhury*, Vanderbilt Journal of Transnational Law 41 (2008), 775 (790 *et seq.*). On the still disputed review competence of tribunals concerning the existence of public interest concerns and a respective margin of appreciation enjoyed by the host states see for example *Libyan American Oil Company (LIAMCO) v. Libya*, Award of 12 April 1977, ILR 62 (1981), 140 (194) (“Motives are indifferent to international law, each state being free to judge for itself what it considers useful or necessary for the public good”); *ADC Affiliate Ltd. et al. v. Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006, para. 432 (“In the Tribunal’s opinion, a treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”).

⁶⁹ See, e.g., Human Rights Council, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 34 (“When an investor brings a claim regarding a bilateral investment treaty or host Government agreement to binding international arbitration, depending on the rules incorporated into the agreements, little or nothing about the case may be made public. This is at variance with precepts of transparency and good governance. While confidential business information must be protected, under some rules not even the existence of a case against a country is known to its public, let alone its substance. This impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, undermining the system’s predictability and legitimacy.”); as well as *Choudhury*, Vanderbilt Journal of Transnational Law 41 (2008), 775 (808 *et seq.*); *García*, Florida Journal of International Law 16 (2004), 301 (354 *et seq.*); *Tams/Zoellner*, Archiv des Völkerrechts 45 (2007), 217 (222 *et seq.*); *Delaney/Magraw*, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 721 (756 *et seq.*).

⁷⁰ See thereto also *infra* D.II.2.

equitable treatment standard and at promoting the transparency of investor-state arbitrations, among them the publication of tribunal awards, other decisions and memorials of the parties as well as the possibility of *amicus curiae* submissions.⁷¹ In addition, the revised ICSID Arbitration Rules, which came into effect on 10 April 2006, provide for certain procedural enhancements as to the transparency of ICSID arbitration proceedings.⁷² Moreover, the ASEAN Comprehensive Investment Agreement of 26 February 2009⁷³ includes – in addition to measures aimed at enhancing the transparency of investment arbitration proceedings (Article 39) – also, *inter alia*, specifications of the scope of application of protection standards like indirect expropriation (Annex 2), fair and equitable treatment (Article 11 (2) lit. a), full protection and security (Article 11 (2) lit. b) as well as the most-favoured nation treatment clause.⁷⁴ Furthermore, respective specifications are for example also stipulated in the investment chapter of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area signed on 27 February 2009.⁷⁵ Finally, the Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area, adopted at the Twelfth Summit of the COMESA Heads of State and Government on 22/23 May 2007, is worth noticing in this connection.⁷⁶ The agreement does not only include quite detailed clarifications on substantive protection standards like fair and equitable treatment (Article 14), national treatment (Article 17) as well as expropriation (Article 20), and provide for various transparency measures in investment dispute settlement proceedings between the contracting parties as well as with respective foreign investors (Articles 27, 28 and Annex A). Rather, it also establishes the COMESA Common Investment Area Committee, being entrusted, *inter alia*, with the task of making recommendations on the “development of common standards relating to in-

⁷¹ See for example FTC, Clarifications Related to NAFTA Chapter 11, 31 July 2001; FTC, Statement on Non-Disputing Party Participation, 7 October 2003; and thereto *Tietje*, in: *Tietje* (ed.), *International Investment Protection*, 17 (29 *et seq.*); *Blackaby/Richard*, in: *Waibel et al.* (eds.), *The Backlash Against Investment Arbitration*, 253 (259 *et seq.*); *Harrison*, in: *Dupuy/Francioni/Petersmann* (eds.), *Human Rights in International Investment Law*, 396 (401 *et seq.*). Generally on authoritative treaty interpretation *Nowrot*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, 61 (97 *et seq.*).

⁷² See thereto, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, *The ICSID Convention, A Commentary*, Article 44, paras. 97 *et seq.*, Article 48, paras. 107 *et seq.*; *Tams/Zoellner*, *Archiv des Völkerrechts* 45 (2007), 217 (227 *et seq.*); *Zoellner*, in: *Hofmann/Tams* (eds.), *The International Convention on the Settlement of Investment Disputes (ICSID)*, 179 (186 *et seq.*); *Triantafylou*, *Arbitration International* 24 (2008), 571 *et seq.*; as well as from the subsequent practice in this regard *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 of 2 February 2007.

⁷³ The text of the ASEAN Comprehensive Investment Agreement is available at: <www.aseansec.org/documents/FINAL-SIGNED-ACIA.pdf> (last visited on 26 April 2010).

⁷⁴ See in particular footnote 4 lit. a to Article 6, providing that “this Article shall not apply to investor-State dispute settlement procedures that are available in other agreements to which Member States are party; [...]” On the underlying controversy in the practice of arbitration tribunals and the literature see already the references given *supra* in fn. 53.

⁷⁵ The text of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area of 27 February 2009 is available at: <www.dfat.gov.au/trade/fta/asean/aanzfta/#FullText> (last visited on 26 February 2010).

⁷⁶ The text of the Investment Agreement for the COMESA Common Investment Area of 22/23 May 2007 is available at: <<http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/invagrecomesa.pdf>> (last visited on 26 April 2010).

vestment in areas such as: (i) environmental impact and social impact assessments; (ii) labour standards; (iii) respect for human rights; (iv) conduct in conflict zones” and on the issue of corruption (Article 7 (2) lit. d).

At the bilateral and individual state level, the policy responses so far suggested or already implemented vary considerably – and most naturally, taking into account the quite diverse political and economic backgrounds and preconceptions involved – from country to country. While some states such as Germany have not yet introduced any significant changes to their model BITs, others like South Africa are currently in the phase of reviewing their BIT policy in order to more appropriately secure their conformity with social and economic objectives.⁷⁷ Moreover, the free trade agreement between China and New Zealand of 7 April 2008 provides in its investment chapter, *inter alia*, for respective specifications of the scope of application of the most-favoured nation standard (Article 139 (2) to (5)), the fair and equitable treatment standard (Article 143 (2)), the guarantee of full protection and security (Article 143 (3)) and the standard to be applied in connection with indirect expropriations (Annex 13).⁷⁸ Another notable example in this regard is the Comprehensive Economic Cooperation Agreement between India and Singapore, signed on 29 June 2005, which neither includes in its investment chapter the guarantee of fair and equitable treatment nor a most-favored nation obligation.⁷⁹ A different, albeit equally noteworthy approach has found its expression in the Economic Partnership Agreement between Japan and the Philippines.⁸⁰ Whereas its investment chapter includes quite comprehensive substantive protection standards, it confines itself with regard to potential international remedies available to foreign investors to stipulate in Article 107 (1) that the contracting parties “shall enter into negotiations after the date of entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party”. In the absence of such a mechanism mutually agreed upon by the contracting parties, it restates in Article 107 (2) that “the resort to international conciliation or arbitration tribunal is subject to mutual consent of the parties to the dispute”, adding in a so far quite unusually explicit manner that “[t]his means that the disputing Party may, at its option or discretion, grant or deny its consent in respect of each particular investment dispute and that, in the absence of the express written consent of the disputing party, an international conciliation or arbitration tribunal shall have no jurisdiction over the investment dispute involved”.⁸¹

⁷⁷ *Damon Vis-Dunbar*, South African Trade Department Critical of Approach taken to BIT-Making, Investment Treaty News, July 2009, 2.

⁷⁸ The text of the Free Trade Agreement between China and New Zealand of 7 April 2008 is available at: <<http://chinafta.govt.nz/1-The-agreement/2-Text-of-the-agreement/index.php>> (last visited on 26 April 2010).

⁷⁹ The text of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore of 29 June 2005 is for example available at: <<http://commerce.nic.in/ceca/toc.htm>> (last visited on 26 April 2010).

⁸⁰ The text of the Agreement between Japan and the Republic of the Philippines for an Economic Partnership of 9 September 2006 is for example available at: <www.mofa.go.jp/region/asia-paci/philippine/epa0609/main.pdf> (last visited on 26 April 2010).

⁸¹ See thereto also *Ryan*, University of Pennsylvania Journal of International Law 29 (2008), 725 (755) (“The Philippines’ reluctance to allow for international arbitration is not surprising in light of its experience with prior investment-related disputes. The fact that this reluctance has led to the

A related approach is also for example provided for in Article 11.16 (1) of the US-Australia Free Trade Agreement.⁸² Furthermore, it is worth drawing attention in this connection to the approach adopted by Norway, which has – amongst others for constitutional reasons – not entered into new BITs since the middle of the 1990s. In order to overcome respective concerns, the Norwegian government prepared a – in many ways – quite innovative draft model BIT, released in December 2007 for public comments; a project which, however, was abandoned in June 2009.⁸³

In addition, Canada and the United States have amended their model BITs already in 2004⁸⁴ by, *inter alia*, specifying the scope of application of some protection standards such as the distinction between indirect expropriations and legitimate regulatory measures.⁸⁵ This clarification has subsequently been incorporated for example in the Annexes 10-B of the free trade agreements concluded by the United States with Oman and with Peru, in Annex 10-C of CAFTA-DR, in Annex 11-B of the US-Australia free trade agreement, and in Annex B of the BIT concluded between Uruguay and the United States. In addition, the revised model BITs also provide for measures aimed at promoting transparency in investor-state arbitration proceedings⁸⁶ which in the realm of treaty practice are stipulated for example in the Articles 10.20 *et seq.* CAFTA-DR, the Articles 10.19 *et seq.* of the free trade agreements between the United States and Chile as well as Oman, in the Articles 15.19 *et seq.* of the US-Singapore free trade agreement, and in the Articles 28 *et seq.* of the BIT concluded between Uruguay and the United States. At present, the United States are since 2009 again undertaking a comprehensive review of their model BIT in order to ensure its consistency with public interest concerns.⁸⁷ In this connection, the Subcommittee on

signing of an investment treaty that does not provide investors with access to any international dispute-resolution forum, however, is quite remarkable.”).

⁸² See Article 11.16 (1) US-Australia Free Trade Agreement: “If a Party considers that there has been a change in circumstances affecting the settlement of disputes on matters within the scope of this Chapter and that, in light of such change, the Parties should consider allowing an investor of a Party to submit to arbitration with the other Party a claim regarding a matter within the scope of this Chapter, the Party may request consultations with the other Party on the subject, including the development of procedures that may be appropriate. On such a request, the Parties shall promptly enter into consultations with a view towards allowing such a claim and establishing such procedures.” See thereto also *Dodge*, *Vanderbilt Journal of Transnational Law* 39 (2006), 1 *et seq.*

⁸³ See thereto, e.g., *Luke Eric Peterson*, *Norway Proposes Significant Reforms to its Investment Treaty Practice*, *Investment Treaty News* of 27 March 2008; *Damon Vis-Dunbar*, *Norway Shelves its Proposed Model Bilateral Investment Treaty*, *Investment Treaty News*, June 2009, 7.

⁸⁴ Specifically on the Canadian approach to investment protection see recently *Fortier*, in: *Binder et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 525 *et seq.*; concerning the 2004 US model BIT see, e.g., *Vandeveldt*, *U.S. International Investment Agreements*, 64 *et seq.* and *passim*; *Kantor*, *Journal of International Arbitration* 21 (2004), 383 *et seq.*; *Gagné/Morin*, *Journal of International Economic Law* 9 (2006), 357 *et seq.*

⁸⁵ See, e.g., Annex B No. 4 lit. b 2004 US Model BIT: “Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”

⁸⁶ See Articles 28 *et seq.* 2004 US Model BIT; Articles 38 *et seq.* 2004 Canada Model BIT.

⁸⁷ See thereto, e.g., *Damon Vis-Dunbar*, *United States Reviews its Model Bilateral Investment Treaty*, *Investment Treaty News*, June 2009, 5; *Elizabeth Whisitt*, *United States Trade Representative and State Department Hold Public Hearing and Solicit Written Comments in US Model BIT Review*, *Investment Treaty News*, September 2009, 4.

