1 Introduction

International investment law has focused, so far, on the protection of investment and thus on investor rights. Throughout the past two decades we have been witnessing an impressive proliferation of bilateral investment treaties (BITs), which introduce an elaborate set of substantive investor protection provisions on the one hand and arbitration clauses on the other, generally referring an investor–host State arbitration to, inter alia, the International Centre for the Settlement of Investment Disputes (ICSID), which has subsequently become the crucial – though not the only – forum before which investment disputes are resolved.

BITs mainly, and in a plethora of cases exclusively, deal with investor rights. Inter alia, they grant prompt, adequate and effective compensation in case of expropriation; they guarantee fair and equitable, national and most favored nation treatment; and quite often they contain the prohibition of performance requirements and an umbrella clause. However, as past experience has shown and fierce opposition to the creation of a multilateral framework has demonstrated, investments do not take place in a vacuum and thus disputes that eventually come to the stage of ICSID or other investment arbitration fora involve a multitude of different issues, some concerning investor rights, others concerning matters of mainly public interest, e.g. human rights, corruption or the environment. While soft law instruments exist that stress certain responsibilities of corporate non-State actors on the international stage, particularly vis-à-vis the three said public interest issues,[1] their legal reach in a dispute settlement

[1] See Report of the World Summit on Sustainable Development, Johannesburg, August 26 to September 4, 2002, available at http://daccess-ods.un.org/TMP/7699301.html; Agenda 21, Chapter 1: Preamble, Para. 1.1, available at www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter1.htm; The UN Global Compact, available at

system referring to a myriad of clear-cut treaties dealing exclusively with investor rights is considerably limited.[2]

This book seeks to both flesh out the pressing need for including such aforementioned public interest considerations within the realm of international investment law, and identify the challenges they entail. I will subsequently refer to this complex as the public interest challenge. This challenge comprises, among others, the host State's need (and constitutional, or otherwise, remit) to protect third party interests or common interests. The present legal framework offers the host State only very limited options to pursue such interests. That is, because it elevates such issues to the international level and tests them against the backdrop of, as I will argue, investor rights serving as international law "trump cards" and enjoying primacy and supremacy over domestic law.

What is more, such interests – for example, the right of a worker to join a union or the preservation of flora and fauna in proximity to an industrialized area – do not merely constitute domestic concerns but frequently also expand to the international level and translate into international law rules or principles that the host State has undertaken to observe. The fact that such public interests enshrined in international legal obligations of the host State compel the latter to integrate and to protect them in its domestic law system hence means giving them effect on the domestic as well as the international level. I will refer to such harmonization, or even enmeshment, of the domestic and the international

www.unglobalcompact.org/AboutTheGC/index.html; on the drafting history of the Compact see E. Morgera, "The UN and Corporate Environmental Responsibility: Between International Regulation and Partnerships," *Eur. Com. & Int'l Env. L. Rev*., 15 (2006), 93; Millennium Development Goals, adopted at the UN Millennium Summit in New York, September 18, 2000: see www.un.org/millenniumgoals/; The OECD Guidelines for Multinational Enterprises, Revision 2000, available at www.olis.oecd.org/olis/2000doc.nsf/LinkTo/daffe-ime-wpg(2000)9; on the OECD Guidelines, see further R. Jones, "The 1999 Review of the OECD Guidelines for Multinational Enterprises" in R. Blanpain (ed.), *Multinational Enterprises and the Social Challenges of the XXIst Century* (Kluwer Law International, 2000), p. 141 at pp. 143 f.

