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Transnational Corporations as Steering Subjects in International Economic Law: Two Competing Visions of the Future?

KARSTEN NOWROT*

ABSTRACT

Transnational corporations (TNCs) not only occupy an important status as economic actors on the international scene, but they are also political actors who are increasingly involved in the progressive development and enforcement of the regulatory structures of the international economic system. Against this background, this article focuses on the current status and potential future development of TNCs as steering subjects in international economic law (IEL). It evaluates the role played by this category of nonstate actors in two of the central public international law fields of IEL, namely the legal order of the World Trade Organization (WTO) and the international regime on the protection of foreign investments. Based on this evaluation, this article argues that the multilateral framework of world trade law, on the one side, and international investment law, on the other side, serve as notable “reference fields” for two competing approaches to the incorporation of TNCs in the regulatory practice of the global economic system and thus to their position as steering subjects in the framework of IEL as a whole. In light of these findings, this article provides some broader conceptual thoughts on the normative guiding vision of an emerging transnational economic community as an analytical framework for assessing the future development of TNCs as steering subjects in the international economic realm.

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INTRODUCTION

From a sociological perspective, the global economic system has always been and is currently ever more so characterized by a configuration of the relations and interactions not only of states, but also, first and foremost, various categories of nonstate actors involved in transnational economic transactions.¹ In particular, the currently more than 82,000 TNCs in the world hold quite a prominent position among the relevant nonstate actors.² Their status as influential participants in international economic relations and “driving forces” of the processes of globalization is vividly illustrated by the fact that foreign investment—a constitutive activity of TNCs³—is now a key component of the global economic system.⁴

Given their important role as economic actors on the international scene, it is hardly surprising that TNCs also developed a particular interest in the normative framework governing their economic activities. They influence the respective domestic legal regimes of states by taking advantage of the differences in territorial regulation in their business decisions on where to make investments, how to disperse their assets, and choosing the suitable legal framework for their transactions.⁵ In addition, however, as now increasingly analyzed and acknowledged in the legal literature,⁶ TNCs are also involved in the

1. See, e.g., Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, ¶ 7.76, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report] (“The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators.”); ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 7 (2009).

2. United Nations Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development* 17, 222-24, UNCTAD/WIR/2009/Corr.1 (Oct. 26, 2009). On the distinctive features of and challenges arising from the activities of TNCs as compared to other business actors, see, for example, Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights and Responsibilities*, 23 AM. U. INT’L L. REV. 451, 474-81 (2008).

3. On the definition of TNCs, including the controversies and challenges connected with this issue, see PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 5-8 (2d ed. 2007).

4. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 2 (2008). For a discussion on the economic importance of TNCs, see generally United Nations Conference on Trade and Development, *The Universe of the Largest Transnational Corporations*, UNCTAD/ITE/ILA/2007/2 (2007).

5. See Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT’L & COMP. L. 499, 503-08 (2008).

6. On the different subjects and successive phases of analysis in this regard, see generally Anne Peters, Lucy Koechlin & Gretta Fenner Zinkernagel, *Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion*, in NON-STATE

progressive development and enforcement of the regulatory structure of the international economic system itself.

Against this background, this article focuses on some notable aspects of the current status and potential future development of TNCs as “steering subjects” in IEL. The term “steering subjects”—in particular to be distinguished from and considerably broader than the generally recognized circle of subjects of international law—comprises all state, substate, intergovernmental, nonstate, and intermediate actors that participate in the creation and development of IEL and in the respective law-realization processes⁷ aimed at the enforcement of its rules of behavior.

It needs to be emphasized that the issue of TNCs as steering subjects in IEL is far too broad a topic to be comprehensively discussed in a single contribution. This perception results from the fact that the appropriate notional and dogmatic conceptualization of the regulatory mechanisms governing the interactions in the global economic system have already for some time been subject to a controversial debate in the literature. Given that even the meaning of “economic law” is still disputed, it is hardly surprising that so far no general agreement has been reached with regard to the scope of the application of the term “IEL,”⁸ traditionally the most commonly used expression for the normative structure of the international economic system. While some still adhere to the view that IEL should be limited to the rules of public

ACTORS AS STANDARD SETTERS 1, 4-5 (Anne Peters et al. eds., 2009) (“[S]ome international lawyers have studied the legal role of business actors as authors or co-producers of norms. A traditional field of interest for contract lawyers has been the so-called *lex mercatoria*, whose *problématique* was in the 1990s linked to the globalisation debate. A different strand of legal scholarship, notably in the 1970s and 1980s, examined state contracts between firms and states. Later, lawyers have taken an interest in corporate self-regulation in the form of codes of conduct, often in the context of corporate social responsibility and corporate citizenship. Legal scholars have barely analysed the elaboration of technical or product standards by industrial sectors, professional associations, technical experts and government officials. The role of transnational corporations (TNCs) as formants of ordinary international hard law has been studied only recently.”).

7. Generally on the notion of “law-realization” as distinct from the considerably narrower term “law-enforcement,” see in particular CHRISTIAN TIETJE, *INTERNATIONALISIERTES VERWALTUNGSHANDELN* 264-78 (2001); CHRISTIAN TIETJE, *NORMATIVE GRUNDSTRUKTUREN DER BEHANDLUNG NICHTTARIFAERER HANDELSHEMMNISSE IN DER WTO/GATT-RECHTSORDNUNG* 132-35 (1998).

8. See, e.g., Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT’L L. 769 (2006); JOHN H. JACKSON, *Economic Law, International*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 20 (Rudolf Bernhardt ed., 1995); ASIF H. QURESHI & ANDREAS R. ZIEGLER, *INTERNATIONAL ECONOMIC LAW* 7 (2d ed. 2007).

international law dealing with transboundary economic relations,⁹ it has frequently been stressed that IEL is in fact characterized by an interconnection of various different areas and means of regulation that transcend the traditional distinctions between international and domestic law, as well as between public and private law.¹⁰ Furthermore, the legal literature has identified and comprehensively analyzed the phenomenon of the so-called law merchant or *lex mercatoria*, an autonomous body of regulations that private economic actors created and independently enforced to govern their international trade and financial relations without the involvement of states.¹¹

However, in light of the current regulatory reality in the international economic system, it becomes more and more obvious that neither the traditional three-sided differentiation between public international law, domestic law, and the *lex mercatoria*, nor the above-mentioned broader understanding of IEL can be regarded as a conceptual approach adequately describing the characteristics of the normatively relevant rules of behavior governing transboundary economic relations. IEL—in the same way as the normative structure of the international system as a whole—indicates the evolution of a functional unity between international and domestic law. In addition, it first and foremost comprises an interconnected plurality of various other normatively relevant steering mechanisms, including international standards, codes of conducts, and intermediate, as well as private, regulatory regimes.

Therefore, the former distinction between “hard law” and the diverse nonbinding regulatory instruments is increasingly blurred.

9. See PIETER VERLOREN VAN THEMAAT, *THE CHANGING STRUCTURE OF INTERNATIONAL ECONOMIC LAW* 9 (1981); IGNAZ SEIDI-HOHENVELDERN, *INTERNATIONAL ECONOMIC LAW* 1 (3d ed. 1999); HERCULES BOOYSEN, *PRINCIPLES OF INTERNATIONAL TRADE LAW AS A MONISTIC LEGAL SYSTEM* 9 (2003); Jeffery Atik, *Uncorking International Trade, Filling the Cup of International Economic Law*, 15 AM. U. INT'L L. REV. 1231, 1234 (2000); Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS, no. 1, 1966 at 1, 7.

10. See, e.g., Federico Ortino & Matteo Ortino, *Law of the Global Economy: In Need of a New Methodological Approach?*, in *INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE* 89 (Colin B. Picker et al. eds., 2008); Peter Fischer, *Das Internationale Wirtschaftsrecht – Versuch einer Systematisierung*, 19 GER. Y.B. INT'L L. 143 (1976); MARKUS KRAJEWSKI, *WIRTSCHAFTSVOELKERRECHT* 2 (2d ed. 2009); GEORG ERLER, *GRUNDPROBLEME DES INTERNATIONALEN WIRTSCHAFTSRECHTS* (1956).

11. From the numerous literature on this phenomenon see, e.g., Filip De Ly, *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*, in *RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS* 159 (Richard P. Appelbaum et al. eds., 2001); Hans-Joachim Mertens, *Lex Mercatoria: A Self-Applying System Beyond National Law?*, in *GLOBAL LAW WITHOUT A STATE* 31 (Gunther Teubner ed., 1997).

Transboundary economic relations, irrespective of whether they are of a more public or exclusively private nature, are, in a normative sense, thus ever more determined by what can most appropriately be described as a network of various regulatory instruments resulting from cooperative efforts of governmental, intermediate, and nongovernmental entities, notably among them also TNCs.¹²

That said, and in light of this complex regulatory reality in the international economic system as well as the manifold involvement of TNCs therein, it hardly needs to be emphasized that it will not be possible to elaborate on all the aspects and implications arising from this issue in a comprehensive way. Rather, this article largely confines itself to evaluating the role TNCs play as steering subjects in two of the central public international law fields of IEL, namely the legal order of the WTO, as discussed in part I, and the international legal regime on the protection of foreign investments, as discussed in part II. Far from merely giving credit to the complexity of the issue, the narrower focus of the present analysis is justified in light of the fact that the findings made regarding these two legal areas will at the same time reveal important broader implications for the future prospects concerning the status of TNCs in the other normatively relevant steering mechanisms of the international economic order. This article argues that the multilateral framework of world trade law, on the one side, and international investment law, on the other side, serve as notable “reference fields”¹³ for two competing approaches to the incorporation of TNCs in the regulatory practice of the global economic system and thus to their position as steering subjects in the framework of IEL as a whole. Against this background, this article also provides some broader conceptual thoughts on the normative guiding vision of an emerging transnational economic community as an analytical framework for assessing the future development of TNCs as steering subjects in the international economic realm, as discussed in part III.

12. For a more in-depth evaluation of this proposition, see Christian Tietje & Karsten Nowrot, *Laying Conceptual Ghosts of the Past to Rest: The Rise of Philip C. Jessup's Transnational Economic System*, in PHILIP C. JESSUP'S *TRANSNATIONAL LAW REVISITED – ON THE OCCASION OF THE 50TH ANNIVERSARY OF ITS PUBLICATION* 17, 19-25 (Christian Tietje et al. eds., 2006). On the participation of TNCs in the various and diverse normatively relevant steering mechanisms in the global economic system, see KARSTEN NOWROT, *NORMATIVE ORDNUNGSSTRUKTUR UND PRIVATE WIRKUNGSMACHT* 217-422 (2006); STEPHEN TULLY, *CORPORATIONS AND INTERNATIONAL LAWMAKING* 52-304 (2007).

13. On the recourse to reference fields as a dogmatic approach to the identification of general legal principles and concepts, see Andreas Voßkuhle, *The Reform Approach in the German Science of Administrative Law: The 'Neue Verwaltungsrechtswissenschaft'*, in *THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE* 89, 138-40 (Matthias Ruffert ed., 2007).

