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"Contracting Parties' Intentions in Investor State Dispute Settlement: Coherence between Treaty Interpretation and Policy Objectives?"

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List of Acronyms

ALBA	*Alianza Bolivariana para los Pueblos de Nuestra América – Tratado de Comercio de los Pueblos*
AUSFTA	Australia–United States Free Trade Agreement
BIT	Bilateral Investment Treaty
CERDS	Charter of Economic Rights and Duties of States
CETA	Comprehensive Economic and Trade Agreement
CSR	Corporate Social Responsability
ECT	Energy Charter Treaty
EU	European Union
CIL	Customary International Law
FCN Treaty	Treaty of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	fair and equitable treatment
FTA	Free Trade Agreement
GA Resolution 1803	General Assembly Resolution 1803 on the Principle of Permanent Sovereignty Over Natural Resources
GATS	General Agreement on Trade in Services
HDI	Human Development Index
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIL	Institute of International Law
ILC	International Law Commission
ILFI	International Law on Foreign Investment
ILO	Intenatinal Labour Organization
IMF	International Monetary Fund
IIA	International Investment Agreement
IIR	Internatinal Investment Regime
ILA	International Law Association
IPFSD	Investment Policy Framework for Sustainable Development
ISDS	Investor State Dispute Settlement
ISLG	Investor-State **LAW**GUIDE™
JEFTA	Japan-EU Free Trade Agreement
MFN	Most Favord Nation
MIA	Multilateral Investment Agreement
MIGA	Multilateral Investment Guarantee Agency
MNC	Multinational Corporation
NAFTA	North American Free Trade Agreement
NGO	non-governmental organization
NIEO	New International Economic Order
NIEO Declaration	Declaration of the Establishment of a New International Economic Order

New York Convention	New York Convention on the Recognition of Foreign Arbitral Awards
OECD	Organisation for Economic Co-operation and Development
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
TIP	Treaty with Investment Provisions
ToT	Terms of trade
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
US	United States
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
World Bank	World Bank Group
WBGTFDI	World Bank Guidelines on the Treatment of Foreign Direct Investment
WESP	World Economic Situation and Prospects
WTO	World Trade Organization
WWII	World War II

When considering whether the actions of Republic of Estonia constituted a breach of *fair and equitable treatment (FET)* the tribunal in *Genin v. Estonia* admitted, "the exact content of this standard is not clear".[3] The same lack of certainty can be observed in regard to other key terms in ISDS such as *indirect expropriation*.[4] "The Article 1110 [North American Free Trade Agreement (NAFTA)'s provisions on expropriation] language is of such generality as to be difficult to apply in specific cases."[5] Among others, Ranjan pointed out a lack of predictability, as the interpretation across tribunals has differed fundamentally in cases with "similar set of facts, or even the same provision of a BIT [Bilateral Investment Treaty]".[6] Even the annulment committees of International Centre for Settlement of Investment Disputes (ICSID) have fiercely criticized overly expansive interpretations of tribunals in various cases.[7] In many cases of expansive interpretation, tribunals based their argument on the *object and purpose* of the applicable IIA—or so called *case law*.[8] Especially, when particular provisions of the applicable IIA were ambiguously worded and lacked clear definitions, arbitration panels have recurred to the intentions of contracting parties, reconstructed from proxies, such as the wording of preambles or *preparatory work*.[9] This issue leads me to the research question: *What role have intentions of contracting parties to IIAs played within ISDS practice?*

[3] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, Award ICSID Case No. ARB/99/2, ICSID, June 25, 2001, URL: http://www.italaw.com/sites/default/files/case-documents/ita0359.pdf (accessed: 04/20/2016), par. 367.

[4] Cf. Santiago Montt: State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation (Studies in International Law 26), Oxford: Hart Publishing, 2009, pp. 108 sq.

[5] Marvin Roy Feldman Karpa v. United Mexican States, Award ICSID Case No. ARB(AF)/99/1, ICSID, Dec. 16, 2002, URL: http://www.italaw.com/sites/default/files/case-documents/ita0319.pdf (accessed: 04/20/2016), par. 98.

[6] Prabhash Ranjan: Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Reappraisal, in: Cambridge Journal of International and Comparative Law 3.3 (2014), pp. 853–883, DOI: 10.7574/cjicl.03.03.227, at pp. 858 sq.; cf. also Federico M. Lavopa et al.: How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties, in: Journal of International Economic Law 16.4 (Dec. 2013), pp. 869–891, DOI: 10.1093/jiel/jgt025, at p. 870; Gary Born: A New Generation of International Adjudication, in: Duke Law Journal 61.4 (2012), pp. 775–879, URL: http://scholarship.law.duke.edu/dlj/vol61/iss4/1 (accessed: 09/06/2016), p. 843, n. 266; Tomoko Ishikawa: Keeping Interpretation in Investment Treaty Arbitration "on Track": The Role of State Parties, in: Jean E. Kalicki/Anna Joubin-Bret (eds.): Reshaping the Investor-State Dispute Settlement System: Journies for the 21st Century (Nijhoff international investment law series 4), Leiden and Boston: Brill Nijhoff, 2015, pp. 115–149, DOI: 10.1163/9789004291102_040, at p. 117.

[7] Cf. Lavopa et al.: Kill a BIT (see n. 6), Sec. II, pp. 872–878.

[8] Cf. e. g. Montt: State Liability (see n. 4), pp. 2 sq.; critical see : Irene M. Ten Cate: The Costs of Consistency: Precedent in Investment Treaty Arbitration, in: Columbia Journal of Transnational Law 51.2 (2013), pp. 418–478; D. Brian King: Consistency in Awards in Cases of Parallel Proceeding Concerning Related Subject Matters, in: Emmanuel Gillard et al. (eds.): Towards a Uniform International Arbitration Law (IAI series on International Arbitration 3), Bern and New York: Stämpfli Verl. and Juris Pub., 2005, pp. 293–317.

[9] Cf. J. Romesh Weeramantry: Treaty Interpretation in Investment Arbitration (Oxford International Arbitration Series), Oxford: Oxford Univ. Press, 2012, ch. 4.

This question is being answered in a myriad of mutually exclusive ways by scholars and practitioners, alike. Hence, a qualification of different approaches is in order. For illustrative purposes, I present two explanations: Santiago Montt argued that "the ultimate payoff from BITs depends not so much on the text of treaties already concluded, but on the interpretations adopted among the collection of awards that we are just beginning to see."[10] "[S]tates", from this point of view, "intentionally adopted similar, if not identical, treaties that were *deliberately broadly formulated* because they anticipated that future investment jurisprudence, not just on the treaty in question, but on BITs more generally, would concretize the vague standards and therefore increase the predictability of investors' rights."[11] This view is closely linked to a broader controversy within (international) law and neighboring disciplines; the disputed question is how far international law can be considered to be converging towards a uniform corpus or should rather be characterized by fragmentation.[12] Conversely, Skovgaard Poulsen and Aisbett qualitatively and quantitatively showed that developing countries signing BITs tend to not be aware of the implicit risks involved.[13] The review of investment treaties and efforts to specify provisions, not only by low-income countries, such as Bolivia and Ecuador, but also by the United States and Australia reflect the uncertainty for responding states.[14] In consideration of potentially high costs brought about by ISDS, the focus turns to the intentions of political decision makers—in the moments of negotiating and concluding treaties. Skovgaard Poulsen/Aisbett explained the proliferation of (very similar) IIAs with "bounded rationality" of the political decision makers.[15]

In order to answer the research question and qualify various answers given by scholars or practitioners, four subquestions have to be answered:

1. How did claimants, defendants, and tribunals argue with *intent* in ISDS practice?

[10]Montt: State Liability (see n. 4), p. 109.

[11]Stephan W. Schill: W(h)ither Fragmentation?: On the Literature and Sociology of International Investment Law, in: European Journal of International Law 22.3 (Aug. 2011), pp. 875–908, DOI: 10.1093/ejil/chr062, p. 900, emphasis added; but cf. Ishikawa: Keeping (see n. 6), p.. 138. He remindes that interpretative discretion is confined by "the treaty framework set by the contracting States."

[12]See Schill: W(h)ither Fragmentation? (see n. 11); Steve Charnovitz: What is International Economic Law?, in: Journal of International Economic Law 14.1 (Mar. 2011), pp. 3–22, DOI: 10.1093/jiel/jgr008.

[13]Cf. Lauge N. Skovgaard Poulsen/Emma Aisbett: When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning, in: World Politics 65.2 (Apr. 2013), pp. 273–313, DOI: 10.1353/wp.2013.0007, at p. 276.

[14]See e. g. Anna Lotte Böttcher: Dekonstitutionalisierungstendenzen im internationalen Investitionsschutzrecht: eine Untersuchung im Lichte von Verfassungsrechtsreformen, ICSID-Kündigungen und Integrationsprojekten in Südamerika unter besonderer Berücksichtigung der bolivianischen Verfassung (2009) (Studien zum Internationalen Investitionsrecht 16), Baden-Baden and Wien: Nomos et al., 2015.

[15]Cf. Lauge N. Skovgaard Poulsen: Bounded Rationality and the Diffusion of Modern Investment Treaties, in: International Studies Quarterly 58.1 (Apr. 2013), pp. 1–14, DOI: 10.1111/isqu.12051, at pp. 7–11; Skovgaard Poulsen/Aisbett: When the Claim Hits (see n. 13), pp. 273–276.

2. What theoretical grounding does ISDS rely on?

3. What intentions for the conclusion of IIAs can be derived from the background of international relations theory or official statements?

4. Are political intentions reflected in ISDS practice?

The research question draws relevance from real implications in international relations and within particular states, because (domestic) politics is becoming increasingly dependent on international law. Leeway for (democratically legitimated) policies may be restricted beyond *perceived* legitimacy. Especially in developing countries, predominantly on the *receiving end* of Foreign Direct Investment (FDI), a flood of (creative) claims for compensation in ISDS has become a thread for legitimacy. Huge compensations (e. g. of US$ 1.77 billion in *Occidental v. Ecuador (II)*[16]) have the potential to shake governments and to endanger the provision of (basic) public services to their populations. The understanding of the mechanisms in ISDS is vital to prevent vulnerable populations to be adversely affected. Furthermore, International Law on Foreign Investment (ILFI) is procedural in character. This points to two main aspects: first, the development of new IIAs (e. g. the Comprehensive Economic and Trade Agreement (CETA), or the Japan-EU Free Trade Agreement (JEFTA)), as well as new or differently worded provisions (e. g. permanent arbitral bodies). Future policies have to guarantee that political intentions are reflected in the resolution of investment disputes. The understanding of the translation of their intentions expressed in treaties into practice is vital information in this enterprise. The second aspect of ILFI as a process, is the changing practice of interpretation of *existing* provisions. An excellent example is the expansion of Most Favord Nation (MFN) provisions to dispute resolution provisions in *Maffezini v. Spain* and others.

In the subsequent section, I disclose the analytical approach to the problematic proposed, and provide some terminological clarifications.

1 Methodology, Data, and Terminology

In order to answer the questions posed above, I apply four steps of investigation. As a basis for the investigative part, I disclose my methodology and data in this section. Furthermore, I provide an overview of the historical evolution of ILFI in section 2. This allows for a deeper understanding of the field of investigation and to integrate arguments of subsequent sections

[16]Cf. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II), Award ICSID Case No. ARB/06/11, ICSID, Aug. 22, 2012, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf` (accessed: 08/08/2017), par. 876 (v).

into the bigger picture of ILFI. The first step of investigation is a summary of rules of treaty interpretation in international law, as provided for in the VCLT. That is section *3 "Treaty Interpretation"*. Special attention is given to the interpretation of intent in ISDS. This part heavily depends on Weeramantry's seminal contribution *Treaty Interpretation in Investment Arbitration*. In his study, the author included arbitral awards until the end of June 2011. The following section *4 "Empirical Analysis"* completes Weeramantry's analysis by looking into the arbitral awards after June 2011. This analysis includes a descriptive part that shows the frequency of *object and purpose* and *supplementary means of interpretation* arguments applied by claimants, respondents, and tribunals, as well as the composition of claimants' home states and respondents according to their economic and human developmental statuses. The closely linked qualitative appreciation of these arguments makes visible recurrent legal arguments applied in ISDS. Together with Weeramantry's contribution, this serves to answer subquestion 1 on the arguments based on intentions in ISDS.

The second step of investigation (section *5 "Theory. Neutrality or Politics?"*) concerns itself with the theoretical foundation of ILFI, statehood, as well as the role of states and populations within the framework of international law. Relying mainly on Martín Rodríguez, Simmons, Scott, and Byers, I sketch different approaches, how international law can be understood from an international relations perspective.[17] Koskenniemi's contributions are central for the understanding of how theory is understood in ISDS practice.[18] This analysis answers subquestion 2 on what basic theoretical assumptions play into the practice of ISDS. Furthermore, it provides the ground work for subquestion 3 on the policy aims states want(ed) to achieve by taking part in the Internatinal Investment Regime (IIR).

[17] see Pablo J. Martín Rodríguez: On the unity of International Law Theory, in: Revista Electrónica de Estudios Internacionales 21 (2011), pp. 1–13, URL: http://www.reei.org/index.php/revista/num21/archivos/Nota_MARTIN_PabloJ.pdf (accessed: 01/18/2017); Beth A. Simmons: International Law and International Relations, in: Gregory A. Caldeira et al. (eds.): The Oxford Handbook of Law and Politics, Oxford et al.: Oxford Univ. Press, 2008, pp. 187–208, DOI: 10.1093/oxfordhb/9780199208425.003.0011; Michael Byers: International Law, in: Christian Reus-Smit/Duncan Snidal (eds.): The Oxford Handbook of International Relations (The Oxford Handbooks of Political Science 5), Oxford et al.: Oxford Univ. Press, 2008, pp. 612–631, DOI: 10.1093/oxfordhb/9780199219322.003.0035; Shirley V. Scott: Identifying the Source and Nature of a State's Political Obligation Towards International Law, in: Journal of International Law & International Relations 1.(1–2) (2004/2005), pp. 49–60.

[18] See Martti Koskenniemi: From Apology to Utopia: the Structure of International Legal Argument, 2nd ed., Cambridge and New York and: Cambridge Univ. Press, 2005; idem: International Legal Theory and Doctrine, Max Planck Encyclopedia of Public International Law [MPEPIL], Nov. 2007, URL: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1618#law-9780199231690-e1618-p-34 (accessed: 02/03/2017); idem: The Politics of International Law: 20 Years Later, in: European Journal of International Law 20.1 (Feb. 2009), pp. 7–19, DOI: 10.1093/ejil/chp006; idem: Law, Teleology and International Relations: An Essay in Counterdisciplinarity, in: International Relations 26.1 (Mar. 2012), pp. 3–34, DOI: 10.1177/0047117811433080.

I answer this question in the third step of investigation (section *6 "Intentions of Contracting Parties"*) by providing different possible sets of intentions based on diverse theoretical basic assumptions, as well as empirical third party research. It's design is based on Katzenstein and Okawara's methodological "Case for Analytical Eclecticism"[19] that allows to appreciate the issue of interest form different angles and, therefore, to reach a more integral understanding, thereof. Theoretical blending promises more accurate analyses, since traditional theories of international relations towards international law have proven to be insufficient.[20]

The fourth step of investigation consists of a comparison and qualification of the commonalities and differences between the intentions identified from within the practice of ISDS and from a policy point of view. I do this in subsection *6.3 "Appraisal of Intentions within ISDS and from Theoretical Perspectives: a profound rift"*, answering subquestion 4 on the (in)sufficient overlap between policy goals and their interpretation in ISDS. In case this is answered negatively, i. e. that intentions of contracting parties are not sufficiently reflected in ISDS practice, one has to ask how states might be able to safeguard that their policy goals are to be accounted for. In a concluding section, I summarize the results of the analysis and provide and outlook on policy options.

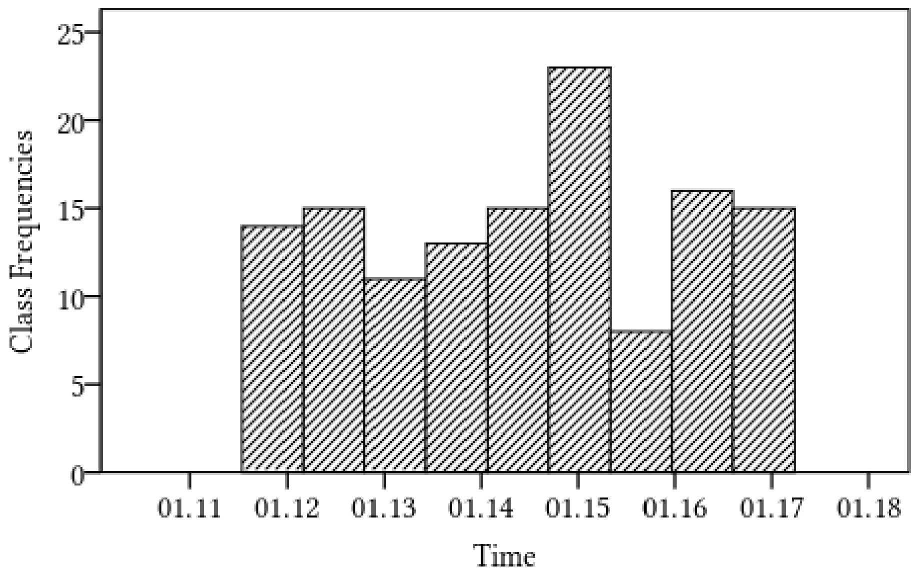

Figure 1: Histogram. Awards over time (N=130)

[19]Peter J. Katzenstein/Nobuo Okawara: Japan, Asian-Pacific Security, and the Case for Analytical Eclecticism, in: International Security 26.3 (2001), pp. 153–185, at p. 153.
[20]Cf. Byers: International Law (see n. 17), pp. 621–624.

Section 4 *"Empirical Analysis"* builds on empirical data condensed from the the collection of "Dispute Documents" available via Investor-State **LAW**GUIDE™ (ISLG). Of its approximately 3500 fully searchable documents of arbitration proceedings, I will descriptively asses all 133 awards available in English and published on ISLG between July of 2011 and February 2017. Two issued awards in this period have not (yet) been published and have to be excluded from the analysis.[21] This corresponds to about 1.5% of issued awards and does not significantly compromise the results of this study. Additionally, *Ecuador v. United States* will be excluded from the quantitative analysis, because it does not fit into the category of investor-state awards. Furthermore, the omission of awards not available in English is justifiable with the linguistic method of research and does not significantly compromise the results due to the small number of fourteen documents. Another shortcoming of this methodology is the mere selection of *awards*. Especially *amicus curiae* briefs by third state parties (only a few exist, most are submitted by non-governmental organizations (NGOs)) reflect resistance against the institutionalization of certain interpretations. In a similar manner, I consider annulment proceedings to be a fertile source of information on original intentions of contracting parties to IIAs. The exclusion is based on the limited scope of a Master's thesis, as well as the desired comparability with Weeramantry's study. Further research could address this issue by looking into these documents in order to complement the findings of the present thesis.

The number of awards issued varies over time. As can be appreciated in figure 1, there is a rather even distribution of awards issued over the time of interest; however, the data exhibits an exceptional peak around the beginning of 2015, and a subsequent low until the end of 2015.

Figure 2 shows, how different versions of the ICSID arbitration rules were dominant with about 54%. Including the additional facility rules for non-member states, ICSID arbitrations amounted to almost two thirds of all arbitrations. Roughly another third of the fora is made up by United Nations Commission on International Trade Law (UNCITRAL). It is surprising that the vast majority of these cases used the old 1976 rules, which did not require high standards of transparency. Contrastingly, ICSID arbitrations tended to use the updated rules. Furthermore, only a small minority of about 3% of all arbitrations took place pursuant to Stockholm Chamber of Commerce (SCC) or other rules.

In order to extract the data from the documents, key terms are systematically looked for by means of ISLG's Full Text Search, and statistically processed. These terms were object and

[21] They are Mercuria Energy Group Limited v. Republic of Poland, FinalAward, SCC, Dec. 1, 2011; EDF International S.A. v. Republic of Hungary, Award, UNCITRAL, Dec. 4, 2014.

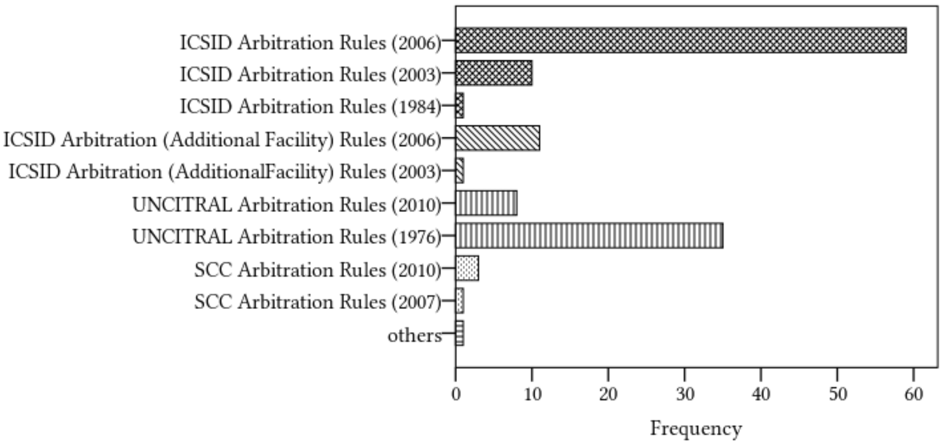

Figure 2: Bar Chart. Applicable arbitration Rules (N=130)

purpose, original intent, intentions, *travaux préparatoires*, preparatory work, and supplementary means. In order to include typographic errors, similar terms, and different word orders, a strong fuzziness and area search was applied in ISLG. For example, object and purpose was looked for by the search term "object w/2 purpose" with the parameter fuzziness three. This, for instance, would cover document terms such as "purpose and objective", or "objects and purposes". The returns of the search were manually qualified according to their relevance, as well as, to whether the present argument was brought forward by claimant, respondent, or tribunal. For example, results were omitted from the analysis when the proceeding dealt with the object and purpose of a certain concession contract. Analytical variables gathered were:

- *Date*: the date of issuance.
- *ApplicableRules_String*, *ApplicableRules_Cat*: the arbitration rules applied from the proceedings including, among others different versions of the ICSID, ICSID additional facility, UNCITRAL, and SCC arbitration rules. These were recorded as string and categorical variables.
- *RespondentNationalityString*, *RespondentNationalityNumeric*, *ClaimantNationalityString*, and *ClaimantNationalityNumeric*: The nationalities of the respective respondents of claimants, recorded as string and nominally.
- *RespondentWESPClass* and *ClaimantWESPClass*: World Economic Situation and Prospects (WESP) categories of respective respondents and claimants recorded nominally.

- *RespondentWESPClassValue* and *ClaimantWESPClassValue*: Valuation of WESP categories of respective respondents and claimants. From 4 = (Multiple) Developed Economy to 0 = (Multiple) Devloping or Transitioning Economies.

- *WESPdiffClaimantResp*: As a means to exemplify the developmental differences between the home states of claimants and respondents, an ordinal aggregate variable (*WESPdiffClaimantResp*) has been calculated. Categories are "Two Step Difference (various) Claimant(s)-Repondent", "Mixed Claimants Including Developed. Two Step Difference Claimants-Respondent", "One Step Difference Claimant-Respondent", "Mixed Claimants Including Developed. One Step Difference Claimants-Respondent", "No Difference Claimant-Respondent", "One Step Reverse Difference Claimant-Respondent", "Two Step Reverse Difference Claimant-Respondent". Steps refer to the WESP qualification of developed, transitioning, and developing economies.

- *RespondentHDI* and *ClaimantHDI*: Human Development Index (HDI) scores of the respective respondents and claimants 2016.[22] In the cases of various claimants, an unweighted average has been calculated. If there is no score for territories, such as the British Virgin Islands the respective administrative country's score was used. In this case of the United Kingdom.

- *HDIdiffClaimantRespondent*:Difference between *ClaimantHDI-RespondentHDI* as a means to measure the differences of developmental statues (HDI) between claimants and respondents.

- *OnP*: Dichotomous variable representing whether Object and Purpose appears in the respective document.

- *OnPDefinedTribunal*: Dichotomous variable representing whether the respective tribunal explicitly defined the object and purpose.

- *OnPDefinedViaPreambleTribunal*: Dichotomous variable representing whether Tribunals expressly relied on the preamble when defining the object and purpose.

- *OnPByTribunal*: Dichotomous variable representing whether the tribunal used at least one of the *OnP* arguments.

[22]Cf. United Nations: Human Development Report 2016: Human Development for Everyone, New York: United Nations Development Programme (UNDP), 2016, URL: `http://hdr.undp.org/sites/default/files/2016_human_development_report.pdf` (accessed: 05/31/2017), pp. 198–201.

- *OnPByTribunalEff*: Dichotomous variable analogous to *OnPByTribunal*, however going beyond the mere quoting of rules of interpretation, above all Article 31, VCLT. Effective Variables exclude the hits that merely cite the VCLT rules of interpretation. However, they include mere quotations of treaty provisions. Among others, *Ecuador v. United States* and *Servier v. Poland* cite the complete preambles of the respective BITs.[23] Yet, neither of the tribunals includes the preambles in their further analysis of the case. This provides for a unsteady quality of the data analyzed in this study. This restriction is, however, limited to the variables concerning the preambles. This problem of quality could be solved by introducing an additional variable that depicts this problem. The decision not to exclude quotation only cases from *PreambleByTribubalEff* is based on the understanding that they reflect the importance a tribunal generally attributes to the preambles.

- *OnPByClaimant*: Dichotomous variable representing whether claimant used at least one of the *OnP* arguments.

- *OnPByRespondent*: Dichotomous variable representing whether respondent used at least one of the *OnP* arguments.

- *Intentions*: Dichotomous variable representing whether "Intent*" appears in the respective document.

- *IntentionsByTribunal*: Analogous to *OnPByTribunal*, referring to *Intentions*.

- *IntentiosByClaimant*[*sic!*] : Analogous to *OnPByClaimant*, referring to *Intentions*.

- *IntentionsByRespondent*: Analogous to *OnPByRespondent*, referring to *Intentions*.

- *OriginalIntent*: Dichotomous variable representing whether "orig* intent*" appears in the respective document.

- *OriginalIntentByTribunal*: Analogous to *OnPByTribunal*, referring to *OriginalIntent*.

- *OriginalIntentByClaimant*: Analogous to *OnPByClaimant*, referring to *OriginalIntent*.

[23]Cf. Republic of Ecuador v. United States of America, Award PCA Case No. 2012-05, UNCITRAL, Sept. 29, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf (accessed: 06/15/2017), par. 49; Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland, Award (redacted), UNCITRAL, Feb. 14, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/italaw3005.pdf (accessed: 06/15/2017), par. 35.

- *OriginalIntentByRespondent*: Analogous to *OnPByRespondent*, referring to *OriginalIntent*.
- *SupplMeans*: Dichotomous variable representing whether "Suppl* Mean*" appears in the respective document.
- *SupplMeansEff*: Analogous to *OnPEff*, referring to *SupplMeans*.
- *SupplMeansByTribunal*: Analogous to *OnPByTribunal*, referring to *SupplMeans*.
- *SupplMeansByTribunalEff*: Analogous to *OnPByTribunalEff*, referring to *SupplMeans*.
- *SupplMeansByClaimant*: Analogous to *OnPByClaimant*, referring to *SupplMeans*.
- *SupplMeansByRespondent*: Analogous to *OnPByRespondent*, referring to *SupplMeans*.
- *SupplMeansAllowed*: Dichotomous variable representing whether any kind of Article 32 resources were explicitly admitted by tribunals.
- *Travaux*: Dichotomous variable representing whether "preparatory work" or "zit" appear in the respective document.
- *TravauxEff*: Analogous to *OnPEff*, referring to *Travaux*.
- *TravauxByTribunal*: Analogous to *OnPByTribunal*, referring to *Travaux*.
- *TravauxByTribunalEff*: Analogous to *OnPByTribunalEff*, referring to *Travaux*.
- *TravauxByClaimant*: Analogous to *OnPByClaimant*, referring to *Travaux*.
- *TravauxByRespondent*: Analogous to *OnPByRespondent*, referring to *Travaux*.
- *Preamble*: Dichotomous variable representing whether "preamble" appears in the respective document.
- *PreambleEff*: Analogous to *OnPEff*, referring to *Preamble*.
- *PreambleByTribunal*: Analogous to *OnPByTribunal*, referring to *Preamble*.
- *PreambleByTribunalEff*: Analogous to *OnPByTribunalEff*, referring to *Preamble*.
- *PreambleByClaimant*: Analogous to *OnPByClaimant*, referring to *Preamble*.
- *PreambleByRespondent*: Analogous to *OnPByRespondent*, referring to *Preamble*.

- *AtLeastOneArt31*: Dichotomous variable representing whether at least one of the above, *OnP*, *Intentions*, or *OriginalIntent* appear in the respective document.
- *AtLeastOneArt31Eff*: Dichotomous variable representing whether at least one of the above, *OnPEff*, *Intentions*, or *OriginalIntent* appear in the respective document.
- *AtLeastOneArt32*: Dichotomous variable representing whether at least one of the above, *SupplMeans*, or *Travaux* appear in the respective document.
- *AtLeastOneArt32Eff*: Dichotomous variable representing whether at least one of the above, *SupplMeansEff*, or *TravauxEff* appear in the respective document.
- *Year*: Year of publication of the award.
- *OnPorSynonymByClaimant*: Dichotomous variable representing whether at least one of the above, *OnPByClaimant*, *IntentionsByClaimant*, or *OriginalIntentByClaimant* appear in the respective document.
- *OnPorSynonymByRespondent*: Dichotomous variable representing whether at least one of the above, *OnPByRespondent*, *IntentionsByRespondent*, or *OriginalIntentByRespondent* appear in the respective document.

Before the analysis, some terminological clarifications are in order.

> Terminology
>
> International investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. A bilateral investment treaty (BIT) is an agreement between two countries regarding promotion and protection of investments made by investors from respective countries in each other's territory. The great majority of IIAs are BITs. The category of treaties with investment provisions (TIPs) brings together various types of investment treaties that are not BITs. Three main types of TIPs can be distinguished:
>
> broad economic treaties that include obligations commonly found in BITs (e.g. a free trade agreement with an investment chapter); treaties with limited investment-related provisions (e.g. only those concerning establishment of investments or free transfer of investment-related funds); and treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues.
>
> In addition to IIAs, there also exists an open-ended category of investment-related instruments (IRIs). It encompasses various binding and not-binding instruments and includes, for example, model agreements and draft instruments, multilateral conventions

on dispute settlement and arbitration rules, documents adopted by international organisations, and others.[24]

For the sake of readability and provided that no analytical clarity is lost, I limit myself to the terms IIA and BIT. The category of IIAs comprises different types of Treaties with Investment Provisions (TIPs), as well as BITs. However, the above United Nations Conference on Trade and Development (UNCTAD) terminology is useful to separate International Investment Law from "International Law on Foreign Investment"[25].

The applied methodology is subject to some drawbacks. The sole reliance on awards conveys a methodological problems in relation to the patterns of legal argument of the respective disputing parties. This is due to the fact that tribunals tend to summarize the proceedings. For example, "[t]he Tribunal [in *Copper Mesa v. Ecuador*] briefly summarizes below the Parties' respective cases, based on their written and oral submissions made in this arbitration. This summary, made to facilitate an understanding of this Award, is not intended to be complete or exhaustive, as to legal or factual issues."[26] Hence, arguments of disputing parties may be lost from the analysis due to the filter imposed by the selection of awards, only. The lack of transparency in international investment arbitration[27] also compromises the methodology. Insufficient transparency is rooted, on the one hand, in the practice of preventing awards from publication.[28] On the other hand, a considerable number of arbitral awards selectively blackens out sensitive passages from published materials.[29]

[24]Cf. UNCTAD: Investment Policy Hub, URL: `http://investmentpolicyhub.unctad.org/IIA` (accessed: 06/26/2016).

[25]Muthucumaraswamy Sornarajah: The International Law on Foreign Investment, 3rd ed., Cambridge and New York: Cambridge Univ. Press, 2010, DOI: `10.1017/CBO9780511841439`.

[26]Copper Mesa Mining Corporation v. Republic of Ecuador, Award (redacted) PCA Case No. 2012-2, UNCITRAL, Mar. 15, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf` (accessed: 06/11/2017), par. 1.70.

[27]Thierry P. Augsburger: Exceptions to transparency, in: Dimitrij Euler et al. (eds.): Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, Cambridge: Cambridge Univ. Press, 2015, pp. 249–306, See for intransparency in the case of UNCITRAL:

[28]Filip Balcerzak/Jarrod Hepburn: Publication of Investment Treaty Awards: The Qualified Potential of Domestic Access to Information Laws, in: Groningen Journal of International Law 3.1 (2015), pp. 147–170, URL: `https://grojil.files.wordpress.com/2015/05/grojil_vol3-issue1_balcerzak_hepburn_.pdf` (accessed: 05/09/2017), See on this problem; two relevant awards were not available in this study: Mercuria Energy v. Poland (FinalAward) (see n. 21), and EDF v. Hungary (Award) (see n. 21)

[29]One example is Servier v. Poland (Award) (see n. 23).

2 Evolution of the International Law on Foreign Investment

"International Law on Foreign Investment" (ILFI)[30] has been evolving in various stages.[31] Sornarajah's term provides a broader definition than "International Investment Law" as it comprises not only formalized investment treaties, but also preexisting arrangements; European as well as non-European.[32] Indeed, Miles argued, European "international rules on the protection of foreign-owned property"[33] that were meant to ensure minimum standards of treatment gradually transformed into international investment law. There are two major competing perspectives on the development of international investment law. On the one hand, there is a perception that historically contextualizes the evolution and stresses power relations dating back to the colonial encounter.[34] Miles suggested that ILFI was developed "as a mechanism to protect the interests of capital-exporting states" because "they were also in a political position to enforce their perspective as law."[35] The competing positivist position, on the other hand, conceives international investment law as a mere body of treaties. This latter view dominates textbooks on international investment law. Dolzer and Schreuer's *Principles of International Investment Law*, for example, dedicates only three pages to developments prior to World War II (WWII).[36] Thereby, it renders invisible international power structures

[30]Sornarajah: Law on Foreign Investment (see n. 25).

[31]Sketching the evolution of international investment law, I follow the depiction by Cf. Kate Miles: The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (Cambridge studies in international and comparative law), Cambridge: Cambridge Univ. Press, 2013; praised for its comprehensiveness by Michael Fakhri: Book Review: The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital. By Kate Miles, in: Journal of International Economic Law 18.3 (Aug. 2015), pp. 697–708, DOI: 10.1093/jiel/jgv034, at p. 697.

[32]Cf. ibid.

[33]Miles: Origins (see n. 31), p. 21.

[34]See e. g. ibid.; Sornarajah: Law on Foreign Investment (see n. 25); Anthony Anghie: Imperialism, sovereignty, and the making of international law, digit. print (Cambridge studies in international and comparative law 37), Cambridge: Cambridge Univ. Press, 2008; Andrew Newcombe/Lluís Paradell: Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International), Alphen an den Rijn and Frederick: Wolters Kluwer Itl. and Apspen Publ., 2009, URL: http://www.ebook.de/de/product/7996137/andrew_newcombe_lluis_paradell_law_and_practice_of_investment_treaties_standards_of_treatment.html; Zeng Huaqun: Balance, Sustainable Development, and Integration: Innovative Path for BIT Practice, in: Journal of International Economic Law 17.2 (June 2014), pp. 299–332, DOI: 10.1093/jiel/jgu019, URL: http://dx.doi.org/10.1093/jiel/jgu019.

[35]Miles: Origins (see n. 31), p. 69; cf. likewise Huaqun: Balance, Sustainable Development (see n. 34), p. 301.

[36]Cf. Rudolf Dolzer/Christoph Schreuer: Principles of International Investment Law, 2nd ed., Description based upon print version of record, Oxford: Oxford Univ. Press, 2012, pp. 1–4. Lowenfeld dismissed the view of the importance imperialism has had for the development of ILFI by reference to superiority in efficiency of private property. However, he recognized that "[t]he mix of pragmatism and shifts in ideology is impossible to disentangle." Andreas F. Lowenfeld: International Economic Law, 2nd ed. (Inernationel Economic Law Series), New York and Oxford: Oxford Univ. Press, 2008, p. 467 sq., quote at p. 468.

and maintains an oversimplified view on the intentions of contracting parties.[37] I conceive the historical evolution of the ILFI as vital to understanding international investment law. As Koskenniemi stated "[i]t is possible to have a grasp of the way we are governed, and how power is exercised in the world, only by retracing that history."[38] That is why I henceforth outline central stages.

2.1 Diplomatic Protection and Challenges by Capital Importing Countries

The basic idea of "diplomatic protection is that an injury to a state's national is an injury to the state itself, for which it may claim reparation from any responsible state."[39] Treaties of Friendship, Commerce and Navigation (FCN Treaties) had been the legal foundation for the protection investors' interests in foreign countries.[40] Imposed unequal treaties (nonreciprocally granting privileges[41] to foreign nationals) declared the refusal to allow foreigners to engage in commerce and investment as a *hostile act*. Noncompliance allowed for military interventions. Diplomatic protection and Gunboat Diplomacy were further means to safeguard legal rights of nationals in foreign states.[42] The extend of foreign interventionism can be exemplified by at least 40 military interventions of Great Britain between 1820 and 1914 in Latin America alone.[43] Miles stated that concessions and their forced creation and adherence "evolved into imposed assertions of universally applicable international law as the colonial encounter unfolded."[44] Through the "[a]lignment of state interests with investor interests" investors acquired considerable influence and direct participation in shaping international law.[45]

[37]For the equivalent phenomenon in the more general terms of International Law cf. Anthony Carty: Sociological Theories of International Law, Max Planck Encyclopedia of Public International Law [MPEPIL], Mar. 2008, URL: `http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e735?rskey=rTrcBj&result=9&prd=EPIL` (accessed: 01/12/2017), par. 43.

[38]Koskenniemi: Law, Teleology (see n. 18), p. 24.

[39]Newcombe/Paradell: Law and Practice (see n. 34), p. 4.

[40]Cf. Dolzer/Schreuer: Principles of International Investment Law (see n. 36), p. 1; Miles: Origins (see n. 31), pp. 24 sq.; Kenneth J. Vandevelde: Bilateral Investment Treaties: History, Policy, and Interpretation, Oxford and New York: Oxford Univ. Press, 2010, pp. 24–27.

[41]Privileges such as "travel prerogatives of foreign traders, the securing of extensive trading and investment rights, non-discriminatory commercial access to the host state, the granting of concessions to foreign companies, the protection of Christian missionaries, the leasing or ceding of territory to foreign states, and governance powers." Miles: Origins (see n. 31), p. 27.

[42]Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 8; Miles: Origins (see n. 31), pp. 26 sq., 31.

[43]Cf. Vandevelde: Bilateral Investment Treaties (see n. 40), p. 30.

[44]Cf. Miles: Origins (see n. 31), pp. 28–31, quote at p. 29.

[45]Cf. ibid., pp. 33–42, quote at p. 33. Miles provides an analysis of the influence of the Dutch East India Company.

2.1.1 The Era of Diplomatic Protection

In the 19th and early 20th centuries, international investment protection developed as a component of the diplomatic protection of aliens. The latter defined minimum standards of protection and authorized home states to intervene diplomatically and/or by the use of force in case of a breach of these minimum requirements. Generally, however, aliens were subjects to domestic jurisdiction.[46] The evolution of investment protection has taken place within a matrix of diverging interests, especially between net capital exporting and capital importing nations.[47] Expropriations were already a recurring topic in international relations during the era of diplomatic protection. The expropriation of aliens needed to fulfill three requirements to be considered legal and to exempt the intervention of foreign states. They needed to (1) be in line with a public purpose, (2) refrain from arbitrariness towards and/or discrimination against aliens, and (3) be compensated adequately as part of the *minimum standard of treatment* assumed under Customary International Law (CIL).[48]

2.1.2 Challenges to Diplomatic Protection by Capital importing Countries

As opposed to the view in the diplomatic protection paradigm, many net capital importing countries favored the national standard of treatment. It ruled out any foreign interventions into national affairs (be it diplomatic, be it political) and required that foreigners should not enjoy a higher level of protection compared to their national counterparts.[49] Host states should be allowed to "reduce protection of alien property whilst also reducing the guarantees for property held by nationals".[50] This position, prominently voiced by Carlos Calvo, triggered heated discussions on states' obligations as it gave space to huge differences on the protection of foreign investment across states.[51] Miles pointed out in this respect that the enforcement of the view of capital exporting countries by means of military intervention in the 19th century played a vital role in "the very creation of the international rules

[46] Cf. Miles: Origins (see n. 31), pp. 47 sq.; Newcombe/Paradell: Law and Practice (see n. 34), p. 5; Vandevelde: Bilateral Investment Treaties (see n. 40), p. 25.