Investment, established in June 2009 by the Advisory Committee on International Economic Policy at the request of the Department of State as well as the Office of the United States Trade Representative and comprising a quite diverse membership, presented its report to the US State Department on 30 September 2009.⁸⁸ While the report includes in general a wealth of suggestions in particular with regard to securing the necessary “policy space” for the government when dealing with foreign investors, one of the most remarkable findings – or rather non-findings – is the fact that the Subcommittee members could not agree on a recommendation as to the dispute settlement mechanisms to be stipulated in a new US model BIT. Apparently, a considerable number of members have argued for introducing further constraints on future recourse to investor-state arbitration like the requirement to exhaust local remedies or have even suggested to no longer include any investor-state arbitration clauses in the new model agreement.⁸⁹

The present contribution is not intended to provide an in-depth evaluation of the economic, political and social implications resulting from these and other policy approaches. This applies also to the respective strategy adopted by Ecuador. While until now very few states have gone as far as Ecuador in their efforts to modify the international legal regime on the protection of foreign investments, the path taken by this country is surely a possible and in principle also among the plausible answers to the challenges outlined above, in particular if accompanied by an intensive search for innovative approaches to a feasible reformation of international investment law as it currently appears to be the case in Ecuador.⁹⁰ Against this background and taking – for the purpose of this contribution – the policy responses by Ecuador as a fact, the remaining sections will primarily focus on viable medium-term alternatives for this country and other Latin American states to adjust the international legal investment framework applicable to them.

C. The “Seven Lives” of the Current Investment Protection Framework

However, before turning to the future perspectives for international investment agreements in the Latin American context, it seems necessary to at least briefly consider the international legal implications of Ecuador’s recently implemented and currently discussed policy responses in order to assess the short-term effects of these

⁸⁸ Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty, presented to the US Department of State on 30 September 2009, available at: <www.state.gov/e/eeb/rls/othr/2009/131098.htm> (last visited on 26 April 2010).

⁸⁹ See *id.*, para. 16; as well as *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 15. Although fairly remarkable in itself, nevertheless attention needs to be drawn to the fact that quite similar suggestions have already been made by some Subcommittee members in the course of the previous review of the US model BIT in 2004, see Report of the Subcommittee on Investment Regarding the Draft Model Bilateral Investment Treaty, presented to the Advisory Committee on International Economic Policy on 30 January 2004, p. 17, available at: <www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf> (last visited on 26 April 2010).

⁹⁰ See thereto already *supra* A.

measures as well as – correspondingly – the remaining ‘lifespan’ of the current international investment law framework applicable to this country.

From the perspective of public international law, it is in this connection important to bear in mind that Ecuador is currently still party to at least seventeen BITs in force, namely the respective agreements concluded with Argentina, Bolivia, Canada, Chile, China, Finland, France, Germany, Italy, the Netherlands, Peru, Spain, Sweden, Switzerland, the United Kingdom, the United States and Venezuela.⁹¹ Most, if not all, of them stipulate the largely standardized protection standards, *inter alia*, on fair and equitable treatment, national treatment, most-favoured nation treatment, full protection and security as well as expropriation.⁹² Furthermore, they include investor-state arbitration clauses which – aside from ICSID – also refer to other arbitration venues and procedures like in particular the UNCITRAL Arbitration Rules.⁹³ Therefore, after the denunciation of the ICSID Convention by Ecuador, respective foreign investors may very well decide to bring disputes to other international arbitration institutions or regimes. And indeed, this was precisely what happened already in the case of the above mentioned investment treaty claim launched by *Chevron* in September 2009, which will be arbitrated under the UNCITRAL Arbitration Rules.⁹⁴ Moreover, it has so far not been addressed by any arbitration tribunal and is still controversially discussed in the literature whether a denunciation of the ICSID Convention ultimately forecloses the possibility of a foreign investor to initiate arbitration proceedings once the respective notice has been received by the depositary of the ICSID Convention in accordance with Article 71 ICSID Convention or whether a prior consent to investor-state arbitration given by the host state in a BIT has to be considered as a ‘consent’ under Article 72 ICSID Convention with the consequence that after the denunciation takes effect, investor-state arbitrations under ICSID continue to be possible as long as the respective BIT remains in force and – considering the frequent stipulation of so-called “survival clauses” – even for a considerable number of years afterwards.⁹⁵

⁹¹ For the texts of most of these agreements see the information provided at: <www.unctadxi.org/templates/DocSearch____779.aspx>; and at: <www.sice.oas.org/ctyindex/ECU/ECUBITS_e.asp> (both last visited on 26 April 2010).

⁹² See, e.g., Articles 2 *et seq.* Ecuador-UK BIT; Articles 3 *et seq.* Ecuador-Netherlands BIT; Article III *et seq.* Ecuador-Argentina BIT; Articles 2 *et seq.* Ecuador-Germany BIT; Articles 4 *et seq.* Ecuador-France BIT; Articles 2 *et seq.* Ecuador-Peru BIT; Articles IV *et seq.* Ecuador-Chile BIT; Articles 2 *et seq.* Ecuador-Finland BIT.

⁹³ See for example Article VI Ecuador-USA BIT; Article 11 Ecuador-Netherlands BIT; Article 8 Ecuador-Sweden BIT; Article IX Ecuador-Argentina BIT; Article 10 Ecuador-Finland BIT; Article XIII Ecuador-Canada BIT; Article XI Ecuador-Spain BIT.

⁹⁴ *Damon Vis-Dunbar*, *Chevron Launches Investment-Treaty Claim against Ecuador*, Investment Treaty News of 2 October 2009. See also for quite similar developments in the case of Bolivia following its denunciation of the ICSID Convention *Luke Eric Peterson*, *Will Ecuador’s Denunciation of ICSID Drive that Country’s Arbitrations further Underground?*, Investment Treaty News of 12 July 2009.

⁹⁵ On the respective discussion in the literature see, e.g., *Tietjel/Nowrot/Wackernagel*, *Once and Forever?*, 5 *et seq.*; *Schreuer*, in: *Waibel et al.* (eds.), *The Backlash Against Investment Arbitration*, 353 *et seq.*; *Garibaldi*, in: *Binder et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 251 *et seq.*; *Rastegar*, in: *ibid.*, 278 *et seq.*, each with further references.

From the perspective of public international law, it also needs to be stressed that the continued access of foreign investors to international arbitration under the BITs in force is not barred by the already mentioned Article 422 of Ecuador's new constitution of October 2008.⁹⁶ Aside from the interpretatory issue of whether this provision applies from its wording also to international agreements already in force at the time when the constitution became effective, it is a generally recognized principle of customary international law – as also prominently enshrined in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) – that a party to a treaty may not invoke the provisions of its domestic law as justification for its failure to comply with the respective treaty provisions.⁹⁷ The theoretically given possibility that consent to investor-state arbitration could be in conflict with a peremptory norm of general international law (*jus cogens*) and would thus have to be considered void⁹⁸ appears not only at first sight to be devoid of any sound legal basis under current public international law.

Finally, even assuming that Ecuador should decide to implement the termination of another thirteen of its BITs as currently discussed,⁹⁹ attention has to be drawn to the fact that although many of the agreements may be denounced at any time, with twelve months' prior notice,¹⁰⁰ most, if not all, of these BITs provide for so-called "survival clauses". By virtue of these provisions, the substantive and procedural guarantees of the respective agreement continue to be effective for a further period of ten to fifteen years from the date of termination with regard to investments made prior to that date.¹⁰¹ Consequently, respective foreign investors will also be able to launch

⁹⁶ See thereto already *supra* A.

⁹⁷ See thereto already, e.g., PCIJ, *The Greco-Bulgarian 'Communities'*, Advisory Opinion of 31 July 1930, Ser. B, No. 17, 32; PCIJ, *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, Advisory Opinion of 4 February 1932, Ser. A/B, No. 44, 24; ICJ, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, ICJ Reports 1988, 12 (34, para. 57); as well as *Villiger*, Commentary on the 1969 Vienna Convention, Article 27, paras. 1 *et seq.*; *Brownlie*, Principles of Public International Law, 34 *et seq.*; *Aust*, Modern Treaty Law and Practice, 180 *et seq.* See, however, in this connection also more recently for example European Court of Justice, *Kadi et al./Council*, Judgment of 3 September 2008, paras. 278 *et seq.*; Federal German Constitutional Court, *Görgülü*, 2 BvR 1481/04, Order of 14 October 2004, paras. 34 *et seq.* The last mentioned decision is available in German at: <www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html>; an English summary of the decision is provided in the Court's press release No. 92/2004, available at: <www.bundesverfassungsgericht.de/pressmitteilungen/bvg04-092en.html> (both last visited on 26 April 2010); as well as generally thereto, e.g., *de Burca*, Harvard International Law Journal 51 (2010), 1 *et seq.*

⁹⁸ See generally thereto also Article 53 and 64 VCLT; as well as, e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006, paras. 361 *et seq.*; *Villiger*, Commentary on the 1969 Vienna Convention, Article 53, paras. 1 *et seq.*, Article 64, paras. 1 *et seq.*, each with further references.

⁹⁹ See thereto already *supra* A.

¹⁰⁰ See, e.g., Article 14 Ecuador-UK BIT; Article XVIII (2) Ecuador-Canada BIT; Article XII (2) Ecuador-USA BIT; Article 12 (2) Ecuador-Germany BIT; Article 14 Ecuador-France BIT. Generally on the clauses providing for the termination of BITs see also *Salacuse*, The Law of Investment Treaties, 351 *et seq.*; *Carska-Sheppard*, Journal of International Arbitration 26 (2009), 755 (761 *et seq.*).

¹⁰¹ See Article XVIII (2) Ecuador-Canada BIT: "This Agreement shall remain in force unless either Contracting Party notifies the other Contracting Party in writing of its intention to terminate it. The termination of this Agreement shall become effective one year after notice of termination has

treaty claims at international arbitration venues for quite some time to come.¹⁰² The primary reason for the frequent incorporation of these “survival clauses” lies in the specific character of the kind of economic transactions addressed by international investment agreements. As for example emphasized by *Christoph Schreuer* and *Rudolf Dolzer*, “[m]aking a foreign investment is different in nature from engaging in trade transactions. Whereas a trade deal typically consists in a one-time exchange of goods and money, the decision to invest in a foreign country initiates a long-term relationship between the investor and the host state”.¹⁰³ Again, also the validity of these provisions under current public international law appears to be beyond a reasonable doubt.

In sum, while Ecuador has already implemented a variety of measures to exit the present regime of international investment protection and is now in the phase of considering further steps in this connection, the current legal framework is most certainly going to exercise considerable effects for quite some time to come.

D. Perspectives on Future Approaches to International Investment Agreements in the Latin American Context

Despite the given normative perseverance of the present legal framework on investment protection as applicable to Ecuador for more than another decade, it is, as first and foremost also recognized by this country,¹⁰⁴ already now the time to consider possible constructive approaches to a reformation of international investment law including respective dispute settlement mechanisms, thereby striving for a new balance between the legitimate interests of host states and of foreign investors and thus for a legal environment acceptable to all stakeholders concerned.