I. TNCs AS STEERING SUBJECTS IN THE WTO LEGAL ORDER

At the multilateral level, the present public international legal framework on trade in goods and services is essentially codified in the numerous agreements annexed to the Agreement Establishing the World Trade Organization.¹⁴ The legal order of the WTO is fundamentally aimed at ensuring legal certainty in international trade as a necessary prerequisite “to create the predictability needed to plan future trade”¹⁵ and for the optimal allocation of economic resources by its at present 153 members and in particular, also by private business actors, to achieve the welfare-creating effects of international economic relations.¹⁶ Given that WTO law is thus also intended to benefit and protect private business activities,¹⁷ it appears only natural that TNCs have, in general, always displayed a strong interest in this international organization and its activities.¹⁸ Identifying the main characteristics of the position previously and currently enjoyed by TNCs as steering subjects in this regard thereby involves an evaluation of three different—albeit interrelated—dimensions: the involvement of these actors in the creation of the WTO and its subsequent development; their participation in dispute settlement processes; and, finally, the legal status of TNCs in the realm of WTO law.

A. *Formation of and Participation in the WTO*

The first dimension that needs to be evaluated in order to assess and clarify the status occupied by TNCs as steering subjects in the WTO legal order concerns two perspectives: (1) the involvement of this type of nonstate actors in the creation of this international organization; and

14. For a comprehensive account of the historical development as well as the institutional and substantive structures of the WTO legal order, see generally MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETRO C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* (2d ed. 2006).

15. Report of the Panel, *United States—Taxes on Petroleum and Certain Imported Substances*, ¶ 5.2.2, L/6175 (June 5, 1987), GATT B.I.S.D. (34th Supp.) at 136, 153 (1988).

16. See, e.g., Section 301 Panel Report, *supra* note 1, ¶¶ 7.75–77.

17. See *id.* ¶ 7.73.

18. However, on the perception that the respective corporate interest in and engagement with the WTO has, for a variety of reasons, declined in recent years while business actors have focused increasingly on the promotion of regional trade agreements, see BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND* 643–44 (3d ed. 2009). Concerning the respective consequences for the current Doha Round negotiations, see *id.* at 644 (“Whatever the reasons, the lack of vigorous support by business for the Doha Round was a significant factor in the lack of progress that was achieved.”).

(2) their subsequent participation in the decision-making processes of the WTO.

1. *Creation of the WTO*

The strong interest and involvement of TNCs in the legal regime of the WTO can be traced back further than its entering into force on January 1, 1995. Already at the forefront of the launch of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT 1947) in September 1986 and during the subsequent negotiations, which ultimately led to the creation of this international organization, many of these business actors were actively involved in the formation of the agreements constituting the WTO legal order.

A vivid and well researched example is the evolution of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It has been argued that the adoption of TRIPS can ultimately be retraced to the concerted efforts of only thirteen TNCs.¹⁹ While such a perception is most certainly an oversimplification, given the various relevant factors in the Uruguay Round negotiations, the underlying empirical evidence indicates TNCs exercised a considerable influence in the drafting history of TRIPS.²⁰ Experiencing the structural deficits of the traditional international regime on the protection of intellectual property, U.S.-based TNCs in particular started to advocate the adoption of a more effective legal framework by the late 1970s.²¹ More coordinated and thus more effective efforts began in 1984 with the establishment of the International Intellectual Property Alliance (IIPA), comprised of eight trade associations representing more than 1,500 companies,²² and continued in March 1986 with the formation of an ad hoc coalition of thirteen U.S.-based TNCs under the Intellectual Property Committee (IPC).²³ Following meetings of IPC representatives

19. See Susan K. Sell, *Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 169 (A. Clair Cutler et al. eds., 1999); e.g., PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY?* 10 (2002) (quoting a "senior US trade negotiator" stating in 1994 that "probably less than 50 people were responsible for TRIPS").

20. E.g., NOWROT, *supra* note 12, at 218-29 (citing numerous further references).

21. See NOWROT, *supra* note 12, at 218-27.

22. For a general discussion on the IIPA, see DRAHOS & BRAITHWAITE, *supra* note 19, at 91-92; Susan K. Sell, *TRIPS and the Access to Medicines Campaign*, 20 WIS. INT'L L.J. 481, 485-86 (2002).

23. Generally thereto as well as with regard to the participating TNCs, see DUNCAN MATTHEWS, *GLOBALISING INTELLECTUAL PROPERTY RIGHTS: THE TRIPS AGREEMENT* 20

with corporations and business associations from Europe and Japan aimed at coordinating their joint efforts, the success of the lobbying activities eventually materialized in the decision by the Contracting Parties of GATT 1947—against considerable resistance by a number of states—to include the issue of the protection of intellectual property rights in the negotiation mandate of the Uruguay Round.²⁴

Although TNCs are neither able to become parties to traditional international agreements²⁵ nor did they enjoy any formal status in deliberations during the Uruguay Round, it is generally recognized that these nonstate actors also subsequently exercised an often “decisive influence on the course of the negotiations” on TRIPS²⁶ by way of, *inter alia*, their representatives accompanying state delegations as advisors, providing draft texts of the agreement to negotiators, and lobbying activities at the international and in particular domestic level of the Contracting Parties of GATT 1947.²⁷ Quite comparable intensive involvements of TNCs in the Uruguay Round have also been identified, for example, in connection with the negotiations on the General Agreement on Trade in Services (GATS)²⁸ as well as eventually with regard to securing the approval of the Agreement Establishing the WTO—in light of the “Great 1994 Sovereignty Debate”²⁹ being far from certain—by both houses of the U.S. Congress in November and December 1994.³⁰

(2002); MICHAEL P. RYAN, *KNOWLEDGE DIPLOMACY: GLOBAL COMPETITION AND THE POLITICS OF INTELLECTUAL PROPERTY* 69 (1998).

24. See NOWROT, *supra* note 12, at 226-27.

25. On the controversial issue of so-called “state contracts” in the realm of international investment law, see *infra* Part II. A.

26. DRAHOS & BRAITHWAITE, *supra* note 19, at 123.

27. Peter Drahos, *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*, in *GLOBAL INTELLECTUAL PROPERTY RIGHTS: KNOWLEDGE, ACCESS AND DEVELOPMENT* 161, 172 (Peter Drahos & Ruth Mayne eds., 2002) (“From 1990 onwards the main issue to be decided was how far an agreement on intellectual property would deviate from the blueprint that had been provided to the negotiators by Pfizer, IBM, Du Pont and other members of the international business community in the form of a draft proposal. . .”). On the respective involvement of TNCs, see NOWROT, *supra* note 12, at 227-29.

28. Susan K. Sell, *Big Business and the New Trade Agreements: The Future of the WTO?*, in *POLITICAL ECONOMY AND THE CHANGING GLOBAL ORDER* 174 (Richard Stubbs & Geoffrey R.D. Underhill eds., 2d ed. 2000); TULLY, *supra* note 12, at 158-59.

29. See generally John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 *COLUM. J. TRANSNAT'L L.* 157 (1997) (discussing the 1994 debate in Congress about whether the United States should ratify the treaty negotiated at the Uruguay Round).

30. See, *e.g.*, PHILIP A. MUNDO, *NATIONAL POLITICS IN A GLOBAL ECONOMY: THE DOMESTIC SOURCES OF U.S. TRADE POLICY* 136-37 (1999).

Already the extent to and means by which TNCs participated in the negotiations and decision-making processes leading to the creation of the WTO allow for two important findings on their position as steering subjects in this area of IEL. First, although certainly far from having always succeeded in their efforts,³¹ these private actors are, in general, often able to exercise considerable influence on the adoption and content of international agreements,³² thereby substantially contributing to the phenomenon of an at least “partial privatisation of economic diplomacy” also in the area of world trade law.³³ Second, however, in the course of their participation in these law-making processes, TNCs usually do not enjoy any formal status. Rather, their involvement is largely characterized by informal, unofficial means and actions directed at governmental and intergovernmental actors on the international scene, as well as lobbying activities at the domestic level.³⁴

2. Decision-Making Processes in the WTO

An overall quite similar picture emerges from an evaluation of TNCs’ involvement in the decision-making processes of the WTO. Individual private business actors do not benefit from any direct, legally recognized status in this regard. The only formal venue for participation is through the guise of their business associations on the basis of Article V:2 of the Marrakesh Agreement Establishing the WTO. This provision states that the General Council “may make appropriate arrangements for consultation and cooperation with non-governmental organizations

31. For example, in connection with the Uruguay Round, see the rather disappointing outcome (from the perspective of TNCs) of the Agreement on Trade-Related Investment Measures (TRIMs). General Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186. On the regulatory structure and content of this agreement, see, for example, MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 14, at 838-49. With regard to the involvement of TNCs in the respective negotiations, see Sell, *supra* note 28, at 179-80.

32. On the creation of the WTO legal order, see Sylvia Ostry, *What are the Necessary Ingredients for the World Trading Order?*, in GLOBAL GOVERNANCE: AN ARCHITECTURE FOR THE WORLD ECONOMY 123, 124-25 (Horst Siebert ed., 2003) (“The activism paid off and it’s fair to say that American MNEs [multinational enterprises] played a key—perhaps even *the* key—role in establishing the new global trading system.”).

33. Nicolas Bayne & Stephen Woolcock, *Economic Diplomacy in the 2000s*, in THE NEW ECONOMIC DIPLOMACY: DECISION-MAKING AND NEGOTIATION IN INTERNATIONAL ECONOMIC RELATIONS 287, 295 (Nicolas Bayne & Stephen Woolcock eds., 2003).

34. See Anne Peters, Till Förster & Lucy Koechlin, *Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters*, in NON-STATE ACTORS AS STANDARD SETTERS 492, 495 (Anne Peters et al. eds., 2009).

concerned with matters related to those of the WTO.”³⁵ The term “nongovernmental organizations” (NGOs) thereby comprises, in the WTO context, NGOs in the narrow sense of the meaning,³⁶ as well as private business organizations like the International Chamber of Commerce.³⁷

Nevertheless, the WTO’s approach to the participatory entitlements of these collective nonstate actors is, in general, rather restrictive, especially if compared to the practices of other international organizations like the United Nations.³⁸ Based on the authorization in Article V:2 WTO Agreement, the General Council adopted the Guidelines for Arrangements on Relations with Non-Governmental Organizations on July 18, 1996. In rather broad terms, these guidelines essentially only provide for enhanced public access to WTO documents and contain the recommendation that the WTO Secretariat should interact with NGOs,

through various means such as inter alia the organisation on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.³⁹

However, with regard to the issue of direct participation in the decision-making processes of the WTO, the guidelines state that

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental

35. Marrakesh Agreement Establishing the World Trade Organization art. V:2, Apr. 15, 1994, 1867 U.N.T.S. 154; 33 I.L.M. 1144.

36. For more on the definition of NGOs, see generally Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 350-52 (2006); Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579, 615-20 (1999).

37. See Karen Kaiser, *Article V WTO Agreement*, in *WTO: INSTITUTIONS AND DISPUTE SETTLEMENT* 64, 72 (Rüdiger Wolfrum, Peter-Tobias Stoll & Karen Kaiser eds., 2006).

38. See, e.g., John H. Jackson, *The WTO ‘Constitution’ and Proposed Reforms: Seven ‘Mantras’ Revisited*, 4 J. INT’L ECON. L. 67, 77 (2001); Donald McRae, *The Place of the WTO in the International System*, in *OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 54, 66 (Daniel Bethlehem et al. eds., 2009).