[47] Cf. Miles: Origins (see n. 31), p. 70; Nicolás M. Perrone: The Governance of Foreign Investment at a Crossroad: Is an Overlapping Consensus the Way Forward?, in: Global Jurist 15.1 (Jan. 2015), pp. 1–28, DOI: 10.1515/gj-2014-0014, at p. 10.

[48] Cf. Miles: Origins (see n. 31), p. 48.

[49] Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 12; Miles: Origins (see n. 31), p. 48; Vandevelde: Bilateral Investment Treaties (see n. 40), p. 29.

[50] Dolzer/Schreuer: Principles of International Investment Law (see n. 36), p. 1.

[51] Cf. Newcombe/Paradell: Law and Practice (see n. 34), pp. 12 sq.; Dolzer/Schreuer: Principles of International Investment Law (see n. 36), pp. 1 sq.; Perrone: Governance of Foreign Investment (see n. 47), p. 10; Ryan J. Bubb/Susan Rose-Ackerman: BITs and bargains: Strategic aspects of bilateral and multilateral regulation of foreign investment, in: International Review of Law and Economics 27.3 (Sept. 2007), pp. 291–311, DOI: 10.1016/j.irle.2007.07.005, at p. 294.

on foreign investment protection." The Drago-Porter Convention 1907 challenged the 1868 Calvo Doctrine, reinstated the minimum standard, and ruled out the the use of force if host states allowed for arbitral dispute settlement.[52] It was, therefore, not acceptable for most Latin American Nations.

The Bolshevik and Mexican revolutions opened a new chapter of rejecting far reaching investment protection.[53] The new governments labeled their policies of massive uncompensated expropriations as *nationalizations*. This terminology made reference to social objectives of expropriations, implying a fundamentally distinct character. From this line of thought, social objectives exempted from the obligation to compensate.[54] However, this view did not prevail. Capital exporting countries rejected this view:

> The purpose of this program, however desirable, is entirely unrelated to and apart from the real issue. [...] The issue is whether in pursuing them [the purposes] the property of American nationals may be taken without making prompt payment of just compensation under international law.[55]

The Hull Formula, derived from a diplomatic exchange between United States and Mexico, required "prompt, adequate and effective compensation" for expropriations.[56] This rule, again, stressed the requirement of compensation under CIL.[57] Because "a rule of international law cannot be changed or abolished by the action of one or a few governments," Kunz affirmed, the rejection of compensation on the grounds of social purposes could not rule out the continually applicable rule of international law that required compensation. Hence, he continued, the pre-World War I status quo remained intact.[58]

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[52]Cf. Newcombe/Paradell: Law and Practice (see n. 34), pp. 8 sq.

[53]See Miles: Origins (see n. 31), pp. 74–78.

[54]"Mexico argued that, in the case of general and impersonal expropriation for the purpose of redistribution of land, it was only required to pay compensation in accordance with its national laws. In Mexico's view, international law distinguished between expropriations resulting from a 'modification of the juridical organization and which affect equally all the inhabitants of the state and those otherwise decreed in specific cases and which affect interests known in advance and individually determined.'" Newcombe/Paradell: Law and Practice (see n. 34), p. 17; cf. also Miles: Origins (see n. 31), p. 75.

[55]Josef Laurenz Kunz: The Mexican Expropriations, New York University School of Law Contemporary Pamphlets Series 5 (1), New York University School of law, 1940, p. 27; as quoted in Miles: Origins (see n. 31), p. 76.

[56]As quoted in Dolzer/Schreuer: Principles of International Investment Law (see n. 36), p. 2; further see extensively Lowenfeld: International Economic Law (see n. 36), pp. 475–481; Miles: Origins (see n. 31), pp. 48, 75 sq.; Newcombe/Paradell: Law and Practice (see n. 34), p. 17; Andrew T. Guzman: Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, in: Virginia Journal of International Law 38.639 (1998), pp. 639–688, at pp. 641 sq.

[57]Cf. Dolzer/Schreuer: Principles of International Investment Law (see n. 36), p. 2; Guzman: Treaties That Hurt (see n. 56), pp. 641 sq.

[58]Kunz: Mexican Expropriations (see n. 55), pp. 13–16; as quoted in Miles: Origins (see n. 31), p. 76.

2.2 Decolonization and the New International Economic Order

As many former colonies became independent after WWII, newly independent countries continually called into question the status quo of the international economic system in order to become politically and economically independent.[59] One stream of thinking in international law, the "School of Reims", agreed with the newly colonized states and saw "international law as an ideological expression of economic conflict in the world".[60] The issue of the protection of foreign investors proved to be a key point of conflict. After WWII, many socialist governments came into power. The result was, what Lowenfeld denoted as "The Wave of Expropriations (1945–70)".[61] Additionally, many capital-importing nations tried to readjust ILFI through their dominant position in the United Nations (UN). From 1962 onwards, three key resolutions were passed against the resistance of dominant powers: the General Assembly Resolution 1803 on the Principle of Permanent Sovereignty Over Natural Resources (GA Resolution 1803), the 1974 Charter of Economic Rights and Duties of States (CERDS), and the 1974 Declaration of the Establishment of a New International Economic Order (NIEO Declaration).[62] Although it openly rejected the Hull Formula, GA Resolution 1803 made concessions to capital exporting countries. That is, it maintained the obligation of "appropriate compensation"[63] despite its emphasis on the sovereign control over natural resources and compensation claims for damage done during colonial rule.[64] The CERDS and the NIEO Declaration (forced into being by the G77 against the resistance of capital exporting countries) went much further; they covered various topics, such as: decreasing Terms of trade (ToT), the impact of colonialism, the international monetary system, assistance for

[59] Cf. Duncan French: "From Seoul with Love": The Continuing Relevance of the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law Relating to a New International Economic Order, in: Netherlands International Law Review 55.01 (Mar. 2008), pp. 3–32, DOI: 10.1017/s0165070x0800003x, at pp. 6 sq.; Miles: Origins (see n. 31), pp. 93 sq.; Newcombe/Paradell: Law and Practice (see n. 34), pp. 25 sq., 30–32; Edward Guntrip: Self-Determination and Foreign Direct Investment: Reimagining Sovereignty in International Investment Law, in: International and Comparative Law Quarterly 65.04 (Aug. 2016), pp. 829–857, DOI: 10.1017/s0020589316000324, at p. 839.

[60] Koskenniemi: Law, Teleology (see n. 18), p. 13.

[61] Cf. Lowenfeld: International Economic Law (see n. 36), pp. 483–485, quote at p. 483; Guntrip: Self-Determination (see n. 59), p. 839.

[62] See French: "From Seoul with Love" (see n. 59), pp. 6–11; Miles: Origins (see n. 31), pp. 94–99; Guntrip: Self-Determination (see n. 59), pp. 840 sq.

[63] The US proposal to define appropriate compensation as "promt adequate and effective compensation" was not adopted. Paragraph 4 advocates the settlement of compensation claims under domestic jurisdiction. However, it allows for international arbitration if concerned parties agree. Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 25

[64] Cf. Miles: Origins (see n. 31), pp. 95 sq.

development, and, most importantly, they reinstated the right to nationalize without making reference to compensation.[65]

Provided far reaching nationalizations in many parts of the world, capital importers' reluctance to accept "international customary standards", and the New International Economic Order (NIEO), the capital exporting economies reacted with two courses of action.

First, their positions were reaffirmed by doctrinal development.[66] With the concept of *state succession* (former) colonial powers argued that acquired rights had to be fully respected by the new states. For example, disputes about concessions should be submitted to international arbitration. Rather than national law, "a new natural law of [international] contracts" was considered applicable law.[67] The so called Minimum Standard of Treatment was reaffirmed in a series of arbitral awards in the 1920s and the post-WWII era, despite its rejection by many former colonies.[68] Another example of doctrinal development by means of case law was the re-rendering of concessions as "quasi-treaties" of international law by the invocation of "general principles of law".[69] An attempt to codify CIL including the *Responsibility of States for Damage Caused in Their Territories to the Persons and Properties of Foreigners* failed in 1930 because many capital-importing members of the League of Nations rejected the standards.[70]

Secondly, capital exporting states deflected ex-colonies' efforts to participate in the designing of the ILFI by "regime creation".[71] Various efforts to introduce a multilateral treaty on the protection of foreign investment failed between 1948 and 1967, due to stark disagreement about substantive standards.[72] Another example is the New York Convention on the Recognition of Foreign Arbitral Awards (New York Convention) which "limits the grounds upon which local courts may refuse to recognize and enforce awards."[73]

Guzman argued that, because of the reluctance to buy into codified obligations and rejection of customary obligations, the Hull Formula had lost legitimacy and ceased to be part on

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65 Cf. French: "From Seoul with Love" (see n. 59), pp. 7 sq.; Miles: Origins (see n. 31), pp. 98 sq.

66 Cf. ibid., pp. 80–82.

67 Anghie: Imperialism, sovereignty (see n. 34), p. 229; cf. further Newcombe/Paradell: Law and Practice (see n. 34), p. 18; Miles: Origins (see n. 31), p. 80.

68 Newcombe/Paradell: Law and Practice (see n. 34), pp. 13, 23 sq.

69 Anghie: Imperialism, sovereignty (see n. 34), p. 232; cf. further Miles: Origins (see n. 31), p. 81.

70 Cf. Newcombe/Paradell: Law and Practice (see n. 34), pp. 14 sq.

71 Cf. Miles: Origins (see n. 31), pp. 84–89, quote at p. 84; Guntrip: Self-Determination (see n. 59), p. 841.

72 Cf. Miles: Origins (see n. 31), p. 85; Newcombe/Paradell: Law and Practice (see n. 34), p. 26; Rainer Geiger: Towards a multilateral agreement on investment, in: Cornell International Law Journal 31.3 (1998), pp. 467–475, at p. 472; as quoted in Born: International Adjudication (see n. 6), p. 833; see also Franziska Tschofen: Multilateral Approaches to the Treatment of Foreign Investment, in: ICSID Review 7.2 (Sept. 1992), pp. 384–427, DOI: 10.1093/icsidreview/7.2.384.

73 Newcombe/Paradell: Law and Practice (see n. 34), p. 24.

CIL (based on state practice and *opinio iuris*) by the mid 1970s.[74] The threat to investments by nationals abroad gave rise to another tier of regime creation efforts.

2.3 Introducing an International Treaty System Safeguarding Far Reaching Investment Protection

The challenges to the protection of foreign investment brought to the fore by nationalization policies and the NIEO "were met with hostility from capital-exporting states similar to that seen in response to the Calvo Doctrine proposals of the nineteenth century."[75] Ironically, challenges by civil society activism against far reaching investor protection served capital exporting countries as an argument to call for reinforced protection.[76] Miles convincingly argued that the development of legal doctrine, the system of bilateral treaties on investment protection and the installation of institutions, such as ICSID, were direct reactions to these challenges.[77]

2.3.1 Institutional Development

After the end of the Cold War, important institutional innovations were introduced. The World Trade Organization (WTO) (although not directly commissioned to regulate international investment protection) introduced a series of TIPs: the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[78] ICSID was introduced in 1965 as a neutral forum, a means to "depoliticize" investment disputes and a substitute for failed Multilateral Investment Agreement (MIA) initiatives. Rather than substantive standards that are determined by the applicable IIA, the ICSID provided procedural regulations and binding awards.[79] In 1978, it was extended by an additional facility to provide a forum where non-members of the ICSID Convention could chose to settle their disputes.[80]

[74]Cf. Guzman: Treaties That Hurt (see n. 56), p. 641; because of protests, UN declarations (practice) and the reluctance to pay full compensation for expropriation (*opinio iuris*) the Hull Rule ceased to be part of CIL. Cf. Andrew Guzman: The Consent Problem in International Law, Berkeley Program in Law and Economics, Working Paper Series, University of California and Berkeley Law School, Oct. 3, 2011, URL: `https://escholarship.org/uc/item/04x8x174` (accessed: 01/06/2017), p. 37.

[75]Miles: Origins (see n. 31), p. 72.

[76]Cf. ibid., p. 73.

[77]Cf. ibid.

[78]Cf. UNCTAD: Reforming the International Investment Regime: An Action Menu, in: World Investment Report 2015: Reforming International Investment Governance, New York and Geneva: United Nations Publ., 2015, chap. IV, pp. 119–173, DOI: `10.18356/4f5603a5-en`, at p. 123.

[79]Cf. Newcombe/Paradell: Law and Practice (see n. 34), pp. 26 sq.

[80]Cf. ibid., p. 27.

Furthermore, the World Bank Group (World Bank) introduced Multilateral Investment Guarantee Agency (MIGA) in 1985; and World Bank Guidelines on the Treatment of Foreign Direct Investment (WBGTFDI) preparing and strengthening what the UNCTAD denoted as the "Era of Proliferation".[81]

The ICSID Convention, together with the UNCITRAL (the most important fora of ISDS), has an impressive record of applicability: 153 out of 193 member states of the UN are subject to it. However, some important economies such as Brazil, India, Iran, Mexico, Poland, The Russian Federation, and South Africa were reluctant to sign or ratify it.[82] Moreover, up until now, three former signatory parties of the ICSID Convention (Bolivia, Ecuador, and Venezuela) have withdrawn from it.[83] Various authors pointed out that other states, such as Argentina might follow suit.[84] Resembling institutional development, the proliferation of bilateral and multilateral investment treaties and agreements has been growing considerably.

2.3.2 BIT-System

The first BIT was signed between Germany and Pakistan in 1959. Still, many FCN Treaties were adopted after WWII, which also included significant provisions on investment protection. For example, Newcombe and Paradell pointed out that "the 1956 Nicaragua-US FCN Treaty might be considered as providing more comprehensive substantive standards of investment protection than many of the early European BITs."[85] In the 1960s and 70s, many capital exporting countries followed Germany's example, concluding BITs. Although rights and obligations are reciprocal, Newcombe and Paradell argued that "BITs were developed by capital exporting states to protect the economic interests of their nationals abroad."[86] This first generation of BITs focused on baseline standards of protection such as national treat-

[81]Cf. UNCTAD: Reforming (see n. 78), p. 121, 123, see below.

[82]*Non-Signatory States:* Andorra, Angola, Antigua and Barbuda, Bhutan, Bolivia, Brazil, Cuba, Djibouti, Dominica, Ecuador, Equatorial Guinea, Eritrea, India, Iran, Kiribati, Lao, Libya, Liechtenstein, Maldives, Marshall Islands, Mexico, Monaco, Myanmar, North Korea, Palau, Poland, Tajikistan, Tuvalu, Vanuatu, Venezuela, Viet Nam, South Africa. *Signatory states without ratification:* Belize, Dominican Republic, Ethiopia, Guinea-Bissau, Kyrgyz Republic, Namibia, The Russian Federation, Thailand. Cf. ICSID: Database of ICSID Member States, URL: `https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx` (accessed: 09/06/2016).

[83]Cf. Antonio R. Parra: Participation in the ICSID Convention, in: ICSID Review 28.1 (Apr. 2013), pp. 169–178, DOI: `10.1093/icsidreview/sit008`, at p. 175; David Schneiderman: Investing in Democracy?: Political Process and International Investment Law, in: University of Toronto Law Journal 60.4 (Oct. 2010), pp. 909–940, DOI: `10.3138/utlj.60.4.909`, at pp. 912 sq.; Lavopa et al.: Kill a BIT (see n. 6), p. 873. There are diverging opinions on the legal effects of the renouncing ICSID convention, especially when consent to arbitration under ICSID is concerned. Cf. Lavopa et al.: Kill a BIT (see n. 6), pp. 876 sq.

[84]Cf. ibid., p. 871; Born: International Adjudication (see n. 6), p. 832, n. 219.

[85]Newcombe/Paradell: Law and Practice (see n. 34), pp. 40 sq.

[86]Ibid., p. 42.

ment, MFN treatment, minimum standards, the right to compensation for expropriation, and others. One important innovation in comparison to FCN Treaties was the introduction of state-to-state arbitration, as an alternative to jurisdiction under the International Court of Justice (ICJ).[87] From the late 1960s onwards, clauses for investor-state arbitration were added to new BITs, propelled by ICSID's 1969 publication of model clauses on investor-state arbitration for their inclusion in new treaties.[88] Newcombe and Paradell asserted that this step "marks the true beginning of modern BIT practice because it combines substantive investment promotion and protection obligations with binding investor-state arbitration to address alleged breaches of those obligations."[89]

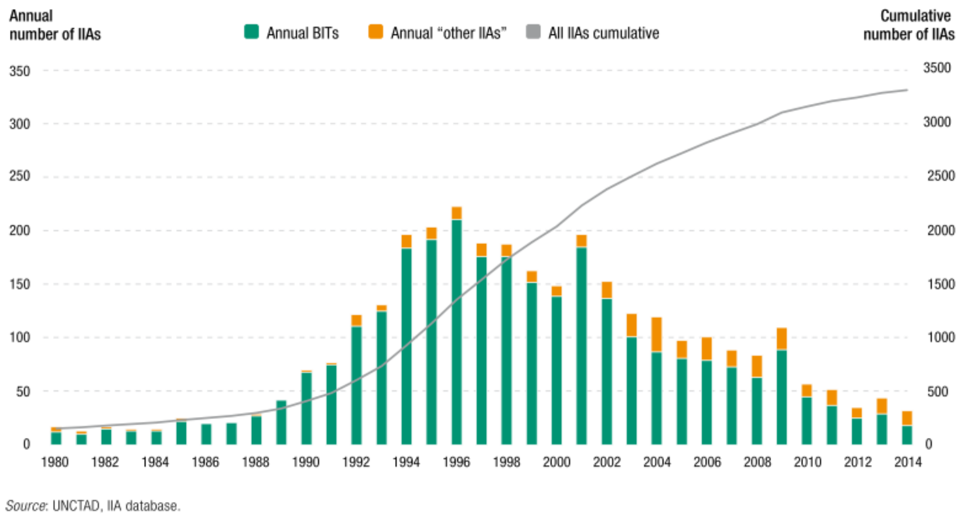

Figure 3: Trends in IIAs signed, 1980–2014[90]

Throughout the 1970s, as little as 93 BITs were adopted, reproducing the speed of the past decade[91]. This is due to the divergent views on investment protection between capital

[87]Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 41.

[88]Cf. ibid., p. 44.

[89]Ibid. The first case of ISDS relying on obligatory consent to arbitration is *AAPL v. Sri Lanka*: "The Request stated that AAPL wished to institute arbitration proceedings against the Democratic Socialist Republic of Sri Lanka [...] under the terms of the ICSID Convention to which Sri Lanka is a contracting Party, and in reliance upon Article 8.(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern-Ireland and the Government of Sri Lanka for the Promotion and Protection of Investment of February 13, 1980". Asian Agricultural Products Ltd. v. Republic of Sri Lanka, Final Award ICSID Case No. ARB/87/3, ICSID, June 27, 1990, URL: `http://www.italaw.com/sites/default/files/case-documents/ita1034.pdf` (accessed: 06/25/2016), par. 1.

[90]Graph taken from UNCTAD: Recent Policy Developments and Key Issues, in: World Investment Report 2015: Reforming International Investment Governance, New York and Geneva: United Nations Publ., 2015, chap. III, pp. 101–118, DOI: `10.18356/4f5603a5-en`, at p. 106.

[91]Cf. idem: Bilateral Investment Treaties 1959–1999: Treaty Practice and Interpretation in a Changing World, UNCTAD/ITE/IIA/2, New York and Geneva, Dec. 15, 2000, URL: `http://unctad.org/en/Docs/poiteiiad2.en.pdf` (accessed: 06/26/2016), p. 1.

importing and exporting states mentioned above.[92] In contrast, the 80s saw a dramatic increase of about 220 BITs[93], adding up to a total of 404 IIAs.[94] Many of the new treaties can be attributed to the new US BIT program.[95] It is until 1982 when the first model BIT and the first BIT with Egypt were signed. Before, US investors had to rely solely on FCN Treaties.[96] This "Era of Dichotomy" (the 1970s and 80s) was followed by an "Era of Proliferation" that lasted until 2007.[97] During the 1990s through to the end of 2000, almost three new agreements were signed *each week*; consequently, the UNCTAD counted 1686 new BITs in the same period (see fig. 3).[98] At the same time, multilateral agreements flourished. As mentioned above, this "'IIA rush'"[99] was spear headed by three major TIPs under the auspices of WTO in the mid 90s. Furthermore, Free Trade Agreements (FTAs), like North American Free Trade Agreement (NAFTA), which included provisions on investment protection and ISDS were agreed upon. They have not only regulated the treatment of investments by contracting parties, but also included provisions on market access. Since then, they have been promoting non-discrimination of foreign investment and/or services.[100] As reflected in figure 4, the 1990s also witnessed an unprecedented increase in ISDS claims. The 1992 NAFTA between Canada, US, and Mexico developed into a major vehicle in subsequent years and, to a lesser degree, decades.[101] Vandevelde pointed out that the huge number of "NAFTA claims triggered a flood of investor-state arbitrations."[102] Another important factor for the proliferation of ISDS was the new understanding on consent to arbitration established by the tribunals in *AAPL v. Sri Lanka* and *AMT v. Zaire*. As Stern indicated, these cases instituted the understanding that by signing BITs with arbitration provisions states consented to arbitration. This development contributed significantly to the spread of ISDS.[103]

[92]Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 45.
[93]Cf. UNCTAD: Bilateral Investment Treaties 1959–1999 (see n. 91), p. 1.
[94]Cf. idem: Reforming (see n. 78), p. 121.
[95]Cf. Huaqun: Balance, Sustainable Development (see n. 34), p. 301.
[96]Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 46.
[97]UNCTAD: Reforming (see n. 78), p. 121.
[98]Cf. ibid., p. 1.
[99]Ibid., p. 124.
[100]Cf. ibid., pp. 123 sq.
[101]Ita**law** listed 62 cases of ISDS under NAFTA. Cf. italaw: International Investment Agreement Name: NAFTA, URL: `http://www.italaw.com/browse/international-investment-agreement-name?field_case_type_tid[0]=1090&field_case_treaties_tid=11` (accessed: 08/15/2017).
[102]Vandevelde: Bilateral Investment Treaties (see n. 40), p. 74.
[103]Cf. Brigitte Stern: The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate, in: José E. Alvarez et al. (eds.): The Evolving international Investment Regime: Expectations, Realities, Options, Oxford, New York: Oxford Univ. Press, 2011, pp. 174–192, at pp. 178–181.

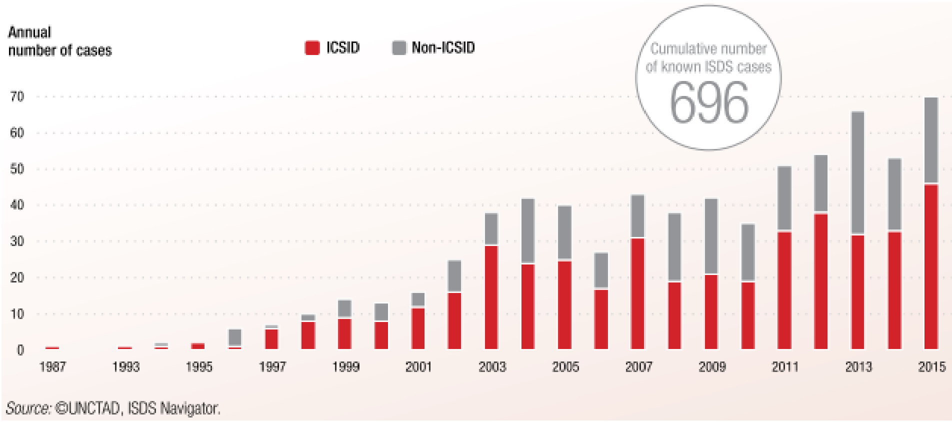

Figure 4: Known ISDS cases, 1987–2015[104]

Since 2008, many factors have led to an "Era of Re-orientation" in the IIA framework.[105] One prominent factor is the experience capital exporting countries have had with ISDS, especially as respondent states. For example, the US and Canada reacted with new model BITs that clarified the "scope and meaning of investment obligations", especially of the minimum standards of treatment and indirect expropriation.[106] Australia, on the other hand, decided to discontinue the inclusion of ISDS in trade agreements.[107]. Innovations, such as open hearings of ISDS tribunals and the possibility of non-contracting parties to submit *amicus curiae* briefs, addressed the problem of transparency and accountability. Another factor was the banking crisis that was followed by a severe financial and economic crisis in 2008. Among others, it reminded decision makers of the importance of an adequate regulatory framework for international investment.[108] Additionally, concerns about regulatory space of nation states and the dissatisfaction with the outcomes of current ISDS practice gave incentives for reform. Whilst many capital exporting countries work towards a "'new generation'" of BITs in the framework of UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), others do no longer negotiate new IIAs or even decided to terminate

[104]Graph taken from UNCTAD: Investor-State Dispute Settlement: Review of Developments in 2015, IIA Issue Notes 2, June 2016, URL: `http://unctad.org/en/PublicationsLibrary/webdiaepcb2016d4_en.pdf` (accessed: 01/17/2017), p. 2.

[105]Idem: Reforming (see n. 78), pp. 121, 124.

[106]Ibid., p. 124.

[107]Cf. Lavopa et al.: Kill a BIT (see n. 6), p. 871; Waldemar Hummer: Was haben TTIP, CETA und TISA gemeinsam?: "Investor-To-State Dispute Settlement" (ISDS) als umstrittenes Element der EU-Freihandelsabkommen, in: integration 38.1 (2015), pp. 3–25, DOI: 10.5771/0720-5120-2015-1-3, The same discussion is momentarily taking place in the European Union (EU) about Transatlantic Trade and Investment Partnership (TTIP) and CETA. See for example; Peter Draper et al.: Streitpunkt Investitionsschutz: Für und Wider des Investitionsschutzes im TTIP-Abkommen, in: ifo Schnelldienst 67.12 (2014), pp. 3–19, (accessed: 09/08/2016).

[108]Cf. UNCTAD: Reforming (see n. 78), p. 124.

existing ones.[109] As BITs often provide not only for arbitration under the ICSID convention but also under other rules such as UNCITRAL or International Chamber of Commerce (ICC), a country may still be subjected to international arbitration after its withdrawal from ICSID. Hence, the termination of IIAs may be the only way to avoid international arbitration.[110] For example, as of now, Bolivia has terminated 10 of its 23 BITs, e. g. its treaties with the US, Germany, and France.[111] However, *survival clauses* included in many BITs provide for an extension of protection of investments concluded under the BIT of 10–20 years.[112] Lavopa and his colleagues Lavopa et al. argued, that a renegotiation of existing BITs may be a more effective strategy in comparison to a termination, because it tends to not trigger survival clauses.[113] In 2015, "at least 50 countries or regions", indiscriminate of their economic status and geographic location, were in or had concluded a process of revision of their model IIAs.[114] The fact that big economic powers increasingly have to respond to arbitral tribunals may promote further renegotiations as interests between contracting parties may coincide.[115] In only 9% of ISDS cases (1990–2014), respondent states were part of the Organisation for Economic Co-operation and Development (OECD).[116] "Since the mid-to-late 1990s", Schultz and Dupont asserted, ISDS ceased to be "a 'rich vs poor', 'developed vs developing' instrument" and converted into "a mixed 'developed vs developed' and 'developed vs developing' instrument".[117] Still, only a very limited number of cases are filed by poor states. None appear in the top 15 list of filers that accounts for 87.1% of cases.[118] Rivkin and his colleagues pointed out that many new BITs "either excluded ISDS provisions or limited the potential for ISDS in some way."[119] For example, the new US model BITs from 2004 and 2012 delimited the scope

[109]Cf. UNCTAD: Reforming (see n. 78), p. 124; Erlend M. Leonhardsen: Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration, in: Journal of International Dispute Settlement 3.1 (Sept. 2012), pp. 95–136, DOI: 10.1093/jnlids/idr014, at pp. 107 sq.

[110]Cf. Lavopa et al.: Kill a BIT (see n. 6), pp. 877 sq.

[111]Cf. UNCTAD: Bolivia, Plurinational State of: Bilateral Investment Treaties (BITs) (Investment Policy Hub), URL: http://investmentpolicyhub.unctad.org/IIA/CountryBits/24 (accessed: 09/11/2016).

[112]Cf. idem: Reforming (see n. 78), p. 130; Lavopa et al.: Kill a BIT (see n. 6), pp. 879 sq.

[113]Cf. ibid., pp. 881 sq. However, the VCLT is not completely clear on the issue of "amendment and modification of treaties". Cf. ibid., pp. 882–885.

[114]Cf. UNCTAD: Key Issues (see n. 90), p. 108.

[115]Cf. Lavopa et al.: Kill a BIT (see n. 6), p. 885.

[116]Cf. Rachel L. Wellhausen: Recent Trends in Investor—State Dispute Settlement, in: Journal of International Dispute Settlement 7.1 (Jan. 2016), pp. 117–135, DOI: 10.1093/jnlids/idv038, at p. 127.

[117]Thomas Schultz/Cédric Dupont: Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study, in: European Journal of International Law 26.3 (2015), pp. 1147–1168, DOI: 10.1093/ejil/chu075, at p. 1156.

[118]The poorest country is Cyprus with 15 filings. That can however be attributed to "'treaty shopping'". Cf. Wellhausen: Recent Trends (see n. 116), pp. 124 sq.

[119]David W. Rivkin et al.: The future of investor-state dispute settlement in the energy sector, in: The Journal of World Energy Law & Business 8.2 (Mar. 2015), pp. 130–153, DOI: 10.1093/jwelb/jwv013, at p. 132.

of FET and *indirect expropriation.*[120] However, MFN clauses have to be taken into account. As they allow to import of more favorable provisions from other IIAs, the same lower standards have to be implemented in *all* treaties of one state, in order to be effective.[121]

All in all, the evolution of international law was a political enterprise determined by an imbalance of power in the system of states, states-to-be, and private actors. This view is an outcome of postmodern criticism that "rejects a traditional reading of international legal history as a history of progress from anarchy to order, from politics to law."[122] Miles characterized the evolution of the ILFI as driven by capital exporters in a "dual process of assertion and creation" of their views on international obligations.[123] What is clear from this section is, that the evolution of the IIR can not be divorced from the colonial past and power imbalances within the state system. This fact sheds a different light on the concrete outcomes of ISDS analyzed in the subsequent two sections.

3 Treaty Interpretation

This, and the subsequent sections give answers to the question of the arguments brought forward by claimants, respondents, and arbitral bodies in relation to the intentions of contracting parties in the context of ISDS (subquestion 1). An overview of the VCLT rules of treaty interpretation, as well as an analysis of the concrete arguments brought forward over time, is required.

Before the Vienna Convention on the Law of Treaties (VCLT) various attempts to codify treaty law had failed. The VCLT was adopted in 1969 after preparations by the International Law Commission (ILC), and entered into force eleven years later.[124] The VCLT codified and put together pre-existing standards of interpretation and tried to realize a coherent set of rules.[125] Notwithstanding these intentions, the VCLT was criticized for ambiguities in its provisions. Weininger, McLachlan and Shore, for example, criticized that provisions allowed for diametrically opposed interpretations in various cases of ISDS.[126]

[120]Cf. Lavopa et al.: Kill a BIT (see n. 6), p. 885.
[121]Cf. ibid., p. 890.
[122]Andreas L. Paulus: International Law After Postmodernism: Towards Renewal or Decline of International Law?, in: Leiden Journal of International Law 14.4 (Dec. 2001), pp. 727–755, DOI: 10.1017/s092215650100036x, pp. 737–739, quote at p. 737.
[123]Cf. Miles: Origins (see n. 31), pp. 55–69, quote at p. 69.
[124]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 1.12.
[125]Cf. ibid., 2.11—2.12.
[126]Cf. Campbell McLachlan et al.: International investment arbitration: substantive principles (Oxford International Arbitration Series), Oxford: Oxford Univ. Press, 2007, pp.67 sq. Weininger identifies the following problematic cases: *CMS v. Argentina*; *SGS v. Pakistan*; *SGS v. Philippines*; *Tokios Tokelés v. Ukraine*. Cf. Matthew Weiniger: Jurisdiction Challenges in BIT Arbitrations: Do You Read a BIT by Reading a BIT or

A majority of scholars considers that the VCLT "as a whole, is reflective of customary international law."[127] Hence, it applies to *all* states of the international community, not only signatories.[128] "The United States, for example, is not party to the treaty and yet accepts that it is bound through CIL."[129] The ICJ ruled in *North Sea Continental Shelf Cases* that customary rules "by their very nature, must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its favour."[130] Exempt may only be *persistent objectors*, states that since the introduction of a certain rule have constantly denied its applicability.[131] This concept is deeply rooted in the sources of international law.[132] However, Dumberry dismisses the existence of a *persistent objector* rule[133] on the basis of "its weak judicial recognition [...], the lack of actual state practice supporting it [...],and its logical incoherence and inconsistent application".[134]

3.1 VCLT Article 31 General Rule of Interpretation

Article 31 establishes a "[g]eneral rule of interpretation"[135] that has a clear focus on the text of the treaty, as well as developments that follow its conclusion.[136] Circumstances preceding a treaty's conclusion are dealt with in VCLT Article 32. Supplementary means of interpretation, below. Article 31 *as a whole* is the general rule of interpretation. However, various scholars have pointed out that tribunals in ISDS tend to selectively apply it. This is especially

by Reading into a BIT?, in: Julian D. M. Lew/Loukas A. Mistelis (eds.): Pervasive Problems in International Arbitration (International Arbitration Law Library 15), Alphen aan den Rijn and New York: Kluwer Law International, 2006, pp. 234–265, at p. 254. Weeramantry points to similar problems with *Plama v. Bulgaria*. Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 2.19.

[127]Ibid., par. 1.14.

[128]Ibid., par. 2.25.

[129]Guzman: Consent Problem (see n. 74), p. 36.

[130]North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands), Judgement ICJ Nos. 51 & 52, ICJ, Feb. 20, 1969, URL: `http://www.icj-cij.org/docket/files/52/5561.pdf` (accessed: 11/07/2016), par. 63.

[131]Cf. Stefan Lorenzmeier: Völkerrecht: Schnell erfasst, 2nd ed., Berlin and Heidelberg: Springer Verl., 2012, DOI: `10.1007/978-3-642-23711-9`, pp. 50 sq.; Patrick Dumberry: The Last Citadel!: Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor–State Arbitration?, in: Leiden Journal of International Law 23.02 (Apr. 2010), p. 379, DOI: `10.1017/s0922156510000105`, at p. 386.

[132]Cf. ibid., p. 386, especially nn. 45–48.

[133]Cf. ibid., p. 399.

[134]Ibid., pp.- 386 sq., cf. further pp. 387–391.

[135]United Nations: Vienna Convention on the law of treaties (with annex): Concluded at Vienna on 23 May 1969, in: Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (Treaty Series 1155), New York 1987, pp. 331–512, Art. 31.

[136]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.04.

problematic as the ICJ has rejected the idea of any hierarchy among Article 31 provisions.[137] For example, only about 16% of 98 ICSID decisions studied by Fauchald "extend their references beyond this provision [31(1)]."[138] The importance of the comprehensive application of Article 31 can be illustrated by an dissenting opinion by arbitrator Berman in *Lucchetti v. Peru*. He claimed that the tribunal did not "diligently and systematically apply the Vienna Convention rules at all, let alone with the particular care the situation would seem to have dictated."[139] Therefore, Berman opted for an annulment of the final award in *Lucchetti v. Peru* whereas the tribunal dismissed it.[140] Article 31(1) provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[141]

This article being part of the general rule, requires four basic principles: (1) i, good faith, (1) ii, ordinary meaning of its terms, (1) iii, their context, and (1) iv, its object and purpose. I pay special attention to the fourth requirement, as it reflects the research question. Moreover, the general rule also incorporates the (2) consideration to preamble, annexes, and connected agreements or instruments.

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[137] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.10; Ishikawa: Keeping (see n. 6), p. 137.

[138] That is, they made reference to one or more of the Articles 31(2) through 31(4). Ole, Kristian Fauchald: The Legal Reasoning of ICSID Tribunals: An Empirical Analysis, in: European Journal of International Law 19.2 (Apr. 2008), pp. 301–364, DOI: 10.1093/ejil/chn011, at p. 314.

[139] Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4 (also known as: Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A. v. The Republic of Peru), Decision on Annulment ICSID Case No. ARB/03/4, ICSID, Sept. 5, 2007, URL: http://www.italaw.com/sites/default/files/case-documents/ita0277.pdf (accessed: 11/11/2016), dissenting opinion, par. 12. In his opinion, the tribunal failed to discern the meaning of "dispute" by not considering the object and purpose of the treaty: "So when the issue was, as here, how the term 'dispute' was to be understood for the purposes of Article 2 of the BIT, one would have expected a number of straightforward enquiries to have been undertaken, including: a textual analysis of the provision in question and its purpose; an analysis of other connected provisions of the treaty; an examination of other places in the treaty where the same terms had been used, to see what light that might throw on the intentions behind Article 2; a discussion of the object and purpose of the treaty as a whole as a guide to the interpretation of Article 2; a search for whatever other material might be available to illuminate the precise intentions of the Treaty Parties in agreeing to Article 2; and so on and so forth. There is nothing special about this list; the items in it are simply the normal tools of treaty interpretation."ibid., dissenting opinion, par. 8.

[140] Cf. ibid., dissenting opinion, par. 18.

[141] United Nations: Vienna Convention (see n. 135), Art. 31(1).

3.1.1 31(1) i. Good Faith

The good faith obligation ties interpretation of a treaty to "object and purpose of a treaty prior to its entry into force."[142] Therefore, adjudicators have to refrain from interpretations that render provisions of a treaty useless or deviate from its object and purpose.[143] For example, the tribunal in *Millicom v. Senegal* went beyond a provision that granted protection to natural persons only because this stipulation obviously contradicted the object and purpose of relevant BIT. It noted that "additions and corrections may be made without distorting the original intent of the parties."[144] The *pacta sunt servanda principle* lies at the core of good faith. This means that contracting parties respect and adhere to concluded treaties.

3.1.2 31(1) ii. Ordinary Meaning

The ordinary meaning (that is, the exact wording of a treaty) is the starting point of interpretations.[145] However, scholars advocate for further examinations in order to complete the interpretative process.[146] For substantive provisions, such as fair and equitable treatment (FET), an analysis of the literal meaning does not suffice because its meaning is "indicated through past practice, decisions, or commentary."[147] Different cultural and subjective normative positions of the interpreter, as well as the changing of literal meanings over time, may also compromise the meaningfulness of literal interpretations.[148]

3.1.3 31(1) iii. Context

An "over-literal interpretation" may be mitigated by the context requirement.[149] Tribunals have referred to a wide scope of contextual variables; on occasions too wide an array. Ac-

[142] Markus Kotzur: Good Faith (Bona fide), Max Planck Encyclopedia of Public International Law [MPEPIL], Jan. 2009, URL: `http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412#law-9780199231690-e1412-div1-3` (accessed: 12/13/2016), par. 19.

[143] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.21–3.31.

[144] Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal, Decision on Jurisdiction of the Arbitral Tribunal ICSID Case No. ARB/08/20, ICSID, July 16, 2010, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw1247.pdf` (accessed: 04/21/2016), par. 98.

[145] Tribunals may also refer to the ordinary meaning as "(a) 'natural and fair meaning'; (b) 'natural and ordinary meaning'; (c) 'natural and obvious sense'; (d) 'normal sense'; (e) 'ordinary or grammatical meaning'; (f) 'plain language'; (g) 'plain meaning'; (h) 'plain wording'; (i) 'plain and natural meaning'; (j) 'common use'; and (k) '*usus loquendi*'" Weeramantry: Treaty Interpretation (see n. 9), par. 3.33, original emphasis.

[146] Cf. ibid., par. 3.38.

[147] Ibid., par. 3.42.

[148] Ibid., par. 3.48–3.50.

[149] Ibid., par. 3.53.

cording to Paulsson, “[t]he permissible context is the context of the terms of the treaty and not the context of the treaty generally”.[150]

Context allows for expansive interpretation that go beyond the ordinary meaning of stipulations. Fauchald’s empirical study of 98 awards sheds light on the usage of contextual arguments in ISDS. 49 decisions featured at least one contextual argument, 38 of which proved to be an essential issue in the interpreter’s analysis of the respective cases.[151] Notably, complex TIPs such as NAFTA provide a lot of context and may include conflicting provisions across chapters.[152]

3.1.4 31(1) iv. Object and Purpose

Object and purpose (also referred to in past decisions as “‘intention’; ‘aim and spirit’; ‘aim’; ‘motive’; ‘objective[s]’; ‘objects’; ‘purposes’; ‘purpose and aim’; ‘general spirit and objectives’”[153]) reflect the intention of contracting parties. However, the ICJ made clear in *Libya v Chad* that “interpretation must be based above all upon the text of the treaty.”[154] Weeramantry concluded that the requirements in 31(1) ii through iv were based on the treaty text.[155] This means that intentions contracting parties had at the moment of concluding the treaty can only be taken into account if they are laid down in the treaty text. The “intentions of parties approach”, favored by various scholars, was refuted by the ICJ and the Institute of International Law (IIL) in multiple occasions.[156] That is the reason why political issues such as power imbalances between contracting parties were not considered in the interpretative process.