[2] On the – naturally – limited legal force as well as on the legal influence they may nonetheless exert see P. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn. (Oxford University Press, 2007), pp. 568 ff. My book does not deal with those – admittedly potentially considerable – effects of soft law instruments on public interest issues within the realm of international investment law. The eventual solution I will promote will be – deliberately so, as I will explain throughout this book and particularly in the concluding remarks – a quite doctrinal one. However, while I thus risk excluding some possibly fruitful inspirations, the theory I will flesh out in the subsequent chapters and which leaves little room for soft law instruments to assume a relevant role, in my opinion best encapsulates the specifics of international investment law.

by regulatory action through treaties, decisions by international bodies such as the UN Security Council or other international instruments, as a "global" phenomenon. International investment law, as I will contend, on the one hand represents such cutting through and mélange of the domestic and the international, and thus on the other touches upon and is faced with public interest challenges bearing relevance on both the domestic and international levels by piercing their dichotomy. Therefore, the public interest this book is concerned with will be called the "*Global* Public Interest."

This term, for the sake of the analysis undertaken in this book, shall comprise all interests inhering a pivotal importance for the international community and bearing relevance on both the domestic and international levels. However, to clarify the purpose of the book and in order to obviate disappointment, my analysis is not so much concerned with discerning *what* Global Public Interest in international investment law actually comprises, but rather *how* to legally translate it and reconcile it with competing investor rights. The former issue requires a separate study of a rather sociological and international relations based approach. Since I am more interested in the "how" than in the "what," the structure of this book falls in two main parts: Part I fleshes out the public interest challenge and thereinafter seeks to develop a general theory as an adequate response to such challenge, including its legal translations as well as doctrinal structure and mode of reconciliation with investor rights. Part II undertakes three case studies in exemplary Global Public Interest issues – the environment, international human rights and corruption – viewing the investment arbitration case law against the backdrop of the general theory and doctrine developed in Part I.

Hence, this book focuses on theory and its potential to shape practice, which naturally means a preponderance of Part I. Therefore, several considerations underlie the point of departure of my analysis. Looking at the strongly favorable position BITs give to the investors, two main questions arise: Firstly, does this situation create an imbalance that is unacceptable given the importance of a Global Public Interest issue? And secondly, if we answer the first question in the affirmative, is there a way to argue for a doctrinal foundation to infer such Global Public Interest concerns as within the realm of international investment law?[3] Naturally, in order

[3] For the sake of clarity and in order to avoid confusion, I refer to "international investment law" as the general framework set by both procedural and substantive provisions. Differentiating between investment law (substance, i.e. BITs) and investment

to counter such alleged imbalance, the way Global Public Interest concerns will play out doctrinally is through defenses the host State may raise against investor rights infringements claimed by the investor. If one acknowledges, say, the environment as a licit issue to bring up legally, it is simply inevitable that such matter will very often be introduced as a defense against an infringement of investor rights.

To say as much, my answer to both questions will be yes. My argumentation is structured in three parts. In Chapter 2, I seek to shed light on the relationship of domestic and international law under the realm of international investment law. It will be my argument that the role of international law under the general applicable law clause of Article 42(1) second sentence ICSID, which provides a pattern for applicable law clauses in most international investment agreements, has constantly grown. International law's prominence has now arrived at a stage where Tribunals not only acknowledge its supremacy over domestic law within the realm of international investment law, but also grant the former the role as the primary source in an investment dispute. I call this development the "internationalization" of international investment law. Moreover, I opine that investment arbitration case law describes the legal order applicable in investment disputes as a specific mélange of domestic and international law that defines a clear-cut hierarchy of the two sources from which it draws, with international law at the top. I will refer to this phenomenon of interdigitation of different legal sources as the "integration" of international investment law. What my conclusion entails is that as long as Global Public Interest concerns can only be addressed on the level of domestic law, they represent no viable defense against the supreme international law investor rights with which they might collide. Thus, there appears to be a need for possible defenses the host State may raise as justification for investor rights infringement it commits in pursuit of the Global Public Interest.

Chapter 3 demonstrates that neither current doctrinal discussions regarding international legal obligations of Multinational Enterprises nor BIT practice at the present stage are able to adequately respond to the challenges my observations as to "internationalization" and "integration" of international investment law entail. Therefore, Chapter 4 delineates what

arbitration (procedure, i.e. ICSID or other arbitration rules) I find futile, given the influence procedure and substance have on each other – as I demonstrate in Chapter 4. Hence, I will only refer to "investment arbitration" in case I seek to specifically emphasize an exclusively procedural aspect.