39. Decision by the General Council, *Guidelines for Arrangements on Relations with Non-Governmental Organizations*, ¶¶ 3, 4 WT/L/162 (July 23, 1996).

treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings.⁴⁰

Although the fact that nonstate actors are essentially excluded from any direct participation in the decision-making processes of the WTO has been subject to an intensive and controversial debate,⁴¹ it is, in light of the fairly reserved attitude of the majority of WTO members, rather doubtful whether respective formal opportunities for NGOs—not to mention individual TNCs—will be enhanced considerably any time soon. However, in order to gain a broader picture of the issue at hand, the evaluation—again—should not confine itself to the formal possibilities for participation. Rather, one also has to consider the various informal means by which TNCs and their business associations exercise an often considerable influence on individual WTO members, as well as the outcome of WTO decision-making processes as a whole.⁴² Aside from the respective lobbying activities in the internal realm of WTO members, the indirect involvement of TNCs and business associations in the deliberations of the WTO Committee on Trade and Environment provides a notable example in this regard.⁴³

In sum, in addition to the creation of the WTO, nonstate actors, in general, and TNCs, in particular, “have long played very significant—albeit informal and unofficial—roles”⁴⁴ in the decision-making processes of this international organization.

40. *Id.* ¶ 6.

41. See, e.g., Marcos A. Orellana, *WTO and Civil Society*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 671; Peter Van den Bossche, *NGO Involvement in the WTO: A Comparative Perspective*, 11 J. INT'L ECON. L. 717 (2008).

42. On the significance of this indirect involvement by TNCs and other private actors in the context of the WTO, see, for example, HOEKMAN & KOSTECKI, *supra* note 18, at 642-44; NOWROT, *supra* note 12, at 272-75; Jeffrey L. Dunoff, *The Misguided Debate over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 434 (1998).

43. See Gregory C. Shaffer, “If Only We Were Elephants”: *The Political Economy of the WTO's Treatment of Trade and Environmental Matters*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 349, 374-75 (Daniel L. M. Kennedy & James D. Southwick eds., 2002).

44. Jeffrey L. Dunoff, *Civil Society at the WTO: The Illusion of Inclusion?*, 7 ILSA J. INT'L & COMP. L. 275, 281 (2001); see also, e.g., Oded Shenkar & Ilgaz Arikan, *Business as International Politics: Drawing Insights from Nation-State to Inter-Firm Alliances*, 11 BUS. & POL., no. 4, 2009, at art. 1, 15.

B. Involvement in the Dispute Settlement Mechanism

It is generally recognized that one of the central structural components of the WTO that provides for the effectiveness and thus success of this legal regime is its dispute settlement mechanism as stipulated in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁴⁵ Thereby and in order to adequately assess the importance to attach to the decisions of the WTO panels and the Appellate Body, as well as of other international judicial and quasi-judicial bodies, one should recall that in particular institutionalized dispute resolution, such as that provided by the WTO legal order, must be regarded not only as a means of law application and enforcement, but also as a mechanism of law making and thus a “most important factor in the development of international law.”⁴⁶

The direct participation of private actors as complainants or defendants in WTO panel and Appellate Body proceedings is already excluded by the fact that the relevant provisions of the DSU only refer to WTO members, and thus make it sufficiently clear that the dispute settlement mechanism is only open to them.⁴⁷ The same restrictions apply to the possibilities for becoming a third party in DSU proceedings, which are also limited to WTO members by the respective provisions of Articles 4(11), 10(2) and 17(4) of the DSU.⁴⁸ The only exception in the WTO legal order that provides for the direct participation of individuals and private corporations as complainant is the dispute settlement mechanism established under Article 4 of the Agreement on Preshipment Inspection, which, however, has not gained any practical significance until now.⁴⁹ Aside from this unique procedure, there is currently no possibility for TNCs to participate directly as a party or third party in dispute settlement processes. Despite various pleas in

45. See, e.g., Valerie Hughes, *The Institutional Dimension*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 269, 294 (“WTO dispute settlement institutions have proved to be the success story of the WTO.”).

46. [Vol. I, Pt. 1 Peace] OPPENHEIM’S INTERNATIONAL LAW 41 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); see also ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 263-311 (2007); Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right is it Anyway?*, 44 HARV. INT’L L.J. 221, 223 (2003) (“[C]ontrol over litigation entails a degree of control over the type of law that is made . . .”).

47. See also, e.g., Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 40, WT/DS138/AB/R (May 10, 2000).

48. See also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 101, WT/DS58/AB/R (Oct. 12, 1998).

49. See generally Emily Rome, Note, *The Background, Requirements, and Future of the GATT/WTO Preshipment Inspection Agreement*, 7 MINN. J. GLOBAL TRADE 469 (1998).

favor of granting private entities standing to bring a complaint *de lege ferenda*,⁵⁰ the prospects for such an enhancement of their position in the course of the ongoing negotiations on a reform of the DSU appear to be rather remote, considering the negative attitude of a substantial number of WTO members toward this issue.⁵¹ Consequently, it is also in this regard of considerable importance to evaluate the current opportunities for TNCs to participate in WTO dispute settlement proceedings on an informal basis.

In practice, the involvement of TNCs starts already well before a WTO member files a complaint. Indeed, in the overwhelming majority of cases, the respective governmental authorities not only receive their initial information on trade-restricting practices of other WTO members from the affected private corporations, but they also often enter into consultations with interested economic actors and business associations prior to initiating dispute settlement proceedings.⁵² While for most WTO members these contacts only take place on an informal basis,⁵³ the legal systems of some members even provide institutionalized mechanisms in this regard. The most important examples are the regulations included in the United State's Trade Act of 1974—frequently referred to as the “Section 301 procedure”—as well as the mechanism provided for in the EU Trade Barriers Regulation. Although the scope of application of these procedures is not exclusively limited to WTO dispute settlement proceedings, both mechanisms have already served as useful tools for various private economic actors interested in exercising influence on the relevant public authorities—in particular the U.S. Trade Representative and the European Commission, respectively—to initiate complaints aimed at challenging the legality of obstacles to free trade imposed by other WTO members.⁵⁴ The underlying reasons for these close interactions between public authorities and private corporations are obvious. The experience of private corporations and the valuable

50. See, e.g., Aaron Catbagan, *Rights of Action for Private Non-state Actors in the WTO Dispute Settlement System*, 37 DENV. J. INT'L L. & POL'Y 279 (2009).

51. For a discussion of WTO members' skepticism see Steve Charnovitz, *International Law Weekend Proceedings: Economic and Social Actors in the World Trade Organization*, 7 ILSA J. INT'L & COMP. L. 259, 270-71 (2001).

52. See James P. Durling, *Rights of Access to WTO Dispute Settlement*, in DUE PROCESS IN WTO DISPUTE SETTLEMENT: 3RD YEARBOOK OF THE WTLA 141 (Philippe Ruttley et al. eds., 2001); Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT'L ECON. L. 861, 868-70 (2005).

53. For an example on the situation in Japan see Hiroko Yamane, *The WTO Dispute Settlement Mechanism and Japanese Traders*, 1 J. INT'L ECON. L. 683 (1998).

54. On these institutionalized mechanisms as a means for private economic actors to participate in WTO dispute settlement proceedings, see GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 31-64, 84-101 (2003).

information they collect concerning trade-restricting practices often make close cooperation between them and governmental authorities in the initial phase of WTO dispute settlement proceedings an indispensable component of a successful complaint. One only needs to draw attention to the central and well documented role played by TNCs, such as Chiquita Brands International, Eastman Kodak, and Fuji Photo Film, in the relevant WTO dispute settlement proceedings formally initiated by the United States against the EU⁵⁵ and Japan⁵⁶ to illustrate the considerable influence TNCs exercised even during the preliminary phase of WTO dispute settlement proceedings.

Furthermore, once a formal complaint has been raised by a WTO member, TNCs also have various options for participating in the panel and Appellate Body proceedings. Aside from the involvement of interested private economic actors in the selection of panelists—as occurred, for example, in the Kodak/Fuji case⁵⁷—a notable form of participation is the possibility of direct representation in the WTO member's delegation in the dispute settlement proceedings. The Appellate Body stated as early as 1997 that “we can find nothing in the Marrakesh Agreement Establishing the World Trade Organisation, . . . the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings,”⁵⁸ thus offering representatives of corporations and their private lawyers—subject to the permission of the

55. See Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997). On the role of Chiquita in the preliminary stage of these proceedings, see SHAFFER, *supra* note 54, at 23-4; Stefan Ohlhoff & Hannes Schloemann, *Transcending the Nation-State? Private Parties and the Enforcement of International Trade Law*, 5 MAX PLANCK U.N.Y.B. L. 675, 677 (2001) (“[I]t was Chiquita which guided the hand of the United States Trade Representative (USTR) in successfully challenging the EC’s Banana import regime.”).

56. See Panel Report, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998). On the various activities undertaken by Kodak and Fuji in this preliminary phase, see Dunoff, *supra* note 42, at 441-48; Ernesto Hernández-López, *Recent Trends and Perspectives for Non-State Actor Participation in the World Trade Organization Disputes*, 35 J. WORLD TRADE 469, 483-85 (2001).

57. See, e.g., August Reinisch & Christina Irgel, *The Participation of Non-Governmental Organisations (NGOs) in the WTO Dispute Settlement System*, 1 NON-ST. ACTORS & INT’L L. 127, 139 (2001).

58. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶.10, WT/DS27/AB/R (Sept. 9, 1997).

respective WTO member—an opportunity to potentially exert influence on the proceedings, even during the oral hearings.⁵⁹

However, even if private actors like TNCs are not officially represented in member delegations, a number of informal means have evolved by which they may support WTO members in the course of dispute settlement proceedings, thereby potentially also exercising influence on the outcome of the cases. Aside from the well known and intensively debated option of submitting *amicus curiae* briefs,⁶⁰ private economic actors have, for example, been active in assisting WTO members in the preparation of their written submissions. In some cases, such as the panel proceedings of the case of Japan—Measures Affecting Consumer Photographic Film and Paper, the involvement of interested private economic actors even went as far as the drafting and formulation of considerable parts of the written submissions of both the United States and Japan.⁶¹ Furthermore, even though representatives of Kodak and Fuji did not serve directly as advisors on the delegations of the United States and Japan in the relevant WTO dispute settlement proceedings, both TNCs were present in Geneva during the oral hearings to provide additional advice.⁶²

To summarize, the role of TNCs in the dispute settlement mechanism basically confirms the findings made with regard to their involvement as steering subjects in the creation of the WTO and its decision-making processes. These nonstate actors enjoy, in practice, various participatory options on an informal basis to assist the particular WTO members—a development that has already been characterized as the emergence of “public-private partnerships in WTO

59. See NOWROT, *supra* note 12, at 391-94. However, for a discussion of the challenges presented in ensuring confidentiality throughout these proceedings, see Ohlhoff & Schloemann, *supra* note 55, at 697-98.

60. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 145 (3d ed. 2005) (“perhaps the most heated controversy over WTO dispute settlement procedures”). Specifically with regard to the recourse taken by TNCs and business associations to this participatory option, see TULLY, *supra* note 12, at 248-64; NOWROT, *supra* note 12, at 401-06. However, on the secondary importance attributed to this option by many TNCs, see Robert Howse, *Membership and its Privileges: The WTO, Civil Society, and the Amicus Brief Controversy*, 9 EUR. L.J. 496, 509 (2003) (“[T]he powerful interests in developed countries, such as corporate interests, have means of getting their point of view known in dispute settlement circles that do not depend on *amicus* submissions.”).