In many cases, tribunals did not clarify the sources (e. g. the preamble) of their interpretation of a treatie’s object and purpose. This may suggest their understanding of it as evident.[157] Another reason may be the poor drafting of preambles that has not allowed for

[150]Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, Individual Opinion of Jan Paulsson ICSID Case No. ARB/05/24, ICSID, June 12, 2009, URL: http://www.italaw.com/sites/default/files/case-documents/italaw6291.pdf (accessed: 12/13/2016), par. 44. For an overview of contextual variables cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.54.

[151]Fauchald: Legal Reasoning (see n. 138), p. 321.

[152]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.65–3.68; see e. g. S.D. Myers, Inc. v. Government of Canada, First Partial Award, UNCITRAL, Nov. 13, 2000, URL: http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (accessed: 12/13/2016).

[153]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.78.

[154]Territorial Dispute Libyan Arab Jamahiriya/Chad, Judgement ICJ General List No. 83, ICJ, Feb. 3, 1994, URL: http://www.icj-cij.org/docket/files/83/6897.pdf (accessed: 12/13/2016), par. 41.

[155]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.13.

[156]Cf. ibid., par. 3.18–3.19.

[157]Cf. Fauchald: Legal Reasoning (see n. 138), p. 322; Matthias Herdegen: Interpretation in International Law, Max Planck Encyclopedia of Public International Law [MPEPIL], Mar. 2013, URL: http://opil.ouplaw.

usage as a proxy for the intentions of contracting parties.[158] Additionally, Wälde advocated to not assigning too much weight to the object and purpose of a treaty because they may be multiple or contradictory among each other or contracting parties.[159]

Weeramantry identified two prevalent interpretations of what the object and purpose of investment treaties are. First, tribunals consider them "the protection of foreign investors and their investments."[160] The tribunal in *Tokios Tokelés v. Ukraine*, for example, defined them in its appraisal of respondent's request to restrict protection to certain investors.

> [T]he Respondent's request to *restrict* the scope of covered investors through a control-test would be inconsistent with the object and purpose of the Treaty, *which is to provide broad protection of investors and their investments.*[161]

A second frequent definition of object and purpose is "to promote economic cooperation and stimulate the flow of capital and technology through the reciprocal encouragement and protection of foreign investments."[162] In *Aguas del Tunari v. Bolivia*, the tribunal provided a definition by quoting from the preamble of the BIT between the Netherlands and Bolivia:

> Thus [*sic!*] the object and purpose of the treaty is to "stimulate the flow of capital and technology" and the Contracting Parties explicitly recognize that such stimulation will result from "agreement upon the treatment to be accorded to ... investments" by "the national of one Contracting Party in the territory of the other Contracting Party."[163]

This practice has been fiercely criticized after the award in *SGS v. Philippines*. The tribunal opined that, considering object and purpose of the treaty, "[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."[164] Weeramantry listed a considerable number of cases where tribunals

com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?rskey=zi7QR5&result=6&prd=EPIL (accessed: 12/14/2015), par. 27.

[158] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.80.

[159] Cf. Thomas W. Wälde: Interpreting Investment Treaties: Experiences and Examples, in: Christina Binder et al. (eds.): International Investment Law for the 21st Century: Essays in honour of Christoph Schreuer, Oxford and New York: Oxford University Press, 2009, 724–781?, at pp. 759 sq.; as quoted in Weeramantry: Treaty Interpretation (see n. 9), par. 3.81.

[160] Cf. ibid., par. 3.83.

[161] Tokios Tokelés v. Ukraine, Decision on Jurisdiction ICSID Case No. ARB/02/18, ICSID, Apr. 29, 2004, URL: http://www.italaw.com/sites/default/files/case-documents/ita0863.pdf (accessed: 10/13/2016), par. 32, first original emphasis, second emphasis added.

[162] Weeramantry: Treaty Interpretation (see n. 9), par. 3.83.

[163] Aguas del Tunari, S.A. v. Republic of Bolivia, Decision on Objections to Jurisdiction ICSID Case No. ARB/02/3, ICSID, Oct. 21, 2005, URL: http://www.iisd.org/pdf/2005/adt_decision-en.pdf (accessed: 12/17/2016), par. 241.

[164] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction ICSID Case No. ARB/02/6, ICSID, Jan. 29, 2004, URL: http://www.italaw.com/sites/default/files/case-documents/ita0782.pdf (accessed: 10/13/2016), par. 116.

> have given weight to the object and purpose as justifying a broad or expansive rather than restrictive interpretation of its jurisdiction. Reliance on the object and purpose also arises where the FIAT [foreign investment arbitral tribunal] has considered that the interpretation asserted by a party would frustrate, defeat, or be irreconcilable, inconsistent, or incompatible with the object and purpose of the treaty or its provisions.[165]

Various observers have expressed concern about biased ISDS practice in favor of investor parties. As a result of this critique, some tribunals have broadened their assessment of treaties' possible objects and purposes and challenged the bias in favor of investors.[166] The tribunal in *Saluka v. Czech Republic* voiced the concern that this bias threatened the aim of strengthening foreign investment because it "may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations."[167] The arbitrators therefore called for a "balanced approach to the interpretation of the Treaty's substantive provisions."[168] This argument rejected the basic assumption that increased protection of investors and their investments results in an increase of FDI. However, it does not challenge the limited perception of the object and purpose of investment treaties. Likewise, the tribunal in *Noble Ventures v. Romania* came to the conclusion that it was "not permissible, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors".[169] Analogously, the *Amco v. Indonesia* tribunal concluded that the purpose of ICSID was *a balanced one*, i. e. "to protect, to the same extent and with the same vigour the investor and the host State".[170] It perceived the protection of investments to be in "the general interest of development and of developing countries."[171] The *Plama v. Bulgaria* panel reiterated Sinclair's warning that

> "[...] the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties".[172].

[165]Weeramantry: Treaty Interpretation (see n. 9), par. 3.88.

[166]Cf. ibid., par. 3.84.

[167]Saluka Investments B.V. v. The Czech Republic, Partial Award, UNCITRAL, Mar. 17, 2006, URL: http://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (accessed: 12/17/2016), par. 300.

[168]Ibid.

[169]Noble Ventures, Inc. v. Romania, Award ICSID Case No. ARB/01/11, ICSID, Oct. 12, 2005, URL: http://www.italaw.com/sites/default/files/case-documents/ita0565.pdf (accessed: 07/05/2017), 52, original emphasis ommitted at "*permissible, as is*".

[170]Amco Asia Corporation and others v. Republic of Indonesia, Decision on Jurisdiction ICSID Case No. ARB/81/1, ICSID, Sept. 25, 1983, par. 23, as quoted in Christoph Schreuer: Do We Need Investment Arbitration, in: Jean E. Kalicki/Anna Joubin-Bret (eds.): Reshaping the Investor-State Dispute Settlement System: Journies for the 21st Century (Nijhoff international investment law series 4), Leiden and Boston: Brill Nijhoff, 2015, pp. 879–889, DOI: 10.1163/9789004291102_006, at p. 881.

[171]Amco v. Indonesia (Decision on Jurisdiction) (see n. 170), par. 23, as quoted in Schreuer: Do We Need (see n. 170), p. 881.

[172]Plama Consortium Limited v. Republic of Bulgaria, Decision on Jurisdiction ICSID Case No. ARB/03/24, ICSID, Jan. 29, 2004, URL: http://www.italaw.com/sites/default/files/case-documents/

A more political stance is adopted in *Banro v. DR Congo*. The tribunal pointed out that with the creation of ICSID states intended to "taking disputes between host States and foreign private investors out of the political and diplomatic realm in order to submit them to legal settlement mechanisms".[173] By that, as the preparatory work shows, they wanted to contribute to the peaceful settlement of international conflicts.[174] Although object and purpose has been subordinate to the ordinary meaning requirement in ISDS practice, it has had significant impact in individual decisions.[175] Two extraordinary decisions with ongoing consequences were made in *Salini v. Morocco*, and *Plama v. Bulgaria*. They reviewed the[176] decision on the import of more favorable procedural provisions by means of the MFN clause. The arbitrators of the first case did not allow the import because they did not find "any evidence of a common intention of the parties to have that clause apply to dispute resolution issues (indeed, quite the contrary given the terms of Art.9(2))."[177] By doing so, they limited expansive treaty interpretation and reaffirmed the consent principle of international law. The *Plama* tribunal, dealing with the same issue, reinforced this understanding by asserting that "[i]t is a well-established principle, both in domestic and international law, that such an agreement [the offer to arbitrate] should be *clear and unambiguous*."[178] Both awards were considered as a turning point to the practice of an almost unlimited import of more favorable conditions (especially procedural provisions) by means of MFN.[179]

3.1.5 31(2) Consideration to Preamble and Annexes

Article 31(2) defines to what extent context variables (see above) are to be taken into account. Preambles serve to discern object an purpose of a treaty. However, they do not contain sub-

ita0669.pdf (accessed: 10/13/2016), par. 193; Ian Sinclair: The Vienna Convention on the Law of Treaties, 2nd ed. (Melland Schill monographs in international law), Manchester: Manchester Univ. Press, 1984, p. 130, original emphasis.

[173] Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo, Award ICSID Case No. ARB/98/7, ICSID, Sept. 1, 2000, URL: http://www.italaw.com/sites/default/files/case-documents/italaw6351.pdf (accessed: 12/17/2016), par. 16.

[174] Cf. ibid., par. 15–16.

[175] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.87; Fauchald: Legal Reasoning (see n. 138), pp. 322 sq.

[176] Emilio Agustín Maffezini v. The Kingdom of Spain, Award ICSID Case No. ARB/97/7, ICSID, Nov. 13, 2000, URL: http://www.italaw.com/sites/default/files/case-documents/ita0481.pdf (accessed: 01/12/2017).

[177] Steven Fietta: Most Favoured Nation Treatment and Bilateral Investment Treaties: A Turning Point?, in: International Arbitration Law Review 2005, pp. 131–138, URL: http://www.lw.com/upload/pubContent/_pdf/pub1395_1.pdf (accessed: 07/05/2017), at p. 135.

[178] Plama v. Bulgaria (Decision on Jurisdiction) (see n. 172), par. 198, emphasis added.

[179] Fietta: Most Favoured Nation (see n. 177), pp. 135–138.

stantive provisions.[180] As for 2012, annexes did not play any important role in ISDS practice. This could change, nonetheless, as new model BITs are being developed. For example, US BITs since 2004 strengthen the state's right to regulate *bona fide* in Annex B(4) b.[181] Because Article 6 on expropriation and compensation provides for an interpretation that takes Annexes A and B into account, the US model BIT avoids interpretations following the "sole effect doctrine".[182] In relation to the interpretation of preambles, the *Salini v. Morocco* board made a far reaching decision with significant repercussions in subsequent ISDS cases. The panel deepened the understanding of what *Fedax v. Venezuela* had glanced before by creating a clear benchmark for what could be considered an investment in the light of the object and purpose (expressed in the preamble) of the ICSID convention.

> [I]nvestment infers: contributions ["of money or assets"[183]], a certain duration of performance of the contract and a participation in the risks of the transaction [...]. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.[184]

This conclusion (especially the requirement of a "contribution to the economic development of the host State") has been heavily contested in subsequent proceedings.[185] I refrain from going into agreements and instruments connected to the treaty, also required in Article 31(2) VCLT because of their insignificance in ISDS, so far.[186]

[180]In *Bayindir v. Pakistan* the tribunal did not deduce a obligation to FET notwithstanding that the preamble of the respective BIT considers this treatment as "desirable". Cf. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, Decision on Jurisdiction ICSID Case No. ARB/03/29, ICSID, Nov. 14, 2005, URL: http://www.italaw.com/sites/default/files/case-documents/ita0074.pdf (accessed: 12/19/2016), par. 230.

[181]"Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." Office of the United States Trade Representative (USTR)/Department of State: U.S. Model Bilateral Investment Treaty (BIT), Nov. 2004, URL: https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf (accessed: 12/19/2016), Annex B(4) b.

[182]Catharine Titi: The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration, in: The Journal of World Investment & Trade 14.5 (Jan. 2013), pp. 829–851, DOI: 10.1163/22129000-01405003, at pp. 848 sq.; the "sole effect doctrine" only analyses the effect of regulation on investments without including the (legitimate) intentions of the legislator.

[183]Alex Grabowski: The Definition of Investment under the ICSID Convention: A Defense of Salini, in: Chicago Journal of International Law 15.1 (2014), pp. 287–309, URL: http://chicagounbound.uchicago.edu/cjil/vol15/iss1/13 (accessed: 07/04/2017), at p. 296.

[184]Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, Decision on Jurisdiction ICSID Case No. ARB/00/4, ICSID, July 23, 2001, URL: http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf (accessed: 07/04/2017), par. 52.

[185]Cf. Grabowski: Definition of Investment (see n. 183), pp. 297–302; Priscilla Schwartz: Capitalism, International Investment Law and the Development Conundrum, in: The Law and Development Review 6.2 (Jan. 2013), pp. 217–253, DOI: 10.1515/ldr-2013-0025, at pp. 235–237.

[186]See , however, Weeramantry: Treaty Interpretation (see n. 9), par. 3.97–3.100.

3.1.6 31(3) Subsequent Agreements, Practice, and Applicable Rules in International Law

Article 31(3) poses three requirements to interpreters of international treaties. "[T]ogether with the context", they have to take into account 31(3) "(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties."[187] However, quantitative research by Weeramantry showed that only about 5% of the studied decisions made reference to Article 31(3).[188]

In case that all contracting parties voice a joint statement on the interpretation of certain provisions, this constitutes a subsequent agreement to be taken into account under VCLT Art. 31(2).[189] However, more attention has been payed to subsequent practice, which provides evidence for or constitutes agreements of the parties on the meaning of treaty provisions.[190] For example, subsequent BITs concluded by Venezuela helped to define the meaning of "investment" in *Fedax v. Venezuela*.[191]

As to the consideration of rules of international law, the tribunal in *Pinson v. Mexico* made reference to the impossibility to enumerate every relevant rule of international law in treaty texts. This is why the arbitrators advocated for a tacit consideration of rules of international law in order to "refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way."[192] However, the effect of including these "rules" is contested; whereas Wälde considered it an obstacle for the modernization of individual investment treaties, the *Mondev v. US* tribunal advocated for an "evolutionary interpretation" of international investment law that at that time already consisted of a dense network of BITs and other TIPs.[193] This topic is part of the discussion about convergence versus fragmentation of international investment law, discussed below. In opposition to the

[187]United Nations: Vienna Convention (see n. 135), Article 31.

[188]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.101.

[189]Cf. ibid., par. 3.112–3.117. The question about the relevance of subsequent agreements for cases filed for arbitration *before* remains contested.

[190]Cf. ibid., par. 3.105–3.107; See also Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits, UNCITRAL, Aug. 3, 2005, URL: `http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf` (accessed: 12/29/2016), Pt. II, Ch. B, pars. 19–21.

[191]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.120.

[192]Georges Pinson v. United Mexican States, Decision No. 1, Oct. 19, 1928, URL: `http://legal.un.org/riaa/cases/vol_V/327-466.pdf` (accessed: 12/30/2016), par. 50.4; translated in Weeramantry: Treaty Interpretation (see n. 9), par. 3.133.

[193]Cf. Wälde: Interpreting Investment Treaties (see n. 159), pp. 269 sq.; as quoted in Weeramantry: Treaty Interpretation (see n. 9), par. 3.134; Cf. Mondev International Ltd. v. United States of America, Award

inclusion of a wide range of customary rules, various tribunals have stressed the superiority of the treaty text. For example, the tribunal in *Waste Management v. Mexico II* comes to the conclusion that, where a treaty is sufficiently precise, "there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise."[194]

3.1.7 31(4) Special Meaning of Certain Provisions

Article 31(4) is particularly relevant for the research question because it makes explicit reference to the intentions of contracting parties. It overrides the ordinary meaning of provisions with a special meaning intended by them.[195] However, it has had a marginal impact on ISDS.[196] Recently though, past expansive interpretations have led to a reformulation of investment treaties. Traditional BITs did not include clear definitions of ISDS key terms; they were, therefore, determined by commentary or case law.[197] Currently, states have begun to further specify these terms in new BITs in order to improve predictability.[198]

3.2 VCLT Article 32. Supplementary Means of Interpretation

With Article 32 the VCLT provides for additional, subordinary means of interpretation in two cases. If an interpretation according to Article 31 "(a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."[199] Only then, interpreters *may* turn their attention "to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion".[200] Due to its subordinate and non-mandatory position, Article 32 has been referenced only in 26% of the cases of ISDS studied by Weeramantry, compared to 56% for Article 31.[201]

Regarding the scope of what the preparatory work (or *travaux préparatoires*) encompasses, different opinions have been expressed by tribunals and commentary. Wälde cautioned

ICSID Case No. ARB(AF)/99/2, ICSID, Oct. 11, 2002, URL: `http://www.italaw.com/sites/default/files/case-documents/ita1076.pdf` (accessed: 01/06/2017), par. 123.

[194] Waste Management, Inc. v. United Mexican States II, Award ICSID Case No. ARB(AF)/00/3, ICSID, Oct. 11, 2002, URL: `http://www.italaw.com/sites/default/files/case-documents/ita0900.pdf` (accessed: 01/06/2017), par. 85; for further relevant cases see Weeramantry: Treaty Interpretation (see n. 9), par. 3.143 sq.

[195] Cf. United Nations: Vienna Convention (see n. 135), Art. 31(4).

[196] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.151.

[197] Cf. ibid., par. 3.158.

[198] Cf. on expropriation provisions UNCTAD: Expropriation, New York and Geneva, 2012, URL: `http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf` (accessed: 01/06/2017), pp. 125–137.

[199] United Nations: Vienna Convention (see n. 135), Art. 32.

[200] Ibid.

[201] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 4.03.

against the inclusion of individual expressions (such as memoirs of officials or their ex-post statements) as opposed to documentation of the negotiation process, because of their presumptive subjective character.[202] Furthermore, preparatory work may be incomplete or not available—especially for BITs as opposed to MIAs.[203] During interpretation, the ordinary meaning of provisions may be overwritten by preparatory work. In practice, due to good faith, their consideration will be triggered when parties make reference to it.[204] The ambiguity of the *travaux préparatoires* is a problem for interpretation. This may be due to the large number of changing officials, selective application or availability, the will of contracting parties to complete treaty negotiations by adopting vague terms, incompleteness of the *travaux* originating from informal negotiations or lack of documentation.[205] Jiménez de Aréchaga cautioned against an extensive application of preparatory work. According to him, it allows parties to a treaty to evade obligations and bend the meaning of a treaty text.[206] What is more, with growing case law and growing agreement on the meaning of certain provisions, the value of preparatory work decreases.[207] The relevance of *travaux* consists in the possibility of a historic interpretation; they may shed light on the intentions of the parties *at the moment* of conclusion.[208] However, Fauchald's statistics are compelling. He found only three cases which referred to the preparatory work of the ICSID in order to determine the object and purpose of a treaty. None of them made reference to the preparatory work of any specific BIT or NAFTA.[209]

According to Sinclair, the *circumstances of treaty conclusion* (also provided for in Article 32 VCLT) remind "the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated".[210] Yet, this notion has almost never been applied in ISDS practice.[211] This is problematic, insofar as power relations have had an important impact on the historical evolution on international investment law (Cf. sections *2 "Evolution of the International Law on Foreign Investment"* and *6 "Intentions of Contracting Parties"*). From

[202]Cf. Wälde: Interpreting Investment Treaties (see n. 159), p. 778; as quoted in Weeramantry: Treaty Interpretation (see n. 9), par. 4.11.
[203]Cf. ibid., par. 4.12.
[204]Cf. ibid., par. 4.16 sq.
[205]Cf. ibid., par. 4.18–4.20.
[206]Cf. Eduardo Jiménez de Aréchaga: International Law in the Past Third of a Century, in: Hague Academy of International Law (ed.) (Collected Courses 159), Brill and Nijhoff, 1979, pp. 46–48; as quoted in Weeramantry: Treaty Interpretation (see n. 9), par. 4.21.
[207]Cf. Methanex v. US (Final Award) (see n. 190), Pt. II, Ch. H, par. 24.
[208]Cf. Herdegen: Interpretation in International Law (see n. 157), par. 16 sq.
[209]Cf. Fauchald: Legal Reasoning (see n. 138), p. 322.
[210]Sinclair: Vienna Convention (see n. 172), p. 141.
[211]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 4.27.

this point of view, the subordinate and non-mandatory status of Article 32 VCLT, and the exclusion of circumstances leading up to the conclusion of IIAs therein, is unfortunate.

3.3 Interpretation Beyond VCLT

Beyond VCLT, there are other general principles of international custom that may be referred to in ISDS. For example, the principle of effectiveness is widely recognized.[212] These exceptions are the reason why tribunals may consider that international rules on treaty interpretation may only be "set out *primarily* in the Vienna Convention on the Law of Treaties".[213]

Although tribunals tend to refer to past decisions[214] in order to support their respective interpretations, precedents in ISDS are not of binding nature.[215] It is remarkable for the discussion about precedent, and convergence or fragmentation in international investment law, that opposing views are adopted across tribunals. On the on hand the arbitrators in *Saipem v. Bangladesh* considered it their "duty to adopt solutions established in a series of consistent cases."[216] Following the same reasoning, the annulment committee in *Continental Casualty v. Argentina* argued that "responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals."[217]Notwithstanding the lack of "binding precedent in the ICSID arbitration system, the Committee considers that in the longer term the emergence of a *jurisprudence constante* in relation to annulment proceedings may be a desirable goal."[218] On the other hand, *SGS v. Philippines*, though recognizing the desirability to "act consistently", stresses the obligation imposed on "each tribunal to exercise its competence in accordance with the applicable law,

[212]Cf. Weeramantry: Treaty Interpretation (see n. 9), ch. 5, sec. F.

[213]Lucchetti v. Peru (Annulment) (see n. 139), par. 79, emphasis added.

[214]Cf. Dolzer/Schreuer: Principles of International Investment Law (see n. 36), p. 33; 92 of 96 cases studied by Fauchald exhibited reliance on precedent Cf. Fauchald: Legal Reasoning (see n. 138), p. 335.

[215]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 5.04, cf. especially the decision of the tribunal in *Methanex v. US*. It stated that "[t]his Tribunal can set no legal precedent, in general or at all. [...] For each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only."Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", UNCITRAL, Jan. 15, 2001, URL: http://www.italaw.com/sites/default/files/case-documents/ita0517_0.pdf (accessed: 01/06/2017), par. 51.

[216]Saipem S.p.A. v. The People's Republic of Bangladesh, Decision on Jurisdiction and Recommendation on Provisional Measures ICSID Case No. ARB/05/07, ICSID, Mar. 21, 2007, URL: http://www.italaw.com/sites/default/files/case-documents/ita0733.pdf (accessed: 01/06/2017), par. 67.

[217]Continental Casualty Company v. The Argentine Republic, Decision on the Application for Partial Annulment, and the Application for Partial Annulment ICSID Case No. ARB/03/9, ICSID, Sept. 16, 2011, URL: http://www.italaw.com/sites/default/files/case-documents/ita0231.pdf (accessed: 01/11/2017), par. 83; quoting: M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, Decision on Annulment ICSID Case No. ARB/03/6, ICSID, Oct. 19, 2009, URL: http://www.italaw.com/sites/default/files/case-documents/ita0502.pdf (accessed: 01/11/2017), par. 24.

[218]Continental Casualty Company v. Argentina (Partial Annulment) (see n. 217), par. 84, original emphasis.

which will by definition be different for each BIT and each Respondent State. [...] [T]here is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals."[219] In accordance with the weight tribunals have attributed to preceding decisions in ISDS, claimants and respondents have heavily relied on them, as well.[220]

According to Montt, international investment law through the proliferation of BITs and BIT practice "meets that critical threshold of similarity" that generates a "new and distinctive legal field."[221] Against this (subjectively assumed) background, the "comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation."[222] Other tribunals, however, have decidedly avoided this type of reliance.[223]

Another frequent point of reference for tribunals has been scholary opinion. The reliance on very few scholars in multiple cases[224] raises serious questions about legitimacy. However, Weeramantry has empirically shown that this resource has been decreasing with the growing corpus of past arbitrary decisions.[225]

The development of international law has also been an important issue in the interpretation of investment treaties. There is no provision such issue in the VCLT. For example, *Mondev v. US* and *Pope & Talbot v. Canada* have adopted a evolutionary stance of what fair and equitable treatment was at the moment of adjudication and refuted the *Neer* standard of *customary minimum standards of treatment* as outdated.[226] In opposition to this view, (tex-

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[219] SGS v. Philippines (Decision on Objections to Jurisdiction) (see n. 164), par. 97.

[220] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 5.16.

[221] Montt: State Liability (see n. 4), p. 106; cf. Weeramantry: Treaty Interpretation (see n. 9), par. 5.32.

[222] AAPL v. Sri Lanka (Final Award) (see n. 89), par. 40, "Rule F". "[A]ll relevant precedents" do not only refer to other BITs, but also to other TIPs. 28 and 14 out of 98 decisions analyzed by Fauchald used BITs or other TIPs decisions for legal reasoning. Cf. Fauchald: Legal Reasoning (see n. 138), p. 345.

[223] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 5.37.

[224] These scholars have been, among others, Schreuer, Broche, Dolzer/Stevens, Amerasinghe, and Delaume. Cf. ibid., par. 5.58–5.60.

[225] Cf. ibid., par. 5.56.

[226] Cf. ibid., par. 5.64–5.68; Mondev v. US (Award) (see n. 193), par. 123, 125; Pope & Talbot Inc. v. The Government of Canada, Award in Respect of Damages, UNCITRAL, May 31, 2002, URL: http://www.italaw.com/sites/default/files/case-documents/ita0686.pdf (accessed: 01/07/2017), par. 65. However, an opposite decision was adopted in Glamis Gold, Ltd. v. The United States of America, Award, UNCITRAL, June 8, 2009, URL: http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (accessed: 01/07/2017), par. 21 sq. The tribunal opined that "the burden of doing so [proving the evolution of custom] falls clearly on the party asserting the change." It continues: "Given the absence of sufficient evidence to establish a change in the custom, the fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105(1).", original emphasis.

tualist) scholars caution against an overly expansive interpretation that impose "obligations on parties that are not strictly evident on the face of the text."[227]

One more principle applied in the interpretation of TIPs is the "presumption that parties intended that all term in their agreement had a purpose and theat thay did not intend any part of it to be ineffective."[228] Tribunals have applied the *principle of effectiveness* in various cases by interpretations that avoid the ineffectiveness of certain provisions or that give full effect to others.[229] For example, the *Millicom v. Senegal* tribunal allowed the investor access to ISDS, although the BIT limits arbitration to nationals. It justified its deviation from the ordinary meaning with through the principle of effectiveness.[230]

Legal maxims, such as *generalia specialibus non derogant*, *lex specialis*, *lex posterior*, *in dubio mitius*, *expressio unius est exclusio alterius*, and others have also been applied in ISDS.[231]

4 Empirical Analysis. After Weeramantry

In this section, I analyze ISDS cases which were not taken into account by Weeramantry in respect to arguments related the contracting parties' intentions. First, however, I give some insight into the composition of respondents and claimant home states.

4.1 Landscape of Actors

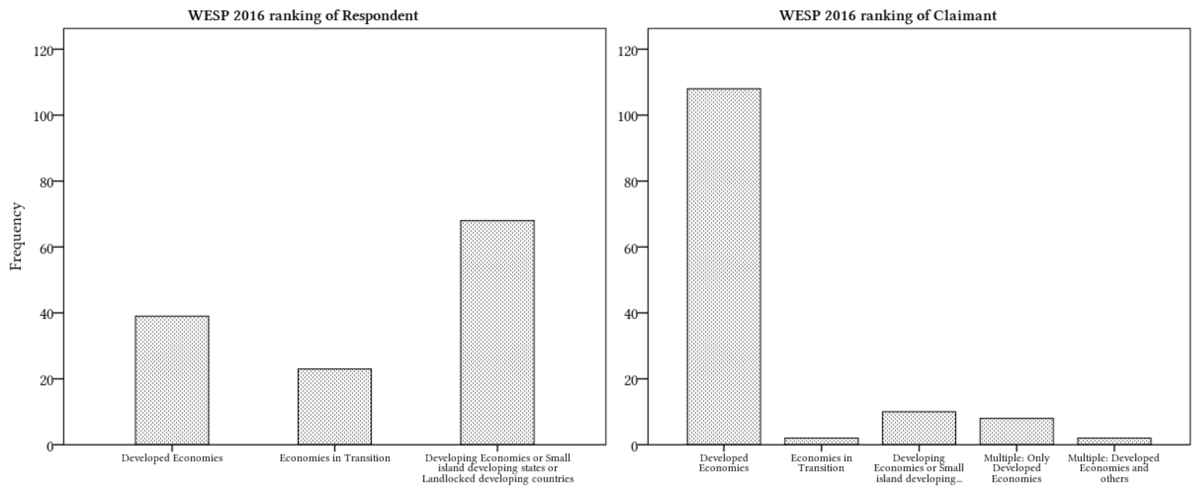

Figure 5: Bar Charts. WESP Rankins of Respondents and Claimants (N=130)

[227]Weeramantry: Treaty Interpretation (see n. 9), par. 5.69.
[228]Ibid., par. 5.74.
[229]Cf. ibid., par. 5.77 sq.
[230]Cf. Millicom v. Senegal (Decision on Jurisdiction) (see n. 144), par. 71, 91, 98.
[231]Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 5.86–6.97.

WESP classes difference between Claimant host state(s) - Respondent

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Two Step Reverse Difference Claimant-Respondent	3	2,3	2,3	2,3
	One Step Reverse Difference Claimant-Respondent	2	1,5	1,5	3,8
	Mixed Claimants Including Developed. Two Step Difference	2	1,5	1,5	5,4
	No Difference Claimant-Respondent	43	33,1	33,1	38,5
	One Step Difference Claimant-Respondent	19	14,6	14,6	53,1
	Two Step Difference (various) Claimant-Repondent	61	46,9	46,9	100,0
	Total	130	100,0	100,0	

Table 1: Frequencies. WESP Classes Difference between Claimant Host State - Respondent

The composition of the claimants' home states and respondents (cf. figure 5) clearly shows a imbalance in the respective developmental statuses, according to the UN's WESP categorization 2016.[232] In 90.8% of the cases "developed economies" are the host states of at least one of the claimants. In contrast to this, they only represent 30% of the respondents. With only a few exceptions, they respond to investors based in other developed economies. However, the language selection bias has to be accounted for. South-South arbitration proceedings are only partially issued in or translated to English. Yet, I consider this selection-bias as insignificant, because the number of awards not researched in this study amounts to only fourteen published by ISLG. In only three of these cases, developing or transitioning countries constitute sole claimants. Additionally, there are two awards between transitioning and one award between developing economies.[233] Were these fourteen cases included into the analysis, the participation rate of developed countries as home countries of claimants would be reduced

[232]Cf. United Nations: World Economic Situation and Prospects 2016, New York, 2016, URL: `http://www.un.org/en/development/desa/policy/wesp/wesp_current/2016wesp_full_en.pdf` (accessed: 05/31/2017), pp. 159–164; because of the relative stability of categories across time, I chose to use the 2016 report, only.

[233]Claimants are based in Kazakhstan, Ukraine, and Argentina; respondents are Kyrgyzstan, Moldova, and Peru, respectively. OKKV (OKKB) and others v. Kyrgyz Republic, Award, Nov. 21, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3258.pdf` (accessed: 05/31/2017); Energoalians TOB v. Republic of Moldova, Award, UNCITRAL, Oct. 23, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4220.pdf` (accessed: 05/31/2017); Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru, Final Award ICSID Case No. ARB/10/2, ICSID, May 21, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw0503.pdf` (accessed: 05/31/2017).

to 89.6%. As a means to exemplify the developmental differences between the home states of claimants and respondents, an ordinal aggregate variable (*WESPdiffClaimantResp*) has been calculated. As depicted in table 1, the majority of nearly half of the tribunals arbitrate cases between developed and developing countries (i. e. a positive Two Step Difference). A positive difference, i. e. claimants home state is wealthier than respondent, shows a prevalence of almost two thirds. On the contrary, the prevalence of negative difference between claimant home state and respondent does not even reach one in 25. Looking at the third of arbitrations between "equals" with more scrutiny reveals a misrepresentation based on the overly broad categories of WESP. For example, a proceeding between Netherlands and Romania would fall into this category. If we consider the HDI ratings between the respective claimant's home states and respondents, over 85% of proceedings demonstrate a difference of 0.03 or more. This approximately corresponds to the human development gap between France and Greece. The exemplary Netherlands-Romania arbitration, considered as equal under WESP, exhibits a significant disparity of 0.122 points under HDI. This is close to the average downward dissimilarity of 0.115 points. The shift of the normal distribution curve well beyond the point of zero difference in figure 6 powerfully demonstrates that a vast majority of ISDS takes still part between investors of wealthy countries on the one hand, and relatively poor respondents on the other hand.

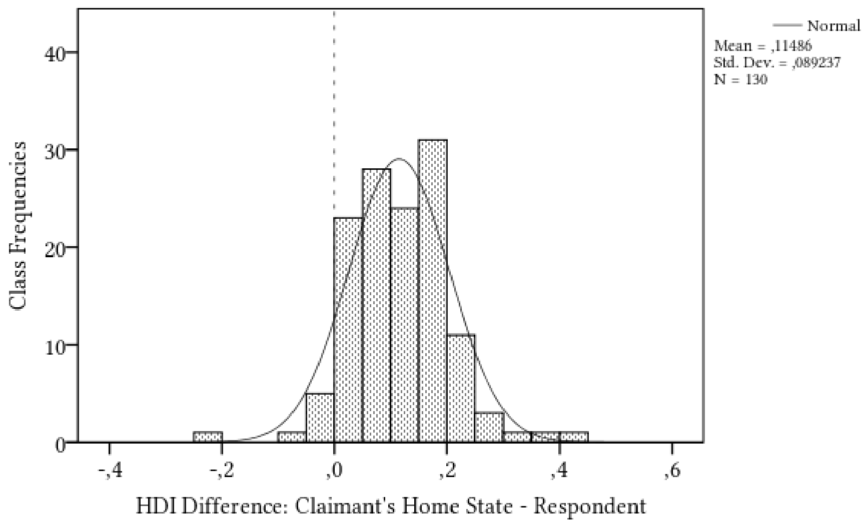

Figure 6: Histogram. HDI Difference between Claimant Host State - Respondent (N=130)

This problem is further exacerbated by the phenomenon of treaty or forum shopping.[234] That is, the restructuring of companies so as to gain access to arbitration.[235] For illustrative purposes, Cyprus was home state to 6 claimants, more than major capital exporting countries such as Italy, Spain, or Switzerland. Only in some cases, treaty and forum shopping are considered as not admissible. For example, the tribunal in *CEAC v. Montenegro*, denied jurisdiction, on the basis that claimant "did not have a 'seat' in Cyprus at the relevant time."[236] Likewise, the tribunal in *ST-AD v. Bulgaria* did not accept claimant's request for relief based on a transfer of shares of a national company to an international investor.[237]

4.2 Article 31 VCLT

This analysis is confined to certain aspects of interpretation under Article 31 VCLT; these are object and purpose and the role of preambles. Ordinary meaning, good faith and context were not considered. The relevant dispute resolution documents were scanned for key words so as to analyze whether they use these kind of legal arguments in the proceedings. Given the huge amount of awards a limitation was drawn in relation to the synonyms of object an purpose. From Weeramantry's list above, only three were systematically searched for: object and purpose, intent*, original intent*. The search was executed using strong fuzziness (value 3, ISLG) so as to ensure that similar words or spelling errors would also appear as

[234] Cf. John Lee: Resolving Concerns of Treaty Shopping in International Investment Arbitration, in: Journal of International Dispute Settlement 6.2 (May 2015), pp. 355–379, DOI: 10.1093/jnlids/idv011, at pp. 355–361; Julien Chaisse: The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration, in: Hastings Business Law Journal 11.2 (2015), pp. 225–305, pp. 249–259; for illegitimate treaty shopping practices see especially the list at pp. 251 sq.

[235] Some analysts denoted the MFN import of substantive and/or procedural provisions as treaty shopping. Furthermore, this problem raises questions about sovereignty and statehood because regulation and accountability remain rooted in the national level, whilst footloose Multinational Corporations (MNCs) have the power to evade regulation and (societal) responsibilities, and cherry pick benefits. Cf. David A. Lake: The State and International Relations, in: Christian Reus-Smit/Duncan Snidal (eds.): The Oxford Handbook of International Relations (The Oxford Handbooks of Political Science 5), Oxford et al.: Oxford Univ. Press, 2008, pp. 41–61, DOI: 10.1093/oxfordhb/9780199219322.003.0002, at pp. 48 sq.; Anthony Carty: Social Theory and the "Vanishing" of International Law: A Review Article. Reviewed Work(s): The Power of Legitimacy Among Nations by Thomas M. Franck; Eunomia: New Order for a New World by Philip Allott, in: International and Comparative Law Quarterly 41.4 (1992), pp. 939–945, DOI: 10.1093/iclqaj/41.4.939, at par. 24.

[236] Central European Aluminium Company (CEAC) v. Montenegro, Award ICSID Case No. ARB/14/8, ICSID, July 26, 2016, URL: https://www.italaw.com/sites/default/files/case-documents/italaw7456.pdf (accessed: 06/11/2017), par. 143.

[237] Cf. ST-AD GmbH v. The Republic of Bulgaria, Award on Jurisdiction PCA Case No. 2011-06, UNCITRAL, Nov. 20, 2013, URL: https://www.italaw.com/sites/default/files/case-documents/italaw3113.pdf (accessed: 06/15/2017), par. 408–411; likewise National Gas S.A.E. v. Arab Republic of Egypt, Award ICSID Case No. ARB/11/7, ICSID, Apr. 3, 2014, URL: https://www.italaw.com/sites/default/files/case-documents/italaw4043.pdf (accessed: 06/11/2017), par. 136 sq.

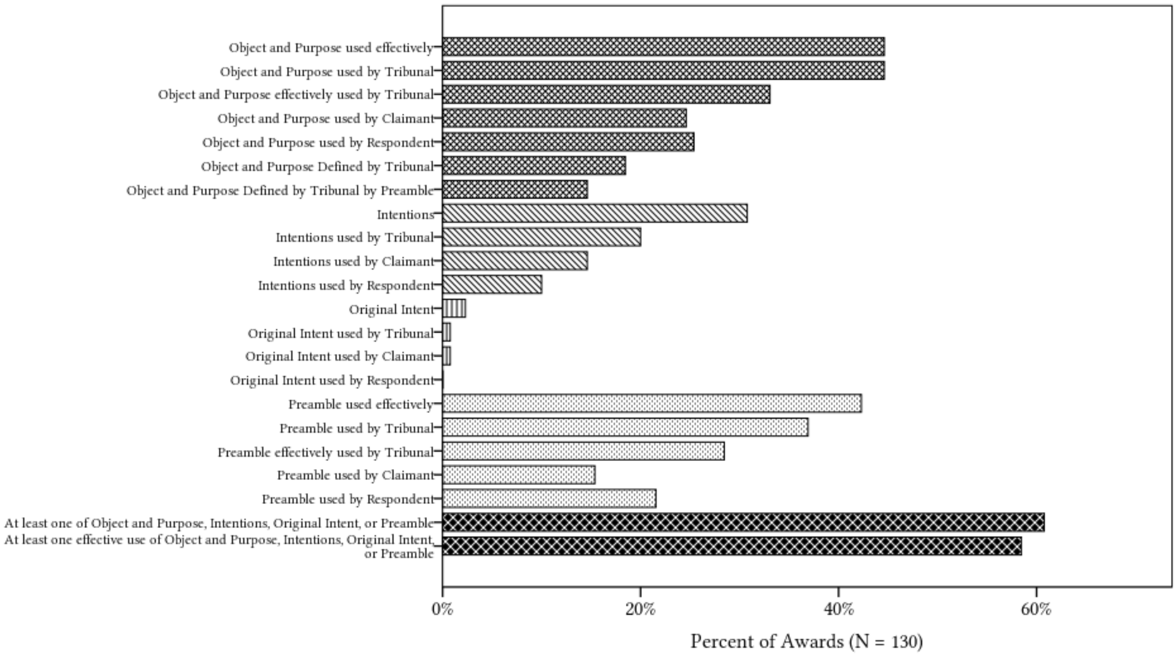

Figure 7: Bar Chart. Use of Art. 31 VCLT criteria (N=130)

results. In a second step, thousands of results were manually qualified as relevant or not relevant in their context of occurrence. Subsequently, relevant sequences were assigned to the respective participants in the arbitration—tribunal, claimant, respondent—who used them as an argument in the proceedings.

