1. International investment protection and constitutional law: Between conflict and complementarity

Stephan W. Schill and Christian J. Tams

Until recently, international investment law and constitutional law kept maximum distance from each other; while both form part of the legal universe, they inhabited far-away planets. Constitutional courts and constitutional law scholars, in most jurisdictions, largely ignored international investment law and did not evaluate it from the perspective of constitutional law – and international investment law and investor-State dispute settlement did not pay much heed to the specificities of constitutional law and practice. The contacts and interactions that did exist were generally no more than tangential and rarely concerned the core principles of either constitutional law or international investment law.

This is changing, with investor-State dispute settlement increasingly dealing with issues of constitutional law, including compliance of constitutional law with international investment law, and with mounting proceedings before constitutional courts that question the constitutionality of international investment agreements and the dispute settlement mechanisms they establish. The resulting encounters, and the tensions they involve, are not trivial and risk creating severe normative conflict.

The present book aims at shedding light on the various forms in which constitutional law and international investment law interact, and at providing a framework for critically assessing the encounters between both fields of law. This introduction sets the stage for this endeavor. We first provide an account of how the interaction between international investment protection and constitutional law has evolved, both in international investment arbitration and in constitutional adjudication, arguing that we are moving from occasional encounters to structured interaction (Section I). We then turn to the normative tensions and conflicts that this interaction raises, as both constitutional law

1 We would like to thank Nadine Berger for excellent assistance in research and for preparing this chapter for publication.
and international investment law come with their own claims for authority and supremacy (Section II). Conceptualizing and operationalizing those different claims of authority, and evaluating them, is what the contributions to the present book engage in (Section III). In closing, we argue that constitutional law and international investment law do not have to remain caught between competing claims for supremacy; instead the debate should focus on managing the competing claims and facilitating coexistence and interaction in a complementary fashion (Section IV).

I  FROM OCCASIONAL ENCOUNTERS TO STRUCTURED INTERACTION

Constitutional law and international investment law have never been entirely sealed off from each other. In fact, historically both fields were conceived as projects with a common objective, namely to subject the State’s exercise of public authority to rule-of-law standards and to shield economic interests against certain forms of government interference, in particular arbitrariness, discrimination, denial of justice, and expropriation without compensation. Accordingly, interactions between the two fields of law and their respective adjudicative organs – constitutional courts and investor-State tribunals – have existed for a considerable time. Still, the points of interaction, the issues raised, and the intensity of that interaction have changed over the past decade: we are moving from occasional encounters to repeated and structured interaction. This development becomes apparent when looking at both constitutional adjudication and investment dispute settlement.

Reflecting the like-mindedness of constitutional law and international investment law and the two fields’ common objective to subject government conduct to the rule of law, constitutional courts traditionally engaged little with core aspects of international investment law. Although requests to rule on the constitutionality of international investment treaties arose from time to time, these questions were rarely specific to the content of investment treaties and involved instead generic issues concerning, for example, a State’s internal competence to conclude investment treaties or the applicable procedures for ratification. Only in exceptional cases did constitutional litigation assess

---

2 In that context, investment treaties have even been seen as a means to export core constitutional standards that are characteristic of limited government under the rule of law in order to govern international investment relations. See Kenneth J Vandevelde, ‘Sustainable Liberalism and the International Investment Regime’ (1998) 19 Mich J Int’l L 373.

3 German Federal Constitutional Court, BVerfGE 123, 267 – Lissabon (concerning the extent to which the transfer of competence to the EU for foreign direct invest-
whether rights and obligations granted in investment treaties, or the dispute settlement mechanisms the treaties established, comply with core constitutional principles on the organization of government, the rule of law, or fundamental and human rights. When such issues did arise, constitutional courts were often reluctant to apply exacting forms of constitutional scrutiny and rather exercised deference vis-à-vis the government’s foreign relations powers, of which international investment law and policy were seen to form part. Tensions and conflicts between constitutional law and international investment law were therefore rather exceptional and, to the extent that courts addressed them, mostly attracted criticism for having subjected a State’s foreign relations to parochial constraints and isolating the State internationally. This limited interaction was not unusual; it rather reflected ‘[t]he historically limited role of domestic courts in international law’ more generally.

Similarly, international investment law and investor-State dispute settlement traditionally paid little attention to the specificities of constitutional law. While constitutional law issues came up occasionally in investment disputes, both as

---

4 For recent examples of this approach, see Costello v Government of Ireland and others [2021] IEHC 600, paras 96–7; German Federal Constitutional Court, BVerfGE 143, 65, paras 47–8 – CETA. For an analysis of the limited scrutiny exercised by the CJEU in matters of foreign/external policies, see Matthias Kottmann, Introvertierte Rechtsgemeinschaft (Springer 2014). Interestingly, this rather restrictive approach contrasts with how domestic courts, including those that also serve as constitutional courts, such as the Supreme Court of the United States, approach determining compliance of arbitral proceedings with the lex fori, or how deeply they at times go into assessing whether the recognition and enforcement of investment awards complies with the State’s public policy under the New York Convention. See e.g. BG Group plc v Republic of Argentina, 572 US 25 (2014). See also Swiss Federal Tribunal, Case No 4A_306/2019, Judgment (25 March 2020) paras 3.4.2.3–3.4.2.5 – Clorox v Venezuela (setting aside an arbitral award where the tribunal mistakenly did not exercise jurisdiction under the governing investment treaty because it had read requirements into the treaty that the treaty objectively did not contain, namely a limitation of protection to investors that had made an ‘active’ investment).

5 For an example, see Constitutional Court of Colombia, Judgment C-358/96 (1996). For criticism of that approach, see ibid, Partial Dissenting Opinion by Judges Barrera Carbonell, Cifuentes Muñoz and Ortiz Gutierrez.

part of the applicable law to an investment dispute\textsuperscript{7} and as an element of fact for determining breach of an investment treaty,\textsuperscript{8} these were generally limited to incidental questions that did not specifically imply rights and obligations set out in investment treaties. Instead, the occasional arbitral decisions concerned general issues in relation to which international law draws on, and intersects with, constitutional law, such as the determination of nationality,\textsuperscript{9} the (constitutional and by extension international legal) status of certain State entities or instrumentalities,\textsuperscript{10} the internal distribution of competences of different State entities, in particular in federal States,\textsuperscript{11} or the availability and effectiveness of domestic remedies as a precondition under some treaties for recourse to investor-State arbitration.\textsuperscript{12} Moreover, investment tribunals, in most cases, generally treated constitutional law as one set of norms of domestic law whose role for international investment law and investor-State arbitration was not different in nature or kind from that of other domestic law rules.

\textsuperscript{7} See e.g. AAPL v Sri Lanka, ICSID Case No ARB/87/3, Award (27 June 1990) para 21. See also Convention on the Settlement of Investment Disputes between States and Nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) art 42(1), which provides: ‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’

\textsuperscript{8} See e.g. Alps Finance and Trade AG v Slovak Republic, UNCITRAL, Award (5 March 2011) para 197; MTD v Republic of Chile, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007) para 73; Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/17, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 4.128.

\textsuperscript{9} See e.g. Siag and Vecchi v Arab Republic of Egypt, ICSID Case No ARB/05/15, Decision on Jurisdiction (11 April 2007) paras 143 ff; Victor Pey Casado and President Allende Foundation v Republic of Chile, ICSID Case No ARB/98/2, Award (8 May 2008) paras 236–323.

\textsuperscript{10} See e.g. Generation Ukraine v Ukraine, ICSID Case No ARB/0/9, Award (16 September 2003) paras 10.1–10.7. For further case law on the attribution of acts and omissions of State entities in international investment arbitration, see Carlo de Stefano, ‘Attribution of Conduct to a State’ (2022) 37 ICSID Review 20.

\textsuperscript{11} See e.g. Casinos Austria International GmbH and Casinos Austria AG v Argentine Republic, ICSID Case No ARB/14/32, Decision on Jurisdiction (29 June 2018) paras 306–10; Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013) paras 100–29; Teinver SA, Transportes de Cercanias SA and Autobuses Urbanos del Sur SA v Argentine Republic, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) paras 130–6 (citing Elettronica Sicula SpA (ELSI) (United States v Italy) [1989] ICJ Rep 15, para 59).
Over the past decade, however, as in many other fields of international law, interactions between constitutional law and international investment law are becoming more intense and lay open tensions between the core legal principles of both fields. To start with, international investment law and investor-State arbitration functionally are moving more and more into areas that have traditionally been the realm of constitutional courts. Applying provisions in international investment treaties that qualify as ‘inward-looking norms’ – that is, norms that ‘specifically enjoin States to undertake certain conduct within their own domestic legal order: to adopt a specific legal framework, to accord individual rights, to abstain from taking specific actions, etc.’ – tribunals scrutinize the legality of conduct of all branches of government, whether executive, legislator, or the judiciary. Moreover, the provisions in international investment treaties in question resemble and find parallels in principles of constitutional law – so-called consubstantial norms – whether involving rules on expropriation without compensation, principles of non-discrimination and equal treatment, prohibitions on arbitrariness, rights to due process, or the protection of legitimate expectations. Adjudicating government conduct under norms that are consubstantial to domestic constitutional law, and that have direct effect on private-public relations, moves investment treaty tribunals functionally into the field of constitutional adjudication. In other

---

13 For details, see ILA (n 6) para 14 (noting the ‘increased significance of domestic courts in the interpretation, application, but also development, of international law’). See on the complex interrelation between investor-State arbitration and national courts more generally, Gabrielle Kaufmann-Kohler and Michele Potestà, ‘The Interplay between Investor-State Arbitration and Domestic Courts in the Existing IIA Framework’ in Gabrielle Kaufmann-Kohler and Michele Potestà (eds), Investor-State Dispute Settlement and National Courts: Current Framework and Reform Options (Springer 2020) 31–86.

