International Investment Law and Sustainable Development: A Political-Economy Theory

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List of abbreviations

ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and People's Rights
ADR	Alternative Dispute Resolution
AGP	Agreement on Government Procurement
ARIO	(Draft) Articles on the Responsibility of International Organizations
ARSIWA	(Draft) Articles on the Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
BGE	Bundesgerichtsentscheid (Decision by the Swiss Federal Supreme Court)
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
CERDS	Charter of Economic Rights and Duties of States
CETA	Comprehensive Economic and Trade Agreement (EU–Canada economic agreement)
CIFA	Cooperation and Investment Facilitation Agreement
CIL	Customary International Law
CTR	Claims Tribunal
DSB	Dispute Settlement Body (of the WTO)
DSU	Dispute Settlement Understanding (of the WTO)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice

ECOWAS	Economic Community of West African States
ECOWAS CCJ	Court of Justice of the ECOWAS
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EUCJ	European Court of Justice
FAO	Food and Agriculture Organisation (of the United Nations)
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FPI	Foreign Portfolio Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GNP	Gross National Product
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBA	International Bar Association
ICA	International Commercial Arbitration
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IIL	International Investment Law
IISD	International Institute for Sustainable Development
IISD Model	IISD Model International Agreement on Investment for Sustainable Development
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation

ILR	International Law Review
IMF	International Monetary Fund
IO	International organisation
IPE	International Political Economy
IPO	Initial public offering
ISDS	Investor-State Dispute Settlement
ITA	International Treaty Arbitration
ITLOS	International Tribunal for the Law of the Sea
IWI	Inclusive Wealth Index
LCIA	London Court of International Arbitration
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MIGA	Multilateral Insurance Guarantee Agency
MNC	Multinational corporation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisaion
NPM	Non-Precluded Measures
OECD	Orgnisation for Economic Co-operation and Development
OPIC	Overseas Private Investment Corporation
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PIL	Public International Law
RCT	Rational-choice theory
RIAA	Reports of International Arbitral Awards
SCC	Stockholm Chamber of Commerce
SCM	Subsidies and Countervailing Measures
SDGs	Sustainable-development goals
TPPA	Trans-Pacific Partnership Agreement (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, US, and Vietnam economic agreement)
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights

TTIP	Trans-Atlantic Trade and Investment Partnership (EU–US economic agreement)
UN	United Nations
UNCSI	United Nations Convention on Jurisdictional Immunities of States and their Property
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNDRD	United Nations Declaration on the Right to Development
UNEP	United Nations Environment Programme
UNTS	United Nations Treaty Series
UNUDHR	United Nations Universal Declaration of Human Rights
UNU-IHDP	United Nations University - International Human Dimensions Programme
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Summaries

Short summary

This work studies the relationship between 'international investment law' and 'sustainable development'. Specifically, this work asks three questions and relies upon the conceptual framework of economics to answer them. First, this work asks whether contemporary IIL is aligned with SD; it finds that contemporary IIL exhibits several SD deficits. Second, this works asks whether alignment of IIL with SD is likely in practice; it finds that States can be expected to have a desire to align IIL with SD if the masses influence state decision-making in the context of foreign-investment policy-making, and that this requires (i) that the masses are aware of IIL's SD deficits and (ii) that these deficits negatively affect their well-being. And third, this work asks how IIL should look like for it to be aligned with SD; it finds that such an alignment requires reformation of both IIL's dispute settlement as well as IIL's applicable (jurisdictional and substantive) norms.

Kurze Zusammenfassung

Diese Arbeit untersucht die Beziehung zwischen 'Investitionsschutzrecht' und 'nachhaltiger Entwicklung'. Genauer gesagt stellt diese Arbeit drei Fragen und braucht das konzeptionelle Gebilde der modernen Ökonomie, um sie zu beantworten. Erstens fragt diese Arbeit, ob das heutige Investitionsschutzrecht mit nachhaltiger

Entwicklung übereinstimmt; sie findet, dass das Investitionsschutzrecht mehrere Defizite in dieser Hinsicht aufweist. Zweitens fragt diese Arbeit, ob es praktisch möglich ist, dass Investitionsschutzrecht mit nachhaltiger Entwicklung in Übereinstimmung gebracht wird; sie findet, dass wir erwarten können, dass Staaten ein Interesse daran haben, Investitionsschutzrecht mit nachhaltiger Entwicklung in Übereinstimmung zu bringen, wenn das Volk staatliches Handeln im Bereich ausländische Investitionen beeinflusst, und dass dies erfordert, dass (i) das Volk über die Defizite Bescheid weiss und (ii) die Defizite das Wohlbefinden des Volkes beeinträchtigen. Und drittens fragt diese Arbeit, wie Investitionsschutzrecht aussehen sollte, um mit nachhaltiger Entwicklung in Übereinstimmung zu sein; sie findet, dass eine solche Übereinstimmung eine Reformation sowohl vom Streitschlichtungsverfahren wie auch von den Normen erfordert.

Court résumé

Ce travail étudie la relation entre le 'droit international de l'investissement' et le 'développement durable'. Spécifiquement, ce travail pose trois questions et repose sur le cadre conceptuel des sciences économiques pour y répondre. Premièrement ce travail demande si le droit international de l'investissement contemporain est aligné avec le développement durable; il trouve que le droit international de l'investissement présente plusieurs déficits à cet égard. Deuxièmement, il demande si l'alignement du droit international de l'investissement avec le développement durable est faisable dans la pratique; il trouve que l'on peut s'attendre à ce que les États ont un désir d'aligner le droit international de l'investissement avec le développement durable si le peuple influence la législation dans le cadre des investissements étrangers, et qu'une telle influence requière (i) que le peuple ait connaissance de ces déficits et (ii) que ces déficits affectent négativement le bien-être du peuple. Et troisièmement, ce travail demande à quoi le droit international de l'investissement devrait ressembler pour qu'il soit aligné avec le développement durable; il trouve qu'un tel alignement requière une réformation de la procédure

de résolution des différends ainsi que des normes applicables (de compétence et de fond).

Part I

Setting the stage

Chapter 1

Introduction

International investment law can be described as the subset of public international law containing the rules dealing with foreign investments. The source of contemporary IIL virtually exclusively amounts to treaties – so-called 'international investment agreements'.[1] In these treaties, sovereign States have consented to grant certain substantive and procedural rights to foreign investors from the other contracting State(s). Most notably, foreign investors have been granted the procedural right to directly file a claim against their host State before an international adjudicative body (specifically: an international arbitral tribunal) based on an alleged violation of one of their substantive rights by their host State.

Sustainable development is understood as requiring consideration of current and future generations' quality of life – with economic, environmental, and social (which includes: cultural and political) dimensions as being relevant for 'quality of life'.[2] Decision-making is said to be aligned with SD if and only if it engages in impartial and rational consideration of the quality of life of all individuals across generations. As such, for a decision, norm, or rule (e.g., IIL) to be aligned with SD, it must be supported by impartial and rational consideration thereof.

Political economy describes the reliance upon the conceptual framework of eco-

[1] For a detailed description of contemporary IIL, see Chapter 5.

[2] For a more detailed treatment of the concept of SD, see Chapter 4.

nomics to the study of state decision-making. And the conceptual framework of economics describes a descriptive (positive) framework for studying real-world phenomena.[3]

1.1 Research questions

This work studies the relationship between 'international investment law' and 'sustainable development'. Specifically, this work asks three questions.

First, this work asks *whether contemporary IIL is aligned with SD*. To answer this question, it holds that 'the rules of contemporary IIL' are provided by the decisions of contemporary IIL's (international) adjudicative bodies and then assesses whether those rules are aligned with SD.

Second, if SD deficits are found, then this work asks *whether alignment of IIL with SD is likely in practice*. To answer this question, it constructs a descriptive (positive) theory of state decision-making in the context of foreign-investment policy-making and then derives from this theory the factual conditions under which we can expect a State to have a desire to behave in accordance with SD.

And third, if SD deficits are found and IIL can be aligned with SD, then this work asks *how IIL should look like for it to be aligned with SD*. To answer this question, it constructs a descriptive (positive) theory of adjudicative decision-making and then relies upon this theory as well as further social-science insights to propose a set of measures (policy prescriptions) that tackle those SD-deficits.

1.2 Importance

This work's reliance upon SD as the overarching normative framework can be motivated on two grounds: it can be argued that SD is synonymous with justice and it can be argued that SD nowadays amounts to the overarching normative objective of the majority of the members of the international community (Chapter 4). Observe that the existing literature tends to simply rely upon 'economic efficiency' (or 'wealth

[3] For a more extensive treatment, see Chapter 2.

maximisation'; Section 4.3.2.4) as the normative criterion; and even where the literature relies upon SD, it tends to simply take its normative value as given. This work therefore not only extends the analysis beyond 'economic efficiency', but also provides a justice-theoretical justification for relying upon SD as the overarching normative criterion.

This work's research questions are important for two reasons. First, IIL has the potential to fulfil several desirable functions and therewith has the potential to further SD (Chapter 3). And second, IIL may not only be SD furthering, but it actually has the potential to be SD hindering (Section 7.1).

Those research questions invariably require a researcher to make real-world causal assumptions. Consequently, to provide sound answers to those questions, it is important to rely upon an empirically-founded internally-consistent descriptive (positive) framework. The conceptual framework of economics (Chapter 2) fulfills those criteria. Furthermore, those research questions also require a researcher to focus on the law in action (i.e., on the decisions/interpretations of adjudicative bodies) because contemporary IIL's applicable norms are formulated in broad and vague terms (i.e., leave a wide interpretational freedom). Observe that the existing literature is under-theorised in this respect; most notably, perhaps, the existing literature is missing both a social-science theory of 'state decision-making in the context of foreign-investment policy-making' and of 'international adjudicative decision-making in the context of foreign-investment-based disputes'.[4]

Finally, the analysis of this work could arguably not be more timely: over the past years, we have been witnessing a backlash by ever more States against contemporary IIL (Section 5.14). Unfortunately, policy advice (whether by academics, IOs, or the public) has tended to be grounded in ideology rather than reason (i.e., rather than based on scientific theories); namely, the policy prescriptions have tended to appeal to, or to be driven by, emotions. Since IIL has the potential to further SD (Chapter

[4]The state of research on 'state decision-making in the context of foreign-investment policy-making' is especially in contrast to the state of research on 'state decision-making in the context of international-trade policy-making'; for an extensive review of both theoretical literatures, see Chapter 9.

For an extensive review of the existing theoretical literature of 'international adjudicative decision-making in the context of foreign-investment-based disputes' see Chapter 12.1.

3), there is a real risk of throwing the proverbial baby out with the bath water – an analysis grounded in reason (i.e., reliance upon an empirically-founded internally-consistent descriptive framework) may reduce this risk.

1.3 Roadmap

Part II answers the first research question (i.e., whether contemporary IIL is aligned with SD) and therewith provides the normative justification of this work. Specifically, it provides a justice-theoretical justification for the normative focus on SD and then assesses contemporary IIL from a SD perspective.

Part III answers the second research question (i.e., whether alignment of IIL with SD is likely in practice) and therewith provides the practical justification of this work. Specifically, it advances a 'non-unitary-state theory of foreign-investment policy-making' and then, based thereupon, studies the conditions under which SD alignment is likely in practice.

Parts IV and V answer the third research question (i.e., how IIL should look like for it to be aligned with SD) and therewith advances a set of policy prescriptions. Specifically, it provides policy prescriptions for IIL's dispute-settlement design as well as for its applicable-norm design.

Finally, Part VI briefly summarises the findings of this work and provides an outlook for future research.

Chapter 2

Overarching descriptive framework

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.
>
> — Oliver Wendell Holmes, Jr.[1]

> 'Law' without effects approaches zero in its meaning ... To know its effect without study of the persons whom it affects is impossible.
>
> — Karl N. Llewellyn[2]

This Chapter presents the elements of the overarching descriptive framework – or 'method of analysis'[3] – relied upon in this work. Specifically, this work builds upon

[1] Holmes (1897), at 469.

[2] Llewellyn (1931), at 1249.

[3] I follow the late Austrian economist Fritz Machlup's distinction between *method* and *methodology*: methods describe the various concepts and techniques that researchers rely upon when constructing theories, whereas methodology describes the philosophical study of those methods. In his own words,

the insights gained by the (descriptive) social sciences to study IIL. Remark that the study of PIL by international lawyers, as opposed to the study of international relations by political scientists, has historically taken the form of doctrinal enquiries;[4] early calls that social-science theories ought to be taken into account by international lawyers can be traced back to the late 1980s.[5]

Social-science theories may help one to better understand the behavioural consequences of some existing norm, the likely behavioural consequences of some norm which is not yet in force, or the norms which the fundamental actors of some system are likely to support. The social sciences can therefore help inform (international) legal scholars on two levels.[6] First, the so-called *external level* (i.e., law making). Social science can help one realise when some norm does not yield the desired behaviour and it can help one design norms that are most likely to yield the desired behaviour; remark that the normative goal (i.e., desired behaviour) is taken as given – the (descriptive) social sciences only contribute to the practical implementation of this goal.[7] Furthermore, social science can also help one better understand which norms are likely in practice, that is, which norms may actually be implemented in practice because the system's fundamental actors support them (e.g., by considering the preferences and incentives of adjudicators, legislators, voters). Second, the so-called *internal level* (i.e., law application). On the one hand, and most naturally, social science enters law application when the norm explicitly refers to social-science concepts; be it in its elements (the norm's 'if'; e.g., 'affecting trade') or its consequences (the norm's 'then'; e.g., 'damage calculation'). On the other hand, and less obviously, it can – should, arguably even must – also enter law application in the absence of such concepts: since social science can help one better understand the behavioural consequences of some norm, it can contribute to a better legal interpre-

"[methodology] provides arguments, perhaps rationalizations, which support various preferences entertained by the scientific community for certain rules of intellectual procedure, including those for forming concepts, building models, formulating hypotheses and testing theories" (Machlup, 1978, at 54 et seq.).

[4] See e.g. Aaken (2012).

[5] Abbott (1989) is seminal for making such a statement.

[6] For a more detailed discussion, see e.g. Aaken (2011).

[7] The 'overarching normative framework' (i.e., sustainable development) adopted in this work is described in Chapter 4.

tation by improving one's utilisation of the teleological interpretation perspective, historical interpretation perspective, or by improving one's weighing between different interests when a weighing rule must be applied (e.g., proportionality principle) as such an application may require consequential reasoning.

The remainder of this Chapter is organised as follows. Section 2.1 describes the core of this work's descriptive framework (i.e., the 'conceptual framework of economics') and motivates its utilisation. Section 2.2 argues that a pluridisciplinary perspective ought to be taken. Section 2.3 argues that the process of norm application is not logical. Section 2.4 provides a descriptive theory of contract design and briefly mentions its normative implications. Finally, Section 2.5 explains why this work may be categorised as a 'political-economy theory'.

2.1 Conceptual framework of economics

This work's descriptive framework fundamentally builds upon the 'conceptual framework of economics'. This framework is traditionally defined by the combination of the concepts of methodological individualism, rational-choice theory (or 'instrumental rationality', 'utility maximisation'), and equilibrium analysis (i.e., game theory).[8] This conceptual framework can arguably be equated with ***rational-choice theory*** because 'game theory' can be seen as an application/extension of rational-choice theory to strategic interactions.

Because there is some misconception about the content of the descriptive model of human decision-making known as rational-choice theory, let it be pointed out that this theory makes no assumptions about a decision-maker's preferences (motivations), beliefs, or information sets – it only says that a decision-maker should be understood as maximising the satisfaction of their preferences given their beliefs (read: should be modelled as instrumentally rational).[9]

[8] Seminally: "The assumptions of maximizing behavior, ... equilibrium, ... form the heart of the economic approach as I see it." (Becker, 1976a, at 5).

[9] Becker (1993), at 385 et seq., "It is a *method* of analysis, not an assumption about particular motivations ... [it] assumes that individuals maximize welfare *as they conceive it*"; Colman (2003), at 141, "Rational decisions or choices are those in which agents act according to their preferences, relative to their

As such, rational-choice theory is mute about the content of preferences, about the formation of beliefs, and about the content of information sets. Specifically, it does not assume: (i) that preferences are fixed over time and allows them to be endogenous; (ii) that preferences are necessarily self-interested; (iii) that beliefs follow Bayesian rationality (i.e., that the updating of beliefs (of 'prior probabilities') in response to new information follows the laws of probability;[10] or (iv) that information sets are complete and/or symmetric.

This work relies upon the 'conceptual framework of economics' (i.e., upon 'rational-choice theory') because: it exhibits *parsimony*;[11] it exhibits *tractability*, and is therefore easily understandable and usable by a wide audience;[12] it exhibits *generalisability*, since it can be applied to a wide range of social phenomena; it exhibits *internal/logical consistency*;[13] and it exhibits significant *empirical consistency*.[14]

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knowledge and beliefs at the time of acting. This is instrumental rationality (or means-end rationality), and it can be traced back to the Scottish Enlightenment writings of David Hume (1739–1740/1978) and Adam Smith (1776/1910)."; Aumann and Brandenburger (1995), at 1161, footnote 2, "We call a person [instrumentally] rational if he maximizes his utility given his beliefs." (emphasis omitted); Mankiw (2012), at 7, "[an instrumentally-]rational decision maker takes an action if and only if the marginal benefit of the action exceeds the marginal cost."

[10] Bayesian rationality is sometimes referred to as 'Bayesian information processing' or 'Bayesian belief updating'.

[11] Arguing that parsimony is valuable (amongst others): King, Keohane, and Verba (1994), at 123, "explaining as much as possible with as little as possible", and at 123, "by limiting the number of explanatory variables".

The idea is reflected in the so-called 'Occam's Razor' which is named after the late English logician William of Occam.

[12] Arguing that tractability is valuable (amongst others): Dekel and Lipman (2010), at 262, "because models do not simply sit on a shelf but are to be used, tractability is valuable".

[13] Arguing that a theory's set of causal assumptions must be mutually consistent with one another and that a theory's causal claims must logically be derived from its causal assumptions (amongst others): King, Keohane, and Verba (1994), at 105.

[14] Arguing that empirical consistency is valuable (amongst others): Popper (2002 [1959]) – "Science is distinguishes from pseudo-science, he [Popper] argued, by its commitment to falsificationism" (Bevir, 2008, at 57).

In spite of what one often hears, rational-choice theory is able to capture the behaviour of participants in controlled experiments (most notably, by assuming non-self-interested preferences): Camerer (2003),

2.2 Pluridisciplinary perspective

> Only fluency across the boundaries will provide a clear view of the world as it really is, not as seen through the lens of ideologies and religious dogmas.
>
> — E. O. Wilson[15]

> nobody can be a great economist who is only an economist—and I am even tempted to add that the economist who is only an economist is likely to become a nuisance if not a positive danger
>
> — Friedrich A. von Hayek[16]

Policy-oriented research – research aiming at providing policy prescriptions – requires taking into account the complexity of the real world, which in turn requires considering the subject of analysis from various perspectives.[17] As such, insights from, amongst others, history, philosophy, political science, psychology, sociology, and economics shall be considered – independently of whether they draw upon controlled experiments or real-world observations and independently of whether they rely upon large-N (quantitative analyses; cross-case (i.e., co-variational) analyses) or small-N (qualitative analyses; case studies) designs.

Although the 'conceptual framework of economics' amounts to the core of this work's descriptive framework, remember that it leaves a lot of freedom and therefore

at 101, "The regularities . . . [observed in experiments] can be explained by maintaining the assumptions that players maximize utility . . . but allowing utility to reflect [for example] a social preference for what others get."

[15] Wilson (1998), at 13.

[16] Hayek (1956), at 463.

Similarly: Heckman (2014), "It takes more than Economics to be a great economist".

[17] Katzenstein and Sil (2008), at 117, "The benefits of embedding scholarship within research traditions—the cultivation of a recognizable professional identity, efficient communication based on shared stocks of knowledge and skills, a common set of evaluative standards linked to explicit methodological assumptions, and the psychological and institutional support provided by fellow members—need to be sacrificed for the purpose of recognizing and framing problems in ways that more closely approximate the complexity of the social world".

allows for insights from a plurality of perspectives. In so doing, this work follows the understanding of economics embraced, most notably, by the late Ronald Coase, John Maynard Keynes, and Friedrich A. von Hayek: "Keynes—like Coase—adhered to the older view that economics is the study . . . employing whatever assumptions seem realistic".[18]

2.3 Legal realism

> The life of the law has not been logic
>
> — Oliver Wendell Holmes, Jr.[19]

> It is frequently stated that if the meaning of a treaty is sufficiently clear from its text, there is no occasion to resort to 'rules of interpretation' in order to elucidate the meaning. Such a proposition is, however, of limited usefulness. *The finding whether a treaty is clear or not is not the starting point but the result of the process of interpretation.*
>
> — Lassa Oppenheim[20]

Legal realism describes a descriptive (positive) theory of norm application which holds that norm application (or 'norm concretisation') always involves *interpretation* and therefore does not simply involve logical reasoning;[21] put differently, it holds that applicable norms always exhibits some textual ambiguity (i.e., some degree of uncertainty about the meaning and scope which was intended by the creators/writers of the norms) and therefore do not deterministically/readily provide the

[18] Posner (2011), at 35.

[19] Holmes (1881), at 1.

[20] Jennings and Watts (1992), at 1267, emphasis added.