4.2.1 Tribunals

In almost 60% of all analyzed awards object and purpose, one of its synonymously used terms, or the preamble were effectively used as an argument (cf. figure 7). Tribunals used it in about 45% of the cases. However, in about 12% they only cited general rules of interpretation, i. e. in most of the cases Art. 31 VCLT, and did not pay any further regard to these terms during interpretation.[238]

Definitions | Similar to the results of Weeramantry, there is a strong trend towards an implicit interpretation. Whereas a third effectively used object and purpose in their inter-

[238] Two of many examples are Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, Award of the Tribunal ICSID Case No. ARB/07/27, ICSID, Oct. 9, 2014, URL: https://www.italaw.com/sites/default/files/case-documents/italaw4011.pdf (accessed: 06/15/2017), par. 242; SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, Award ICSID Case No. ARB/07/29, ICSID, Feb. 10, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/italaw1525.pdf (accessed: 06/15/2017), par. 90.

pretative processes, less then one fifth (18.5%) cared to define it. Among these definitions, even a smaller number of approximately one sixth made explicit reference to the preamble. Interestingly, in many cases the analyses are based on the object and purpose of ICSID rather than the applicable IIA.[239] On this basis, many tribunals negotiated the scope of the term *investment*. This is due to the precedents of *Fedax v. Venezuela* and especially *Salini v. Morocco*.[240] The tribunal in *Urbaser and CABB v. Argentina* even argued that the object and purpose of the applicable BIT was to be contextualized with the aims of the "'mother' treaty to which most BIT's (including that in the instant case) relate, *i.e.* the ICSID Convention."[241] Definitions reached from mere textual reproductions of the preamble to very broad or general statements divorced from the treaty text. One example of a textual definition is provided by *Guaracachi v. Bolivia*:

> The Tribunal notes that the UK-Bolivia BIT was (according to its preamble) designed to "*create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State*". Furthermore, the parties agreed in Article 2 of the said BIT that "*each contracting party shall encourage and create favourable conditions for nationals or companies of the other Contracting party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*"[242]

[239] Cf. e. g. OI European Group B.V. v. Bolivarian Republic of Venezuela, Award ICSID Case No. ARB/11/25, ICSID, Mar. 10, 2015, URL: https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf (accessed: 06/11/2017), par. 228, 232.

[240] See Grabowski: Definition of Investment (see n. 183), pp. 295–297.

[241] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, Award ICSID Case No. ARB/07/26, ICSID, May 21, 2013, URL: https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf (accessed: 12/08/2016), par. 53, original emphasis.

[242] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, Award (corrected) PCA Case No. 2011-17, UNCITRAL, Jan. 31, 2014, URL: https://www.italaw.com/sites/default/files/case-documents/italaw3293.pdf (accessed: 05/31/2017), par. 357, original emphasis. Further definitions by means of the preamble can be found in El Paso Energy International Company v. The Argentine Republic, Award ICSID Case No. ARB/07/26, ICSID, Oct. 31, 2011, URL: https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf (accessed: 06/11/2017); Ulysseas, Inc. v. The Republic of Ecuador, Final Award PCA Case No. 2009-19, UNCITRAL, June 12, 2012, URL: http://www.italaw.com/sites/default/files/case-documents/ita1019.pdf (accessed: 06/15/2017); Iberdrola Energía S.A. v. Republic of Guatemala, Award (Inofficial translation) ICSID Case No. ARB/11/25, ICSID, Aug. 17, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/italaw1173.pdf (accessed: 06/11/2017); Daimler Financial Services AG v. Argentine Republic, Award ICSID Case No. ARB/11/25, ICSID, Aug. 22, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/ita1082.pdf (accessed: 06/11/2017); Standard Chartered Bank v. The United Republic of Tanzania, Award ICSID Case No. ARB/10/12, ICSID, Nov. 2, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/italaw1184.pdf (accessed: 06/11/2017); Mr. Franck Charles Arif v. Republic of Moldova, Award ICSID Case No. ARB/11/23, ICSID, Apr. 8, 2013, URL: https://www.italaw.com/sites/default/files/case-documents/italaw1370.pdf (accessed: 06/11/2017); Metal-Tech Ltd. v. Republic of Uzbekistan, Award ICSID Case No. ARB/10/3, ICSID, Oct. 4, 2013, URL: https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf (accessed: 06/11/2017); AES Corporation and Tau Power B.V. v. Republic

Contrarily, one example of an extremely vague definition is provided by the tribunal in *Mamidoil v. Albania*:

> Generally speaking, investment treaties aim at the stimulation of cross-border investment in order to foster economic relations between the treaty partners and economic development in the partner countries.[243]

Likewise the tribunal in *Veteran Petroleum v. Russia*, *Hulley Enterprises v. Russia*, and *Yukos Universal v. Russia* define a general aim of "investment treaties" divorced from any textual basis:

> In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and bona fide investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state [...] should not be allowed to benefit from the Treaty.[244]

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of Kazakhstan, Award ICSID Case No. ARB/10/16, ICSID, Nov. 1, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw8205_0.pdf` (accessed: 06/11/2017); Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, FinalAward ICSID Case No. ARB/05/20, ICSID, Dec. 11, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf` (accessed: 06/11/2017); Enkev Beheer B.V. v. Republic of Poland, First Partial Award PCA Case No. 2013-01, UNCITRAL, Apr. 29, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw6208.pdf` (accessed: 06/11/2017); Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Final Award, UNCITRAL, Dec. 15, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf` (accessed: 06/11/2017); OIEG v. Venezuela (Award) (see n. 239); Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium, Award ICSID Case No. ARB/12/29, ICSID, Apr. 30, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4285.pdf` (accessed: 06/11/2017); Bernhard von Pezold and Others v. Republic of Zimbabwe, Award ICSID Case No. ARB/10/15, ICSID, July 28, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf` (accessed: 06/11/2017); Adel A Hamadi Al Tamimi v. Sultanate of Oman, Award ICSID Case No. ARB/11/33, ICSID, Nov. 3, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf` (accessed: 06/11/2017); Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat, Award, UNCITRAL, Dec. 17, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf` (accessed: 06/15/2017); İçkale İnşaat Limited Şirketi v. Turkmenistan, Award ICSID Case No. ARB/10/24, ICSID, Mar. 8, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7163_1.pdf` (accessed: 06/11/2017); Urbaser and CABB v. Argentina (Award) (see n. 241).

[243] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, Award ICSID Case No. ARB/11/24, ICSID, Mar. 30, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf` (accessed: 06/11/2017), par. 611.

[244] Veteran Petroleum Limited v. The Russian Federation, Final Award PCA Case No. AA 228, UNCITRAL, July 18, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3280.pdf` (accessed: 05/31/2017), par. 1352; Hulley Enterprises Limited v. The Russian Federation, Final Award PCA Case No. AA 226, UNCITRAL, July 18, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3278.pdf` (accessed: 05/31/2017), par. 1352; Yukos Universal Limited v. The Russian Federation, Final Award PCA Case No. AA 227, UNCITRAL, July 18, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf` (accessed: 05/31/2017), par. 1352.

The definition of object and purpose in the respective arbitral proceedings is relevant in so far as it may result in certain interpretations that trespass the ordinary meaning of the treaty text. In some cases, this lead to a bias in favor of investors or respondents. In the definition given by the previously mentioned tribunals, they consider to exclude from protection illegal or bad faith investments on the basis of a general, non-treaty-related statement about the encouragement of good faith or legal investments. Au contraire, a problematically biased pro-investor definition of object and purpose was fabricated in *Al-Warraq v. Indonesia*:

> The preamble of the OIC Agreement[245] refers to the anxiety of the signatories to develop "a favourable climate for investment". The OIC Agreement contains typical investment protection provisions, including guarantees of adequate protection and security, incentives, freedom of movement of personnel, most-favoured-nation protection, protection against expropriation, free transfer and disposition of capital, compensation for the violation of rights, and national treatment. *The object and purpose of the OIC Agreement is investment, [sic!] promotion and protection by conferring a broad range of rights on investors.*[246]

In the present case, the protection of foreign investment was clearly the pre-conception of the tribunal about the general aim of IIAs. Although it quoted the complete preamble it completely ignored its wording and justified its biased opinion with substantive provisions. For example, the preamble talks about a "framework of close cooperation among Member States"; investment as a *means* "through which economic and social development therein can be fostered *on the basis of common interest and mutual benefit*"; and the anxiety "to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources *in a way that will serve their development and raise the standard of living of their peoples*".[247] Clearly, contracting parties had the intention not only to protect investment but also

[245] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, dated June 1981.

[246] Al-Warraq v. Indonesia (Final Award) (see n. 242), par. 549, emphasis added.

[247] My emphases. Full quotation: "PREAMBLE| The Governments of the Member States of the Organisation of the Islamic Conference signatory to this Agreement,| *In keeping with* the objectives of the Organisation of the Islamic Conference as stipulated in its Charter,| *In implementation* of the provisions of the Agreement for Economic, Technical and Commercial Cooperation among the Member States of the Organisation of the Islamic Conference and particularly the provisions of Article 1 of the said Agreement,| *Endeavouring to avail of* the economic resources and potentialities available therein and to mobilize and utilize them in the best possible manner, within the framework of close cooperation among Member States,| *Convinced* that relations among the Islamic States in the field of investment are one of the major areas of economic cooperation among these states through which economic and social development therein can be fostered on the basis of common interest and mutual benefit,| *Anxious* to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples,| *Have approved* this Agreement,| *And have agreed* to consider

to foster cooperation, social and economic development, as well as the improvement of the lives of their respective populations. This is very similar to the contested *Salini*-requirements for investment under ICSID. By teleological omission the arbitrators narrowed the object and purpose down to "investment, [*sic!*] promotion and protection by conferring a broad range of rights on investors."[248] Against the intention of contracting parties they freed investors from their obligation to contribute to economic, social and human development as a precondition to enjoy special protection of their investments under the OIC Agreement. Tribunals have to carve out the aims of treaties in the interpretative process, disregarding the politics of IIAs. Obviously they *can* reach conclusions that offer investors a broad scope of protection. One example is the case of *Enkev Beheer v. Poland*. Because the Netherlands-Poland BIT "intended (by its preamble) expressly to encourage and protect foreign investments in Poland, the Tribunal decides that the over-strict meaning [of Art. 8 on dispute resolution], for which the Respondent contends, is too semantic in its approach and unduly harsh in its result."[249] As opposed to the decision in *Al-Warraq v. Indonesia*, however, this tribunal is able to backup its argument on the BIT's sparse language clearly favoring investors. It merely states that the parties intended "to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party" as a means to stimulate "initiative in this field."[250]

All in all, the perceptions of object and purpose varied strongly across arbitral bodies. Its definition heavily depended on the appointed arbitrators. This was clear from the adoption or rejection of the *Salini*-requirements for investment from ICSID's object and purpose. Cautious approaches co-existed with expansive ones. Furthermore, there is strong variance in the sources tribunals consult in their endeavors to define object and purpose. Whilst some tribunals sticked to the wording of preambles and substantive provisions others derived their definitions from generalized pre-conceptions about the goals of IIAs, divorced from textuality.

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the provisions contained therein as the minimum in dealing with the capitals and investments coming in from the Member States,| *And have declared* their complete readiness to put the Agreement into effect, in letter and in spirit, and of their sincere wish to extend every effort towards realizing its aims and objectives. "Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference, June 5, 1981, URL: `http://investmentpolicyhub.unctad.org/Download/TreatyFile/2399` (accessed: 06/20/2016), all original emphases.

[248] Al-Warraq v. Indonesia (Final Award) (see n. 242), par. 549.

[249] Enkev Beheer v. Poland (Partial Award) (see n. 242), par. 321.

[250] Agreement Between the Kingdom of the Netherlands and the Republic of Poland on encouragement and reciprocal protection of investments, July 9, 1992, URL: `http://investmentpolicyhub.unctad.org/Download/TreatyFile/2074` (accessed: 06/20/2016).

Another aspect of object and purpose is the transfer of the concept from the whole treaty to certain articles, substantive and/or procedural provisions, thereof. For instance, the tribunal in *ST-AD v. Bulgaria* defined the object and purpose of the treaty's MFN clause.[251]

Furthermore, a wide array of approaches in relation to the interpretative leeway of tribunals can be found across the awards. Whereas in cases of textual ambiguity some arbitrators opted for an expansive interpretation, others adopted more balanced or even approaches that restricted states' obligations to these evident from the treaty texts.

Expansive Interpretation | For illustration purposes, the tribunal in *Al-Warraq v. Indonesia* argued with its biased definition of object and purpose (discussed above) in its decision to allow the import of the FET provision from the UK-Indonesia BIT into the applicable OIC Agreement by means of the MFN clause.[252]

The arbitrators in *Oxus Gold v. Uzbekistan*—"[c]onsidering the lack of specific definition in the BIT"—found that "the FET standard may have a broader scope than the more specific duties to act in a reasonable and non-discriminatory way". They came to this conclusion by making recourse to the treaty's object and purpose.[253]

Another issue arises in relation to the required behavior of host states to foreign investment. The tribunal in *Philip Morris v. Uruguay* inferred from the object and purpose of the applicable BIT

> a continuing duty that the Contracting States have accepted in order to foster investments both by creating favourable conditions for their flowing into each other's territory and, once investments have been made, by ensuring their protection and by granting the necessary permits and authorizations concerning the activities to be carried out by investors.[254]

The tribunal subsequently dismissed regulation (even in the face of public health concerns) in relation to pre-established investments as a violation of the state conduct required by the BIT's object and purpose.[255] Similarly, the arbitrators in *Pezold and others v. Zimbabwe* inferred a duty for broad legal protection of investments in the host state from the Objects

[251] Cf. ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 397.

[252] Cf. Al-Warraq v. Indonesia (Final Award) (see n. 242), par. 550 sq.

[253] Oxus Gold v. Uzbekistan (Award) (see n. 242), par. 318, 323; likewise Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, Award (redacted), UNCITRAL, Apr. 23, 2012, URL: `https://www.italaw.com/sites/default/files/case-documents/ita0933.pdf` (accessed: 06/23/2017), par. 230.

[254] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay(formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay), Award ICSID Case No. ARB/10/7, ICSID, July 8, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf` (accessed: 06/11/2017), par. 168.

[255] Cf. ibid., par. 171 sq., 174.

and Purposes as expressed in both the ICSID and applicable BIT *preambles*.[256] This superseded the substantive provisions of the applicable BIT.

Another significant issue arises in the area of policy review by investment tribunals. (Democratically legitimized) state regulation measures may be interpreted to violate IIAs. In *El Paso v. Argentina* the tribunal assessed whether the regulatory measures ensuing the Argentinian financial and monetary crisis violated the legitimate expectations of the investor protected under the FET standard. On the one hand, it conceded that "[f]irstly, economic stability cannot be a legitimate expectation of any economic actor" and "[s]econdly, it is inconceivable that any State would accept that, because it [...] must guarantee absolute legal stability."[257] On the other hand, "[u]nder a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature."[258] The arbitrators, reiterating the sovereign right to regulate in cases of necessity, dismissed respondent's plea for necessity regulation:

> The world changes and so does the environment for foreign investment, especially when extraordinary circumstances appear. The host State is generally not responsible for the consequences of a state of emergency. It will be responsible, however, for the consequences of a state of emergency if it has significantly contributed to that situation. Holding otherwise would mean that Article XI of the Argentina-US BIT is not being interpreted in the light of its object and purpose, for that Treaty cannot possibly allow for the possibility that if the host State itself has caused or significantly helped to cause, intentionally or by omission, the situation and the consequences complained of, that State may shirk its obligations under the BIT by invoking Article XI.[259]

Consequently the tribunal reviewed Argentina's contribution to the crisis and found *by majority*:

> [T]he actions and omissions by Argentina until the end of 2001, and Argentina's own admission of its "inability to maintain a fiscal discipline," support the conclusion of a majority of the Tribunal that Argentina contributed to the crisis to a substantial extent, so that Article XI cannot come to its rescue.[260]

Two vital elements can be extracted from this example. First, the review of state policies by means of investment arbitration against the nebulous benchmark of *reasonableness*; a body of three arbitrators is authorized to put into question democratically legitimized policies in the public interest. Inaction in situations of severe economic crises, but also of in situations of objective public health, environmental, or social problems can lead to devastating results.

[256]Cf. Pezold and others v. Zimbabwe (Award) (see n. 242), par. 323.
[257]ElPaso v. Argentina (Award) (see n. 242), par. 366 sq.
[258]Ibid., par. 372.
[259]Ibid., par. 615.
[260]Ibid., par. 665.

Although so called experts are heard in arbitration processes, there are usually conflicting views on what may be an adequate policy reaction to existing shortcomings. Sovereignty, especially when backed up by democratic decision processes, allows for *political* decisions. Policy review by investment tribunals has the potential to seriously threaten state sovereignty and necessary regulatory discretion. Of course, investment protection has to include safeguards against discriminatory policies aimed at certain economic actors in order to harm them or put them into disadvantage *vis à vis* (domestic) competitors. Good faith *general* policies applicable to *all* actors in a country have to be exempt from review, is sovereignty to be reaffirmed. The second element is realted to the tribunal's view on the cause of necessity. In her dissenting opinion, arbitrator Stern

> does not consider that, on the concrete level, the contribution of a State to an economic crisis should be lightly assumed – should the US be held responsible of the worldwide sub-prime crisis as it contributed to it, because the SEC did not monitor the banks closely enough? Moreover, she is of the view that, considering the facts of this case, the substantial contribution of the Argentine authorities to the crisis has not been sufficiently proven by strong and uncontroverted evidence presented by the Claimant.[261]

As Stern's comparison exemplifies, monetary policy is a complicated and ambiguous enterprise. Responsibilities in a globally interconnected economy with significant and unforeseeable impacts on individual domestic economies and currencies is not unambiguously attributable. "The experts have presented contradictory analyses. The IMF itself recognised that it made mistakes in monitoring Argentina's problems"[262]. This, and similar awards cast the image of an over-confident, closed, overwhelmingly white and male caste of technocrats.[263]

An array of awards expansively interpreted the scope of the term investment beyond the ordinary meaning of substantive provisions. In most cases, this happened in favor of the investors; exceptions are *SCB v. Tanzania* and *KT Asia v. Kazakhstan*. The award in *Guaracachi v. Bolivia* represents a case of expansive interpretation. Deciding whether the term investment required territoriality, the tribunal found silence in the treaty. Given the aim of the treaty as reflected in the preamble and "the absence of an express limitation in the BIT" the tribunal decided to include claimants' investment under the coverage of the treaty.[264] The tribunal in *Philip Morris v. Uruguay* considered the object and purpose and the preamble of the ICSID convention to be too broadly worded so as to allow for a restrictive interpretation

[261] ElPaso v. Argentina (Award) (see n. 242), par. 666.
[262] Ibid., par. 667.
[263] Cf. on the structure of the arbitrator community below, p. 91, n. 441.
[264] Guaracachi v. Bolivia (Award (corrected) (see n. 242), par. 354–357.

of the term *investment*. Hereby, it rejected the contested *Salini*-Test requirements for investments established on the basis of the ICSID convention. Rather, "the term 'investment' under Article 25(1) of the ICSID Convention, when interpreted according to its ordinary meaning in its context and *in the light of the object and purpose of the Convention*, is to be given a broad meaning."[265]

The tribunal in *SCB v. Tanzania* comes to the exact opposite conclusion. Heavily relying on a textual interpretation of the preamble—parties "encourage and create favourable conditions for nationals or companies of the other Contracting State *to invest* capital in its territory and,"—"the text of the BIT reveals that the treaty protects investments 'made' by an investor in some active way, rather than simple passive ownership."[266] Similarly, claimant was refused jurisdiction on the grounds of Salini-Requirements in *Alapli v. Turkey*. The tribunal found that claimant had failed to make any contribution.[267] Another expansive pro-respondent decision in relation to the definition of investment was delivered in *KT Asia v. Kazakhstan*. Beyond the ordinary meaning of substantive provisions the tribunal inferred a duration requirement for investments from the object and purpose of the BIT. It considered the alleged investment "was a mere vehicle for the sale of the shares"[268]. Thus, investor did not hold an investment in the sense of the BIT and ICSID convention.[269]

Balanced Interpretation | Between the expansive and restrictive approaches pursued by some tribunals, others seek to find a more balanced approach. One example is *ST-AD v. Bulgaria*:

> In conducting its analysis, the Tribunal shall adopt neither a restrictive nor an expansive interpretation, but a balanced interpretation. The imbalanced approach suggested by the Claimant has been rejected by a series of tribunals [...] In the present case, the Tribunal does not consider that the object and purpose of the BIT require either a broad or a restrictive approach to the interpretation of its provisions for arbitration. Instead, the Tribunal adopts a neutral approach, based on the ordinary meaning of the text, with

[265] Philip Morris v. Uruguay (Award) (see n. 254), par. 193–210, quote at 202, emphasis added; another example of expansive interpretation of the scope of covered investment using object and purpose arguments isCf. Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, Award ICSID Case No. ARB/13/8, ICSID, Apr. 9, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4238.pdf` (accessed: 06/11/2017), par. 286.

[266] SCB v. Tanzania (Award) (see n. 242), par. 229, original emphasis, par. 225.

[267] Cf. Alapli Elektrik B.V. v. Republic of Turkey, Award (Excerpts) ICSID Case No. ARB/08/13, ICSID, July 16, 2012, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4306.pdf` (accessed: 06/23/2017), par. 352, 363.

[268] KT Asia Investment Group B.V. v. Republic of Kazakhstan, Award ICSID Case No. ARB/09/8, ICSID, Oct. 17, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3006.pdf` (accessed: 06/23/2017), par. 212.

[269] Cf. ibid., par. 222; another example of expansive interpretation of the scope of covered investment using object and purpose arguments is Poštová banka and Istrokapital v. Greece (Award) (see n. 265), par. 286.

> particular reference to the will of the parties to the BIT, as reflected in the *travaux préparatoires.*[270]

This suggests that the massive critique against the decision in *SGS v. Philippines* to generally interpret uncertainties in the treaty provisions in favor of the investor(s)[271], and against other expansive decisions, has led some tribunals towards a more cautious assessment. In *Poštová banka and Istrokapital v. Greece* the tribunal used the object and purpose of the BIT in order to define the scope of the term *investment.*[272] A sole ordinary meaning interpretation would render a list of possible covered investments "useless or meaningless."[273] In the opinion of the arbitrators this required for an interpretation including context as well as object and purpose. Although they allowed for a broader definition of investment based on these aspects, the tribunal decided against the coverage of bonds because they are "generally held by a large group of creditors, generally anonymous. Moreover, unlike creditors in a loan, the creditors of bonds may change several times in a matter of days or even hours, as bonds are traded."[274] Due to this volatility of ownership, coverage that is bound to nationality was not confirmed.[275] Another balanced approach interpretation can be found in *Nova Scotia Power v. Venezuela (II).* The tribunal rejected claimant's call for an expansive interpretation of the term investment relying on object and purpose. It did so by giving weight to the actual wording of dispute resolution provisions, commenting their exceptional character and their expressing the intentions of the contracting parties. It further argued that their displacement by generalized object and purpose arguments could lead to an "over-proliferation of claims that would result from boundless interpretations of the term 'investment.'"[276] The tribunal in *Metal-Tech v. Uzbekistan* dismissed the usefulness of the object and purpose for the interpretation of the scope "investment." It "is of no assistance [... because] the object and purpose is a balanced one that takes into account both the private interests of the investor and the public interest of the State."[277]

Restrictive Interpretation | As opposed to the expansive interpretation of awards by means of the treaty's or ICSID's object and purpose, some tribunals sticked to a rather re-

[270]ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 383 sq., original emphasis.
[271]Cf. SGS v. Philippines (Decision on Objections to Jurisdiction) (see n. 164), par. 116; for pro-investor bias cf. Weeramantry: Treaty Interpretation (see n. 9), Ch. 6, G, par. 191–195.
[272]Cf. Poštová banka and Istrokapital v. Greece (Award) (see n. 265), par. 288.
[273]Ibid., par. 312.
[274]Ibid., par. 337.
[275]Cf. ibid., par. 350.
[276]Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (II), Award (Excerpts) ICSID Case No. ARB/11/1, ICSID, Apr. 30, 2014, URL: https://www.italaw.com/sites/default/files/case-documents/italaw3319.pdf (accessed: 06/20/2017), par. 82.
[277]Metal-Tech v. Uzbekistan (Award) (see n. 242), par. 192.

strictive practice. For example, the Claimants in *Ping An v. Belgium* had demanded the application of the new 2009 BIT between China and the Belgium-Luxembourg Economic Union on the pre-2009 dispute. Tribunal rejected this expansive interpretation:

> The fact that the 2009 BIT is intended to strengthen economic co-operation by creating favourable conditions for investments, or is intended to encourage, promote and protect investments (in common with all BITs) cannot lead to an inference that, if there is an arbitration gap for pre-2009 BIT disputes, it should be filled by creative interpretation.[278]

In *ICS v. Argentina* the tribunal had to decide whether the object and purpose displaced the 18 month period in which the investor had to seek local remedies. Claimant had argued that this provision would result in a mere waiting period until investors would be compensated for suffered damages. This would violate the aim of the treaty. In spite of these arguments, the arbitrators decided that the specific wording of the offer to arbitrate had priority.[279] Yet, the futility to go to local courts, had it been shown, would have defeated the obligation to wait for arbitration.[280] The mere lack of an international adjudicatory body was, from the tribunal's perspective, a common situation in international law and did not allow to forgo the explicit consent to arbitrate without violating the object and purpose of the treaty.[281] *Daimler v. Argentina* is related to to the issue of consent. The tribunal rejected the extension of the MFN clause to procedural provisions, demanded by claimant on the basis of object and purpose and an alleged evolution of international investment law:

> International law does not construe a State's silence as consent. Neither does it require states to run around disavowing the jurisdiction of international tribunals in order to avoid being ensnared by unanticipated jurisdictional tentacles every time a claimant invents a clever new argument. Each state's consent to submit to the jurisdiction of an international tribunal must be established on the basis of objective indicators.[282]

In *National Gas v. Egypt* the tribunal denies jurisdiction to the claimant beyond the (contradictory) ordinary meaning of the ICSID convention. In its judgment, there was no basis to the admission of an enterprise under domestic control, notwithstanding the dual nationality claimant.[283]

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[278]Ping An v. Belgium v. Guatemala (Award) (see n. 242), par. 225.

[279]Cf. ICS Inspection and Control Services Limited v. The Argentine Republic, Award on Jurisdiction PCA Case No. 2010-9, UNCITRAL, Feb. 10, 2012, URL: `https://www.italaw.com/sites/default/files/case-documents/ita0416.pdf` (accessed: 06/23/2017), par. 246–248; likewise Servier v. Poland (Award) (see n. 23), par. 529.

[280]Cf. ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 265–269.

[281]Cf. ibid., par. 280 sq.

[282]Daimler v. Argentina (Award) (see n. 242), par. 277 sq.

[283]Cf. National Gas v. Egypt (Award) (see n. 237), par. 136 sq.

In *Fraport v. Philippines (II)* the tribunal did not allow to water down the substantial legality provision by means of object and purpose. It reiterated that the ordinary meaning was unambiguous and that the general goals of the BIT did not change this.[284]

In *İçkale v. Turkmenistan* the arbitrators refused to extend the scope of treatment beyond the minimum standard of treatment:

> It is well-established in international law, including in the jurisprudence of investment treaty tribunals, that preambles to treaties are not an operative part of the treaty and do not create binding legal obligations which are capable of giving rise to a distinct cause of action. While a preamble may, in certain circumstances, be relied upon in treaty interpretation as part of the context of the treaty and for the purposes of ascertaining its object and purpose, it cannot be relied upon as a source of independent or free-standing legal rights or obligations. Accordingly, the Tribunal rejects the Claimant's argument that the reference in the Preamble to the BIT to "fair and equitable treatment of investment [being] desirable" creates a binding legal obligation on which the Claimant is entitled to rely to found a claim.[285]

Yet another example of a cautious approach to expand the scope of a BIT by means of object and purpose arguments is *Renco v. Peru*. The claimant had argued against the requirement to seek justice in amenable negotiations and the host countries court system before filing for arbitration based on object and purpose arguments and the principle of severability. However, respondent pointed to the sovereign right to make reservations to and within a treaty. In her opinion, reservations of sovereign states in conformity with Art. 19 VCLT prevailed over the principle of severability—not universally accepted in international law.[286] Even a sovereign "reservation contrary to the object and purpose of a treaty [is allowed under international law and] may result in the 'total invalidity' of the treaty for the State making the reservation."[287] The tribunal agreed with this position and rejected the notion of the object and purpose of the treaty defeating the local remedies requirement, i. e. the limitation of the offer to arbitrate.[288] Furthermore, in *Tidewater v. Venezuela*, the tribunal rejects claimant's intentions-of-the-drafters proposition of all expropriations to be illegal. This would defeat

[284]Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II), Award ICSID Case No. ARB/11/12, ICSID, Dec. 10, 2014, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw4114.pdf` (accessed: 06/23/2017), par. 323.

[285]İçkale v. Turkmenistan (Award) (see n. 242), par. 337; quoting: Agreement Between the Republic of Turkey and Turkmenistan Concerning the Reciprocal Promotion and Protection of Investments, May 2, 1992, URL: `http://investmentpolicyhub.unctad.org/Download/TreatyFile/4785` (accessed: 06/23/2016), preamble.

[286]Cf. The Renco Group, Inc. v. Republic of Peru, Partial Award on Jurisdiction ICSID Case No. UNCT/13/1, ICSID, July 15, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7434.pdf` (accessed: 06/20/2017), par. 161–165.

[287]Ibid., par. 165.

[288]Cf. ibid., par. 172 sq.

the fair-market-value approach in modern BITs, including the applicable one. In the view of the arbitrators, claimant's view was not reconcilable with the BIT's intentions.[289] Also, the review of policies, as problematically presented in *El Paso v. Argentina* above, has been dealt with more restrictively. In *Al Tamimi v. Oman* the tribunal restrictively assessed the minimum standard of treatment towards the investor in the light of respondents sovereign right to regulate and the US-Oman FTA's object and purpose.[290] However, it has to be taken into account that the applicable treaty belongs to a new generation of investment protection treaties, related to the new US model BIT which specifically stipulates regulatory discretion in environmental affairs. Regarding the role object and purpose and/or preambles play in the definition of investments, more cautious approaches can also be identified. In *Arif v. Moldova* the tribunal did not allow the preamble to override the specific definition of investment under Article 31 of the applicable BIT; not either the ICSID convention's preamble require that.[291] Similarly, the tribunal in *MNSS and RCA v. Montenegro* rejected respondent's contribution argument based on the preamble of the treaty, for the sake of possible future contributions of the investment.[292]

In view of these different and—in some cases—irreconcilable approaches, one has to ask the question about the degree of the arbitrators' discretion. Predictability of proceedings with comparable facts and precedent is important to investors and states, as well as to the perception of legitimacy and consistency of the whole system. Indeed, arbitrators have taken different points of view in regards to their interpretative leeway in various final awards. There is evidence that some tribunals have taken a more cautious stance. For example, the tribunal in *Mamidoil v. Albania* stated:

> the Tribunal agrees with the ad hoc committee in the MTD v. Chile annulment decision that "*the vagueness inherent in such treaty standards such as 'fair and equitable treatment'* [should not] *allow international tribunals to second-guess*". [...] [T]he vagueness of the

[289] Cf. Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela, Award ICSID Case No. ARB/10/5, ICSID, Mar. 13, 2015, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4206_0.pdf` (accessed: 06/23/2017), par. 138.

[290] Cf. Al Tamimi v. Oman (Award) (see n. 242), par. 389 sq.

[291] Cf. Arif v. Moldova (Award) (see n. 242), par. 382.

[292] Cf. MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro, Award ICSID Case No. ARB(AF)/12/8, ICSID, May 4, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf` (accessed: 06/20/2017), par. 211. Further cases of restrictive, ordinary meaning definitions of the scope of investment are Cf. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, Award SCC Case No. V (116/2010), SCC, Dec. 19, 2013, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf` (accessed: 05/31/2017), par. 806; White Industries Australia Limited v. The Republic of India, Final Award, UNCITRAL, Nov. 30, 2011, URL: `https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf` (accessed: 06/23/2017), pars. 7.3.1–7.3.8.

> terms does not entitle tribunals to create a new standard of international law in disregard of the terms of the applicable treaties, generic as they may be.[293]

Consequently, annulment proceedings seem to have an influence in subsequent arbitrations. However, it has to be taken into account that annulment proceedings are not a mere tool at defendant states' disposal to rectify overly expansive interpretation. Rather, according to Baetens's analysis, it is only *more often* used by states. Until April of 2016, states were responsible for 58% of the applications for annulment; 62% of all annulments were decided upon in proceedings that were initiated by respondents.[294] As a consequence, this also means that many investors were unhappy about *restrictive* interpretation. The overall rate of all awards that were reviewed has been oscillating between 32 and 48%.[295] This reflects a lack of predictability and acceptance of decisions in investment arbitration.

The same cautious approach was undertaken in *Daimler v. Argentina.* It stressed the important role *consent* played in treaty interpretation. In the light of the Art. 31 VCLT *good faith* requirement, it reminded arbitrators of their "duty [...] to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties."[296] Likewise, in *Flemingo DutyFree v. Poland*, the arbitrators rejected an object and purpose argument that was meant to go beyond the ordinary meaning of substantive provisions. It had been voiced by respondent in order to limit the term *investor* to entities who actually *made* and investment in Poland. The tribunal found a contradiction between the preamble and substantive provisions of the treaty:

> Respondent unsuccessfully relies upon the Treaty Preamble, which states that the Treaty is aimed at "fostering investments by investors of one State in the territory of another State", and argues that this statement implies that only entities which actually invest in Poland should be considered "investors" under the Treaty. However, the Preamble cannot contradict the provisions of the Treaty itself.[297]

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[293] Mamidoil v. Albania (Award) (see n. 243), par. 601, 610, both original emphasis; quoting: MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Decision on Annulment ICSID Case No. ARB/01/07, ICSID, Mar. 21, 2007, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf` (accessed: 06/14/2017), par. 107.

[294] Cf. Freya Baetens: Judicial Review of International Adjudicatory Decisions: A Cross-Regime Comparison of Annulment and Appellate Mechanisms, in: Journal of International Dispute Settlement 7.0 (2016), pp. 1–28, DOI: `10.1093/jnlids/idw021`, at p. 4.

[295] Cf. ibid.

[296] Daimler v. Argentina (Award) (see n. 242), par. 173.

[297] Flemingo DutyFree Shop Private Limited v. Republic of Poland, Award (redacted), UNCITRAL, Aug. 12, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7709_3.pdf` (accessed: 06/20/2017), par. 321; quoting: Agreement Between the Government of the Republic of India and the Government of the Republic of Poland on the Promotion and Protection of Investments, Oct. 7, 1996, URL: `http://investmentpolicyhub.unctad.org/Download/TreatyFile/1587` (accessed: 06/20/2016), preamble.

Another course of action was taken by the twin awards *Reinhard Unglaube v. Costa Rica* and *Marion Unglaube v. Costa Rica*. They heavily relied on "case law", although from a technical point of view, no binding precedent exists in international investment arbitration (cf. above, p. 44). Faced with the sparse language of the preamble and the FET Article 2(1) of the Treaty

> [i]t is not the Tribunal"s role, having appraised the evidence presented, to decide based on its own judgments of fairness. It is, instead, to assess whether investors have been subjected to arbitrary or discriminatory treatment, to legal arrangements which violate due process, and, in particular, whether the legitimate expectations of the investor (i.e., expectations reasonably held by the investor at the time the investment was made) have been duly respected.[298]

In order to do so, they made reference to precedent. "*These* [*Siemens v. Argentina*, *Saluka v. Czech Republic*, *Duke Energy v. Ecuador*, *Azurix v. Argentina (I) LG&E v. Argentina*, and *Biwater v. Tanzania*[299]] *and other leading authorities* indicate that to prove a breach of the standard, a claimant must show more than mere legal error."[300] This approach indicates the will to create consistent case law. In the long run, this might lead to the establishment of CIL; or to the *perception* that CIL has been established.

The statement of these tribunals on politics and normative questions of legitimacy/fairness is remarkable because they make reference to one of the possible political intentions of contracting parties to IIAs: the depoliticization of disputes between states. I will turn to these topics in more detail in sec. 6 "Intentions of Contracting Parties", p. 102.

A more radical approach was taken by the tribunal in *El Paso v. Argentina*. Relying on *SD Myers v. Canada*, the tribunal finds that "the silence of the treaty indicates the *intention of the*

[298] Marion Unglaube v. Republic of Costa Rica, Award ICSID Case No. ARB/08/1, ICSID, May 16, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/ita1052.pdf (accessed: 06/15/2017), par. 242; Reinhard Hans Unglaube v. Republic of Costa Rica, Award ICSID Case No. ARB/09/20, ICSID, May 16, 2012, URL: https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf (accessed: 06/15/2017), par. 242.

[299] Siemens A.G. v. The Argentine Republic, Award ICSID Case No. ARB/02/8, ICSID, Jan. 17, 2007, URL: https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf (accessed: 06/15/2017); Saluka v. Czech Republic (Partial Award) (see n. 167); Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador, Award ICSID Case No. ARB/11/33, ICSID, Aug. 18, 2008, URL: https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf (accessed: 06/15/2017); Azurix Corp. v. The Argentine Republic, Award ICSID Case No. ARB/01/12, ICSID, July 14, 2006, URL: https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf (accessed: 06/15/2017); LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, Decision on Liability ICSID Case No. ARB/02/1, ICSID, Oct. 3, 2006, URL: https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf (accessed: 06/15/2017); Biwater Gauff Limited v. United Republic of Tanzania, Award ICSID Case No. ARB/05/22, ICSID, July 24, 2008, URL: https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf (accessed: 06/15/2017).

[300] Marion Unglaube v. Costa Rica (Award) (see n. 298), par. 242; Reinhard Unglaube v. Costa Rica (Award) (see n. 298), par. 242, emphasis added.

drafters 'to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case'".[301]

Tribunals also applied object and purpose where different language versions of the applicable IIA were in conflict. As IIAs generally aim to protect foreign investments, language conflicts tended to be resolved in favor of claimant.[302].

Against the backdrop of the empirically observable range of discretion applied by tribunals, Ishikawa talks of an "'accordion-like' quality" provisions have been accorded to, dependent on the respective arbitrators' "own 'grand vision'".[303] He expressed the anxiety that interpretations could be expanded "beyond the limits on discretion conferred by both of the State parties."[304]

4.2.2 Claimant

Claimants used object and purpose or one of its synonymously used terms in 30% of the cases. In many cases, claimants used object and purpose arguments so as to manifest their claim to be admissible to arbitration or that their investment was an investment in the sense of the applicable IIA.[305] For example, in *ECE v. Czech Republic* the claimant argued that the

[301]ElPaso v. Argentina (Award) (see n. 242), par. 701; quoting: SD Myers v. Canada (First Partial Award) (see n. 152), par. 311–315.

[302]Examples where object and purpose arguments were used to reconcile language conflicts are Cf. İçkale v. Turkmenistan (Award) (see n. 242), par. 209; Daimler v. Argentina (Award) (see n. 242), par. 225, n. 394; Ömer Dede and Serdar Elhüseyni v. Romania, Award ICSID Case No. ARB/10/22, ICSID, Sept. 5, 2013, URL: https://www.italaw.com/sites/default/files/case-documents/italaw5010.pdf (accessed: 06/23/2017), par. 210 sq.; Renée Rose Levy and Gremcitel S.A. v. Republic of Peru, Award ICSID Case No. ARB/11/17, ICSID, Jan. 9, 2015, URL: https://www.italaw.com/sites/default/files/case-documents/italaw4105.pdf (accessed: 06/23/2017), par. 165 sq.; Ascom and others v. Kazakhstan (Award) (see n. 292), par. 1301.

[303]Ishikawa: Keeping (see n. 6), p. 138; cf. likewise Stern: Future of International Investment (see n. 103), p. 186.

[304]Ishikawa: Keeping (see n. 6), p. 139.