14 ILA (n 6) para 12 (emphasis in the original).

15 On consubstantial norms, see Antonios Tzanakopoulos, ‘Domestic Courts in International Law: The International Judicial Function of National Courts’ (2011) 34 Loy LA Int’l & Comp L Rev 133, 142–3; Antonios Tzanakopoulos and Christian J Tams, ‘Introduction: Domestic Courts as Agents of Development of International Law’ (2013) 26 LJIL 531, 535; ILA (n 6) para 30 (defining consubstantial norms as ‘norms which happen to exist both at the international and at the domestic level, and provide for the same substantive regulation (ie, they have the same substance’)). See also Jarrod Hepburn, ‘Remedying Misaligned Norms in International and Constitutional Law: Investment Treaties, Property Rights and Proportionality’ (2020) 43 UNSW LJ 1167.

cases, investment tribunals may even review whether domestic constitutional law itself is in line with the State’s obligations under international economic agreements. And in yet other cases, investment tribunals are called upon to apply domestic constitutional law directly as applicable law, as cases involving environmental counterclaims for harm based on a breach of specific constitutional provisions illustrate.

However, it is not only that claims before investment tribunals raise issues that are similar to constitutional litigation, or implicate consubstantial norms. Like constitutional courts, investment tribunals are not restricted to ‘speaking the law’ as it percolates from narrowly tailored and clear-cut rules, but to a considerable extent concretize and further develop openly worded standards of treatment through their jurisprudential activities – whether in relation to the fair and equitable treatment standard, the concept of indirect expropriation, or full protection and security – and thereby act as law-makers in the field.

Functionally, this moves investment treaty tribunals closer to constitutional

---

17 Bernhard von Pezold and others v Republic of Zimbabwe, ICSID Case No ARB/10/15, Award (28 July 2015) (dealing inter alia with the legality under an international investment treaty of a constitutional amendment that differentiated between nationals and foreigners in relation to land ownership); Muszynianka v Slovak Republic, UNCITRAL, PCA Case No 2017-08, Award (7 October 2020) (concerning the legality of a constitutional amendment that prohibited the cross-border transport of water via pipeline under the State’s investment treaty obligations).

18 See Perenco Ecuador Ltd v The Republic of Ecuador, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) paras 319 ff. For further examples of cases where constitutional law is applied or invoked by investment tribunals, see Laurence Boisson de Chazournes and Brian McGarry, ‘What Roles Can Constitutional Law Play in Investment Arbitration?’ (2014) 15 JWIT 862.

19 See generally Stephan W Schill, ‘System-Building in Investment Treaty Arbitration and Lawmaking’ (2011) 21 German LJ 1083. At the same time, investment tribunals are regularly removed from the institutional controls that are customary under most domestic constitutional systems, notably the possibility that the legislator (whether the simple or the constitutional legislator) reacts to jurisprudential developments by making changes to the law in question. For this argument from the perspective of the principle of democracy, see Armin von Bogdandy and Ingo Venzke, In Whose Name? A Public Law Theory of International Adjudication (OUP 2014).
courts. Interestingly, this development is accompanied by an important strand in investment law scholarship that promotes the use of constitutional law arguments and comparative constitutional analysis as guidance for the development of international investment law.\[^{20}\] In all of these instances, investment tribunals assume functions of, and start occupying the same legal environment as, constitutional courts; at times they become competitors for, at times even predators to, constitutional adjudication.

It is against this background that constitutional courts are increasingly and more systematically called on to address the constitutional limits of investment treaties and investor-State arbitration. The catalysts for constitutional litigation on these matters are above all various mega-regional trade and investment agreements – often involving multiple parties with major economic and geopolitical importance – that have been negotiated during the last decade, such as the Comprehensive Economic and Trade Agreement (CETA) concluded between Canada and the European Union (EU), the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) concluded between eleven Pacific Rim economies,\[^{21}\] or the project of concluding the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the EU. While trade and investment deals have, for a long time, met with opposition in civil society – the abandoned Multilateral Agreement on Investment (MAI) in the 1990s, but also protests connected to negotiation rounds in the World Trade Organization (WTO) are some well-known examples\[^{22}\] – criticism of CETA and TTIP is different in character: it takes issue with how these agreements

---

\[^{20}\] See the references provided in n 16.

\[^{21}\] The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) is the successor agreement to the Trans-Pacific Partnership (TPP), which also involved the United States as a contracting party before President Trump withdrew from the agreement during his first days in office. In February 2021, the United Kingdom requested formal accession to the CPTPP. See e.g. the information on CPTPP provided by the Australian Government’s Department of Foreign Affairs and Trade at www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership accessed 29 October 2021.

approach globalization and global capitalism, is grounded in constitutional rules, principles, and values, and has resulted in raising these arguments in proceedings before constitutional courts.

To illustrate, CETA, including its provisions on investor-State dispute settlement and substantive investment protection standards, has prompted constitutional litigation in no fewer than five constitutional courts. The French \textit{Conseil constitutionnel}, the Court of Justice of the European Union (CJEU) (which, at least functionally, can be viewed as the EU’s constitutional court), and Ireland’s High Court have already handed down judgments on the constitutionality of CETA, addressing, \textit{inter alia}, principles of equal treatment, the independence of the judiciary, and the extent to which CETA affects democratic governance and policy space. The German Federal Constitutional Court, which was seized of several challenges to the constitutionality of CETA’s investment rules, first declined provisional measures to ensure that CETA’s investment rules would not become provisionally applied, and later found that CETA’s rules on investment protection and investment dispute settlement were constitutionally innocent, as these rules were not subject to provisional application, and no decision had been taken for CETA to enter fully into force.\(^{23}\) Across the Atlantic, a constitutional challenge against CETA has also been launched in the Canadian Federal Court, invoking violations of similar constitutional principles, including equal treatment, democratic legitimacy, and guarantees of an independent judiciary.\(^{24}\)

Yet, CETA is not the only investment agreement that has prompted constitutional litigation. Other investment agreements have also been challenged in proceedings – some concluded, some pending – that involve debate about constitutional limits to international investment law. These include – without any claim of completeness – proceedings in the constitutional courts of Colombia, Bolivia, Ecuador, and Costa Rica relating to specific bilateral investment trea-

\(^{23}\) For the decision on provisional measures, see German Federal Constitutional Court, BVerfGE 143, 65 – \textit{CETA}. For the decision rejecting the constitutional complaints, see German Federal Constitutional Court, Case No 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16, 2 BvE 3/16, Order (9 February 2022) ECLI: DE:BVerfG:2022:rs20220209.2bvr136816.

ties (BITs) or investment chapters in free trade agreements,25 and proceedings before Japanese courts concerning the constitutionality of the Trans-Pacific Partnership (TPP).26 The CJEU has also been involved in various proceedings that concern the interaction between EU constitutional law, international investment treaties, and investor-State dispute settlement outside the context of CETA, in particular in respect of intra-EU investment treaties.27

25 For Costa Rica, see e.g. Constitutional Chamber of the Supreme Court of Costa Rica, Resolution No 2007-09469 (3 July 2007) (on the Central America Free Trade Agreement). For Colombia, see e.g. Constitutional Court of Colombia, Judgment C-252/19 (2019) (on the France–Colombia BIT) and Judgment C-254/19 (2019) (on the Israel–Colombia Free Trade Agreement). The Constitutional Court of Ecuador has, in a series of cases between 2010 and 2014, concluded that several BITs providing for investor-State arbitration were contrary to art 422 of the Ecuadorian Constitution, which prohibits the State from concluding international treaties or instruments that cede jurisdiction to international arbitration entities for contractual and commercial disputes between the State and foreign natural persons or legal entities. A further request for interpretation, lodged in 2018, asking whether the prohibition set forth in art 422 of the Ecuadorian Constitution also applies to international investment disputes that are neither contractual nor commercial in nature, has been rejected by the Court as inadmissible; see Constitutional Court of Ecuador, Judgment No 2-18-IC/22 (12 January 2022). For details on the cases before the constitutional courts of Colombia and Ecuador, see José Gustavo Prieto Muñoz, ‘Constitutional Courts and International Investment Law in Latin America: Between Escalation and Conditional Coexistence’ (in this volume) 149. See also Juan Camilo Fandiño Bravo, ‘The Role of Constitutional Courts in International Investment Law and Investment Treaty Arbitration: A Latin American Perspective’ (2014) 18 Max Planck YB UN Law 667.