I. Four Medium-Term Options for a Reformation of International Investment Law: Bilateral, Local, Global and ... Regional

In the medium-term perspective, Latin American countries like Ecuador basically enjoy four main options for reforming the regime of investment law applicable to them. The most conventional among them is the bilateral option which refers to a

been received by the other Contracting Party. In respect of investments or commitments to invest made prior to the date when the termination of this Agreement becomes effective, the provisions of Articles I to XVII inclusive of this Agreement shall remain in force for a period of fifteen years.”; see also, e.g., Art. 14 (3) Ecuador-Netherlands BIT (fifteen years); Article 10 (2) Ecuador-Argentina BIT (fifteen years); Article 14 Ecuador-UK BIT (fifteen years); Article 11 (3) Ecuador-Sweden BIT (fifteen years); Article 12 (3) Ecuador-Germany BIT (fifteen years); Article XII (3) Ecuador-USA BIT (ten years); Art. XII (2) Ecuador-Spain BIT (ten years); Article 8 Ecuador-Switzerland BIT (ten years); Article 14 (2) Ecuador-Finland BIT (ten years); Article XI (2) Ecuador-Chile BIT (ten years).

¹⁰² The same finding applies of course to the BITs recently already denounced by Ecuador, see, e.g., Article 12 (2) Ecuador-Romania BIT; Article 10 (3) Ecuador-Nicaragua BIT; Article XIII (3) Ecuador-Paraguay BIT; Article 11 (2) Ecuador-El Salvador BIT; Article 15 (3) Ecuador-Dominican Republic BIT.

¹⁰³ *Dolzer/Schreuer*, Principles of International Investment Law, 3.

¹⁰⁴ See thereto already *supra* A.

continued travelling of the “BIT route” under modified terms. It would primarily involve the drafting of a model BIT¹⁰⁵ and – on this basis – efforts aimed at re-negotiating existing BITs in force as well as future negotiations on the conclusion of modified investment agreements with other countries. This alternative would probably – and most certainly depending on the content of these new BITs – provide among the options available for the least deviation from the current structure of international investment law. Thus, it would constitute, at least at first sight, the most natural policy response also already taken recourse to in practice by countries like India, Singapore, the United States, New Zealand, the Philippines and Canada.¹⁰⁶ However, the bilateral approach as outlined has also certain downside risks. It appears for a variety of reasons rather doubtful whether countries like Ecuador will be in the short or medium-term run able to achieve major adjustments with regard to the content in their negotiations and re-negotiations of bilateral investment agreements in particular as far as most Western states are concerned. This applies not the least to the obviously disputed inclusion and design of investor-state arbitration clauses; a field of discussion where far-reaching concessions as envisioned and in the case of Ecuador even constitutionally required are in practice at present highly unlikely to be expected from many current and prospective treaty parties.

In light of these difficulties connected with the bilateral approach, the second and from the perspective of the current international regime most radical choice available to Ecuador and other like-minded states comprises the local or domestic option. It refers to the possibility of an almost complete ‘opting-out’ of the international legal framework on investment protection, with the protection and treatment of foreign investors and investments being – aside from the largely disputed rules of customary international law in this regard¹⁰⁷ – more or less exclusively subjected to the domestic laws and regulations of the host state as well as to state contracts and with respective disputes being settled by the host state’s courts.¹⁰⁸ It is to be presumed that following this approach appears to be probably quite attractive to some opponents of the present system. Furthermore, it has to be conceded that it is in particular in the Latin American context not without precedent, as evidenced by the – currently quite successful – example of Brazil.¹⁰⁹ Nevertheless, adopting and implementing this kind of “persistent objector”-perspective is from an economic and political point of view likely to give rise to the materialization of some serious flaws. Despite the fact that adequate protection under international law is but one of many factors influencing an investor’s decision on where to make a foreign investment as again demonstrated by the example of Brazil, a respective “retreat” by Ecuador and other countries nevertheless gives rise to the

¹⁰⁵ On respective efforts currently made by the Ecuadorian government see *Fernando Cabrera Diaz*, Ecuador Prepares for Life after ICSID, While Debate Continues over Effect of its Exit from the Centre, *Investment Treaty News*, September 2009, 7.

¹⁰⁶ See thereto already *supra* B.II.

¹⁰⁷ On the customary international law rules governing foreign investments see recently *Salacuse*, *The Law of Investment Treaties*, 46 *et seq.*, with further references.

¹⁰⁸ See in this connection also the vision of a “minimalist system of international investment law” recently argued for by *Yackee*, *Suffolk Transnational Law Review* 32 (2009), 303 (320 *et seq.*).

¹⁰⁹ See thereto as well as on its exemplary character for other Latin American states *García-Boltívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming).

clear and present danger of a considerably heightened caution exercised by foreign investors. It thus entails the risk of certain “economic hermit”-effects with the respective host states – at least as far as foreign investments are concerned – unwillingly moving closer to the ideal of the “closed commercial state” as prominently advocated by the German philosopher *Johann Gottlieb Fichte* at the turn of the nineteenth century.¹¹⁰ Furthermore, once the available local remedies have been exhausted by foreign investors, the host states are again facing often highly politicized disputes with the respective home states potentially leading to the adoption of retorsions or even proportionate reprisals and thus the resurrection of a rather undesirable situation which hosted states have more recently been largely able to shield themselves against by consenting to international arbitration.¹¹¹ Finally, it also has to be taken into account in this connection that Latin American countries are no longer more or less exclusively capital importing, but increasingly themselves also home states to investors doing business in other developed and developing countries. According to the most recent data available, in 2008 foreign direct investment outflows from Latin American states and the Caribbean increased by 22 percent, to reach \$ 63 billion. In this connection, it is particularly noteworthy that while respective outflows from Central America and the Caribbean declined by 22 percent, in the very same period foreign direct investments from South America increased by 131 percent.¹¹² Consequently, it is important to bear in mind that many Latin American states are now expected not only to consider the question of a necessary “policy space” for host states governments when deciding on their approach to international investment law, but also to take into account the protection enjoyed by their own investors.¹¹³ The fact that taking up the local option would at the same time deny respective Latin American investors the from a business perspective – the relevant catchphrase being “reduction of transaction costs”¹¹⁴ – quite important protection under international investment agreements, adds further doubts as to the viability of this alternative policy approach.

¹¹⁰ *Fichte*, *Der geschloßne Handelsstaat*, 1800.

¹¹¹ See thereto, e.g., *Dolzer/Schreuer*, *Principles of International Investment Law*, 221; *Reinisch/Malintoppi*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 691 (712 *et seq.*). See in this connection also for example on the respective *ratio* of Article 27 ICSID Convention *Schreuer/Malintoppi/Reinisch/Sinclair*, *The ICSID Convention, A Commentary*, Article 27, paras. 1 *et seq.*, with further references.

¹¹² UNCTAD, *World Investment Report 2009*, *Transnational Corporations, Agricultural Production and Development*, 2009, 65.

¹¹³ *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming) (“In a globalized economic scenario where many multinationals from Latin America are foreign investors, the interest of many countries in the region on being part of the consensual international law of foreign investment now has a different motive: to protect the interests of Latin American investors. In absence of the protection granted by the international law of foreign investment many of those investors could be considered – in the words of a prominent arbitrator – ‘orphan investors’.”); see also, e.g., *García-Bolívar*, *Transnational Dispute Management* 6 (Issue 4, December 2009), 4 *et seq.*

¹¹⁴ Generally on the functions and importance of law in international economic relations *Tietje*, in: *Tietje* (ed.), *Internationales Wirtschaftsrecht*, 145 (152 *et seq.*), with further references. Specifically from the perspective of world trade law also already, e.g., GATT, *United States – Taxes on Petroleum and Certain Imported Substances*, Report of the Panel adopted on 17 June 1987, BISD 34S/136, para. 5.2.2; WTO, *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel of 11 December 1999, WT/DS152/R, paras. 7.75 *et seq.*

The third and most ambitious choice is what can be called the global option. This alternative would involve advocating for and eventually participating in negotiations on a more or less comprehensive multilateral investment agreement at the global level. While from a theoretical perspective probably to be regarded as – again most certainly depending on its content – the best solution to the issue of international investment protection, the likelihood of successfully implementing this approach appears for the time being rather remote. Although one should never say never, the experiences drawn from respective failed efforts in previous decades – from Article 12 of the 1948 Havana Charter for an International Trade Organization, over an attempt by the relative homogeneous group of OECD members to establish a Multilateral Agreement on Investment (MAI) in the mid 1990s, to the abandonment in August 2004 of the anyway only modest efforts in the Doha Development Round of the WTO¹¹⁵ – strongly suggest that the global alternative is for a variety of reasons not among the feasible mid-term options available to Latin American countries.

However, if neither going local nor going global appears to be a viable medium-term option and if one does not want to – as it seems to be the case with a number of Latin American states – or cannot continue travelling the BIT route under modified terms, there is still a fourth alternative available in the form of what can be termed the regional option. This approach basically refers to the possibility of creating an investment agreement among Latin America countries including a respective dispute settlement framework. In this connection, it needs to be emphasized that the phenomenon of regional economic integration is not only from a global perspective gaining increasing momentum in recent years¹¹⁶ with an ever growing number of respective agreements including provisions or even whole chapters on investment.¹¹⁷ Rather, regional integration has played also in the Latin American context – as in principle already envisioned by *Simón Bolívar*¹¹⁸ – a noteworthy role for quite some time and is currently ever more on the rise. To mention but a few examples, reference can be made in this regard to the Andean Community, MERCOSUR, the Caribbean Community (CARICOM) as well as – more recently – the Energy Council of South America,

¹¹⁵ See Doha Working Programme, Decision adopted by the General Council on 1 August 2004 (“July Package”), WTO Doc. WT/L/579 of 2 August 2004, para. 1 lit. g: “Relationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.” Generally on these as well as various other efforts to create a multilateral investment agreement *Salacuse*, *The Law of Investment Treaties*, 86 *et seq.*, 90 *et seq.*, 104 *et seq.*; *Amarasinha/Kokott*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 119 (125 *et seq.*).

¹¹⁶ Generally on the increasing importance of regional economic integration in the international economic system and the controversially discussed consequences of this development for the global trading system *Fiorentino/Verdeja/Toqueboeuf*, *The Changing Landscape of Regional Trade Agreements: 2006 Update*, 1 *et seq.*; *Nourot*, in: Tietje (ed.), *Internationales Wirtschaftsrecht*, 61 (116 *et seq.*), with numerous further references.

¹¹⁷ See thereto, e.g., UNCTAD, *Investment Provisions in Economic Integration Agreements*, 2006; *Kotschwar*, in: Estevadeordal/Suominen/Teh (eds.), *Regional Rules in the Global Trading System*, 365 *et seq.*; *Salacuse*, *The Law of Investment Treaties*, 97 *et seq.*

¹¹⁸ See, e.g., *Lynch*, *Simón Bolívar*, 213 *et seq.*

ALBA and the project of UNASUR, some of which like the Andean Community and MERCOSUR already provide for investment regulations.¹¹⁹ Last but not least, among the alternatives at hand, the regional option – and thus the possibility of a cooperative efforts at least initially limited to a number of more or less like-minded Latin American states – appears also to be most in line with the current policy approach adopted by countries like Ecuador on investment, currency and other economically-related issues.¹²⁰

II. Towards a Regional Investment Agreement for Latin America

In light of these findings, the following part of the contribution will discuss the possible content of a regional investment agreement for Latin America. In this connection, it will focus on three main issues – the personal scope of application, the possibilities for an enhanced incorporation of public interest concerns in its substantive provisions and the dispute settlement mechanisms provided for – all of which are likely to play a central role when determining the acceptance, political feasibility and thus ultimately the chances of this project to be successfully implemented in practice.