[305]Cf. e. g. National Gas v. Egypt (Award) (see n. 237), par. 101; Poštová banka and Istrokapital v. Greece (Award) (see n. 265), par. 128–131; Rafat Ali Rizvi v. Republic of Indonesia, Award on Jurisdiction ICSID Case No. ARB/11/13, ICSID, July 16, 2013, URL: http://www.italaw.com/sites/default/files/case-documents/italaw3170.pdf (accessed: 06/30/2017), par. 126, 130; KT Asia v. Kazakhstan (Award) (see n. 268), par. 107; Pezold and others v. Zimbabwe (Award) (see n. 242), par. 269; Philip Morris v. Uruguay (Award) (see n. 254), par. 184–192; Nova Scotia Power v. Venezuela (II) (Award) (see n. 276), par. 82; Guaracachi v. Bolivia (Award (corrected) (see n. 242), par. 204; Philip Morris Asia Limited v. The Commonwealth of Australia, Award on Jurisdiction and Admissibility PCA Case No. 2012-12, UNCITRAL, Dec. 17, 2015, URL: https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf (accessed: 06/27/2017), par. 190 sq.; Flemingo DutyFree v. Poland (Award) (see n. 297), par. 250; ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic, Final Award PCA Case No. 2010-5, UNCITRAL, Sept. 19, 2013, URL: http://www.italaw.com/sites/default/files/case-documents/italaw4258.pdf (accessed: 06/15/2017), par. 3.35 sq.; Copper Mesa v. Ecuador (Award) (see n. 26), par. 5.16; Luigiterzo Bosca v. Republic of Lithuania, Award PCA Case No. 2011-05, UNCITRAL, May 17, 2013, URL: https:

object and purpose of the applicable BIT was to reach "a very high level of protection".[306] From her point of view it would violate the object and purpose of the BIT "to interpret the scope of jurisdiction restrictively by saying the investment has to be a contribution to limit the wide definition of covered investments".[307] Additionally, this position was backed up by the historical context of the conclusion of the treaty, to be interpreted as additional means under Article 32, VCLT.[308] Because of these intentions, she further explained, substantive provisions under the BIT were autonomous standards that offered a higher protection compared to CIL.[309] Another recurring topic in respondents' quest for access to arbitration was the rejection of further requirements for covered investments, especially the *Salini*-Test:

> 185. The *Salini* criteria are not jurisdictional requirements. Most of the tribunals that have examined these criteria have used them as typical characteristics rather than as jurisdictional requirements. Specifically, the criterion of the contribution to the economic development of the host State is inappropriate because it has no basis in the BIT, leads to a troubling *post hoc* analysis of the investment and is highly subjective. [...] 189. The contribution-to-development criterion is in any event based on a misunderstanding of the Preamble of the ICSID Convention. The reference to the "need for international cooperation for economic development and the role of private investment therein" is not evidence that contribution to economic development is a required criterion of investment, as Uruguay claims. The Preamble should be read as describing how the ICSID Convention will foster economic development by achieving and maintaining a flow of foreign investment.[310]

Additionally, claimant in *ICS v. Argentina* tried to evade the 18 moth period for amicable and local court dispute resolution relying on the treaties object and purpose. It would violate the objectives of the BIT to require "a mere procedural waiting period which is satisfied

//www.italaw.com/sites/default/files/case-documents/italaw7179_1.pdf (accessed: 09/19/2013), par. 149.

[306]ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtungsechzigste Grundstücksgesellschaft mbH & Co v. The Czech Republic, Claimants' Memorial on the Merits and Observations on Jurisdiction and Admissibility PCA Case No. 2010-5, UNCITRAL, Oct. 15, 2010, par. 366; as quoted in ECE v. Czech Republic (Final Award) (see n. 305), par. 3.35.

[307]ECE v. Czech Republic (Claimants' Memorial) (see n. 306), par. 370; as quoted in ECE v. Czech Republic (Final Award) (see n. 305), par. 3.36.

[308]Cf. ibid.

[309]Cf. ibid., par. 4.478.

[310]Philip Morris v. Uruguay (Award) (see n. 254), pars. 185, 189, all original emphases; quoting: Convention on the Settlement of Investment Disputes Between States and Nationals of other States: Opened for Signature at Washington, on 18 March 1965, Mar. 18, 1965, URL: http://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf (accessed: 06/30/2017), preamble. Similarly *Deutsche Bank v. Sri Lanka*: "[I]t cannot have been the parties' intention that Article 25(1) of the Convention would restrict the broad definition of "investments" chosen in Article 1(1) of the Treaty so as to frustrate the bringing of any claim." Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, Award ICSID Case No. ARB/09/2, ICSID, Oct. 31, 2012, URL: http://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf (accessed: 06/30/2017), par. 144.

by the passing of 18 months from when the dispute might have been so submitted" and to postpone relief for suffered damages.[311] In *Ping An v. Belgium*, claimant used the object and purpose as a vehicle to argue for the application of transitional provisions prior to the entry in force of the follow-up BIT. She argued that "[a]n interpretation which would allow a State to avoid responsibility for breaches of the 1986 BIT by denying investors recourse to any form of dispute settlement cannot be reconciled with the object and purpose of the 2009 BIT."[312] In light of the object and purpose, the new 2009 BIT did "not exclude pre-existing disputes".[313] Furthermore, the claimants in the related awards *Veteran Petroleum v. Russia*, *Hulley Enterprises v. Russia*, and *Yukos Universal v. Russia* rejected respondents argument that taxation measures were exempt from arbitral scrutiny. In these cases, they voiced, taxation amounted to expropriation and were in violation of the Energy Charter Treaty (ECT)'s object and purpose. Were the tribunals to adopt respondent's line of argument, this would produce "*a gaping hole in the ECT* where investors would stand completely unprotected from expropriatory taxation"[314]

Another type of Article 31 arguments by claimants is the case for broad protection application of certain substantive provisions. In *ST-AD v. Bulgaria*, for instance, claimant argued (in general terms) for an expansive interpretation in favor of investors; based on the object and purpose of the BIT.[315] The claimant in *Crystallex v. Venezuela* inferred from the object and purpose of the applicable BIT, the requirement of a *proactive behavior* of host states in the protection of investments, and rejects the notion that FET under the treaty was identical with the international minimum standard of treatment.[316] Furthermore, FET was interpreted

[311] ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 246.
[312] Ping An v. Belgium v. Guatemala (Award) (see n. 242), par. 156.
[313] Ibid., par. 154.
[314] Veteran Petroleum v. Russia (Final Award) (see n. 244), pars. 1380–1382, original emphasis; Hulley Enterprises v. Russia (Final Award) (see n. 244), pars. 1380–1382, original emphasis; Yukos Universal v. Russia (Final Award) (see n. 244), pars. 1380–1382, original emphasis.
[315] Cf. ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 381 sq.
[316] Cf. Crystallex International Corporation v. Bolivarian Republic of Venezuela, Award ICSID Case No. ARB(AF)/11/2, ICSID, Apr. 4, 2016, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf` (accessed: 06/28/2017), par. 491–499; more calls for an pro-investor interpretation of the FET-standard based on Object and purpose is to be found in Ascom and others v. Kazakhstan (Award) (see n. 292), par. 891–893; 467 Rupert Joseph Binder v. Czech Republic, Final Award, UNCITRAL, July 15, 2011, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf` (accessed: 07/02/2017), par. 166; Micula v. and others (Award) (see n. 242); Railroad Development Corporation (RDC) v. Republic of Guatemala, Award ICSID Case No. ARB/07/23, ICSID, June 29, 2012, URL: `http://www.italaw.com/sites/default/files/case-documents/ita1051.pdf` (accessed: 06/30/2017), par. 109; Deutsche Bank v. Sri Lanka (Award) (see n. 310), par. 410; Garanti Koza LLP v. Turkmenistan, Award ICSID Case No. ARB/11/20, ICSID, Dec. 19, 2016, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw8189_12.pdf` (accessed: 06/30/2017), par. 265 sq.; Supervision y Control S.A. v. Republic of Costa Rica, Award ICSID Case No. ARB/12/4, ICSID, Jan. 18,

as binding from preambles even though it would not appear in the binding substantive provisions of the IIA.[317] Another example of Article 31 arguments as a legal vehicle to broaden the scope of protection, is claimant's call for the application of the English version of the BIT in *Guaracachi v. Bolivia*. The wording of the definition of protected investment in the English version, she claimed, better reflected the object and purpose of the treaty. The definition of the Spanish version on which respondent relied on, on the contrary, would devoid it of *effet utile*.[318] Also, claimant rejected the retroactive application of Article XII of the BIT that exempts investors from protection if one of their owners is from a third state that "does not maintain normal economic relations with" respondent.[319] Especially interesting in the context of broadening scope by Article 31 arguments, is the plead of claimants to import substantive and even more importantly procedural provisions from other IIAs through MFN clauses. In *Daimler v. Argentina* claimant argued that the preamble and title to the present BIT showed the intention of contracting parties to allow for a broad application of the MFN clause, including the import of procedural provisions. With this, claimant supported her direct recourse to international arbitration and her non-compliance with amicable and domestic dispute resolution requirements imposed on her by the BIT.[320] Claimant in *Kılıç v. Turkmenistan* went even further, insofar as she not only argued that contracting parties intended to include dispute resolutions provisions in the scope of MFN treatment. She also submitted that

> the object and purpose of the BIT is the promotion and protection of investments. A crucial component in the effectiveness of that protection is said to be access to fair and efficient means of dispute settlement. 4.3.23 In light of the condition of Turkmenistan's court system, insistence upon resort by Claimant to the courts of Turkmenistan would offer no reasonable possibility of bringing a fair resolution to this dispute. Thus, depriv-

2017, URL: https://www.italaw.com/sites/default/files/case-documents/italaw8230.pdf (accessed: 07/02/2017), par. 188, c), v.

[317]Cf. e. g. İçkale v. Turkmenistan (Award) (see n. 242), par. 312, 333 sq.

[318]Cf. Guaracachi v. Bolivia (Award (corrected) (see n. 242), par. 204.

[319]Cf. ibid., par. 216; quoting: Treaty Between the Government of the United States of America and the Government of the Republic of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Apr. 17, 1998, URL: http://investmentpolicyhub.unctad.org/Download/TreatyFile/463 (accessed: 06/28/2016), Art. XII: "Each Party reserves the right to deny to a company of the other Party the benefits of this Treaty if nationals of a third country own or control the company and:| (a) the denying Party does not maintain normal economic relations with the third country; or| (b) the company has no substantial business activities in the territory of the Party under whose laws it is constituted or organized.".

[320]Cf. Daimler v. Argentina (Award) (see n. 242), par. 159; likewise Philip Morris v. Uruguay (Award) (see n. 254), par. 86; Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, Award ICSID Case No. ARB/10/1, ICSID, July 2, 2013, URL: http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf (accessed: 06/28/2017), par. 3.3.54–3.3.56, 4.2.32; ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 122–125.

ing the Claimant of direct access to international arbitration, it is said, would clearly be contrary to the object and purpose of the BIT.[321]

Similar to the lines of legal arguing in relation to a broad application of MFN treatment, claimants also rallied for a broad application of umbrella clauses with the objective to gain access to arbitration in cases of contractual violation.[322]

Moreover, claimant in *Servier v. Poland* argued for the extension of the *full protection and security* obligation. From her point of view and in the light of the treaty's object and purpose, any unfair or inequitable treatment of her investment would automatically result in a breach of this substantive obligation entered into by contracting parties.[323]

Another approach was the argument that pro-investor intentions of IIAs obliged tribunals to not restrictively apply wordings in favor of respondents. In *Gold Reserve v. Venezuela*, for instance, according to claimant, a restrictive interpretation of the stipulation "to make" in the definition of covered investment was not reconcilable with the BIT's object and purpose.[324] Claimants also employed object and purpose arguments so as to decry states' sovereign right to regulate. Two prominent examples are *El Paso v. Argentina* and *Ulysseas v. Ecuador*. The first case concerns the right to regulate under conditions of necessity and was discussed in appropriate length, above, (p. 56). In the second case, claimant defended that the violation of her legitimate expectations constituted a breach of the applicable BIT.[325]

A rather exotic application of Article 31 resources can be found in *Roussalis v. Romania*. Claimant tried to deflect a counter-claim by respondent relying on the object and purpose of the BIT. From her perspective, the treaty "was set out as to promote and protect in accordance with its terms, the investment of the foreign investor."[326]

4.2.3 Respondent

Like claimants, respondents used object and purpose or one of its synonymously used terms in almost 30% of the cases. Opposed to their investor counterparts, respondents tried to disqualify investments as not being covered investments in the terms of the applicable IIA. For instance, in *Bosca v. Lithuania*, the defending party rejected jurisdiction of the tribunal,

[321]Kılıç v. Turkmenistan (Award) (see n. 320), par. 4.3.22 sq.

[322]Cf. e. g. ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 175–186.

[323]Cf. Servier v. Poland (Award) (see n. 23), par. 421 sq.

[324]Cf. Gold Reserve Inc. v. Bolivarian Republic of Venezuela, Award ICSID Case No. ARB(AF)/09/1, ICSID, Sept. 22, 2014, URL: https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf (accessed: 06/28/2017), par. 237–239.

[325]Cf. Ulysseas v. Ecuador (Final Award) (see n. 242), par. 202–204.

[326]Spyridon Roussalis v. Romania, Award ICSID Case No. ARB/06/1, ICSID, Dec. 7, 2011, URL: http://www.italaw.com/sites/default/files/case-documents/ita0723.pdf (accessed: 06/30/2017), par. 831.

as the alleged investment did "not contribute to the prosperity of both Contracting Parties, contrary to the object and purpose of the Agreement."[327] These contribution requirements are closely linked to the *Salini* requirements. Respondent in *Philip Morris v. Uruguay* argued with net contributions; i. e. that the harm done to the her overall economic development by claimant outweighed the latter's alleged contributions. Therefore, the investment was not a covered investment under the ICSID convention.[328] Another argument to disqualify an investment as covered by IIAs, is the reference to nationality and the prerequisite to have the main seat in the respective countries. In *Tenaris and Talta v. Venezuela (II)* claimant argued that dropping this requirement would devoid the seat provision of *effet utile*. This would disregard the drafters' intention "to limit a BIT's coverage by the inclusion of a genuine link between the individual putative claimant corporate entity and the national State".[329] Furthermore, the object and purpose underscored this definition of covered investment by stressing the fostering of cooperation between the contracting parties.[330] Another Article 31 route to call for the denial of jurisdiction was to reproach investors for treaty shopping (referred to above, p. 48), incompatible with the respective IIA's object and purpose. According to respondent in *Flemingo DutyFree v. Poland* "the signatory States did not anticipate that the BIT would be 'abused' by 'multi-layer tax optimisation structures'."[331] Respondent in *Gold Reserve v. Venezuela* explicitly decried that "[c]laimant engaged in abusive treaty-shopping

[327]Bosca v. Lithuania (Award) (see n. 305), par. 137; alike contribution requirement arguments: OIEG v. Venezuela (Award) (see n. 239), par. 160–163; MNSS and RCA v. Montenegro (Award) (see n. 292), par. 97; Philip Morris v. Uruguay (Award) (see n. 254), par. 177–182; Garanti Koza v. Turkmenistan (Award) (see n. 316), par. 168 sq.; Poštová banka and Istrokapital v. Greece (Award) (see n. 265), par. 99–103; White Industries v. India (Final Award) (see n. 292), par. 5.1.1–5.1.4; *Guardian Fiduciary v. Macedonia* modified this to the preamble stipulation "'to extend and intensify the economic relations between [the Contracting States], particularly with respect to investments by the nationals of one Contracting State in the territory of the other Contracting State,' and to 'stimulate the flow of capital and technology and the economic development of the Contracting States.'" Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of, Award ICSID Case No. ARB/12/31, ICSID, Sept. 22, 2015, URL: http://www.italaw.com/sites/default/files/case-documents/italaw4447.pdf (accessed: 07/02/2017), par. 53; similarly Arif v. Moldova (Award) (see n. 242), par. 381–383; quoting: Agreement on Encouragement and Reciprocal Protection of Investments between the Macedonian Government and the Government of the Kingdom of the Netherlands, July 7, 1998, URL: http://investmentpolicyhub.unctad.org/Download/TreatyFile/1936 (accessed: 07/03/2017), preamble; likewise Poštová banka and Istrokapital v. Greece (Award) (see n. 265), par. 110 sq.

[328]Philip Morris v. Uruguay (Award) (see n. 254), par. 180–182.

[329]Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II), Award ICSID Case No. ARB/12/23, ICSID, Dec. 12, 2016, URL: https://www.italaw.com/sites/default/files/case-documents/italaw8137_0.pdf (accessed: 06/27/2017), par. 117.

[330]Cf. ibid., par. 273.

[331]Flemingo DutyFree v. Poland (Award) (see n. 297), par. 246; quoting: Flemingo DutyFree Shop Private Limited v. Republic of Poland, Respondent's Post-Hearing Brief, UNCITRAL, Dec. 22, 2015, par. 38 sq., 44; likewise Gold Reserve v. Venezuela (Award) (see n. 324), par. 229–233; KT Asia v. Kazakhstan (Award) (see n. 268), par. 72 sq., 95 sq., 101.

for more than a decade by the shifting of legal domiciles to gain access to various treaties."[332] Furthermore, respondent in *Pezold and others v. Zimbabwe* brought forward that the object and purpose required a *new investment* or at least control over the investment in order to enjoy protection under the BIT. A portfolio holding, she insisted, was not enough.[333] Likewise, respondent in *Transglobal v. Panama* rejected jurisdiction of the tribunal because claimant did not control the investment.[334] Furthermore, jurisdiction was rejected on the basis of a legality requirement derived from the object and purpose.[335] Additionally, respondent in *Awdi v. Romania* dismissed jurisdiction on the grounds that the investor had violated good faith and the object and purpose of the treaty by not respecting workers' rights explicitly included in the preamble to the applicable BIT.[336] Respondent's request, however, was turned down by the tribunal.[337] This example shows that new generation IIAs may provide host states with further arguments against investments that are not in line with specific (political) development goals. A rebuild of IIAs might help to reduce conflicts between public interest and foreign investment. Although it does not prevent investments that undermine politically defined development goals (such as social or environmental sustainability), readjusted treaty language may at least help to regain the sovereign right to regulate in the public interest, by excluding harmful investments from coverage. Furthermore, it may reduce policy review by arbitral bodies. For further information see sec. 6.2 "Reforming IIAs. An Expression of Original Intent?", p. 111, below.

Another interesting argument related to convergence in international investment law in connection with the *Salini* requirements was brought forward in *Ascom and others v. Kazakhstan.* Responding Kazakhstan called for a broader meaning of the term "investment" compared to the ordinary meaning by reference to the object and purpose of the ECT.

> Contrary to Claimants' argument, the definition of "*investment*" is not institution-specific – indeed, to make it so would (1) encourage forum shopping within the ECT (where in-

[332] Gold Reserve v. Venezuela (Award) (see n. 324), par. 233; likewise cf. Pezold and others v. Zimbabwe (Award) (see n. 242), par. 291 sq.

[333] cf. ibid., par. 290 sq.

[334] Cf. Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama, Award ICSID Case No. ARB/13/28, ICSID, June 2, 2016, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw7336.pdf` (accessed: 07/04/2017), par. 90; likewise National Gas v. Egypt (Award) (see n. 237), par. 79 sq.

[335] Cf. Metal-Tech v. Uzbekistan (Award) (see n. 242), par. 169; likewise Fraport v. Philippines (II) (Award) (see n. 284), par. 300–307; Veteran Petroleum v. Russia (Final Award) (see n. 244), par. 1314–1316; Hulley Enterprises v. Russia (Final Award) (see n. 244), par. 1314–1316; Yukos Universal v. Russia (Final Award) (see n. 244), par. 1314–1316.

[336] Cf. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, Award ICSID Case No. ARB/10/13, ICSID, Mar. 2, 2015, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw4208.pdf` (accessed: 07/04/2017), par. 145.

[337] Cf. ibid., par. 212.

vestors have a choice of commencing arbitration under three different institutions) and (2) would violate the principle endorsed in *CIM v. Ethiopia* that Parties should search for a consistent meaning across investment treaties.[338]

On this basis and "general principles of international law," respondent urged the tribunal to apply the *Salini* or alike tests as a benchmark for covered investments.[339]

Another strategy to deflect pro-investor interpretations that went beyond the ordinary meaning of the applicable treaty's provisions was to stress the superiority of the ordinary meaning. Respondent in *ECE v. Czech Republic* repudiated claimant's theory of contracting parties intention to provide a high level of protection as "pure speculation"; she continued denying "that the supposed high level of protection under the BIT allegedly intended by the parties could be derived from its object and purpose, or the preamble".[340] Likewise, respondent in *İçkale v. Turkmenistan* endeavored to limit her obligations on the treatment of foreign investors and investments by stating that "the fact that FET is mentioned in the preamble as being 'desirable,' but was then left out of the BIT's 'obligatory clauses,' demonstrates that the state parties 'deliberately chose not to include it as a binding obligation.'"[341] Another instance of repudiating interpretative weight on object and purpose is *Ping An v. Belgium*. Respondent dismissed the retroactive application of the new BIT. If the parties to the treaty would have intended this, they would have explicitly said so. This interpretation, respondent was convinced, did not contravene the BIT's goals.[342] Similarly, respondent in *Philip Morris v. Australia* rejected the claim filed against her on account of the requirement of ownership *before* the submission for arbitration.

> [T]he object and purpose of the Treaty as stated in the preamble, including the creation of favourable conditions for greater investment and the promotion of economic relations, do not support an interpretation of Article 10 as allowing an international company first to engage in a pre-existing dispute involving a subsidiary in one of the Contracting Parties, and then to arbitrate this dispute once ownership of such subsidiary is transferred to a company incorporated in the other Contracting Party.[343]

Another call to the tribunal to not supersede the treaty text by the application of object and purpose arguments was voiced by the respondent in *EDF and others v. Argentina*. She

[338] Ascom and others v. Kazakhstan (Award) (see n. 292), par. 776, both original emphasis.

[339] Cf. ibid., par. 777–804, 821 sq.; another case where respondents—on the basis of Article 31 arguments—denied the investment at stake to be a covered investment under the applicable treaty is Cf. Deutsche Bank v. Sri Lanka (Award) (see n. 310), par. 221 sq.

[340] ECE v. Czech Republic (Final Award) (see n. 305), par. 4.264.

[341] İçkale v. Turkmenistan (Award) (see n. 242), par. 335; quoting: İçkale İnşaat Limited Şirketi v. Turkmenistan, Respondent's Objections to Jurisdiction and Counter-Memorial on the Merits ICSID Case No. ARB/10/24, ICSID, Nov. 3, 2012, par. 427.

[342] Cf. Ping An v. Belgium v. Guatemala (Award) (see n. 242), par. 148–150.

[343] Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 355.

> argues that customary international law recognizes neither legitimate expectations nor legal stability as essential elements to the Fair and Equitable Treatment standard. [...] Respondent asserts that *such broad interpretation extending to the protection of legitimate expectation constitutes a legislative expansion inconsistent with the contracting parties' intentions as well as the principles of treaty interpretation under Articles 31 and 32 of the Vienna Convention.* [...] Moreover, Respondent argues against Claimants' interpretation of *CMS Gas*, *Enron* and *Sempra* by suggesting that those awards are distinguishable in that those tribunals included an obligation to maintain a stable and predictable framework because the preamble of the Argentina-U.S. BIT made express reference to the concept of stability.[344]

She continued with her own BIT practice as a supplementary means to show the non-inclusion of any obligation to legal security. If drafters had intended so, they would have explicitly included stipulations in the way other Argentinian BITs do.[345] Furthermore, respondent in *Daimler v. Argentina* asserted her right to necessity measures relying on the object and purpose of the applicable BIT. The denial of her right to apply emergency measures would substantially contravene the purpose that was "to increase the welfare of both countries".[346]

A distinct case of resistance against an overly-broad interpretation based on object and purpose can be found in *Renco v. Peru*, presented in some detail above, p. 44. My insistence on this case substantiates in the *amicus curiae* involvement of the US. As a respondent, the government of the US had an interest in not allowing arbitral case-law that could result in subsequent proceedings of investment arbitration culminating in a repeated cut back on state sovereignty. Claimant had argued with object and purpose arguments and the general principle of severability. Respondent, and the *amicus curiae* argued that the application of this principle would cancel out the purpose of the offer to arbitrate.[347] Furthermore, respondent in *ICS v. Argentina* rejected the negligence of the period to settle amicably or seek justice in domestic courts before the recourse to arbitration by means of object and purpose. "[R]eference to the alleged purpose of the BIT does not authorise a breach of Article 8."[348] Furthermore, respondent in *Servier v. Poland* opposed claimants assertion that the standard of treatment was broader than the ordinary meaning of the applicable BIT's provision be-

[344] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, Award ICSID Case No. ARB/03/23, ICSID, June 11, 2012, URL: `http://www.italaw.com/sites/default/files/case-documents/ita1069.pdf` (accessed: 07/03/2017), par. 359, first emphasis added, second, third, and fourth original emphasis.

[345] Cf. ibid., par. 414.

[346] Daimler v. Argentina (Award) (see n. 242), par. 94.

[347] Cf. Renco v. Peru (Partial Award on Jurisdiction) (see n. 286), par. 165–168.

[348] ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 97, 103, 246 sq.; likewise, cf. Ascom and others v. Kazakhstan (Award) (see n. 292), par. 820–822.

cause of the developments in CIL. This conclusion would infringe the object and purpose of the treaty.[349]

Also, respondent states tried to dissuade the import of broader provisions through MFN clauses. On the one hand, substantive; on the other hand, procedural provisions. In *Kılıç v. Turkmenistan*, for instance, respondent rejected the import of dispute resolution provisions on the basis of object and purpose.

> In light of the *Plama* line of decisions, and consistent with the principle that the requirement that the state consent be clear and unequivocal, the absence of any explicit reference to DRPs in the text of Article II.2 excludes that the DRPs found in Article VII.2 fall within the scope of the MFN clause.[350]

As in the previous example, respondent in *İçkale v. Turkmenistan* refused the import of an umbrella clause by means of the MFN clause. She asserted that to allow for such a dramatic extension of scope, clear evidence of consent had to be provided for. "[T]he wording of a treaty [had to] show a clear intention to conclude an umbrella clause".[351]

4.3 Article 32 VCLT

As in the awards studied by Weeramantry, supplementary means of interpretation were employed in a significantly smaller amount of party arguments and interpretations (cf. figure 8). In almost 30% "supplementary means", "preparatory work" or "travaux" were applied effectively. Approximately, in more than one out of three awards they are mentioned without being included in party arguments or the tribunals' analyses.

4.3.1 Tribunal

The big gap between tribunal's usage and effective usage and their mere mentioning of the terms "supplementary means", "preparatory work" or "travaux", expresses the approach to merely reference VCLT articles 31 and 32.[352]

When it comes to the use of supplementary means by arbitral bodies under Article 32 VCLT, two basic questions come to mind. First, *under what circumstances* did they look to supplementary means? And second, what kind of material did they consult? In relation to the first question, there were different approaches across tribunals. Many tribunals strictly

[349] Cf. Servier v. Poland (Award) (see n. 23), par. 439.
[350] Kılıç v. Turkmenistan (Award) (see n. 320), par. 3.3.22, original emphasis; further examples are EDF and others v. Argentina (Award) (see n. 344), par. 417; ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 80–84, 88.
[351] İçkale v. Turkmenistan (Award) (see n. 242), par. 324.
[352] Cf. e. g. Kılıç v. Turkmenistan (Award) (see n. 320), par. 5.2.2.

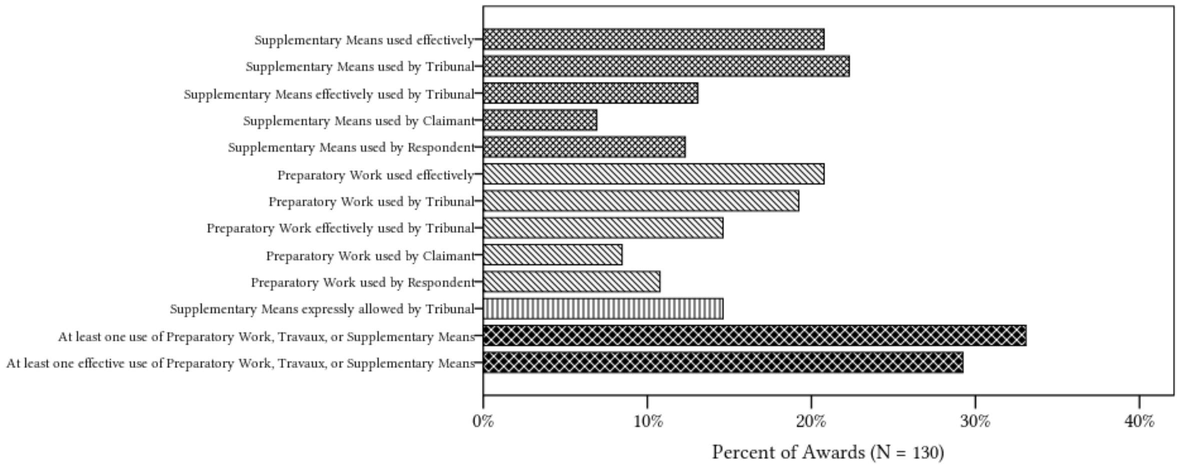

Figure 8: Bar Chart. Use of Art. 32 VCLT criteria (N=130)

sticked to the guidelines and only applied supplementary means when Article 31 interpretation " "(a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."[353] On this grounding, some tribunals decided not to include an analysis of supplementary means. For instance, in *Libananco v. Turkey*:

> [t]he Tribunal observes that Mr Bamberger's [a witness to the arbitral proceeding] evidence would be directly relevant if there were to exist any ambiguity that might be resolved by reference to the preparatory work. But in truth there is no ambiguity in Article 7 itself[...][354]

Similarly, the tribunal in *Ascom and others v. Kazakhstan* did not allow for the application of supplementary means in the endeavor to define the term "investment". The definition given by the ECT does not leave uncertainties that would allow for Article 32 interpretation.[355] Other tribunals like in *ST-AD v. Bulgaria* applied them "[i]n order to lift any possible ambiguity".[356] The detailed and precisely documented negotiations consulted as *travaux* lead the arbitrators to not allow the import of procedural provisions by means of the MFN clause.

> The Tribunal is convinced that the *travaux préparatoires*, which were presented and documented by the Respondent in its Submission on Article 4(5) of the BIT,421 show that it was never the intention of the contracting parties to the BIT to apply the MFN clause to

[353]United Nations: Vienna Convention (see n. 135), Art. 32.

[354]Libananco Holdings Co. Limited v. Republic of Turkey, Award ICSID Case No. ARB/06/8, ICSID, Sept. 2, 2011, URL: `http://www.italaw.com/sites/default/files/case-documents/ita0466.pdf` (accessed: 06/27/2017), par. 554; further examples Garanti Koza v. Turkmenistan (Award) (see n. 316), par. 241; Veteran Petroleum v. Russia (Final Award) (see n. 244), par. 1415; Hulley Enterprises v. Russia (Final Award) (see n. 244), par. 1415; Yukos Universal v. Russia (Final Award) (see n. 244), par. 1415.

[355]Cf. Ascom and others v. Kazakhstan (Award) (see n. 292), par. 807.

[356]ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 401, original emphasis.

> the narrow offer of arbitration. [...] It is unreasonable to pretend that such a "carefully crafted compromise" could be implicitly overturned by the MFN clause.[357]

Other tribunals, however, applied Article 32 more liberally. Here, again, the individual arbitrators' views on the role of arbitral discretion in the system of ISDS played a vital role. *El Paso v. Argentina* is very instructive in the respect. The panel found that *all* tribunals had the possibility to look into supplementary means of interpretation, due to the "special meaning" sub-article of the general rule of interpretation.

> Article 31(4) must be read in conjunction with Article 32 [...] Article 32 of the Vienna Convention adds that the supplementary means of interpretation mentioned by it – preparatory work, circumstances surrounding the treaty's conclusion – may also be used to confirm an interpretation already obtained via the elements listed in Article 31, which carries the implication that said supplementary means may equally be used to invalidate that interpretation.
> 606. To sum up, supplementary means of interpretation may be used:
> 607. Despite opinions according to which the supplementary means of interpretation cannot normally be resorted to – and this also seems to be the Claimant's view – the above explanations show that in practice it is always possible to have recourse to them.[358]

Hence, the application of Article 32 VCLT varied fundamentally across tribunals. Further examples of the more liberal approach to Article 32 requirements, is a group of tribunals that put into use supplementary means not to ascertain the meaning of provisions in ambiguous/obscure or absurd cases, but rather to confirm their interpretation. For example, the arbitrators in *Tenaris and Talta v. Venezuela (II)*, found that

> there is nothing in the treaty practice of either Luxembourg or Portugal that is sufficiently conclusive as to undermine the analysis of "*siège social*" and "*sede*" set out above, and arrived at in the application of Article 31 of the Vienna Convention.[359]

Yet, it conceded "that no supplementary material is to be used as a first step for interpretation."[360] A similarly cautious approach was adopted in *Nova Scotia Power v. Venezuela (II)*:

> "Secondly, the Claimant has argued that the prior treaty making practice of both Canada and Venezuela supports its reading of the term investment because in other instances

[357] ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 402.

[358] ElPaso v. Argentina (Award) (see n. 242), par. 605–607.

[359] Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 159, original emphasis; other examples are: Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia, Award ICSID Case No. ARB/06/8, ICSID, Sept. 16, 2015, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw4389.pdf` (accessed: 06/27/2017), par. 578; Daimler v. Argentina (Award) (see n. 242), par. 178,278; Metal-Tech v. Uzbekistan (Award) (see n. 242), par. 411 sq.

[360] Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 164.

> these two States have excluded certain types of commercial activity from the definition of investment. Because this has not occurred in the BIT, it should be presumed that NSPI's alleged investment is included. The Tribunal does not find this argument persuasive. Whilst it is accepted that other tribunals have had recourse to prior treaty making practice, the Tribunal is not convinced that this avenue is open based on the interpretive framework provided for in the VCLT, and thus whether it is appropriate. 137 The Tribunal notes that were prior treaty making practice to be examined as a factual matter, 138 there would need to be substantial prior treaty practice and complete symmetry with regard to the particular treaty provision between Canada and Venezuela's practice, sufficient to evidence a "meeting of the minds" and a common and continuous understanding. This may justifiably shed light on a bilateral investment treaty. [...] The Tribunal further notes that even were such symmetry established looking at prior treaty-making practice requires caution. Each treaty or international agreement is a different bargain struck and based on different sets of circumstances."[361]

Another interesting example is *Tenaris and Talta v. Venezuela (II)*. When assessing the compensable amount of an expropriation, the tribunal considered that ordinary meaning and a very broadly defined object and purpose of the treaty did not give enough evidence on the drafters' intentions. Should compensation also be paid for expected net revenue in case no state action would have occurred? To answer this question the tribunal looked into the *travaux préparatoires* of the treaty to fill the silence of the document. As a consequence of no evidence from the *travaux* the panel finally resorted to an pro-investor expansive interpretation.[362] Conversely, the arbitration panel in *Philip Morris v. Australia* came to a restrictive interpretation after an unsuccessful Article 32 analysis. It resorted to preparatory work so as to ascertain the meaning of "substantial interest". Faced with the lack of clarity in the *travaux* on this subject "the Tribunal considers that it cannot draw the kind of far-reaching conclusions from this paragraph that the Claimant suggests."[363] In relation to the arbitrators' interpretative discretion, also *Mamidoil v. Albania* is instructive. The tribunal rejected a *default* pro-investor expansive approach. In case the analysis of object and purpose would reap ambiguous or obscure results, the application of supplementary means would help the panel to stick to drafters' original intentions.[364]

As to the question about the materials used under Article 32 VCLT, beyond the suggestions of the non-exhaustive list, tribunals used a wide array of different resources. There were, among others, the treaty practices of the respective contracting parties to the applica-

[361]Nova Scotia Power v. Venezuela (II) (Award) (see n. 276), par. 83.
[362]Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 544 sq.
[363]Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 503; a similar non-expansive approach based on preparatory work can be found in ST-AD v. Bulgaria (Award on Jurisdiction) (see n. 237), par. 384.
[364]Cf. Mamidoil v. Albania (Award) (see n. 243), par. 602.

ble treaty.[365], domestic/municipal law of respondent states[366], the Romanian Europe Agreement[367], a joint interpretative statement of Argentina and Panama[368], individual government or parliament statements[369], subsequent state conduct[370], and witness or expert testimony[371]. Next, I present some cases where supplementary means *had* interpretative weight:

In *Micula and others v. Romania* the tribunal decided to weaken the requirements of FET because of the respondent, Romania, on the basis of a *political* statement of intentions. Respondent made recourse to the Europe Agreement, an Agreement between the European Community and Romania before its accession to the future EU. "The Respondent argues that the BIT was signed pursuant to Article 74 of the Europe Agreement, which prompted Romania to sign investment protection treaties with EU member states."[372] Due to the goal to harmonize domestic law with EU law, respondent argued that it could not comply with FET requirements.[373] "That being said, the Tribunal cannot conclude in the abstract (as Romania seems to suggest) that the revocation of the incentives is fair and equitable solely because it was undertaken pursuant to Romania's obligation under the Europe Agreement to harmonize its law with EU law."[374] That is, the arbitrators took general *policy*-goals into account—though in a cautious, limited way—during the interpretation of a substantial provision of a third, not directly related BIT. With regards to the controversial issue of *control* over an investment, the tribunal in *National Gas v. Egypt* ruled on the foundation of the preparatory work to the ICSID convention that drafters intended to give broad discretion to members to define control, nationality and related terms. Consequently, the panel dismissed respondent's argument that control meant effective control under ICSID.[375] In *İçkale v. Turkmenistan*, the tribunal relied heavily on the circumstances of the conclusion of the treaty so as to assess whether the turkish version of the applicable BIT was to be considered authentic.

[365]Cf. Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 155–162; Daimler v. Argentina (Award) (see n. 242), par. 261–278; KT Asia v. Kazakhstan (Award) (see n. 268), par. 122–124; Metal-Tech v. Uzbekistan (Award) (see n. 242), par. 162.

[366]Cf. Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 163–195; ElPaso v. Argentina (Award) (see n. 242), par. 135.

[367]Cf. Micula v. and others (Award) (see n. 242), par. 512.

[368]Cf. Daimler v. Argentina (Award) (see n. 242), par. 272.

[369]Cf. Philip Morris v. Uruguay (Award) (see n. 254), par. 465 sq.; Pezold and others v. Zimbabwe (Award) (see n. 242), par. 340 sq.; İçkale v. Turkmenistan (Award) (see n. 242), par. 204.

[370]Cf. Pezold and others v. Zimbabwe (Award) (see n. 242), par. 409.

[371]Cf. İçkale v. Turkmenistan (Award) (see n. 242), par. 33; Ascom and others v. Kazakhstan (Award) (see n. 292), par. 839.

[372]Micula v. and others (Award) (see n. 242), par. 512.

[373]Cf. ibid., par. 512–514.

[374]Ibid., par. 514.

[375]Cf. National Gas v. Egypt (Award) (see n. 237), par. 112 sq.

Due to the finding that the turkish version did not exist prior to the ratification process, the tribunal discarded its authenticity.[376]

4.3.2 Claimant

Claimant arguments based on the term *supplementary means* or terms *travaux/preparatory work* were present in about 7% or 9% of the awards, respectively.

As with Article 31 arguments, claimants tried to defend their right to arbitration drawing on supplementary means. For instance, one strategy was to invoke the treaty practice of parties to the treaty as a supplementary means of interpretation. In *Nova Scotia Power v. Venezuela (II)* this had the objective to show that respondent had generally followed a policy of explicitly excluding certain types of investment from protection. Because this was not the case in the present BIT, claimant incurred the contracting parties' intention to protect investments without any exceptions.[377] Another instance of claimants' strategies to advocate for access to arbitration under Article 32 is *Philip Morris v. Australia.* Claimant "concludes that the *travaux préparatoires* show that the Respondent 'wanted Article 1(e) to protect assets that were controlled, but not necessarily owned, by investors [...]'".[378] Additionally, she rejected the idea that respondent had had the right to deny her from investing in Australia. From her perspective, under Article 2(1) of the treaty, Australia had

> pre-establishment obligations to the Respondent. The only limitation to this pre-establishment obligation is that the investments shall be "admitted subject to [Respondent's] laws and investment policies". The Claimant, relying on the *travaux préparatoires* of the Treaty as well as on arbitral jurisprudence, explains that this requirement operates as a control mechanism to screen out illicit investments.[379]

Claimant also summoned the *travaux* of the VCLT with the objective to convince the arbitrators that disputes—the one at hand included—which continue to exist when a treaty is entering into force, were subject to the new treaty's substantive provisions.[380]

Similarly, claimant in *İçkale v. Turkmenistan* relied on political statements of certain Turkish officials and parliament with the objective to demonstrate respondent's intention to allow for *direct* access to arbitration without the obligation to settle amicably or go to local

[376] Cf. İçkale v. Turkmenistan (Award) (see n. 242), par. 206–209.
[377] Cf. Nova Scotia Power v. Venezuela (II) (Award) (see n. 276), par. 83; a similar application of BIT practice in SCB v. Tanzania (Award) (see n. 242), par. 233.
[378] Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 199.
[379] Ibid., par. 348; quoting: Philip Morris Asia Limited v. The Commonwealth of Australia, Claimant's Rejoinder on Preliminary Objections PCA Case No. 2012-12, UNCITRAL, Jan. 12, 2015, par. 226.
[380] Cf. Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 361.

courts.[381] This is remarkable due to the fact that one goal of the IIR is to depoliticize disputes and redirect them to neutral resolution mechanisms.