27 See e.g. CJEU, Opinion 2/15 EU–Singapore Free Trade Agreement EU:C:2017:376 (on the question of exclusive and shared competences between the EU and its Member States regarding foreign investment and investor-State dispute settlement). On the issue of intra-EU investment agreements and arbitration, see CJEU, Case C-284/16 Slovak Republic v Achmea BV EU:C:2018:158; Case C-741/19 Republic of Moldova v Komstroy LLC EU:C:2021:655; Case C-109/20 Poland v PL Holdings Sàrl EU:C:2021:875. See also accompanying text to nn 39–41 below.
Both of these developments – investor-State arbitrations moving into the realm, or even domaine réservé, of constitutional courts, and constitutional courts determining the constitutional limits of investment treaties and investor-State dispute settlement – reflect a change from occasional encounters between both fields of law to a more structured interaction. The interaction is structured because investment tribunals repeatedly take cognizance of and apply constitutional law, or assume functions of constitutional courts, and because, in return, constitutional courts become involved on a regular basis in evaluating the conclusion, interpretation, and application of investment treaties against core constitutional disciplines, namely democracy, the rule of law, and the protection of human rights.

Moreover, even though proceedings before constitutional courts typically relate to a specific (bilateral or regional) investment treaty, and address the constitutionality under the constitutional law of just one single country, the underlying tensions are of a general nature, as they pit principles of international investment law recognized in a large number of treaties against constitutional principles that exist across multiple constitutional orders and are not idiosyncratic to a specific constitutional system. The interaction between constitutional law and international investment law has, in other words, become a transnational legal phenomenon.

II COMPETING CLAIMS FOR AUTHORITY AND SUPREMACY

The new ways in which international investment law and constitutional law interact raises many practical issues, such as how investment tribunals should determine the meaning and content of constitutional law (in particular when that content is not fully clear), or how constitutional courts should determine how investment treaties are or should be interpreted (in particular when that content is not clear either). More importantly, however, the interaction

---

28 See Perenco v Ecuador (n 18) paras 319 ff for an example of a circumspect manner in which an investment tribunal attempted to determine the meaning of a provision of constitutional law, which had never been applied before by the country’s constitutional court, through recourse to the way the provision was understood by other constitutional organs, including the executive (in form of the Ecuadorian Ministry of the Environment, the Ministry of Non-Renewable Resources, and the Undersecretary of Environmental Protection within the Ministry of Mines and Petroleum) as well as the judiciary.

29 See e.g. Constitutional Court of Colombia, Judgment C-252/19 (n 25) on the constitutionality of the France–Colombia BIT, in which the Court examined how the standards of investment protection contained therein, such as fair and equitable treatment, national treatment, or the concept of indirect expropriation, are generally interpreted,
between both fields lays open normative tensions and, at times, gives rise to conflict, as both constitutional law and international investment law come with their own claims of authority and supremacy.

Constitutional law’s claim for supremacy is obvious when looking at the various proceedings before constitutional courts that address the constitutional limits for States when committing to investment treaty obligations. Depending on the constitutional procedures at play, such proceedings can, in case of a determination of unconstitutionality by a constitutional court, \textit{ex ante} prevent the treaty in question from entering into force or make that entry into force subject to certain conditions.\footnote{This has happened, for example, in constitutional litigation before the Colombian Constitutional Court; see Judgments C-252/19 and C-254/19 (n 25). For details, see Prieto Muñoz (n 25) 158–169.} Alternatively, constitutional litigation could \textit{ex post} require governments to terminate international investment agreements already entered into.\footnote{This has happened, for example, as a consequence of constitutional litigation in Ecuador. See Prieto Muñoz (n 25) 169–176. See also Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (signed 5 May 2020, entered into force 29 August 2020) [2020] OJ L 169/1 (hereinafter Termination Agreement) (resulting in the termination of intra-EU investment agreements as a consequence of the CJEU’s \textit{Achmea} decision; see Slovak Republic v \textit{Achmea BV} (n 27)).} Constitutional law’s supremacy may also have an impact on how domestic actors, in particular domestic courts, interpret the investment treaty in question in order to avoid constitutional conflict\footnote{See e.g. Republic of Moldova v \textit{Komstroy LLC} (n 27) paras 40–66 (requiring a certain interpretation of art 26 of the Energy Charter Treaty to avoid conflicts with EU law).} or influence the recognition and enforcement of investment treaty awards.\footnote{The enforcement of the \textit{Micula} award has involved a myriad of judicial bodies across various jurisdictions, see e.g. Cases T-624/15, T-694/15 and T-704/15 \textit{European Food SA and others v European Commission} EU:T:2019:423 and Case C-638/19 \textit{P European Commission v European Food SA and others} EU:C:2022:50 (setting aside the judgment of the General Court on appeal); \textit{Micula and others v Romania} [2020] UKSC 5; see also the reference in n 46 below. German courts have been concerned with the set-aside of the \textit{Achmea} award; see German Federal Court of Justice, Case No I ZB 2/15, Decision (31 October 2018) DE:BGH:2018:311018BIZB2.15.0 (setting aside the \textit{Achmea} award based on the invalidity of the arbitration clause in the underlying intra-EU BIT following the CJEU’s \textit{Achmea} decision) and ibid, Decision (24 January 2019) DE:BGH:2019:240119BIZB2.15.0 (rejecting Achmea’s challenge that the Court’s previous decision of 31 October 2018 violated the plaintiff’s right to be heard). In addition, the Dutch company Achmea has lodged a constitutional complaint before the German Federal Constitutional Court (Case No 2 BvR 557/19) challenging the aforementioned decisions by the German Federal Court of Justice. The com-}
Recent experience suggests that investment law, looked at from the perspective of constitutional law, prompts rather many concerns. These concerns include, amongst others, the reduction of democratic policy space by investment treaty standards that are, from the perspective of constitutional law, overly demanding and restrictive of democratic choice and that may negatively impact on competing fundamental and human rights of the host State’s population; issues of equal treatment, as investment treaties only protect foreign, not domestic investors; the lack of predictability and consistency in how investment tribunals interpret and apply investment treaties, considering both inconsistent decisions and the vagueness of most of the core standards of treatment; the independence and impartiality of arbitrators in light of the disputing parties’ involvement in the appointment process; and the procedural maxims that apply to investment proceedings, including questions of transparency and third-party participation. On all of these points, constitutional courts have been asked to assess whether investment treaties and investor-State dispute settlement remain within the limits set by constitutional law.

Asserting supremacy is not a one-way street, though. Investor-State arbitration tribunals also advance claims that international investment law enjoys supremacy over constitutional law. In fact, constitutional law, from the perspective of international law, is in principle no different from any other norm of domestic law and thus has to comply with the State’s international legal

obligations. Article 27 of the Vienna Convention on the Law of Treaties,\(^{34}\) as well Articles 3 and 32 of the International Law Commission’s Articles on State Responsibility,\(^{35}\) clarify that international legal obligations, including those contained in an investment treaty, are independent of, and supersede, domestic law, including constitutional law. This claim to supremacy of international investment law becomes particularly clear when considering arbitration proceedings that conclude that constitutional amendments had resulted in a violation of the State’s investment treaty obligations.\(^{36}\)

These competing claims for supremacy are not only of an abstract nature: they are capable of causing uncertainty and tension for all actors that are subject to the law, and that are caught between the normative demands of constitutional law and investment law, be they investors, States, or a State’s population affected by an investment project. This is so even when investment law and constitutional law do not create conflicting obligations, but merely overlap with different normative content in setting out differing standards of legality for State and investor behavior in a given situation. For example, even though the standards of legality under domestic constitutional law and international investment law may resemble each other, and as consubstantial norms have very similar content, investment tribunals and constitutional courts can, of course, interpret and apply the respective norms – for example, requirements for the legality of expropriations, prohibitions of arbitrariness, requirements of equal treatment – differently, so that one and the same government conduct could well be lawful under constitutional law, but unlawful under the applicable investment treaty (or vice versa). Examples that make this tension particularly clear are cases where one and the same measure is assessed before both an investment treaty tribunal and a constitutional court, such as the cases brought by Vattenfall relating to Germany’s nuclear power phase-out,\(^{37}\) or Philip Morris’s challenges to tobacco regulations in Australia

\(^{34}\) Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) (providing that ‘[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’).

\(^{35}\) International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/RES/56/83, Annex (providing respectively that ‘[s]uch characterization [of an act of a State as internationally wrongful] is not affected by the characterization of the same act as lawful by internal law’ and that ‘[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations’).

\(^{36}\) See e.g. von Pezold and others v Zimbabwe (n 17) paras 488–510, 542–52.

\(^{37}\) Vattenfall AB and others v Federal Republic of Germany, ICSID Case No ARB/12/12 (registered 31 May 2012, discontinued 9 November 2021).
and Uruguay. Divergent outcomes in turn are likely to create uncertainty as to the applicable standards of legality and, where investment treaty standards are more demanding than their constitutional pendant, reduce the authority of constitutional law (or the acceptance of investment law).

The normative pressure that international investment law and investor-State dispute settlement exercise on constitutional law, in turn, can prompt constitutional courts to reinforce constitutional law’s claims for authority and supremacy and lead to even more conflict in the relationship between both fields. Constitutional courts’ increased scrutiny, in turn, can prompt investment tribunals to be particularly sensitive in assessing their independence. Outright jurisdictional conflict may be the result and, fueled by competing claims to supremacy, may well spiral out of control. The most prominent example of such a conflict is currently playing out in the relationship between EU constitutional law and the CJEU, on the one hand, and investment agreements concluded between EU Member States (so-called intra-EU BITs), as well as the intra-EU application of the Energy Charter Treaty (ECT), and arbitral tribunals established thereunder, on the other hand.