61. See, e.g., Dunoff, *supra* note 42, at 446-48; SHAFFER, *supra* note 54, at 46-50.

62. With regard to these informal means of involvement by private economic actors, see Dunoff, *supra* note 42, at 446-48; SHAFFER, *supra* note 54, at 46-50.

litigation”⁶³—and are thus frequently in a position to influence the initiation and the course of dispute settlement proceedings.⁶⁴ However, aside from the submission of amicus curiae briefs, this involvement is—at least from a formal perspective—largely dependent upon the willingness of the respective governmental complainant, respondent, or third party to cooperate with the interested corporations, since neither TNCs nor other private actors benefit from any legally recognized status in the WTO dispute settlement proceedings.

C. *Legal Status in WTO Law*

The present evaluation of the position TNCs enjoy as steering subjects in the WTO legal order has revealed that this category of private actors is quite influential but generally does not hold any formal, legally recognized standing in the decision-making and dispute settlement processes. In order to more comprehensively understand the legal status—or, rather, nonstatus—of TNCs in WTO law, it is furthermore necessary to draw attention to the issue whether this legal regime is intended to and is capable of according rights to nonstate actors in the internal legal systems of WTO members with the particular consequence that private parties would have access to domestic courts with the complaint that WTO law has been breached.

While the United States, for example, has expressly excluded the possibility for private parties to rely on WTO law in proceedings before U.S. domestic courts through its implementing legislation passed under the Uruguay Round Agreements Act of 1994,⁶⁵ and whereas WTO panels have been equally cautious in their findings,⁶⁶ the issue whether WTO law is capable of having a so-called “direct effect” has been the subject of an intensive debate with regard to a number of other WTO members, including first and foremost the European Union. Almost four decades ago, the European Court of Justice (ECJ) already held that provisions of international agreements that are binding on the European Communities could, under certain conditions, create rights on

63. SHAFFER, *supra* note 54; *see also, e.g.*, Anne Peters, *Global Constitutionalism in a Nutshell*, in WELTINNENRECHT-LIBER AMICORUM JOST DELBRÜCK 535, 543 (Klaus Dicke et al. eds., 2005).

64. On this perception, see Robert McCorquodale, *An Inclusive International Legal System*, 17 LEIDEN J. INT’L L. 477, 491 (2004); TULLY, *supra* note 12, at 264.

65. *See* Uruguay Round Agreements Act of 1994 §§ 102(a)-(c), Pub. L. No. 103-465, 108 Stat. 4809 (1994); MATSUSHITA, SCHOENBAUM & MAVROIDIS, *supra* note 14, at 92-94.

66. *See* Section 301 Panel Report, *supra* note 1, ¶ 7.72 (“Neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect.”).

which individuals may rely directly.⁶⁷ In 1972, however, the court found that these requirements were not fulfilled with regard to the former GATT 1947 due to “the great flexibility of its provisions.”⁶⁸ Despite various pleas to the contrary, the court confirmed this decision even in light of considerable institutional changes resulting from the entry into force of the Marrakesh Agreement. In its 1999 judgment in *Portugal v. Council*, the ECJ held that although “the WTO agreements . . . differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes,” the WTO legal order “nevertheless accords considerable importance to negotiation between the parties.”⁶⁹ Bearing in mind that “some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law,” the lack of reciprocity resulting from an attribution of direct effect to WTO law in the European Union’s legal order “would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners.”⁷⁰ The court has reiterated in a number of subsequent decisions the finding that WTO law generally lacks the capacity to directly create individual rights in the European Union’s legal order,⁷¹ and thus, the decision can be described as firmly established case law.⁷²

This restrictive position conforms to the overall approach other WTO members have adopted. Although far from being entirely convincing in light of the clearly also individual-oriented dimension of the WTO legal system,⁷³ and whereas, for example, the WTO panel in the Section 301 Report did not consider its finding on the mere “indirect effect” of WTO law to be necessarily the final word on this disputed

67. See Case 21-24/72, *Int’l Fruit Co. v. Produktschap Voor Groenten En Fruit*, 1972 E.C.R. 1219, ¶ 19-20, at 1227; Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd.*, 1987 E.C.R. 3719, ¶ 14.

68. *Int’l Fruit Co.*, 1972 E.C.R. at ¶ 21, at 1227.

69. Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395, ¶ 36, at I-8402.

70. *Id.* ¶¶ 43, 46.

71. Concerning the exceptional circumstances in which WTO law may be invoked before EU courts, see Ohlhoff & Schloemann, *supra* note 55, at 709-13.

72. For a more in-depth analysis of the court’s position through case law, see, for example, Marco Bronckers, *From ‘Direct Effect’ to ‘Muted Dialogue’*, 11 J. INT’L ECON. L. 885 (2008); Pieter J. Kuijper & Marco Bronckers, *WTO Law in the European Court of Justice*, 42 COMMON MKT. L. REV. 1313 (2005).

73. See, e.g., Christian Tietje & Karsten Nowrot, *Forming the Centre of a Transnational Economic Legal Order? Thoughts on the Current and Future Position of Non-State Actors in WTO Law*, 5 EUR. BUS. ORG. L. REV. 321, 327-30 (2004).

issue,⁷⁴ the predominant practice reveals that WTO members currently do not intend to grant TNCs, individuals, and other private entities respective corresponding legal entitlements under domestic law. Rather, these actors are at present merely benefiting factually from the respective obligations of the WTO members. Consequently, also in this regard the WTO did indeed until now “not create a new legal order the subjects of which comprise both contracting parties or Members and their nationals.”⁷⁵

II. THE POSITION OF TNCs AS STEERING SUBJECTS IN INTERNATIONAL INVESTMENT LAW

Following a decades-long period characterized by diverging perceptions of as well as polarized debates on the content and development of the international legal regime for the protection of foreign investments,⁷⁶ 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 IEL, in particular.⁷⁷ The reasons for the considerably enhanced normative significance of this legal regime are manifold, making it impossible to deal with them in detail in the course of this article. Basically, the rise of international investment law can be attributed to three interrelated and mutually reinforcing factors. In addition to the increased factual importance attached to foreign investments and the overall more positive attitude of states toward this type of international economic transaction in recent decades, a second aspect concerns the remarkably strengthened and expanded normative framework on the substantive standards of protection. Although—in the absence of a comprehensive multilateral agreement—being, from a formal perspective, a very fragmented area of IEL, the provisions on, *inter alia*, expropriation, fair and equitable treatment, national treatment, most favored nation treatment, and full protection and security as stipulated in the numerous international investment treaties are in general largely

74. See Section 301 Panel Report, *supra* note 1, ¶ 7.72, n.661.

75. *Id.* The phrasing of the Panel’s statement is obviously closely related to the famous finding by the ECJ in Case 26/62, *Van Gend En Loos v. Nederlandse Administratie Der Belastingen*, 1963 E.C.R. 1, 12 (“[T]he European Economic Community constitutes a new legal order . . . and the subjects of which comprise not only member States but also their nationals . . .”).

76. On the different phases in the development of international investment law, see JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 78-108 (2010).

77. See DOLZER & SCHREUER, *supra* note 4, at 2.

standardized,⁷⁸ thus constituting a quite comprehensive core of largely undisputed protection standards for foreign investors. Finally, the third factor, which has undoubtedly 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.⁷⁹

However, aside from its significantly enhanced normative importance in the last two decades, a further notable characteristic of this legal regime has, in principle since medieval times, always been⁸⁰ and is currently again ever more so the participation of as well as the legal recognition enjoyed by private foreign investors, in particular also TNCs and their predecessors,⁸¹ in the development and enforcement of international investment law. In order to illustrate the role TNCs play as steering subjects, it is again appropriate to focus on three different—yet, once more interconnected—dimensions: the contribution to the development of international investment law, participation in the dispute settlement mechanisms, and the international legal status of these nonstate actors in this area of IEL.

A. *Contribution to the Law-Making Processes*

Taking into account that the protection of foreign private investors is generally regarded as being at least among the primary purposes pursued by international investment law, it is hardly surprising that TNCs, whose economic activities first and foremost involve direct investments, have always shown a strong interest in law-making processes. In assessing the respective participatory options for nonstate actors like TNCs, it first has to be acknowledged that treaty law dominates the current normative framework of international investment law. Thereby, the already more than 2,750 bilateral

78. See, e.g., STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009); Americo Beviglia Zampetti & Pierre Sauvé, *International Investment*, in *RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW* 211, 215 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

79. See *infra* Part II. B.

80. For examples of the branches set up in other territories by the merchant association of the German *Hanse* and the agreements made with the respective rulers for the protection of these “foreign investments,” see Tillmann Rudolf Braun, *Globalization: The Driving Force in International Investment Law*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 491, 503 (Michael Waibel et al. eds., 2010).

81. On the historical development of modern TNCs and their predecessors, see NOWROT, *supra* note 12, at 99-134; Mira Wilkins, *The History of Multinational Enterprise*, in *THE OXFORD HANDBOOK OF INTERNATIONAL BUSINESS* 3 (Alan M. Rugman & Thomas L. Brewer eds., 2001).

investment treaties (BITs) constitute the public international law “backbone” of this legal regime.⁸² In addition, more than 300 other international agreements provide for investment provisions, among them bilateral and regional economic integration agreements like Chapter 11 of the North American Free Trade Agreement (NAFTA) and multilateral-sectoral conventions such as the Energy Charter Treaty.⁸³ In this context, the patterns of TNCs’ participation are quite similar to their involvement in the law-making processes of world trade law, with these private actors playing overall influential, but largely informal and unofficial, roles.⁸⁴

However, in addition to its treaty law basis, the present regime on the protection of foreign investments also comprises a conglomerate of various other legal instruments and sources. Prominently among them are agreements directly concluded by foreign investors, predominantly TNCs, 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 IEL, as vividly expressed by the label “state contracts,” these agreements have received considerable attention in legal practice and literature from the end of the nineteenth century onward.⁸⁵ Among the main issues intensively and controversially discussed in this regard is the appropriate legal regime applicable to these investment contracts. While in the first half of the twentieth century it was predominantly assumed that they must necessarily have a basis in domestic law,⁸⁶ arbitration tribunals and legal scholars have increasingly accepted and endorsed a possible “internationalization” of these agreements since the 1950s.⁸⁷ Thereby, the prerequisites an

82. See United Nations Conference on Trade and Development, Geneva, June 2010, *Investing in a Low-Carbon Economy*, 81, UNCTAD/WIR/2010 (July 22, 2010) [hereinafter *Investing in a Low-Carbon Economy*].

83. See, e.g., *id.* at 81-83; see generally, e.g., United Nations Conference on Trade and Development, Geneva, *Investment Provisions in Economic Integration Agreements*, UNCTAD/ITE/IIT/2005/10 (June 13, 2006); SALACUSE, *supra* note 76, at 97-103.

84. See, e.g., Peter Muchlinski, *Policy Issues*, in OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 3, 7 (Peter Muchlinski et al. eds., 2008); TULLY, *supra* note 12, at 159-60.