[21] Herdegen (2010), "Interpretation is both a cognitive and a creative process. On the one hand, interpretation purports to establish a pre-existing meaning. On the other hand, the interpretative process has a creative dimension. Creative elements flow from the necessary interconnection and balancing of relevant criteria as well as from the selective focus on facts deemed relevant from the interpreter's point of view."

rules that apply in some specific instance.[22] This view of norm application is perhaps best associated with the late American legal scholars Oliver Wendell Holmes, Jr. and Karl Llewellyn.[23] Empirical support for this non-mechanical application is provided by recent quantitative empirical studies (see Chapter 11) finding systematic statistical associations between 'judicial decisions and the personality of judges' as well as between 'judicial decisions and the extrinsic-incentive structure faced by judges'.[24] Further, more direct, empirical support is provided by the real-world existence of dissenting opinions (about the application of given legal norms to some specific facts).

Legal realism is in conflict with 'legal formalism', which holds that norm application amounts to a purely logical process (specifically: logical syllogism);[25] this latter view is, perhaps most notably, captured by the late French political philosopher Montesquieu,[26] and the late Swiss philosopher and international lawyer Emer de Vattel.[27]

Importantly, contrary to what is oftentimes expressed,[28] legal realism does not

[22]For more extensive overviews of legal realism, see instead of many Leiter (1997); Leiter (2001), at 279, "Realism is essentially a descriptive theory of adjudication, a theory about what it is judges really do when they decide cases."

[23]Holmes (1881), at 1, "The life of the law has not been logic"; Llewellyn (1930) at 180, "Within the law, I say, therefore, rules [read: applicable norms] guide, but they do not control decision."

[24]These quantitative empirical studies are sometimes referred to as 'New legal realism': Miles and Sunstein (2008), at 834, "We believe that much of the emerging empirical work on judicial behavior is best understood as a new generation of legal realism ... The New Legal Realists are conducting what Llewellyn and his peers only envisioned—'large-scale quantitative studies of facts and outcome'".

For a critical appraisal within public international law, see e.g. Bodansky (2015), Lang (2015), and Shaffer (2015).

[25]Dunoff and Pollack (2013), at 14, "As early as the 1920s and 19030s, the legal realists powerfully challenged the view that legal doctrine could generate deterministic outcomes in specific legal disputes".

[26]Montesquieu (1748), Book XI, Chapter VI, "Mais les juges de la nation ne sont ... que *la bouche qui prononce les paroles de la loi* ; des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur." (emphasis added).

[27]de Vattel (1758), at para 263, "La première maxime générale sur l'intérpretation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation."

[28]Many critics of legal realism tend to implicitly hold that legal realism implies 'full indeterminacy of applicable norms' (i.e., 'unfettered discretion for adjudicators' or 'adjudicators are free of any external constraints') and criticise legal realism on that count (Leiter, 1997, at 268). Most notable for mistakenly

hold that applicable norms are fully indeterminate: it holds that there exists a finite set of reasonable interpretations of the applicable norms.[29] As such, it holds that some given applicable norms are compatible with a finite set of rules that apply in some specific instance.

Legal realism therefore implies that adjudicators do not simply find the legal rules that apply in some specific instance, but actually create the legal rules within the boundaries provided by the applicable legal norms.

Finally, contrary to a somewhat widespread view,[30] remark that there is no inherent conflict between 'legal realism' and 'legal positivism'. Indeed, legal positivism amounts to a set of conditions that norms must satisfy to be qualified as 'law' – namely, it amounts to a theory about the nature of law (i.e., to a definition of the concept of 'law').[31] As such, legal positivism provides a theory for when 'applicable

describing legal realism in that manner: Dworkin (1997), at 3, "[under legal realism,] judges actually decide cases according to their own political or moral tastes [read: free of any external constraints], and then choose an appropriate legal rule as a rationalization".

[29] Leiter (2001), at 284, footnote 24, "Strictly speaking, the claim is that the class of legal reasons [read: the applicable norms] underdetermines the outcome: the class justifies more than one, though not simply any outcome." Putting it nicely: Abi-Saab (2011), at para 40, "words have an intrinsic meaning, hence a limited and limiting one, however large and vague it may be (although there is always a penumbra around the limits which provides the margin of interpretation). Without limits, words would be meaningless, because undistinguishable from one another."

[30] Seminal for spreading this mistaken view is the late British legal philosopher H. L. A. Hart (Hart, 1961, at 124 et seqq.). For a brief summary of Hart's mistaken reasoning: Leiter (1997), at 270, "The Realists, on Hart's reading, gave us a 'Predictive Theory' of law, according to which by the concept 'law,' we just mean a prediction of what the court will do. Hart easily demolished this Predictive Theory of Law. For example, according to the Predictive Theory, a judge who sets out to discover the 'law' on some issue upon which she must render a decision is really just trying to discover what she will do, since the 'law' is equivalent to a prediction of what she will do ... Yet Hart ... misread the Realists as answering philosophical questions of conceptual analysis, questions about what particular concepts mean—the questions that Hart himself was concerned to answer."

This mistaken understanding mainly stems from a confusing statement by the late American legal scholar and central advocate of legal realism Oliver Wendell Holmes, Jr.: "what the courts will do in fact ... are what I mean by the law" (Holmes, 1897, at 460 et seq.).

[31] For a brief description of 'legal positivism', see instead of many Green (2009), "Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits ... The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral ... It says that

norms' can be qualified as 'applicable legal norms' and therewith a theory for when the 'finite set of rules that apply in some specific instance and that are compatible with the applicable norms' can be qualified as 'finite set of legal rules'.

2.4 Contract theory

Contract theory (or the 'economic analysis of contracts') is the study of contract design through the lens of rational-choice theory.[32] To start off, a couple of definitions are in order.

A contract's applicable norms (read: the obligations and rights ex ante specified in the contract) may be formulated more or less broadly/vaguely; as such, within contract theory applicable norms are characterised according to where they lie between *rules* (or 'hard norms') and *standards* (or 'soft norms'),[33] where the former are formulated in narrow and precise terms (leaving little interpretational freedom) and the latter are formulated in broad and vague terms (leaving large interpretational freedom).[34]

A *complete (contingent) contract* is defined as a contract which de facto ex ante specifies the rules for every possible future contingency (i.e., for every possible future state of the world).[35] An *incomplete contract* is thus defined as a contract which de facto does not ex ante specify the rules for every possible future contingency.[36]

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they do not determine whether laws or legal systems exist."

[32] This conceptual framework has been applied to study the design of PIL generally; see e.g. Dunoff and Trachtman (1999); Scott and Stephan (2006). Recently, it has also been applied to study the design of IIL specifically; see seminally, Aaken (2009b); see as well Ortino (2013).

[33] Remark that lawyers use those concepts differently.

[34] As such, this work follows Kaplow (1992), at 560, "This Article will adopt . . . a definition, in which the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act." (emphasis omitted)."

[35] Shavell (1980), at 466; Scott and Triantis (2005), at 189, "one that [ex ante] specifies obligations in each possible state of the world".

[36] As such, this work follows Tirole (1999), at 753, "a contract is incomplete if it does not exhaust the contracting possibilities envisioned in the complete [contract]".

Remark that some scholars (confusingly in my view) instead define an 'incomplete contract' by reference to 'optimality': Scott and Triantis (2005), at 190, "A contract is incomplete if it fails to provide

'De facto' because even though a contract may de jure ex ante specify the rules for some future contingency, such de jure specification may not exist de facto because the 'future contingency' may not be identifiable when it occurs.

Section 2.3 held that an applicable norm, whether in the form of a rule or a standard, always exhibits some degree of textual ambiguity. Hence, it can be argued that real-world contracts are always 'incomplete': their applicable norms can never ex ante de facto specify the rules because they always leave some interpretational freedom so that the rules are only de facto specified ex post.[37]

2.4.1 Fundamental problems faced in contracting

In the real world, parties concluding a contract face various problems.[38]

On the one hand, there are ex ante problems.[39] First, there may be a problem of *incomplete information regarding the future*: the parties may not foresee (e.g., due to limited cognitive abilities) all possible future contingencies. And second, there may be a problem of *variability in the future*: even if the parties are able to foresee all future contingencies, it may be impossible (e.g., due to time limitation) to consider all of them because there are simply too many possible future contingencies.

On the other hand, there are ex post problems.[40] First, there may be a problem of *private information of some party*: the parties (and third parties) may in the future not always be able to observe with certainty which contingency they are in (ex post non-observability and ex post non-verifiability) because they cannot observe

for the efficient set of obligations in each possible state of the world."; Scott and Stephan (2006), at 76, "[incomplete contracts] fail to discriminate between states of the world that optimally call for different obligations".

[37] Holding a different view: Scott (2006), at 291, "Parties can easily write ... [a] complete contract simply by specifying, for example, that no matter what circumstance may arise in the future, the buyer must always pay the seller the contract price."

[38] Economists tend to characterise these 'problems' as 'transaction costs' (Scott and Triantis, 2005, at 190).

[39] Tirole (1999), at 743, referring to these problems as 'unforeseen contingencies' and 'cost of writing contracts'.

[40] Tirole (1999), at 744, referring to these problems as 'cost of enforcing contracts'.

the actions of some party (e.g., that party's level of effort).[41] Second, there may be a problem of *asymmetric information with third parties*: although the parties are able to observe which contingency they are in, a third party may not be able to do so with certainty (ex post non-verifiability). And third, there may be a problem of *motivations/preferences of third parties*: third parties' interpretation of a contract's applicable norms may be influenced by their underlying preferences, and third parties may vary with respect to their underlying preferences (e.g., they may exhibit different political-ideology preferences, or may exhibit a self-interested preference).[42]

2.4.2 Optimal contracts

An optimal contract is defined as a contract which is *Pareto optimal* (or 'Pareto efficient'); namely, a contract is said to be 'optimal' if there exists no other contract which ex ante makes at least one party to the contract better off and no party worse off.[43] The optimal design of a contract is function of the relative severity of the problems identified in Section 2.4.1.

'Rules' (i) increase the potential costs associated with 'incomplete information regarding the future' because solely utilising rules while not specifying them for every possible future contingency increases the likelihood that the contract will not yield the rules in every possible future contingency which the parties would have wanted when they wrote the contract (increases ex post costs) since doing so reduces the likelihood that the contract exhibits the parties' intention for those future contingencies for which the contract does not de jure ex ante specify rules;[44] (ii) increase the potential costs associated with 'variability in the future' because solely utilising rules increases the costs of writing the contract (increases ex ante costs) since do-

[41] Such a situation is known as a 'moral-hazard setting'; see e.g. Martimort (2008).

[42] Tirole (1999), at 761 et seq., "Scant attention has been paid in the literature to the enforcement mechanism. In practice, contracts are enforced by human beings ... they may not have the proper background ... they may also have their own preferences ... which they may embody in their decisions".

[43] This formulation is equivalent to 'if there exists no other contract that ex ante makes the parties jointly strictly better off' (Shavell, 1980, at 467) because 'jointly strictly better off' implies that the parties which are better off can more than compensate those which are worse off.

[44] Scott and Stephan (2006), at 77.

ing so requires ex ante specifying rules for every possible future contingency; and (iii) reduce the potential costs associated with 'motivations/preferences of third parties' because solely utilising rules increases the likelihood that the contract will yield the rules which the parties wanted when they wrote the contract (reduces ex post costs) since doing so reduces the likelihood that third parties ex post misapply (misinterpret) the contract when called upon to interpret/enforce it as rules reduce the uncertainty about the meaning and scope of the contractual norms (i.e., reduce the interpretational freedom).[45] The opposite holds for 'standards'.

Hence, the more severe ceteris paribus the 'incomplete information regarding the future' and/or the 'variability in the future', the more a contract should be formulated in terms of standards;[46] and the more problematic ceteris paribus the 'motivations/preferences of third parties', the more a contract should be formulated in terms of rules.

2.5 Political economy

> Over its long lifetime, the phrase 'political economy' has had many different meanings. For Adam Smith, political economy was the science of managing a nation's resources so as to generate wealth. For Marx, it was how the ownership of the means of production influenced historical processes.
>
> — Barry R. Weingast and Donald A. Wittman[47]

For the late Scottish philosopher Adam Smith, political economy describes a normative endeavour (i.e., to maximise a nation's wealth); implicitly, therefore, it describes a positive (causal) theory of how state decision-making impacts economic progress – the state as the explanatory variable (*explanans*).[48] For the late German philosopher

[45] Aaken (2009b), at 517.

[46] Holding so: Masten and Saussier (2002), at 286.

[47] Weingast and Wittman (2006), at 3.

[48] See seminally, Hempel and Oppenheim (1948) and Hempel (1965), who define 'causal laws' as

Karl Marx, political economy describes a positive (causal) theory of how the structure of society impacts state decision-making – the state as the dependent variable (*explanandum*).

In this work, the term 'political economy' (also known as 'political economics') is understood as describing the reliance upon the *conceptual framework of economics* (Section 2.1) to the study of state decision-making (whether as explanans or as explanandum).[49] The concept of *state decision-making* captures all forms of centralised decision-making (i.e., all forms of 'policy-making'; all forms of 'public choice'); as such, it captures formal-institution-making (including 'formal-constitution-making', '(non-customary-)law-making', 'regulation-making') as well as informal state behaviour (e.g., the act of going to war). Notice that the subfield wherein state decision-making amounts to the dependent variable is sometimes referred to as 'public-choice theory' by economists.[50]

Consequently, this work may be categorised as a 'political-economy theory' because the core of its descriptive framework is provided by the 'conceptual framework of economics' (Section 2.1) and because it studies state decision-making (in the context of foreign-investment policy-making).

Addendum: international political economy For the sake of clarity, IPE does not describe a specific conceptual framework like 'political economy', but describes

statements containing *explanans* (a set of explanatory/causal factors) and an *explanandum* (a dependent factor).

[49]This work thus follows: Weingast and Wittman (2006), at 3, "In our view, political economy is the methodology of economics applied to the analysis of political behavior and institutions."; Persson and Tabellini (2000), at 2, "It is popular to refer to research in this area [political economics] as 'political economy.' ... we borrow the main tools of analysis from economics, modeling policy choices as the equilibrium outcome of a well-specified strategic interaction among [instrumentally-]rational individuals", that is, equilibrium analysis and utility maximisation.

[50]The central founding father of public-choice theory is, arguably, the American Nobel laureate in economics James Buchanan (Buchanan, 1949). The other, generally accepted, founding fathers are Duncan Black (Black, 1948), Anthony Downs (Downs, 1957), and George Tullock (Buchanan and Tullock, 1962). For a short summary of the early evolution of public-choice theory, see e.g. Leight (2010), at 214 et seqq. and 217 et seq.

Note that James Buchanan, in contrast to the other ones, was mainly normative rather than descriptive.

a substantive topic of enquiry – as a subject matter, IPE allows for any conceptual framework.[51] Roughly speaking, IPE captures the study of the politics of international economic exchanges; as such, it is concerned with the causal factors underlying a State's international-economic policies (e.g., opening or closing its economy to cross-border flows) as well as with the consequences of such policies.

[51] Lake (2006), at 758, "IPE is a substantive topic of enquiry, rather than a methodology in which economic models are applied to political phenomena—although scholars are, in fact, increasingly drawn to such methods"; Ravenhill (2008), at 542, "[IPE exhibits] a tolerance for eclecticism in theoretical approaches, methodologies, and ontology".

Chapter 3

Desirability of international investment law

This Chapter discusses why IIL (which includes IIAs) is relevant for this work's overarching normative framework (i.e., sustainable development; Chapter 4). Specifically, it shows that IIL exhibits several functions that are desirable because they each have the potential to further SD.

The Chapter is organised as follows. Section 3.1 shows that IIL is desirable because it may reduce the political risk faced by foreign investors. Section 3.2 shows that IIL is desirable because it may further norm internalisation in the world. And Section 3.3 shows that IIL is desirable because it may help holding foreign investors accountable for their misbehaviours in host countries.

3.1 Risk-reduction instrument

Investors (including 'foreign investors') arguably care about State decision-making in the future because a State's future policies may substantially affect the expected discounted profitability of their investments – the riskiness created by State decision-making is oftentimes referred to as *political risk*. Specifically, a State's future poli-

cies substantially affect the expected discounted profits of physical investments since they tend to involve sunk costs: such investments generally cannot be moved (out of the country) and furthermore, due to their specificity, are difficult to sell (i.e., ex-post illiquidity) and to be put to other uses (and even if they can be put to other uses, this would not be without substantial costs).

In the context of foreign investments, this political risk may for instance take the form of: restrictions on repatriating profits through restrictions on the capital account; higher taxes; or forbidding certain business activities.[1]

Trivially, this political risk arises if one is not convinced that the State is well intentioned and lies to investors; namely, when one expects the State to engage in 'regulatory opportunism'.[2] Importantly, however, this political risk arises even in the absence of bad intentions if States are solely motivated by (material or survival) self-interest because States may then face a 'time-inconsistency problem': although a promise to behave in a certain way in the future may be self-interest maximising for the State before the investment is made (i.e., the promise is well-intentioned), once the investment is made (i..e, once the investment is 'sunk') keeping that promise may no longer be self-interest maximising for the State.[3] Both of these sources of political risk occur because the State by itself cannot credibly commit to fulfilling a promise in the future since a State by itself cannot bind itself.[4]

In the following, it is argued that (i) political-risk reduction is desirable (in this work: SD furthering)[5] for two reasons; and (ii) that IIL is desirable because it has the potential to bind a State to its promises (i.e., to function as a commitment instrument)

[1] Büthe and Milner (2009), at 181.

[2] Howse (2011), at 3, "regulatory opportunism, [namely,] luring the investor into the country with promises of a stable and favorable regulatory framework, only to alter that framework to the investor's disadvantage, or threaten to do so in order force renegotiation of the terms and conditions of the investment, after the investment is established".

[3] Regarding States' time-inconsistency problem (sometimes also referred to as 'dynamic-inconsistency problem') generally, see seminally Kydland and Prescott (1977).

[4] Guzman (1998), at 659, "Regardless of the assurances given by the host before the investment and regardless of the intentions of the host at the time, the host can later change the rules if it feels that the existing rules are less favourable to its interests than they could be."

[5] See Chapter 4.

and therewith reduce the political risk faced by foreign investors (i.e., to function as a risk-reduction instrument).[6]

3.1.1 Intrinsic value of political-risk reduction

The reduction of political risk may be SD furthering for its own sake; namely, an increase in the private-property protection of investors may be SD furthering for its own sake.[7]

IIL may have such intrinsic value: IIL may reduce the political risk faced by foreign investors through two channels, through its ex post effects and through its ex ante effects.

3.1.1.1 Ex post: voluntary monetary compensation

IIL may provide States with incentives to voluntarily pay monetary compensation for certain State behaviours adversely affecting foreign investors if these behaviours amount to violations of IIL-based obligations. Indeed, a violation of a PIL-based obligation (i.e., a violation of a State's promises vis-à-vis other States) creates potential future costs and voluntarily paying monetary compensation may allow a State to reduce these violation costs.

We can classify these violation costs into the following four categories: retaliation costs, reciprocity costs, reputation costs, moral costs. The first three violation costs all involve some form of external sanctioning,[8] and the fourth violation

[6] UNCTAD (2012a), at 37, "From an investor's perspective, IIAs [and therewith IIL] essentially act as an insurance policy".

Some commentators view the political-risk reduction as IIL's principal raison d'être: Vandevelde (2000), at 488, "the principal contribution of the BIT is . . . reducing risk to investors".

[7] This follows from observing that doing so increases investors' quality of life by increasing their 'economic security'. Whether doing so is SD furthering requires impartial and rational consideration of all SD-relevant aspects; see Section 4.6.

Remark that the 'intrinsic value' of political-risk reduction has mostly been neglected by IIL scholars: Bonnitcha and Aisbett (2013), at 700, "our view is that the existing debate about IITs is perhaps too concerned with the question of FDI flows [i.e., whether IIAs increase FDI flows]".

[8] For a detailed description of these three violation costs, see Guzman (2008), at 33 et seqq.

cost involves an internal sanctioning (through some internal moral norm holding that 'promises ought to be kept');[9] note that States motivated solely by (material or survival) self-interest only exhibit the first three of these potential costs.

The first three violation costs may result from the behaviour of other States and/or foreign investors. In other words, other States and/or foreign investors may sanction the State for its violation: the former because a violation of PIL-based obligation may entail retaliation by other States (retaliation), may make other States renege on their promises as well (reciprocity), and/or may lead other States to refuse to cooperate in the future (reputation); and the latter because a violation of a PIL-based obligation, and especially of an IIL-based obligation, may lead foreign investors to avoid the violator as a host country in the future (reputation).

Empirical evidence Empirical data suggests that foreign investors sanction States for a violation of their IIL-based obligations. Indeed, an empirical study finds that a State experiences a reduction of FDI inflows for the next 5 years when a States sees a case filed against it before ICSID, loses a case before ICSID, or settles a case that was filed before ICSID; the study furthermore finds that the reduction associated with a lost case is more than twice as large as the reduction associated with a settled case; and the study finds that the reduction associated with a lost case and a settled case is more than twenty respectively ten times larger than the reduction associated with a filed case.[10] Foreign investors therefore seem to consider both the filing of a case and the losing/settling of a case in their foreign-investment decision-making.[11]

[9] Holding that States exhibit such a compliance preference: Franck (1990), Chayes and Chayes (1993), and Koh (1997).

[10] Allee and Peinhardt (2011), at 423 and 425 et seq., find, based on a panel-data analysis of FDI inflows into all non-OECD States between 1984 and 2007 (1796 observations), that "FDI inflows decrease as the number of pending ICSID disputes against a government increases ... [and] that governments also experience notable FDI losses as the number of ICSID disputes filed in the past two and past five years increases".