In its 2018 judgment in Slovak Republic v Achmea, the CJEU famously held that investor-State arbitration provisions included in intra-EU investment treaties were contrary to core principles of EU constitutional law, notably the principle of autonomy of EU law and the principle of mutual trust and loyal cooperation between Member States. The CJEU has since clarified that the Achmea logic also applies to dispute settlement between a Member State and an investor from another Member State under the ECT, and to ad hoc agreements between disputing investors and States formed to substitute for an agreement to arbitrate based directly on an intra-EU BIT, which the CJEU held to be contrary to EU law in Achmea.

The CJEU’s position contrasts starkly with that of investment treaty tribunals established under intra-EU BITs and in intra-EU disputes under the ECT. So far, with the exception of one arbitral tribunal and two dissenting opinions.


39 Slovak Republic v Achmea BV (n 27).

40 Republic of Moldova v Komstroy LLC (n 27).

41 Poland v PL Holdings Sàrl (n 27).
to the contrary, who accepted that EU law takes precedence, investment treaty tribunals have not considered the CJEU’s jurisprudence on the incompatibility of intra-EU investment treaty arbitration with EU constitutional law to be relevant for determining their own jurisdiction under the treaties in question. Some of those tribunals are not shy of presenting the conflict as a clash


43  For examples, see Julian Scheu and Petyo Nikolov, ‘Jurisdiction of Tribunals to Settle Intra-EU Investment Treaty Disputes’ (2021) 36 ICSID Review 171, 172 note 6 (listing 26 decisions by arbitral tribunals rendered until September 2019 rejecting the relevance of the Achmea judgment for determining arbitral jurisdiction). Further examples rejecting the CJEU’s position in Achmea and Komstroy not listed in that article include SolEx Badazajt GmbH v Kingdom of Spain, ICSID Case No ARB/15/38, Award (31 July 2019) paras 223–53; Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary, ICSID Case No ARB/17/27, Award (13 November 2019) paras 200–48; Stadtwerke München GmbH and others v Kingdom of Spain, ICSID Case No ARB/15/1, Award (2 December 2019) paras 123–46; BayWa re Renewable Energy GmbH and BayWa re Asset Holding GmbH v Kingdom of Spain, ICSID Case No ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019) paras 244–83; RWE Inngoy GMBH and RWE Inngoy Aersa SÀU v Kingdom of Spain, ICSID Case No ARB/14/34, Decision on Jurisdiction, Liability and Certain Issues of Quantum (30 December 2019) paras 309–74; Watkins Holding Sàrl and others v Kingdom of Spain, ICSID Case No ARB/15/44, Award (21 January 2020) paras 180–226; Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v Cyprus, ICSID Case No ARB/15/49, Decision on Jurisdiction (7 February 2020) paras 150–87; Strabag SE and others v The Republic of Poland, ICSID Case No ADHOC/15/1, Partial Award on Jurisdiction (4 March 2020) paras 8.76–143; Ioan Micula and others v Romania, ICSID Case No ARB/14/29, Award (5 March 2020) paras 259–89; Hydro Energy I S.à.r.l and Hydroxana Sweden AB v Kingdom of Spain, ICSID Case No ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020) paras 446–502; Sunreserve Luxco Holdings Sàrl (Luxembourg) and others v Italian Republic, SCC Case No V (2016/32), Final Award (25 March 2020) paras 350–464; GPF GP Sàrl v The Republic of Poland, SCC Case No V 2014/168, Final Award (29 April 2020) paras 341–85; AMF Aircraftleasing Meier & Fischer GmbH & Co KG v Czech Republic, PCA Case No 2017-15, Final Award (11 May 2020) paras 329–414; Addiko Bank AG and Addiko Bank dd v Republic of Croatia, ICSID Case No ARB/17/37, Decision on Croatia’s Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis (12 June 2020) paras 197–308; Cavalmun SGPS, SA v Kingdom of Spain, ICSID Case No ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum (31 August 2020) paras 301-371; ibid, Decision on the Kingdom of Spain’s Request for Reconsideration (10 January 2022) paras 36–99; ESPF Beteiligungs GmbH and others
of a constitutional nature, in which they assert the supremacy of international investment law over constitutional law. The Tribunal in *RREEF v Spain*, for example, posited that:

74. … The ECT is the ‘constitution’ of the Tribunal … This is what the Parties to the ECT agreed amongst themselves; it is not within the jurisdiction of the Tribunal to alter this.

75. Therefore, in case of any contradiction between the ECT and EU law, the Tribunal would have to insure the full application of its ‘constitutional’ instrument, upon which its jurisdiction is founded. … It follows from this that, if there must be a ‘hierarchy’ between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law. Therefore, the ECT prevails over any other norm (apart from those of *ius cogens* – but this is not an issue in the present case) …

---

44 *RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016) paras 74–5 (emphases in the original).
Quite similarly, the Tribunal in *Kruck and others v Spain* commented on the relationship between the ECT and EU law as follows:

The Tribunal recognizes that there is here a clash of *Grundnormen*. The CJEU has its role and authority within the EU legal order. The CJEU itself has made clear that ECT arbitration tribunals are not part of that legal order. Their role and their authority is established by an international treaty, concluded by sovereign States and by the EU. … The mandate of this Tribunal, and its authority, derive from the agreement of the ECT Contracting Parties in accordance with international law and are invoked by the Parties to the dispute. It is deeply regrettable that parties to disputes should find themselves caught up in a clash of *Grundnormen* that could have been foreseen and resolved in advance. But this Tribunal has the duty to fulfil its mandate under the ECT, and has no legal right or capacity to do otherwise. The solution lies in the hands of the Contracting Parties to the ECT.45

As is clear from these statements, and from what might be referred to as the ‘*Achmea* fallout’, the relationship between investment law and constitutional law can result in head-on jurisdictional conflict, with courts and tribunals on both sides of the conflict asserting authority and claiming supremacy of the legal order they apply. A resolution of that conflict, at least within the adjudicatory systems of investment arbitration and EU courts, is nowhere in sight.

Any such resolution, from within the adjudicatory processes, is difficult as neither investment tribunals, nor the CJEU, are able to effectively impose their own claim to supremacy on the respective other. Certainly the CJEU, and domestic courts of EU Member States, are able to set aside and refuse enforcement of investment treaty awards rendered in intra-EU disputes. At the same time, the decision by investment tribunals to continue ‘processing’ cases submitted to them, notwithstanding *Achmea*, bypasses the *Achmea* ruling and is not directly actionable before the CJEU. In addition, investors may seek to enforce respective awards outside the EU legal order despite the CJEU’s ruling, thus circumventing the CJEU’s assertion of EU law’s supremacy.46

45 *Kruck and others v Spain*, Decision on Request for Reconsideration (n 43) para 46.
46 See e.g. Ioan Micula and others v Gov’t of Romania, 404 FSupp 3d 265 (DDC 2019), aff’d, No 19-7127 (DC Cir, 19 May 2020); *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 (confirming the awards in *Eiser Infrastructure Ltd and Energía Solar Luxembourg Sàrl v Kingdom of Spain*, ICSID Case No ARB/13/36 and *Infrastructure Services Luxembourg Sàrl and Energia Termosolar BV* (formerly *Antin Infrastructure Services Luxembourg Sàrl and Antin Energía Termosolar BV*) v *Kingdom of Spain*, ICSID Case No ARB/13/31), aff’d, *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 3 and 112.
As none of this offers satisfactory outcomes beyond individual instances, it is increasingly recognized, as stated *inter alia* in *Kruck and others*,\textsuperscript{47} that only the political branches of government will be able to resolve the clash between EU constitutional law and international investment law. Responding to that challenge, in May 2020, most EU Member States concluded the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, which aims at ending investor-State arbitration under intra-EU BITs in favor of settling such disputes in domestic courts, limits enforcement of awards resulting from intra-EU BIT arbitration, and provides for the resolution of pending disputes through a mediation-like ‘structured dialogue’.*\textsuperscript{48} The European Commission, in turn, has initiated infringement proceedings against Member States who have so far refused to sign and ratify the Termination Agreement.\textsuperscript{49}

While the debate about *Achmea* is in many ways peculiar, conflicts between legal orders that both assert claims for supremacy are deeply problematic. Not only do they create legal uncertainty about which norm is applicable in which context; competing claims to supremacy also have an impact on the balance between, and the preference to be given to, the underlying values and interests protected by each regime, as different actors use different forums – constitutional courts or international investment tribunals – to see their own interests prevail. Ultimately, such conflicts have the potential to undermine the legitimacy of both constitutional law and international investment law, if both regimes are perceived as insufficiently protecting important interests at play. Foreign investors see shortcomings in how domestic constitutional law protects them against certain types of government action, just as those with competing rights and interests see shortcomings in how international investment law takes their interests into account. Claims to supremacy of either regime will fail to adequately meet the expectations of the respective other.

---

\textsuperscript{47} *Kruck and others v Spain*, Decision on Request for Reconsideration (n 45) para 46.