Moreover, a claimant rejected the *Salini*-requirements through the lens of *travaux préparatoires*. They "show that the attempts to include a fixed definition in the Convention failed."[382] Therefore, general prerequisites for investment under the ICSID convention did not exist.[383] Claimant in *National Gas v. Egypt* fell in line with this position. The *travaux* showed no limitation to access international arbitration with respect to ownership or control.[384]

Claimant in *Metal-Tech v. Uzbekistan* relied on previous treaty practice as supplementary means with the objective to show "the Parties' intention to extend the MFN clause to the definition of investment (including the legality requirement), or else they would not have made an exception for pre-1992 treaties."[385] On this basis she defends the status of her previously established investment as *investment* in the terms of the treaty. Post-establishment violations of domestic law by an investor could not result in the host state being redeemed from its obligations under the treaty.[386]

Claimants not only tried to use Article 32 arguments to prove their case; on the contrary. In various cases claimants tried to block the application of supplementary means on interpretation. For instance, claimant in *Tenaris and Talta v. Venezuela (II)* successfully prevented the analysis of domestic laws as an Article 32 means in the interpretation of the term "seat"; in her opinion they were only to be taken into account if the result of the general rule of interpretation would be absurd or a meaning obscure or ambiguous.[387]

4.3.3 Respondent

Respondent arguments based on the term *supplementary means* or terms *travaux/preparatory work* were present in about 12% or 11% of the awards, respectively. Respondents used a variety of supplementary means with the objective to discard jurisdiction of tribunals in the respective cases. In *Tenaris and Talta v. Venezuela (II)* the defendant made reference to the treaty practice of both claimants' home states in order to show that with the wording *siège social* and *sede* they intended to require *seat of operations* rather than a mere registered

[381]Cf. İçkale v. Turkmenistan (Award) (see n. 242), par. 185–187.
[382]Ibid., par. 277.
[383]Cf. ibid.
[384]Cf. National Gas v. Egypt (Award) (see n. 237), par. 112–114.
[385]Metal-Tech v. Uzbekistan (Award) (see n. 242).
[386]Cf. ibid., par. 181; likewise: Fraport v. Philippines (II) (Award) (see n. 284), par. 211.
[387]Cf. Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 164 sq.; another case is: ElPaso v. Argentina (Award) (see n. 242), par. 582; Rizvi v. Indonesia (Award on Jurisdiction) (see n. 305), par. 133.

office.[388] In *EURAM Bank v. Slovakia* respondent dismissed the tribunal's jurisdiction on the grounds that claimant had a parallel proceeding in court to the same subject matter. She reiterated that the *travaux* to the UNCITRAL rules supported the interpretation that claimant had waived her right to arbitrate.[389] Another instance of the application of supplementary means so as to disqualify an investment as covered investment is to be found in *Philip Morris v. Australia*:

> The Respondent refers to the *travaux préparatoires* as "clearly demonstrat[ing] that Australia and Hong Kong regarded the need for a 'substantial interest' as the sole criterion of control". According to the Respondent, Hong Kong was initially unwilling to agree to the inclusion of "control" but agreed on the basis that it was defined by reference to the concept of "substantial interest". The Respondent asserts that the discussion of "substantial interest" by the Treaty drafters was not, as the Claimant asserts, by reference to direct or indirect ownership, but rather in order to distinguish "full" ownership and having a "substantial interest" which nonetheless confers control.[390]

This relates to claimants' treaty shopping strategies, revised above, p. 48. The insistence on full ownership in the investment was a recurrent argument amongst respondents as a safeguard against letter-box arbitrations.

Veteran Petroleum v. Russia, *Hulley Enterprises v. Russia*, and *Yukos Universal v. Russia* exhibited another *travaux* argument with the goal to dispel jurisdiction of the arbitral bodies. The respondent showed that taxation measures were explicitly excluded from the offer to arbitration; therefore the tribunal had no jurisdiction.[391] Respondent in *Dede v. Romania* employed *travaux* in order to prove her point that the waiting period until arbitration (i. e. amicable solution, local courts) was mandatory.[392] Furthermore, the respondent in *Rizvi v. Indonesia* rejected the admissibility of the investment to arbitration on the grounds that it was an illegal investment under domestic law. She showed through the *travaux* to the treaty

[388] Cf. Tenaris and Talta v. Venezuela (II) (Award) (see n. 329), par. 157–162.

[389] Cf. European American Investment Bank AG v. The Slovak Republic, Second Award on Jurisdiction PCA Case No. 2010-17, UNCITRAL, June 4, 2014, URL: `https://www.italaw.com/sites/default/files/case-documents/italaw4227.pdf` (accessed: 07/02/2017), par. 193; likewise in the context of NAFTA cf. Detroit International Bridge Company v. Government of Canada, Award on Jurisdiction PCA Case No. 2012-25, UNCITRAL, Apr. 2, 2015, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw4255.pdf` (accessed: 07/02/2017), par. 162 sq.

[390] Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 206, original emphasis; quoting: Philip Morris Asia Limited v. The Commonwealth of Australia, Respondent's First Post-Hearing Brief on Preliminary Objections PCA Case No. 2012-12, UNCITRAL, Apr. 6, 2015, par. 21; and Philip Morris Asia Limited v. The Commonwealth of Australia, Respondent's Reply on Preliminary Objections PCA Case No. 2012-12, UNCITRAL, Dec. 1, 2014, par. 170–177.

[391] Cf. Veteran Petroleum v. Russia (Final Award) (see n. 244), par. 73; Hulley Enterprises v. Russia (Final Award) (see n. 244), par. 73; Yukos Universal v. Russia (Final Award) (see n. 244), par. 73.

[392] Cf. Dede v. Romania (Award) (see n. 302), par. 115; likewise Philip Morris v. Uruguay (Award) (see n. 254), par. 44.

that the drafters perfectly knew that investments in Indonesia had to be approved by a certain domestic authority. Investors who circumvented this authorization did consequently not enjoy protection under the BIT.[393] She further rejected the tribunals jurisdiction due to the origin of the investment. Once again, relying on the preparatory work, she demonstrated that the British negotiators accepted the non-coverage of Hong Kong due to the resistance of the Indonesian side.[394] In *EURAM Bank v. Slovakia*, respondent relied of the *travaux* of UNCITRAL arbitration rules with the objective to justify its submission of new objections to jurisdiction after a first award on jurisdiction. She "contends that Article 20 of the UNCITRAL Rules permits amendments to claims and defences as of right, and authorizes tribunals to reject these amendments only if these were excessively delayed and have caused prejudice to the opposing party."[395] Furthermore, respondent in *WNC v. Czech Republic* did not accept international arbitration for breaches of FET. She relied on preparatory work to show that the drafters of the BIT intended to exclude this type of cases from international arbitration.[396]

A further field of respondents' application supplementary means of interpretation was the rally against overly expansive pro-investor interpretations of certain substantive provisions. Again, *El Paso v. Argentina* offers a highly illustrative example for this strategy. In relation to Article XI of the applicable BIT on contracting parties' right to apply policy measures "necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection [*sic!*] of its own essential security interests"[397] respondent asserted the Article's self-judging character.[398] That is, no objective standard; parties to the contract would, from respondent's point of view, be allowed to implement measures they *subjectively* deemed appropriate. To prove her position, respondent relied on the the US treaty practice and the circumstances of the conclusion of the treaty. She argued that the *travaux* and commentary of the respective Article in the US model BIT stated a self-judging character; furthermore, Argentina was aware of this

[393]Cf. Rizvi v. Indonesia (Award on Jurisdiction) (see n. 305), par. 78; likewise Fraport v. Philippines (II) (Award) (see n. 284), par. 313.

[394]Cf. Rizvi v. Indonesia (Award on Jurisdiction) (see n. 305), par. 117–119; another case where respondent rejected the tribunals' jurisdiction is *Quiborax v. Bolivia.* Cf. Quiborax v. Bolivia (Award) (see n. 359), pars. 546, 574 a.

[395]EURAM Bank v. Slovakia (Second Award on Jurisdiction) (see n. 389), par. 105.

[396]Cf. WNC Factoring Ltd (WNC) v. The Czech Republic, Award PCA Case No. 2014-34, UNCITRAL, Feb. 22, 2017, URL: `http://www.italaw.com/sites/default/files/case-documents/italaw8533.pdf` (accessed: 07/03/2017), par. 95.

[397]Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, URL: `http://investmentpolicyhub.unctad.org/Download/TreatyFile/127` (accessed: 07/03/2017), Art. XI.

[398]Cf. ElPaso v. Argentina (Award) (see n. 242), par. 564.

US position at the moment of concluding the present BIT.[399] Another example for this strategy is *Gold Reserve v. Venezuela.* Respondent turned to the Canadian treaty practice in order to prove that there was a clear understanding that FET equaled the international minimum standard of treatment. She especially stressed frequent Canadian assertions in the NAFTA context and Canada's new model BIT that expressed the same perception of FET.[400] Similarly, respondent in *Ulysseas v. Ecuador* applied treaty practice with the objective to show that FET did not go further than the minimum standard under the applicable treaty. She made reference to the US model BIT and NAFTA with the objective to evidence the intention to allow regulation in the public interest without conflicting with the protection of investment.[401] In like manner, respondent in *Micula and others v. Romania* asked the tribunal to consider the circumstances of the conclusion of the treaty as supplementary means of interpretation, with the intention to reach a restrictive interpretation. She argued with the process of accession to the EU characterized by gradual harmonization of domestic with European law. As the "conclusion of the [applicable] BIT was a direct consequence of the Europe Agreement,"[402] harmonization and the impeding obligation to cut back on subventions could not be held against her.[403] In more general terms, respondent in *ECE v. Czech Republic* used preparatory work arguments with the objective to dispel investors allegations of intended high levels of protection. She pointed out, that there was no evidence for this interpretation in the *travaux préparatoires* to the applicable BIT.[404]

Another issue addressed by respondents through supplementary means was the question whether procedural provisions were to be imported via MFN clauses. This became relevant after the notorious decision in *Maffezini v. Spain.* An illustrative example is *Daimler v. Argentina.* Respondent objected by reference to varied supplementary sources. First, she asked the tribunal to consult its shared statement with Panama regarding and rejecting the decision in *Siemens v. Argentina*, that had overruled the 18 month period to settle amicably or resolve the dispute in local courts. "'[A]fter the decision on jurisdiction in Siemens, the Argentine Republic and Panama exchanged diplomatic notes with an "interpretive declaration" of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, *and that this has always been their intention.*'"[405] The

[399]Cf. ElPaso v. Argentina (Award) (see n. 242), par. 568 sq.
[400]Cf. Gold Reserve v. Venezuela (Award) (see n. 324), par. 548.
[401]Cf. Ulysseas v. Ecuador (Final Award) (see n. 242), par. 204, 206.
[402]Micula v. and others (Award) (see n. 242), par. 304.
[403]Cf. ibid., par. 304, 486.
[404]Cf. ECE v. Czech Republic (Final Award) (see n. 305), par. 4.264.
[405]Daimler v. Argentina (Award) (see n. 242), par. 272, both original emphases; National Grid PLC v. The Argentine Republic, Decision on Jurisdiction, UNCITRAL, June 20, 2006, URL: `https://www.italaw.`

tribunal acknowledged that "[t]he fact that Argentina and Panama nevertheless went out of their way to distance themselves from the understanding adopted by the *Siemens* tribunal is therefore indicative of their mutual disapproval of that holding."[406] Furthermore, the tribunal considered related statements of third states with the objective to "clarify whether the understanding of the MFN clause's scope of operation that prevailed among the general international community at the time of the conclusion of the German-Argentine BIT has since evolved to acquire a larger scope."[407] The panel considered it

> striking that these statements by Argentina, Panama, Colombia, the DR-CAFTA countries (including the US), the EU Commission, and Switzerland (the latter three together representing a majority of the world's highly developed and capital exporting countries) all converge in signaling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the respectively mentioned investment agreements. By contrast there have been no known clarifications issued in which states have embraced the *Maffezini* holding.[408]

This magnitude of protest against the decision in *Maffezini v. Spain* reflects this, some subsequent tribunals' careless conduct in relation to their discretion, and a gap between states (retro-active) original intentions and arbitral decisions on this subject. (Yet, a more cautious approach to the import of dispute resolution provisions by means of MFN clauses seems to have prevailed after the *Salini v. Morocco* and *Plama v. Bulgaria* cases.[409]) The reference to it's own and other states protests against the expansion of MFN import of procedural provisions is, however, to be considered a blunt weapon against arbitrators' discretion. This is due to the stark differences in how tribunals have handled the admission and the weight of supplementary means of interpretation, outlined in the chapter on tribunals above, pp. 74–79. Furthermore, clarifying statements rejecting the expansion of MFN to dispute resolution provisions may not be interpreted as binding, because they were voiced *ex-post*[410] and are political in nature. A similar argument based on home state interpretative statements was presented by respondent in *Philip Morris v. Uruguay.* She presented a letter from the Swiss government asserting that the "BIT was not intended to cover obligations arising under general legislative, administrative, or other unilateral measures."[411] The tribunal considered an application

com/sites/default/files/case-documents/ita0553.pdf (accessed: 07/03/2017), adding second empasis to the original quotation in.

406 Daimler v. Argentina (Award) (see n. 242), par. 272, original emphasis.

407 Ibid., par. 273.

408 Ibid., par. 276.

409 Cf. Fietta: Most Favoured Nation (see n. 177), pp. 135–138.

410 Cf. Yannick Radi: The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse", in: European Journal of International Law 18.4 (Sept. 2007), pp. 757–774, DOI: 10.1093/ejil/chm031, at p. 770.

411 Philip Morris v. Uruguay (Award) (see n. 254), par. 465.

as a supplementary means as admissible. Yet, "[i]t would be quite novel and potentially raise due process concerns in investment arbitration cases if a subsequent unilateral statement by one State [*sic!*] could be given substantial, let alone decisive, weight."[412] It is clear that states have publicly rejected or clarified their understanding when they were confronted with (third party) interpretations of certain treaty provisions in conflict with their (original) intentions. Nevertheless, they cannot count on their protest to be considered in subsequent arbitrations. Beyond interpretative statements, other supplementary means were employed to rebuff the application of MFN clauses to procedural provisions. Respondent in *ICS v. Argentina* argued, that Britain had explicitly included procedural provisions in *some* IIAs, whereas in others (the applicable BIT included) it had not. Hence, Britain had no intention provide to a broad scope of MFN treatment in the present BIT.[413]

Alike their investor counterparts, respondents presented arguments so as to exclude adverse supplementary means from interpretation. For example, respondent in *Philip Morris v. Australia* dismissed the application of her prior treaty practice as irrelevant and not admissible as Article 32 resources.[414] Similarly, Argentina pointed out in *EDF and others v. Argentina* that Article 5(3) of the applicable BIT allowed for policy measures in exceptional situations, regardless of their origin. Because the Article 31 interpretation led to an unambiguous result, respondent vetoed the application of supplementary means.[415]

4.4 Interim conclusions

In order sum up this analysis, it is vital to understand that the *intention of the parties* approach to the interpretation of international investment law did not apply in most ISDS proceedings and was repeatedly refuted; e. g. by the ICJ. This means that political circumstances, such as the debt crises, the origin of treaties in an undemocratic past, International Monetary Fund (IMF) conditionality, and many others, which lead up to the conclusion of IIAs were not considered within proceedings. Interpretation was generally based on the wording of the applicable IIA. Even the inclusion of *travaux préparatoires* was not able to go beyond the treaty wording; it was rather used to analyze the contents of ambiguous wordings—how they were understood by the respective contracting parties during the negotiation process. Circumstances leading up to the conclusion of a treaty were not allowed as supplementary means of interpretation with the exception of very view cases. One exception was *Micula and others v. Romania*, where the tribunal took the process of respondent's accession to the

[412] Philip Morris v. Uruguay (Award) (see n. 254), par. 476.
[413] Cf. ICS v. Argentina (Award on Jurisdiction) (see n. 279), par. 99.
[414] Philip Morris v. Australia (Award on Jurisdiction and Admissibility) (see n. 305), par. 207.
[415] Cf. EDF and others v. Argentina (Award) (see n. 344), par. 487.

EU into account when assessing the concrete requirements under the FET standard. "Depolitisization" was taken very seriously. Normative questions about fairness were excluded relying on this premise. In the twin awards *Marion Unglaube v. Costa Rica* and *Reinhard Unglaube v. Costa Rica* the arbitrators stated "[i]t is not the Tribunal's role, having appraised the evidence presented, to decide based on its own judgments of fairness. It is, instead, to assess whether investors have been subjected to arbitrary or discriminatory treatment, to legal arrangements which violate due process, and, in particular, whether the legitimate expectations of the investor (i.e., expectations reasonably held by the investor at the time the investment was made) have been duly respected."[416] These findings allow to tentatively answer subquestion 4 on whether policy goals are reflected in ISDS practice. The previous analysis leans towards a negative answer. I will further elaborate on this question in section *6*, and especially subsection *6.3 "Appraisal of Intentions within ISDS and from Theoretical Perspectives: a profound rift"*.

As to subquestion *1*, on the arguments in relation to the intentions brought forward by the respective parties and tribunals, the picture is ambiguous. The following paragraphs sum up parties' and tribunals' arguments and provide answers to subquestion *1*. What is clear is that claimants recurrently tried to expand the scope of protection by reference to the (sparse) object and purpose of the applicable treaties. One recurrent argument is that the tribunal had jurisdiction on the claim at hand. They did this by expanding the scopes of covered investment based on the object and purpose, by refuting further requirements on investments, such as the *Salini*-Test, by calling for a broad application of umbrella clauses, or by circumventing periods for amicable or domestic court resolution of conflicts. Furthermore, claimants used object and purpose arguments to call for an high standards of protection of certain substantive provisions. Provisions recurrently addressed were the FET and the MFN treatment. In cases of ambiguity, claimants advocated to interpret in their favor because of the pro-investment orientation of IIAs.

In regard to Article 32 arguments, claimants similarly called for their application in order to underline their right to access arbitration. They also referred to supplementary means in their rejection of the *Salini*-Test. Moreover, claimants often discouraged the application of supplementary means of interpretation as unnecessary, given the clear wordings and reasonable results arrived at, by means of Article 31 interpretation.

Obviously, respondents followed reversed strategies. They relied on object and purpose arguments so as to prove that the investment at hand did not qualify as an investment un-

[416] Marion Unglaube v. Costa Rica (Award) (see n. 298), par. 242; Reinhard Unglaube v. Costa Rica (Award) (see n. 298), par. 242.

der the applicable IIA. Among other arguments, such as nationality requirements or treaty shopping practices conflicting with the IIA's object and purpose, they heavily relied on contribution arguments (*Salini*) based on the ICSID convention's preamble. Another strategy to deflect pro-investor interpretations that went beyond the ordinary meaning of the applicable treaty's provisions, was to stress the superiority of the ordinary meaning. This was especially true for dramatic expansions of protection regularly requested by claimants, such as the import of dispute resolution provisions by means of MFN clauses.

Respondents applied supplementary means for different purposes. For instance, they tried to deflect the tribunal's jurisdiction by making reference to control arguments, showing that the drafters' intention was to require more than a registered office in a country for admission to arbitration. Some also relied on the *travaux préparatoires* to, among others, clarify the meaning of a certain provision (especially as a reaction to claimant's plea for expansive interpretation based on object and purpose), to prove the obligatory nature of amicable settlement or domestic relief provisions, or to establish a legality of operations requirement. Various respondents also turned to treaty practice as a means to show that the FET equaled the international minimum standard of treatment under CIL. Additionally, *travaux*, treaty practice, and joint interpretative statements and the massive international protest against the decision in *Maffezini v. Spain* were used to reject the import of dispute settlement clauses through MFN. In this context, it became evident that the interpretative weight of "ex-post" (political) statements was not clear. Alike their investor counterparts, respondents presented arguments so as to exclude adverse supplementary means from interpretation.

Tribunals' definitions of object and purpose widely varied from textual repetitions of preambles or statements of intent to very broad or general statements, divorced from the treaty text. The approach taken by tribunals reflects their respective grand vision on the objective of the IIR as such. The selection of certain aspects of preambles, as the IIA's objective, also reflects this pre-existing conception of arbitrators. There is no neutrality. It is rather a political decision by arbitral bodies that has implications for the ongoing interpretative process. The definition adopted has profound influence if, or in which way tribunals trespass ordinary meaning in the interpretative process.

The ISDS practice has proven to be disparate across tribunals. Three different approaches have been identified: expansive, balanced, and restrictive approaches. Object and purpose played an important role in this respect. Recurrent examples for expansive interpretations are the import of dispute settlement provisions by means on MFN clauses, the expansion of covered investment definitions, or behavioral requirements in relation to the FET standard. The latter is closely linked to policy review by arbitral bodies, considerably threatening state sovereignty. Arbitral bodies decided whether policies adopted by the governments of host states were adequate and sufficiently took investors' expectations into account. Balanced approaches tried to not interpret uncertainties in favor of one of the parties. They were informed by the critique voiced with regard to certain expansive awards. Restrictive interpretations did not allow to expand provisions by means of pro-investor definitions of object and purpose and resolved silences of treaties in favor of respondents. For example, tribunals rejected the avoidance of periods to settle amicably or seek for relief domestically before filing for arbitration based on object and purpose arguments. The question about the nationality of claimants was a also a reappearing issue.

Witnessing the different interpretative approaches in ISDS practice, some tribunals made statements about their discretion. In this respect, again, positions exhibited an unsatisfyingly broad range. Some arbitrators cautioned against second guessing of contracting parties' intentions and advocated a clear dependence on literacy. Others, such as *El Paso v. Argentina*, however, interpreted silences of treaties as the intention of contracting parties to give full discretion to arbitral bodies. Based on this view, mixed with a far reaching interpretation of what the object and purpose of the applicable IIA was, tribunals reached conclusions well beyond the ordinary meaning.

When it comes to supplementary means of interpretation, tribunals also adopted various approaches, stretching from strict to liberal. Some rejected their application on the basis that the meaning was not "ambiguous or obscure" or that the result was not "manifestly absurd or unreasonable".[417] Others, however, admitted Article 32 material independent of these requirements. In this context, the body's view an its discretion played a vital role. Whatever approach, the application of Article 32 resources lead to a range from expansive to restrictive outcomes. If supplementary means were allowed, most cases would use preparatory work. Some also interpreted the IIA practice of the respective contracting parties. The dismissal of a joint interpretative statement on MFN treatment in *Daimler v. Argentina* is indicative for policy options. Actively refuting interpretations of ISDS practice does not seem to be enough, in order to be exempt from their application in own cases.

5 Theory. Neutrality or Politics?

To understand the argument about (alleged) intentions of states for their participation in the IIR, it has to be theoretically contextualized. In addition to the macro perspective traditionally assumed in international law (i. e. an interaction of state actors with clearly defined

[417] United Nations: Vienna Convention (see n. 135), Art. 32.

state interest) a micro perspective is necessary to understand how "state interest" is constructed from different theoretical points of view. Furthermore, because individual natural persons are the "ultimate subjects of international law and sovereign states their agents"[418], it is important to theoretically go beyond state aggregates, "to lift the state veil"[419].

5.1 International Law as a Theoretical *Ab*-originee? Paradigms of Thinking

On the macro level, according to Martín Rodríguez, there are four main theoretical paradigms in international law; normative, realist-processural, postmodern-discursive, and instrumental-systemic paradigms.[420] The normative paradigm understands international law as a *given* set of rules and principles. In this context, normative refers to norms and rules in international law, as opposed to the competing social sciences concepts of normative versus empirical (i. e. "ought" versus "is") assertions. It is this perception that allows international lawyers to claim neutrality and refuse the notion of any theoretical or ideological foundation of adjudication. After all, they just *implement* substantive and procedural rules that precede interpretation.[421] It is rather a *craft* than an scientific endeavor. It "concerns itself with the study of legal norms, but not with the study of their contents. It does not study the reasons or motives of the lawgiver for the enactment of norms, nor does it concern itself with the effect of these norms in the outside world."[422] Legitimacy or questions about the distribution of power, are not relevant, from this point of view. Reviewing two books about these issues, Carty dismisses their relevance, because they "appear to ignore the form-content or procedure-substance distinction in international law."[423]

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[418] Samantha Besson: Sovereignty, International Law and Democracy, in: European Journal of International Law 22.2 (May 2011), pp. 373–387, DOI: 10.1093/ejil/chr029, at p. 374; prarphrasing Jeremy Waldron: Are Sovereigns Entitled to the Benefit of the International Rule of Law?, in: European Journal of International Law 22.2 (May 2011), pp. 315–343, DOI: 10.1093/ejil/chr031, at pp. 325–327.

[419] Samantha Besson: The Authority of International Law: Lifting the State Veil, in: Sydney Law Review 31.3 (2009), pp. 343–380, URL: https://sydney.edu.au/law/slr/slr31/slr31_3/Besson.pdf (accessed: 02/01/2017), at p. 359.

[420] Cf. Martín Rodríguez: Unity (see n. 17), p. 3.

[421] Cf. Byers: International Law (see n. 17), p. 613; Paulus: After Postmodernism (see n. 122), p. 734; Martín Rodríguez: Unity (see n. 17), p. 11; Rebecca LaForgia: The Politics of International Law: Twenty Years Later: A Reply to Martti Koskenniemi, in: European Journal of International Law 20.4 (2010), pp. 979–984, DOI: 10.1093/ejil/chp076, at p. 979; Koskenniemi: Law, Teleology (see n. 18), p. 21; Guntrip: Self-Determination (see n. 59), p. 830; but cf. Frauke Lachenmann: Legal Positivism, Max Planck Encyclopedia of Public International Law [MPEPIL], July 2013, URL: http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1856?prd=EPIL#law-9780199231690-e1856-div2-8 (accessed: 01/12/2017), par. 54.

[422] George E. Glos: The Normative Theory of Law, in: William & Mary Law Review 11.1 (1969), pp. 151–184, URL: http://scholarship.law.wm.edu/wmlr/vol11/iss1/6 (accessed: 01/31/2017), at p. 166.

[423] Carty: Social Theory (see n. 235), par. 939.

Contrarily, the realist-processural paradigm "considers IL [international law] as a social process of power and authority."[424] Within this paradigm, power is an important factor; not only in the interpretation, but also in the creation of international obligations.[425] It stresses the indeterminacy of legal norms, and that a social process is required (informed by power, strategies, and interests of relevant actors) to translate into certain outcomes. The realist paradigm is open for analyses deploying different rationals, be it policy-oriented, economic, etc.[426] Furthermore, it has a rather pessimistic stance on the effectiveness of international law because it interprets compliance with international rules as behavioral patterns states would have displayed in absence of actual codification.[427]

Other approaches can be subsumed under the postmodern-discursive paradigm. It conceives of international law as nothing material, but rather "as a discourse concealing political interests."[428] In this perception, international law is deployed by powerful states to maintain their dominance in international relations. Moreover, it poses the question whether states can be considered as intentional actors of/in international law.[429] "[S]ystematic deconstruction of the whole intentionalist, voluntarist structure of classical international law positivism" lies at the center of this paradigm.[430] Built on the "absolute indeterminacy of law"[431] assumed and justified by this branch of thought, Koskenniemi makes visible what he calls "decisionism"; "there is no space in international law that would be 'free' from decisionism, no aspect of the legal craft that would not involve a 'choice' – that would not be, in this sense, *a politics of international law*".[432] One recurrent example is the choice of the field in the adjudication of international conflicts. An investment conflict, for instance, could be assessed in fundamentally different ways through the lenses of international investment law, trade law, environmental law, or human rights law.[433]

> Taken to its radical end, the deconstruction of international law as a distinct discipline leads to politics without legal bounds, a society subjected to the unfettered, unabashed, unashamed exercise of power. The lack of public control (even worse, the widespread

[424] Martín Rodríguez: Unity (see n. 17), p. 4.
[425] Cf. Simmons: International Law (see n. 17), p. 203.
[426] Cf. Martín Rodríguez: Unity (see n. 17), pp. 4 sq.
[427] Cf. Simmons: International Law (see n. 17), pp. 191–193, 197 sq.; Siegfried Schieder: Pragmatism as a Path towards a Discursive and Open Theory of international law, in: European Journal of International Law 11.3 (Mar. 2000), pp. 663–698, DOI: 10.1093/ejil/11.3.663, at p. 667.
[428] Martín Rodríguez: Unity (see n. 17), p. 5; Paulus: After Postmodernism (see n. 122), pp. 729, 732 sq.
[429] Cf. Carty: Sociological Theories (see n. 37), par. 19; see more extensivly idem: Philosophy of International Law, Edinburgh: Edinburgh Univ. Pr., 2007, pp. 79–109.
[430] Idem: Sociological Theories (see n. 37), par. 20.
[431] Martín Rodríguez: Unity (see n. 17), p. 5.
[432] Koskenniemi: Apology to Utopia (see n. 18), p. 596; as quoted in Martín Rodríguez: Unity (see n. 17), p. 5.
[433] Cf. Koskenniemi: Politics of International Law (see n. 18), pp. 9–13; Guntrip: Self-Determination (see n. 59), p. 833.

> lack of a public that could exercise control) of the forces of globalization demonstrates the inherent dangers of this deconstruction.[434]

Lastly, the instrumental-systemic paradigm understands international law as a consistent legal system. However, this universality and absence of contradictions falls short of providing a sound theoretical and/or empirical foundation. Rather, it is an unquestionable "epistemological premise."[435] An excellent example is the ILC's concluding assessment on the fragmentation or unity of international law. In the first sentence it establishes: "International law is a legal system."[436] Without further explaining its premises, it continues: "As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them."[437] This seems peculiar, as the paper is meant to examine the fragmentation of international law. These unfounded opening premises allow for one and *only one* conclusion: the intact unity of international law.[438] Empirically existing contradictions or collusion of norms (e. g. investors' rights versus human rights) are treated as negligible oddballs, as "legal black holes".[439] Based on these immovable premises, the ILC's "analysis" degenerates to an ideological tautology.

From the perspectives of the normative and the instrumental-systemic paradigms, international law appears to be a theoretical *ab*-originee. Like colonizers all over the world, they deny historicity: because the populations in colonized spaces *had no history or origin*, superiority of the self-proclaimed civilized white men was *necessary* and *clearly not political*; because international law rules *have no history or origin*[440], their enforcement (by predominantly "white men"[441]) is *necessary* and *clearly not political.*

[434]Paulus: After Postmodernism (see n. 122), p. 748.

[435]Martín Rodríguez: Unity (see n. 17), p. 6.

[436]International Law Commission: Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Best Practices Series, International Law Commission, 2006, URL: http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/1_9_2006.pdf&lang=EF (accessed: 01/31/2017), par. 1.

[437]Ibid.

[438]Cf. Martín Rodríguez: Unity (see n. 17), p. 8.

[439]Ibid.

[440]Cf. Schieder: Discursive and Open Theory (see n. 427), p. 687.

[441]In an extensive study from 2012, the authors found that 3 law firms located in the global north dominated the arbitration industry. Likewise, "15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes."Pia Eberhardt/Cecilia Olivet: Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom, Brussels and Amsterdam: Corporate Europe Observatory and the Transnational Institute, Nov. 2012, URL: https://www.tni.org/files/download/profitingfrominjustice.pdf (accessed: 07/14/2017), p. 8 With the exception of Francisco Orrego Vicuña (global south) and Brigitte Stern (female), *all* the top 15 arbitrators are from high-income countries of the global north—and male. Cf. ibid., pp. 38–41.

A further explanation for the development of international law(s) is functionalism. Autopoiesis takes a radical position beyond national or global statehood: each international activity creates a self-regulatory framework out of necessity and functional appropriateness.[442] Politics and power relations fall victim to functionality.

It is vital to understand "that a clear semantic and pragmatic incommensurability" exists in international law.[443]

> On the one hand, taxonomic incommensurability would stem from semantic/lexical divergences reflecting differences not only in the meaning of some words, but also in the concept and categorial structures used by two scientific theories, with eventual ontological implications on the nature of reality. On the other, incommensurability has been described too as including, along with semantic conceptual differences, changes in world-views and in standards and problems (holistic incommensurability).[444]

Because of incommensurability, Martín Rodríguez was worried about the "[l]imits of [m]eaningful [i]nter-paradigm [c]ommunication".[445] Due to the dominance of the normative and instrumental-systemic paradigms in (international) law practice, social science approaches have been ostracized in international law discourse.[446] This happens despite of each of the above paradigms' different framings and analytical values. The non-inclusion and denial of relevance are grounded in the "retreat to the presumably safe ground of scientific cognition and method by stressing the correctness of an objectively valid legal doctrine".[447] This is closely connected the appraisal of the own profession as a neutral craft beyond theory or ideology and the denial of the impact basic assumptions ("are set exogenously to the system"[448]) have.

I consider the realism and postmodern critique of traditional international law as of vital importance in order to assess the intentions (of the preset containers) of states. They include power imbalances among actors, be it states, juridical persons (NGOs or MNCs), or individuals in the international system. Because of this importance, I proceed by providing some detail on three central assertions of the postmodern critique: the understanding of the nature of international law and its interpretation; the indeterminacy of international law and its rules; and implications of indeterminacy for the interpretative practice.

First, this paradigm assumes international law is a result of power. It is "a product of social and political forces, a 'reflection' of the world of power, a concrete emanation of the way the

[442] Cf. Carty: Sociological Theories (see n. 37), par. 26.
[443] Cf. Martín Rodríguez: Unity (see n. 17), p. 9.
[444] Ibid., pp. 8 sq.
[445] Ibid., p. 8; cf. likewise Carty: Social Theory (see n. 235), par. 939 sq.
[446] Cf. idem: Sociological Theories (see n. 37), par. 33; Koskenniemi: Law, Teleology (see n. 18), p. 16; Guntrip: Self-Determination (see n. 59), p. 841.
[447] Schieder: Discursive and Open Theory (see n. 427), p. 665.
[448] Ibid., p. 686.

world is."[449]. This is also the reason why almost all textbooks on international law exclude "the context of an awareness of power politics".[450] This line of thought also rejects two central premises generally held in the international law community. On the one hand, the premise of equality and universality; on the other hand, the one of neutrality beyond any foundation in theory. There is a "bias towards the universal, and against the particular [...] However universal, rules and right-formulations have also reinforced privilege, and procedural standards have discriminated as much as they may have empowered."[451] This critique also asserts there is no neutrality because theory is a necessary precondition to express anything in a certain vocabulary.[452]

Second, indeterminacy lies at the core of international law. This is the "idea that all legal constructs should be treated as imaginary fictions" because *a)* there is no one "objective reality behind any given set of legal concepts, rules, or doctrines [...] independent of the collective imagination of the ILP [international legal profession]" and *b)* "none of these constructs is capable of having any kind of inherent or self-evident meaning: from an ontological point of view, they are all just imaginary artefacts".[453] "There is nothing perpetual, privileged, or objective about their content: they are *all* empty floating signifiers."[454] To legal concepts there is no "external or internal logic."[455] Although there are "relatively stable patterns of analytical classification [...] [they] will always remain arbitrary and capable of shifting at any given moment."[456]

This indeterminacy shows itself (most importantly) in two arenas: inconsistent interpretation within one field of international law and openly contradictory interpretations across a multiplicity of fields. One recurrent critique of ISDS is the inconsistency of decisions across cases with equal or similar facts. From this point of view, interpretation follows (biased) preconceptions of the interpreters, their "'grand vision'".[457] To complicate issues of consistency even further, there is an observable proliferation of specialized fields (e. g. human rights law,

[449]Koskenniemi: Law, Teleology (see n. 18), p. 12.
[450]Carty: Sociological Theories (see n. 37), par. 43.
[451]Koskenniemi: Law, Teleology (see n. 18), p. 22.
[452]Cf. idem: Politics of International Law (see n. 18), p. 14.
[453]Akbar Rasulov: From Apology to Utopia and the Inner Life of International Law, in: Leiden Journal of International Law 29.03 (July 2016), pp. 641–666, DOI: 10.1017/s0922156516000248, at p. 656.
[454]Ibid., p. 656, original emphasis.
[455]Ibid., p. 657.
[456]Ibid.; cf. likewise Koskenniemi: Law, Teleology (see n. 18), p. 17.
[457]Ishikawa: Keeping (see n. 6), pp. 138 sq.; cf. e. g. likewise David Gaukrodger/Kathryn Gordon: Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, OECD Working Papers on International Investment 2012/03, OECD, 2012, DOI: 10.1787/5k46b1r85j6f-en, pp. 58–61; Ten Cate: The Costs of Consistency (see n. 8), pp. 24–36; but relativizing inconsistencies Stanimir A. Alexandrov: On the Perceived Inconsistency in Investor-State Jurisprudence, in: José E. Alvarez et al. (eds.): The Evolving international Investment Regime: Expectations, Realities, Options, Oxford, New York: Oxford Univ. Press,

trade law, environmental law, investment law, ect.) in international law. "The point of creating such specialized institutions is precisely to affect the outcomes that are being produced in the international world. [...] [There is now] jurisdictional conflict, struggle between competing expert vocabularies, each equipped with specific bias."[458] Public international law has been replaced by a plethora of specialized fields with their respective "preferred idiom, career prospects, and, of course, structural bias."[459] A dispute on investment could be resolved using *any* of these fields. Doing so would yield dramatically different outcomes. In theory, there is no superiority of one legal field over the other. However, there is a predetermined *choice* of arena depending on the "nature" of the conflict. That the selection of one of the expert vocabularies *is a choice* is usually denied, thus, it becomes *naturalized*. According to Koskenniemi this practice is ideological in character.[460] Actors' obligations conflict across subfields of international law. For illustrative purposes: a generic foreign investor is running mining operations that have severe impact on the environment and health of the local population due to leakage of harmful chemicals. Non-action by the host state would constitute breaches of obligations under international environmental or human right laws. Contrarily, regulation in the public interest would have an inadmissible impact on the mining operations and would, therefore, breach obligations of international investment law. This choice of field is political[461]—a "'politics of law'"[462]. Especially so, as each of these sub-fields have clear preferences in regard to certain outcomes or distributive choices. These *political* preferences are, however, concealed behind "managerialism"[463], i. e. expert vocabularies and claims of neutrality.[464] Koskenniemi framed this phenomenon as *teleology*. According to him, law is the only science to insist on the concept of progress resulting in an interpretative practice that follows an ideal desirable future.[465]

Third, indeterminacy displaces the role of interpreters from a neutral to a necessarily political one[466] because provisions open a space of possibilities, rather than providing objective instructions. Arbitrators are necessarily faced with contradictions and should, for that reason

2011, pp. 60–69, at pp. 64–66; Alexandrov considered this critique to be exaggerated and pointed to variation of facts and treaty provisions.

458 Koskenniemi: Politics of International Law (see n. 18), p. 9; cf. likewise Guntrip: Self-Determination (see n. 59), p. 832.

459 Koskenniemi: Politics of International Law (see n. 18), p. 9; cf. likewise idem: International Legal Theory and Doctrine (see n. 18), par. 29.

460 Idem: Politics of International Law (see n. 18), pp. 11 sq.

461 Cf. Guntrip: Self-Determination (see n. 59), p. 832.

462 Koskenniemi: Law, Teleology (see n. 18), p. 22.

463 LaForgia: Politics of International Law (see n. 421), p. 979.

464 Ibid., Cf. Martín Rodríguez: Unity (see n. 17), p. 12.

465 Cf. Koskenniemi: Law, Teleology (see n. 18), pp. 4–6.

466 Cf. Paulus: After Postmodernism (see n. 122), pp. 735–737.

“resist the temptation to reconstruct their materials into some imaginary aesthetic harmony”, i. e. biased *teleology*.[467] Interpretation needs normativity (in a social science sense) because else it would “degenerate into mere apology” for power; and should follow “social factuality” to not “collapse into utopia”.[468] Due to the indeterminacy, arbitrators have to take into account the context of application and the effects this application has in the social field at hand.[469] This goes in line with Brownlie’s separate opinion in *CME v. Czech Republic* which called for an inclusion of social and economic effects in the calculation of compensation (see below).[470] The arbitrator is not engaged in positivist, neutral interpretation, but rather in future-politics.[471] Making something “legal” or “right” is not enough (e.g. the so called ”war on terror”). It all comes back to strategic choices.[472]

The position of postmodern critique has been heavily attacked for arbitrariness. Nonetheless, this could also be said about the traditional way of interpretation. There are, for example no objective, but rather power-based reasons for the strong institutionalization of international investment law fora. Furthermore, traditional basic assumptions can be characterized as *platonic* because they can not be justified objectively; they are given exogenously.[473] However, if these are given up, Paulus fears for the “death of legal foundations”.[474] The result of lacking illegitimacy and authority of international law is “brute power. [...] The ultimate result of radical criticism of international law is Realism.”[475] Investment law, and the whole (fragmented) body of international law, he argued, degenerate to a vehicle for political aims.[476] This, however, is not a result of postmodern critique but rather a constant practice that was only *discovered* by postmodern scholars. As a result of specialized legal institutions and necessarily political lawyers, there are legal arguments in support of practically everything. From Paulus’ viewpoint, “still, some arguments are more convincing than others”.[477] For example, Schieder advocates for a pragmatic approach. The decision for a certain political position ought to be tested against both, the good and the just: “do we already have

[467]Carty: Sociological Theories (see n. 37), par. 42.
[468]Koskenniemi: Law, Teleology (see n. 18), p. 12.
[469]Ibid., p. 22.
[470]CME Czech Republic B.V. v. The Czech Republic, Separate Opinion on the issues at the quantum phases of CME v. Czech Republic by Ian Brownlie, C.B.E., Q.C., UNCITRAL, Mar. 14, 2003, URL: `https://www.italaw.com/sites/default/files/case-documents/ita0181.pdf` (accessed: 07/14/2017), par. 74–78.
[471]Cf. Koskenniemi: Law, Teleology (see n. 18), pp. 23 sq.
[472]Cf. idem: Politics of International Law (see n. 18), p. 17.
[473]Cf. Schieder: Discursive and Open Theory (see n. 427), p. 686.
[474]Paulus: After Postmodernism (see n. 122), p. 735.
[475]Ibid.
[476]Cf. ibid., pp. 735 sq.
[477]Ibid., p. 743.

the best possible procedure for bringing things into relation to other things in such a way as better to meet our needs by more appropriately fulfilling them"?[478]

Then, what is the solution when every position is legally sound? For Paulus, the only way is a return to positivism, to stick to clearly established rules, to not interpret them expansively.[479] There is no justification for the legal judgments being dependent on individual values of the lawyer.[480] It is legitimate to critisize "the imperfect implementation of international legal norms and the bias towards the powerful. But this is a call for the equal implementation of the law, not against law as such."[481] The abandonment of international law would put weaker members of the international community in even more compromising situations. In order to reconceptualize international law (and its subfields), democratic participation under the inclusion of minority voices is necessary.[482] How can this reconceptualization be organized if the state is a theoretical black-box? Subsequently, I work on the question of the relationship between states and between states and their constituents in the international arena.