[11] Allee and Peinhardt (2011), at 425, "At one level, investors punish governments who merely appear as ICSID respondents because this suggests noncompliance with investment rules. In addition, they severely punish governments who later are more conclusively deemed by an ICSID panel to have violated their commitments."

The literature lacks a systematic empirical analysis of voluntary monetary compensation by States for violations of IIL-based obligations. And yet, investment arbitration counsels and arbitrators, unsurprisingly, tend to hold (based on anecdotal evidence) that compliance with adverse awards (read: voluntary monetary compensation) is the norm rather than the exception.[12] However, we know for instance that Argentina has long refused to comply with adverse awards in the amount of 400 million USD rendered by IIL-based adjudicative bodies.[13]

3.1.1.2 Ex post: involuntary monetary compensation

Contemporary IIL is an exception within PIL in that it provides for an *external enforcement mechanism*. Hence, a violation of an IIL-based obligation creates potential future costs beyond those discussed in Section 3.1.1.1 in the form of future involuntary monetary payments.

Indeed, contemporary IIL provides foreign investors with a neutral dispute-resolution mechanism in the form of an extra-jurisdictional institution (by giving them the right to pursue a claimed violation of an IIL-based obligation before international arbitral tribunals) and also allow foreign investors to enforce those awards against certain assets of the violating State (roughly speaking, its commercial property) in virtually any national jurisdiction around the world – namely, they provide for extra-jurisdictional dispute resolution and de jure enforcement of those decisions.[14] In so doing, contemporary IIL lets a State's foreign assets become a (de facto) collateral serving as protection to foreign investors.

[12] Holding so: Born (2012), at 835, footnote 238, "Although there is no systematic data, anecdotal evidence indicates that states have virtually always satisfied ICSID and BIT awards against them, though in some instances they have negotiated the amount and terms of payment."

[13] Investment Arbitration Reporter (2011) notes that by 2011, Argentina had still not complied with the awards against it amounting to over 400 million USD (plus interest); these awards, most notably, include CMS Gas Transmission Company in 2005 (133.2 million USD award), Azurix in 2006 (165 million USD award), LG&E in 2007 (57.4 million USD award), and Vivendi Universal in 2007 (105 million USD award).

[14] Regarding extra-jurisdictional dispute resolution, see Section 5.4. And regarding de jure enforcement of their decisions, see Sections 5.2.7 and 5.2.8.

Empirical evidence The literature lacks a systematic empirical analysis of involuntary monetary compensation by States for violations of IIL-based obligations; namely, an analysis of the de facto enforcement of the award in case of non-compliance by the loosing State.

We know that some prevailing claimants in IIL-based adjudications against Argentina were able to temporarily seize (in Ghana) an Argentine navy training ship and to seize (in the United States) shares belonging to a privatised Argentine bank of a value of USD 90 million which were held by a New York trustee.[15] Such successful de facto enforcement in foreign jurisdictions, however, seems to be the exception rather than the rule.

Indeed, one of these prevailing claimants unsuccessfully tried freeze Argentina's assets, in the amount of USD 300 million, at the Bank of International Settlement in Basel.[16] Furthermore, we also know that in 2013, Argentina was able to settle 5 hitherto non-complied-with awards against itself (which arose between 2005 and 2008) in the amount of 677 million USD for 506 million USD in the form of Argentine (sovereign) bonds – which suggests that these claimants were hitherto unsuccessful in de facto enforcing their awards.[17] We also know that a German foreign investor has unsuccessfully tried to de facto enforce its 2.3 million USD award against Russia for over 12 years.[18] De facto enforcement in foreign jurisdictions might actually become even more difficult in the future if Venezuela's repatriation of foreign assets is of any representativity.[19]

Remark, however, that even though full de facto enforcement in case of non-

[15] Economist (2014a).

[16] The Swiss Federal Supreme Court decided not to lift the Bank of International Settlement's enforcement immunity; see BGE 136 III 379.

[17] Bloomberg (2013).

[18] See e.g. Kryvoi (2011). The case in question is *Sedelmayer v Russian Federation*, International Court of Arbitration at the Chamber of Commerce in Stockholm, Award, 7 July 1998 (Germany–Russia BIT).

[19] Ripinsky (2012), at 12, "The government has already moved its gold reserves from foreign banks to Caracas (160 tons valued at nearly US$9 billion); it was also reported as preparing to transfer US$6 billion in cash reserves held in European and U.S. banks to Russian, Chinese and Brazilian banks. The latter, presumably, are seen as less likely to accommodate freezing orders and to facilitate the enforcement of arbitral awards against Venezuela." (footnotes omitted).

compliance may prove difficult, foreign investors can pose some serious problems to the non-complying State: Argentina, for instance, had to be careful where it lands its presidential plane.[20]

3.1.1.3 Ex ante: modification of State behaviour

Sections 3.1.1.1 and 3.1.1.2 showed that a violation of an IIL-based obligation creates potential future costs; namely, potential costs associated with non-compliance, in the form of voluntary monetary payments, and in the form of involuntary monetary payments.

These future potential costs may let a State ex ante (i.e., before a violation of an IIL-based obligation) modify its behaviour because they increase the relative costs of certain behaviours; namely, because they increase the potential future costs of engaging in behaviours which lead to a violation of an IIL-based obligation. In so doing, IIL may de facto reduce the 'policy space' of States by making certain policies no longer de facto available to the State (through the increase in the potential future costs associated with enacting those policies).

Empirical evidence There is some empirical support that IIL has sometimes led to a de facto reduction in policy space in the context of human-rights issues: New Zealand has announced that it would wait with the introduction of plain-packaging-tobacco laws until the resolution of the IIL-based claim against Australia's introduction of such laws.[21] A recent empirical study, however, suggests that IIL has only yielded limited de facto reduction in policy space in the context of health, safety, and environmental regulation.[22]

[20] Economist (2014d).

[21] See e.g. Bonnitcha (2014), at 126 et seq. The case in question is *Philip Morris Asia Limited v. Australia*, UNCITRAL, PCA Case No. 2012-12, Award pending (Australia–Hong Kong BIT).

[22] Côté (2014), at 16, based on a comparative case-study approach, "Case studies focused first on NAFTA Chapter 11 on Investment's impact on the regulatory policy development process in Canada [between 1998 and 2013] in the area of health, safety and the environment and second on the impact of IIAs on tobacco control regulation globally."

3.1.2 Instrumental value of political-risk reduction

The reduction of political risk may also be instrumentally SD furthering; namely, an increase in the private-property protection of investors may increase investments and may therewith be SD furthering because it positively contributes to other SD-relevant aspects.[23]

IIL may have such instrumental value: IIL may positively contribute to other SD-relevant aspects because it may reduce the political risk faced by foreign investors (Section 3.1.1), may therewith increase foreign-investment flows by influencing foreign-investment decision-making, which in turn may positively contribute to other SD-relevant aspects.

Hence, two causal empirical assumptions underlie IIL's instrumental value: IIL influences foreign-investment flows; and foreign-investment flows positively impact SD.

3.1.2.1 Empirical evidence: IIL and foreign-investment flows

Empirical evidence (presented below) suggests that contemporary IIL has not influenced foreign-investment decision-making – namely, that it has not influenced international-investment flows.

It is, however, important to realise that simply because contemporary IIL has failed to influence international-investment flows does not imply that IIL cannot influence them. Several reasons can explain IIL's hitherto weak empirical record: we can reasonably expect foreign investors wanting to first to see whether IIL is actually capable of reducing political risk (Section 3.1.1) before taking IIL seriously in their foreign-investment decision-making; and we cannot exclude the possibility that contemporary IIL does not maximise IIL's potential for reducing political risk (i.e., contemporary IIL may not be optimally designed to reduce political risk).[24]

[23] For a brief summary of the SD-relevant aspects, see Section 4.6.

[24] Section 14.6 contains policy prescriptions aiming at improving IIL's de facto enforcement and therewith aiming at improving IIL's political-risk reduction.

Quantitative empirical evidence Large-N empirical studies (i.e., co-variational analyses) find widely diverging results: some find that BITs substantially impact FDI flows, others find a weak impact, and yet others find no statistically significant impact at all.[25] A couple of studies have found that the positive impact on FDI flows found in several empirical studies becomes statistically insignificant when the estimation strategy is slightly changed or the possibility of reverse causality is controlled for.[26] Empirical studies do not seem to find that BITs with market-access provisions (in addition to post-establishment protections) and/or with consent to investor-State arbitration have a stronger impact on FDI flows.[27]

Remark that the aforementioned empirical studies do not separate the effects for different sectors or for different investment sizes.[28] The former is problematic because different sectors may exhibit different levels of political risk (e.g., because some sectors are more politicised). And the latter is problematic because international arbitration may (due to its costs) not be worth relying upon for small investors, and very large investors may be able to sign investor-State contracts with the same or better conditions because of their bargaining power; that is, small and very large investors are more likely to disregard the existence of IIL when making their foreign-investment decisions.

Qualitative empirical evidence Surveys seem to suggest that investors have not taken IIL very much into account when making foreign-investment decisions.[29] For instance, BIT negotiators tend to say that they only receive inquiries about BITs after

[25] These empirical studies include: Hallward-Driemeier (2005), who finds a negative effect; Neumayer and Spess (2005), who find a large positive effect; Salacuse and Sullivan (2005), who find a modest positive effect; Yackee (2008a), who finds no statistically-significant effect; Kerner (2009), who finds a large positive effect; Tobin and Rose-Ackerman (2011), who find a positive effect on FDI inflows and that the size of this effect increases with the quality of the legal and economic environment of the host country; Kerner and Lawrence (2014), who find a modest positive effect for fixed-capital FDI (or 'sunk FDI') and little to no effect for non-fixed-capital FDI.

[26] For a critical analysis of these empirical studies, see e.g. Poulsen (2010), at 543 et seq.; Yackee (2011), at 405 et seqq.

[27] For a critical analysis of these empirical studies, see e.g. Poulsen (2010), at 545 et seq.

[28] Pointing out these limitations: Poulsen (2010), at 546.

[29] For a critical analysis of these surveys, see e.g. Poulsen (2010), at 548 et seqq.

the foreign-investment decision is made;[30] and in-house counsels at large US corporations tend to say that BITs do not play a big role in their corporations' foreign-investment decisions.[31]

However, empirical evidence also suggests that foreign investors seem to recognise (although arguably not with much confidence) that IIL may possibly reduce their political risk: foreign investors tend to channel/structure their foreign investments so as to have a BIT partner as a home State; and some foreign investors wait with their planned foreign investments until a BIT is signed.[32]

3.1.2.2 Empirical evidence: Foreign-investment flows and SD

> During the heyday of the 'Washington consensus,' conventional wisdom held that foreign direct investment was 'good' for development (as long as the foreign firms did not engage in flagrant worker abuse or environmental pollution), and the more the better . . . The accumulated evidence shows that the Washington consensus is fundamentally flawed
>
> — Theodore H. Moran[33]

Empirical evidence (presented below) indeed suggests a more differentiated picture: foreign-investment flows have different impacts on the host State depending on their type and depending on the host country's local conditions.[34] This empirical evidence

[30] Poulsen (2010), at 551, "When I interviewed BIT-negotiators in capital-exporting countries, all thus confirmed that while they receive direct requests from investors about BITs on occasion, such requests are relatively rare and investors typically inquire about BITs only *after* the investment decision has been made."

[31] Yackee (2011), at 400, finds, based on a mail-based survey of in-house counsels at large US-based corporations, that "general counsel report relatively low corporate familiarity with, or appreciation of, BITs as risk-reducing devices".

[32] See e.g. Poulsen (2010), at 541, "This is confirmed by reports of treaty shopping, for instance, when investors choose to invest from countries that have a BIT with the host country rather than investing from their home country . . . Similarly, anecdotal reports [suggest] that some investors have postponed already-planned investments until BITs were in place."

[33] Moran (2006), at 1 et seq.

[34] Observe, however, that most empirical studies do not disaggregate foreign investments: Moran

suggests that foreign-investment flows have the potential to further SD because certain types of foreign investments, under certain local conditions, can reasonably be expected to be SD furthering.

Foreign investment in extractive industries This type of foreign-investment flows is not readily SD furthering for the host country: they produce resources for the host State (which are, however, only desirable if the population as a whole benefits from them); they produce limited vertical or horizontal externalities/spillovers because exploitation of natural resources requires no functioning economy;[35] they may lead to a so-called 'economic resource curse' (or 'Dutch disease);[36] they are likely to have a negative impact on the environment;[37] and they may lead to food shortages in the host country.[38] An empirical study suggests that such foreign-investment inflows

(2013), at 30, "[these differences are, however,] consistently ignored by many in the economics community ... the standard body of economic literature aims to find a statistically significant relationship between aggregate FDI flows and some measure of host country welfare, productivity or growth".

[35] Stiglitz (2002), at 72, "development is a transformation of society. An investment in a mine—say in a remote region of a country—does little to assist the development transformation"; Hirschman (1970b), at 110, "The grudge against what has become known as the 'enclave' type of development is because of this ability of primary products from mines, wells, and plantations to slip out of a country without leaving much of a trace in the rest of the economy."

[36] The 'economic resource curse' describes the situation wherein the existence of natural resources draws resources from other parts of the economy (physical and human capital) and yields currency appreciation – the ensuing lack of competitiveness of the other parts of the economy (especially exporting ones) produces an undiversified economy that is very vulnerable to adverse natural-resource shocks.

Stiglitz (2006), at 148, "Before the oil boom three or four decades ago, Nigeria was a major exporter of agriculture produce. Today it is a major importer. Before Venezuela became a major exporter of oil, it was a major exporter of high-quality chocolate (it still produces some chocolate)."; Sharma (2013), at 67, "The strong demand for Brazilian coffee, steel, and iron ore drives up the value of the real, which makes all other Brazilian exports more expensive. That is hollowing out Brazilian factories, which can no longer find customers for their increasingly expensive exports ... [Furthermore,] the strong real gives the Brazilian consumer greater purchasing power: the total value of imports is rising faster than exports".

[37] Moran (2011), at 6.

[38] Zhan (2013), at 18, "Foreign investment in agricultural production, for example, has given rise to concerns about land grab and aggravation of food shortages in host countries. And foreign investment in extractive industries has increasingly come under pressure following soaring global commodity prices." (footnote omitted).

have arguably tended to be SD hindering: it finds that their existence has significantly reduced the per capita nutrient-consumption average in developing countries.[39]

This type of foreign-investment flows is likely to be SD furthering for the home country because it increases the supply and lowers the prices of natural resources in the home country.[40]

Foreign investment in infrastructure This type of foreign-investment flows is likely to be SD furthering for the host country: the quality of the infrastructure seems to be a central determinant of a country's economic development (i.e., infrastructure naturally produces externalities/spillovers);[41] and the quality of the infrastructure seems to be better (in developing countries at least) when it is privatised.[42]

This type of foreign-investment flows is unlikely to be SD hindering for the home country because it is unlikely to adversely impact the home country beyond potentially lowering investments therein.

Foreign investment in manufacturing and assembly This type of foreign-investment flows may be SD furthering for the host country: they may bring the host country directly to the cutting edge of the latest technology and best prac-

[39] Mihalache-O'keef and Li (2011), at 84 et seq., find, based on a panel-data analysis using real-world data of FDI inflows between 1981 and 2001 into a sample (determined by data availability) of 56 developing and transition economies, that FDI in extractive industries reduce both per capita caloric consumption and per capita protein consumption; and at 81, "it is worth noting that changes in per capita nutrient-consumption averages tend to reflect closely changes in the consumption of lower income groups, under the reasonable assumption that the high income group typically gets the nutrition it needs".

[40] Moran (2011), at 99.

[41] Instead of several, see Moran (2011), at 25, 63 percent of empirical studies conducted between 1989 and 2007 find a statistically significant correlation between infrastructure and economic growth; the effect seems to be stronger for developed States; Moran (2013), at 39, "Reliable supplies of electricity, water and telecommunications repeatedly show themselves to be key components of the World Bank's 'doing business' indicators. High marks for these services, plus efficient road, port and airport facilities, are central to the growth of a robust indigenous business sector ... for the attraction of foreign investors ... and for the development of FDI supply chains and backward linkages deep into the host economy."

[42] See e.g. Moran (2011), at 26, "evidence from telecommunication, electricity, water, and sanitation sectors suggests that access for lower segments of the population in Uganda, Bolivia, Gabon, and Peru increased with privatization".

tices in production and control (through knowledge and technology transfers) – they are especially likely to do so when foreign investments are made in the context of global-supply chains;[43] they may produce vertical externalities/spillovers (backward linkages) by requiring quality improvements of local suppliers;[44] they may produce horizontal externalities/spillovers by spreading (involuntarily) the transferred knowledge and technology in the host country (known as 'entrepreneurship externalities' or simply 'ideas');[45] and they may diversify the production and export base of the host country.[46]

This type of foreign-investment flows may be SD hindering for the home country because it may amount to offshoring; namely, because it may amount to shifting domestic production (read: jobs) abroad.[47]

Foreign investment in services This type of foreign-investment flows is likely to be SD furthering for the host country: although there has been very little empirical investigation of the impact of this type of foreign investments, we can expect them to yield similar effects for the host country as does 'foreign investment in manufacturing and assembly'.

This type of foreign-investment flows is unlikely to be SD hindering for the home country because it is unlikely to generally adversely impact the home country as most

[43] Moran (2011), at 39 et seq., "The evidence shows clearly that multinational firms that set up intrafirm supplier links between developed- and developing-country affiliates behave differently in significant ways that those that do not . . . knowledge flows, production coordination, reporting links, and other communication channels are more extensive and active between the affiliates and the parent–and among the affiliates themselves–for those firms that are organized to engage in intrafirm trade than for firms with little or no intrafirm trade".

[44] Instead of several, see Moran (2011), at 42 et seqq.

[45] Instead of several, see Moran (2011), at 6 and 41 et seq., "alumni of US and European multinational firms started to appear on the management rosters of local companies . . . managers from multinational firms [sometimes leave] to set up their own companies . . . indigenous firms may be able to observe and imitate foreign practices . . . [and to gain] knowledge about new technologies by studying foreign firms as those firms enter their industry".

[46] Moran (2011), at 6.

[47] Moran (2011), at 123 et seq., "MNCs do close plants at home and build plants abroad, and they demonstrably threaten workers in labor negotiations that they will ship jobs overseas if the workers ask for wages or benefits that the MNC considers excessive."

services are consumed where they are produced; an exception are foreign-investment flows in information technology.

Crowding out or loss of profits of domestic firms Empirical data strongly suggests that FDI inflows yield a crowding out or loss of profits of the host country's existing local firms in the sector experiencing FDI inflows.[48]

Local conditions matter There exists some evidence that FDI inflows tend to increase the host country's growth rate significantly more when the host country exhibits a *well-developed financial market*; it is argued that for knowledge and technology transfers to occur, namely for foreign knowledge and technology to be absorbed/implemented by local firms, capital is necessary – and well-developed financial markets increase the likelihood that local firms have the necessary capital by providing them with external funding.[49]

There exists some evidence that FDI inflows tend to increase the host country's growth rate only when the host country exhibits a minimum level of *human-capital stock*; it is argued that an education threshold level is necessary so that local firms are able to absorb/implement foreign knowledge and technology – namely, it is argued that the stock of human capital limits the absorptive capacity of the host country.[50]

[48] For a list of quantitative empirical studies, see Pinto (2013), at 2 et seq., "[the] empirical literature on foreign investment ... persuasively shows that ... return to capital in the FDI-receiving country tends to fall".

Moran (2011), at 7, "at least initially, crowding out is ... likely to be inevitable ... [as] investment liberalization unleashes Schumpeterian winds of creative destruction", and at 50, "the presence of foreign investors may shrink local companies' market share and drain workers, managers, and capital away from them, undermining local firm performance or driving those firms out of the market".

Stiglitz (2002), at 68, "there are many examples of this. Soft drinks manufacturers around the world have been overwhelmed by the entrance of Coca-Cola and Pepsi into their home markets. Local ice cream manufacturers find they are unable to compete with Unilever's ice cream products."

[49] Alfaro et al. (2004) find, based based on a cross-section analysis using real-world data of FDI flows between 1975 and 1995, that countries with well-developed financial markets experienced a 0.60 percent higher annual growth rate from FDI inflows. For a theoretical model capturing this causal mechanism, see Alfaro et al. (2010).

[50] Borensztein, Gregorio, and Lee (1998) find, based on a panel-data analysis using real-world data of

FDI inflows provide consumers with lower prices – at least until the local competition is driven out of the market. Host countries therefore need *competition laws* to ensure that foreign firms do not take advantage over time of a potential monopoly position and raise prices again.[51]

3.1.3 Criticism of this function's relevance

IIL may be attacked on the basis that its function as a risk-reduction instrument has no value. Such criticism may take one of two forms and both, as we shall see, can reasonably be rejected – IIL therefore has value as a risk-reduction instrument. To be sure, even if such criticism could not be rejected, IIL would still be valuable due to its other functions (i.e., its functions beyond its function as a risk-reduction instrument).

3.1.3.1 Use investor-State contracts

IIL's risk-reduction function may be attacked on the basis that investor-State contracts with neutral (i.e., extra-jurisdictional) investor-State dispute settlement are better suited at providing such risk reduction.[52] IIL's risk-reduction function is nonetheless valuable for several reasons.