1. *Personal Scope of Application: Regional, Universal or ... Conditional*

A first issue worth considering is the appropriate personal scope of application of a possible regional investment agreement. In this regard and thus on the circle of potential investors to be covered, the respective states basically enjoy three alternative options. The – at least at first sight – most natural approach would be the applicability exclusively to investors from other state parties on a traditional reciprocal basis. Taking up this “regional” options would certainly constitute the most conventional approach in line with the current treaty practice in international investment law in general and with regard to regional investment agreements in particular. This is for example evidenced by the respective scopes of application of the Unified Agreement for the Investment of Arab Capital in the Arab States of 26 November 1980,¹²¹ the Investment Agreement for the COMESA Common Investment Area, and the ASEAN Comprehensive Investment Agreement of 26 February 2009.¹²² However, it needs to be emphasized that such a choice would entail at least two major shortcomings. On

¹¹⁹ On the investment provisions stipulated under the framework of the Andean Community see *Hummer*, in: *Binder et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 561 *et seq.*; on the respective protocols signed in the context of MERCOSUR see, e.g., *Salacuse*, *The Law of Investment Treaties*, 99.

¹²⁰ See thereto already *supra* A.

¹²¹ See Article 1 of the Unified Agreement for the Investment of Arab Capital in the Arab States of 26 November 1980, available at: <www.unctad.org/sections/dite/ia/docs/Compendium/en/36%20volume%202.pdf> (last visited on 26 April 2010).

¹²² See Article 3 of the ASEAN Comprehensive Investment Agreement of 26 February 2009, available at: <www.aseansec.org/documents/FINAL-SIGNED-ACIA.pdf>; see also already Article II of the ASEAN Agreement for the Promotion and Protection of Investments of 15 December 1987, available at: <www.aseansec.org/6464.htm> (both last visited on 26 April 2010).

the one hand, the question of whether and how to establish an appropriate level of protection for foreign investors from third states – and thus for the time being the primary source of investments made in Latin America – would remain unanswered, with all negative impacts on the investment climate in the state parties as potentially resulting from these uncertainties.¹²³ On the other hand and closely connected to this issue, this alternative would also not provide any solution to the increasingly important challenge of how to ensure adequate protection under international law to Latin American investors from state parties with regard to their investment activities in third states,¹²⁴ thus, as the case may be, ultimately requiring recourse to the currently rather unwanted approach of continuing the BIT practice with other countries.

The second alternative and most far-reaching option is what can be characterized as the “universal” approach. It refers to the possibility of extending the personal scope of application of the regional investment agreement to all investors from other state parties and from third states, as well as potentially even including own nationals and corporations of the state party concerned, thereby mirroring the approach adopted by multilateral and regional human rights agreements. Although in line with a clearly visible general trend in the present international legal order to move away from the traditional requirement of reciprocity,¹²⁵ the practicability of this approach appears questionable for at least two reasons. First, it is rather doubtful whether the incorporation of own nationals and corporations in the scope of application enjoys at least at present a sufficient degree of political acceptance in Latin America in order to be seriously considered and implemented by the respective state parties. Second, this solution is – again – based on an incomplete reflection of the broader economic picture by not addressing the legal protection of investors from state parties when making investments in third states.

Therefore, in order to avoid these and other shortcomings of the regional and universal approaches, it is submitted that recourse should be taken to a third and rather innovate “mixed” option. This alternative essentially combines an unconditioned – and directly reciprocal – applicability to foreign investors from other state parties with a conditioned – and thus indirectly reciprocal – applicability to foreign investors from third states. Whereas the regional investment agreement would certainly apply to nationals and corporations from other state parties without additional qualification, respective foreign investors from third countries would only be covered if two main requirements are fulfilled.¹²⁶ First, the third state in question has to ensure a level of protection to investors from state parties that can be considered at least equivalent to the substantive protection standards and dispute settlement mechanism for which the regional investment agreement provides. This requirement is of course aimed at securing for Latin American investors from the state parties with regard to their activities in respective third states a minimum standard of protection comparable to the one provided for in the agreement, thereby indirectly reintroducing the reciprocity element necessary to create the desired economic “level playing field”. Second,

¹²³ See thereto already *supra* D.I.

¹²⁴ Generally on the increasing importance of this issue see already *supra* D.I.

¹²⁵ Generally thereto, e.g., *Simma*, RdC 250 (1994), 217 *et seq.*, with further references.

¹²⁶ On the implementation and review of these requirements see *infra* D.II.3.

the third state at issue has to commit itself not to take recourse to diplomatic protection or bring an international claim in respect of a dispute arising between its respective investor and one of the state parties, thus largely shielding the state parties from the rather undesirable situation of often highly politicized disputes with the home states in question.¹²⁷

Under this “mixed” approach, the scope of application clause stipulated in a future regional investment agreement for Latin America could for example contain the following wording:¹²⁸

“The State Parties to this Convention shall apply within their jurisdiction the standards stipulated therein to:

- (1) all nationals and juridical persons of other State Parties with regard to investments in the sense of this Convention; as well as
- (2) nationals and juridical persons of third States with regard to investments in the sense of this Convention provided that
 - a. the respective third State ensure a level of protection to nationals and juridical persons from State Parties that can be considered at least equivalent to the substantive protection standards and dispute settlement mechanism for which this Convention provides; and
 - b. the respective third State commits itself not to take recourse to diplomatic protection or bring an international claim in respect of a dispute arising between its respective national or juridical person and one of the State Parties under this Convention, unless such State Party has failed to abide by and comply with the judgment rendered in such dispute. Diplomatic protection, for the purposes of this section, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of a respective dispute.”

2. *Substantive Provisions: Possible Approaches to an Enhanced Incorporation of Public Interest Concerns*

Another central issue in connection with the possible shape and content of a regional investment agreement for Latin America concerns the substantive standards stipulated therein. In this regard, it appears for a variety of reasons advisable – not the least in order to promote the acceptance of the legal regime among foreign investors – to also include in principle the protection standards as by now stipulated in most

¹²⁷ See thereto already *supra* D.I.

¹²⁸ It hardly needs to be emphasized that the precise circle of persons or entities covered by the investment agreement as well as – with regard to the material scope of application – the definition of covered ‘investments’ should be – in line with current practice – dealt with in separate provisions of the investment agreement. On the various facets of these issues, see for example *Dolzer/Schreuer, Principles of International Investment Law*, 46 *et seq.*; *Salacuse, The Law of Investment Treaties*, 128 *et seq.*, 158 *et seq.* Exclusively for the sake of clarity and simplicity, the draft clause suggested here adopts the term “nationals and juridical persons” and “investments in the sense of this Convention” respectively.

BITs and other existing investment agreements.¹²⁹ However, the intended reformation of international investment law should – in light of the current challenges already outlined above¹³⁰ – find its expression first and foremost also in the stipulation of provisions aimed at enhancing the interpretatory weight to be accorded to retaining an adequate steering capacity of host states for the promotion and protection of public interest concerns.

Thereby, it needs to be recalled that the existence of such specific provisions – still rather exceptional in current investment treaty practice¹³¹ – is by no means a *conditio sine qua non* for respective dispute settlement bodies to consider the need for governmental “policy spaces” in furtherance of public interest concerns when interpreting and thus specifying the substantive standards enshrined in investment agreements. Quite to the contrary, under the general rules of treaty interpretation as codified in the Articles 31 to 33 VCLT, which are to a large extent reflecting customary international law¹³² and are in this capacity also frequently applied by investment arbitration tribunals,¹³³ even in the absence of explicit stipulations, recourse to respective public interests is not only possible but indeed even required, at least in case they have already found their manifestation in other norms of international law applicable to the parties. In addition to the specific case of preemptory norms of international law (*jus cogens*),¹³⁴ Article 31 (3) lit. c VCLT proscribes that when interpreting a treaty also “any relevant rules of international law applicable in the relations between the parties”

¹²⁹ See thereto already *supra* B.I.

¹³⁰ See thereto already *supra* B.II.

¹³¹ See, e.g., on the specific example of human rights provisions the respective finding by *Reiner/Schreuer*, in: Dupuy/Francioni/Petersmann (eds.), *Human Rights in International Investment Law*, 82 (“It is not impossible for investment protection treaties, [...], to provide for human rights, but this would be highly unusual.”).

¹³² See, e.g., ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (United Nation), Advisory Opinion of 9 July 2004, reprinted in: I.L.M. 43 (2004), 1009 (1036, para. 94); ICJ, *Case Concerning Kasikili/Sedudu Island* (Botswana v. Namibia), Judgment of 13 December 1999, ICJ-Reports 1999, 1045 (1059); WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Appellate Body of 7 April 2005, WT/DS285/AB/R, para. 159.

¹³³ On the customary international law status and applicability of the means of treaty interpretation as laid down in the Articles 31 and 32 VCLT see, e.g., *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction of 11 May 2005, para. 141; *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 296; *National Grid PLC v. The Argentine Republic*, UNCITRAL Arbitration, Decision on Jurisdiction of 20 June 2006, para. 51; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 75; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNICTRAL Arbitration, Partial Award on the Merits of 30 March 2010, paras. 159 *et seq.*

¹³⁴ See thereto already *supra* C; as well as specifically in the investment context the respective *obiter dictum* in *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78 (“To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.”); and UNCTAD, *Selected Recent Developments in IIA Arbitration and Human Rights*, IIA Monitor No. 2 (2009), 13 *et seq.*

have to be taken into account.¹³⁵ In this connection, it is important to note that the parties in the sense of Article 31 (3) lit. c VCLT are not the foreign investor and the host state as parties to the dispute, but the home and the host state as parties to the respective investment agreement. Thus, the disputed issue whether at least certain private investors like transnational corporations are already under current public international law obliged to contribute to the realization of public interest concerns such as the protection of human rights and the environment as well as the promotion of international social and labour standards¹³⁶ needs not be addressed in order to determine the scope of application of this interpretation guideline.

Despite the fact that investment tribunals are so far rather reluctant to consider other areas of public international law,¹³⁷ it was in light of Article 31 (3) lit. c VCLT in principle never in doubt and has more recently also been explicitly recognized that international investment agreements “cannot be read and interpreted in isolation from public international law, and its general principles”.¹³⁸ The increasing practical impor-

¹³⁵ Generally on this provision see, e.g., *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006, paras. 410 *et seq.*; *Gardiner*, *Treaty Interpretation*, 250 *et seq.*; *Villiger*, *Commentary on the 1969 Vienna Convention, Article 31*, paras. 24 *et seq.* Specifically on the importance of this rule of interpretation in the context of international investment law see for example *Simmel/Kill*, in: *Binder et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 678 (691 *et seq.*); *Wälde*, in: *ibid.*, 724 (769 *et seq.*); *Hirsch*, in: *Muchlinski/Ortino/Schreuer* (eds.), *International Investment Law*, 154 *et seq.*

¹³⁶ The contributions on this issue specifically with regard to business actors are by now more than legion. See, e.g., *Muchlinski*, *Multinational Enterprises and the Law*, 473 *et seq.*; *Morgera*, *Corporate Accountability in International Environmental Law*, 3 *et seq.*; *Clapham*, *Human Rights Obligations of Non-State Actors*, 195 *et seq.*; *Nowrot*, *Philippine Law Journal* 80 (2006), 563 *et seq.*; *Cata Backer*, *Columbia Human Rights Law Review* 37 (2006), 287 *et seq.*; *Zerk*, *Multinationals and Corporate Social Responsibility*, 60 *et seq.*, each with numerous further references.