5.2 Statehood and Sovereignty. A Micro-Perspective

The ILC's position on statehood, as expressed in the *Draft articles on responsibility of States for internationally wrongful acts*, reflects the dominant understanding in international law: "The State is treated as a unity, consistent with its recognition as a single legal person in international law."[483] That is, "current law sees the state as a monolithic whole."[484] Beyond law, statehood is contested in the social sciences (and humanities). A recent and inconclusive example is the state-as-a-person debate, prominently set in motion by Alexander Wendt which tries to analytically separate real (i. e. material) from "as if" (i. e. discoursive) elements.[485] The conceptualization of statehood and the relationship between states and their constituents, states among each other, and between states and private actors (especially NGOs and MNCs), is

[478]Schieder: Discursive and Open Theory (see n. 427), p. 687.

[479]Cf. Paulus: After Postmodernism (see n. 122), pp. 745 sq.

[480]Cf. ibid., p. 755.

[481]Ibid., p. 752.

[482]Cf. ibid., pp. 744 sq.

[483]International Law Commission: State Responsibility, in: United Nations (ed.): Yearbook of the International Law Commission 2001: Report of the Commission to the General Assembly on the work of its fifty-third session, vol. II, pt. two, New York and Geneva 2007, pp. 20–143, URL: http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf (accessed: 02/21/2017), at p. 35.

[484]Mark Chinen: Complexity Theory and the Horizontal and Vertical Dimensions of State Responsibility, in: European Journal of International Law 25.3 (Aug. 2014), pp. 703–732, DOI: 10.1093/ejil/chu048, at p. 718.

[485]For an overview of the debate see Jacob Schiff: "Real"? As if!: Critical reflections on state personhood, in: Review of International Studies 34.02 (Apr. 2008), pp. 363–377, DOI: 10.1017/s0260210508008061.

decisive for ISDS-related questions. What responsibilities do states assume by concluding IIAs? Can liabilities that arise from a breach of these treaties be handed down to its constituent populations? Are IIAs legitimate if they hinder states from honoring human rights obligations towards (parts of) its citizenry or if they endanger the environmental quality for current and future generations?

Traditionally, states have been understood as monolithic actors in the international arena. This understanding emanates from the system introduced through the Peace of Westphalia. It includes, above all, sovereignty and its twin concept non-intervention. In the wake of democratization and the evolution of international law after WWII (Human Rights, *jus cogens*, *erga omnes* obligations), this understanding of state sovereignty has empirically weakened[486] and lost legitimacy. One drastic example is the *responsibility to protect*, unanimously adopted by the UN in 2005. In this context, Cogan argued that there has been a regulatory turn in international law. States have been entering into a myriad of new international agreements regulating admissible behaviors of individuals in their territories.[487] This is a new aspect, as before the regulatory turn, international law used to only restrict state behavior.[488] Whereas this transmutation of international law, relations, and policies endows state actors (depending on their relative power in the international system of states[489]) with new and more effective instruments to further their interests, states have also transferred regulatory authority concerning their individual citizens to international governance institutions.[490] The "'internal' face of sovereignty" (i. e. "the authority of states over their own citizens")[491] is increasingly being limited by international law obligations.[492] This has shaken the perception of sovereignty and who might be the real sovereigns within the international system. These observations have given rise to theories that tie sovereignty to democratic legitimacy.

Based on Waldron's seminal treatise on the relationship between statehood and international law[493], Besson limited state regulatory discretion to decisions that further their citi-

[486]Cf. Schieder: Discursive and Open Theory (see n. 427), pp. 575 sq.

[487]See Jacob Katz Cogan: The Regulatory Turn in International Law, in: Harvard International Law Journal 52.2 (2011), pp. 321–372, URL: http://www.harvardilj.org/wp-content/uploads/2011/07/HILJ_52-2_Cogan1.pdf (accessed: 02/01/2017).

[488]Cf. ibid., p. 370.

[489]The power to regulate internationally depends heavily on the relative power of states (and other actors) in the international system. "In less powerful countries, all domestic authorities are deprived of acertain amount of rulemaking power because they generally have less clout in international negotiations".ibid., p. 363.

[490]Cf. ibid., pp. 370 sq.

[491]Cf. Lake: State (see n. 235), p. 49.

[492]Cf. Hanns W. Maull: Staat/Staatlichkeit im Wandel, in: Wichard Woyke/Johannes Varwick (eds.): Handwörterbuch Internationale Politik, 13th ed., Opladen and Toronto: Verl. Barbara Budrich, 2015, pp. 455–466, at p. 461.

[493]See Waldron: Are Sovereigns Entitled (see n. 418).

zens' autonomy. "[B]eing a good polity", they only bind themselves to rules of international law, if they respond to the preferences of their constituents (*legitimate authority condition*).[494] According to her, states are mere agents or representatives of their constituents. This understanding (of the Newstream and/or critical legal studies[495]) has radical repercussions for the *validity* of international law rules. Internal accountability constrains rule making abilities of governments.[496] Hence, states and individuals do not have to abide by obligations consented to without a due democratic process.[497] This new concept of "sovereignty now finds its source both in constitutional and international law".[498] The ultimate sovereigns are peoples, not states.[499] From Besson's point of view, there is a myriad of "illegal" international law rules in power.[500]. This idea has profound implications for the IIR, considering that autocratic regimes tend to sign more IIAs than democracies.[501] On the basis of this reasoning, Guntrip put into question the tribunal's position in *ADC v. Hungary*.[502] The arbitrators had found that the right to regulate (i. e. sovereignty) was limited by "the rule of law, which includes treaty obligations".[503]

Taking up Besson's validity argument and Verdross' concept of "Forbidden Treaties in International Law", Dagbanja saw state action in the international arena constrained by certain criteria. It had to conform to an "'ethical minimum recognized by all the states of the international community', which [...] will include the protection of the right to health and life."[504] Furthermore, it could not obstruct the fulfillment of baseline state duties, such as "the maintenance of law and order, defence against external attacks, care for the welfare of citizens, and

[494]Besson: Sovereignty, International Law (see n. 418), pp. 378 sq.; she further argued that, even if this legitimate authority condition was fulfilled, states would have to maintain sovereignty in key issues to allow for future preference changes. Cf. ibid., p. 379.

[495]Cf. Schieder: Discursive and Open Theory (see n. 427), p. 679.

[496]Cf. Besson: Sovereignty, International Law (see n. 418), p. 385.

[497]Cf. ibid., pp. 381 sq.

[498]Cf. ibid., pp. 382 sq.

[499]Cf. ibid., p. 383; likewise Guntrip: Self-Determination (see n. 59), p. 842.

[500]Cf. Besson: Sovereignty, International Law (see n. 418), pp. 385 sq.

[501]Cf. Soumyajit Mazumder: Can I stay a BIT longer?: The effect of bilateral investment treaties on political survival, in: The Review of International Organizations 11.4 (2016), pp. 477–521, DOI: 10.1007/s11558-015-9235-7, at p. 515.

[502]Guntrip: Self-Determination (see n. 59), pp. 835 sq.

[503]ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, Award ICSID Case No. ARB/03/16, ICSID, Oct. 2, 2006, URL: http://www.italaw.com/sites/default/files/case-documents/ita0006.pdf (accessed: 07/14/2017), par. 423.

[504]Dominic N. Dagbanja: The conflict of legal norms and interests in international investment law: Towards the Constitutional-General International Law Imperatives Theory, in: Transnational Legal Theory 6.3-4 (Oct. 2015), pp. 518–560, DOI: 10.1080/20414005.2015.1126110, at p. 550; quoting: Alfred von Verdross: Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties", in: The American Journal of International Law 31.4 (1937), pp. 571–577, DOI: 10.2307/2190670, p. 574, omitting the original emphasis "*ethical minimum*".

protection of citizens abroad."[505] Treaties irreconcilable with this requirements resulted *void* because the power to make treaties flows from the constitution.[506] Another void condition considered by Dagbanja was the procedural unconstitutionality.[507] In the same way, Yelpaala doubted that under the conditions of *jus cogens* states can lawfully surrender responsibility to protect their populations in IIAs.[508] In line with Besson's argument, that it is peoples, not states who are beneficiaries of international law[509], Guntrip asserted *peoples'* right to economic self-determination.[510] The fact that it "function[s] as a continuing right" means that populations have to be heard in the context of IIAs, including minorities and indigenous populations.[511] "[T]he suggested understanding of sovereignty is equally as valid [and justifiable] as a normative [in the law sense] approach to sovereignty"[512] Yet, of course, this new understanding of sovereignty, as *peoples* is no accepted in law. Guntrip further argued, that increasing transparency requirements and phenomenons like civil society participation in the TTIP negotiations, were evidence for an ongoing semantic shift.[513]

The Complexity Theory declines this interpretation of statehood as agents of ultimate sovereign citizens.

> [T]he state is neither a legal abstraction nor reducible to the individuals who purportedly comprise it. Instead, the state is an emergent phenomenon that arises from complex interactions among individuals, formal and informal subgroups, and the conceptual tools and structures that individuals and subgroups use within their physical and social environments. [...] [T]he state as such is the proper subject of legal responsibility; it is not simply a proxy for agents that act on its behalf or for its citizens, nor is it simply an extension of the citizen.[514]

Still, state responsibility is central to this approach. Conflicts between horizontal and vertical responsibilities put into question the legitimacy of international law when international obligations make it impossible to comply with vertical responsibilities towards its citizens.[515] As an example, Chinen presented the tribunal in *SGS v. Paraguay* that awarded $ 39 million to

[505] Dagbanja: Conflict of legal norms (see n. 504), p. 550, emphases omitted.
[506] Cf. ibid., p. 551.
[507] Ibid., pp. 553 sq.
[508] Cf. Kojo Yelpaala: Fundamentalism in Public Health and Safety in Bilateral Investment Treaties [Part II], in: Asian Journal of WTO & International Health Law and Policy 3.2 (2008), pp. 465–502, URL: `https://ssrn.com/abstract=1311202` (accessed: 07/14/2017), at pp. 467 sq.
[509] Cf. Besson: Sovereignty, International Law (see n. 418), pp. 374 sq.
[510] This idea dates back to the Marxist critique of international law in the 1970s and 80s until the triumph of neo-liberalism. Cf. Carty: Sociological Theories (see n. 37), par. 11.
[511] Guntrip: Self-Determination (see n. 59), pp. 845 sq.
[512] Ibid., p. 848.
[513] Cf. ibid., pp. 849, 853 sq.
[514] Chinen: Complexity Theory (see n. 484), p. 704.
[515] Cf. ibid., pp. 706 sq.

the claimant whilst in *Xámok Kásek v. Paraguay* the Inter-American Court found Paraguay guilty of not providing "access to water, food, health care, and education to certain members of the Xákmok Kásek Indigenous Community" and for violating "their right to a decent life".[516] Chinen concluded that "the payment of reparations could impair a state's ability to meet its international obligations to its citizens."[517] In *CME v. Czech Republic* arbitrator Brownlie rejected the amount awarded in a separate opinion. Calculations should include Czech Republic's responsibility for "the well-being of its people"[518]:

> Even States which have been held responsible for wars of aggression or crimes against against humanity are not subjected to economic ruin [...] It would be strange indeed, if the outcome of acceptance of a bilateral investment treaty took the form of liabilities "likely to entail catastrophic repercussions for the livelihood and economic well-being of the population" of the Czech Republic.[519]

This theoretical and empirical considerations raise the question: in which manner can state liability be handed down to individuals? From a Complexity Theory point of view, none of the prevalent explanations (moral collective responsibility, sates as fundamental unit of concern, citizen as beneficiary of the state, or citizen participation in government) are satisfactory.[520] Rather, statehood should be understood as containers of responsibility. Individual behavior will not produce breaches of international obligations; *collective* efforts or the lack thereof will. The link of responsibility between states and its constituents originates non-linearly in "complex interactions of individuals".[521] Due to the ontology of statehood in international law and the non-linear connection between citizens and states, payable reparations will always spark "criticism that its citizens are suffering injury by association if those reparations adversely affect them."[522] One solution for this conundrum could be Brownlie's approach, to include other international obligations (e. g. human rights) into ISDS analyses.[523] Against the classical definition of the internal aspect of sovereignty, as the power of the state to bindingly impose regulation on its citizens, new understandings displace agency. Constituents are the holders of internal and external sovereignty; their well-being limits policy leeway in the international arena.

Both, the *sovereignty of peoples*, and *Complexity Theory* approaches to statehood are logically concise and justifiable. They legitimately co-exist with the classical international law

[516]Chinen: Complexity Theory (see n. 484), pp. 707 sq.
[517]ibid., p. 708.
[518]CME v. Czech Republic (Separate Opinion) (see n. 470), par. 74.
[519]Ibid., par. 77 sq.
[520]Cf. Chinen: Complexity Theory (see n. 484), pp. 716–720.
[521]Ibid., pp. 723–725.
[522]Ibid., pp. 725, 732.
[523]Cf. ibid., pp. 728 sq.

understanding of statehood and sovereignty. However, these and other approaches are systematically ostracized from the "neutral craft" of international law interpretation. States (whatever concept is applied) have to keep that in consideration in their search for (international) policies that enhance the well-being of their citizens.

Neither of the above conceptualizations of statehood, however, dismiss states as *meaningful* entities for the appreciation and functioning of the international system. [T]he need to develop and enforce binding policies, implies the necessity of statehood; in spite of cleavages within the societies.[524] For the *sovereignty of people*, the state is indispensable as a tool to maintain and enforce the rule of law.[525] Nonetheless, the new conceptions of statehood radically displace *intentionality* of prior monolithic black-boxes. There is no "State" interest. Policies do affect different groups in different ways; they unevenly take into account the needs and wishes of certain interest groups or classes.[526]

This section has shown that the majority of international lawyers, insisting on their "neutrality", are believers of the *normative* or the *instrumental-systematic* of international law. From the normative paradigm point of view, a certain set of laws is a given, its development not put into question. Hence, interpreters can claim neutrality because they only *implement* them. From the instrumental-systematic point of view, a perfectly systematic character of international law without contradictions is an immovable presupposition. The disregard of contradictions, especially between specialized fields of international law, as well as the tendency to strive for uniform practice, is based on these basic assumptions that lack any sound theoretical or empirical foundation. Both perspectives understand international law as a theoretical *ab*-originee and, hence, insist on their neutrality. This is the theoretical basis of ISDS asked for in subquestion 2. Contrarily the *realist-processural* and *postmodern-discursive* paradigms stress the aspect of power in the evolution of international law and the indeterminacy of interpretation. From the latter perspective, interpretation always and necessarily includes political decisions. This is the reason for Carty's warning which states that the outcomes of research (and interpretation) were ideologically informed. The (political) decision on a certain theory determines the outcomes.[527]

The main take-away from only a view of the richly varying conceptualizations of state-citizenry relations, is a big question mark behind the overly simplistic views on the *state-as-a-black-box* understanding in international law and other theories. Of course, international law

[524]Cf. Lake: State (see n. 235), p. 47.
[525]Cf. Besson: Sovereignty, International Law (see n. 418), p. 375.
[526]Cf. Lake: State (see n. 235), p. 46; Carty: Sociological Theories (see n. 37), par. 19 sq.; Maull: Staat/Staatlichkeit (see n. 492), p. 455; Koskenniemi: Law, Teleology (see n. 18), p. 17.
[527]Cf. Carty: Sociological Theories (see n. 37), par. 40.

is built on several assumptions about world affairs: they are justifiable; they are instrumental for the development and interpretation of international law. Furthermore, international law enables states, individuals, and juridical persons to prevent and resolve international conflicts peacefully. Nonetheless, the understanding of states as monolithic actors may hinder interpreters of international law in general, and of ISDS more specifically to appraise the amalgamate intentions behind international obligations. Taking the analysis to a micro level, leaving behind the black-box understanding of statehood dominant in international law opens new perspectives on sovereignty, the validity of international law rules, collective liability, and especially on *intentionality* of state actors. First of all, the internal aspect of sovereignty has been shaken by a regulatory turn in international law. Legitimacy of national regulation may be conceptualized in relation to their impact on the *ultimate sovereigns*, the respective populations (*legitimate authority condition*). The *sovereignty of peoples* approach questions the validity of international law rules when they do not further the general population's interests—especially if states bind their hands in relation to regulation in favor of (vulnerable) populations. The *complexity theory* approach rejects populations as ultimate sovereigns; however, it stresses potential of conflict between vertical and horizontal state responsibilities. From this point of view, the valuation of compensation ought to include the respective respondent's ability to comply with its vertical responsibilities towards its populations. These and other conceptualizations are as logically concise and justifiable, as is the dominant monolithic view of states within international law. Again, the decision for one concept is a political one, and far from being "neutral".

Informed by these theoretical conceptualizations, I turn to the possible intentions (or non-intentions) of states for their participation in the IIR.

6 Intentions of Contracting Parties to IIAs. Perspectives

The term *extensive* or *expansive interpretation* implies that tribunals go beyond what was originally intended or expected by contracting parties. There are key instances of this phenomenon in the history of ISDS: one of them is, of course, the *Maffezini v. Spain* award that allowed the import of dispute resolution provisions by means of the MFN clause. Likewise, the import of umbrella clauses by means of MFN in *EDF and others v. Argentina* represented a huge expansion of scope, since it allowed for international arbitration in cases of minor contractual violations.[528] Another group of awards have dramatically expanded the scope of covered investment (e. g. to minority shareholdings) rights to access markets, or debt instru-

[528]Ishikawa: Keeping (see n. 6), pp. 115 sq.

ments.[529] The tribunal in *Abaclat and others v. Argentina* admitted, for the first time, mass claims by over-interpreting silence in the ICSID convention.[530]

Moreover, substantive provisions such as FET, expropriation, or full protection and security have been interpreted expansively. *Metalclad v. Mexico v. Argentina* introduced the overly influential construction of *indirect expropriation* giving rise also to *legitimate expectations* of investors.[531] Some tribunals developed the FET standard (before a non-term equivalent to the international minimum standard of treatment) into a strong independent standard imposing huge obligations of conduct on host states; which includes "the investor's legitimate expectations [...] non-discrimination, fair procedure, proportionality, good faith, prohibition of denial of justice and compliance with contractual obligations."[532] A similar expansion can be observed in relation to the *full protection and security* standard. From the obligation to merely protect investments from physical harm, it may include today the maintenance of a stable and secure investment environment.[533] Expansive interpretation has (had) strong repercussions on regulatory spaces and sovereignty.

Given expansion of treaty provisions, the question arises whether these interpretations are in line with the intentions of contracting parties. Opinions differ. Some scholars consider the ambiguity of treaty provisions to be deliberate, so that states reach a agreement, in the first place[534], or to allow for the convergence of international investment law into a homogeneous body.[535] This reflects the ideology purported by the instrumental-systemic approach to international law that places the *telos* at the center to "actually reach coherent (systemic) results"[536]. Others, however, decry the interpretative expansion calling arbitrators to stay within the frame consented to by states.[537] Inconsistency across arbitral bodies has been a major problem in ISDS. According to Ishikawa, interpretation rather followed the respective panels' "grand vision" on the nature of investment law.[538] This vision, in turn, was is heavily informed by the *instrumental-systematic* paradigm in international law thinking, presented above. With this background as a starting point, I consider it vital to review possible *original intentions* of contracting parties at the moment of signature.

[529]Cf. Ishikawa: Keeping (see n. 6), pp. 115 sq.; Titi: Arbitrator as a Lawmaker (see n. 182), p. 835.
[530]Cf. ibid., p. 838.
[531]Cf. ibid., p. 839.
[532]Ibid., pp. 840 sq.
[533]Cf. ibid., p. 841.
[534]Cf. Ko-Yung Tung: Foreign investors vs sovereign states: towards a global framework, BIT by BIT, in: Meredith Lewis Kolsky/Susy Frankel (eds.): International Economic Law and National Autonomy, Cambridge: Cambridge Univ. Press, 2010, pp. 243–268, at p. 252.
[535]Cf. Montt: State Liability (see n. 4), p. 109.
[536]Martín Rodríguez: Unity (see n. 17), p. 9.
[537]Cf. Ishikawa: Keeping (see n. 6), p. 138; Daimler v. Argentina (Award) (see n. 242), par. 161.
[538]Cf. Ishikawa: Keeping (see n. 6), pp. 138 sq.

6.1 "Analytical Eclecticism". A Differentiated View on State Intentions

Various theoretical approaches accentuate disparate possible state intentions to participate in the evolution of international law and the IIR, respectively.

> Some strategic decisions, such as those between different lawmaking forums, mechanisms, and types of legal instruments, are readily amenable to rational choice theory. Others, such as the allocation of decisional powers to an independent court or tribunal, or recourse to preexisting rules and institutions as analogies or models, might best be explained through insights drawn from institutionalism. Yet further decisions, such as the deliberate invocation of shared concepts of justice and legitimacy, are usefully seen through the lens of constructivism. The diversity of tools and the complex interaction of law and politics involved in international lawmaking make this an area that requires an "eclectic" approach to theory that is interdisciplinary both across and within disciplines.[539]

As previously laid out the theoretical appraisal of statehood (as, among others, rational monolithic black-boxes, as complex adaptive systems, or mere agents for their heterogeneous population of constituents) allows for varying accounts of their intentions or even intentionality. Various theoretical approaches stress different factors such as "power, normative structures, identities, interests, and [...] deliberate manipulation."[540] Adhering to Katzenstein and Okawara's plea for *"Analytical Eclecticism"*[541] allows us to transcend what international law interpretation understands as the *singular* original intent of a treaty. It permits to identify a broad variety of *(original) intentions.* The will to foster the evolution of one universal and consistent mode of interpretation across investment treaties is only one of them.

Above all, it is vital to keep Koskenniemi's warning in mind: statements of intention by state representatives pose a significant methodological problem insofar as they might be dishonest about the *true* motives behind investment treaties.[542] This is due to the political nature of IIAs. Official statements can have real and costly implications in ISDS. This is especially problematic in arbitration proceedings, where claimant home states and respondent states are confronted with concrete monetary benefits or disadvantages. A further methodological shortcoming in relation to statements of intent extracted from arbitration proceedings lies in the inner logic of ISDS. Only certain goals may be admissible as *legal arguments*, whereas others do not fit in this context and would, therefore, be considered irrelevant. The following outline of possible state intentions to sign IIAs, specifically refers to the fist generation of broadly formulated treaties and does not apply to current efforts to more balanced treaties

[539] Byers: International Law (see n. 17), p. 628.
[540] Ibid., p. 626.
[541] Katzenstein/Okawara: Analytical Eclecticism (see n. 19), p. 153, emphasis added.
[542] Cf. Koskenniemi: Law, Teleology (see n. 18), p. 13.

(on the latter cf. below). Another important point to be taken into account is the strong variation of motivations across countries, according to their developmental statuses. As with the composition of parties to proceedings (lined out above), the same holds true for contracting parties to IIAs: the majority of treaties (although lately there has been some change) exist between capital exporters and importers. According to Chaisse, there is a clear rift between inward and outward intentions—the attraction vs. the protection of FDI[543]

First, I present *political* intentions from a *monolithic state* perspective. Clearly, investment treaties are part of the intention to attract FDI.[544] This argument was voiced in the context of Article 31 arguments in arbitral proceedings (cf. sections *3 "Treaty Interpretation"* and *4 "Empirical Analysis"*). In an extensive study on factors that favor BIT signings, Elkins, Guzman, and Simmons found strong evidence for their "Competitive Theory of BIT Diffusion".[545] They found evidence that BIT signings usually originate from capital importing countries rather than capital exporters.[546] However, they tended to be in a weak bargaining position *vis à vis* "home countries [which] make take-it-or-leave-it offers to potential hosts".[547] BITs helped potential hosts to make "credible commitments" to potential investors by creating *ex-post* costs to their economies. These treaties reduce ambiguity on their obligations; by expressly including the home state, breaches are transformed, from contractual in nature, to breaches of international law; and most importantly, by increasing enforcibility through binding ISDS provisions.[548] The authors found sound statistical evidence for their hypotheses about competition as the main driver of BIT diffusion: first, higher signing rates in places of intense competition, especially in countries with big manufacturing sectors. The signing rate of direct competitors was an especially strong predictor for treaties. Second, a correlation between the availability of global FDI and the propensity to sign BITs. Third, signings were especially important for countries that were perceived to be politically unstable. Various, but not all, political risk quantifying variables (corruption, law system quality) correlated

[543]Chaisse: Treaty Shopping (see n. 234), p. 239.

[544]Cf. among others Perrone: Governance of Foreign Investment (see n. 47), p. 13; Newcombe/Paradell: Law and Practice (see n. 34), p. 20; Born: International Adjudication (see n. 6), p. 838.

[545]Cf. Zachary Elkins et al.: Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000, in: International Organization 60.4 (Oct. 2006), pp. 811–846, DOI: 10.1017/S0020818306060279, at p. 822.

[546]Cf. ibid., pp. 819, 822.

[547]Ibid., p. 822.

[548]Cf. ibid., pp. 822–824; Likewise, Kerner presented two rationals why investment treaties may contribute to competitiveness: first, investors are more prone to invest in a country because the IIA has a "hands-tying" function, i. e. the respective state would suffer ex-post costs in case she does not comply with the obligations. Second, the potential investor can depend on the "cost-sinking" function that separates good apples from bad apples.Cf. Andrew Kerner: Why Should I Believe You?: The Costs and Consequences of Bilateral Investment Treaties, in: International Studies Quarterly 53.1 (2009), pp. 73–102, URL: http://www.jstor.org/stable/29734275, at pp. 76–82.

positively with signing rates.[549] Yet, the authors conceded that these findings were not applicable for recent South-South treaties.[550] The strategy to make a credible commitment was of special importance for (former) communist countries. They depended on it to dispel the smell of "high-risk countries"[551] Even though, there are two important aspects that compromise the effectiveness of FDI attraction by means of the competition approach; this does not disqualify competition as an original intention of policy makers for they have to work under circumstances of incomplete information and the ambiguity of future developments. These aspects are: first, various studies have failed to show a clear correlation between investment protection treaties and FDI.[552] (For example: although Brazil has not signed any IIAs, it is, nonetheless, the biggest recipient of FDI in Latin America.[553]) The second problem was vehemently voiced by Guzman (and others): "although an *individual* country has a strong incentive to negotiate with and offer concessions to potential investors—thereby making itself a more attractive location relative to other potential hosts—developing countries *as a group* are likely to benefit from forcing investors to enter contracts with host countries that cannot be enforced in an international forum, thereby giving the host a much greater ability to extract value from the investment."[554] With the remark that IIAs "reduce the overall welfare of developing states", Guzman brought to the fore a classical prisoners' dilemma:[555] although a new treaty provides a country with a competitive advantage in the rally for FDI, the net benefits melt away if multiple countries engage in gradually more comprehensive and confining treaties. The proliferation of BITs as opposed to MIAs exacerbates this problem.[556]

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[549]Cf. Elkins et al.: Competing for Capital (see n. 545), pp. 825–827, 836–841; on the second point Beth A. Simmons: Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment, in: World Politics 66.01 (Dec. 2013), pp. 12–46, DOI: 10.1017/s0043887113000312, at p. 20.

[550]Cf. Elkins et al.: Competing for Capital (see n. 545), p. 842.

[551]Cf. Sornarajah: Law on Foreign Investment (see n. 25), p. 185.

[552]Cf. Simmons: Bargaining over BITs (see n. 549), p. 29; Lavopa et al.: Kill a BIT (see n. 6), p. 870; Perrone: Governance of Foreign Investment (see n. 47), p. 13; summarizing the results of various prominent studies on the relationship Kerner stated: "signing more BITs correlates with greater aggregate FDI flows [...]. On the other hand, studies have generally been unable to show that signing a BIT with a specific country correlates with more FDI from that country." Kerner: Why Should I (see n. 548), p. 74[51]Allee.Peinhardt2014.EvaluatingThreeExplanations Yet, he finds in his analysis that BITs *do actually attract FDI*.

[553]Cf. Enrique Fernández Masiá: Arbitraje inversor-Estado: De "bella durmiente" a "león en la jungla", in: Revista Electrónica de Estudios Internacionales 26 (2013), pp. 1–27, at par. 29.

[554]Guzman: Treaties That Hurt (see n. 56), p. 643.

[555]Ibid., pp. 643, 679; cf. further Huaqun: Balance, Sustainable Development (see n. 34), p. 302; Meredith Kolsky Lewis: The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements, in: Tomer Broude et al. (eds.): The Politics of International Economic Law, Cambridge: Cambridge Univ. Pr., 2011, pp. 19–39, DOI: 10.1017/cbo9780511976834.002, at p. 38; Miles: Origins (see n. 31), p. 90.

[556]Ibid.

Related to the competition for capital approach are some motivations of institutional learning. Elkins and his colleagues showed that states tended to sign more BITs when they "worked", i. e. when they conceived of increased FDI as a result of previously implemented IIAs.[557] On the contrary, signings slowed down, when governments were exposed to claims against them. This relates to several studies on the unreal expectations of capital exporters. Separate scholars showed that governments did not anticipate the proliferation of ISDS proceedings, let alone that claims would be brought against them. Thus, they did not include them in their evaluation of potential benefits and losses.[558] First of all, at the moment, many IIAs were signed, decision makers did not have any point of reference so as to the risks of arbitration.[559] In this context, Skovgaard Poulsen and Aisbett talk about "bounded rationality".[560] This research is based on findings from behavioral economics. They found that states systematically overestimated benefits over costs[561], especially with regard to "High-Impact, Low-Probability Events".[562] As I have shown in chapter 2 "Evolution of the International Law on Foreign Investment", the first arbitrations dated from the early/mid 1990s and considerably lagged behind the signing practice. But even after the proliferation of ISDS proceedings, decision makers underestimated potential losses as compared to the potential benefits IIAs could bring about.

The power and coercion approach to the diffusion of IIAs is complementary and partially opposed to the competition for capitals approach. It accentuates that the IIR is primarily characterized by an asymmetry of power. Arbitrator and scholar Stern condensed the fundamental idea of this line of thought in her observation that some states "cannot not want to be" part of the system.[563] The power and coercion explanation shifts the agency away from capital importers to capital exporters as the key actors for the development of the IIR. This is strongly intertwined with historical developments, which determine the respective available means of power and specific vulnerabilities of state actors within the international arena. I already made reference to some of these factors in chapter 2 "Evolution of the International Law on Foreign Investment". De-colonization, expropriations, and the activity

[557]Elkins et al.: Competing for Capital (see n. 545), p. 840.

[558]Cf. Skovgaard Poulsen/Aisbett: When the Claim Hits (see n. 13), p. 301; Simmons: Bargaining over BITs (see n. 549), p. 41; Dumberry: Last Citadel! (see n. 131), p. 395.

[559]Cf. Skovgaard Poulsen: Bounded Rationality (see n. 15), p. 8.

[560]Cf. ibid., pp. 7–11; Skovgaard Poulsen/Aisbett: When the Claim Hits (see n. 13), pp. 273–276.

[561]Cf. Skovgaard Poulsen: Bounded Rationality (see n. 15), pp. 4–6.

[562]Cf. Skovgaard Poulsen/Aisbett: When the Claim Hits (see n. 13), pp. 276–279.

[563]Brigitte Stern: La coutume au coeur du droit international: quelques réflexions, in: UNESDOC (ed.): Mélanges offerts a Paul Reuter; le droit international: unité et diversité: Le Droit international: unité et diversité, Paris: A. Pedone, 1981, pp. 479–499, at p. 479; approved translation to english eadem: Custom at the Heart of International Law, in: Duke Journal of Comparative & International Law 11.1 (2001), pp. 89–108; as quoted in Byers: International Law (see n. 17), p. 624.

of poorer countries in the UN assembly (NIEO) made it indispensable for capital exporting countries to find the means to protect investors abroad. With the creation of doctrine and a new regime, capital exporters rejected de-colonized states' challenge to investment protection. However, FDI was not only threatened by foreign governments, but also by foreign *populations.* Miles pointed out that civil unrest in investment destinations was an argument for exporters of capital to rally for stronger protections.[564] The failure of multilateral initiatives and the stronger bargaining power of capital exporters in bilateral negotiations, resulted in the creation of the closely knit, worldwide net of BITs. In continuation, I present some factors that illustrate power asymmetry and that support the power and coercion approach. First, the collective action problem (referred to above), leave capital exporters in a disadvantaged position in IIA negotiations. The incentive of each individual state to gain edge over competitors led to a gradual moderation of the positions formulated in the NIEO. Also, the signing of BITs in times of economic hardship and insufficient growth, reflect the dire need for quick solutions and the waning resistance to more comprehensive agreements.[565] Furthermore, the sharp cut-back on the north-south flow of state (re-)financing towards the end of the 1980s and the 1990s, led a ongoing dept crisis in most poor countries. This provided capital exporting countries with a dramatically efficient lever in their endeavor to attain ever more far-reaching investment protection.[566] Elkins, Guzman, and Simmons showed a strong correlation between the IMF credits and BIT signings. This, they conjectured, may stem from two different mechanisms: first, they may be encouraged, i. e. coerced, to sign investment protection treaties, and/or second, "good governance" requirements (conditionality of credit programs) may overlap with BIT obligations. Hence, adaption costs would be lower.[567] Sornarajah pointed out the dominant role the US as the sole hegemonic power of the second half of the twentieth century played in the coming into being of the IIR.[568]

A more general argument for significance of power and coercion in relation to the IIR's evolution is Paulus' conclusion that poor countries turn to international law as they lack "the means to defend their interests by coercion of others by economic or military means."[569] Closely linked, is the motivation of (negative) "depoliticization". This does not have the same contents as depoliticization from the perspective of capital exporters. In this case, this is no

[564]Cf. Miles: Origins (see n. 31), pp. 72–74.
[565]Cf. Simmons: Bargaining over BITs (see n. 549), pp. 39 sq.
[566]Miles: Origins (see n. 31), pp. 89 sq.
[567]Cf. Elkins et al.: Competing for Capital (see n. 545), p. 840.
[568]Cf. Harm Schepel: M. Sornarajah. Resistance and Change in the International Law on Foreign Investment, in: EJILAW 26.4 (Nov. 2015), pp. 1050–1052, DOI: 10.1093/ejil/chv068, at p. 1052.
[569]Cf. Paulus: After Postmodernism (see n. 122), pp. 750 sq.

more than a strategy to avoid direct or indirect intervention of powerful states in domestic affairs; by means of sanctions, trade, or conventional wars.[570]

Another factor supporting this approach, is the fact that capital importing countries were (i. e. *at least* until the new generation of IIA) usually not the developers, but rather the adopters of predominantly prefabricated treaties (cf. below, 109).[571]

Motivations of capital exporting economies under the power and coercion approach differ significantly from those of importers. Depoliticization, often described as the central strength of ISDS, also comes with a depoliticization of private property.[572] Because of the limitations imposed on host states via IIAs, the treatment of FDI is severed from political discourse. "[T]he IIR is a highly legalized regime where political representation and cooperation are absent."[573] Questions of property and distribution of wealth are completely cut off from (democratic) decision processes. This favors (foreign) investors and is, therefore, in the interest of predominantly capital *exporting* economies. Furthermore, litigations in front of seemingly neutral and non-permanent tribunals has an obscuring effect on accountability of governments. Additionally, it takes foreign governments out of the line of fire. Another crucial motive for capital exporters is, of course, the protection of investments abroad. Procedural and substantive shortcomings under mere diplomatic protection and CIL were a major driving force behind their initiatives to conclude IIAs.[574] Likewise, they improved the access to markets and investment opportunities.[575] This is especially true for the period of economic stagnation in the home countries. The explosion of FDI, and of credit flows to the weaker economies of the south in the 1980s, is exceptionally relevant in this context. Moreover, the assured enforcibility of judgments based on FDI violations by host states has been a strong incentive.[576]

Considering the two approaches, the comprehensive study of Allee and Peinhardt tested the validity of the two different motivational sets of states for *difference across BITs.* They concluded that, the credibility-based explanations (i. e. tying hands) was not able to compete with the "*power and preferences* approach" in terms of explanatory power.[577] The first

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[570]Cf. Perrone: Governance of Foreign Investment (see n. 47), p. 15.

[571]Cf. Dumberry: Last Citadel! (see n. 131), p. 395; Huaqun: Balance, Sustainable Development (see n. 34), p. 302; Todd Allee/Clint Peinhardt: Evaluating Three Explanations for the Design of Bilateral Investment Treaties, in: World Politics 66.1 (Jan. 2014), pp. 47–87, DOI: 10.1353/wp.2014.0001, 58–65.

[572]Cf. Perrone: Governance of Foreign Investment (see n. 47), pp. 15–17; Miles: Origins (see n. 31), pp. 86 sq.

[573]Perrone: Governance of Foreign Investment (see n. 47), p. 16.

[574]Cf. Newcombe/Paradell: Law and Practice (see n. 34), pp. 37 sq., 40; Sornarajah: Law on Foreign Investment (see n. 25), pp. 184 sq.

[575]Cf. Newcombe/Paradell: Law and Practice (see n. 34), p. 40.

[576]Cf. Huaqun: Balance, Sustainable Development (see n. 34), p. 301.

[577]Cf. Allee/Peinhardt: Evaluating Three Explanations (see n. 571), pp. 77–80, quote at p. 77.

approach explains the variation of provisions across BITs, as a result of how far host-states have to go, to make a *truly* credible commitment. This depends on how they are perceived by other states in respect to different variables depicting credibility. The latter explains the reach of treaty provisions, especially in respect to dispute resolution clauses, using two factors: first, the preference of domestic actors of the home state for strong clauses. And, second, the power imbalance between contracting parties.[578] The strong superiority of the *power and preferences* approach confirms that capital exporters have been able to push their "take-ir-or-leave-it offers."[579] BITs are "particularly susceptible to global power dynamics."[580]

Moreover, there are other possible intentions behind the policy makers' decisions to negotiate and sign IIAs. From a (social) constructivist point of view, certain practices become so accepted over time, that they ended up being adopted almost universally. Power imbalances play no (if not a subordinate) role in constructivist analyses. They consider the development of international law as a independent dynamic, regardless of state power.[581] Whereas Jandhyala, Henisz, Mansfield consider the rational calculus political economy, i. e. the competitive paradigm explanatory for the first and third "wave" of BITs, they see the interim period as characterized by "norm cascade".[582] During this "second wave of BITs" (i. e. the late 1980s until the East Asia and Argentine crises, which clearly demonstrated inherent risks of IIAs) states signed BITs, because their peers did. A complementary rationale for capital importing countries was "to demonstrate adherence to what had become a global standard or norm about the treatment of FDI by host countries."[583] They wanted to be part of a "culture of compliance".[584] These practices were deeply embedded in a global trend to "liberalize", based on the ideology of neo-liberalism, fostered first and foremost by the twin institutions IMF and World Bank through credit programs.[585] Through this lens, governments "knew" that IIAs worked. This approach also helps to understand the so called "strang BITs" between states

[578]Cf. Allee/Peinhardt: Evaluating Three Explanations (see n. 571), pp. 58–65.
[579]Term by Elkins et al.: Competing for Capital (see n. 545), p. 822.
[580]Allee/Peinhardt: Evaluating Three Explanations (see n. 571), p. 62.
[581]Cf. Byers: International Law (see n. 17), pp. 623 sq.
[582]Cf. Srividya Jandhyala et al.: Three Waves of BITs: The Global Diffusion of Foreign Investment Policy, in: Journal of Conflict Resolution 55.6 (Aug. 2011), pp. 1047–1073, DOI: 10.1177/0022002711414373, at p. 1049; using a term by Martha Finnemore/Kathryn Sikkink: International Norm Dynamics and Political Change, in: International Organization 52.4 (1998), pp. 887–917, DOI: 10.1162/002081898550789, at p. 893.
[583]Cf. Jandhyala et al.: Three Waves of BITs (see n. 582), p. 1049.
[584]Simmons: International Law (see n. 17), pp. 201 sq.
[585]Cf. Miles: Origins (see n. 31), 89f. Perrone: Governance of Foreign Investment (see n. 47), pp. 8 sq., 13; Schepel: M. Sornarajah. Resistance and Change (see n. 568), p. 1052.

which predominantly *import* capital.[586] Furthermore, they put into evidence that intentions may vary over time.[587]

Second, from a more granular statehood perspective, more internal conflict lines that foster the evolution of the IIR become visible. Byers commented that there was a split between epistemic communities. On the one hand state elites (especially politicians and lobby groups), on the other hand, populations.[588] This rift has been easily appreciable in recent conflicts around the negotiations of TTIP, CETA, JEFTA, and others. Along this communication gap, host countries governments may also rush for more comprehensive investment protection with the objective to appease worried (potential) investors.[589] Another related issue is the fact that states with less democratic quality tend to sign more IIAs.[590] Tung explained this phenomenon with corruption and individual optimization processes of powerful elites.[591] Of course, this is not in the interest of the respective populations. Moreover, Mazumder presented statistical evidence that autocrats use BITs as a tool to remain in power. The logic behind this argument is that IIAs contribute to a segmentation of property rights between international and domestic business owners. This leads to a stagnating domestic property rights environment since international pressure to modernize the legal protections, as well as the rule of law becomes inessential. Hence, domestic economic elites do not have to fear institutionalized intervention and are able to maintain power.[592]

6.2 Reforming IIAs. An Expression of Original Intent?

In her study, *Arbitrator as a Lawmaker*, Titi domnonstrated that certain rulings by arbitral tribunals have had an impact on the negotiation of new IIAs. She illustrated this with the examples of *Maffezini v. Spain* and *Pope & Talbot v. Canada*—key cases of expansive interpretation. A wide array of reactions rejecting the tribunals' interpretations (among others, more clearly drafted provisions, and interpretative notes) were documented by the author.[593]

> Arbitral interpretation sometimes reveals treaty provisions in a light different than the contracting parties had envisaged and this is not without consequences for future treaty

[586] Cf. Jandhyala et al.: Three Waves of BITs (see n. 582), p. 1067.
[587] Cf. ibid., p. 1068.
[588] Cf. Byers: International Law (see n. 17), p. 627.
[589] Cf. Simmons: Bargaining over BITs (see n. 549), p. 42.
[590] Cf. Mazumder: A BIT longer? (see n. 501), p. 515.
[591] Cf. Tung: Investors vs sovereign states (see n. 534), pp. 267 sq.
[592] Cf. Mazumder: A BIT longer? (see n. 501), pp. 515 sq.
[593] Cf. Titi: Arbitrator as a Lawmaker (see n. 182), pp. 846–848.