First, a State may want to provide protection to its foreign investors beyond the level provided in its national laws because it wants to reduce the political risk faced by its foreign investors (Section 3.1).[53] A State will, however, not be able to provide

FDI flows during the 1970s and 1980s from industrial States to 69 developing States, that a minimum level of stock of human capital is necessary for FDI inflows to increase the economic growth rate; the authors argue that the causal mechanism is that human capital impacts the host country's absorptive capacity.

[51] Stiglitz (2002), at 68, "In the absence of strong (or effectively enforced) competition laws, after the international firm drives out the local competition it uses its monopoly power to raise prices. The benefits of low-prices were short-lived."

[52] Holding this view (note: although they focus on IIAs, they really mean IIL more generally): Yackee (2008c); Van Harten et al. (2010), "Although not without flaws, investment contracts are preferable to investment treaties as a legal mechanism to supplement domestic law in the regulation of investor-state relations".

[53] Similarly: Franck and O'Hara O'Connor (2014), at 1631, "a state might rationally choose to grant minimal baseline protections in the BIT, which apply to all investor from a given nation, and then grant additional rights in investment contracts as needed to induce particular investments".

such protection through investor-State contracts to all its foreign investors because of the transaction costs associated with concluding a contract with any single foreign investor.

Second, as we have just seen, reliance upon investor-State contracts necessarily implies a selection amongst the foreign investors which shall benefit from such protection. Hence, such reliance necessarily involves 'picking winners' by a centralised institution and therewith involves a shift towards a more centralised economic organisation (i.e., away from a market-based economic organisation).

Third, there is a critical difference between investor-State contracts and IIL: only the latter amounts to PIL and therefore only a violation of the latter involves a failure to fulfil an obligation a State has towards other States.[54] This difference is arguably relevant because we can reasonably expect the costs associated with a violation of a PIL-based obligations to be higher,[55] so that IIL may increase the likelihood of voluntary monetary compensation by States and/or of States (ex ante) not engaging in behaviours adversely affecting foreign investments.[56] Such increases are desirable if involuntary monetary compensation by States is not guaranteed (Section 3.1.1.2).

[54] Remember that the criticism presented in this Section holds that no IIL is needed; namely, that investor-State contracts alone are enough, which specifically means that no 'umbrella clause' (Section 5.10) or 'pacta-sunt-servanda norm' (applying also to investor-State contracts) in PIL is needed (since the existence of such norms would amount to IIL).

Regarding this 'pacta-sunt-servanda norm': the "jurisprudence demonstrates that international tribunals [in the absence of BITs] ... reliably awarded investors meaningful compensation for violations of the principle [of pacta sunt servanda]" (Yackee, 2009, at 1553 et seq.).

[55] Because we can expect (Section 3.1.1.1) other States to react to a violation of a PIL-based obligation by retaliating, reciprocating, and/or refusing to cooperate in the future – but not to react in this manner to a violation of an investor-State contract.

Because a violation of a PIL-based obligation is arguably more likely to be publicised: Franck and O'Hara O'Connor (2014), at 1632, "Perhaps BIT signaling is more powerful than contract signaling because breaches of a BIT are more public and more notable to the media than are breaches of individual contracts."

[56] See Section 3.1.1.

3.1.3.2 Leave it to the market

IIL's risk-reduction function may be attacked on the basis that markets (read: private insurers) are better suited at providing such risk reduction. IIL's risk-reduction function is nonetheless valuable for at least two reasons.

First, the market may not provide insurance against political risk. Hence, IIL completes the market by providing risk reduction that would otherwise not be supplied.

Second, even if the market provides insurance against political risk,[57] the existence of IIL may reduce the price of such a private insurance through its function as a risk-reduction instrument. Indeed, even when insurers are perfectly diversified, the price of such a private insurance equals at least the expected costs to foreign investments (i.e., expected damages) associated with political risk, IIL may reduce these expected costs (and therewith the price of such a private insurance) because IIL may increase the likelihood of voluntary monetary compensation by States, of involuntary monetary payments by States, and/or of States not engaging in behaviours adversely affecting foreign investments.[58] To be sure, this argument is even stronger when insurers are not perfectly diversified since the reduction in the price of such a private insurance would be even larger.

3.2 Norm-internalisation instrument

The concept of 'norm internalisation' describes the process of internal acceptance of some norm by individuals; namely, it describes the establishment of an internal-sanctioning mechanism for the said norm.[59]

'Norm internationalisation' through the international sphere may occur at two levels: a change in beliefs about how best to achieve some given goal(s); and/or a change in beliefs about the appropriate goal(s).[60]

[57] Such insurance is actually available to investors. Most notably, see MIGA and OPIC.

[58] See Section 3.1.1.

[59] See footnote 51 in Chapter 4.

[60] The former level amounts to a 'learning theory' and the latter level to a 'constructivist theory' in

IIL may influence beliefs at both levels. Regarding the former, IIL by definition exhibits the 'rule of law' and 'legal certainty' as means, and IIL more specifically exhibits private-property protection as a means; both of which States may internalise.[61] Regarding the latter, IIL exhibits a specific purpose (hopefully: sustainable development)[62] which States may internalise.

As such, IIL is desirable because it has the potential to spread good norms (read: SD-furthering norms)[63] around the globe; namely, because it has the potential to yield good-governance spillovers.

Finally, note that empirical studies seem to suggest that contemporary IIL did not yield such norm internalisation: there is little empirical support for good-governance spillovers resulting from IIL.[64]

3.3 Foreign-investor-accountability instrument

It is difficult for a host State to hold its foreign investors accountable for their investments' misbehaviours (in this work: SD-hindering behaviours)[65] in the host State's territory. Indeed, the decision-makers (managers) of foreign investments can quickly leave the host State's territory, and foreign investors can minimise the resources left in the host State's territory by paying profits out to themselves (most notably, to the parent company abroad).[66]

A behaviour is SD hindering if before the foreign investment is 'sunk' forbidding

international-relations theory; see Section 8.6 for a more extensive discussion.

[61] Sharing this view with respect to the 'rule of law': Franck (2007b), at 367, "investment arbitration has the capacity to fuel domestic support for the rule of law because it will instill an incipient belief in the capacity of institutions to administer justice impartially" (internal quotation marks omitted).

[62] See Chapter 4.

[63] SD-furthering norms are the norms which follow from impartially and rationally considering all SD-relevant aspects; see Sections 4.6 and 4.7.

[64] Ginsburg (2005) even finds a negative effect on the host State's institutional quality; and Sasse (2011) finds no effect on the host State's institutional quality.

[65] See Chapter 4.

[66] Holding so in the context of foreign investments in extractive industries and environmental damages: Stiglitz (2008), at 474, "When called upon by the government to clean up the mess, the MNC announces that it is bankrupt: All of the revenues have already been paid out to shareholders."

the behaviour in the future is SD furthering or requiring monetary compensation for engaging in the behaviour in the future is SD furthering.[67] For instance, behaviours yielding extensive environmental damages may, but need not, be SD hindering.

As such, IIL is desirable because it has the potential to incentivise the home State to enact domestic laws allowing a host State to bring a claim (e.g., for monetary compensation) against investors, having the nationality of the home State, for engaging in SD-hindering behaviours in the host State's territory. More precisely, it has the potential to incentivise the home State by providing other States with the right the initiate an international (adjudicative) proceeding against States which fail to domestically legislate certain extraterritorial actions of their investors.

[67] The assessment of whether 'forbidding the behaviour' or 'requiring monetary compensation' is SD furthering requires an impartial and rational consideration of all SD-relevant aspects; see Section 4.6.

Part II

International investment law and sustainable development

Overview

This Part provides the normative justification of this work; that is, it provides the justification for the normative focus on SD and then assesses contemporary IIL from a SD perspective. In so doing, this Part answers the first research question: whether contemporary IIL is aligned with SD (Section 1.1).

Chapter 4 defines the concept of sustainable development and provides a justice-theoretical justification for using it as the overarching normative framework. Specifically, this Chapter argues that justice is synonymous with the concept of sustainable development.

Chapter 5 provides a general overview of contemporary IIL by describing the main building blocks of its institutional structure (international investment agreements and investment arbitral tribunals) and by presenting the jurisprudence relating to its most important norms. Chapter 6 presents the jurisprudence of the two most important PIL-based norms of treaty interpretation (i.e., articles 31 and 32 VCLT).

Finally, Chapter 7 combines the previous Chapters to assess contemporary IIL's alignment with SD. This Chapter finds that contemporary IIL exhibits several SD deficits and identifies its adjudicative bodies' norm application, the design of its dispute-settlement mechanism, and the design of its applicable norms as the sources of its SD deficits.

Chapter 4

Overarching normative framework: sustainable development

This Chapter presents and justifies this work's overarching normative framework. Specifically, it defines the concept of sustainable development, rationalises its utilisation from a justice-theoretical perspective, and applies it to IIL.

The Chapter is organised as follows. Section 4.1 presents some important distinctions amongst normative theories which will help characterise the normative theory advanced in this work. Section 4.2 studies the requirements an 'overarching normative framework' ought to satisfy; namely, it studies the criteria a normative theory must fulfill in order to be qualified as an 'overarching normative framework' (i.e., to be qualified as a 'justice theory'). Section 4.3 then presents several normative theories which must be rejected as 'overarching normative frameworks' based on these requirements. Section 4.4 concretises these requirements and argues that these requirements imply what we contemporarily understand as 'sustainable development' – in so doing, it provides a justice-theoretical justification for utilising 'sustainable

development' as the 'overarching normative framework'. Section 4.5 argues that the majority of the contemporary international community seems to view the concept of sustainable development as amounting to the overarching normative framework in international relations. Section 4.6 draws the implications of the concept of sustainable development for decision-making, for institutional design, and for adjudicative bodies. Finally, Section 4.7 concludes by drawing the implications which the concept of sustainable development has for international investment law; that is, it explains how to assess whether international investment law is aligned with sustainable development.

Historically, the most relied-upon quantitative indicator to assess the progress/success of a country has been the so-called 'Gross Domestic Product' (GDP).[1] Section 4.4.4 presents this indicator in detail, shows what it is actually measuring, and concludes that it is inadequate as a measure of sustainable development.

4.1 Important distinctions

It is helpful to think of normative theories along the following dimensions because it allows to rapidly grasp the essence of those theories.

4.1.1 Subjective vs objective theories

Normative theories can be classified according to how they rely upon real-world feelings/preferences.

[1] Stiglitz, Sen, and Fitoussi (2010), at xxv, "these metrics [GDP and GNP] have increasingly been thought of as measures of societal well-being."; Karabell (2014), at 50, "GDP. No single number has become more central to society in the past fifty years. Throughout the world, GDP has become a proxy for success and for failure, for sentiment about the future and sense of well-being in the present. It has the power to win or lose elections, overthrow governments, start popular movements."; Duraiappah and Jamshed (2014), at 1, "For more than half a century we have appraised our progress as nations on the basis of how much we produce, consume, and invest; we have measured that progress in U.S. dollars and aggregated into an easy-to-compare metric: gross domestic product (GDP)."

Subjective theories A subjective normative theory is a normative theory which readily builds upon real-world feelings/preferences (of individuals or collectivities); namely, it is a normative theory which treats all types of real-world feelings/preferences equally.[2]

The normative theories of the following philosophers, amongst others, amount to subjective theories: relying upon individuals' feelings/preferences are Jeremy Bentham (Bentham, 1823), James Buchanan and Gordon Tullock (Buchanan and Tullock, 1962), Robert Nozick (Nozick, 1974), Peter Singer (Singer, 2011); and relying upon collectivities' feelings/preferences is Michael Sandel (Sandel, 1998).

Objective theories A subjective normative theory is a normative theory which does not readily build upon real-world feelings/preferences; namely, it is a normative theory which somehow filters/selects amongst the types of real-world feelings/preferences.[3]

The normative theories of the following philosophers, amongst others, amount to objective theories: Aristotle (Aristotle, 2009), John Stuart Mill (Mill, 1859)[4]; relying upon 'impartiality' (Section 4.1.4) to filter feelings/preferences are David Hume (Hume, 1738), Adam Smith (Smith, 1759), Immanuel Kant (Kant, 1964 [1785]), John Rawls (Rawls, 1971), Thomas Nagel (Nagel, 1991), and Amartya Sen (Sen, 2009); relying upon 'discourse' (Section 4.1.4) to filter feelings/preferences are Karl-Otto Apel (Apel, 1992), and Jürgen Habermas (Habermas, 1993).

[2] Instead of several, see Aaken (2003), at 186 et seq.

[3] Instead of several, see Aaken (2003), at 187 et seqq.

Remark, however, that this does not mean the non-relevance of real-world feelings/preferences: Sen (1980), at 212, "'Objective' considerations can count along with a person's tastes."

[4] Although this is virtually always mistaken, John Stuart Mill is strictly speaking not a utilitarian because his normative theory does not exhibit the necessary element of 'welfarism' (Section 4.3.2.2); most clearly pointing this out is Sandel (2009), at 53 and at 55 et seq., "Mill believes it is possible to distinguish between higher and lower pleasures ... [In so doing, however,] Mill strays from the utilitarian premise. No longer are de facto desires the sole basis for judging what is noble and what is base. Now the standard derives from an ideal of human dignity independent of our wants and desires ... Mill saves utilitarianism from the charge that it reduces everything to a crude calculation of pleasure and pain, but only by invoking a moral ideal of human dignity and personality independent of utility itself".

4.1.2 Procedural vs substantive theories

Normative theories can be classified according to the type of their assumptions.

Procedural normative theories A procedural normative theory is a normative theory whose underlying structure is mainly of a procedural nature; namely, it is a normative theory which mainly builds upon procedural assumption(s).[5]

The normative theories of the following philosophers, amongst others, arguably amount to procedural normative theories: Thomas Hobbes (Hobbes, 1651), David Hume (Hume, 1738), Adam Smith (Smith, 1759), Immanuel Kant (Kant, 1964 [1785]), James Buchanan and Gordon Tullock (Buchanan and Tullock, 1962), John Rawls (Rawls, 1971), Thomas Nagel (Nagel, 1991), Karl-Otto Apel (Apel, 1992), Jürgen Habermas (Habermas, 1993), T. M. Scanlon (Scanlon, 1998), and Amartya Sen (Sen, 2009).

Substantive normative theories A substantive normative theory is a normative theory which mainly builds upon substantive assumption(s).

The normative theories of the following philosophers, amongst others, arguably amount to substantive normative theories: Aristotle (Aristotle, 2009), Jeremy Bentham (Bentham, 1823), John Stuart Mill (Mill, 1859), Robert Nozick (Nozick, 1974), Michael Sandel (Sandel, 1998), and Peter Singer (Singer, 2011).

Addendum: implied norms Note, however, that both procedural and substantive normative theories may yield substantive and/or procedural norms.[6] A 'substantive norm' specifies what is 'just', whereas a 'procedural norm' specifies the procedure through which what is 'just' is determined.

[5] Although all normative theories exhibit both procedural and material assumptions, procedural normative theories more heavily rely upon procedural assumptions (Tschentscher, 2000, at 140 et seq.).

[6] See Tschentscher (2000), at 74, who mentions John Rawls whose procedural normative theory (Rawls, 1971) yields substantive norms.

4.1.3 Consequential (teleological) vs deontological theories

Normative theories can be classified according to the type of their implications, that is, the form of their implied norms.

Consequential theories A consequential normative theory is a normative theory whose implications take the form of goal-attainment optimisation; namely, it is a normative theory holding that whether something is 'just' ought to be assessed based on its consequences on the attainment of some goal(s).[7] Put differently, such theories imply norms holding that one ought to optimise the consequences according to some metric.

The normative theories of the following philosophers, amongst others, amount to consequential theories: Aristotle (Aristotle, 2009), Thomas Hobbes (Hobbes, 1651), Jeremy Bentham (Bentham, 1823), John Stuart Mill (Mill, 1859), Michael Sandel (Sandel, 1998), Martha Nussbaum (Nussbaum, 2000), Amartya Sen (Sen, 2009), and Peter Singer (Singer, 2011).

Deontological theories A deontological normative theory is a normative theory whose implications take the form of rules; namely, it is a normative theory holding that whether something is 'just' ought to be assessed based on whether they are in accordance with some rule(s).[8] Put differently, such theories imply norms holding that one ought to satisfy some rule.

Deontological theories typically include multiple rules; since these rules may be in conflict, insofar as a conflict-resolution rule is included, the theories still produce a single applicable rule (in so doing, they avoid 'moral dilemmas').[9]

[7] Singer (2011), at 2, "Consequentialists start not with moral rules but with goals. They assess actions by the extent to which they further these goals."; Pettit (1991), at 231, "Consequentialists see the relation between values and agents as an instrumental one: agents are required to produce whatever actions have the property of promoting a designated value".

[8] Singer (2011), at 2, "Those who think that ethics is a system of rules"; Dorff (2002), at 851, "Deontologists ... believe potential policy choices must be run through a gauntlet of moral duties, or principles, which cannot be violated ... deontologists use their principles to make the point that some actions are simply wrong, regardless of their consequences, and are therefore forbidden".

[9] Conflict-resolution norms may, for instance, provide absolute priority to one norm over other norms

The normative theories of the following philosophers, amongst others, amount to deontological theories: Immanuel Kant (Kant, 1964 [1785]), James Buchanan and Gordon Tullock (Buchanan and Tullock, 1962), John Rawls (Rawls, 1971), Robert Nozick (Nozick, 1974), Thomas Nagel (Nagel, 1991), Karl-Otto Apel (Apel, 1992), Jürgen Habermas (Habermas, 1993), and T. M. Scanlon (Scanlon, 1998).

4.1.4 Representational framework and normative rationalisation

Normative theories may rely upon one of three types of expositions and rationalisations in their presentation. A given normative theory need, however, not use the 'representational framework' and 'normative rationalisation' of the same type.[10]

Note that normative rationalisation through any one of these three types does not a priori determine whether the theory's implications are of consequential or deontological nature.[11]

Contract Contractualism looks at justice through the lens of individuals who may voluntarily agree to rights and obligations in the future. The normative theories of the following philosophers, amongst others, rely upon this representational framework: Thomas Hobbes (Hobbes, 1651), Immanuel Kant (Kant, 1964 [1785]), James Buchanan and Gordon Tullock (Buchanan and Tullock, 1962), John Rawls (Rawls,

or provide a balancing formula (e.g., proportionality principle).

For a definition of a 'moral dilemma', see McConnell (2014), "Moral dilemmas ... involve conflicts between moral requirements ... The crucial features of a moral dilemma are these: the agent is required to do each of two (or more) actions; the agent can do each of the actions; but the agent cannot do both (or all) of the actions." Moral dilemmas are arguably problematic because theories allowing for such a dilemma yield a non-rational ordering (Section 4.3.1.1): they fail to order two social realisations (where a different conflicting rule is followed in each social realisation) and therewith yield an incomplete ordering.

[10] This is known as the 'Divergenzthese', Tschentscher (2000), at 97 et seq.

[11] Making the point for contractualism: Scanlon (2001), at 49 et seq., "Contractualism does not require a single standard of overall evaluation [i.e., deontologism or consequentialism]. What it requires is, rather, an account of what various individuals, in virtue of their diverse positions, have reason to want, and a way of comparing these reasons – not by deciding what is best overall but by comparing the importance of a particular benefit from one position with the importance of a burden from some other position."

1971), and T. M. Scanlon (Scanlon, 1998).

Normatively rationalising justice through contractualism amounts to focusing on non-coerciveness; specifically, it amounts to holding that something is 'just' if and only if all affected individuals freely agree to it (as such, it amounts to a 'consent theory').[12] The normative theories of the following philosophers, amongst others, rely upon this normative rationalisation: Thomas Hobbes (Hobbes, 1651), James Buchanan and Gordon Tullock (Buchanan and Tullock, 1962), and T. M. Scanlon (Scanlon, 1998).

Spectator perspective The spectator perspective looks at justice through the lens of an external observer. The normative theories of the following philosophers, amongst others, rely upon this representational framework: David Hume (Hume, 1738), Adam Smith (Smith, 1759), Thomas Nagel (Nagel, 1991), and Amartya Sen (Sen, 2009).

Normatively rationalising justice through a spectator perspective amounts to focusing on impartiality; specifically, it amounts to holding that something is 'just' if an only if it is chosen by the spectator.[13] The normative theories of the following philosophers, amongst others, rely upon this normative rationalisation: David Hume (Hume, 1738), Adam Smith (Smith, 1759), Immanuel Kant (Kant, 1964 [1785]), and John Rawls (Rawls, 1971), Thomas Nagel (Nagel, 1991), and Amartya Sen (Sen, 2009).

Discourse Discourse looks at justice through the lens of individuals who, in the absence of coercion, jointly search for what is right for all of them through argumentation and who may update their preferences in light of new arguments. The normative theories of the following philosophers, amongst others, rely upon this representational framework: Karl-Otto Apel (Apel, 1992), and Jürgen Habermas (Habermas, 1993).

[12] Ashford and Mulgan (2012), "According to contractualism, morality consists in what would result if we were to make binding agreements from a point of view that respects our equal moral importance as rational autonomous agents."

[13] Tschentscher (2000), at 100 et seq.

Normatively rationalising justice through discourse amounts to focusing on autonomy; specifically, it amounts to holding that something is 'just' if an only if all affected individuals could accept it (as such, it amounts to a 'consent theory').[14] The normative theories of the following philosophers, amongst others, rely upon this representational framework: Karl-Otto Apel (Apel, 1992), and Jürgen Habermas (Habermas, 1993).