\textsuperscript{48} Termination Agreement (n 31). Austria, Finland, Sweden, and Ireland have not signed the agreement; Ireland, however, has not concluded any of the treaties in question. For analysis of the agreement, see Johannes Tropper and August Reinisch, ‘The 2020 Termination Agreement of Intra-EU BITs and Its Effect on Investment Arbitration in the EU: A Public International Law Analysis of the Termination Agreement’ [2022] Austrian YB Int’l Arbitration 301.

Against that background, it must be asked whether it is possible to reduce, if not avoid, conflicts between international investment law and constitutional law and arrive at more harmonious, complementary relations between both types of regimes and the interests and values they each protect. When seeking answers to that question, it is key that both sides, international investment law and constitutional law, begin to develop a better understanding of the circumstances and sources of conflicts, of the different perspectives and objectives pursued by the two systems involved, and explore means and methods of coexistence, perhaps even cooperation, in order to resolve underlying conflicts. The contributions to the present book, as we describe in more detail in the next section, explore the different sets of issues involved in that endeavor.

III CONTRIBUTIONS TO THE PRESENT BOOK

The contributions to the present volume are grouped in three sections, which make up Parts II, III, and IV of the book. The contributions in Part II provide overarching analyses that explain the increasing interaction between international investment law and constitutional law and lay out the challenges this raises from the perspective of constitutional law and constitutional theory. These contributions frame the debate about the relationship between international investment protection and constitutional law in terms of three core principles of constitutional law: human rights, democracy, and the rule of law. The contributions in Part III of the book then focus on the requirements domestic and supranational constitutions establish for the constitutionality of international investment treaties. This encompasses contributions that focus on both the post hoc control of constitutionality of investment treaties by constitutional courts and on the role constitutional law plays prospectively in shaping the negotiation and content of investment agreements. Part IV of the book, finally, shifts perspective and addresses the increasing influx of constitutional law thinking and constitutional law analysis inside the field of international investment law and investor-State dispute settlement.

A Framing the Debate: Human Rights – Democracy – Rule of Law

Part II of the book offers three overarching perspectives on the interaction between international investment law and constitutional law. Markus Krajewski’s contribution addresses the relationship between international investment law and one of the core components of modern constitutional
Between conflict and complementarity

Rather than focusing on the conceptual interrelations and the influx of human rights analysis in the interpretation of international investment agreements, he focuses on the tensions arising from what can be called a ‘human rights paradox’, that is, the fact that foreign investors are granted a specific set of property rights under international investment law, without at the same time being obliged under international law to respect competing human rights of affected populations. Krajewski likens this approach of international investment agreements – to create rights and provide for effective enforcement mechanisms – to Karl Polanyi’s observation in his 1944 book *The Great Transformation*: just as States (in Polanyi’s argument) deliberately shaped modern markets by enshrining property rights and guaranteeing the enforcement of contractual claims, so the contemporary investment landscape, rather than evolving naturally, is the result of a deliberate, indeed ‘transformative’, State intervention aimed at dis-embedding investor rights from their domestic context. In Krajewski’s words:

international investment agreements seek to dis-embed foreign investors by offering them a layer of additional protection at the international level and therefore delinking them from the legal and political consequences of their embeddedness in the domestic context. … The internationalization of foreign investment on the basis of these agreements therefore delinks the investment from its societal and political context and therefore leads to a dis-embedding of foreign investors and investments.\(^{51}\)

This dis-embedding, in turn, creates an imbalance in the enjoyment and enforcement of human rights. The solution to this human rights paradox, Krajewski suggests, consists of laying down explicit investor obligations to respect human rights. These obligations should ideally be agreed at the international level itself in order to ensure that foreign investors are prevented from trying to use international investment agreements as instruments to avoid human rights obligations under domestic law. While this will bring investment law and human rights closer together, Krajewski also warns of the continued challenges such a re-embedding at the international level will involve. Instead of resulting in a neat and harmonious coexistence of human rights and investment law, the reality is likely to consist of ‘a pluralistic regime consisting of

\(^{50}\) Markus Krajewski, ‘Re-Embedding Foreign Investment Through Human Rights Obligations for Business Entities: A Nightmare or a Noble Dream?’ (in this volume) 39.

\(^{51}\) ibid 44.
domestic legislation, international soft law standards, and variations in domestic and international jurisprudence’.52

Rhea Tamara Hoffmann’s contribution pursues the linkages between investment protection and constitutional guarantees. She explores the differences in investment protection under domestic and international law and its implications for another core element of modern constitutional law: the principle of democracy.53 She shows that the granting of special rights to foreign investors risks undermining what she calls a ‘property compromise’, that is, the idea that the protection of property in democratic systems goes along with certain duties of property holders vis-à-vis the State and society, duties that are determined through democratic processes and that constitute conditions for why a society accepts granting property rights in the first place. Drawing on constitutional theory, as well as examples from the legal orders of Germany and South Africa, Hoffmann argues that international investment agreements grant a level of property protection that is more extensive and more beneficial to the foreign investor than the one most domestic legal orders offer; in addition, international investment agreements, to a considerable extent, limit the duties the protection of property usually entail under the law of host States. This, in essence, ‘isolate[d] foreign investors from the national property compromise’54 – a ‘dis-embedding’ (in Krajewski’s words) of a particular kind.

Hoffmann argues that this ‘transformation is constitutionally precarious, because the investment protection regime is based on a lower level of democratic legitimacy compared to domestic law’.55 It is lower, she argues, mainly because of the wide discretion that openly worded standards of investment protection grant to arbitral tribunals, because of the considerable impact the standards thus interpreted have on limiting government conduct, and because of the difficulties in reversing, through democratic processes, the level of protection once granted to foreign investors. Against this background, Hoffmann considers classical investment agreements to be difficult to reconcile with the principle of democracy, while more recent agreements, such as CETA, in her view, make strides in improving the democratic deficit. Advances consist in particular in more specific formulations of investment protection standards that better ensure respect for public interests, as well as the creation of the more permanent and stable Investment Court System (ICS), which has been created to settle investor-State disputes under the agreement.

---

52 ibid 55.
54 ibid 76.
55 ibid.
Till Patrik Holterhus, in the final contribution to Part II of the book, then turns to the demands that the rule of law, as a principle of constitutional law, formulates in respect of the content of international investment agreements and the investor-State dispute settlement mechanisms they establish. The core question he asks is whether the content of international investment agreements is merely a matter of a State’s foreign economic policy, or whether it is also influenced by the elements flowing from the constitutional principle of the rule of law. Although his focus is specifically on demands for the constitutional protection of the rule of law in the EU treaties, Holterhus’s analysis can be read to apply, *mutatis mutandis*, to rule-of-law requirements imposed by many constitutional systems. Holterhus addresses both international investment law’s conceptual deficits with respect to the rule of law and demonstrates that the EU’s reform efforts to bring international investment law more in line with the rule of law not only follow a political agenda, but also are determined by the EU’s obligation under its constituent treaties to promote the rule of law in its external actions.

Holterhus acknowledges that ‘[f]or the larger part, international investment law is a legal system that works with an established *acquis* of fairly functioning legal norms and an arbitral mechanism that complies with the basic requirements of a balanced system of legal dispute settlement’. Still, he notes rule-of-law shortcomings that international investment agreements exhibit. These include the vagueness of many key provisions of investment agreements and incoherent decisions that challenge the predictability and legal certainty the rule of law requires. In respect of investor-State dispute settlement, Holterhus lists the absence of an appellate mechanism or other effective mechanism for reviewing arbitral awards, the impact of the parties on the composition of tribunals, the possibilities for double-hatting, and the lack of full transparency as the principal rule-of-law deficits of international investment law. Given the obligations under the EU’s constituent treaties to use the rule of law as a yardstick also for its foreign investment policy and the design of the international investment agreements it negotiates, Holterhus is hopeful that the EU’s involvement in the field will positively impact international investment law by trimming it to take rule-of-law considerations better into account.

---

56 Till Patrik Holterhus, ‘Which It Seeks to Advance in the Wider World’ – The EU’s Legal Obligation to Promote the Rule of Law in International Investment Law’ (in this volume) 94.
57 ibid 101.
B Constitutional Law Limits in Comparative Perspective

The contributions in Part III move from looking at tensions between the principles of constitutional law and international investment law to a more granular approach, dealing with how specific constitutional legal orders and their respective constitutional courts engage with arguments about the limits constitutional law imposes on the conclusion and implementation of international investment agreements.

Sabrina Robert-Cuendet opens up with an analysis of the decision by the French Conseil constitutionnel from July 2017 – the first decision by a constitutional court in Europe concerning such matters – which addresses the limits the French Constitution imposes on international investment agreements and investor-State dispute settlement, in this case the investment chapter in CETA.\footnote{Sabrina Robert-Cuendet, ‘Investor-State Dispute Settlement and French Constitutional Law: The Conseil constitutionnel’s Decision of 31 July 2017 on CETA’ (in this volume) 119.} The proceedings, initiated by a group of over 100 French parliamentarians, saw the Conseil constitutionnel scrutinize the constitutionality of CETA on the basis of Article 54 of the French Constitution, that is, in a form of control that ‘is a priori and in abstracto’ and ‘occurs before the approbation or ratification of the treaty by France’.\footnote{ibid 121.} This, Robert-Cuendet criticizes, led to an at times rather ‘quick and superficial analysis’,\footnote{ibid 140.} even though the Conseil was able to address a broad set of constitutional arguments. In the end, the Conseil constitutionnel approved the constitutionality of CETA, in ways that largely foreshadowed the decision by the CJEU in Opinion 1/17,\footnote{CJEU, Opinion 1/17 CETA EU:C:2019:341.} to which Robert-Cuendet repeatedly refers.