> negotiations. The rhetoric of model BIT revisions is partly led by arbitral interpretations at odds with the parties' understanding of the treaty [...].[594]

With these considerations in mind, I assume that reforms of individual treaties, but also of the IIR as a whole, can give some *limited* evidence for the original intentions of contracting parties. I consider reforms by capital importing countries to carry more explanatory weight, because their position in ISDS has not dramatically changed. On the contrary, many predominantly capital exporting states have suddenly found themselves confronted by claims. Schill did not agree with this argument that reform is driven by a conflict between parties (original) intentions and an expansive practice of treaty interpretation. To him, the "backlash against investment arbitration" is propelled by shocking effects of the Argentinian and some NAFTA cases, as well as critical political work by NGOs.[595]

Furthermore, one could argue that, due to the lack of experience with ISDS, states did not consider to put provisions on regulatory leeway or the preservation of sovereignty into the first generations of IIAs. That they reassert them in the new generation does not mean that they did not have the intention to maintain regulatory discretion before. Rather, they—poor and rich countries, alike—just did not know that ISDS practice would severely cut back on state power (cf. above in this chapter). This assertion may also be true for capital exporting states which have turned to reform treaties to better protect regulation in the interest of the public. Yet, another explanation for this behavior by rich states might be, that they did not care about regulatory autonomy as long as they were not situated at the receiving end of ISDS.[596] Independently from which one of the above reasons dominated, while they were not confronted with claims, capital exporting countries just did not have an incentive to reform a system that was beneficial to their firms.

Consequently, the turn to reform treaties can be interpreted as an instrument to reassert the original intentions to do both, offer protection to foreign investors and maintain sovereignty for capital importers and exporters alike. Recent reform measures give hints to what intentions could have been, in the first place.

First of all, there is a group of states that have renounced their membership in the ICSID or resigned from certain IIAs.[597] Less radical reform approaches were adopted by a wider

[594]Titi: Arbitrator as a Lawmaker (see n. 182), p. 843.

[595]Schill: W(h)ither Fragmentation? (see n. 11), p. 895.

[596]Cf. Perrone: Governance of Foreign Investment (see n. 47), pp. 14 sq., 23.

[597]For example, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSIDCf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 10; Schill: W(h)ither Fragmentation? (see n. 11), p. 895. Among others, Bolivia, Venezuela, Argentina, Russia (ECT) have withdrawn from, above all bilateral treaties.Cf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 19; Schill: W(h)ither Fragmentation? (see n. 11), p. 895; Böttcher: Dekonstitutionalisierungstendenzen (see n. 14), p. 25. Ecuador just terminated its

range of governments, including those of high income countries. One was the narrowing down of certain provisions in new, preexisting, or model IIAs. Examples of a wide array of possible measures are: Some states, such as India or Australia, explicitly excluded or limited the access to ISDS. India is also reconsidering it's existing IIAs. India announced that access to international arbitration will be excluded or, at least, limited.[598] The subsequent AUSFTA is the first and only US FTA without an investment chapter.[599] Similarly, the European Commission reportedly stated that ISDS was dead in the context of the JEFTA negotiations. A permanent court could be an alternative option[600] , similar to the provisions under CETA.[601] A further road of action was to narrow down definitions of "investment" and "investor" and, with this, limit the scope of what foreign investors can claim as expropriation.[602] This might be a reaction to the ever growing array of assets considered covered investment in expansive interpretation. It has also been a tool that allows states to selectively offer special protection beyond CIL to certain types of investments that *contribute* to (sustainable) development goals of the hosts. Recurrently, social, labor, or environmental requirements are being formulated; some treaties expressly exclude certain sectors from its protection. Furthermore, new IIAs tend to formulate reservations of the right to regulate. For example, they exclude good faith in some sensible policy areas from being contrary to the treaty provisions.[603]

I will exemplify this kind of reforms by turning to South Africa and Norway: In South Africa a comprehensive reformulation of investor protection is on the way. This includes the termination of existing BITs and the development of a new model IIA. Future IIAs and the renegotiation of existing ones are to be based on this prototype. Strong investment protection will also be anchored in domestic law applicable to all investors independent from the existence of an IIA with the investor's home state[604]

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last BITs, although, the majority is subject to survival clauses.unknown author: Ecuador denounces its remaining 16 BITs and publishes CAITISA audit report, ed. by Investment Treaty News, June 12, 2017, URL: `http://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report` (accessed: 07/11/2017).

[598] Cf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 31, 24; Simmons: Bargaining over BITs (see n. 549), p. 43.

[599] Cf. Perrone: Governance of Foreign Investment (see n. 47), p. 14.

[600] Cf. Douglas Thomson: EU says "ISDS is dead" ahead of Japan trade deal, ed. by Global Arbitration Review, July 6, 2017, URL: `http://globalarbitrationreview.com/article/1144114/eu-says-%E2%80%9Cisds-is-dead%E2%80%9D-ahead-of-japan-trade-deal`.

[601] Cf. European Commission: CETA: EU and Canada agree on new approach on investment in trade agreement, Feb. 29, 2016, URL: `hhttp://trade.ec.europa.eu/doclib/press/index.cfm?id=1468` (accessed: 07/11/2017).

[602] UNCTAD: Expropriation (see n. 198), p. xi.

[603] Cf. Guntrip: Self-Determination (see n. 59), pp. 854 sq.

[604] Cf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 29 sq.

The new model BIT of the Southern African Development Community (SADC) includes various important changes. First, it clearly states the object and purpose, not only in the preamble, but also in Article 1, i. e. in *substantive provisions.* This binds tribunals to include objectives in the interpretative process and prevents them from picking concepts that coincide with preconceptions about the IIR. Article 1 accentuates *sustainable development*: "The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located."[605] Further, it clearly discloses the drafters' understanding of "sustainable development": it "requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept".[606] Likewise, the drafters stressed the contribution requirement as an element of investment.[607] These objectives are further strengthened by Part III on the obligations of the host state *and investors*; among others, investors have the duty to adhere to respect human rights (not restricted to the workplace) respect ILO labor standards, and be consistent "with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher."[608] Because these investor obligations are part of the substantive provisions, breaches are not merely contractual, but rather breaches of international law. Articles 17 and 19 provide for the adjudication of these cases of non-compliance in the home or host states' courts. The latter also introduces the possibility of counter-claims by the host states against foreign investors.

Furthermore, this model IIA reasserts the "the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives"[609] In Article 20, the BIT allows for any non-discriminatory regulation " consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives."[610] Certain good faith regulations, such as, measures "(a) to protect public morals and safety; (b) to protect human, animal or plant life or health; (c) for the conservation of living or non-living exhaustible natural resources; and (d) to protect the environment" are explicitly exempt from conveying compensatory payments.[611] Additionally, the draft clearly defines investment and specifically excludes certain types of assets

[605]Southern African Development Community (SADC): SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, URL: `http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf` (accessed: 07/11/2017), Art. 1.

[606]Ibid., preamble.

[607]Cf. ibid.

[608]Ibid., Art. 15.

[609]Ibid., preamble.

[610]Ibid., Art. 20.

[611]Ibid., Art. 25.

from protection.[612] Thereby, it counteracts the proliferation of claims of dubious nature that many states have been currently exposed to, in the face of expansive interpretations.

The implementation of different policies depend on specific economic or political reasons in their favor.[613] Conversely, also discursive elements can propel certain policies. This is in line with the constructivist explanaition of the diffusion of BITs. Apparently, South Africa had been part of a norm cascade, and did not sufficiently weigh potential benefits against potential disadvantages.

Not only capital exporting countries revamp their IIAs. Norway, responding to massive popular resistance[614], adopted a new model BIT as well, which places even more emphasis on regulatory autonomy, as well as sustainability. Instead of the objective to encourage investment, the preamble states to "to encourage, create and maintain stable, equitable, favourable and transparent *conditions for investors*".[615] Furthermore, the preamble underscores the aim of sustainable development and Corporate Social Responsability (CSR) on multiple occasions. The most important part is, however, the reaffirmation of sovereignty.

> Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns.[616]

It also excludes a set of policy areas from the scope of protection. On the basis of the good-faith and non-discrimination principles, policy makers have the right to pass necessary measures. As an insurance against the overly restrictive interpretation of necessity, it adds a clarifying footnote that reasserts the "precautionary principle, including the principle of precautionary action."[617] Alike other new generation IIAs, these two model BITs are in line with the policy recommendations of UNCTAD to limit protection to areas that foster sustainable development.[618]

[612] Cf. Southern African Development Community (SADC): SADC Model BIT 2012 (see n. 605), Art. 2.

[613] Cf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 30.

[614] Cf. Damon Vis-Dunbar: Norway shelves its draft model bilateral investment treaty, ed. by Investment Treaty News, June 8, 2009, URL: http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/ (accessed: 07/11/2017).

[615] Agreement Between the Kingdom of Norway and ... for the Promotion and Protection of Investment, May 13, 2015, URL: https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf (accessed: 07/11/2017), preamble.

[616] Ibid., Art. 12.

[617] Ibid., Art. 24, n. 3.

[618] Cf. UNCTAD: Expropriation (see n. 198), pp. 131–134; for further examples of more restictive IIAs see Schwartz: Capitalism, International Investment (see n. 185), Ch. 3.2, pp. 239 sqq.

The reform of model IIAs usually takes a lot of time to show policy results. This is due to survival clauses of mostly five to 20 years after the unilateral termination, and/or the willingness of the other party to renegotiate pre-existing treaties, and/or long terms before expiration. To tackle these issues, India has offered the partners of all their remaining BITs to issue a joint interpretative statement. This would allow to curb interpretation in future arbitrations by clarifying the parties understandings of terms, such as MFN, investor, investment, or FET.[619]

Another field of realigning activity has been transparency requirements. Many IIAs followed the example of NAFTA. Moreover, this type of specifications found their way into the UNCITRAL arbitration rules and the Mauritius Convention.[620]

There have even been some initiatives to introduce new fora for dispute resolution, especially in view of the massive critique ICSID has been exposed to. Under the auspices of the *Alianza Bolivariana para los Pueblos de Nuestra América – Tratado de Comercio de los Pueblos* (ALBA), for instance, member states work towards the establishment of a regional center of arbitration.[621] ALBA member states also introduced two new organizations with the objectives to mutually support and inform member states about ongoing arbitrations, to built teams of specialized legal staff, offer legal advice, organize communication campaigns to inform the public and foster public participation, propose policy options for reforms of the IIR, finance and carry out research on related topics—the *Comité ejecutivo de la Conferencia Ministerial de Estados Latinoamericanos* and *Observatorio Internacional*.[622]

Many of these reforms express growing discontent of states with the IIR. The theory of convergence of international investment law has been confronted recently by theories of deconstitutionalization. Observers point out that the proliferation of different fora and reformation of substantive standards (and subfields of international law) has lead to its fragmentation.[623] Before, and ignoring recent changes, other scholars, and especially practitioners have dreamed of the evolution of an universal regime through (almost) uniform treaty provisions and *precedent* (in the common law sense) which, from their point of view, would

[619]Sarthak Malhotra: India's Joint Interpretive Statement for BITs: An Attempt to Slay the Ghosts of the Past, ed. by Investment Treaty News, Dec. 12, 2016, URL: http://www.iisd.org/itn/2016/12/12/indias-joint-interpretive-statement-for-bits-an-attempt-to-slay-the-ghosts-of-the-past-sarthak-malhotra/ (accessed: 07/11/2017).

[620]Cf. Guntrip: Self-Determination (see n. 59), pp. 849 sq.

[621]Cf. Fernández Masiá: Arbitraje inversor-Estado (see n. 553), par. 19.

[622]Cf. ibid., par. 16–18.

[623]Cf. Böttcher: Dekonstitutionalisierungstendenzen (see n. 14), pp. 218–221, 38–41; Maela Giofré: Investor protection rights and foreign investment, in: Journal of Comparative Economics 41.2 (May 2013), pp. 506–526, DOI: 10.1016/j.jce.2012.07.002, at p. 508; more generally Koskenniemi: International Legal Theory and Doctrine (see n. 18), par. 29.

lead to international custom.[624] Yet, the momentum of reform is immense. States across the whole specters of income levels and importer/exporter of capitals have turned to reform certain provisions, whole treaties, or even fora. The reform of certain provisions in reaction to expansive interpretations, and other means of rejection thereof, are specially indicative for the original intentions parties had at the moment of signature. The rejections to the inclusion of procedural provisions by means of MFN clauses, for example, have been unanimous; no official endorsements of this interpretation were voiced.[625] That means, states wanted to maintain their sovereign right to offer arbitration specifically, in a not generalized manner in *certain* treaties. This is reflective of the failure of MIA initiatives and the turn to BITs. In general, expansive interpretations raise the question of consent. Can states give consent, or how can this consent be valued, if contracting parties could not imagine the creative ways in which claimants and tribunals expanded the scope of the obligations consented to from the start? Reforms that provide delimitations of obligations in a more specific manner, disqualify the hypothesis that states deliberately signed vague provisions as a means to develop international investment law homogeneously, by handing over the torch of law making to arbitrators. It rather reflects their discontent with tribunals' disrespect for their original intentions.

The direction of reform is clear. The inclusion of social, environmental or labor preconditions for protection, as well as the requirement to contribute to (sustainable) development, *reasserts* the will to protect investments *as a means* to foster the domestic economy.

6.3 Appraisal of Intentions within ISDS and from Theoretical Perspectives: a profound rift

The analysis of intentions for the participation in the IIR has produced a wide variety of possible answers—thanks to *Analytical Eclecticism* and the appraisal through macro and micro perspectives of statehood. From a macro perspective, competition for FDI is one approach. The reasoning behind the explanation is that (by means of IIAs) states are able to attract a (bigger) share of overall FDI by making credible commitments to possible investors. Closely related is the *institutional learning* approach that shows that signing rates were higher/lower when IIAs were perceived to work/not work in terms of FDI, respectively. The concept of *bounded rationality* directly docks on to this argument and proposes that "states" were sub-

[624] Cf. Schill: W(h)ither Fragmentation? (see n. 11), pp. 890–894; Frédéric G. Sourgens: Law's Laboratory: Developing International Law on Investment Protection as Common Law, in: Northwestern Journal of International Law & Business 34.2 (2014), pp. 181–247, at pp. 183–185; Titi: Arbitrator as a Lawmaker (see n. 182), p. 831; Carty: Sociological Theories (see n. 37), par. 42.

[625] Cf. Daimler v. Argentina (Award) (see n. 242), par. 276.

ject to systematic bias (e. g. overestimating benefits over costs) in their decisions. The *power and coercion* approach explains the evolution of the IIR and individual states' participation with the power imbalances within the international system of states. The colonial past, (prevention of) military intervention, hegemony/dominance of some states in international organizations, economic hardship, drying up credit flows, or IMF conditionality are just some factors that determined the historical development of the IIR, within this conceptualization. A quantitative study on the variation of provisions across BITs showed the superiority of the *power and coercion* approach, over the *competition for FDI* approach. A further approach was *Social Constructivism* which understood this evolution as a result of states' intention to belong to a universally accepted regime, i. e. "norm cascade". Power is not an obvious component of the equation. However, power played a role in the dominance of neo-liberal thinking/ideology, at that time.

From a micro perspective, inner-society cleavages are key to understand the evolution of the IIR. One explanation is the divide between epistemological communities. Furthermore, leaders of states exhibiting low democratic quality tend to use IIAs as a tool to stabilize their rule by eliminating outside intervention.

Of the above explanations, only one is reflected in ISDS proceedings: the attraction of FDI. Under the premise to depoliticize conflicts related to foreign investment, the IIR systematically makes power imbalances across states invisible. It becomes a tool to legitimize the status *quo* of the international distribution of wealth and power and removes it from political arenas domestically, as well as internationally. This conclusion allows to negatively answer subquestion *4*, whether the intentions of (all) contracting parties are reflected in ISDS practice.

In spite of all the methodological drawbacks, I identified recent reforms within the IIR as possible expressions of intentions, states had when signing the first generation of IIAs. Some reforms embarked on, not only by capital importers, but by exporters, exhibit a common direction: towards a reaffirmation of sovereignty, and recuperation of regulatory authority. Clearer, and more extensive statements of intent (in preambles or annexes), exceptions from protection in order to regain regulatory discretion in key areas (e. g. health, environment, labor), or withdrawals from IIAs, represent the discontent of contracting parties with ISDS practice. I understand the reorganization of the IIR as partially originating from the realization of participants that their original intentions were not sufficiently accounted for in ISDS. The structure of the international economic system provides states with certain incentives and interests depending on their respective positions. For low income or middle income countries, who did not witness a dramatic increase in wealth since the inception of the IIR, these interests remained similar. One example is the continuing dependence on FDI as a means to foster (sustainable) development. Provided this similarity, dramatic changes in IIA strategies are a clear indication that the system did not work out in the manner contracting parties wished for. This reinforces the answer to subquestion *4*, I gave in the previous paragraph.

7 Conclusions and their Implications for Adequate Policy

After carrying through my research, I am able to satisfyingly answer my research question about the role the intentions of the contracting parties have played in ISDS practice. The answer to subquestion *1* suggested that intent played a central role in ISDS practice, especially through proxies, such as object and purpose, intentions, preparatory work, and others. They were applied in a myriad of ways by parties and tribunals, alike. However, they applied different strategies. Claimants usually tried to expand the scope of substantive (e. g. FET, covered investment) and procedural (e. g. import through MFN clauses, direct access to arbitration instead of domestic settlement/relief) provisions , arguing with object and purpose. Some claimants used supplementary means to underscore their object and purpose arguments. Yet, in most cases, they tried to discouraged tribunals the application of Article 32 criteria.

On the contrary, respondents used object and purpose in order to disqualify the investment at hand, as a covered investment under the applicable IIA—especially by advocating for contribution arguments (*Salini*-Test) based on the ICSID convention's preamble. In many cases, however, respondents advocated for ordinary meaning interpretations, as object and purpose arguments (based on the sparse wording of preambles and perceived pro-investor bias) contained the danger of pro-investor expansive interpretation. Moreover, they applied supplementary means for different purposes. For instance, they tried to deflect the tribunal's jurisdiction by making reference to control arguments. Some also relied on the *travaux préparatoires* to, among others, clarify the meaning of a certain provision (especially in reaction to claimant's plea for expansive interpretation based on object and purpose), to prove the obligatory nature of amicable settlement or domestic relief provisions, or to establish a legality of operations requirement. Various respondents also turned to treaty practice as a means to show that the FET equaled the international minimum standard of treatment under CIL. Additionally, *travaux*, treaty practice, and joint interpretative statements and the massive international protest against the decision in *Maffezini v. Spain*, were used to reject the import of dispute settlement clauses through MFN.

Tribunals applied object and purpose to interpret silences or ambiguities of treaties. They based this on definitions of the applicable IIA's objectives (selectively) extracted from preambles, titles, annexes, or provisions; or defined them in very general terms, based on the panel's ideas about the nature and purpose on international investment law. These intentions worked as justifications for tribunals to interpret expansively. Recurrent examples were the expansion of the tribunal's jurisdiction (by definition of covered investment, or the import of procedural provisions—umbrella, or dispute resolution clauses—via MFN clauses), or the expansion of FET beyond the international minimum standard of treatment under CIL. In the context of expansive interpretation based on object and purpose, the perception of arbitrators about their own discretion within the IIR, played a central role. Also, the application of supplementary means was dependent on this conception. Tribunals only used Article 32 resources to clarify the contents of certain provisions; they dismissed the political (or social-economic) goals parties wanted to reach by adopting an IIA.

I am able to clearly answer subquestion *2* on the theoretical groundings of international investment law and ISDS. In spite of their denial of theory and their claim of neutrality, international investment law and ISDS are based on the *normative* or *instrumental-systematic* paradigms of international law thinking. From the normative paradigm point of view, a certain set of laws is a given, its development not put into question. Hence, interpreters can claim neutrality because they only *implement* them. From the instrumental-systematic point of view, a perfectly systematic character of international law is an immovable presupposition. The disregard of contradictions, especially between specialized fields of international law, as well as the tendency to strive for uniform practice, is based on these basic assumptions that lack any sound theoretical or empirical foundation. Both perspectives understand international law as a theoretical *ab*-originee and, hence, insist on their neutrality. Especially the *postmodern-discursive* paradigm in international law allows to deconstruct claims of neutrality and to re-conceptualize ISDS practice. The indeterminacy of legal language and the choice of specialized field within international law inevitably result in *political decisions* of practitioners. The *postmodern-discursive* paradigm completely displaces the understanding of interpreters with international law. Neutral actors become political actors. This theoretical grounding influenced the way tribunals worked. One example from the empirical analysis was the recurrent definition of objects an purpose of a certain IIA divorced from the actual treaty texts. Theoretical preconceptions about the *nature* of IIAs informed some tribunals in their interpretative process, rather than the treaty text.

When it comes to subquestion 3 about the political intentions for the participation in the IIR, a broad spectrum arises against the background of the theoretical analysis and the reliance on “Analytical Eclecticism”. Intentions and intentionality as such, relied on varying conceptualizations of state-citizenry relations and statehood. The understanding of states as monolithic actors may hinder interpreters of international law in general, and within ISDS more specifically, to appraise the amalgamate intentions giving origin to international obligations. Taking the analysis to a micro level, leaving behind the black-box understanding of statehood, which is dominant in international law, opens new perspectives on sovereignty, the validity of international law rules, collective liability, and especially on *intentionality* of state actors.

The analysis of intentions for the participation in the IIR has produced a wide variety of possible answers—thanks to *Analytical Eclecticism* and the appraisal through macro and micro perspectives of statehood. Possible intentions identified through the the macro lens are the *competition for FDI* approach, the closely related *institutional learning* approach, “bounded rationality”, the *power and coercion* approach, or peer pressure and culture of compliance (*social constructivist* approach). From a micro perspective, inner-society cleavages are key to understand the evolution of the IIR. One explanation is the divide between epistemological communities. Furthermore, leaders of states exhibiting low democratic quality tend to use IIAs as a tool to stabilize their rule by eliminating outside intervention.

Of the possible political intentions behind IIAs identified in subquestion 3, only the *competition for FDI* approach was represented in ISDS practice. Other intentions of the parties that lead states to sign IIAs (*intention of the parties* approach) were systematically ignored in interpretation. Only intentions expressly stated in treaty texts were taken into account. Sparse wordings of intent lead tribunals to interpret the object and purpose in very general pro-investor terms. Based on this definitions and confronted with vague wordings of substantive and procedural provisions, they tended towards expansive pro-investor interpretations, such as the import of dispute resolution provisions by means of MFN clauses from *Maffezini v. Spain*, onwards. Informed by internal and external critique against expansive ISDS practice, some tribunals implemented balanced or even restrictive approaches with their interpretative practice. Even in the context of supplementary means of interpretation, political intentions at the moment of the conclusion of the IIA were not evaluated. This answers subquestion *4* of whether political aims behind IIAs were accounted for in ISDS practice. Under the premise to depoliticize conflicts about foreign investment, the IIR systematically makes power imbalances across states invisible. It becomes a tool to legitimize the status *quo* of the international distribution of wealth and power and removes it from political arenas domestically, as well as internationally.

The reconceptualization of reforms during the "Era of Re-orientation" as expressions of original intentions reinforces the negative answer to subquestion 4. State actors have reaffirmed state sovereignty and have attempted to recuperate autonomous regulatory authority by including more clearly worded, and more extensive statements of intent (in preambles or annexes), by stipulating exceptions from protection in order to regain regulatory discretion in key areas (e. g. health, environment, labor), or by withdrawing from (select) IIAs or arbitral fora. I understand the reorganization of the IIR as partially originating from the realization of participants that their original intentions were not sufficiently accounted for in ISDS. This raises the question: what policy options are available to state actors?

Implications for Policy | In subsection *6.2 "Reforming IIAs. An Expression of Original Intent?"*, some recent policy reforms have been lined out as examples of policy reform that might lead to a better reflection of contracting parties' intentions in ISDS practice. They comprised the resignation from certain IIAs or arbitral fora; the *renegotiation of treaties* focusing on more clearly worded provisions, as well as statements of intent; the introduction of alternative arbitral fora, including permanent courts; the inclusion of certain social, labor, environmental, or transparency requirements, by which states try to merely protect investments that contribute to sustainable development; and the issuance of joint interpretative statements.

First of all, states have different policy strategies at their disposal: "recontracting", "delegitimizing" and active participation strategies.[626] Delegitimization could consist in actively influencing the international discourse on international investment law, putting into question the legitimacy and even validity of IIAs.[627] The possible eventual collapse of the IIR[628], however, would also eliminate many benefits closely related to the protection of foreign investments, above all the non-intervention by third states and the ability to attract FDI. Furthermore, states can withdraw from IIAs and arbitral fora. In this respect, Paulus cautioned against the complete withdrawal from the protection of foreign investment under international law. This would disallow states ability to defend their interests from a legal point of view.[629] The result would be mere power politics. Also, Lavopa and his colleagues pointed out that the strategy of withdrawal can not provide for changes in the short term. This is due

[626] Anthea Roberts: Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States, in: The American Journal of International Law 104.2 (Apr. 2010), pp. 179–225, DOI: 10.5305/amerjintelaw.104.2.0179, at p. 193.

[627] See e. g. Dagbanja: Conflict of legal norms (see n. 504).

[628] If considered illegitimate regimes may be effective but unstable. Cf. Michael Barnett/Kathryn Sikkink: From International Relations to Global Society, in: Christian Reus-Smit/Duncan Snidal (eds.): The Oxford Handbook of International Relations (The Oxford Handbooks of Political Science 5), Oxford et al.: Oxford Univ. Press, 2008, pp. 62–83, DOI: 10.1093/oxfordhb/9780199219322.003.0003, at p. 79.

[629] Cf. Paulus: After Postmodernism (see n. 122), p. 743.

to survival clauses that maintain protection of foreign investments during ten to fifteen years after the termination of a IIA.[630] Yet again, the policy of the SADC has proved effective in the phasing out of old generation IIAs. The fact that survival clauses are not triggered by renegotiated treaties encourages recontracting strategies. This might be the only viable route "to stop outright the application of the clauses of the BIT".[631] This view is compromised by the conflict about retroactive application of the new BIT to a pre-existing investment that arose in *Ping An v. Belgium*, analyzed above. Careful drafting of preambles and a clear wording on the applicability for pre-existing investments would be necessary to prevent ambiguity in this respect.

When it comes to concrete contents of renegotiations the UNCTAD provided policy options within "three main models – a 'high protection' model, an 'increased predictability' model and a 'qualified' model."[632] The first is essentially the status *quo*. The second and third refer to the safeguard the adherence of arbitral bodies to their initial intentions, or selectively protect investments that contribute to sustainable development. Suggestions within the increased predictability model aim to bind arbitral panels to their original intentions and allow for state regulation by re-definition of key provisions. In order to limit the scope arbitration, UNCTAD recommendations included a redefinition of the terms of expropriation, indirect expropriation, and especially to clearly delimit indirect expropriation form non-compensable regulation.[633] The suggestions within the qualified model limit protection to certain qualities of foreign investments in order to align their protection with domestic (developmental) policy goals and concerns. To reach these goals, the UNCTAD recommended to exclude certain types of property or assets from the definition of investment.[634] Furthermore, states could add general exceptions to the application of expropriation provisions such as to require to compliance with human rights or domestic law.[635] Also, in order to limit compensable amounts, states could (1) exclude expected profits from valuation, (2) declare indirect expropriations as lawful and, hence allow for a calculation of compensation by the model of lawful expropriations, (3) allow tribunals to award below market value amounts in case of lawful expropriations under certain circumstances (e. g. impact on overall public finances or developmental status of respondent), (4) exclude punitive reparations for unlawful expropriations, (5) allow for inter-party negotiation of compensable amount, once the tribunal has

[630]Cf. Lavopa et al.: Kill a BIT (see n. 6), p. 879.
[631]Ibid., p. 882.
[632]UNCTAD: Expropriation (see n. 198), p. 125.
[633]Cf. ibid., pp. 127–130.
[634]Cf. ibid., p. 131.
[635]Cf. ibid., pp. 132 sq.; similarly Guntrip recommended to implement exception to reassert the right to regulate. Cf. Guntrip: Self-Determination (see n. 59), p. 854.

found liability.[636] Ishikawa also suggested the implementation of a state-state consultation period prior to the commencement of arbitration.[637] This could allow to clarify the mutual understanding of relevant legal terms and bind tribunals to this interpretation.

Moreover, Perrone suggested an overhaul of the whole IIR system, away from bilateral towards multilateral agreements. This would increase the bargaining power of states that are usually at the receiving end of ISDS proceedings.[638] By way of democratization of decision processes he also aims for "more space for negotiation and cooperation, and less litigation, whether it is investor-state or state-to-state. The IIR shows that too much legalization and too little politics is a recipe to increase tension."[639] This aimed for reorganization of institutions is, however, faced with the almost unattainable feat to reach consensus across very different actors with an even broader set of interests in the field of ILFI.[640] This was sufficiently clear in the post-war efforts to reach world-wide or even multilateral regimes on investment protection. This scholar also advocates for a centralization of ISDS within one organization in order to increase predictability and where home states, respondents, and third states were allowed to comment on awards as a means to inform the appellate body and future proceedings about commonly hold interpretations.[641] From his point of view, democratization is key.

An exciting new development has taken place with the negotiation of the new Argentina-Qatar BIT[642]. It requires foreign investors to adhere to domestic laws of the home state and omits the passage in the ISDS provision specifically limits the filing for arbitration to "'the investor concerned'".[643] In the opinion of Pérez-Aznar, this may allow host states to file for international arbitration against foreign investors who do not comply with domestic law.[644] The future will show whether this possibility is made use of. If so, this could lead to a balancing of state and investor interests in ISDS and dramatically increase compliance with domestic law. The elevation of unlawful investor conduct to breaches of international law and their adjudication in international arbitral bodies could lead to better enforceability,

[636]Cf. UNCTAD: Expropriation (see n. 198), pp. 135–137.

[637]Cf. Ishikawa: Keeping (see n. 6), pp. 146 sq.

[638]Cf. Perrone: Governance of Foreign Investment (see n. 47), p. 18.

[639]Ibid.

[640]Cf. ibid., p. 19.

[641]Cf. ibid., p. 20.

[642]See The reciprocal promotion and protection of investments between the Argentine Republic and the State of Qatar, Nov. 6, 2016, URL: http://investmentpolicyhub.unctad.org/Download/TreatyFile/5383 (accessed: 08/13/2017).

[643]Facundo Pérez-Aznar: The Recent Argentina–Qatar BIT and the Challenges of Investment Negotiations, ed. by Investment Treaty News, June 12, 2017, URL: https://www.iisd.org/itn/2017/06/12/recent-argentina-qatar-bit-challenges-investment-negotiations-facundo-perez-aznar/ (accessed: 08/11/2017).

[644]Cf. ibid. Another call for to recognize MNCs as subjects of international law and to "ascribe international obligations to these corporations" is voiced in Perrone: Governance of Foreign Investment (see n. 47), p. 20.

compared to local court decisions. If these provisions are truly following through with their promising proposal, they could become a recurrent element of future IIAs.

Yet, the recontracting strategy is faced with a number of meaningful drawbacks that may lead designers of investment policies to implement withdrawals instead, in spite of their evident weaknesses. First, MFN clauses require a renegotiation of *all* IIAs a state is party to. Else, more favorable provisions can be imported into the new, more restrictive IIA.[645] This problem may be exacerbated by the lack of willingness of the respective other party or parties to renegotiate. International investors (especially MNCs) significantly benefiting from the existing system, negatively influence the willingness of home states to implement reforms of the IIR.[646] Another stumbling block is the possible applicability of the old treaty, mentioned before.[647] The new situation, however, that net capital exporting countries also find themselves in the position of respondents, has the potential to create an overlap of interest with net capital importing countries and to open a viable road to reform the IIR.[648]

As a third strategy, next to "recontracting" and "delegitimizing strategies", Roberts encouraged "treaty parties and investment tribunals to engage in a constructive dialogue about interpretation, which would promote evolutionary and sustainable treaty interpretations without requiring legal amendments."[649] However, as carved out in the empirical analysis of this thesis, tribunals did not handle interpretative statements in a consistent manner. They rather proved to be a blunt weapon against arbitrators' discretion (cf. above p. 84). This is specially true for pre-existing proceedings, because of the prohibition of state interference, a means to maintain neutrality.[650] Therefore, statements have to be issued prior to a claim.[651] However, even preexisting joint interpretative statements are in many cases not binding for arbitral bodies. Ishikawa advocated for a clear mechanism for the status and bindingness of interpretative statements by contracting parties.[652]

Obviously, these three main strategies are not mutually exclusive. In many cases states will engage in various of them, so as to give substance to their interests within the IIR and ISDS. Both, recontracting and delegitimizing strategies have been increasingly common during the

[645] Cf. Lavopa et al.: Kill a BIT (see n. 6), pp. 881 sq.

[646] Cf. ibid., pp. 866, 886.

[647] Cf. ibid., pp. 881 sq.

[648] Cf. ibid., p. 885.

[649] Roberts: Power and Persuation (see n. 626), p. 193.

[650] Cf. Weeramantry: Treaty Interpretation (see n. 9), par. 3.116–3.117.

[651] UNCTAD: Interpretation of IIAs: What States can do, IIA Issue Notes 3, Dec. 2011, URL: http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (accessed: 01/17/2017), pp. 4 sq.; Tarcisio Gazzini: States and Foreign Investment: A Law of the Treaties Perspective, in: Shaheeza Lalani/Rodrigo Polanco Lazo (eds.): Role of the State in Investor-State Arbitration (Nijhoff International Investment Law Series 3), Leiden and Boston: Brill Nijhoff, 2015, pp. 23–48, DOI: 10.1163/9789004282254_004, at pp. 38 sq.

[652] Cf. Ishikawa: Keeping (see n. 6), pp. 147 sq.

last decade. Yet, renegotiation seems to be a more appropriate tool, especially if states want to reach results in the short run. Nevertheless, they might not be able to engage in this strategy due to a lack of political will of the respective other parties. In this case, a withdrawal can be an appropriate road of action that could lead to the negotiation of new treaties after the phasing out of old ones, as is the case for India or the SADC. I consider an active participation in the evolution of treaty interpretation as a necessary but only supplementary strategy.

The future will show whether current questions about the legitimacy and appropriateness of the IIR are a mere "*crise de croissance*——a teenager's crisis"[653] of the IIR, or if they result in sustained instability leading up to an eventual collapse.

[653]Stern: Future of International Investment (see n. 103), p. 175, original emphasis.

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Abstract in English

The present thesis answers the question: *What role have intentions of contracting parties to international investment agreements played within investor state dispute settlement practice?* First, the author carves out intentions identified by tribunals throughout the history of ISDS. Furthermore, he shows how parties to proceedings and tribunals have used arguments related to intentions in the context of these proceedings.

Second, the author points out possible political aims related to states' participation in IIAs. Building on Katzenstein and Okawara's methodological "Case for Analytical Eclecticism", he deduces possible state intentions from a variety of theoretical positions. Additionally, he utilizes recent reforms of IIAs as evidence for original intentions of contracting parties. Applying the *realist-processural* and the *postmodern-discursive* paradigms, the author elaborates on the theoretical foundation the interpretation of international investment law is built on.

Main findings are: first, intentions played a central role in ISDS practice. In many cases, arbitral bodies allowed expansive interpretation on the basis of object and purpose, or related concepts. Parties, as well as tribunals, used arguments related to contracting parties' intentions in a myriad of ways. Second, treaty interpretation was not neutral or apolitical. It was rather based on authoritative basic assumptions derived from the *normative* or *instrumental-systematic* paradigms of international law thinking. Third, a broad spectrum of political aims motivated states to sign IIAs; e. g. competition for FDI, power and coercion, or inner-societal cleavages. Fourth, only one of these policy goals was reflected in ISDS practice: the will to attract FDI.

Based on these findings, the author presents and qualifies policy solutions which have the potential to foster the respect of contracting parties' intentions in ISDS practice.

Abstract in German

Die vorliegende Abschlussarbeit beantwortet folgende Frage: *Welche Rolle spielten die Intentionen von Unterzeichnerstaaten von Internationalen Investitionsschutzabkommen (IIA) in der Praxis von Investor-Staat Streitbeilegung (ISDS)?* Zuerst arbeitet der Autor Intentionen heraus, die von Tribunalen im Laufe der Geschichte von ISDS identifiziert wurden. Außerdem zeigt er wie Prozessparteien und Schiedsgerichte im Rahmen von Prozessen mit Intentionen argumentierten.

Zweitens präsentiert der Autor mögliche politische Ziele, die mit der Teilnahme von Staaten an IIAs verbunden sind. Aufbauend auf Katzensteins und Okawaras methodologischem Plädoyer für „Analytischen Eklektizismus“ leitet er aus einer Vielzahl theoretischer Positionen mögliche Staatsintentionen ab. Zusätzlich nutzt er jüngste Reformentwicklungen als Indizien für ursprüngliche Intentionen von Vertragsmitgliedsstaaten. Durch die Anwendung des *realistisch-prozesshaften* und des *postmodern-diskursiven* Paradigmas vertieft der Autor das Verständnis über die Theoretischen Fundamente, auf welche die Interpretation von internationalem Investitionsrecht aufbaut.

Zentrale Ergebnisse sind, dass erstens Intentionen eine ganz zentrale Rolle in der ISDS-Praxis spielten. In vielen Fällen ließen Schiedsgerichte auf der Basis von *object and purpose*, also der Zielsetzung eines IIA oder ähnlichen Konzepten, expansive Interpretationen zu. Prozessparteien und Tribunale fanden für Zielsetzungsargumente eine Vielzahl kreativer Anwendungsmöglichkeiten. Zweitens war die Interpretation von Investitionsschutzverträgen weder neutral noch apolitisch. Vielmehr wurde sie von wirkungsmächtigen Grundannahmen geprägt, die von dem *normorientierten* und dem *instrumentell-systematischen* Paradigma herrühren. Drittens ermutigte eine breites Spektrum politischer Ziele Staaten, IIAs zu unterzeichnen; z. B. der Wettbewerb um ausländische Direktinvestition (FDI), Macht und Zwang, oder innergesellschaftliche *cleavages.* Außerdem findet sich, viertens, nur eines dieser Politikziele in der ISDS-Praxis wieder: die Bereitstellung vorteilhafter Investitionskonditionen.

Aufgrund dieser Erkenntnisse präsentiert und qualifiziert der Autor Politiklösungen, die das Potenzial haben, eine stärkere Berücksichtigung der Interessen von Vertragsmitgliedsstaaten in der ISDS-Praxis zu garantieren.

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