¹³⁷ See thereto, e.g., *Hirsch*, in: *Dupuy/Francioni/Petersmann* (eds.), *Human Rights in International Investment Law*, 97 (106); *Reiner/Schreuer*, in: *ibid.*, 82 (90); *Simmel/Kill*, in: *Binder et al.* (eds.), *Essays in Honour of Christoph Schreuer*, 678 (679). See, however, also for example *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 332, noting the existence of a “complex relationship between investment treaties, emergency and the human rights of both citizens and property owners”; as well as, e.g., on a recourse to the host state’s international obligations under the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, paras. 381 *et seq.*; *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, paras. 154 *et seq.*; and thereto *Mann*, *International Investment Agreements, Business and Human Rights*, 26; *Liberti*, in: *Dupuy/Francioni/Petersmann* (eds.), *Human Rights in International Investment Law*, 557 (560 *et seq.*). More recently, the arbitration proceedings in the case of *Glamis Gold v. USA* would have provided for the possibility to evaluate the relationship between international investment law and the regime on the protection of indigenous peoples, see *Peterson*, *Human Rights and Bilateral Investment Treaties*, 35 *et seq.*; *Cantegreil*, in: *Dupuy/Francioni/Petersmann* (eds.), *Human Rights in International Investment Law*, 367 *et seq.* However, the claims made by the investor on an alleged violation of protection standards under Chapter 11 NAFTA were rejected by the investment tribunal already for other reasons, see *Glamis Gold Ltd. v. USA*, UNCITRAL Arbitration, Award of 8 June 2009, paras. 353 *et seq.*, 537 *et seq.*

¹³⁸ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78, explicitly referring to the by now already famous statement in WTO, *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body of 29 April 1996, WT/DS2/AB/R, at 17 (“That direction reflects a measure of recognition that the *General*

tance of this issue in the realm of investment dispute settlement is vividly illustrated by the fact that a number of arbitration tribunals have already – in favour of the investor – considered respective guarantees enshrined in human rights treaties as well as the jurisprudence of regional human rights courts in their interpretation of substantive protection standards under international investment agreements.¹³⁹ However, there are also a growing number of pending investor-state arbitration proceedings in which respective host states justify an impairment of economic interests of foreign investors by taking recourse to public interest concerns, thus potentially requiring arbitration tribunals to abandon their currently still quite “*unenthusiastic attitude*”¹⁴⁰ and to examine the relevance of other areas of public international law.

Although the absence of specific provisions thus does most certainly not preclude recourse to public interest concerns as stipulated in relevant rules of international law, it seems nevertheless advisable to depart from the currently still predominant treaty practice by including in a respective regional agreement for Latin America also provisions explicitly emphasizing the importance of governmental “policy spaces” for the promotion and protection of public interest concerns in order to provide for unambiguous guidance to dispute settlement bodies in this regard. It hardly needs to be pointed out that future contracting parties enjoy of course an in principle unlimited number of options how to draft the content of their investment agreements so as to more accurately reflect the interpretatory weight to be accorded to the furtherance of other public interest concerns. Nevertheless, a number of basic approaches – certainly also to be used in any combination – have more recently been discussed among practitioners and academics or even already applied in practice that are worth introducing in this connection.

A first possibility involves the already mentioned specification of the scope of application of certain protection standards as already taken recourse to in the treaty practice of some states in particular concerning the distinction between indirect expropriations and legitimate regulatory measures, the content of the fair and equitable treatment standards as well as the scope of application of the most-favoured-nation treatment clause.¹⁴¹ Moreover, a second option refers to an explicit recognition – in the

Agreement is not to be read in clinical isolation from public international law.”) (emphasis in the original). See also on the recourse by investment tribunals to other primary and secondary sources of general public international law like general principles of law, judicial decisions and the teachings of highly qualified publicists more recently *Merrill & Ring Forestry L.P. v. Canada*, UN-CITRAL Arbitration, Award of 31 March 2010, paras. 187 *et seq.*; and specifically on the concept of estoppel *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UN-CITRAL Arbitration, Partial Award on the Merits of 30 March 2010, paras. 350 *et seq.*

¹³⁹ See, e.g., *Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2, Award of 11 October 2002, paras. 141 *et seq.*; *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, paras. 116 *et seq.*; *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 311 *et seq.*; *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, paras. 130, 132.

¹⁴⁰ *Hirsch*, in: Dupuy/Francioni/Petersmann (eds.), *Human Rights in International Investment Law*, 97 (106) (emphasis in the original).

¹⁴¹ See thereto already *supra* B.II.

preamble to the investment agreement¹⁴² – of the importance attached by the contracting parties to the realization of other public interests aside from the promotion and protection of foreign investments. While currently still quite rare in treaty practice, notable exceptions include the preamble of the free trade agreement between Canada and Columbia, signed on 21 November 2008, which makes reference, *inter alia*, to the importance of the “promotion and protection of human rights and fundamental freedoms as proclaimed in the Universal Declaration of Human Rights”, environmental protection, sustainable development, the promotion of “broad-based economic development in order to reduce poverty”, basic workers’ rights, corporate social responsibility, preserving “flexibility to safeguard the public welfare”, and cultural policies.¹⁴³ In addition, also the preamble of the free trade agreement between the EFTA states and Singapore, which entered into force on 1 January 2003, refers to the commitment of the parties “to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights”.¹⁴⁴ China and New Zealand stress in the preamble to their free trade agreement “the rights of their governments to regulate in order to meet national policy objectives” and to preserve “their flexibility to safeguard the public welfare”. Furthermore, the preamble of the Comprehensive Economic Cooperation Agreement between India and Singapore explicitly reaffirms the “right to pursue economic philosophies suited to their development” as well as the “right to regulate activities to realise their national policy objectives”. There are apparently only few respective examples in the realm of agreements exclusively devoted to the issue of foreign investments. Among them is the preamble of the BIT concluded between Uruguay and the United States, stipulating that the parties desire to achieve the economic objectives “in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights.” In addition, the preamble of the Finland-Guatemala BIT includes a recognition by the parties that “the development of economic and business ties can promote respect for internationally recognised labour rights”, as well as their agreement that the objectives pursued by the BIT “can be achieved without relaxing health, safety and environmental measures of general application”. Moreover, attention can be drawn to the already mentioned quite innovative former draft model BIT

¹⁴² Generally on the functions and importance of preambles from the perspective of treaty interpretation, see for example ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; *Gardiner*, *Treaty Interpretation*, 186 *et seq.*, 192 with further references. Specifically on the content of preambles to investment agreements, see, e.g., UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends and Investment Rulemaking*, 2007, 3 *et seq.*; *Newcombe/Paradell*, *Law and Practice of Investment Treaties*, 122 *et seq.*; *Dolzer/Stevens*, *Bilateral Investment Treaties*, 20 *et seq.*

¹⁴³ Free Trade Agreement between Canada and the Republic of Colombia of 21 November 2008, available at: <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/can-colombia-toc-tdm-can-colombie.aspx> (last visited on 26 April 2010).

¹⁴⁴ Free Trade Agreement between the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation (EFTA States) and the Republic of Singapore of 26 June 2002, available at: <www.worldtradelaw.net/fta/agreements/eftasingfta.pdf> (last visited on 26 April 2010).

published by the Norwegian government in December 2007,¹⁴⁵ which envisioned in its preamble an explicit emphasis on, *inter alia*, the commitment to human rights, sustainable development, environmental protection, respect for internationally recognized labour rights, corporate social responsibility and combating corruption.¹⁴⁶

A third possible approach concerns the inclusion of provisions explicitly emphasizing the regulatory autonomy of host states in furtherance of certain public interest concerns. Indeed, a respective example is currently provided by Article XVII (2) of the BIT between Canada and Ecuador, stipulating that “[n]othing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns”.¹⁴⁷ Furthermore, Article XI (1) lit. c of that treaty states that “[n]othing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as: [...] (c) ensuring the integrity and stability of a Contracting Party’s financial system”. While these clauses only refer to environmental protection and financial stability, it hardly needs to be pointed out that there is nothing which would prevent potential contracting parties to extent in future international investment agreements the scope of application of such provisions to other public interest concerns like human rights, development aspects¹⁴⁸ and rights of indigenous peoples.¹⁴⁹ Closely related to this technique

¹⁴⁵ See thereto also already *supra* B.II.

¹⁴⁶ The text of the former Norwegian draft model BIT is available at: <www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtale2.doc> (last visited on 26 April 2010).

¹⁴⁷ See also, e.g., the Articles 102 *et seq.* of the Economic Partnership Agreement between Japan and the Philippines; Article 11.11 of the US-Australia Free Trade Agreement, as well as Article 12 Uruguay-USA BIT which contains the following wording:

“1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.”

¹⁴⁸ For an empirical research on the treatment of the development dimension in investor-state arbitration from a broader perspective, see *Franck*, Harvard International Law Journal 50 (2009), 435 *et seq.*

¹⁴⁹ A considerably broader phrased clause of this kind is for example stipulated in the investment chapter of the Comprehensive Economic Cooperation Agreement between India and Singapore:

“Article 6.10: Measures in the Public Interest

Nothing in this Chapter shall be construed to prevent:

(a) a Party or its regulatory bodies from adopting, maintaining or enforcing any measure, on a non-discriminatory basis; or

(b) the judicial bodies of a Party from taking any measure;

consistent with this Chapter that is in the public interest, including measures to meet health, safety or environmental concerns.”

is the possibility of stipulating exception and justification clauses. Exception clauses, which essentially either carve out for example certain classes of investors or certain economic sectors,¹⁵⁰ or provide for a deviation from core treaty provisions under specified extraordinary conditions including in particular situations where the host country's essential security interests are at stake,¹⁵¹ are in principle already at present quite common in the treaty practice of investment agreements¹⁵² and could with regard to their scope of application also potentially be expanded to include other public interest concerns. To the contrary, justification clauses in the narrower sense of the meaning, which occupy a quite important position in the regulatory structure of world trade law,¹⁵³ are apparently still a comparatively rare phenomenon in the realm of international investment law.¹⁵⁴ However, in addition to, *inter alia*, Article 6.11 of the Comprehensive Economic Cooperation Agreement between India and Singapore, Article 22 of the Investment Agreement for the COMESA Common Investment Area, Article 17 of the ASEAN Comprehensive Investment Agreement, and Article 99 of the Economic Partnership Agreement between Japan and the Philippines, a respective example is again also provided by Article XVII (3) of the Ecuador-Canada BIT,¹⁵⁵

¹⁵⁰ See, e.g., the Protocol attached to the Ecuador-USA BIT, forming in accordance with Article XII (4) of the agreement an integral part thereof, which stipulates the right of the parties to make or maintain limited exceptions to national treatment and most-favoured nation treatment in certain business sectors.

¹⁵¹ See, e.g., Article IX (1) Ecuador-USA BIT: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests."

¹⁵² Generally thereto as well as specifically on the potential limits to the self-judging nature of these exception clauses UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends and Investment Rulemaking*, 2007, 80 *et seq.*; *Salacuse*, *The Law of Investment Treaties*, 341 *et seq.*; *Burke-White/von Staden*, *Virginia Journal of International Law* 48 (2008), 307 *et seq.*; *Newcombe/Paradell*, *Law and Practice of Investment Treaties*, 481 *et seq.*; *van Aaken*, *Journal of International Economic Law* 12 (2009), 507 (523 *et seq.*). On the approaches adopted by arbitration tribunals concerning this type of provisions, see for example *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of 12 May 2005, paras. 353 *et seq.*; *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, paras. 119 *et seq.*; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, paras. 204 *et seq.*; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award of 22 May 2007, paras. 322 *et seq.*

¹⁵³ See, e.g., Article XX GATT, Article XIV GATS; as well as thereto for example *Matsushita/Schoenbaum/Mavroidis*, *The World Trade Organization*, 635 *et seq.*, 797 *et seq.*

¹⁵⁴ Generally thereto, e.g., *Newcombe/Paradell*, *Law and Practice of Investment Treaties*, 500 *et seq.*; *van Aaken*, *Finnish Yearbook of International Law* 17 (2006), 91 (111 *et seq.*); *Krajewski/Ceyssens*, *Archiv des Völkerrechts* 45 (2007), 180 (200); *Supnik*, *Duke Law Journal* 59 (2009), 343 (368 *et seq.*).

¹⁵⁵ Article XVII (2) Canada-Ecuador BIT: „Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
- (b) necessary to protect human, animal or plant life or health; or
- (c) relating to the conservation of living or non-living exhaustible natural resources.“

which could more generally serve as a starting point and guideline for a respective regulatory approach to be adopted in connection of a future Latin American investment agreement.