85. See, e.g., DOLZER & SCHREUER, *supra* note 4, at 72-78; MUCHLINSKI, *supra* note 3, at 577-83; NOWROT, *supra* note 12, at 339-68.

86. See, e.g., *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, 1929 P.C.I.J. (ser. A) No. 20, ¶ 41 (July 12) (“Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.”).

87. The term “internationalization” was probably originally used in this context first by F. A. Mann, *The Law Governing State Contracts*, 21 BRIT. Y.B. INT’L L. 11, 19 (1944) (“[S]uper-national rules of law . . . may enable and justify the parties to de-localize their

investment contract has to fulfill to be considered “internationalized” are still disputed. The same applies to the respective legal consequences, in particular whether public international law, some kinds of general principles of law, or rather an autonomous third legal order applies to these internationalized contracts.⁸⁸ Nevertheless, although still no consensus has been reached in this regard, already the fact that TNCs regularly conclude respective agreements with host states at eye level illustrates their important position as direct steering subjects in the development of international investment law.⁸⁹

B. Participation in the Dispute Settlement Mechanisms

The perception that TNCs occupy a very notable status as steering subjects in international investment law is further confirmed when focusing on the participation of these nonstate actors in the legal regime governing the settlement of international investment disputes. Although the investor’s home state has brought a handful of investment-related disputes to the International Court of Justice, for example,⁹⁰ 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, 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, again mainly TNCs.

This type of investment arbitration is not an entirely new phenomenon on the international scene. Even aside from certain predecessors in medieval times,⁹¹ 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

contract and to submit it to what may be called public international law, i.e. to internationalize it.”)

88. For a more comprehensive evaluation of the respective positions and for further references, see NOWROT, *supra* note 12, at 344-67.

89. See, e.g., WOLFGANG FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 224 (1964); Peter Muchlinski, ‘Global Bukowina’ Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community, in *GLOBAL LAW WITHOUT A STATE* 79, 88 (Gunther Teubner ed., 1997).

90. See, e.g., Case Concerning Amadou Sadio Diallo, (Guinea v. Dem. Rep. Congo), I.C.J., Preliminary Objections (May 24, 2007); Elettronica S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15 (July 20); Barcelona Traction, Light, and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (July 20); Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (July 22).

91. See, e.g., Braun, *supra* note 80, at 503-04.

Westphalia in 1648,⁹² the modern practice of investor-state arbitration started as early as in the 1930s.⁹³ However, it was in particular since the beginning of the 1990s that the general acceptance of these proceedings and a number of structural changes resulted in an enhanced effectiveness of, as well as recourse to, investor-state arbitration,⁹⁴ thus ultimately leading to the current prominence of this mechanism for the settlement of international investment disputes and especially also a further strengthening of the position of TNCs in this regard. 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 International Centre for Settlement of Investment Disputes (ICSID) Convention, but also, for example, under the framework of the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, or—albeit without an institutional structure—on the basis of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁹⁵

In addition, in recent years these developments have been accompanied by a fundamental shift concerning the legal basis for investor-state arbitration. In the past, the host state and the foreign investor typically gave the necessary consent to arbitration⁹⁶ by way of an arbitration clause in a respective state contract or in the form of a compromis concerning a dispute that 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.⁹⁷ As a consequence, although arbitration clauses in state contracts

92. See KARSTEN NOWROT, *GLOBAL GOVERNANCE AND INTERNATIONAL LAW* 14-15 (2004).

93. See, e.g., SALACUSE, *supra* note 76, at 372-74.

94. See generally DOLZER & SCHREUER, *supra* note 4, at 211-14; Stephan W. Schill, *Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 29 (Michael Waibel et. al., eds., 2010) (discussing advantages of investor-state arbitration for private investors and host states in light of the shortcomings of traditional methods of dispute settlement such as diplomatic protection or proceedings in domestic courts).

95. See, e.g., DOLZER & SCHREUER, *supra* note 4, at 222-29.

96. See generally Christoph Schreuer, *Consent to Arbitration*, in *OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW*, *supra* note 84, at 830.

97. See CHRISTIAN TIETJE, KARSTEN NOWROT & CLEMENS WACKERNAGEL, *ONCE AND FOREVER? THE LEGAL EFFECTS OF A DENUNCIATION OF ICSID* 19 (2008).

between the host state and the private investor are still quite common,⁹⁸ during “the last 10 years most cases were brought on the basis of treaty provisions.”⁹⁹

Already the quantitative development of investment arbitration proceedings on the basis of the ICSID Convention,¹⁰⁰ which is currently the most important forum for the settlement of investment disputes, vividly illustrates the considerable dynamics and effectiveness that characterize the present international legal regime on the protection of foreign investments. This comes as a result of the legal recognition of direct access by investors, such as TNCs, to effective international remedies in case of a dispute with the host state. Whereas during the whole period from 1966—the year the ICSID Convention entered into force—until 1993 only twenty-seven investment arbitration proceedings took place under this framework, since 1998, on average one new case per month has been registered with ICSID.¹⁰¹ As of August 2010, a total of 200 proceedings were concluded with 124 cases still pending.¹⁰²

C. *Legal Status in International Investment Law*

The possibility of direct access to international mixed arbitration serves as a clear indication of the quite prominent role played by TNCs in the enforcement processes—and thereby also the progressive development¹⁰³—of international investment law. In addition, the new

98. See Karl-Heinz Böckstiegel, *Enterprise v. State: The New David and Goliath?*, 23 *ARB. INT'L* 93, 99 (2007).

99. Christoph Schreuer, *The Dynamic Evolution of the ICSID System, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID) – TAKING STOCK AFTER 40 YEARS* 15, 20 (Rainer Hofmann & Christian J. Tams eds., 2007).

100. The same probably applies to the development of—albeit still often confidential—investor-state arbitrations at, for example, 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 August Reinisch, *The Future of Investment Arbitration, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY – ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 894, 896 (Christina Binder et. al. eds., 2009). By the end of 2009, the cumulative number of known treaty-based investor-state arbitrations had reached 357. See *Investing in a Low-Carbon Economy, supra* note 82, at 83.

101. Christian Tietje, *Internationaler Investitionsrechtsschutz, in RECHTSSCHUTZ IM ÖFFENTLICHEN RECHT* 63, 74 (Dirk Ehlers & Friedrich Schoch eds., 2009).

102. See *List of ICSID Cases*, INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last visited Aug. 21, 2010).

103. See BOYLE & CHINKIN, *supra* note 46, at 263-311; JENNINGS & WATTS, *supra* note 46, at 41; MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 4 (3d ed. 2010) (describing specifically the respective role played by corporations in international investment law: “The multinational corporations themselves

developments in the field of investor-state arbitration also illustrate the increasing normative recognition of these nonstate actors within the international legal framework.

It is controversial whether TNCs are able to acquire the status of partial, derivative subjects of international law on the basis of state contracts concluded with host states,¹⁰⁴ but the above-mentioned structural changes in the scheme of and legal basis for the settlement of investment disputes indicate at least the emergence of an international legal status in this area of IEL. Thereby, contrary to a view occasionally found in the literature,¹⁰⁵ the ICSID Convention itself does not support this proposition. Article 25(1) of the ICSID Convention requires the specific additional consent of the parties to the dispute—the host state and the investor—to establish jurisdiction of ICSID for investor-state arbitration.¹⁰⁶ Since the investor has therefore no unconditional legal entitlement to initiate respective dispute settlement proceedings on the basis of the ICSID Convention alone, it has rightly been emphasized that this treaty itself does not amount to recognition of an international legal personality of TNCs.¹⁰⁷

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 whether the investor accepts this legally binding offer by, *inter alia*, instituting investment arbitration proceedings.¹⁰⁸ A respective treaty-based legal entitlement to take recourse to investor-

must be seen as distinct bases of power capable of asserting their interests through the law. . . . It is a fascinating fact that through the employment of private techniques of dispute resolution, they are able to create principles of law that are generally favourable to them.”); Trachtman & Moremen, *supra* note 46, at 223.

104. See, e.g., PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 102 (7th ed. 1997); NOWROT, *supra* note 12, at 367.

105. See, e.g., S.B.O. Gutto, *Violation of Human Rights in the Third World: Responsibility of States and TNCs*, in *THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW* 275, 285 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

106. See 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.” Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, pmbl., Apr. 10, 2006, I.C.S.I.D. 15. For a comprehensive evaluation of the consent requirement as stipulated in Article 25 of the ICSID Convention, see CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION – A COMMENTARY* 190-253 (2d ed. 2009).

107. See, e.g., Christian Tietje, *The Law Governing the Settlement of International Investment Disputes*, in *INTERNATIONAL INVESTMENT PROTECTION AND ARBITRATION* 17, 32 (Christian Tietje ed., 2008).

108. See, e.g., *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, ¶ 12.2 (Sept. 16, 2003) (discussing the admissibility of this approach).

state arbitration—and thus the allocation of direct subjective rights to private investors under international law¹⁰⁹—is today frequently stipulated in the arbitration clauses of BITs. Whereas in this context, however, the existence of a respective legal entitlement depends largely upon the specific wording of the arbitration clauses of the individual BIT in question,¹¹⁰ an increasing number of other international agreements also include a binding consent of the contracting parties to investor-state arbitration. In the realm of regional economic integration agreements, Article 1122 of NAFTA, the Articles 10.17 and following of the Central America-Dominican Republic Free Trade Agreement (CAFTA-DR), Article 6.21 (4) of the Comprehensive Economic Cooperation Agreement between India and Singapore, Articles 32 and following of the ASEAN Comprehensive Investment Agreement, and Article 10.16 of the United States-Oman Free Trade Agreement serve as notable examples in this regard. The same applies at the multilateral-sectoral level to Article 26(3)(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.”¹¹¹ 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 TNCs, thus “marking another step in their transition from objects to subjects of international law.”¹¹²

109. See, e.g., *BG Group Plc. v. Argentina*, UNCITRAL, Final Award, ¶ 145 (Dec. 24, 2007) (“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.”) (emphasis added); Elihu Lauterpacht, *International Law and Private Foreign Investment*, 4 *IND. J. GLOBAL LEGAL STUD.* 259, 274 (1997); Ole Spiermann, *Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties*, 20 *ARB. INT’L* 179, 185 (2004). However, this view is far from undisputed. See, e.g., DOUGLAS, *supra* note 1, at 10-38 (discussing the respective doctrinal debate).

110. DOLZER & SCHREUER, *supra* note 4, at 242. Please note, however, in this context also the potentially relevant issue of a possible procedural dimension of the most-favored-nation clauses stipulated in BITs. Generally on this controversially debated question, see, for example, Guido Santiago Tawil, *Most Favored Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY – ESSAYS IN HONOUR OF CHRISTOPH SCHREUER*, *supra* note 100, at 9.