4.2 Requirements of a justice theory

This Section discusses the criteria which a normative theory must fulfill in order to be qualified as a 'justice theory' – namely, to be qualified as an 'overarching normative framework'; normative theories fulfilling those criteria cannot be rejected as 'justice theories'. Assessing whether some normative theory qualifies as a 'justice theory' always requires one to a priori state a set of normative criteria (i.e., presume to some degree what justice looks like) for making the assessment – some degree of circularity is therefore inevitable. Generally speaking, theories may be assessed based on their assumptions (starting conditions) and/or based on their implications (logical consequences of the starting conditions).[15]

Normative theories should not be assessed based on their implications (e.g., based on whether they imply a given set of norms such as human-rights norms) because this approach would be redundant. Indeed, if we already know what justice materialises into (i.e., what set of norms equates with justice), then there is no point

[14] Tschentscher (2000), at 101 et seq.

[15] There is a long-lasting debate within the social sciences about whether descriptive theories ought to be assessed based on their assumptions or their implications, that is, based on the empirical consistency of their assumptions or of their implications. There is, to the best of my knowledge, no explicit debate within moral philosophy about whether justice theories ought to be assessed based on their assumptions or their implications.

Within the social sciences, the former, arguably still heterodox, view that the realism of the assumptions (or: the realism of the theory's causal mechanism; the realism of its story) is central finds its strongest supporters within political science; see e.g. Seawright and Collier (2010) and Collier (2011). The latter view that the accuracy of the implications is central finds its strongest supporters within economics; most notable here is Friedman (1953).

in searching for justice theories since we already know what justice exactly looks like – such a search would, in the best case, merely amount to (self-servingly) select a normative theory supporting one's beliefs and, in the worst case, falsely provide a sense of objectivity to one's justice preconception.

In consequence, normative theories should be assessed based on their assumptions. This Section thus focuses on starting conditions which a normative theory must jointly satisfy in order to qualify as a 'justice theory'. The following exposition is inspired by the Nobel laureate in Economics Amartya Sen's thinking on the starting conditions of justice presented in his book entitled *The Idea of Justice* (Sen, 2009, Chapters 1–10).[16]

4.2.1 Requirement I: Realisation-focused understanding

> we have to seek institutions that *promote* justice, rather than treating the institutions as themselves manifestations of justice . . . it is hard to think of them [institutions] as being basically good in themselves, rather than possibly being effective ways of realizing acceptable or excellent social achievements
>
> — Amartya Sen[17]

This work adopts the view that a justice theory must be directly connected to social realisations – namely, it must be directly connected with how people's lives actually go (read: with *quality of life*).[18] Specifically, to ask whether something is 'normatively better' than something else is to ask whether the consequences on quality of

[16] Sen (2009), at viii, "[we] have to ask what kinds of reasonings should count in the assessment of ethical and political concepts . . . Does this demand impartiality in some particular sense, such as detachment from one's own vested interests? Does it also demand re-examination of some attitudes even if they are not related to vested interests, but reflect local preconceptions and prejudices, which may not survive reasoned confrontation with others not restricted by the same parochialism? What is the role of rationality and reasonableness in understanding the demands of [these concepts]".

[17] Sen (2009), at 82 et seq.

[18] Moral philosophers which have taken this view include: Adam Smith, the Marquis de Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx, John Stuart Mill (see e.g., Sen, 2009, at 7).

life is preferable to the consequences thereon of that something else.[19]

This realisation-focused understanding of justice is in contrast with contemporary moral philosophers who tend tp view the overarching normative framework as directly connected with the institutions surrounding people and whose normative theories consequently propose ideal institutions ('just institutions'; possibly referred to as hypothetical 'social contract').[20] But such an 'arrangement-focused understanding of justice' is arguably inappropriate because: (i) a picture of institutions may not fully capture the lives that people actually do live (i.e., there exists no universal one-to-one relationship between institutions and quality of life);[21] and (ii) the ideal institutions may not be feasible in practice so that such a normative theory is of little help for choosing between feasible institutions and therewith for improving society.[22]

[19] Similarly: Sandel (2009), at 19, "To ask whether a society is just is to ask how it distributes the things we prize".

[20] Sen (2009), at x et seq., "In contrast, many of the principal theories of justice concentrate overwhelmingly on how to establish 'just institutions' ... For example, John Rawls's rightly celebrated approach of 'justice as fairness' yields a unique set of 'principles of justice' that are exclusively concerned with setting up 'just institutions' (to constitute the basic structure of the society)", and at xvi, "[these moral philosophers] concentrated on identifying perfectly just social arrangements, and took the characterization of 'just institutions' to be the principal – and often the only identified – task of the theory of justice".

Moral philosophers which have taken this view include: Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Immanuel Kant, John Rawls, Ronald Dworkin, David Gauthier, Robert Nozick (see e.g., Sen, 2009, at xvi and 8).

[21] Sen (2009), at 18.

This fact is nicely illustrated by the following example focusing on the institution known as 'equality of opportunity': Chang (2010), at 210 and 218., "Equality of opportunity is the starting point for a fair society ... the [relevant] question [then] is whether they are actually competing under the same conditions as their competitors ... Given all this, as far as we accept that we should not punish children for having poor parents, we should take action to ensure that all children have some minimum amounts of food, healthcare and help with their homework.", and at 220, "When some people have to run a 100 metre race with sandbags on their legs, the fact that no one is allowed to have a head start does not make the race fair."

[22] Sen (2009), at 9, "an exercise of practical reason that involves an actual choice demands a framework for comparison of justice for choosing among the feasible alternatives and not an identification of a possibly unavailable perfect situation".

4.2.2 Requirement II: Impartial and rational reasoning

> it can plausibly be argued that if others cannot, with the best of efforts, see that a judgment is, in some understandable and reasonable sense, just, then . . . its soundness would be deeply problematic
>
> — Amartya Sen[23]

> Everyone ought to follow the principles whose universal acceptance everyone could rational will
>
> — Derek Parfit[24]

The idea of impartiality has had a prominent place in normative theories – typically through reliance upon 'equality' in some form or another.[25]

This work adopts the view that a justice theory must rely upon impartiality in the form of 'impartial reasoning'; namely, in the form of reasoning which equally considers the quality of life of all affected beings and which is hence not dictated

[23] Sen (2009), at 394.

[24] Parfit (2011), at 20.

[25] Sen (1992), at ix, "a common characteristic of virtually all the approaches to the ethics of social arrangements that have stood the test of time is to want equality of *something*"; Sen (2009), at 291 and 293, "every normative theory of social justice that has received support and advocacy in recent times seems to demand equality of *something* – something that is regarded as particularly important in that theory . . . There seems to be a recognition . . . of the need for impartiality in some form for the viability of a theory."

Let me mention a couple of examples here. Equality of legal and political treatment: James Buchanan (Buchanan, 1986). Equality of a right to liberty (libertarianism): Friedrich Hayek (Hayek, 1960); Milton Friedman (Friedman, 1962); Robert Nozick (Nozick, 1973, 1974); Richard Epstein (Epstein, 2005). Equality of holding primary goods: John Rawls (Rawls, 1958, 1971). Equality of relevance of everybody's utilities (Benthamian utilitarianism): Jeremy Bentham (Bentham (1823); R. M. Hare (Hare, 1963, 1981); Peter Singer (Singer, 2011). Equal consideration of all affected individuals: Jürgen Habermas (footnote 32); John Rawls (footnote 27); Amartya Sen (footnote 30); Adam Smith (footnote 30) – the indicated footnotes contain a more extensive discussion of how 'equal consideration' materialises in these philosophers' works.

by one's own preferences, vested interests, tradition or customs.[26] Reliance upon impartial reasoning has been re-popularised by John Rawls' seminal 1958 paper entitled *Justice as Fairness* (Rawls, 1958) and 1971 book entitled *A Theory of Justice* (Rawls, 1971) wherein 'fairness' is understood as 'impartial reasoning'.[27]

I believe that the concept of ***impartiality reasoning*** is best understood by reference to the *initial position* of John Rawls' conceptual framework (Rawls, 1958, 1971).[28] The 'initial position' is defined as a situation wherein nobody knows who they are going to be in society – a situation wherein people are behind a veil of ignorance.[29] Impartial reasoning understood as *reasoning behind the veil of igno-*

[26] 'Impartial reasoning' is also sometimes referred to as 'universalisability principle'. I prefer 'impartial reasoning' because it avoids the following confusion: Singer (2011), at 11, "Ethics takes a universal point of view. This does not mean that a particular ethical judgment must be universally applicable. Circumstances alter cases . . . What it does mean is that in making ethical judgments, we go beyond our own likes and dislikes."

[27] Specifically, Rawls (1971), at 17, "the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name 'justice as fairness'."

[28] Also relying upon this framework is Dworkin (2000), at 65 et seqq.

I believe that Sen's critique of the 'initial position' is really directed at Rawls' utilisation thereof, namely at the fact that John Rawls only includes the members of some given political community rather than all of mankind, and not at the usage of the 'initial position' per se (even though Sen formulates his critique as a rejection of the 'initial position' per se): Sen (2009), at 62, "I do not believe that the impartiality captured in the reflective device of the 'original position' (on which Rawls greatly relies) is adequate for the purpose", and at 127 et seq., "It is the contractarian framework of 'justice as fairness' that makes Rawls confine the deliberations in the original position to a politically segregated group whose members 'are born into the society in which they lead their lives' . . . The Rawlsian 'veil of ignorance' in the 'original position' is a very effective device for making people see beyond their personal vested interests and goals And yet it does little to ensure an open scrutiny of local and possibly parochial values."

[29] Amongst others, they do not know: when or where they will live; what their preferences will be (self-interested or not, risk averse or not, soccer lovers or not, etc.); whether they will be creative, intelligent, talented (and if so, in which domain), rich, powerful, connected, part of a minority (racial, ethnic, or religious), healthy, educated, part of a supportive family; or which sentient species they will be part of.

Contrary to John Rawls' claim (Rawls, 1971, at 145, "there seem to be no objective grounds in the initial situation for assuming that one has an equal chance of turning out to be anybody"), I believe people in the 'initial position' should be thought of as having an equal probability to end up at any position in the real world. Agreeing with my view, Parfit (2011), at 351, "If we supposed that we had an equal chance of being in anyone's position, that would make us just as impartial."

rance is arguably quite similar to the reasoning implied by Adam Smith's 'impartial spectator',[30] by Immanuel Kant's 'categorical imperative',[31] or by Jürgen Habermas' 'public deliberation';[32] it is, however, different from the Golden Rule (i.e., 'Do unto others as you would have them do unto you.').[33]

I understand ***rational reasoning*** as reasoning which is in accordance with *abstract logic for assessing the internal consistency of claims* and with the *scientific method for assessing empirical claims*.

It is important to recognise and accept that impartial and rational reasoning may

[30] Smith (1759), Part III, Chapter III, at para 38, "it is always from that spectator, from whom we can expect the least sympathy and indulgence, that we are likely to learn the most complete lesson of self-command".

Amartya Sen relies upon the impartial spectator to yield impartial reasoning (see e.g., Sen, 2009, at 404).

The similarity exists insofar as the 'initial position' includes all of mankind because Adam Smith's impartial spectator can be any person and therewith captures 'all of mankind'.

[31] The similarity is best illustrated by Kant's formulation of the 'categorical imperative' as a 'universal law': Kant (1964 [1785]), at 421, "Act only on that maxim whereby you can at the same time will that it should become a universal law." Sandel (2009), at 121, "The universalizing test points to a powerful moral claim: it's a way of checking to see if the action I am about to undertake puts my interests and special circumstances ahead of everyone else's.", and at 126, "When we will the moral law, we don't choose as you and me, particular persons that we are, but as rational beings, as participants in what Kant calls 'pure practical reason.' ... Insofar as we exercise pure practical reason, we abstract from our particular interests."

[32] See, amongst others, Habermas (1993, 1995).

Arguing for such a similarity: Sen (2009), at 43, "Habermas also imposes many exacting demands on public deliberation. If people are capable of being reasonable in taking note of other people's point of view and in welcoming information, which must be among the essential demands of open-minded public dialogue, then the gap between the two approach [John Rawls' approach and Jürgen Habermas' approach] would tend to be not necessarily momentous." Sen goes on to argue that the differences in the substantive outcomes (i.e., of the 'just institutions') of both Habermas' and Rawls' normative theories result from differences in where both philosophers believe that impartial reasoning would lead rather than from differences in both philosophers' impartiality frameworks.

[33] Indeed, although the Golden Rule asks us to put ourselves in the shoes of the other person (i.e., to detach ourselves from our vested interests), it does not ask us to detach ourselves from our actual preferences. Agreeing with this view: Sandel (2009), at 124 et seq., and at 214, "Kant's idea of an autonomous will and Rawls' idea of a hypothetical agreement behind a veil of ignorance have this in common: both conceive the moral agent as independent of his or her particular aims and attachments."

lead to the non-rejection of several normative theories – and therewith to allow for the possibility of a *plurality of justices*.[34] This follows from observing that people engaging in impartial and rational reasoning may exhibit different risk preferences.[35]

[34] Arguing so: Sen (2009), at x, "Reasoning and impartial scrutiny are essential. However, even the most vigorous of critical examination can still leave conflicting and competing arguments that are not eliminated by impartial scrutiny ... the necessity of reasoning and scrutiny is not compromised in any way by the possibility that some competing priorities may survive despite the confrontation of reason. The plurality with which we will then end up will be the result of reasoning, not of abstention from it.", and at 12, "At the heart of the particular problem of a unique impartial resolution of the perfectly just society is the possible sustainability of plural and competing reasons for justice, all of which have claims to impartiality and which nevertheless different from – and rival – each other."

The potential of an absence of unanimity due to multiple impartial and rational reasons is nicely illustrated by the following example: "[Assume that] you have to decide which of three children – Anne, Bob and Carla – should get a flute about which they are quarrelling. Anne claims the flute on the ground that she is the only one of the three who knows how to play it (the others do not deny this), and that it would be quite unjust to deny the flute to the only one who can actually play it ... Bob who speaks up, and defends his case for having the flute by pointing out that he is the only one among the three who is so poor that he has no toys of his own. The flute would give him something to play with (the other two concede that they are richer and well supplied with engaging amenities) ... Carla who speaks up and points out that she has been working diligently for many months to make the flute with her own labour (the others confirms this), and just when she had finished her work, 'just then', she complains, 'these expropriators came along to try to grab the flute away from me'." (Sen, 2009, at 13). Sen then notes that: (i) someone who is committed to reduce gaps between economic means would give the flute to the poorest, namely Bob (such a preference is referred to as 'egalitarian'); (ii) someone who believes that a person has the right to the fruits of their labour would give the flute to Carla (such a preference is referred to as 'libertarian'); and (iii) someone who wants to maximise the sum of utilities may either give the flute to Anne, because her increase in utility is likely to be larger since she is the only one who can play it, or to Carla, because this provides incentives to create things and thus increases utility in the long run (such a preference is referred to as 'utilitarian').

[35] There is no reason to expect people engaging in impartial and rational reasoning to exhibit the same risk preference since there is no impartial and rational reason for rejecting any specific risk preference.

Importantly, one's risk preference in the 'initial position' (i.e., one's risk preference as a person engaging in impartial and rational reasoning) is not necessarily identical to one's risk preference in the real world (i.e., once the veil of ignorance rises) since one does not know in the 'initial position' what kind of risk preference one will have in the real world.

Remark, however, that Rawls implicitly assumes that everybody is risk averse in his 'initial position': Pettit (1974), at 315 et seq., "It is only if we presuppose in the contractors a certain attitude to risk [read: risk aversion] ... that the maximin rule will seem the rational procedure for them to adopt ... [Yet,] Rawls

Which implies that different people engaging in impartial and rational reasoning may reach different conclusions and therewith may support different normative theories.[36]

A normative theory cannot be rejected if and only if there exists an impartial and rational reason supporting it (or, equivalently, a theory must be rejected if and only if there exists no impartial and rational reason supporting it).[37]

To be sure, people engaging in impartial and rational reasoning are identical with respect to beliefs (read: non-empirically-falsifiable claims) because rational beings will (i) recognise that their preferred belief need not be true and (ii) agree on the likelihood that any belief is true. Identity with respect to beliefs implies, most notably, that people engaging in impartial and rational reasoning are not affected by their own 'conception of the good', 'metaphysical beliefs', or 'mystical beliefs'.[38]

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claims, contrary to this objection, that his argument does not rest directly on the assumption of an aversion to risk among the contractors".

[36]Rawls' failure to see that people in the 'initial position' may not agree has been criticised in the literature: Pettit (1974), at 311, "The author criticises Rawls's assumption that men of any background, of any socialisation, would choose these principles in the original position. He argues that the choice which Rawls imputes to his contractors reflects a specific socialisation – one dominant in Western democracies."; Sen (2009), at 90, "[Rawls can be criticised for] not allowing the possibility that even in the original position different persons could continue to take, even after much public discussion, some very different principles as appropriate for justice, because of the plurality of their reasoned political norms and values".

[37]These words are just paraphrasing Amartya Sen's quotation mentioned at the beginning of this Section.

Remark that the version advocated in this work is stricter than T. M. Scanlon's version of contractualism which holds that 'a normative theory must be rejected if and only if there exists an impartial and rational reason rejecting it' implying that a normative theory cannot be rejected in the absence of an impartial and rational reason supporting it if there exists no impartial and rational reason rejecting it; specifically, Scanlon (1998), at 187, "every rational person must be committed to the aim of finding and living by the principles that others . . . could not reasonably reject".

[38]Indeed, a rational being will realise that his or her preferred belief need not be true and has the same probability of being true than any other belief. Since we can imagine an infinite number of possible beliefs, the probability of any given belief to be true is virtually zero.

Rawls agrees that beliefs are irrelevant in the 'initial position'. This view has, however, been criticised in the literature: Nagel (1973), at 226 et seq., "they are [in Rawls' initial position] deprived also of knowledge of their particular conception of the good. It seems odd to regard that as morally irrelevant from the standpoint of justice. If someone favors certain principles because of his conception of the good, he will not be seeking special advantages for himself so long as he does not know who in the society he is.

Clearly, *even in the presence of a plurality of justice theories there may exist agreement on some issues* since these different justice theories may all lead to the same partial orderings of social realisations – even though they rely on different (possibly conflicting) impartial and rational reasons.[39]

4.2.3 Implications of the requirements

These requirements of a 'justice theory' have several immediate implications. First, they imply *normative individualism* because 'explicitly relying upon the quality of life of all affected beings' puts the focus on individual beings rather than on collectivities of beings.[40]

Second, and related, they imply a *rejection of moral intuition ('moral sentiments')* because they must be subject to critical review; namely, for them not to be rejected they must be supported by an impartial and rational reason and there is no basis for generally expecting such a reason to exist since intuition derives from experience and evolution (i.e., emerges through selection of the fittest – and not selection of the most impartial).[41]

Rather he will be opting for principles that advance the good for everyone, as defined by that conception ... It is true that men's different conceptions of the good divide them and produce conflict, so allowing this knowledge to the parties in the original position would prevent unanimity."

Importantly, this point does not make beliefs irrelevant: people in the 'initial position' realise that in the real world (i.e., once the veil of ignorance rises) they may have a specific belief and be convinced of its trueness, and they will consequently take this fact into consideration during the rational reasoning in the 'initial position'. In short, all this point is saying is that people in the 'initial position' behave as if they themselves had no beliefs of their own.

[39] Sen (2009), at 397, "Definite conclusions can emerge despite plurality ... The competing criteria will yield different rankings of alternatives, with some shared elements and some divergent ones. The intersection – or the shared elements of the rankings – of the diverse orderings generated by the different priorities will yield a partial ordering that ranks some alternatives against each other with great clarity and internal consistency, while failing altogether to rank other pairs".

This reasoning leads to Derek Parfit's quotation mentioned at the beginning of this Section.

[40] Vanberg (1994), at 209, "normative individualism ... rests on the premise that the ultimate judge on the 'goodness' of social transactions and arrangements are the individuals who are affected by the respective transactions and arrangements" (emphasis omitted).

[41] Elster (1982), at 234, "If they are culturally relative, one hardly sees why they should be relevant for

Third, they imply *consideration of non-human beings* because 'explicitly relying upon the quality of life of all affected beings' captures all sentient beings (read: those beings experiencing quality of life) since there is no impartial and rational reason for excluding certain sentient beings,[42] which arguably leads to the inclusion of some non-human beings.[43]

Fourth, they imply a normative rationalisation of justice through a *spectator perspective* (Section 4.1.4) because they hold that 'justice' is anything a spectator can rationally support by holding that 'justice' is anything for which there exists a rational and impartial reason supporting it.

Fifth, they imply a *procedural normative theory* (Section 4.1.2) because even

a non-relative theory of justice. And if they are culturally invariant, one suspects that they might have a biological foundation, which would if anything make them even less relevant for ethics." (footnotes omitted); Sen (2009), at xvii, "I argue against the plausibility of seeing emotions or psychology or instincts as independent sources of valuation, without reasoned appraisal. Impulses and mental attitudes remain important, however, since we have good reasons to take not of them in our assessment of justice and injustice in the world."; Singer (2011), at 14, "We cannot just rely on our [moral] intuitions, even those that are very widely shared, since these could ... be the result of our evolutionary heritage and therefore an unreliable guide to what is right."

Of different opinion: Posner (1990), at 163, "conformity to intuition is the ultimate test of a moral (indeed of any) theory"; Wilson (1998), at 262, "Ethics ... is conduct favored consistently enough throughout a society to be expressed as a code of principles. It is driven by hereditary predispositions in mental development".