I call the Global Public Interest theory. It argues that international investment law has an inherently public law character, which, however, in its specific nature may not be explained by either the classical model of public international law or current and evolving approaches that can only capture certain and insular aspects of it but are unable to explain their interplay and interrelation. Comparing it with similar legal systems that share the alleged public law character of international investment law, my argument is that balancing the individual with the public interest is a defining feature of every public law system, i.e. also of a Global Public Law system such as international investment law. In this Global Public Law system, so I will argue, the Global Public Interest finds its legal translation in certain general principles and customary international law norms. Chapter 5 doctrinally categorizes those legal translations as defenses the host State may raise against investor rights infringements, argues for employing proportionality analysis as the tool to balance the Global Public Interest with the interest of the investor, and proposes to introduce a procedural mechanism in order to prevent the host State from abusing Global Public Interest considerations for protectionist or other illicit purposes.

As regards the methodological approach, the emphasis in this book will be on systemic analysis. As has been foreshadowed above, I will scrutinize how international investment law functions and compare it with other legal systems sharing distinct features with the former, such as "integration" – compared with the European law system – or "internationalization" as regards the function of international law as "trump cards" – compared with the European Convention on Human Rights system. To say as much, I will categorize international investment law as what I call a "Global Public Law system." In short, such denomination seeks to capture my assessments of international investment law as (1) a public law system that is concerned with the control of the exercise of (the host State's) public authority, and as (2) a legal régime that is characterized by the enmeshment of the domestic and the international levels and creates a (to some extent) constitutional system by the phenomena I have referred to earlier as "integration" and "internationalization."

At this point I have to emphasize that among the plethora of thought-provoking pieces that have been published on international investment law in the past decade, two works in particular have inspired me to tackle the *problematique* of the present book, for it partially builds on their ideas and undertakes to push the argument several steps further or even to draw new conclusions from them or their combination. The first one is, as

the ardent follower of the recent investment debate already might have suggested, Gus Van Harten's *Investment Treaty Arbitration as Public Law*.[4] His descriptive study of international investment arbitration as a public law system has not only proven tremendously instructive to my analysis but, among other major influences, actually incited me to start thinking about the (Global) Public Interest in international investment law in the first place.[5] However, as the focus on investment *arbitration* makes apparent, Van Harten's systemic analysis concentrates on the consequences of bringing international investment issues before an arbitration forum tailored after a commercial arbitration system for disputes between private entities. Thus, his assessment mainly, albeit not exclusively, pertains to procedural aspects. My analysis, however, adds a substantive dimension to the procedural assessment by drawing conclusions from the phenomena of "internationalization" and "integration" for the public law nature of international investment *law*, i.e. the combination of procedure and substance. Moreover, while Van Harten detects the public interest challenge, his response, since being related to his mainly procedural perspective, naturally is procedural or institutional – he proposes to create a permanent Investment Arbitration Appellate Court. Here, again, my approach seeks to advance the argument and to provide substantive solutions to the public interest challenge that emerges from the concoction of procedural as well as substantive elements that create the specific features of international investment law that I have categorized as Global Public Law.

Less influential, although nonetheless very helpful for expanding my argument, particularly as just described, was Stephan Schill's *Multilateralization of International Investment Law*.[6] My analysis has heavily profited from his assessment that the investment treaty system, consisting mostly of bilateral investment treaties, is no mere rag-rug of scattered and contradictory rules, but establishes a rather harmonious régime of investment protection that provides for a thrust of highly similar norms and thus arguably represents a de facto multilateral system. Building on this concept, I will push the argument as to harmonization and the existence of a general framework of international investment law to a further level by arguing for a comprehensive understanding of an investment régime

[4] G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007).
[5] Van Harten refers rather to "arbitration" instead of "law," but I prefer – as explained previously – the term "international investment law" due to the reasons given earlier.
[6] S. W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009).

which integrates Global Public Interest defenses that must be balanced against investor rights and which thus expands the general framework to a full public law system.