111. Energy Charter Treaty art. 26(3)(a), Dec. 12, 1994, 2080 U.N.T.S. 100.

112. See *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 141 (Feb. 8, 2005) (describing the legal regime established by the Energy Charter Treaty) (“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

III. INFORMAL VS. NORMATIVELY RECOGNIZED STEERING SUBJECTS: PATHS TO BE TAKEN

It is admittedly always difficult to measure the particular political influence TNCs exercise in specific regulatory activities at the domestic as well as international level. Nevertheless, the present analysis of two reference fields of IEL congruently indicates that these nonstate actors occupy an increasingly important position as steering subjects in the WTO legal order as well as in the international legal framework on the protection of foreign investments, thereby contributing to the “inherent heterogeneity of modern partnerships in international law making and international law adjudication.”¹¹³

A. Factors Contributing to the Importance of TNCs as Steering Subjects in IEL

The reasons for the growing involvement of TNCs in the respective normative steering processes are manifold. In addition to their often great economic importance, which is generally recognized as a notable source of political influence, attention must be drawn, inter alia, to the growing awareness among states and other international actors of the advantages resulting from cooperative law-making and law-realization processes¹¹⁴ as well as to the overall more positive attitude of states and international organizations toward the activities of TNCs.¹¹⁵ Furthermore, prominently among these reasons are the various processes of globalization, appropriately defined as the “denationalization of clusters of political, economic and social activities,”¹¹⁶ which have led to an at least partial loss by states of their previously held steering capacity.¹¹⁷ As a consequence, states are

for investors, marking another step in their transition from objects to subjects of international law.”); CHRISTIAN TIETJE, *THE APPLICABILITY OF THE ENERGY CHARTER TREATY IN ICSID ARBITRATION OF EU NATIONALS VS. EU MEMBER STATES* 13 (2008).

113. Pierre-Marie Dupuy, *Proliferation of Actors*, in *DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 537, 541 (Rüdiger Wolfrum & Volker Röben eds., 2005).

114. See NOWROT, *supra* note 12, at 444-47, 469-73.

115. See generally, e.g., SANDRINE TESNER WITH GEORG KELL, *THE UNITED NATIONS AND BUSINESS: PARTNERSHIP RECOVERED* (2000).

116. Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 *IND. J. GLOBAL LEGAL STUD.* 9, 11 (1993) (emphasis omitted). For a related definition, see Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 *UCLA L. REV.* 1687, 1693-94 (2002).

117. See, e.g., David P. Fidler, *The Globalization of Public Health: Emerging Infectious Diseases and International Relations*, 5 *IND. J. GLOBAL LEGAL STUD.* 11, 14 (1997); Stephan Hobe, *The Era of Globalisation as a Challenge to International Law*, 40 *DUQ. L.*

increasingly required to create and participate in formal and informal cooperative mechanisms with not just other states and international organizations, but also with influential nonstate actors such as NGOs, business associations, trade unions, and, last but not least, TNCs in order to provide an effective regulatory scheme for the political, economic, ecological, and social processes they are unable to control and channel when acting alone.¹¹⁸ Thereby, it is not argued that states are no longer of importance in the international economic system or even about to “wither away.” Overall, they still remain very influential actors on the international scene. However, under the influence of globalization, states are increasingly incorporated in the multilayered scheme of global economic governance, and their position in these regulatory processes sometimes cannot even be characterized as being *primus inter pares*.

B. WTO Legal Order vs. International Investment Law: Approaches to an Assessment of Two Competing Modi Operandi

While all these and other factors contribute to the notable role TNCs play in the WTO legal order and international investment law, the present analysis, however, also reveals that these two fields of IEL are characterized by two overall fundamentally different approaches to the involvement of these nonstate actors in the respective regulatory processes. Whereas on the one side, in the multilateral regime on trade in goods and services, TNCs usually do not enjoy any recognized legal status and are thus largely confined to informal means. international investment law, on the other side, not only provides for various venues of direct involvement in the law-making and dispute settlement processes, but also contributes to the emerging recognition of TNCs as at least partial subjects of international law.

In light of these two competing approaches to the status of TNCs as steering subjects in IEL, the question arises as to which of them is preferable to provide a generally more suitable role model for the future incorporation of these private entities in the regulatory practice of the international economic system. Thereby, it is worth recalling that both *modi operandi* appear to have—in state practice as well as in academia—their supporters, but also their fair share of opponents.

REV. 655, 656 (2002); John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 784, 799 (2003).

118. Concerning the increasing need for these kinds of cooperative regulatory efforts, see, for example, Jost Delbrück, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 IND. J. GLOBAL LEGAL STUD. 31, 32-47 (2004).

While the quite restrictive approach adopted by the WTO has been frequently criticized as, *inter alia*, mirroring an institutional system and culture that “do not fit into an international economic system shaped by globalization” and thus being unable “to cope with the challenges of today,”¹¹⁹ it is nevertheless apparently in conformity with the view of a considerable majority of WTO members on this issue. Quite similar divergent perceptions can be found with regard to the approaches adopted in the realm of international investment law. Whereas the present, predominant practice clearly promotes the direct participation of TNCs, especially in the field of investment arbitration, the respective legal developments have in particular more recently also given rise to concerns in policy fora and in the literature for example with regard to an alleged bias of the current normative framework in favor of private investors and—closely related—concerns of undue restrictions on the host state’s regulatory autonomy in furtherance of other public interests.¹²⁰ In addition and even more notably, there are by now clear indications in state practice that international investment law as a whole, or at least with regard to certain aspects, has become—again—increasingly controversial.¹²¹ This applies in particular—albeit by far not exclusively—to a number of Latin American countries’ display of

119. Christian Tietje, *The Effect of Globalization on International Economic Law*, in GLOBALISATION – THE STATE AND INTERNATIONAL LAW 43, 45 (Stephan Hobe ed., 2009) (“The thus broadened perspective on law making and implementation in international economic law, however, contrasts with approaches taken within the WTO. . . . Moreover, the entire WTO is built on the practice and culture of the old GATT 1947 which played its role in the old international system on the basis of a concept of a small club of trading powers, namely the US and the EU, ruling the system. However, the days of the old GATT 1947 are gone; the former bi-polar system has been replaced by a multi-polar system of different important actors – states, civil society and transnational corporations – and a multitude of interests. The institutional system of the WTO and its entire culture do not fit into an international economic system shaped by globalization. It is obvious that a system built on ideas of the Post-World War II era is not able to cope with the challenges of today – but this is exactly the situation with regard to the WTO.”); *see also* Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 J. INT’L ECON. L. 559, 572 (2008); Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT’L ECON. L. 803, 831 (2009).

120. *See* Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps towards the Operationalization of the “Protect, Respect and Remedy” Framework*, ¶¶ 20-25, U.N. Doc. A/HRC/14/27 (April 9, 2010); Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 433 (Michael Waibel et al. eds., 2010).

121. *See, e.g.*, Christoph Schreuer, *Introduction to International Investment Law in Context* 3, 5 (August Reinisch & Christina Knahr eds., 2007); KARSTEN NOWROT, INTERNATIONAL INVESTMENT LAW AND THE REPUBLIC OF ECUADOR: FROM ARBITRAL BILATERALISM TO JUDICIAL REGIONALISM 5-24 (2010).

recently renewed suspicion that found its expression, inter alia, in the denunciations of the ICSID Convention by Bolivia in 2007 and by Ecuador in 2009.¹²²

Aside from the controversial suitability of both approaches, another aspect to be taken into account concerns the general differences between the economic transactions addressed by world trade law and international investment law, respectively. For example, as Christoph Schreuer and Rudolf Dolzer point out, “[m]aking a foreign investment is different in nature from engaging in a trade transaction. 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 country.”¹²³ It appears not too far-fetched to presume that the more direct involvement of investors, such as TNCs, and the resulting “triangle relationship” comprised of the investor, its home state, and its host state as being characteristic of international investment law can also be attributed to the specific business nature of foreign investments as compared to trade in goods and services.¹²⁴

Although there seems to be—thus—as is frequently the case—no simple and straightforward generalized answer to the question as to which of the two competing approaches to the status of TNCs as steering subjects appears to be preferable, the remaining part of this article will nevertheless attempt to provide a respective assessment based on some broader conceptual thoughts. Thereby, in order to at least largely avoid the problems connected with a legal policy argumentation that is inevitably influenced by subjective points of view, it should be recalled that an “objective” evaluation cannot be undertaken in an abstract, unconnected sense. Rather, it requires recourse to a superordinate normative focal point in light of whose requirements and expectations the evaluation is made, thereby at the

122. For further discussion of this, as well as the controversially debated legal implications of such a denunciation, see, for example, Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY*, *supra* note 94, at 353; TIETJE, NOWROT & WACKERNAGEL, *supra* note 97, at 5-32; Oscar M. Garibaldi, *On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 251 (Christina Binder et al. eds., 2009); NOWROT, *supra* note 121, at 5-8, 24-27.

123. DOLZER & SCHREUER, *supra* note 4, at 3.

124. However, with that said, it must be recalled that the WTO legal order, in particular with regard to its normative framework on trade in services, also covers respective direct investments. See General Agreement on Trade in Services art. I:2, lit. c, art. XXVIII, lit. d, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167; e.g., Beviglia Zampetti & Sauvé, *supra* note 78, at 254-57.

same time providing for the necessary disclosure of the author's respective preunderstanding (Vorverständnis). Against this background, it is submitted that the normative "guiding vision"¹²⁵ of an emerging transnational economic community offers an appropriate—and in light of the current state of the global economic order and its legal framework, also realistic—overarching concept for an assessment of the divergent approaches in the WTO legal order and international investment law.

C. The Emerging Transnational Economic Community as a Normative "Guiding Vision"

In order to evaluate and illustrate the potential of the idea of an emerging transnational economic community as a normative guiding vision in the present context, the following analysis is divided into two main sections. The first part is devoted to an assessment of the value-orientation of IEL as having more recently evolved as one of the main characteristics of this area of law. Based on the findings made in this first part, the second part provides some broader conceptual ideas on the adequate incorporation of TNCs as steering subjects in IEL.

1. Economic System or Economic Community?: The Value-Orientation of IEL

It is generally recognized that states and an increasing variety of other actors in the international realm presently form an international system, in the sense that the actors have sufficient contact with each other and adequate impact on their decisions to act as parts of a whole.¹²⁶ The same applies to the existence of an international economic system (or subsystem) as an inherent component of this international system.¹²⁷ However, taking into account that a respective international (economic) system can also be a mere agglomeration of mechanically interacting units,¹²⁸ it is still debated whether the current international

125. See generally Voßkuhle, *supra* note 13, at 134-38 (discussing the recourse to "guiding visions" as a dogmatic approach in legal science).

126. See, e.g., Stanley Hoffmann, *International Systems and International Law*, in THE INTERNATIONAL SYSTEM: THEORETICAL ESSAYS 205 (Klaus Knorr & Sidney Verba eds., 1961).

127. See Christian Tietje, *Begriff, Geschichte und Grundlagen des Internationalen Wirtschaftssystems und Wirtschaftsrechts*, in INTERNATIONALES WIRTSCHAFTSRECHT 1, 3-5 (Christian Tietje ed., 2009).

128. See HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 13-14 (1977).

system has also evolved toward an international community in a substantive sense or whether this frequently applied term “remains essentially a tool of political rhetoric.”¹²⁹ It is obviously beyond the scope of this article to engage in a more comprehensive discussion of this issue.¹³⁰ However, there is substantial agreement that the existence of an international community presupposes as one of its central elements the recognition of “certain common interests and common values” among its members, who consequently believe “themselves to be bound by a common set of rules in their relations with one another.”¹³¹

In this regard, it is worth drawing attention to the frequently highlighted perception that the international legal framework has undergone quite substantial changes over the past few decades. While previously comprising basically a set of rules—often merely of a procedural nature—which limited and guided states as the sole subjects of international law in their interactions with each other, international law has more recently transformed into what has already been called “a comprehensive blueprint of social life”¹³² and the evolution of a “world (internal) law.”¹³³ In the course of this process, the international legal order is more and more independent of the will and interests of individual states, with its substantive norms increasingly focusing on the realization of community interests.¹³⁴

These observations regarding the changing normative structure of the international system as a whole are also applicable to the global

129. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, in 241 RECUEIL DES COURS 195, 232 (1993).