In reaching its decision, the Conseil constitutionnel rejected a whole set of arguments asserting the unconstitutionality of CETA’s investor-State dispute settlement mechanism and the substantive rights granted to foreign investors. The Conseil constitutionnel found that CETA was in conformity with the constitutional guarantee to ensure recourse to independent and impartial adjudicators, as both the CETA Tribunal, as well as the CETA Appellate Body, require its judges to be impartial and independent, contain extensive ethical requirements, and provide for procedures to remove decision-makers who do not live up to the applicable standards. Furthermore, the Conseil constitutionnel pointed out that CETA’s investor-State dispute settlement mechanism is optional and does not fully replace domestic courts in the resolution of investor-State disputes. The Conseil constitutionnel also found that CETA
contains numerous other innovations: provisions that limit the interpretative powers of investment tribunals and circumscribe the substantive rights more concretely than old-generation BITs; remedies that are limited to damages to the exclusion of specific performance; the establishment of treaty committees that could serve as legislative counterweights and correct wrong-headed interpretations of CETA’s investment chapter; and the requirement that CETA’s investor-State dispute settlement mechanism respect the host State’s right to regulate. For the Conseil constitutionnel these were sufficient guarantees to ensure that CETA’s investment chapter would not infringe core guarantees of the French Constitution and leave France’s constitutional identity intact. Likewise, the Conseil constitutionnel found that the granting of rights under CETA to foreign investors only did not violate the constitutional guarantee of equality. The different treatment of foreign investors, it found, was justified by specific public interest objectives, namely, to increase foreign investments in the relations between the contracting States.

José Gustavo Prieto Muñoz’s contribution then turns to the evolving practice of the Ecuadorian and Colombian courts on the constitutionality of international investment agreements.62 Prieto Muñoz analyzes the jurisprudence of both courts as examples of different strategies for engaging with international investment law when identifying conflicts or tensions with constitutional law: either escalation, meaning the assertion of normative supremacy of the Constitution, or conditional coexistence, that is, an approach of continued checks and balances that permits international investment agreements to come into existence subject to conditions set and monitored by constitutional courts.

Escalation was, Prieto Muñoz explains, the strategy adopted by the Colombian Constitutional Court in 1996 when it found that the BIT between Colombia and the United Kingdom was incompatible with the Colombian Constitution because it granted rights to UK nationals without according them to Colombian nationals and because it did not allow, under certain circumstances, unlike the Colombian Constitution, for expropriations without compensation. Consequently, the Colombia–United Kingdom BIT could not enter into force. However, rather than result in a permanent supremacy of constitutional law, it took only some three years for Colombia to change the constitutional provisions the Court found to block the BIT from entering into force. The Court’s approach to constitutional limits to the State’s participation in the international treaty regime, therefore, ultimately had the directly opposite effect from constitutional supremacy: it resulted instead in an adaptation of constitutional law to the demands of international investment law. Insisting on the Constitution’s supremacy led to changes in constitutional law and the

---

62 Prieto Muñoz (n 25).
de facto supremacy of international over constitutional law. As put by Prieto Muñoz: ‘the judgment did not increase the Court’s influence over the future of the Colombian Constitution; on the contrary, the Court’s argumentative efforts to uphold … the Constitution instead forced a change to the Constitution itself’. 63

The experience of Ecuador’s Constitutional Court was similar. It too lost influence over the future content of international investment law when it decided that a newly introduced constitutional norm that prohibits Ecuador from agreeing to arbitrate contractual and other commercial disputes with private parties requires Ecuador to terminate BITs that contain investor-State dispute settlement provisions. This decision, as Prieto Muñoz argues, not only was ineffective in allowing Ecuador to disengage from its international investment agreements; the decisions also had the paradoxical effect that the Ecuadorian Court lost influence over the interpretation of parts of its own domaine réservé, the Ecuadorian Constitution, in favor of investment tribunals.

Discussing the International Centre for Settlement of Investment Disputes (ICSID) cases in *Burlington v Ecuador* and *Perenco v Ecuador*, Prieto Muñoz shows that investment tribunals in those cases were asked by the Ecuadorian government to decide on counterclaims for environmental damage caused in the investments’ operations that were based on the breach of a provision in the Ecuadorian Constitution, which had introduced a strict liability regime for environmental damage. Since the constitutional norm in question had never been applied or interpreted before by the Ecuadorian Constitutional Court, the investment tribunals in *Burlington* and *Perenco* ended up being tasked, in a case of first impression, to interpret and apply that norm, therefore exercising a function one would normally expect the Constitutional Court itself to fulfill. For Prieto Muñoz:

The Ecuadorian experience underscores how important it is for a constitutional court to retain jurisdiction over the interpretation of constitutional texts in the face of a state’s engagement with international law, in order to protect its own authority and the autonomy of the legal system. By claiming this exclusive authority, a court can ensure the uniform interpretation and consistent application of the constitution. 64

The better strategy to ensure that influence, Prieto Muñoz argues, is to seek a form of conditional coexistence. This is the strategy adopted in two judgments rendered in 2019 by the Colombian Constitutional Court that concerned the constitutionality of the Colombian BIT with France, and Colombia’s free trade agreement with Israel. In an approach that is reminiscent of the idea of

---

63 ibid 163–4.
64 ibid 175.
constitutional counter-limits, a well-known constitutional safety valve used by several constitutional courts in EU Member States to limit the supremacy of EU law and its interpretation by the CJEU, the Colombian Constitutional Court found the agreements in question to be constitutional, but it made that finding conditional on Colombia and its treaty partner issuing declarations expressly excluding certain interpretations of the treaty that would be contrary to the Colombian Constitution as understood by the Colombian Constitutional Court. In addition, the Constitutional Court stressed its own duty to continuously monitor the interpretation and future application of the treaties, so as to ensure that they remain within the limits established by the Colombian Constitution, in particular as regard safeguarding sufficient policy space for Colombia to regulate in the public interest. This strategy allows for a constitutional court’s continued influence over the interpretation of international investment law, and is therefore preferable to strict insistence on constitutional supremacy.

The idea of constitutional counter-limits, which are enforced by constitutional courts, and used to monitor how investor-State dispute settlement mechanisms interpret and apply international investment agreements, is also used by the CJEU in relation to the EU’s own international investment instruments, as Angelos Dimopoulos shows in his contribution. In Opinion 1/17, the CJEU assessed to what extent CETA complies with the EU’s constitutional order, in particular the principle of autonomy of EU law, a principle of EU constitutional law that ensures ‘the protection of the EU’s institutional and constitutional integrity’, which is closely linked to the Court’s exclusive jurisdiction to ensure the authentic and authoritative interpretation of EU law, and the provisions of the Charter of Fundamental Rights, the EU’s binding human rights catalog.

As far as the Charter of Fundamental Rights is concerned, the CJEU addressed the same arguments that were already raised before the French Conseil constitutionnel, namely that CETA’s granting of rights to foreign investors violated the right to equal treatment and that CETA’s ICS itself did not comply with the procedural guarantees of independence and impartiality. On both counts, the CJEU found that CETA complies with the Charter requirements. In its view, the ICS sufficiently ensures independence and impartiality; the principle of equal protection is complied with because the Court considered foreign investors not to be in a comparable situation to national investors, possibly – but the Court’s reasoning in this respect lacks clarity – because they face greater difficulties in investing on an equal footing to national investors.

---

66 ibid 195 (referring to CJEU, Opinion 1/17 (n 60) paras 109–10).
In respect of the principle of autonomy, the CJEU concluded that no violation occurred either, because CETA ‘does not confer on the envisaged tribunals any power to interpret or apply EU law [and] does not structure the powers of those tribunals in such a way that … awards … have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework’.67 In fact, the Contracting Parties to CETA have taken pains to ensure that the judges of the ICS can only interpret the provisions of CETA, not those of domestic and EU law, and are limited in their remedies to damages, thus maintaining the CJEU’s monopoly in both the interpretation of EU law and the legality under EU law of measures taken by EU institutions or Member States.

While the CJEU therefore found that, in principle, CETA’s investment chapter is not incompatible with EU constitutional law, it qualified this by two caveats. One relates to the difficulties for small- and medium-sized enterprises (SMEs) to access CETA’s investor-State dispute settlement mechanism and make use of it to enforce their substantive rights as foreign investors. Here, the Court was concerned that the high costs of litigation under CETA could limit access to justice of those SMEs, contrary to the guarantee in Article 47 of the Charter of Fundamental Rights. The Court therefore demanded that the Contracting Parties to CETA ensure that litigation before CETA’s ICS was affordable for SMEs, for example, by providing for less costly means of litigation, or by establishing a legal aid mechanism. Such a mechanism, the Court noted, could be established under CETA itself and therefore does not constitute a constitutional obstacle to CETA’s entry into force.

