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Global Public Goods, Global Commons, Fundamental Values and International Investment Law: the Responses of the New Generation of International Economic Law Agreements and Investment Arbitration Proceedings

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The group of five articles forming this special section of Brill Open Law is a selection of the papers presented at the Workshop on "Global Public Goods, Global Commons, Fundamental Values: the Responses of International Economic Law," organized by the Interest Group (IG) on International Economic Law (IEL) of the European Society of International Law (ESIL) in Naples on September 6th, 2017. The mission of the ESIL IEL IG is to promote research in the field of International Economic Law, endorsing exchange of views among young and experienced scholars, as well as supporting debate and discussion

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with practitioners, lawyers and officials from international organizations and national administrations working in the fields of international trade and investments and International Financial Law.

The articles appearing in this Section are all devoted to International Investment Law, the first work being the opening speech to the Naples Workshop by Professor Pavel Šturma on "Public Goods and International Investment Law: Do the New Generation of IIAS Better Protect Human Rights?", while the subsequent four essays are all dedicated to the recent case-law developed in international arbitration proceedings dealing with the right to water and the right to human health.

Professor Šturma provides a synthetic effective reconstruction of the way in which International Investment Law now interacts with International Human Rights Law. Starting from the description of the situation in the first generation of Bilateral Investment Treaties (BITS), establishing the rights of investors and the obligations of States, the author then goes on exposing the differences with human rights treaties, and analyzes the significant developments in relation to the new generation of investment treaties. The relevant clauses concerning the exceptions to investment protection, or the right to regulate of the host State, expressed by the new generation of International Investment Agreements (IIAS), such as the EU-Canada Comprehensive Economic Trade Agreement (CETA), the now-abandoned Transatlantic Trade and Investment Partnership (TTIP), or the BIT models of Norway, Canada, Austria, or the Czech Republic, are therefore considered, stressing their relevance to guide interpreters and arbitrators when having to combine investment protection with human rights. Due attention is then given to the role of private parties with reference to human rights, underlining the introduction of the concept of Corporate Social Responsibility (CSR) in the new IIAS encouraging economic operators to conduct their business in compliance with the relevant international soft law codes inspired by the principle of sustainable development – requiring that economic development be constantly combined with environmental protection and social progress. The article also emphasizes the role that the principle of systemic integration in treaty interpretation, as codified in Article 31, para. 3(c) of the Vienna Convention on the Law of Treaties, may play when arbitrators have to combine human rights, environmental protection and BITS, illustrating the relevance of the case-law of international investment disputes in order to strike a fair balance between non-economic considerations and investors' rights.

The analysis by Pavel Šturma opens the door to the subsequent four articles. Professor Ursula Kriebaum, in her work on "The Right to Water Before

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Investment Tribunals," provides a complete overview of the case-law developed in international investment arbitration proceedings with reference to the right to water. She presents the constantly rising relevance that the human right to water has been given by the Arbitral Tribunals while discussing the respect of the investors' prerogatives enshrined in the various BITs invoked by the claimants. Professor Kriebaum thus emphasizes that the Arbitrators never denied that they have an obligation to take into consideration human rights while interpreting BITs. On the contrary, international awards concluded that national measures introduced in order to protect the environment against the pollution of water resources, and the termination of concessions as a consequence of inadequate performance of an investment contract on the part of the investor involved in water distribution services cannot be automatically considered as infringements of BITs by the States benefitting from the foreign investments. Furthermore, Ursula Kriebaum stressed the highly relevant developments reached by the Arbitral Tribunal in the *Urbaser* case, where it was held in an *obiter* that investors have to abstain from acts which may violate the human right to water by endangering access to water.

The *Urbaser* case is at the center of the analysis by Dr Edward Guntrip and Dr Patrick Abel. In his work on "Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of *Urbaser v. Argentina*," Dr Guntrip considers how the Arbitral Tribunal allocated responsibility for compliance with the right to water between the host State and the foreign investor while being asked to settle the dispute over privatized water services in Greater Buenos Aires. The author underlined that the Arbitrators chose to follow the scheme defined by the UN Committee on Economic, Social and Cultural Rights (CESCR). Pursuant to that, human rights obligations in relation to economic, social and cultural rights, which include the right to water, have to be broken down into obligations to respect, protect and fulfil. Edward Guntrip criticizes the Tribunal's decision to limit the duties of the investor to the obligation to respect only, i.e. not to interfere with the enjoyment of the right to water. In fact, such a limitation makes the human right to water vulnerable for the right holders trying to hold a foreign investor responsible. Dr Patrick Abel manifests further perplexities on the counterclaim raised by Argentina in relation to the existence of an international investor obligation under the human right to water, for the first time accepted as possible in international investment arbitration proceedings. While stressing the importance of the novelty of the *Urbaser* award -i.e. the possibility of holding investors accountable for a breach of an international human rights obligation- Patrick Abel highlights the flaws in the legal reasoning of the Tribunal,

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which he considers unclear in the way it perceives the integration of human rights obligations as a source of international law external to the relevant BIT invoked in the investment arbitration.

Last but not least, Professor Pei-Kan Yang, in his article on "The Margin of Appreciation Debate over Novel Cigarette Packaging Regulations in *Philipp Morris v. Uruguay*," explores the legal reasoning of the Arbitrators in the case brought by the famous tobacco multinational company against the Latin-American State. The majority of the Tribunal, applying the "margin of appreciation" doctrine as originally developed by the European Court of Human Rights (ECtHR), found that Uruguay's tobacco legislation did not violate the Switzerland – Uruguay BIT as the Latin-American State enjoyed a substantial degree of discretion in choosing the regulatory means to achieve its public health objectives among various options of effective measures. Pei-Kan Yang analyzes both the majority conclusions and the dissenting opinion by Gary Born, and identifies lacunae in each of the two approaches, suggesting an adjustment of the concept of the margin of appreciation in order to better accommodate the right to regulate of the host State for public health purposes and balance it against the investor's private rights.

We do hope that the proposed set of articles may represent a welcome perspective of analysis of some recent developments concerning treaties and case-law in the field of International Investment Law. Enjoy the reading!

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