Finally, an – admittedly quite innovative – option worth considering in this regard concerns the possibility of establishing obligations for foreign investors directly in an investment agreement, instead of only providing the host states with the right to impose them on the basis of their domestic laws.¹⁵⁶ *De lege lata* this normative steering approach has so far not found a prominent expression in investment treaty practice. In fact, most investment agreements – reflecting the promotion and protection of foreign investments as the primary purposes of most current BITs – confine themselves to stipulating reciprocal obligations on the treatment of investors and investments of the other parties. They do not impose any direct legal responsibilities on investors under international law. A notable exception is provided by the recent Investment Agreement for the COMESA Common Investment Area, adopted on 22/23 May 2007. However, even this regional investment agreement stipulates in its Article 13 only the largely undisputed obligation of foreign investors to “comply with all applicable domestic measures of the Member State in which their investment is made”. In addition, also the legal consequences of “investments made in breach of fundamental principles of the host State’s law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership”¹⁵⁷ as currently intensively discussed in arbitral practice,¹⁵⁸ as well as the implications of other forms of “unconscionable conduct” on the side of the foreign investor,¹⁵⁹ do not concern investors’ legal obligations in the actual sense. Rather, in the context of international investment law they more closely resemble behavioural expectations being incumbent upon investors (*Obliegenheiten*) on the basis of the principle of good faith,¹⁶⁰ a violation of which does not give rise to compensation, but “merely” results in a legal disadvantage with the investor forfeiting the protection under the respective investment agreement.¹⁶¹ In light of these findings, it becomes apparent that under the current investment law framework, the issue of investors’ responsibilities for the promotion and protection of certain public interest concerns is

¹⁵⁶ On the potential scope and content of such international legal obligations see also already for example UNCTAD, Development Implications of International Investment Agreements, IIA Monitor No. 2 (2007), 6 (“Such obligations may be merely passive, that is, an obligation to refrain from activity of a certain type, such as activity that would violate human or labour rights, damage the environment, or constitute corruption. The obligations, however, could also be active in nature, such as an obligation to make a development contribution.”).

¹⁵⁷ *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, para. 104.

¹⁵⁸ See for example *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award of 16 August 2007; *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, paras. 97 *et seq.*; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100 *et seq.*

¹⁵⁹ See *Azinian et al. v. Mexico*, ILM 39 (2000), 537 (553 *et seq.*); see thereto also *Muchlinski*, International and Comparative Law Quarterly 55 (2006), 527 (536 *et seq.*).

¹⁶⁰ On good faith as the basis of these behavioural expectations see also, e.g., *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, paras. 100 and 106 *et seq.*, with further references.

¹⁶¹ See thereto also *Tietje*, in: Ehlers/Schoch (eds.), *Rechtsschutz im Öffentlichen Recht*, 63 (88).

from the perspective of public international law more or less exclusively dealt with on the basis of “soft law” and other voluntary guidelines for foreign investors in the form of codes of conduct like the “OECD Guidelines for Multinational Enterprises”.¹⁶²

That said, it is nevertheless important to bear in mind that under modern public international law in general no systematic reasons exist why non-state entities such as foreign investors may not be incorporated in the international legal order as addressees of respective obligations. Thus, there is no *numerus clausus* of subjects of international law.¹⁶³ Against this background, it is hardly surprising that in the course of the current discussions on possible approaches aimed at achieving a more appropriate balance between host states and foreign investors, also the idea of establishing investors’ obligations in international investment agreements attracts more recently an increasing number of supporters in the literature.¹⁶⁴ Furthermore, while at present even more innovative investment agreements like the free trade agreement between Canada and Colombia merely refer in the preamble to the importance attached by the parties to corporate social responsibility, and also the former Norwegian draft model BIT stated in its Article 32 only that the “Parties agree to encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact” without stipulating any specific legal responsibilities for foreign investors, attention should finally be drawn in this connection to the “Model International Agreement on Investment for Sustainable Development”, published by the International Institute for Sustainable Development (IISD) in April 2005.¹⁶⁵ In addition to a number of other pioneering features, this model agreement provides in its third part (Article 11 to 17) for an admittedly quite extensive and ambitious list of investors’ obligations, which might in principle also serve as a useful template to be discussed in connection with an investment agreement for Latin America.

¹⁶² Reprinted in: ILM 40 (2001), 237 *et seq.*; generally on the importance of these corporate social responsibility instruments as well as their relationship with respective national legal regulations adopted by the home and host states see, e.g., *Muchlinski*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 637 *et seq.*; *Nowrot*, *The Relationship between National Legal Regulations and CSR Instruments*, 5 *et seq.*, each with further references.

¹⁶³ See, e.g., *Mosler*, *Berichte der Deutschen Gesellschaft für Völkerrecht* 4 (1961), 39 (71); *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/1, 23; *Tietje*, in: Tietje (ed.), *International Investment Protection*, 17 (32); *Nowrot*, *Indiana Journal of Global Legal Studies* 6 (1999), 579 (621); and, as early as 1927, *Lauterpacht*, *Private Law Sources*, 79.

¹⁶⁴ See thereto, e.g., *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming); *García-Bolívar*, *Transnational Dispute Management* 6 (Issue 4, December 2009), 4; UNCTAD, *Development Implications of International Investment Agreements*, IIA Monitor No. 2 (2007), 6; *Weiler*, *Boston College International and Comparative Law Review* 27 (2004), 429 (437 *et seq.*); *Stiglitz*, *American University International Law Review* 23 (2008), 451 *et seq.*; *Bridgeman/Hunter*, *Georgetown International Environmental Law Review* 20 (2008), 187 *et seq.*; *Nowrot*, in: Rudolf/Hawari/Spaude (eds.), *Menschenrechtliche Verantwortung von Unternehmen im 21. Jahrhundert* (forthcoming).

¹⁶⁵ IISD Model International Agreement on Investment for Sustainable Development, April 2005, available at: <www.iisd.org/pdf/2005/investment_model_int_agreement.pdf>; as well as the accompanying *Negotiators’ Handbook*, 2nd edition, April 2006, available at: <www.iisd.org/pdf/2005/investment_model_int_handbook.pdf> (both last visited on 26 April 2010).

3. *Dispute Settlement Mechanism: Arbitration, Local-Intergovernmental or ... Creating a Latin American Court of Investment Law*

A third and final issue being undoubtedly of at least equal outstanding importance concerns the types of dispute settlement mechanisms provided for in a future regional investment agreement. In this connection, Latin American countries essentially have three main alternative options at hand. Again, the most conventional among them from the perspective of current international investment law would involve – in addition to stipulating a provision for dispute settlement between the contracting parties – the inclusion of an investor-state arbitration clause. While most likely to be met with applause by foreign investors, the political feasibility of implementing this approach appears doubtful for at least two reasons. On the one side, it is already from a political perspective for a variety of reasons rather questionable whether countries like Ecuador and Bolivia would be willing to subscribe to this “conformist” option, even if access to a respective international arbitration venue would be conditioned on the prior exhaustion of local remedies. On the other side, it has to be recalled that from the point of view of constitutional law, some potential contracting parties – first and foremost among them again Ecuador¹⁶⁶ – are apparently barred from entering into international agreements which provide for the possibility of investor-state arbitration, at least insofar – as suggested here with regard to the personal scope of application of a regional investment agreement¹⁶⁷ – as also investors from outside of Latin America are concerned.

To the contrary, the most obvious departure from the present state of international investment law would be what can be characterized as the local-intergovernmental approach. It concerns the possibility of significantly limiting the remedies available to foreign investors by merely referring to dispute settlement before the national courts of the host state, combined with a provision on the settlement of disputes between the contracting parties themselves. This approach would be broadly in line with ideas prominently advocated by *Carlos Calvo* in the nineteenth century¹⁶⁸ and – by far not only for nostalgic reasons – be probably favoured by a number of opponents of the present system. Nevertheless, it is submitted that – taking recourse to a recent finding by the Venezuelan lawyer *Omar E. García-Bolívar* – a respective return to the past is at least not the most viable way forward.¹⁶⁹ Completely denying foreign investors the possibility of direct access to an international remedy – although not without precedent in recent treaty practice¹⁷⁰ – appears for a variety of reasons a step too far backwards to provide for a feasible and acceptable solution to the chal-

¹⁶⁶ See thereto already *supra* A.

¹⁶⁷ See already *supra* D.II.1.

¹⁶⁸ Generally on the “Calvo doctrine” and its manifestations in the practice of Latin American countries, see *Shea*, *The Calvo Clause*, 1955.

¹⁶⁹ *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming) (“when it comes to international law of foreign investment the return to the past is not the way forward”).

¹⁷⁰ See thereto already *supra* B.II.

lenges posed by the issue of foreign investments.¹⁷¹ Not only does this procedural feature enable host states to significantly enhance the credibility of their substantive treaty commitments towards potential foreign investors, the absence of which being highly likely to result in an overall considerably heightened caution exercised by respective corporations and individuals. Rather, granting investors recourse to international dispute settlement mechanisms also entails other advantages for host states, not the least among them – as already mentioned¹⁷² – the possibility to avoid often highly politicized conflicts with the home states in question. In this connection, it also needs to be emphasized that validly raised concerns as to the indeterminacy of legal terms in investment treaties and the corresponding broad powers enjoyed by international dispute settlement bodies¹⁷³ can first and foremost effectively be addressed and remedies on the basis of a careful and balanced drafting of the substantive provisions to be included in the regional investment agreement.¹⁷⁴ Moreover, implementing such an approach would preclude the possibility – generally given under the suggested indirectly reciprocal personal scope of application clause¹⁷⁵ – of requiring third states to provide for international remedies to Latin American investors as a prerequisite for their respective investors enjoying protection under the regional investment agreement. Last but not least, it should be recalled that the local-intergovernmental option is for valid reasons apparently also lacking support among potential contracting parties of a regional investment agreement, bearing in mind that for example the member states of ALBA have just recently established a working group in order to discuss the possibility of creating a regional centre for dispute settlement to be entrusted also with the task of dealing with claims by foreign investors.¹⁷⁶

If thus neither the at present still predominant approach of investment arbitration nor the local-intergovernmental alternative appear to be feasible options for the dispute settlement framework in a future Latin American investment agreement, attention has to be drawn to the sometimes overlooked fact that contract- and in particular treaty-based investor-state arbitration are not the only possibilities of providing foreign investors with access to an effective international remedy.¹⁷⁷ Rather, it is submitted that – at least at the regional level here at issue¹⁷⁸ – establishing a permanent dispute settlement body in the form of a Latin American court of investment law consti-

¹⁷¹ See also for example recently *Schill*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 29 (31 *et seq.*); *Brower/Schill*, *Chicago Journal of International Law* 9 (2009), 471 (477 *et seq.*), with further references.

¹⁷² See *supra* D.I.

¹⁷³ See already *supra* B.II.

¹⁷⁴ See thereto already *supra* D.II.2.

¹⁷⁵ See *supra* D.I.

¹⁷⁶ See thereto already *supra* A.

¹⁷⁷ See, however, in this connection also for example the respective ideas provided by *Van Harten*, *Investment Treaty Arbitration and Public Law*, 180 *et seq.*; *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming); *Salacuse*, *Fordham International Law Journal* 31 (2007), 138 (154 *et seq.*); *Griebel*, *Recht der Internationalen Wirtschaft* 55 (2009), 469 (473); and, as early as 1945, *Timberg*, *Georgetown Law Journal* 33 (1945), 373 *et seq.*

¹⁷⁸ To the contrary, the prospects for establishing a respective institution at the global level appear to be currently almost as remote as the chances for a comprehensive multilateral investment agreement, see thereto already *supra* D.I.

tutes an alternative worth considering in order to adequately address and remedy the increasingly perceived challenges arising from and connected with the current approach of investor-state arbitration.