The second caveat concerned the issue of policy space. While the Court acknowledged that the autonomy of EU law is safeguarded because the ICS cannot strike down EU conduct that is contrary to CETA’s investment protection standards, the CJEU was concerned that monetary remedies could indirectly affect and reduce the EU’s policy space to regulate in the public interest. In this respect, the CJEU reasoned that

the jurisdiction of those tribunals [established under the ICS] would adversely affect the autonomy of the EU legal order if it were structured in such a way that those tribunals might, in the course of making findings on restrictions on the freedom to conduct business challenged within a claim, call into question the level of protection of a public interest that led to the introduction of such restrictions by the Union.68

---

67 CJEU, Opinion 1/17 (n 60) para 119.
68 ibid para 148.
The Court explained that

this could create a situation where, in order to avoid being repeatedly compelled by the CETA Tribunal to pay damages to the claimant investor, the achievement of that level of protection needs to be abandoned by the Union … Hence it would have to be concluded that such an agreement undermines the capacity of the Union to operate autonomously within its unique constitutional framework.69

Through this second caveat, similar to the Colombian Constitutional Court’s 2019 decisions, the CJEU effectively introduced constitutional counter-limits to the interpretation and application of CETA, in order to ensure, and continuously monitor, that the EU’s power to regulate in the public interest was not undermined.

Whereas the CJEU’s approach to EU investment agreements was rather flexible, its take on BITs concluded among Member States (so-called intra-EU BITs), which is discussed by Hannes Lenk’s contribution, is quite different.70 While the affected principles of EU constitutional law, notably the principle of autonomy and the principle of non-discrimination, are almost identical to those assessed in Opinion 1/17, the CJEU decided in its famous Achmea decision that intra-EU BITs are contrary to EU constitutional law.71 In particular, the Court found that the principle of autonomy, as well as the principle of mutual trust between Member States, prevents Member States from agreeing in BITs to investor-State dispute settlement mechanisms that would bypass domestic courts and the preliminary reference mechanism laid down in EU law,72 as this ensures the CJEU’s interpretative monopoly over EU law. In reaching this result, the CJEU found it irrelevant whether tribunals operating under the BITs’ investor-State dispute settlement mechanism actually apply EU law. What is relevant instead is that Member States, by agreeing to investor-State arbitration in a BIT, withdraw an entire class of disputes from the jurisdiction of the domestic courts and the supervision of the CJEU, thus opting out of central institutional norms of the EU’s constitution.

Lenk focuses not on a criticism or defense of the Achmea decision, and its reception in the jurisprudence of investment tribunals. Instead, he puts the

69 ibid paras 149–50.
70 Hannes Lenk, ‘Constraints on Intra-EU BITs in the Union Legal Order’ (in this volume) 221.
71 Slovak Republic v Achmea BV (n 27).
72 See Treaty on the Functioning of the European Union (Consolidated Version) [2012] OJ C 326/47, art 267. This provision lays down the authority of courts or tribunals of Member States, and under certain circumstances an obligation of these courts, to refer questions concerning the interpretation and application of EU law to the CJEU for authoritative determination.
relationship between constitutional arguments and politics at the center of his analysis. Insisting that the spheres of constitutional law and politics operate independently, Lenk first reminds us that the conflict between intra-EU BITs and EU law, notably the EU’s internal market rules, is principally due to ‘political failures on the part of the EU institutions to address this issue during the process of transitioning the accession countries into the internal market’. Consequently, the Achmea decision is not so much a decision that targets or criticizes international arbitration and the community of investment arbitrators and arbitration counsel, but is directed at EU Member States and the European Commission for failing to address the fate of intra-EU BITs during the different rounds of accessions of new Member States to the EU from 2004 to 2013. In that respect, according to Lenk, the Achmea decision fulfills a core function of constitutional law, that is, to ensure that the political process, rather than the settlement of investment disputes under BITs, observes constitutional law.

Second, Lenk sensitizes us to the fact that the Achmea decision, like any other decision of a constitutional court on questions of constitutional law, generally leaves significant room for the political process to determine how to implement such a decision and remedy the breaches of the constitutional framework. In this context, Lenk observes that the termination of intra-EU BITs was just one option for Member States to react to Achmea. In Achmea, he insists, the Court ‘acknowledges that things were different if an investment tribunal was common to all Member States, which would then be empowered to request a reference from the CJEU ex officio’. Termination of intra-EU BITs, Lenk suggests, was therefore not a constitutional necessity. Member States could have created just as well, had they wanted to, a specific investment court for intra-EU investment disputes provided (1) that all EU investors have access to such a mechanism against all EU Member States other than their home State, and (2) that that mechanism could have referred questions concerning the interpretation and application of EU law to the CJEU. Constitutional limits, in other words, limit the political process and what content politics can give to international investment agreements, but they still leave sufficient margin for politics to create a system of investment protection and dispute resolution.

73 Lenk (n 70) 228.
74 ibid 241 (internal reference omitted).
75 Such a mechanism had been suggested by Austria, Finland, France, Germany, and the Netherlands, see ‘Intra-EU Investment Treaties – Non-paper from Austria, Finland, France, Germany and the Netherlands’ (7 April 2016) www.tni.org/files/article-downloads/intra-eu-bits2-18-05_0.pdf accessed 22 February 2022.
C Constitutional Analogies in International Investment Law

The increasing impact of constitutional law analysis, and the involvement of constitutional courts in reviewing the constitutionality of international investment agreements and investor-State dispute settlement, has not gone unnoticed in international investment law. One common reaction among investment lawyers, which can be seen particularly in relation to the CJEU’s Achmea decision, is to criticize constitutional lawyers and constitutional courts for misunderstanding investment law and investment arbitration and to resist constitutional law’s demands and impact.76 This is not the only reaction, however, as the contributions in Part IV of the book show. The chapters in this Part explore to which extent international investment law itself constitutes a form of constitutional law and seek to concretize international investment law’s standards of treatment and other open-ended concepts relevant for investor-State dispute settlement through constitutional law analogies.

Joshua Paine analyzes to what extent the substantive standards of treatment contained in international investment treaties can be understood as an emerging form of global constitutional law.77 Focusing on fair and equitable treatment (FET), provisions on expropriation, and national treatment, he argues that investment treaty law is an example of ‘supplementary constitutionalization’, that is, a type of international law that governs issues traditionally regulated by domestic constitutional law. As Paine shows, the three standards in question reflect constitution-type norms. This holds true in respect of the protection of investments/property against direct and indirect expropriations without compensations under investment treaties and domestic constitutional law, the principle of non-discrimination protected under investment treaties and domestic standards of equal treatment, as well as the requirements under FET that the host State must respect due process, reasonableness, proportionality, non-arbitrariness, regulatory stability, and the protection of legitimate expectations.

It is against this background that Paine evaluates the use of constitutional analogies in interpreting and applying international investment agreements. Conceptually, Paine suggests, constitutional law analogies ‘can help us better understand the two-way national-international interaction that is central to the investment treaty regime’.78 They illustrate both the constitution-like impact investment treaties have on the balances of competing rights and obligations at the domestic level, and the influence domestic constitutional law concepts have

---

76 See e.g. Electrabel v Hungary (n 8) para 4.112.
77 Paine (n 16).
78 ibid 257.
on the way investment tribunals conceptualize, interpret, and apply investment treaty standards. Normatively, Paine continues, constitutional law analogies can provide guidance ‘for more balanced interpretations’ of investment treaty standards by requiring to construe such standards ‘in their wider context, and in a manner that does not undermine other domestic or international constitutional values’, and adapting investment law to other constitutional demands, such as increased transparency and openness. At the same time, Paine warns of the danger that if constitutional law analogies are used ‘in an unbalanced manner, which does not give sufficient weight to non-investor interests or the principle of subsidiarity, it is likely to fuel contestation and rejection of what is already a highly controversial area of international law’.

Constitutional law analogies can therefore only be as good as those who make use of them, including counsel pleading and tribunals deciding investment disputes and giving reasons for their decisions. To this end, Paine’s analysis serves as a call on tribunals to reflect critically on constitutional analogies and to use them for the right reasons and ends.

Paine’s analysis is also highly useful for reminding us of what constitutional law does not, or should not, imply for international investment law: namely fortify and therefore one-sidedly constitutionalize economic interests to the detriment of competing concerns. In Paine’s words:

Firstly, this exercise should not be undertaken in a way that posits a small number of economic interests (of foreign investors) as fundamental rights that prevail over all other interests that are affected by the investment regime. Second, and relatedly, the analysis should not be understood as implying that the rights that foreign investors arguably hold under investment treaties are human rights. … Third, reading investment law as having certain ‘constitution-like’ qualities does not necessarily imply that the existing investment regime is legitimate, nor that its norms are above politics. … Finally, a predictable criticism of reading investment law as global constitutional law is that this system lacks a true polity that could legitimize it …

Valentina Vadi, in the final contribution to the book, reflects on a different facet of the constitutional law analogy and asks to what extent investor-State arbitration tribunals can or should be analogized with constitutional courts. While recognizing similarities in the substantive norms applied and the function to subject government authority to the rule of law, Vadi notes deep structural differences between investment treaty arbitration and constitutional adjudication. These concern above all the fact that investment tribunals are one-off dispute

---

79 ibid 257–8.
80 ibid 258.
81 ibid 269–70 (internal references omitted).
82 Vadi (n 16).
settled bodies, that their composition is determined largely by the disputing parties, that they operate predominantly according to private-law rationales, and that their jurisprudence is full of inconsistencies. Constitutional courts, by contrast, are embedded in a specific polity, their members are appointed in democratically legitimized procedures, and their jurisprudence is generally consistent and developed in public proceedings. Moreover, unlike constitutional courts, investment tribunals cannot draw on ‘a complete value system as do constitutions’. Instead, investment agreements generally only focus on investor rights and economic interests and say little about competing concerns. Investment tribunals therefore have “monothematic” jurisdiction and are hardly able to ‘unite all aspects of the common good … for all persons subject to their authority’. Finally, investment arbitration concentrates on monetary remedies, not the reestablishment of the lawful status quo ante. For these reasons, investment treaty tribunals and the law they apply lack constitutional density. For all of these reasons, Vadi concludes, investment tribunals should not be viewed as (global) constitutional courts.