130. See, e.g., Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1004 (Michelle Everson trans., 2004); Andreas L. Paulus, *The Emergence of the International Community and the Divide between International and Domestic Law*, in NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 216 (Janne Nijman & André Nollkaemper eds., 2007); Bruno Simma, *From Bilateralism to Community Interest in International Law*, in 250 RECUEIL DES COURS 217, 243-48 (1994); Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3 (Christian Joerges et al. eds., 2004).

131. BULL, *supra* note 128, at 13; see also, e.g., JAN KLABBERS ET AL., THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 153 (2009); Simma, *supra* note 130, at 245; Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, in 281 RECUEIL DES COURS 9, 77-78 (1999).

132. Tomuschat, *supra* note 131, at 63.

133. Jost Delbrück, *Prospects for a “World (Internal) Law?”: Legal Developments in a Changing International System*, 9 IND. J. GLOBAL LEGAL STUD. 401 (2002).

134. See, e.g., Simma, *supra* note 130, at 229-43 and *passim*; Jost Delbrück, “Laws in the Public Interest”—Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law, in LIBER AMICORUM GÜNTHER JAENICKE 17 (Volkmar Götze et al. eds., 1998); NOWROT, *supra* note 12, at 486-96.

economic system and its legal order. Aside from taking recourse to the *topos quidquid de omnibus valet, valet etiam de quibusdam et singulis* (in the present context: whatever applies to the general level, also applies to its subdivisions), the growing value orientation of IEL is supported by the current discussion about the possibility of qualifying certain normative ordering principles of the global economic system—among them the principles of open markets and free trade as well as the stability of the international financial markets—themselves as overarching community interests.¹³⁵ In addition, the fact that IEL is increasingly confronted with the challenge of how to incorporate noneconomic concerns, like the protection of human rights and the environment as well as the enforcement of core labor and social standards, into its normative scheme serves as a further indication in this regard. For example, the respective debates focus not only on the WTO legal order no longer being interpreted “in clinical isolation from public international law”¹³⁶—contrary to the “fire-wall approach” that dominated the GATT 1947—and on the activities of key international financial institutions like the International Monetary Fund (IMF) and the World Bank.¹³⁷ Rather, the need for finding an adequate balance between conflicting private and community interests is in particular also increasingly recognized in the realm of international investment law.¹³⁸

Finally, the value orientation of IEL can be normatively based on a systematic interpretation of Articles 55, 56, and 103 of the U.N. Charter. According to Article 103, the obligations of the members of the United Nations under the Charter prevail over the obligations of these states under any other international agreement. Contrary to its restrictive wording, this provision’s scope of application—in light of its objective and purpose—is not limited to other obligations contained in treaties, but also covers obligations deriving from any other

135. See, e.g., NOWROT, *supra* note 12, at 497-500; Gregory Shaffer, *Recognizing Global Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?: The Case of Trips and Pharmaceutical Patent Protection*, 7 J. INT’L ECON. L. 459, 462-63 (2004).

136. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996); see also, e.g., Jeffery Atik, *Trade and Health*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 597; Lorand Bartels, *Trade and Human Rights*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 571; Daniel Bodansky & Jessica C. Lawrence, *Trade and Environment*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 505; Gabrielle Marceau, *Trade and Labour*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 539; Hunter Nottage, *Trade and Development*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW, *supra* note 38, at 481.

137. See generally, e.g., SIGRUN I. SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001).

138. See NOWROT, *supra* note 121, at 17-24, 33-41.

international legal sources, such as customary international law.¹³⁹ Among these Charter obligations in the sense of Article 103 are also the various duties to cooperate that are listed in Articles 55 and 56 of the U.N. Charter that, when read together, are intended to contribute to the realization of community interests.¹⁴⁰ Consequently, in light of Article 103, the normative structure of the international economic system must also be interpreted in a way that gives effect to the obligations to protect and promote the community interests as stipulated in Articles 55 and 56 of the U.N. Charter.¹⁴¹

Considering this value orientation of IEL as a normative framework that increasingly focuses on the realization of generally recognized community interests or global public goods, it can be argued that the international economic system is currently in the phase of transforming into a transnational economic community. Thereby, the use of the term “transnational” is to be favored in particular to the word “international.” Whereas “internationalization” refers to the process of institutionalized cooperation between states which started already in the nineteenth century,¹⁴² the term “transnational”—deeply inspired by the superb and foresighted 1956 study *Transnational Law* by Philip C. Jessup¹⁴³—rightly conveys the notion that the current regulatory reality in the economic realm comprises an interconnected plurality of various normatively relevant steering mechanisms, which have frequently been

139. See Rudolf Bernhardt, *Article 103*, in 2 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 1292, 1298-99 (Bruno Simma et al. eds., 2d ed. 2002); Rep. of the Study Grp. of the Int'l Law Comm'n, 58th Sess, May 1–Jun. 9, Jul. 3–Aug. 11, 2006, ¶¶ 344-45, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

140. For a comprehensive analysis of the obligations stipulated in these provisions, see Eibe Riedel, *Article 55(c)*, in 2 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY, *supra* note 139, at 917-41; Rüdiger Wolfrum, *Articles 55(a) and (b)*, in 2 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY, *supra* note 139, at 897-917; Rüdiger Wolfrum, *Article 56*, in 2 THE CHARTER OF THE UNITED NATIONS—A COMMENTARY, *supra* note 139, at 941-44.

141. See KARSTEN NOWROT & YVONNE WARDIN, LIBERALISIERUNG DER WASSERVERSORGUNG IN DER WTO-RECHTSORDNUNG: DIE VERWIRKLICHUNG DES MENSCHENRECHTS AUF WASSER ALS AUFGABE EINER TRANSNATIONALEN VERANTWORTUNGSGEMEINSCHAFT 47 (2003); Tietje, *supra* note 127, at 58.

142. See, e.g., Jost Delbrück, *The Role of the United Nations in Dealing with Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277, 277-78 & n.3 (1997).

143. PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); see also GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* 11-26 and *passim* (2010) (discussing broader recent perspectives on this concept); Tietje & Nowrot, *supra* note 12, at 26-31 (discussing Jessup's understanding of transnational law).

attributed to and indeed are reflecting processes of normative transnationalization.¹⁴⁴

2. Normative Consequences for the Status of TNCs as Steering Subjects in IEL

In light of this emerging transnational economic community orientated toward the realization of the common good and its underlying requirements and expectations, it is now possible to provide some broader conceptual ideas on the adequate incorporation of TNCs as steering subjects in IEL. In the following, three respective aspects frequently and rightly associated with this normative guiding vision—the issues of inclusiveness, transparency, and responsibility—will be addressed in this regard.

a. Inclusiveness

A first characteristic often linked to the concept of a transnational community is the inclusiveness of its regulatory processes.¹⁴⁵ In this context, it is in particular an optimal balancing and allocation of community interests¹⁴⁶ as constituting one of the primary aims of a transnational economic community that presupposes an opportunity for all powerful, affected, and interested actors—governmental as well as nongovernmental—to take part in the respective law-making and law-realization processes.

The inclusive approach serves three main purposes. First, it opens up the possibility to benefit from the information and expertise—generally regarded as a central prerequisite for balanced and effective regulation—of the various categories of actors, including TNCs.¹⁴⁷

144. See, e.g., Christian Tietje, *Transnationales Wirtschaftsrecht aus öffentlich-rechtlicher Perspektive*, 101 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 404 (2002).

145. See, e.g., KLABBERS ET AL., *supra* note 131, at 153 (“The concept of an international community suggests inclusiveness and therefore tends to favour rather than to hinder the inclusion of non-state actors.”).

146. On the realization of the common good as a normative principle in the sense of an optimization imperative, see Josef Isensee, *Konkretisierung des Gemeinwohls in der freiheitlichen Demokratie*, in GEMEINWOHLGEFÄHRDUNG UND GEHEINWOHLSICHERUNG 95, 105 (Hans Herbert von Arnim & Karl-Peter Sommermann eds., 2004). On the underlying distinction between rules and principles, see generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., 2002).

147. See generally, e.g., Walter Mattli & Ngaire Woods, *In Whose Benefit? Explaining Regulatory Change in Global Politics*, in *THE POLITICS OF GLOBAL REGULATION* 1, 4

Second, normative steering processes that are governed by the principle of inclusiveness enjoy, in most cases, a considerably higher degree of acceptance among the addressees of these rules of behavior, thus diminishing the risk of enforcement deficits.¹⁴⁸ Finally, the incorporation of TNCs and other nonstate entities in the regulatory processes—in particular in light of the also in this context reduced steering capacity of states—reflects the increasingly perceived necessity of an overarching cooperative and, thus, inclusive approach toward the realization of community interests at the global level.¹⁴⁹

Against this background, it becomes apparent that the comparatively restrictive approach adopted by the WTO with regard to the participation of nonstate actors indeed still leaves certain room for improvements. However, also the current inclusiveness of the regulatory practice in international investment law has been subject to criticism. In this context, the respective calls for enhanced participation are mostly not related to the role of TNCs or other business actors. Rather, they are focusing on the possibilities for other categories of private actors, in particular NGOs, to take part in the law-making processes and, especially, in the investment arbitration proceedings.¹⁵⁰

A number of recent developments in international investment law may serve as an indication for a more inclusive approach. In relation to the law-making processes, a number of states have initiated written consultation processes and public hearings in particular in connection with the drafting and revision of model BITs. The consultation processes in connection with the Norwegian draft model BIT in 2008, the U.S. model BIT review in June and July 2009 as well as the South African “Bilateral Investment Treaty Policy Framework Review” in July 2009

(Walter Mattli & Ngairé Woods eds., 2009) (discussing the connection between the optimal realization of the common good and the need for inclusive governance processes). Specifically on the need for the expertise and information provided by non-state or business actors in the decision and law-making processes of the international economic system, see KLABBERS ET AL., *supra* note 131, at 255; NOWROT, *supra* note 12, at 444-47, 635-39.

148. On the connection between participation in law-making processes and the reduced risk of enforcement deficits, see KLABBERS ET AL., *supra* note 131, at 255; TULLY, *supra* note 12, at 305.

149. On this perception, see, for example, Delbrück, *supra* note 118, at 32-34; NOWROT, *supra* note 12, at 504-09; Tietje, *supra* note 127, at 59.