The problem of inconsistent decisions, frequently associated with the present regime of investment arbitration¹⁷⁹ and having already for a number of years given rise to proposals for and even investment agreement provisions stipulating the possibility of creating an appellate mechanism,¹⁸⁰ could be constructively dealt with on the basis of creating a permanent court, in particular if accompanied by a possibility of appeal to a respective chamber. The court would be staffed not by arbitrators, but composed by judges elected by the state parties for a specific term and being in principle accountable to the public.¹⁸¹ In addition to thus rather effectively avoiding the challenges resulting from “the nature of arbitration as a one-off dispute settlement mechanism without the requisite mechanisms to ensure consistency, stability, and predictability in investment jurisprudence”,¹⁸² this clear departure from the close structural orientation of investment dispute settlement on the model of commercial arbitration would also lead to a fundamental change in perspective on the issue of confidentiality.¹⁸³ Whereas arbitration proceedings in the commercial and investment context are still presumed to be confidential unless the disputing parties agree otherwise, the very idea of adjudication by courts involves at the domestic as well as international level – certainly subject to explicitly stipulated exceptions – openness and transparency as a necessary precondition for the potential exercise of public scrutiny.¹⁸⁴

A further aspect, worth highlighting in connection with the legal and political feasibility of implementing this approach, concerns the constitutional constraints im-

¹⁷⁹ See already *supra* B.II.

¹⁸⁰ See in particular the respective debate initiated by the ICSID Secretariat in October 2004 which, however, received a rather unenthusiastic response by many ICSID members. See thereto, e.g., *Tams*, *An Appealing Option?*, 5 *et seq.*; *Qureshi*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 1154 *et seq.* With regard to respective stipulations in international investment agreements see, e.g., Annex E of the Uruguay-USA BIT: “Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism” Quite similar provisions are for example included in Annex 10-F CAFTA-DR, Annex 10-D of the Panama-US Free Trade Agreement, Annex 10-H of the Chile-US Free Trade Agreement, Annex 10-D of the Oman-US Free Trade Agreement, Annex 10-D of the Peru-US Free Trade Agreement and Annex 10-D of the Colombia-US Free Trade Agreement.

¹⁸¹ Generally on the increasingly perceived challenges associated with the current recourse to arbitrators in investor-state dispute settlement in particular also in light of the public interest concerns involved, see already *supra* B.II.; as well as the quite plain and explicit statement by *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming) (“The interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever changing arbitrators.”).

¹⁸² *Schill*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 29 (50); for a quite similar perception see, e.g., *García-Bolívar*, *ICSID Review – Foreign Investment Law Journal* 24 (No. 2, 2009) (forthcoming); *Van Harten*, *Investment Treaty Arbitration and Public Law*, 164 *et seq.*

¹⁸³ See also already *supra* B.II.

¹⁸⁴ Generally thereto, e.g., *Meron*, *American Journal of International Law* 99 (2005), 359 (360); *Van Harten*, *Investment Treaty Arbitration and Public Law*, 159 *et seq.*, each with further references.

posed on some potential state parties with regard to the type of dispute settlement mechanism to be potentially incorporated in a Latin American investment agreement. In particular with regard to case of Ecuador,¹⁸⁵ attention needs to be drawn to the fact that the prohibition to enter into international agreements under which sovereign jurisdiction would be ceded in contractual or commercial disputes between the state and individuals or private corporations as stipulated in the first sentence of Article 422 of the Ecuadorian Constitution of 2008, only refers to international arbitration venues (“*instancias de arbitraje internacional*”). Therefore, in light of its wording, this provision does not seem to preclude the possibility of Ecuador participating in the creation of a regional court of investment law, even if the jurisdiction of this dispute settlement institution – as suggested here¹⁸⁶ – would also extend to claims brought by investors from outside of Latin America. Finally, it should be recalled in this connection that – from a global perspective – the potential creation of a regional court of investment law in the Latin American context would in principle not be without precedent. Already the Unified Agreement for the Investment of Arab Capital in the Arab States of 26 November 1980,¹⁸⁷ which entered into force on 7 September 1981 following ratification by most member states of the League of Arab States, provides in its Articles 28 for the establishment of the Arab Investment Court. The jurisdiction of this court includes, *inter alia*, investment disputes between state parties relating to or arising from the application of the Unified Agreement, respective disputes between a state party and an individual or corporation of another state party as well as the issuing of non-binding advisory opinions.¹⁸⁸

The institutional setting, competences, composition and other organisational as well as procedural features of a future Latin American court of investment law are most certainly matters to be determined by potential state parties to the regional investment agreement. It hardly needs to be emphasized that it will not be possible to elaborate on all the various respective options enjoyed by them in a comprehensive way. Moreover, in the process of designing this adjudicative body, a more or less close general orientation on the models provided by existing international courts and tribunals¹⁸⁹ is recommended and likely to take place. Consequently, the following final part of this analysis confines itself to address and make some suggestions on three important issues – the composition of the court, its jurisdiction as well as the enforcement of its judgments – which needs to be considered and decided upon by future contracting parties in the course of their negotiations on the possible and feasible design of a Latin American court of investment law.

¹⁸⁵ See thereto also already *supra* A.

¹⁸⁶ See also already *supra* D.II.1.

¹⁸⁷ Unified Agreement for the Investment of Arab Capital in the Arab States of 26 November 1980, available at: <www.unctad.org/sections/dite/iaa/docs/Compendium//en/36%20volume%202.pdf> (last visited on 26 April 2010).

¹⁸⁸ See Articles 29 *et seq.* of the Unified Agreement. The Arab Investment Court rendered its first decision on 12 October 2004 in the case of *Tanmiah v. Tunisia*, see thereto also *Ben Hamida*, *Journal of World Investment & Trade* 7 (2006), 699 *et seq.*

¹⁸⁹ From the by now literally countless contributions in this regard see, e.g., recently the overview provided by *MacKenziel Romano/Shany* (eds.), *The Manual on International Courts and Tribunals*, 2010.

Concerning the institutional details of the court, in particular its panels of judges, it appears sufficient to point out that it should also provide for an appeals chamber, with a respective two-tier court structure being aimed at enhancing the consistency and thus the predictability of the court's jurisprudence. With regard to its composition, the court would be staffed by judges elected by the contracting parties for a set term of – for example – six or nine years, preferably without the possibility of re-election.¹⁹⁰ In line with the approach adopted by other international courts and surely worth supporting, the judges would be elected to and sit on the court in their individual capacity.¹⁹¹ In order to further enhance their independent status, they would during their term of office also be prohibited from engaging in any activity which is likely to endanger their impartiality and independence.¹⁹² Concerning the size of the court, the regional investment agreement could for example stipulate that the number of judges equals three times the number of contracting parties, with each state party thus having the right to nominate three judges, subject to approval by a majority vote of all contracting parties. In this connection, it might be worth considering the idea of proscribing that one or even two of the three judges per state party should not be nationals of any of the contracting parties. Although rather innovative in light of the current practice of international court and tribunals,¹⁹³ adopting such an approach entails the potential of further contributing to the credibility of this dispute settlement institu-

¹⁹⁰ With the notable exception of for example the judges of the International Criminal Court (see Article 36 (9) lit. a Rome Statute), most statutes of international courts and tribunals provide for the possibility of at least one re-election. However, in order to enhance the desired independence of judges, it is suggested that non-renewable longer terms constitutes a more viable solution, see also, e.g., *Meron*, *American Journal of International Law* 99 (2005), 359 (362); *Van Harten*, *Investment Treaty Arbitration and Public Law*, 182. In this connection, attention should also be drawn to the approach adopted by the member states of the Caribbean Community. In accordance with Article IX (3) of the Agreement Establishing the Caribbean Court of Justice, judges hold office until they attain the age of seventy-two years.

¹⁹¹ See, e.g., Article 52 (1) of the American Convention on Human Rights; Article 21 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 2 of the Statute of the International Court of Justice; Article 11 (1) of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights; and Article 40 (1) of the Rome Statute of the International Criminal Court. Generally on the issue of judicial independence of judges at international courts and tribunals, see for example *Aznar-Gómez*, in: Zimmermann/Tomuschat/Oellers-Frahm (eds.), *The Statute of the International Court of Justice*, Article 2, paras. 1 *et seq.*; *MacKenzie/Sands*, *Harvard International Law Journal* 44 (2003), 271 *et seq.*; *Guillaume*, *The Law and Practice of International Courts and Tribunals* 2 (2003), 127 *et seq.*, each with further references.

¹⁹² See thereto for example already Articles 16 *et seq.* of the Statute of the International Court of Justice; Articles 17 *et seq.* of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights; Article 7 of the Statute of the International Tribunal for the Law of the Sea; Article 40 (2) of the Rome Statute of the International Criminal Court; Articles 12 *et seq.* of the Statute of the African Court of Justice and Human Rights; and Article 21 (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁹³ See, e.g., Article 36 (4) lit. b of the Rome Statute of the International Criminal Court, stipulating that each "State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party". See also for example Article 11 (1) of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights; and Article 3 (1) of the Statute of the African Court of Justice and Human Rights.

tion and thus its acceptability in particular among foreign investors from outside of Latin America.

A second issue of utmost importance concerns the jurisdiction of the court. In this regard, the respective provisions should most certainly – in line with the current treaty practice in the realm of investment agreements – provide for jurisdiction over disputes between the contracting parties relating to the application of the regional investment agreement. For the reasons outlined above, it is also almost imperative that the jurisdiction of the court comprises investment disputes – relating to the application of the regional investment agreement – between a contracting party and a natural or juridical person of another contracting party. Moreover, also respective disputes between a contracting party and a natural or juridical person of third states are covered, provided that these individuals and other entities fall within the personal scope of application of the regional investment agreement.¹⁹⁴ In the last mentioned cases, it would be upon the claimant – which would usually be the foreign investor but could, depending on the addressees of the substantive provisions stipulated in the agreement and on the kinds of disputes covered by the jurisdictional clauses, also be a contracting party or another individual or juridical person negatively affected by the activities of a foreign investor – to provide the respective evidence to be considered by the court as to the fulfilment of the prerequisites stipulated in the personal scope of application clause.

With regard to potential admissibility criteria for respective claims launched by a foreign investor against a contracting party, one might consider stipulating the requirement of a prior exhaustion of all domestic remedies in accordance with generally recognized principles of public international law, combined with the setting of a time-limit of six to twelve months from the date on which the respective final decision was taken in the host state. Although common for example in the realm of regional human rights regimes,¹⁹⁵ it is well-known that, first, an obligation to exhaust local remedies before a case can be brought to international dispute settlement venues is a comparatively rare phenomenon in current investment treaty practice and that, second, any suggestions in this connection are still frequently met with – to put it mildly – heightened scepticism among practitioners and academics.¹⁹⁶ Nevertheless, including this requirement as a certain compensation for providing foreign investors with access to an international remedy would not only significantly improve the acceptability and thus political feasibility of a regional investment agreement among many Latin American countries. Rather, this approach – falling far short of in principle completely denying a right to initiate international dispute settlement proceedings as stipulated in some recent investment agreements¹⁹⁷ – also appears to be among the options increas-

¹⁹⁴ See thereto already *supra* D.II.1.

¹⁹⁵ See, e.g., Article 46 of the American Convention on Human Rights; Article 35 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 50 of the African Charter on Human and Peoples' Rights; see also Article 26 of the COMESA Treaty of 5 November 1993, available at: http://about.comesa.int/attachments/comesa_treaty_en.pdf (last visited on 26 April 2010).