The response to the public interest challenge this book promotes, the Global Public Interest theory, seeks to correspond to the current state of public international law. Therefore, although I undertake to define a new category to capture the distinct features of international investment law, my theory takes account of the current antagonism of the potential public international law *Grundnorms* of sovereignty vs. humanity. Thus, the solution the Global Public Interest theory provides will attempt to accomodate both the growing value-orientation of public international law on the one hand and its State-centeredness on the other. This localization of international investment law as part of public international law but with characteristics going way beyond the confines of a classical understanding of the latter is a major concern of this book. To conclude this Introduction, some of the assertions and conclusions that will be made subsequently may appear audacious – albeit, of course, I am convinced they are accurate. However, despite its strong emphasis on theory and the fact that it is relying on contentious concepts that not everybody may share, it is my intention to build a theory that translates well into practice and is as convincing to scholars as it is easy for practioners to implement.

Part I Towards the Global Public Interest theory

2 The "internationalization" of international investment law

The ensuing chapter, together with Chapter 3, is intended to set the stage for my Global Public Interest theory to be developed subsequently in Chapter 4. A relatively narrow doctrinal issue, i.e. analyzing the relationship of international and domestic law in international investment law through the applicable law lens will, so I shall contend, uncover the avenue to the much broader question of how (global) public interest shapes international investment relations and thereby international investment law – which entails both doctrinal and theoretical aspects. For this purpose, Article 42(1) second sentence of the ICSID Convention shall be analyzed in some detail. This is not to limit the discussion and my theory to the ICSID realm and neglect that significant investment arbitration occurs before other fora as well. However, most bilateral investment treaties (BITs) embrace applicable law provisions very similar or identical to Article 42(1) second sentence ICSID. This and the fact that ICSID still is by far the most important investment arbitration forum give thrust to its model character in the entire international investment realm.

What I seek to reveal subsequently is that the more prominence international law has been assuming in international investment law – what I will call "internationalization" – and the more international and domestic law have become intertwined – what I will refer to as "integration" – the lack of public interest considerations in the by far most prominent source of international law in an investment dispute, i.e. BITs, makes apparent a challenge. This challenge – the "public interest challenge" – lies in the host States' responsibility to further the public interest on behalf of their subjects. Domestic law offers answers – some desirable, some rather undesirable – to a conflict of the individual (investor) and the public interest. Once domestic law steps into the background and international law steps into the foreground, this route is closed. What role to

assume for the public interest on the international level and how to do so is the challenge tackled in Chapters 4 and 5. The purpose of this chapter is to flesh out said challenge.

A. A first glance at Article 42(1) ICSID

The Washington Convention on the International Centre for the Settlement of Investment Disputes (ICSID Convention), the main focus of my analysis in this chapter,[1] contains the following rule on the law applicable in an investment dispute:

"Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.
(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree."

Article 42(1) second sentence is of particular interest in this regard. I will demonstrate in the ensuing chapter that this provision and its interpretation by ICSID Tribunals have – in a considerable part due to the proliferation of BITs – undergone a remarkable development in the past years that indicates not only a major change in the view on international investment law but serves well as a basis for building the approach aimed at by this book.

1. Context: general principle of Article 42 ICSID is freedom of choice

The first sentence of Article 42(1) ICSID incorporates a fundamental principle of commercial arbitration into the investor–State dispute settlement system, i.e. that the parties may agree which law has to be applied to the dispute.[2] This freedom of choice derives from the general rationale of party autonomy and gives the parties a flexible means to relate the

[1] On the reasons why that is so, see also *infra* 2 D. 1.
[2] W. L. Craig, W. W. Park and J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd edn. (Oceana Publications, 2000), p. 319; T. Várady, J. J. Barceló III and A. T. von Mehren, *International Commercial Arbitration – A Transnational Perspective*, 3rd edn. (Thomson/West, 2006), p. 616.