[42] Singer (2011), at 50, "If a being suffers, there can be no moral justification for refusing to take that suffering into consideration ... If a being is not capable of suffering, or of experiencing enjoyment or happiness, there is nothing to be taken into account. This is why the limit of sentience ... is the only defensible boundary of concern for the interests of others. To mark this boundary by some characteristic like intelligence or rationality would be to mark it in an arbitrary way. Why not choose some other characteristic, like skin colour?"

[43] For the argumentation: Singer (2011), at 59 et seq., "we can point to the fact that the nervous system of all vertebrates, and especially of birds and mammals, are fundamentally similar. Those parts of the human nervous system that are concerned with feeling pain are relatively old, in evolutionary terms. Unlike the cerebral cortex, which developed only after our ancestors diverged from other mammals, the basic nervous system evolved in more distant ancestors and so is common to all of the other 'higher' animals, including humans. This anatomically parallel makes it likely that the capacity of vertebrate animals to feel is similar to our own. The nervous system of invertebrates are less like our own ... On the other hand, scientists studying the responses of crabs and prawns to stimuli like electric shock or a pinch on an antenna have found evidence that does suggest pain."

though they make a substantive assumption by adopting 'normative individualism', the core of the theory is the procedural assumption of taking a 'spectator perspective'.

Finally, in practice they imply *public consultation (non-solitary exercise)* because 'explicitly relying upon the quality of life of all affected beings' requires a broad informational basis since it necessitates figuring out the affected beings as well as how those beings are precisely affected; and because in practice nobody has perfect information and therewith cannot by themselves satisfy this informational requirement.[44] Importantly, this is not the same as 'discourse' (Section 4.1.4) because 'public consultation' is neither used to look at justice (i.e., not used as the representational framework) nor is 'public consultation' used to make justice conditional on all affected individuals accepting it (i.e., not used for normative rationalisation) – it

[44] Sen (2009), at 88 et seq., "dialogue and communication [are] part of the subject matter of the theory of justice (we have good reason to be sceptical of the possibility of 'discussionless justice')"; Sandel (2009), at 28 et seq., "The answer to that moral reflection is not a solitary pursuit but a public endeavor. It requires an interlocutor—a friend, a neighbor, a comrade, a fellow citizen. Sometimes the interlocutor can be imagined rather than real, as when we argue with ourselves. But we cannot discover the meaning of justice or the best way to live through introspection alone."; Haidt (2012), at 115, "Enlightenment thinkers were united in rejecting divine revelation as the source of moral knowledge, but they were divided as to whether morality transcended human nature—that is, it emerged from the very nature of rationality and could therefore be deduced by reasoning, as Plato believed—or whether morality was a part of human nature, like language or taste, which had to be studied by observation. Given Hume's concerns about the limits of reasoning, he believed that philosophers who tried to reason their way to moral truth without looking at human nature were not better than theologians who thought they could find moral truth revealed in sacred texts." (emphasis and footnote omitted).

The view adopted in this work conflicts with Plato's *Allegory of the Cave*. Also rejecting it for the same reason is Sandel (2009), at 29,

> In Plato's *Republic*, Socrates compares ordinary citizens to a group of prisoner's confined in a cave. All they ever see is the play of shadows on the wall, a reflection of objects they can never apprehend ... Socrates suggests that, having glimpsed the sun, only the philosopher is fit to rule the cave dwellers, if he can somehow be coaxed back into the darkness where they live.
>
> Plato's point is that to grasp the meaning of justice ... we must rise above the prejudices and routines of everyday life. He is right, I think, but only in part. The claims of the cave must be given their due ... moral reflection ... needs opinions and convictions, however partial and untutored, as ground and grist.

is merely used to uncover the necessary information.

4.3 Conflicting approaches

This Section presents several (abstract and specific) normative theories which must arguably be rejected as 'justice theories' – namely, as 'overarching normative frameworks' – for lack of an 'impartial and rational reason' supporting some of their characteristics.

Notice that even though a normative theory may itself be rejected as a 'justice theory', it may nonetheless be (strictly) included in a 'justice theory' if an 'impartial and rational reason' can be advanced for supporting the said normative theory's usage under certain conditions.

4.3.1 Abstract assessment

4.3.1.1 Approaches yielding a non-rational (normative preference) ordering

Accepting 'impartial and rational reasoning' as a requirement for 'justice theories' arguably implies the rejection of normative theories which do not yield a rational (normative preference) ordering of all social realisations. A preference ordering, whether normative or not, qualifies as 'rational' if it satisfies transitivity, completeness, and independence of irrelevant alternatives.[45]

Generally speaking, an ordering is *transitive* if and only if the order between different pairs of social realisation is internally consistent. Specifically, 'impartial and rational reasoning' requires that if A is 'normatively superior' (or 'normatively preferred') to B and if B is 'normatively superior' to C, then A must also be 'normatively superior' to C.

Generally speaking, an ordering is *complete* if and only if there is an order between all pairs of social realisations. Specifically, 'impartial and rational reason-

[45] See, for instance, Gintis (2009), at 1.

Note that some scholars only require transitivity and completeness of the preference ordering for it to be 'rational'; most notably, Mas-Colell, Whinston, and Green (1995), at 6.

ing' requires that a normative theory attributes either 'normatively superior' or 'normatively equivalent' (or 'normatively indifferent') to all pairs of social realisations; namely, that it either specifies which social realisation of the pair is 'just' or holds that both are 'just'.[46]

Generally speaking, an ordering is *independent of irrelevant alternatives* if and only if the order between any pair of social realisations is independent of the existence (or knowledge of the existence) of other social realisations.

4.3.1.2 Approaches readily dependent on the status quo

Accepting 'impartial and rational reasoning' as a requirement for 'justice theories' arguably implies the rejection of normative theories whose normative conclusions are readily dependent on the status quo. By 'readily dependent' it is meant that the status quo is relied upon (i.e., given normative value) without further thought.

First, there is no impartial and rational reason to always give the status quo normative value when studying some social realisation without considering the process that led to the status quo. On the one hand, the status quo (specifically: the distribution of resources existing therein)[47] may be the result of nature (e.g., natural forces, presence of natural resources) and/or may be the result of people having engaged in unjust behaviours.

And second, these normative theories cannot say whether the social realisation under study is 'just' since the status quo's justness is not assessed. Indeed, the status quo may be 'very unjust' and the social realisation under study may hence simply be 'less unjust'.

4.3.1.3 Approaches valuing all real-world feelings/preferences equally

Accepting 'impartial and rational reasoning' as a requirement for 'justice theories' arguably implies the rejection of normative theories which take all real-world feel-

[46] Also rejecting theories which yield an incomplete ordering is: Elster (1982), at 233 et seq.

[47] Which includes the de facto property rules.

ings/preferences to be of equal worth (i.e., to count equally).[48]

First, it is difficult to find an impartial and rational reason that the utility derived from despicable preferences, such as rape or racism, should count equally.[49]

Second, experimental studies provide plenty of evidence that real-world preferences are adaptive (endogenous) through the following processes:[50] norm internalisation (preference-direction variation);[51] habit formation (preference-intensity variation, and possibly preference-direction variation);[52] hedonic adaption (preference-intensity variation).[53] There is no impartial and rational reason for valuing all real-

[48]Remark, however, that 'valuing all real-world feelings/preferences equally' is sometimes advanced as something positive: Sandel (2009), at 41, "It weighs preferences without judging them ... This non-judgmental spirit is the source of much of its appeal."

[49]Wacks (2006), at 64, "why should we seek to satisfy people's desires? Certain desires – e.g. cruelty to animals – are unworthy of satisfaction. And are our needs and desires not, in any event, subject to manipulation by advertising? If so, can we detach our 'real' preferences from our 'conditioned' ones?"

The same idea is captured by the popular 'utility monster thought experiment' wherein someone derives an increase in utility from despicable behaviours (e.g., genocide, hate speech) that is higher than the loss in utility experienced by the victims: Nozick (1974), at 41, "[Benthamian] Utilitarian theory is embarrassed by the possibility of utility monsters who get enormously greater sums of utility from any sacrifice of others than these others lose ... the theory seems to require that we all be sacrificed in the monster's maw, in order to increase total utility".

[50]Preferences are 'adaptive' if they can change over time.

[51]Scott (1971); Coleman (1990), at 293, "I will not use 'internalization of a norm' to mean merely accepting a norm as legitimate, accepting the right of others' to partially control one's action ... [instead, it means] that an individual comes to have an internal sanctioning system which provide punishment when he carries out an action proscribed by the norm or fails to carry out an action prescribed by the norm."

For instance, people's internal fairness norms (i.e., people's internal sanctioning system with respect to fairness) seem to vary with their environment (Frey and Bohnet, 1995; Henrich et al., 2001; Bowles, 2008; Gächter, Herrmann, and Thöni, 2010). The ability of people to internalise norms appears virtually universal (Bowles and Gintis, 2006, at 961).

[52]The concept of 'habit formation' captures the fact that for some activities, the past engagement with them increases the utility derived therefrom in the future; namely, the utility derived from their consumption is a function of one's past consumption thereof.

For instance, exercising seems to amount to such an activity (Charness and Gneez, 2009). More generally, see Korobkin and Ulen (2000), at 1113 et seqq.

[53]The concept of 'hedonic adaption' (or 'hedonic treadmill') captures the fact that for some activities, the past engagement with them decreases the intensity of the happiness or unhappiness derived therefrom in the future. Note that because the concept focuses exclusively on 'happiness', its utilisation here is somewhat a misnomer (an abuse of language) since it is used to refer to the intensity of feelings beyond

world feelings/preferences equally if they are adaptive. Indeed, adaptive preferences are subject to manipulation: oneself or others may manipulate the intensity of one's real-world preferences (i.e., inducing a strengthening or weakening of the preference intensity) and others may manipulate the direction of one's real-world preferences. Furthermore, adaptive preferences may make arguably 'horrible' social realisations appear less bad over time through hedonic adaption.[54]

4.3.2 Assessment of specific normative theories

4.3.2.1 Subjective approach

The subjective approach was described in Section 4.1. A subjective normative theory must arguably be rejected as a justice theory because it values all real-world feelings/preferences equally (Section 4.3.1.3).[55]

In so doing, the requirements of a 'justice theory' implicitly imply an *objective theory* (Section 4.1.1).

4.3.2.2 Utilitarianism

The normative theory known as 'utilitarianism' – whether in the form of 'act utilitarianism' or 'rule utilitarianism',[56] or whether in the form of 'hedonistic utilitarianism'

'happiness'.

For instance, "[t]emporarily giving up chocolate can restore our ability to enjoy it" (Dunn and Norton, 2013, at 34). More generally, see Frederick and Loewenstein (1999).

[54] Although directed at utilitarianism, Sen's critique holds more generally: Sen (2009), at 282 et seq., "The utilitarian calculus based on happiness or desire-fulfilment can be deeply unfair to those who are persistently deprived, since our mental make-up and desires tend to adjust to circumstances, particularly to making life bearable in adverse situations. It is through 'coming to terms' with one's hopeless predicament that life is made somewhat bearable by the traditional underdogs ... the adjustments ... have the consequential effect of distorting the scale of utilities in the form of happiness or desire-fulfilment".

[55] There may be other reasons, the mentioned reason follows from the exposition in Section 4.3.

[56] *Act utilitarianism* holds that an action's moral worth ought to be judged based on its utility consequences (Wacks, 2006, at 62).

Rule utilitarianism holds that an action's moral worth ought to be judged based on the moral worth of the rule it adheres to – and that the rule's moral worth ought to be judged based on its utility consequences if followed by everyone. In other words, "[it] selects rules solely in terms of ... their [utility]

or 'preference utilitarianism'[57] – holds that moral worth is to be judged solely based on the consequences in terms of utility. At its core, therefore, utilitarianism contains three elements: welfarism, consequentialism, and some aggregation/weighing formula (of the various individuals).[58] 'Welfarism' holds that the only information to be used is utility; in so doing, it implicitly holds that all utility variations are of equal worth.[59] Welfarism therefore qualifies utilitarianism as a subjective theory – and, as

consequences and then claims that these rules determine which kinds of acts are morally wrong" (Hooker, 2011). Rule utilitarianism was advocated based on the argument that act utilitarianism is problematic in practice because it requires too much calculation and should therefore be replaced by a requirement to follow 'good' rules (Hardin, 1993, at 131).

[57] *Hedonistic utilitarianism* holds that the utility consequences ought to be measured in terms of happiness (i.e., the relevant consequences are pleasures and pains); classical utilitarianism (think: Jeremy Bentham, John Stuart Mill, Henry Sidgwick) took this form (Hooker, 2011).

Preference utilitarianism holds that the utility consequences ought to be measured in terms of the satisfaction of preferences; contemporary utilitarianism (think: John Harsanyi, R. M. Hare, Peter Singer) tends to take this form (see e.g., Wacks, 2006, at 61 et seqq.).

[58] All utilitarian theories therefore exhibit welfarism and consequentialism, but vary in terms of the aggregation/weighing formula they use.

Remark that 'utilitarianism' is oftentimes implicitly equated with 'Benthamian utilitarianism' – mistakenly in my view because *Benthamian utilitarianism* specifies the 'aggregation formula' (to be a simple sum) and thus amounts to one form of utilitarianism. Most notable amongst the scholars equating 'utilitarianism' with 'Benthamian utilitarianism' is Amartya Sen: "utilitarian reasoning is an amalgam of three distinct axioms: (1) consequentialism, (2) welfarism, and (3) sum-ranking . . . the last stands for the requirement that utility of different people must simply be added up to assess the state of affairs" (Sen, 2009, at 219).

[59] Sen (1979), at 471, "[welfarism] can be seen as imposing an 'informational constraint' in making moral judgments about alternative states of affair . . . If all the personal utility information about two states of affairs that can be known is known, then they can be judged without any other information about these states. This need not stop us [however] from using non-utility information as 'surrogates' for utility information when utility information is scarce . . . but the non-utility information then has no status of its own independent of the indications it gives of the utility picture", and at 478, "Welfarism is an exacting demand, ruling out essential use of any non-utility information (the use of non-utility information being confined to instrumental analysis or as surrogate for utility information when the latter is incomplete)."; Sandel (2009), at 52, "Bentham recognizes no qualitative distinction among pleasures . . . [and] takes people's preferences as they are, without passing judgment on their moral worth. All preference count equally. Bentham thinks it is presumptuous to judge some pleasures as inherently better than others."

See, most notably, Bentham (1825), Book III, Chapter I, at 206, "Prejudice apart, the game of push-pin is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more

such, utilitarianism must arguably be rejected as a justice theory (Section 4.3.2.1).

Forms We can distinguish between two forms of utilitarianism: cardinal and ordinal.[60]

Cardinal utilitarianism relies upon an aggregation/weighing formula whose inputs are utility levels; more specifically, the inputs are the utility levels present in the social realisation under study. Cardinal utilitarianism must arguably already be rejected as a justice theory for the same reason as utilitarianism generally.

Ordinal utilitarianism relies upon an aggregation/weighing formula whose inputs are the directions of utility-level changes of each person; more specifically, the inputs are the direction in which each person's utility changes from the status quo to the social realisation under study. Ordinal utilitarianism must arguably already be rejected as a justice theory for the same reason as utilitarianism generally.[61] There is, however, at least one additional reason for arguably rejecting ordinal utilitarianism:[62] its inputs are always fully dependent on the status quo and it therewith readily depends on the status quo (Section 4.3.1.2).

Finally, observe that utilitarianism (historically its cardinal form and contemporarily its ordinal form)[63] has been the dominant normative theory relied upon by economists for judging social realisations; that is, *welfare economics* has mainly taken the form of utilitarianism.[64]

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pleasure, it is [morally] more valuable than either." Remark that in lieu of Bentham's original quote, it is often misquoted using John Stuart Mill's writing: "He [Jeremy Bentham] says, somewhere in his works, that, 'quantity of pleasure being equal, push-pin is as good as poetry;'" (Mill, 1859, Section 4, at 389).

[60] The term 'ordinal utilitarianism' was coined in Arrow (1973).

[61] Note, however, that adaptive real-world preferences are only an issue here when they involve a 'preference-direction variation'. Indeed, a 'preference-intensity variation' does not modify the direction of the utility-level change of that person (even though it may change the intensity/size of the utility-level change) and therewith does not modify the normative implication of ordinal utilitarianism.

[62] There may be other reasons, the mentioned reason follows from the exposition in Section 4.3.

[63] Economists have increasingly turned since the 1940s towards the Pareto version (ordinal form) of utilitarianism in order to avoid interpersonal comparisons of utilities (Sen, 2009, at 278), at 278.

[64] Sen (2009), at 272.

4.3.2.3 Pareto version of utilitarianism

The Pareto version is a special case of ordinal utilitarianism. The *Pareto criterion* holds that a social realisation is 'normatively better' than the status quo if and only if it increases the utility of at least one person without decreasing the utility of any other person.[65] 'Normatively better' in this sense is referred to as 'Pareto improvement', and a social realisation for which there exists no Pareto improvement is referred to as 'Pareto efficient' or 'Pareto optimal'.

The Pareto version of utilitarianism must arguably already be rejected as a justice theory for the same reasons as utilitarianism generally and ordinal utilitarianism specifically (Section 4.3.2.2).[66] There are, however, additional reasons for arguably rejecting the Pareto version:[67] (i) it provides a veto right to despicable real-world feelings/preferences by treating all utility variations as of equal worth; (ii) it yields an incomplete ordering and therewith yields a non-rational ordering (Section 4.3.1.1).[68]

4.3.2.4 Wealth maximisation[69]

The normative theory known as 'wealth maximisation' – or, more appropriately, *money-equivalent-wealth maximisation* – holds that moral worth is to be judged solely based on the consequences in terms of wealth measured in monetary terms. Specifically, it holds that a social realisation is 'normatively better' than another so-

[65] The aggregation/weighing formula of the 'Pareto criterion' therefore takes the following form: for the status quo, it takes a value of 0; and for the social realisation under study, it weighs any negative utility changes with negative infinities and weighs all positive utility changes with a positive finite number. The two resulting numbers can only be used to compare the status quo to the social realisation under study (i.e., the two resulting numbers only have an ordinal value).

[66] The literature has especially criticised the Pareto criterion for being readily dependent on the status quo; see Aaken (2003), at 214 et seq., for sources.

[67] There may be other reasons, the mentioned reasons follow from the exposition in Section 4.3.

[68] It does not allow to compare social realisations that are 'Pareto optimal'. Instead of many, it cannot tell us how to distribute a pie between several people: all social realisations corresponding to the various distributions of the pie are 'Pareto optimal' since going from one distribution to another always involves at least one loser.

Also criticising the Pareto criterion for yielding an incomplete ordering: Aaken (2003), at 215 et seq.

[69] This normative theory was advanced by Richard Posner. See seminally, Posner (1979).

cial realisation if and only if it increases the sum of all people's wealth (as measured in monetary terms). By 'wealth measured in monetary terms' it is meant that a person's wealth is measured by how much that person values his or her resources in monetary terms; a variation in a person's resources amounts to a variation in that person's wealth, which is equivalent to how much that person values in monetary terms the difference in their resources – namely, equivalent, for a positive variation, to how much they are *willing to pay* to obtain the resources or, for a negative variation, to how much they are *willing to sell* the resources.[70] Wealth maximisation therefore simply holds that a resource ought to be allocated to whomever values it most in monetary terms.

The *Kaldor-Hicks criterion* holds that a social realisation A is 'normatively better' than a social realisation B if and only if those winning (i.e., those seeing their resources increase) from moving from B to A could compensate those loosing (i.e., those seeing their resources decrease) from moving from B to A and would still still be winning. Since in practice 'compensation' tends to take the form of monetary transfers, the 'Kaldor-Hicks criterion' rewrites: if and only if the wealth increase in monetary terms of those winning (i.e., their willingness to pay) is larger than the wealth decrease in monetary terms of those loosing (i.e., their willingness to sell). Hence, for all practical purposes the 'Kaldor-Hicks criterion' is equivalent to 'wealth maximisation'.[71]

Wealth maximisation must arguably be rejected as a justice theory for several reasons:[72] (i) it readily depends on the status quo (Section 4.3.1.2) in two ways – it is dependent on what is considered to be 'money' in the status quo, and it is dependent on the distribution of 'money' (not money-equivalent wealth) in the status quo since a person's willingness to pay/sell (i.e., a person's valuation in monetary terms) varies

[70] Posner (1979), at 119, "Wealth is the value in dollars ... of everything in society. It is measured by what people are willing to pay for something, or if they already own it, what they demand in money to give it up."

[71] Aaken (2003), at 218, footnote 1021.

[72] There may be other reasons, the mentioned reasons follow from the exposition in Section 4.3.

Note that even its founder eventually rejected it as a justice theory: Posner (1985), at 90, "I merely want to persuade you that it [wealth maximisation] is a reasonable, though not a demonstrably or a universally correct, ethic".

with that person's stock of money due to the diminishing marginal utility of money;[73] (ii) it values all real-world feelings/preferences equally (Section 4.3.1.3) since how much a person values (in monetary terms) a resource is function of that person's feelings/preferences.