150. See, e.g., Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 63, 71-77 (Pierre-Marie Dupuy et al. eds., 2009); Amokura Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae*, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 275 (Michael Waibel et al. eds., 2010).

serve as vivid examples in this regard.¹⁵¹ In the realm of investment arbitration, it is in particular the possibility to submit *amicus curiae* briefs that has gained some prominence in recent years. In addition to respective stipulations in a number of bilateral and regional agreements like NAFTA, Article 10.20(3) of the CAFTA-DR or Article 15.19(3) of the United States-Singapore Free Trade Agreement, also ICSID is now—on the basis of its reformed Arbitration Rules that entered into force on April 10, 2006—explicitly recognizing the competence of tribunals to allow for the submission of *amicus curiae* briefs by interested nondisputing parties.¹⁵²

b. Transparency

A second important procedural aspect—albeit connected to the issue of inclusiveness—which bears a close relationship to the concept of a transnational economic community orientated toward the realization of the common good, concerns the transparency of the decision-making and dispute settlement processes.¹⁵³ The overarching principle of transparency or publicity serves a variety of purposes in the domestic and international realm, which cannot be dealt with in detail here.¹⁵⁴ Specifically with regard to the optimal promotion and protection of community interests, its function is essentially twofold. On the one side, nonsecretive, open steering mechanisms benefit from an increased

151. The Norwegian draft model BIT was first published in December 2007. The project, however, was shelved in June 2009. See Damon Vis-Dunbar, *Norway Shelves its Proposed Model Bilateral Investment Treaty*, INV. TREATY NEWS, 7 (June 2009), <http://www.iisd.org/itn/wp-content/uploads/2009/06/ITN-June-2009.pdf>. On the consultation processes initiated by the United States and South Africa, see Damon Vis-Dunbar, *South African Trade Department Critical of Approach Taken to BIT-Making*, INV. TREATY NEWS, 2 (July 2009), <http://www.iisd.org/itn/wp-content/uploads/2009/08/ITN-July-2009.pdf>; Elisabeth Whitsitt, *United States Trade Representative and State Department Hold Public Hearing and Solicit Written Comments in US Model BIT Review*, INV. TREATY NEWS, 4 (Sept. 2009), <http://www.iisd.org/itn/wp-content/uploads/2009/09/ITNSeptember2009.pdf>.

152. On these developments, see, for example, SCHREUER ET AL., *supra* note 106, at 704-07; Epaminontas E. Triantafyllou, *Amicus Submissions in Investor-State Arbitration after Suez v. Argentina*, 24 ARB. INT'L 571, 583-86 (2008).

153. See generally KLABBERS ET AL., *supra* note 131, at 326-30. On an emerging “general legal principle of openness” stipulating that “global governance fora are no longer presumed to be *a priori* closed,” see *id.*, at 222. Specifically on the notion and importance of transparency in IEL, see, for example, Carl-Sebastian Zoellner, *Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings*, in THE INTERNATIONAL CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES (ICSID): TAKING STOCK AFTER 40 YEARS 179, 181-85, 198-207 (Rainer Hofmann & Christian J. Tams eds., 2007).

154. See, e.g., Daniel C. Esty, *Good Governance at the World Trade Organization: Building a Foundation of Administrative Law*, 10 J. INT'L ECON. L. 509, 524-25 (2007).

acceptance among the actors concerned, thereby further reducing the risk of noncompliance.¹⁵⁵ On the other side, it is only on the basis of transparent deliberations that an optimal participation of all relevant actors can be effectively ensured.

In light of these and other important purposes served by the principle of transparency, it is hardly surprising that the regulatory practice of the WTO as well as of international investment law has been often criticized for being overly secretive.¹⁵⁶ Thereby, it is—again—not primarily the status of TNCs and other business entities, but first and foremost of individuals and other nonstate actors, on which the respective discourses on enhanced transparency focus. While in particular the decision-making processes and treaty negotiations have largely retained their confidential character in the realms of world trade and international investment law, there are certain indications that the principle of transparency is more recently gaining ground with regard to dispute settlement in both areas of IEL. Since 2005, WTO panels as well as the Appellate Body recognize the possibility of open hearings if both parties request public access.¹⁵⁷ In addition, in the field of investor-state arbitration—originally largely modeled on the concept of private commercial arbitration and thus traditionally dominated by the principle of confidentiality—a number of recent developments in particular on the basis of agreements to which the United States is a party, but also in the realm of ICSID, underline the increasingly recognized importance of transparency in all regulatory processes of IEL.¹⁵⁸

155. On the overall increased acceptance of the need for transparent normative steering processes in the international system, see, for example, Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 42-43 (2003); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 726-29 (1996-97).

156. On the respective discussions regarding WTO transparency see, for example, Julio A. Larcarte, *Transparency, Public Debate and Participation by NGOs in the WTO: A WTO Perspective*, 7 J. INT'L ECON. L. 683 (2004). Concerning a similar perception, with regard to international investment law, see Special Rep. of the Secretary-General on the Issue of Human Rights and Transnational Corp. and other Bus. Enter., *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 34, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009); Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775 (2008) (arguing that the lack of public participation limits the efficacy of investment arbitration decisions on public interest issues).

157. Lothar Ehring, *Public Access to Dispute Settlement Hearings in the World Trade Organization*, 11 J. INT'L ECON. L. 1021, 1030 (2008).

158. On the at least partial relativization of the principle of confidentiality in investor-state arbitration, see, for example, SCHREUER ET AL., *supra* note 106, at 697-704, 834-39;

c. Responsibility

Finally, the third notable—and the most controversial—consequence of an emerging transnational economic community aimed at the realization of community interests concerns the issue of responsibility. The importance attached to responsibility is based on the perception that an optimal promotion and protection of community interests presupposes that all influential actors participating in the law-making and law-realization processes in the international (economic) system develop and share a sense of responsibility for the common good.¹⁵⁹ Although it has frequently—and rightly—been emphasized that the pursuit of individual or sectoral interests and the realization of the common good are, in principle, far from mutually exclusive, it is nevertheless equally certain that the orientation toward profit maximization as one of the primary motives of the activities of TNCs—in the same way as the frequent “single-issue orientation” of NGOs—does not always guarantee in itself that their TNC participation in the regulatory processes adequately contributes to the promotion of community interests.¹⁶⁰ Indeed, it is precisely this concern for the optimal realization of the common good that has frequently been brought forward against the considerable influence exercised by powerful nonstate actors like TNCs and NGOs on the transnational steering processes in the absence of respective corresponding accountability mechanisms.¹⁶¹

In light of these findings, it becomes apparent that the intensively debated issue on the need and possibilities for making TNCs responsible for the promotion and protection of community interests relates to more than their economic activities, although the literature usually focuses primarily on this aspect. Rather, it is also clearly connected to the

Joachim Delaney & Daniel Barstow Magraw, *Procedural Transparency*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 84, at 721; Zoellner, *supra* note 153, at 181-98.

159. See generally, e.g., WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES 213-14 (2005) (discussing the need for a respective sense of responsibility for the public good among all participants of governance processes).

160. See, e.g., Kenneth W. Abbott & Duncan Snidal, *The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State*, in THE POLITICS OF GLOBAL REGULATION 44, 59-62 (Walter Mattli & Ngaire Woods eds., 2009).

161. KLABBERS ET AL., *supra* note 131, at 156 (“On the other hand, the irregular international status of corporations, and also of NGOs, is pernicious because it leaves space for the exploitation of their power for self-interested goals to the detriment of the public good and of affected individuals.”). See also *id.*, at 250-51 (“[B]usiness does not yet and should not acquire any legitimate expectation to participate in international law-making unless the business actors specifically demonstrate their commitment to the public interest . . .”). See generally NOWROT, *supra* note 12, at 475-82, 606-14.

status of TNCs as political actors based on their participation in the regulatory practice of IEL.¹⁶² Thereby, it is neither possible nor necessary to engage here in a more in-depth assessment on whether, and, if so, by which means and on the basis of which concepts, TNCs—but potentially also international NGOs¹⁶³—should be integrated into the international legal order as addressees of respective obligations.¹⁶⁴ For the purposes of this analysis, it appears sufficient to recall that, at least on the basis of soft law as well as the numerous evolving private regulatory regimes, there are undoubtedly indications that TNCs are increasingly expected to respect and contribute to the promotion of community interests in the course of their activities as economic and political actors.¹⁶⁵ These developments support the present proposition that the various members of the emerging transnational economic community essentially also form a transnational community of responsibility.¹⁶⁶

162. On the role of TNCs as political actors in light of their participation in the regulatory practices of the international economic system, see ANNEGRET FLOHR ET AL., *THE ROLE OF BUSINESS IN GLOBAL GOVERNANCE: CORPORATIONS AS NORM-ENTREPRENEURS* 6 and *passim* (2010). On the resulting responsibilities of these actors, see *id.* at 8 (“However, these emerging patterns of ‘business as partner’ in governance also raise questions about the extent to which and under which conditions corporations take on responsibility to serve the public interest and provide public goods.”).

163. See generally Nowrot, *supra* note 36, at 589-641 (discussing the need for a legal regulatory framework, why NGOs should be legal subjects of international law, and how to legally construct limitations on NGOs).

164. See, e.g., Karsten Nowrot, *Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities*, 80 PHILIPPINE L. J. 563 (2006) (considering whether nonstate actors are obligated to protect and promote international community interests); MUCHLINSKI, *supra* note 3, at 473-574; JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW* (2006).

165. See, e.g., Larry Catá Backer, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*, 39 GEO. J. INT’L L. 591 (2008) (suggesting the creation of a global corporate stakeholder system for disclosure and transparency by corporate actors); KARSTEN NOWROT, *THE NEW GOVERNANCE STRUCTURE OF THE GLOBAL COMPACT: TRANSFORMING A “LEARNING NETWORK” INTO A FEDERALIZED AND PARLIAMENTARIZED TRANSNATIONAL REGULATORY REGIME* (2005) (arguing that creation of the U.N. Global Compact fundamentally alters the steering philosophy into a mechanism by which global public goods can be promoted and protected transnationally); John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT’L L. 819 (2007) (concluding that international law may regulate business and human rights but can be maximized by increasing governance capacity globally).

166. On this perception, see, e.g., KLABBERS ET AL., *supra* note 131, at 261; NOWROT & WARDIN, *supra* note 141, at 53-62; Tietje, *supra* note 127, at 59.

CONCLUSION

While TNCs are, in general, often able to exercise considerable influence on the law-making and law-realization processes in the international economic system, this article illustrated that two of the central areas of IEL—the WTO legal order and international investment law—are characterized by two overall fundamentally different approaches to the incorporation of this category of nonstate actors as steering subjects in the respective regulatory mechanisms. In this context, the normative guiding vision of an emerging transnational economic community and its underlying requirements and expectations justifies the conclusion that the more inclusive and formalized modus operandi of the current international legal framework on foreign investments more appropriately reflects the importance of TNCs as economic and political actors in today's changing international system. Despite international investment law thus providing the generally more suitable role model for the future incorporation of these entities in the regulatory processes of IEL, the need for certain adjustments does not only apply to the WTO. Rather, the requirements of inclusiveness and transparency also suggest—in relation to individuals and other private actors—a demand for further respective improvements in particular in the realm of investor-state arbitration. In addition, realizing the normative idea of a transnational community of responsibility continues to be an overarching task for all steering processes in the international economic realm, most certainly including the WTO legal order and international investment law.

In spite of this rising need for modifications, this article has, for a variety of reasons, deliberately abstained from adding another tone to the already large and many-voiced chorus of specific suggestions concerning the future of the status of TNCs and other nonstate actors as steering subjects in IEL. Nevertheless, also in this context, it is submitted that the normative guiding vision of an emerging transnational economic community in the sense of an inclusive, transparent, and responsible regime aimed at the realization of the common good provides a suitable analytical and conceptual framework for the assessment of respective proposals and their implementation in practice.