¹⁹⁶ In order to support both findings, see, e.g., *Schreuer/Malintoppi/Reinisch/Sinclair*, *The ICSID Convention, A Commentary*, Article 26, paras. 192 *et seq.*, 229 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 249 *et seq.*

¹⁹⁷ See thereto already *supra* B.II.

ingly seriously considered in order to provide for an appropriate balance between host states and foreign investors. Respective evidence is for example provided by Article 45 (B) of the IISD Model International Agreement on Investment for Sustainable Development, Article 15 (3) of the former Norwegian draft model BIT¹⁹⁸ and the recent discussions in the Subcommittee on Investment of the United States Advisory Committee on International Economic Policy.¹⁹⁹ Moreover, it should be recalled that the respective suggestion refers – again in line with the practice of regional human rights regimes – to an incorporation of the exhaustion of local remedies rule in accordance with generally recognized principles of public international law, thus providing foreign investors with the possibility to invoke one of the recognized exceptions to this rule.²⁰⁰

Another issue worth at least briefly addressing in connection with the jurisdiction of the court involves its potential competence to also hear and settle investment disputes involving contract claims raised by the foreign investor or – admittedly so far quite rare in practice²⁰¹ – a contracting party.²⁰² An obvious advantage of adopting this approach could be seen in the possibility for respective Latin American host states to offer foreign investors the option of incorporating in state contracts a dispute settlement clause which provides for the eagerly demanded access to an international remedy in the form of the Latin American court of investment law. The contracting parties would thus be relieved from searching for alternative solutions, the choice of which being in some cases clearly limited by constitutional law constraints as vividly demonstrated by the example of Ecuador. A respective jurisdiction of the court could be established by two means, both of them already well-known and controversially discussed in current international investment law. From a procedural perspective, the jurisdiction clause of the regional investment agreement could – preferably explicitly in order to avoid respective uncertainties²⁰³ – extend the jurisdiction of the court to

¹⁹⁸ Article 15 (3) of the former Norwegian draft model BIT does not require the exhaustion of all local remedies, but made consent to arbitration conditional on the requirement that „agreement cannot be reached between the parties to this dispute within 36 months from its submission to a local court for the purpose of pursuing local remedies, after having exhausted any administrative remedies”. On this approach in investment treaty practice see also, e.g., *Schreuer*, *The Law and Practice of International Courts and Tribunals* 4 (2005), 1 (3 *et seq.*).

¹⁹⁹ See thereto already *supra* B.II. Generally for an argumentation favouring recourse to the exhaustion of local remedies rule see also recently *Van Harten*, in: *Waibel et al.* (eds.), *The Backlash Against Investment Arbitration*, 433 (447 *et seq.*); as well as, e.g., *Sornarajah*, *International Law on Foreign Investment*, 253 *et seq.*

²⁰⁰ Generally on these exceptions see for example *Amerasinghe*, *Local Remedies in International Law*, 200 *et seq.*, with further references.

²⁰¹ On the limited number of cases in which the host state acted as claimant in contract-based investor-state arbitration proceedings see, e.g., *Torall/Schultz*, in: *Waibel et al.* (eds.), *The Backlash Against Investment Arbitration*, 577 (589 *et seq.*); *Laborde*, *Journal of International Dispute Settlement* 1 (2010), 97 *et seq.*

²⁰² Generally on the relationship between contract and treaty claims in international investment law and the legal implications arising from this issue, see for example *Crawford*, *Arbitration International* 24 (2008), 351 *et seq.*; *Wackernagel*, *Das Verhältnis von treaty und contract claims*, 5 *et seq.*, each with further references.

²⁰³ See thereto, e.g., *Consorzio Groupement L.E.S.I.-DIPENTA v. Algeria*, ICSID Case No. ARB/03/08, Award of 10 January 2005, para. 25; *SGS Société Générale de Surveillance S.A. v. Phi-*

certain or all kinds of contract claims.²⁰⁴ From the perspective of substantive law, recourse could be taken in this regard to a so-called “umbrella clause” as for example currently enshrined in Article 3 (4) of the BIT between Ecuador and the Netherlands, stipulating that “[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” For the purposes of this contribution, it is neither possible nor necessary to engage in a more in-depth assessment as to the functions and scope of this controversially discussed type of provisions.²⁰⁵ However, in case the contracting parties should decide to include such a clause and to stipulate also investors’ responsibilities in the regional investment agreement,²⁰⁶ it might be worth considering whether to deviate from the current treaty practice and modify the scope of application of the respective “umbrella clause” by also establishing an international legal obligation of foreign investors to honour the contractual commitments made by them to state parties.

In this connection, a last word on the potential circle of persons and entities entitled to bring a claim to the Latin American court of investment law appears appropriate. As already pointed out, the jurisdiction of the court should comprise disputes between the contracting parties as well as treaty claims by entitled foreign investors against a contracting party. Furthermore, if the state parties should decide to extend the jurisdiction also to contract claims and/or to include investors’ obligations in the regional investment agreement, it would surely make sense to stipulate a corresponding possibility for host states to initiate proceedings against respective foreign investors. Under these conditions the contracting parties might, finally, also consider taking the rather innovative step of granting for example their citizens, juridical persons and indigenous communities negatively affected by or in the course of investment activities, the right to launch claims against foreign investors for certain violations of obligations imposed on them in the regional investment agreement. Although occasionally proposed in the literature,²⁰⁷ this option has so far never been taken up in investment treaty practice. However, it appears almost superfluous to point out that this

Philippines, ICSID Case No. ARB/02/6, Decisions on Objections to Jurisdiction of 29 January 2004, paras. 130 *et seq.*; *Wackernagel*, *Das Verhältnis von treaty und contract claims*, 10 *et seq.*

²⁰⁴ For a respective example in current investment treaty practice, see, e.g., Article VI of the Ecuador-USA BIT; Article 24 of the Uruguay-USA BIT.

²⁰⁵ From the practice of investment tribunals see for example *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction of 6 August 2003, paras. 163 *et seq.*; *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decisions on Objections to Jurisdiction of 29 January 2004, paras. 113 *et seq.*; *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction of 6 August 2004, para. 81; *Eureko B.V. v. Poland*, *Ad Hoc* Arbitration, Partial Award of 19 August 2005, paras. 244 *et seq.* Out of the numerous literature on this issue, see, e.g., *Salacuse*, *The Law of Investment Treaties*, 271 *et seq.*; *Wälde*, *Journal of World Investment & Trade* 6 (2005), 183 *et seq.*; *Schill*, *Minnesota Journal of International Law* 18 (2009), 1 *et seq.*; *Dolzer/Schreuer*, *Principles of International Investment Law*, 153 *et seq.*

²⁰⁶ See thereto already *supra* D.II.2.

²⁰⁷ See for example *Weiler*, *Boston College International and Comparative Law Review* 27 (2004), 429 (437 *et seq.*); on the underlying general issue of providing individuals and groups affected by foreign investments with adequate access to justice, see also, e.g., *Francioni*, in: Dupuy/Francioni/Petersmann (eds.), *Human Rights in International Investment Law*, 63 (71 *et seq.*).

aspect itself can hardly be regarded as an insurmountable obstacle to implementing this approach in the future.

Finally, a third main issue in need of at least drawing attention to in connection with the creation of a Latin American court of investment law concerns the enforcement of its judgments in the territory of the contracting parties.²⁰⁸ In this regard, it is submitted that the idea – occasionally entertained by certain supreme, constitutional and other courts²⁰⁹ – of subjecting the validity of judgements and other decisions by international courts and tribunals to a subsequent judicial review by domestic courts is not a suitable option for the regional investment agreement. While in principle certainly possible with regard to awards in investor-state arbitrations administered for example by the International Chamber of Commerce or arbitrated under the UNICTRAL Arbitration Rules, it should be emphasized that this approach does for valid reasons not find recognition in the statutes of international courts and tribunals,²¹⁰ thus also mirroring – admittedly with the notable exception of the ICSID Convention²¹¹ – a fundamental difference between dispute settlement by arbitrators on the one side and by international judges on the other side. In particular, it might be worth recalling that also the contracting parties to the statute of the apparently only existing regional investment court,²¹² the Arab Investment Court, have adopted this approach in Article 34 of the Unified Agreement for the Investment of Arab Capital in the Arab States of 26 November 1980.²¹³ However, it is not merely these structural and com-

²⁰⁸ Generally on the enforcement of awards in the field of international investment law, see for example *Dolzer/Schreuer*, Principles of International Investment Law, 287 *et seq.*

²⁰⁹ See generally thereto for example Federal German Constitutional Court, *Görgülü*, 2 BvR 1481/04, Order of 14 October 2004, paras. 30 *et seq.* The last mentioned decision is available in German at: <www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html>; an English summary of the decision is provided in the Court's press release No. 92/2004, available at: <www.bundesverfassungsgericht.de/pressemitteilungen/bvg04-092en.html> (both last visited on 26 April 2010). See also Court of Appeal for Ontario, *Council of Canadians et al. v. Attorney General of Canada*, Decision of 30 November 2006, paras. 26 *et seq.*, available at: <www.ontariocourts.on.ca/decisions/2006/november/C43995.pdf> (last visited on 26 April 2010). Generally on this issue in the realm of investor-state arbitration see, e.g., *Baldwin/Kantor/Nolan*, Journal of International Arbitration 23 (2006), 1 (14 *et seq.*); *Schreuer/Malintoppi/Reinisch/Sinclair*, The ICSID Convention, A Commentary, Article 53, paras. 20 *et seq.*

²¹⁰ See for example Article 67 *et seq.* of the American Convention on Human Rights; Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 30 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights; Article 46 of the Statute of the African Court of Justice and Human Rights; Article XV of the Agreement Establishing the Caribbean Court of Justice.

²¹¹ See Articles 53 *et seq.* ICSID Convention.

²¹² It should be noted, however, that other regional courts, established on the basis of economic integration agreements, do occasionally also enjoy jurisdiction over investor-state disputes. A respective example is provided by the COMESA Court, established in accordance with the Articles 7, 19 *et seq.* of the COMESA Treaty of 5 November 1993, that is among the dispute settlement venues offered to foreign investors under Article 28 (1) of the Investment Agreement for the COMESA Common Investment Area of 22/23 May 2007.

²¹³ See Article 34 of the Unified Agreement:

“1. Judgements shall have binding force only with regard to the parties concerned and the dispute on which a decision is given.

parative perspectives that speak in favour of rejecting the “domestic review” option. The unconditional recognition of the binding force and enforceability of judgements issued by the Latin American court of investment law would also most certainly enhance the credibility of the regional investment regime in the eyes of all stakeholders concerned.

E. Outlook

The conceptual thoughts and ideas presented here are meant to be a small contribution to the evolving discourse in Latin America over possible approaches to a reformation of the legal investment framework applicable to them. Ultimately, Latin American countries like Ecuador are in the course of their current efforts facing the old challenge of finding a new appropriate balance between the legally protected economic interests of foreign investors on the one hand and the necessary “policy space” for host states for the promotion and protection of other public interest concerns on the other hand, thus establishing a legal investment regime acceptable to all stakeholders involved and at same time – from a global perspective – potentially making an important and sustainable contribution to the progressive evolution of international investment law in this century.

This process, in order to be constructive and successful, requires engaging in open and inclusive discussions without ideological or other “blindness”, and might eventually lead to paths so far less taken in investment treaty practice. In this connection, it was the purpose of this contribution to make the case for adopting a regional investment agreement including the creation of a Latin American court of investment law as a political feasible, acceptable and thus viable medium-term option to facilitate a reconciliation, on modified terms, between countries like Ecuador and the international legal regime on foreign investments.

2. Judgement shall be final and not subject to appeal. Where there is a dispute as to the meaning or import of a judgement, the Court shall provide its interpretation at the request of any of the parties concerned.

3. A judgement delivered by the Court shall be enforceable in the State Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts.”

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