Finally, observe that wealth maximisation (through the utilisation of the Kaldor-Hick criterion) has been the dominant normative theory relied upon by economists for judging legal rules; that is, the *normative part of Law and Economics* has mainly taken the form of wealth maximisation.[74] The reliance of Economics on this normative theory to judge law has larger consequences: it tends to make non-economists (most notably: legal scholars and lawyers) generally suspicious of insights from Economics on legal matters and therewith hinders the spread of the valuable descriptive part of Economics (read: rational-choice theory) outside of Economics.[75]

4.4 Concretisation: sustainable development

This Section concretises the requirements of a justice theory advanced in Section 4.2. Specifically, Section 4.4.1 argues that these requirements imply that we ought

[73] Importantly, a redistribution of money is not supported by this normative theory because everybody values a given unit of money identically in monetary terms.

Resources (e.g., rights) are therefore more likely to be allocated to those with large stocks of money (i.e., to the rich) since they will ceteris paribus value them more in monetary terms (due to decreasing marginal utility of money). Seminally: Kronman (1980), at 240, "An individual's wealth is defined by his ability and willingness to pay, so the principle of wealth maximization necessarily favors those who already have money, or the resources with which to earn it, and are therefore able to pay more than others to have a new legal rule defined in the way that is favorable to them. The principle of wealth maximization gives an additional advantage to those who are already advantaged, and this quite rightly strikes us as unfair."

[74] Aaken (2003), at 217.

A notable 'recent' law-and-economics scholarship adopting this normative framework is: Kaplow and Shavell (2002), although they themselves argue against wealth maximisation, "wealth maximization is the social welfare function that Kaplow and Shavell effectively employ when applying their theory to specific examples ... [and hence implicitly advocate] that wealth maximization replace all other forms of policy analysis" (Dorff, 2002, at 877 and 898).

[75] Noting that this is especially a problem outside of the United States: Aaken (2004), 426.

to consider the current generation's well-being (quality of life); that quality of life ought to be assessed in terms of the freedom to choose one's level of consumption (i.e., in terms of one's capability); and that freedom of consumption ought to be assessed based on various dimensions (e.g., material, health, political, environment, security). Section 4.4.2 then argues that these requirements imply that we also ought to consider future generations' well-being.

Section 4.4.3 finally argues that the requirements of a justice theory imply the type of considerations required under the concept of 'sustainable development'. That is, it argues that justice is synonymous with the concept of sustainable development and therewith provides a justice-theoretical justification for utilising 'sustainable development' as the 'overarching normative framework'.

4.4.1 Current generation's well-being (quality of life)

The requirement of 'realisation-focused understanding of justice' (Section 4.2.1) implies that one ought to consider quality of life when assessing justice. And the requirement of 'impartial and rational reasoning' (Section 4.2.2) implies that one ought to define quality of life through impartial and rational reasoning.

We can expect that people engaging in impartial and rational reasoning agree that the dimensions, presented hereinafter in Section 4.4.1.1, are (to some degree) relevant for one's quality of life.[76] A justice evaluation therefore requires consideration of how these dimensions are affected.

We cannot expect that people engaging in impartial and rational reasoning agree on some specific level of consumption (or 'on some specific functioning') in each of these dimensions. Indeed, we have seen that people engaging in impartial and rational reasoning have different risk preferences so that they may support different levels of consumption in these dimensions.[77]

[76] 'Agreement' because there is no 'impartial and rational reason' for viewing one of these dimensions as being completely irrelevant to one's quality of life.

[77] Take for instance the dimension referred to as 'material living standards' (Section 4.4.1.1). People engaging in impartial and rational reasoning equally consider all the real-world preferences regarding material living standards since people behind the veil of ignorance do not know what their preference regarding material living standards will be in the real world (i.e., whether they will have a preference

We can, however, expect that people engaging in impartial and rational reasoning agree that one should generally be free to choose their level of consumption (or 'their functioning') in each of these dimensions because such freedom increases the probability that one can achieve the level of consumption that maximises their quality of life (instrumental value)[78] and/or because they may attach some value to freedom for its own sake (intrinsic value).[79] As such, we can expect that people engaging in impartial and rational reasoning agree that the scope of one's freedom to choose – the 'size of one's choice set' or, in Amartya Sen's terminology, 'one's capability'[80] – in each of these dimensions is the relevant criterion. Importantly, although these people agree that a ceteris paribus increase in the scope of a given person's freedom to choose in some dimension is always desirable, they also agree that in some instances such an increase may not be desirable.[81] If this reasoning is sound, then quality of life – and therewith justice – should be thought of in terms of the *scope of freedom to choose (capability)* in those dimensions.[82]

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for minimal material possessions, for exclusive material possessions, etc.). Since the people behind the veil of ignorance have different risk preferences, they may assess differently the uncertainty emanating from the distribution of material-living-standards preferences existing in the real world, and they may consequently prefer different distributions of the levels of material living standards.

[78] Namely, it increases the probability that they can fulfil their real-world preferences.

[79] Arguing so: Sen (2009), at 18, "the freedom [to choose our lives] itself may be seen as important. Being able to reason and choose is a significant aspect of human life.", and at 227 et seq., "In assessing our lives, we have reason to be interested not only in the kind of lives we manage to lead, but also in the freedom that we actually have to choose between different styles and ways of living. Indeed, the freedom to determine the nature of our lives is one of the valued aspects of living that we have reason to treasure."

[80] Sen (1993), at 271, "The capability of a person reflects the alternative combinations of functionings [read: levels of consumption] the person can achieve, and from which he or she can choose one collection." (emphasis omitted); Sen (2009), at 19, "a capability is the power to do something".

[81] Specifically, because such an increase may conflict with the scope of *that person*'s freedom to choose in another dimension and/or because such an increase may conflict with the scope of a*nother person*'s freedom to choose. These considerations are discussed in Section 4.4.1.2.

[82] Namely, if this reasoning is sound, then the so-called 'capability approach' best captures quality of life (and therewith justice).

Regarding the capability approach, see seminally Sen (1980); Sen (1993), at 271, "quality of life is to be assessed in terms of the capability to achieve valuable functionings". See also Sen (1985), Nussbaum and Sen (1993), Sen (1999), at xii, "The removal of substantial unfreedoms . . . is constitutive of development." and Sen (2009), at 249, "Development is fundamentally an empowering process". For a summary, see

The concept of 'freedom to choose' is generally understood as the absence of actual interference in the choice by another person (non-interference view).[83] Since ex ante one may not know whether there will be interference, it leads to a probabilistic assessment of interferences.

4.4.1.1 Relevant dimensions

As mentioned above, we can expect that people engaging in impartial and rational reasoning agree that certain factors are relevant for one's quality of life – let us call them 'relevant dimensions'. This Section argues that people engaging in impartial and rational reasoning agree that the dimensions presented hereinafter are relevant for one's quality of life, namely, that they amount to relevant dimensions.

There is a strong overlap between the dimensions presented hereinafter and the dimensions judged to be relevant for quality of life by Joseph E. Stiglitz, Amartya Sen, and Jean-Paul Fitoussi in their book called *Mismeasuring Our Lives* (Stiglitz, Sen, and Fitoussi, 2010).[84] Furthermore, the dimensions presented hereinafter are also quite congruent (read: ultimately covering approximately the same capabilities) with the dimensions judged to be relevant for quality of life by Martha Nussbaum in her book entitled *Woman and Human Development: The Capabilities Approach* (Nussbaum, 2000).[85]

Robeyns (2005) generally, and at 96, "The capability approach is primarily and mainly a framework of thought, a mode of thinking about normative issues; hence a paradigm – loosely defined – that can be used for a wide range of evaluative purposes. The approach focuses on the information that we need in order to make judgements about individual well-being, social policies, and so forth . . . It can serve as an important constituent for a theory of justice".

[83] Sen (2001), at 54, notes that the 'capability approach' (footnote 82) relies upon the non-interference view.

Pettit (2001), at 17, "The view of liberty that has been standard for nearly two hundred years equates it with the absence of interference by others in one's choice, where interference is understood broadly to include coercion of the will – and indeed manipulation of the will – as well as coercion of the body. This view, which derives from Bentham and Hobbes, means that one is free so far as one is not actively opposed in the choices one makes or might try to make. One is free so far as one is not interfered with, even if one is powerless to resist certain forms of interference that another party might choose to attempt."

[84] For their dimensions, see specifically Stiglitz, Sen, and Fitoussi (2010), at 67 et seqq.

[85] For her dimensions, see specifically Nussbaum (2000), at 78 et seqq.: life (live for a normal length);

Importantly, the dimensions presented hereinafter may not be independent and may at times be causally related to each other. Also, income does not itself amount to a dimension because it has no intrinsic value;[86] income's instrumental value is implicitly captured by the following dimension.[87]

Material living standards People engaging in impartial and rational reasoning would arguably agree that some positive level of material well-being is relevant for one's quality of life. Not least because material well-being contributes to one's health (e.g., bed, clothes, roof, shoes) and one's education (e.g., books, computer).

Health People engaging in impartial and rational reasoning would arguably agree that health is relevant for one's quality of life.[88]

Technological progress (availability of treatments) and availability of sufficient food contribute to this dimension.

Education People engaging in impartial and rational reasoning would arguably agree that education is relevant for one's quality of life.

People might view education as relevant because of its intrinsic value, and/or because of its instrumental value in contributing to their future (e.g., to their future material living standard, economic security, or health).[89]

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bodily health; bodily integrity (personal security); senses, imagination, thought (ability to use senses); emotions; practical reasoning (able to engage in critical reasoning); affiliation (able to live with and towards others); other species (able to live with other species); play (able to have fun); and control over one's environment (political participation and material possessions).

[86] Aristotle (2009), at 7, "wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else".

[87] This is nicely illustrated by the following example: "a richer person with disability may be subject to many restraints that the poorer person without the physical disadvantage may not have. In judging the advantages that different people have compared with each other, we have to look at the overall capabilities they manage to enjoy." (Sen, 2009, at 253).

[88] This is trivial as health clearly affects one's well-being: Stiglitz, Sen, and Fitoussi (2010), at 68 et seqq.

[89] Stiglitz, Sen, and Fitoussi (2010), at 72, "education matters for quality of life independently of its effects on people's earnings and productivity. Education is strongly associated with people's life-evaluations, even after controlling for the higher income it brings."

The availability of schools and the general information availability (e.g., internet, libraries, media) contribute to this dimension.

Personal activities People engaging in impartial and rational reasoning would arguably agree that how one spends their time is relevant for one's quality of life.[90] This dimension includes 'paid work', 'leasure/spare time', and 'unpaid work' (e.g., shopping, household chores, and commuting time).

Political participation/voice People engaging in impartial and rational reasoning would arguably agree that being given a say in the rules that govern their lives is relevant for one's quality of life.[91] In so doing, these people would essentially agree that a society's organisation should amount to a democracy, where 'democracy' is understood as 'government by discussion' (which is broader than democracy's formal/traditional definition as 'voting').[92]

De facto freedom of political participation requires that people have access to relevant information. Fulfillment of this freedom consequently requires media freedom.[93]

Finally, beyond having an intrinsic value, political participation arguably also has an instrumental value in contributing to the other relevant dimensions. Im-

[90] Stiglitz, Sen, and Fitoussi (2010), at 73, "How people spend their time and the nature of their personal activities matters for quality of life, irrespectively of the income generated."

[91] Stiglitz, Sen, and Fitoussi (2010), at 78, "Political voice is an integral dimension of the quality of life. Intrinsically, the ability to participate as full citizens, to have a say in the framing of policies, to dissent without fear and to speak up against what one perceives to be wrong are essential freedoms."

[92] The concept of 'democracy' (from the Greek word *demokratia* which translates into 'rule of common people') is nowadays understood in political philosophy (see e.g., Buchanan and Tullock, 1962; Rawls, 1971; Habermas, 1984; Dworkin, 2006) as 'government by discussion' or 'public reasoning': Sen (2009), at 324, "in contemporary political philosophy the view that democracy is best seen as 'government by discussion' has gained widespread support ... the older – and more formal – view of democracy ... [characterised] it mainly in terms of elections and ballot", and at 326 et seq., "Ballots [therefore] ... can be seen just as one part – admittedly a very important part – of the way public reason operates in a democratic society".

[93] Sen (2009), at 336, "Media freedom is critically important for our capability to do this [read: political participation] ... the press has a major informational role in disseminating knowledge and allowing critical scrutiny" (emphasis omitted).

portantly, however, political participation by itself is no guarantee of development and/or sustainable development: the majority need not care about the quality of life of minorities in their generation (possibly yielding discrimination against them by the majority) and/or of future generations,[94] which would implicitly lead to an 'intra-generational aggregation-weighing formula' (Section 4.4.1.2) and/or 'inter-generational aggregation-weighing formula' (Section 4.4.2) which are/is not supported by impartial and rational reasoning. In short, it is not sufficient to focus solely on political participation.

Social connections People engaging in impartial and rational reasoning would arguably agree that social connections are relevant for one's quality of life.

People might view social connections as relevant because of their intrinsic value,[95] and/or because of their instrumental value in contributing to their future (e.g., to their future material living standard or economic security by increasing the probability of finding a job).[96]

Environmental conditions People engaging in impartial and rational reasoning would arguably agree that the environment is relevant for one's quality of life.

The environment may have an instrumental value in contributing to one's health and personal security (e.g., clean air, absence of natural disasters, global warming) or to one's personal activities (e.g., offering leisure activities through clean water and recreational areas).[97]

[94] For the theoretical argument, see Section 8.5.2.

[95] Stiglitz, Sen, and Fitoussi (2010), at 80, "Social connections improve quality of life in a variety of ways. People with more social connections report higher life-evaluations, as many of the most pleasurable personal activities involve socializing."

[96] Stiglitz, Sen, and Fitoussi (2010), at 80, "The benefits of social connections extend to people's health and to the probability of finding a job".

[97] Sen (2009), at 248, "the value of the environment cannot be just a matter of what there is, but must also consist of the opportunities it offers to people. The impact of the environment on human lives must be among the principal considerations in assessing the value of the environment. To take an extreme example, in understanding why the eradication of smallpox is not viewed as an impoverishment of nature (we do not tend to lament: 'the environment is poorer since the smallpox virus has disappeared'), in the way, say, the destruction of ecologically important forests would seem to be, the connection with lives

Personal security People engaging in impartial and rational reasoning would arguably agree that psychological and physical integrity are relevant for one's quality of life.[98] Verbal or physical violence, natural disasters, or accidents clearly impacts one's quality of life.

Economic security People engaging in impartial and rational reasoning would arguably agree that some degree of economic security is relevant for one's quality of life. Support for this view is provided by the fact that economic security amounts to a major concern for poor people: the poor tend to wish that their children become government workers as these jobs offer strong economic security.[99]

4.4.1.2 Aggregation/weighing

> Aristotle reminds us that all theories of . . . justice discriminate. The question is: Which discriminations are just?
>
> — Michael J. Sandel[100]

The requirement of 'impartial reasoning' (Section 4.2.2) implies that one ought to consider the quality of life of all the individuals within a generation and therewith implies an aggregation of the quality of life of the individuals within a generation. Indeed, people engaging in impartial and rational reasoning equally consider the quality of life of all positions within a generation, since people reasoning behind the veil of ignorance do not know who they are going to be in society.

Aggregation/weighing of quality-of-life dimensions An individual's quality of life – that is, an overall assessment of the scope of that individual's freedom to choose

in general and human lives in particular has to be taken into consideration."; Stiglitz, Sen, and Fitoussi (2010), at 81 et seq.

[98] Stiglitz, Sen, and Fitoussi (2010), at 83.

[99] Banerjee and Duflo (2011), at 226 et seq., "the most common dream of the poor is that their children become government workers . . . The emphasis on government jobs, in particular, suggests a desire for stability, as these jobs tend to be very secure even when they are not very exciting."

[100] Sandel (2009), at 192.

– requires an aggregation of the various (non-commensurable)[101] dimensions that are relevant for quality of life.[102]

Since these dimensions are somewhat in conflict, such aggregation necessarily requires a weighing formula that discriminates between these dimensions. It is difficult to imagine that people engaging in impartial and rational reasoning would agree on a specific aggregation/weighing formula since they differ with respect to their risk preference, which, amongst others, affects how much one values different dimensions.[103] Hence, the requirements of justice (Section 4.2) allow for multiple 'aggregation/weighing formulae of relevant dimensions' (*relevant-dimensions aggregation/weighing formulae)* – for a formula not to be rejected, it must only be supported by some impartial and rational reason.

Aggregation/weighing of positions in society Since individuals' quality of life (i.e., the scope of their freedoms to choose) are somewhat in conflict,[104] such aggregation necessarily requires a weighing formula that discriminates between these individuals (i.e., that discriminates between positions in society). It is difficult to

[101] Sen (2009), at 240, "Capabilities are clearly non-commensurable since they are irreducibly diverse ... Two distinct objects can be taken to be commensurable if they are measurable in common unity (like two glasses of milk). Non-commensurability is present when several dimensions of value are irreducible to one another. In the context of valuating a choice, commensurability requires that, in assessing its results, we can see the values of all the relevant results in exactly one dimension".

[102] Sen (2009), at 240 et seq., "'non-commensurability' – a much-used philosophical concept ... seems to arouse anxiety and panic among some valuational experts ... Anyone who has even gone to shop would know that one has to choose between non-commensurable objects – mangoes cannot be measure in units of apples, nor can sugar be reduced to units of soap ... Non-commensurability can hardly be a remarkable discovery in the world in which we live ... The choice and the weighting may sometimes be difficult, but there is no general impossibility here of making reasoned choices over combinations of diverse objects." Non-commensurability is especially nothing new to legal scholars who are regularly called upon to balance non-commensurable elements; see e.g. Sunstein (1994a,b).

[103] For instance, one's risk preference impacts how one relatively values 'personal security' and 'economic security'.

[104] Instead of several, see Stiglitz (2002), at 78, "Trickle-down economics was never much more than just a belief, an article of faith. Pauperism seemed to growth in nineteenth-century England even though the country as a whole prospered. Growth in America in the 1980s provided the most recent dramatic example: while the economy grew, those at the bottom saw their real incomes decline."

imagine that people engaging in impartial and rational reasoning would agree on a specific aggregation/weighing formula since since they differ with respect to their risk preference, which, amongst others, affects whether they prefer an egalitarian or a winner-takes-it-all society.[105] Hence, the requirements of justice (Section 4.2) allow for multiple 'aggregation/weighing formulae of positions in society' (*intra-generational aggregation/weighing formulae)* – for a formula not to be rejected, it must only be supported by some impartial and rational reason.

Notable formula: average quality of life The intra-generational aggregation/weighing formulae that equally weighs the quality of life associated with each position in society, and therewith considers the average quality of life, has a long history of usage (most notably: 'Benthamian utilitarianism')[106].

There is an ongoing debate about whether this aggregation/weighing formula must be rejected.[107] In this work's terminology: if a the 'average' can be supported by impartial and rational reasoning, then it cannot be rejected as an aggregation/weighing formula. More specifically: if a person engaging in impartial and rational reasoning can be risk-neutral with respect to the (distribution of) positions

[105] Sen (2009), at 232 et seq., "contrary to an often-articulated interpretation, the use of the capability approach for evaluation does not demand that we sign up to social policies aimed entirely at equating everyone's capabilities . . . in judging the aggregate progress of a society, the capability approach would certainly draw attention to the huge significance of the expansion of human capabilities of all members of the society, but it does not lay down any blueprint for how to deal with conflicts between, say aggregative and distributive considerations".

John Rawls believes that people engaging in impartial and rational reasoning (i.e., people reasoning behind the veil of ignorance) would agree on a specific weighing formula (Rawls, 1971, at 24) because he (wrongly) implicitly assumes that all people engaging in impartial and rational reasoning have the same risk preference (see footnote 35).

[106] 'Benthamian utilitarianism' relies upon a 'simple sum' to aggregate/weigh the utilities of the different positions in society (see footnote 58).

The conclusion follows from realising that using the 'average' or the 'sum' is equivalent for ranking purposes when the distribution is equi-probabilistic and from observing that the distribution of positions in society is by definition equi-probabilistic (since every position is different and therefore occurs only once).

[107] The debate focuses on the 'simple sum' but its rationale applies beyond that specific form. For a literature review, see Sen (2008).

in society, then the 'average' cannot be rejected as an aggregation/weighing formula (because the 'average' is supported by a risk-neutral person engaging in impartial and rational reasoning).[108] Note that distributional considerations may nonetheless enter indirectly in this computation by influencing the quality of life associated with each position.[109]

4.4.2 Future generations' well-being

The requirement of 'impartial reasoning' (Section 4.2.2) implies that one ought to consider the quality of life of future generations and therewith implies an aggregation of the quality of life of the individuals across generations. Indeed, people engaging in impartial and rational reasoning equally consider the quality of life of future generations, since people reasoning behind the veil of ignorance do not know which generation they are going to be part of. Such consideration matters because a given generation's behaviour may impact future generations' quality of life.[110]

The issue of 'aggregation/weighing of present and future generations' is similar to the issue of 'aggregation/weighing of different positions in society', which was already discussed in Section 4.4.1.2. Again, the requirements of justice (Section

[108] This follows from observing that a risk-neutral person only cares about the average, and not the riskiness (i.e., higher moments), of a distribution.

[109] Sen (2008), "For example, inequality in the distribution of incomes may be disvalued ... because it may lead to a reduction in the sum-total of individual utilities, through (interpersonally comparable) 'diminishing marginal utilities'." And in scope-of-freedom-to-choose (capabilities) terms: through 'diminishing marginal value of the scope of one's freedom to chose'.