This notwithstanding, Vadi insists that the constitutional analogy is useful because it allows constitutional courts and investment tribunals to realize that both operate in comparable legal spaces, deal with comparable legal issues, and may face situations of normative overlap and tensions. For these tensions to be resolved efficiently and legitimately, dialogue between constitutional courts and investment tribunals is, Vadi considers, ‘useful and desirable’. Such dialogue would not only have the purpose of helping to clarify legal concepts used in investment arbitration or before constitutional courts and to put checks on the exercise of governmental power; such dialogue can also be seen, Vadi suggests, as a form of checks and balances in the relations between international investment law and constitutional law. Investment tribunals would adjudicate on compliance of States and their organs with commitments under international law; constitutional courts in turn could help foster State compliance with international law, but also adjudicate on the constitutional limits of investment agreements and enhance the legitimacy of international investment law and arbitration by nudging arbitrators toward producing decisions that are generally in line with the constitutional limits to international investment law.

\[\text{83 ibid 325.}\]
\[\text{85 Vadi (n 82) 329.}\]
\[\text{86 ibid 336–9.}\]
However, Vadi also warns that looking at investment law through the lens of constitutional analogies may create its own blind spots. After all, constitutional thinking, including in international law, often reflects constitutional ideas and concepts that are specifically Western, while disregarding perspectives developed outside and beyond the canon of Western constitutional law on the relationship between the State and the economy, or between individuals and society as a whole. In Vadi’s view, constitutional analogies should therefore not come at the expense of developing what she calls an ‘inter-civilizational approach’ to investment law. Such an approach would not only increase investment law’s sensitivity for the regulation of cultural concerns, but above all support calls for the ‘gradual opening of investor-state arbitration to experts from all around the globe [and] strengthen perceptions of its demographic representativeness’. In addition, Vadi sees interests of local communities better captured by an inter-civilizational approach to international investment law than ‘the pursuit of an [abstract] ideal of justice that would correspond … to an enlightened constitutional architecture of the world’.

All in all, what the contributions to the present book show is that the relationship between constitutional law and international investment law is multifaceted, dynamic, and complex; it escapes simple categorization and conceptualization. If anything, what can be said for sure is that investment treaty tribunals, as well as the scholarship on international investment law, can no longer ignore constitutional law, or treat it as just another field of domestic law and practice, just as constitutional courts and constitutional law scholarship can no longer avoid deeper engagement with, and analysis of, international investment law. Both fields, and their respective constituencies, will likely have to leave their comfort zones and at least try to get an understanding of the different issues that are important for, and perspectives taken by, each field, explore points of tensions and conflict, evaluate them, and come to terms with them. The contributions to the present book, we submit, provide a fruitful basis for such an endeavor.

IV CONCLUSION: MANAGING THE CLASH OF ‘GRUNDNORMEN’

The relationship between international investment law and constitutional law has seen a significant evolution over the past decade. It has developed from

---

87 ibid 343.
occasional and rather tangential encounters toward repeated and structured interaction. Investment treaty tribunals in many instances engage with domestic constitutional law and function increasingly like constitutional courts when assessing the compliance of government conduct with constitutional-law-type standards of treatment; constitutional courts, in turn, regularly review the constitutionality of international investment treaties and investment treaty awards. In scholarship on constitutional law and international investment law these developments also attract increasing attention. The resulting interaction of both fields of law is, however, far from harmonious. Instead, tensions and conflicts, and the question of which field ranks supreme, dominate scholarly debates and legal practice in both fields.

From a conceptual perspective, it is difficult to resolve the competing claims to supremacy. For constitutional courts, the applicable law, and hence the order that determines the relationship between both fields, is constitutional law; investment law, in that perspective, can only exist within the limits of constitutional law. For the great majority of investment treaty tribunals, by contrast, domestic constitutional law, like any other domestic law, does not absolve States from complying with their international legal obligations; any rule of domestic law, including those of constitutional pedigree must be measured against international law standards. We are thus facing, as aptly put by the Tribunal in *Kruck and others v Spain*, a ‘clash of Grundnormen’. Such a clash can never be resolved in a manner that satisfies the claims for authority of both legal orders. It can only be resolved if one of the involved legal orders gives in and accepts the other’s claim to supremacy. The *Achmea saga* suggests that this is unlikely to happen soon as a general matter (exceptions notwithstanding), considering how hardened the positions of investment tribunals and constitutional courts have become.

Perhaps, therefore, conceptualizing the relationship between international investment law and constitutional law should not start and finish with asking when, why, and how any of the respective orders can or should assert supremacy, but work on a shift in focus. Instead of putting the conceptually unavoidable conflicts center stage, it may be worth exploring the extent to which investment law and constitutional law can co-exist more harmoniously, work complementarily, and manage conflicts in a more constructive fashion. Focusing on conflicts and claims of supremacy is arguably not very helpful, neither for constitutional law, nor for international investment law. A claim to supremacy of constitutional law could lead States to disengage from processes of globalization and could reduce the impact constitutional law has on regu-

---

89 *Kruck and others v Spain*, Decision on Request for Reconsideration (n 45) para 46.
lating globalization through international law. A claim to supremacy of international investment law, in turn, would ignore the specific nature, authority, and source of legitimacy of constitutional law, thus risking undermining State support for international investment law and its impact on governing international investment relations. Consequently, antagonism in the thinking about the relations between investment law and constitutional law should be replaced by attempts to explore the potential for complementarity and cross-fertilization between both fields of law.

Such attempts lack the simplicity of clearly articulated claims to supremacy. They require the more pedestrian search for compromise and mutual arrangement, even containment. But the options are there. Many contributions to the present book suggest pathways toward complementarity and cross-fertilization and aim at fostering constructive engagement between constitutional law and international investment law at various levels: through scholarly engagement, through conscious treaty making that respects the demands of both investment protection and constitutional limits, and through considerate approaches to dispute settlement. Examples of cross-fertilization include, on the side of international investment, the use of constitutional analogies in the scholarship on international investment law, the use of comparative constitutional law in investment dispute settlement practice, the exercise of deference in investment arbitration vis-à-vis domestic constitutional issues, and the drafting of investment treaties in ways that respect core norms of constitutional law. On the side of constitutional law, constructive engagement can, for example, take the form of stressing the openness of constitutional law toward investment treaties and investor-State dispute settlement; relying on constitutional doctrines that allow for continuous, but deferential monitoring of investment treaty practices, and seeking to avoid conflict *ex ante*, including through the *ex ante* constitutional review of investment treaties, rather than relegating the solution of conflicts to dispute settlement forums (both constitutional courts and investment treaty arbitration) after investment treaty commitments have become binding under international law. All this is already happening, as the examples of constructive engagement explored in the contributions to the present book illustrate.

None of this should be read as a plea to ignore existing jurisdictional conflicts between constitutional courts and investment treaty tribunals, as exemplified by the *Achmea* saga; they are real and have to be recognized. But even admitting as much, it is important to stress that normative tensions can be approached in different ways, some of which are more likely than others to foster mutually constructive engagement. For example, instead of relying on arguments of normative supremacy as a conflict-solving technique in litigation processes that will inevitably further polarize, it may be more fruitful to encourage States to address and resolve the conflict between constitutional law and international investment law through treaty making and treaty adaptation,
thus avoiding antagonization between constitutional courts and their judges and investment law and investment arbitrators. Similarly, it makes a difference whether arguments based on normative supremacy seek to subject, potentially even to destroy, the respective other, or whether tensions are framed as substantive disagreements and motivated by the objective of addressing and remedying blind spots the respective other regime creates. The Kruck tribunal’s recognition that different Grundnormen can, after all, clash could perhaps be seen as a helpful terminological ‘disarmament’. After all, both constitutional law and international investment law exhibit such blind spots: the lack of equal protection and equal political participation under constitutional law of foreign investors in domestic constitutional processes, shortcomings in the protection of competing non-economic rights, and policy space in the case of international investment law and investor-State dispute settlement.

The contributions to the present book do not ignore the tensions between international investment law and constitutional law, and many recognize their fundamental nature. However, they highlight promising approaches and techniques premised on complementarity, and on the need to find some arrangement between rival claims for authority. Guided by a desire to reach what German constitutional scholars have long referred to as the ‘principle of practical concordance’,90 the contributions to the present book encourage reflection toward a more harmonious and less confrontational relationship between international investment law and constitutional law. This would, in the end, help both constitutional law and international investment law, properly construed, to achieve what is in their common interest, that is, to subject private-public relations to legal principles that both constitutional law and international investment law wish to foster in regulating the ever-increasing global market: respect for the rule of law, democracy, and the protection of human rights.