[110] Stiglitz, Sen, and Fitoussi (2010), at 98, "the well-being of future generations compared to ours will depend on what resources we pass on to them. Many different forms of resources are involved here. Future well-being will depend upon the magnitude of the stocks of exhaustible resources that we leave to the next generations. It will depend also on how well we maintain the quantity and quality of all the other renewable natural resources that are necessary for life. From a more economic point of view, it will also depend upon how much physical capital—machines and buildings—we pass on, and how much we devote to the constitution of the human capital of future generations, essentially through expenditure on education and research. And it also depends upon the quality of the institutions that we transmit to them, which is still another form of 'capital' that is crucial for maintaining a properly functioning human society.", and at 108, "sustainability in terms of overconsumption, underinvestment or excessive pressure on resources".

4.2) allow for multiple 'aggregation/weighing formulae of present and future generations' (*inter-generational aggregation/weighing formulae)* – for a formula not to be rejected, it must only be supported by some impartial and rational reason.

4.4.3 The concept of 'sustainable development'

> Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs
>
> — United Nations ('Brundtland Report')[111]

This quote captures the foundation of the contemporary understanding of the concept of sustainable development. Indeed, although the concept of sustainable development was historically defined more narrowly, namely as requiring consideration of the environmental alongside the economic dimension,[112] the concept is nowadays defined holistically, namely as requiring *consideration of current and future generations' quality of life – with economic, environmental, and social (which includes: cultural and political) dimensions as being relevant for 'quality of life'*.[113]

[111] United Nations (1987), Chapter I, Section 3, at para 27.

[112] Dasgupta and Duraiappah (2012), at 14, "The literature on sustainable development grew in response to the concern that humanity's use of environmental natural resources is not taken adequately into account in economic decisions."

[113] Stiglitz, Sen, and Fitoussi (2010), at 116 et seq., "Since the Brundtland Report, the notion of sustainable development has expanded to become an all-encompassing concept that absorbs every dimension of present and future economic, social and environmental well-being." Further support for this understanding is provided by the title of the 2008 OECD book *Sustainable Development: Linking Economy, Society, Environment* (Strange and Bayley, 2008). See also Beyerlin (2013), at para 11, "Today, SD [sustainable development] is broadly understood as a concept that is characterized by (1) the close linkage between the policy goals of economic and social development and environmental protection; (2) the qualification of environmental protection as an integral part of any developmental measure, and vice versa; and (3) the long-term perspective of both policy goals, that is the States' inter-generational responsibility."; Sachs (2015), at 3, "sustainable development recommends a holistic framework, in which society aims for economic, social, and environmental goals", and at 12, "From a normative perspective then, we could say that a good society is not only an economically prosperous society (with high per capita income) but also one that is also socially inclusive . . . [and] environmentally sustainable".

The following argues that *justice is synonymous with the concept of sustainable development*[114] and therewith provides a justice-theoretical justification for utilising 'sustainable development' as the 'overarching normative framework'.

Justice-theoretical justification The requirements of a justice theory (Section 4.2) imply consideration of the current generation's quality of life but do not imply some specific aggregation/weighing formulae of positions in society – only that the formulae must be supported by impartial and rational reasoning (Section 4.4.1); the (development element of the) concept of sustainable development also requires such consideration and also does not specify such formulae. The requirements of a justice theory (Section 4.2) imply assessment of quality of life in terms of the freedom to choose one's level of consumption – in terms of one's capability (Section 4.4.1); the (development element of the) concept of sustainable development also focuses on the ability to meet one's needs. The requirements of a justice theory (Section 4.2) imply assessment of quality of life based on various dimensions but do not imply some specific aggregation/weighing formulae of these dimensions – only that the formulae must be supported by impartial and rational reasoning (Section 4.4.1); the (development element of the) concept of sustainable development also requires assessment of quality of life based on various (economic, environmental, and social) dimensions and also does not specify such formulae. Hence, the development element of the concept of sustainable development is implied by the requirements of justice.

Furthermore, the requirements of a justice theory (Section 4.2) imply consideration of future generations' quality of life but do not imply some specific aggregation/weighing formulae of present and future generations (Section 4.4.2); the (sustainability element of the) concept of sustainable development also requires such consideration and also does not specify such formulae. Hence, the sustainability element of the concept of sustainable development is implied by the requirements of

[114]Notice that the formulation of 'justice as sustainable development' would be misleading because in John Rawls' 'Justice as Fairness' (Rawls, 1958), fairness amounts to an initial condition of the justice theory – whereas in 'justice as sustainable development', sustainable development amounts to the implication of the justice theory.

justice.

4.4.4 Assessment of quantitative normative indicators

In the following, the value of several 'quantitative normative indicators' as measurements of a country's level of sustainable development is assessed.

Gross Domestic Product (GDP) The GDP is a scalar measure of the value added through market production ('value added by the market'); that is, a measure of the value added through production meant to be exchanged.[115] As already indicated in the introduction, the GDP has been the most widely relied-upon quantitative indicator to assess the progress/success of a country.[116]

There are three methods to measure GDP.[117] First, the production approach: subtract 'the market value of all inputs used for market production' from 'the market value of all produced outputs meant to be exchanged'.[118] Second, the income approach: add the value of all distributed incomes (wages, corporate profits, financial-investment returns). And third, the expenditure approach: add the market value of consumption, investment, government spending, exports, and subtract the market value of imports.[119]

[115] Stiglitz, Sen, and Fitoussi (2010), at xxiv, "National income statistics like GDP and GNP were originally introduced to provide a measure of the level of market-based economic activity (including the public sector but excluding home production) ... in the aftermath of the Great Depression, as governments took on the responsibility of managing the economy, it became important for them to have statistics that described the state of the economy".

[116] See footnote 1.

[117] Krugman, Wells, and Graddy (2011), at 312 et seqq.

[118] Take for instance labour: labour amounts to a 'produced output' and the value of labour is therefore added; at the same time labour may also amount to an 'input' of some other 'produced output' and the value of labour is therefore subtracted (but remains implicitly accounted for in the value of 'some other produced output'). The subtraction is necessary since the value added by labour would otherwise be counted twice.

Besides avoiding double counting, the subtraction also avoids counting the value of inputs from past years (whose value was already added in past years) and the value of inputs from abroad (whose value was added abroad).

[119] Roughly speaking, 'Consumption' captures the value of the products bought by households. 'In-

Note that the GDP specifies an 'intra-generational aggregation/weighing formula' (Section 4.4.1.2), namely to weigh every position equally (read: sum/average).

The GDP is a bad measure of 'sustainable development' for several reasons.[120] First, it focuses on the value added through market production rather than on the value generally added (note: an increase in the former need not imply an increase in the latter)[121]; as such, it fails to capture value created and consumed by the same person;[122] and, as such, it may not capture the full added value of produced outputs that are freely available (produced public goods).[123] Second, it values production at the market value (i.e., by using market prices); as such, the 'measured value added' need not correspond to the real value added through market production since the market participants (read: their valuation) may not consider the effects on all relevant dimensions (Section 4.4.1.1) of present and future generations (Section 4.4.2) – namely, since the market may exhibit negative/positive externalities in those dimensions which would reduce/increase the value added.[124] Third, it focuses on production (value added) rather than on levels (stocks) and thus only measures variations. Fourth, it focuses on production (multiplied by the market price) and therefore does

vestment' captures the value of the products intended as inputs for future produced outputs meant to be exchanged, the value of (finished or unfinished) produced outputs meant to be exchanged but not yet exchanged, subtracted by the value of past investment used in the production of (finished or unfinished) outputs. 'Government spending' captures the value of the products bought by the government, including salaries of public servants.

[120] Stiglitz, Sen, and Fitoussi (2010), at xvii, "In the quest to increase GDP, we may end up with a society in which citizens are worse off. Too often, we confuse ends with means."

[121] Stiglitz, Sen, and Fitoussi (2010), at 14, "There have been major changes in how households and society function. For example, many of the services people received from other family members in the past are now purchased on the market. This shift translates into a rise in income as measured in the national accounts [e.g., GDP] and may give a false impression of a change in living standards, while it merely reflects a shift from non-market to market provision of services."

[122] Ormerod (1997), at 29, "In a subsistence economy, a great deal of food production, for example, will never be bought and sold in the market, but is consumed by the community in which it is produced. Its value is therefore not reflected in the [GDP]".

[123] Their added value is only captured through the income paid to those producing these outputs.

[124] For instance, if the effects on future generations are not considered by market participants, then "[by relying upon GDP, we] have been working under the implicit underlying assumption that the resource base upon which this growth depends is infinite." (Duraiappah and Jamshed, 2014, at 1).

not directly measure the variation in the actual scope of freedom to choose (capabilities) even in the relevant dimensions it considers.

Human Development Index (HDI) The HDI is a scalar measure of development published by the United Nations.[125] Specifically, the HDI combines levels of health, education and income.[126] Since 2010, the HDI is complemented by an inequality-adjusted HDI (IHDI).[127]

Note that the HDI and IHDI each specifies an 'intra-generational aggregation/weighing formula' (Section 4.4.1.2), namely to weigh every position equally (read: sum/average) respectively to weigh positions higher (lower) the further they are below (above) the mean or median (read: negatively accounting for inequality).

The HDI has several shortcomings as a measure of 'development'. First, it does not capture all the relevant dimensions (Section 4.4.1.1): personal activities, political participation, social connections, environmental conditions, and security are not captured thereby. Second, it specifies a 'relevant-dimensions aggregation/weighing formula', but Section 4.4.1.2 suggested that there are multiple formulae that could have been used.[128] Third, it focuses on levels of consumption and therefore does not directly measure the actual scope of freedom to choose (capabilities) even in the relevant dimensions it considers.[129]

[125] The United Nations Development Programme has annually been publishing the HDI for the world's countries in its 'Human Development Report' since 1990. Seminally, UNDP (1990).

[126] http://hdr.undp.org/en/content/human-development-index-hdi, "The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living ... The health dimension is assessed by life expectancy at birth ... The education component of the HDI is measured by mean of years of schooling for adults aged 25 years and expected years of schooling for children of school entering age ... The standard of living dimension is measured by gross national income per capita."

[127] "The IHDI takes into account not only a country's average human development, as measured by health, education and income indicators, but also how it is distributed." (UNDP, 2010, at 87).

[128] Stiglitz, Sen, and Fitoussi (2010), at 89 et seq., "the choices on the weights used to construct this (and other similar) indices reflect value judgments that have controversial implications: for example, adding the logarithm of per-capita GDP to the level of life expectancy (as done by the Human Development Index) implicitly values and additional year of life expectancy in the United States as worth 20 times an additional year of life in India" (emphasis omitted).

[129] Its creators recognise this shortcoming explicitly: "a quantitative measure of human freedom has

Finally, since the HDI does not capture future generations (i.e., does not capture sustainability; Section 4.4.2) it cannot be used as a measure of a society's 'sustainable development'.

Inclusive Wealth Index (IWI) The IWI is a scalar measure of sustainable development published by the United Nations.[130] Specifically, IWI puts a monetary value (using social prices) on three kinds of assets and then combines them: manufactured/produced capital (infrastructure, buildings, factories, machineries, equipment); human capital (skills, education, knowledge, creativity, health); and natural capital (sub-soil resources, ecosystems, the atmosphere; including agricultural land, forests, fossil fuels, minerals).[131] Social capital (institutions (rule of law, social norms), culture, religion) is indirectly captured by letting it influence the social price.[132] Sustainability is indirectly captured through the social price which takes into account costs and benefits (at their present discounted value) for future generations.[133]

yet to be designed" (UNDP, 1990, at 1). Note that the HDI was created, amongst others, by Amartya Sen – the founding father of the capability approach (see footnote 82).

[130]The United Nations University's International Human Dimensions Programme and the United Nations Environment Programme has biennially been publishing the 'Inclusive Wealth' for most of the world's countries in its 'Inclusive Wealth Report' since 2012. Seminally, UNU-IHDP and UNEP (2012), at 6, "The inclusive wealth framework proposed in this report is a theoretical framework ...to consider the multiple issues that sustainable development attempts to address."

[131]Munoz et al. (2014), at 20.

The 'social price' (or 'shadow price') is the market price which would arise if all (negative and positive) externalities (at their present discounted value) on current and future generations were internalised. For instance, "watersheds are known to provide water purification ecosystem services for human health. The shadow price of these watersheds is then the net benefit an additional unit area of a watershed conserved will contribute towards well-being which, in this case, will be the constituent of health." (Dasgupta and Duraiappah, 2012, at 18).

[132]Dasgupta (2014), at xv, "institutions, culture, religion – more broadly, social capital – were taken to be enabling assets; that is, assets that enable the production and allocation of assets in [manufactured capital, human capital, and natural capital] ... The effectiveness of enabling assets in a country gets reflected in the shadow prices of assets in [manufactured capital, human capital, and natural capital] ... For example, the shadow price of a price of farming equipment would be low in a country racked by civil conflict, whereas it would be high elsewhere, other things being equal."

[133]Indeed, since these future generations do not yet exist, the costs and benefits on them by definition amount to externalities. And remember that the social price internalises all externalities (footnote 131).

Note that the IWI specifies an 'intra-generational aggregation/weighing formula' (Section 4.4.1.2), namely to weigh every position equally (read: sum/average).[134]

The IWI has some shortcomings as a measure of 'sustainable development'. First, it does not capture all the relevant dimensions (Section 4.4.1.1): personal activities, political participation, social connections, and security are not captured thereby. Second, it focuses on levels (multiplied by their social price) of assets and therefore does not directly measure the actual scope of freedom to choose (capabilities) even in the relevant dimensions it considers. Third, it captures the impact on future generations at the present discounted value and will thus arguably under-appreciate long-term consequences; the so-implied implicit 'inter-generational aggregation/weighing formula' is hence arguably not supported by rational and impartial reasoning (Section 4.4.2) because it lacks inter-generational impartiality.

4.5 The international community's overarching normative framework

> The conservation of natural resources, environmental protection and social well-being did not feature prominently on the international policy agenda some 50 years ago. Today, however, these objectives have become universally recognized guiding principles for all policymaking in developed and developing countries ... Accordingly, investment policies (and IIAs) can no longer be designed in isolation, but need to be harmonized with, and made conducive to, the broader goal of sustainable development.
>
> — UNCTAD[135]

This Section argues that there are reasons to believe that the majority of the members of the international community (i.e., most States) nowadays view the overarching

[134] Duraiappah and Jamshed (2014), at 8, "the IWR 2014 does not address the issue of inequality within and among nations".

[135] UNCTAD (2015), at 127.

normative framework in international relations as amounting to something close to the concept of sustainable development described in Section 4.4.3.[136] Specifically, it reaches this conclusion from observing: (i) that multiple States have recently concluded international treaties explicitly or implicitly having sustainable development as a purpose and that customary international law arguable contains a sustainable-development norm (Section 4.5.1); and (ii) that the declarations, publications, and statements of some of the largest and/or most well-known international organisations suggest that these organisations view sustainable development as a goal of the international community (Section 4.5.2).

If this interpretation of the international community is correct, then the present work can be seen as a contribution to the endeavour of most of the contemporary international community in at least two respects. First, by providing a justice-theoretical justification for focusing on sustainable development (Sections 4.2 and 4.4), this work is of value as it may help swaying members of the international community which do not yet accept sustainable development as the overarching normative framework. Second, by studying the alignment of international investment law with sustainable development (Chapter 7) and by proposing solutions for identified misalignments (Parts III, IV, and V), this work is of value as it can help implementing sustainable development in the context of international-investment flows.

If, however, this interpretation of the international community is incorrect, then the present work should be taken as a justice-theoretical critique of the contemporary international community's endeavour.

4.5.1 SD and public international law

The following presentation focuses on broad legal sustainable-development obligations; namely, it focuses on multilateral and plurilateral international treaties, and customary international law.

[136] Sharing this interpretation: Gehring and Newcombe (2011), at 3, "Sustainable development is a widely accepted objective of the global community."

WTO Agreement The preamble of the WTO Agreement famously holds that sustainable development is a goal of the World Trade Organisation in the context of resource usage.[137]

EU Law The Treaty of Lisbon holds that sustainable development for Europe is the goal of the European Union.[138]

Further larger treaties Further large treaties in force contain the idea of a balancing between different interests/needs (e.g., economic development and environment) and therewith capture part of the concept of sustainable development.[139] Amongst others: North American Free Trade Agreement,[140] UN Convention to Combat Deser-

[137] Agreement establishing the World Trade Organisation ('Marrakesh Agreement'; 'WTO Agreement'), 15 April 1994 (entered into force 1 January 1995), Preamble, "The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted ... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development" (emphasis omitted).

[138] Consolidated version of the Treaty on European Union ('Treaty of Lisbon'), 2008/C 115/01, 13 December 2007 (entered into force 1 December 2009), Preamble, "promote economic and social progress for their peoples, taking into account the principle of sustainable development", and Article 3(3), "It [the Union] shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment."

[139] For a list, see e.g. Cordonier Segger and Khalfan (2004), at 32. For an empirical study, see Barral (2012), at 384, "It [sustainable development] is included in over 300 conventions ... References to sustainable development can indeed be found in 112 multilateral treaties, roughly 30 of which are aimed at universal participation ... A common impression among international lawyers is that even though sustainable development receives recognition in a great number of treaties, this recognition is of little legal significance since such references are mainly confined to the preamble, which is not binding. However an empirical analysis shows that 207 of these references are to be found in the operative part of the conventions which is technically binding on the parties."

[140] NAFTA, 1993, 32 ILM 289, Preamble, "The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to ... promote sustainable development."

tification and Drought,[141] UN Convention on the Law of the Sea,[142] and the Kyoto Protocol.[143] This list will in the future include the Comprehensive Economic and Trade Agreement (CETA) if that treaty is ratified.[144]

Customary international law The concept of sustainable development may be contained within customary international law.

It has been held that the concept of sustainable development is too imprecise to amount to a norm and can therefore not amount to customary international law.[145] This argumentation cannot be followed: from an abstract standpoint because lack of precision does not preclude normativity (just think of the broad standards contained in western-countries-style constitutions or those contained in international investment agreements); and from a specific standpoint because we will see that the concept of sustainable development exhibits normative implications (Section 4.6).[146]

[141] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 14 October 1994 (entered into force 26 December 1996), 1954 UNTS 3, 195 members by the end of 2014, Article 2, "The objective of this Convention is to combat desertification and mitigate the effects of drought in countries experiencing serious drought and/or desertification ... with a view to contributing to the achievement of sustainable development in affected areas."

[142] United Nations Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994), 1833 UNTS 3, 167 members by the end of 2014, Article 61, "The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone ... be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States".

[143] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997 (entered into force 16 February 2005), 2303 UNTS 148, 192 members (24 ratifiers) by the end of 2014, Article 2, "Each Party included ... in achieving its quantified emission limitation and reduction commitments under ... in order to promote sustainable development, shall".

[144] CETA (consolidated draft, 1 August 2014), Preamble, "Reaffirming their commitment to promote sustainable development".

[145] Holding such a view: Beyerlin (2013), at para 19, "SD is still highly susceptible to varied explanations. Its 'normative language' is ambiguous to such an extent that it cannot deploy any appreciable steering effect [read: opinio iuris] ... For these reasons, much speaks in favour of the assumption that SD remains below the threshold of normative quality that is an indispensable prerequisite for ascribing the quality of a 'legal' principle to it."; Lowe (1999), at 26 et seqq.

[146] Similarly: Barral (2012), at 390, "Because it [sustainable development] is an objective which has

An argument can be made that most States nowadays believe that they have a legal obligation of sustainable development; namely, that they exhibit an *opinio iuris* vis-à-vis sustainable development. UN General Assembly Resolutions are adopted by formal vote, or without vote if there is consensus,[147] by all the UN member States and therefore may provide information about member States' beliefs regarding legal obligation. Indeed, already in the 1980s the UN General Assembly adopted a declaration showing that most member States believe that they have a legal obligation of development.[148] More recently in 2012, the UN General Assembly consensually adopted a declaration which may be interpreted as suggesting that all member States believe that they have a legal obligation of sustainable development.[149]

Finally, in two recent decisions the ICJ found a sustainable-development norm within public international law (either contained in customary international law or amounting to a general principle of international law) requiring a balancing between different dimensions.[150]

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a flexible but identifiable material content . . . it is capable of regulating and purports to directly regulate conduct and has properly material and direct legal implications".

[147] http://www.un.org/en/ga/about/background.shtml, "In recent years, an effort has been made to achieve consensus on issues, rather than deciding by a formal vote, thus strengthening support for the Assembly's decisions. The President, after having consulted and reached agreement with delegations, can propose that a resolution be adopted without a vote."

[148] United Nations Declaration on the Right to Development (UNDRD), GA Res 41/128, adopted with vote 4 December 1986, Article 1(1), "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." 'Inalienable' should arguably be understood to mean that the right cannot be willingly relinquished: "The common example is that of the right to liberty; one cannot willingly agree to sell oneself into slavery. Similarly, it would be argued, one cannot voluntarily surrender one's right to development." (Bunn, 2012, at 116).

The votes of the member States were as follows: 146 votes in favour; 1 vote against (United States); 8 abstentions (Denmark, Finland, the Federal Republic of Germany, Iceland, Israel, Japan, Sweden and the United Kingdom).

[149] The Future We Want (Rio 2012 Outcome Document), GA Res 66/228, adopted without vote 27 July 2012, at para 1, "We, the Heads of State and Government and high-level representatives . . . renew our commitment to sustainable development and to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations."

[150] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment, 25 September 1997, at para

Teachings of the most highly qualified international-public-law scholars These teachings may serve "as subsidiary means for the determination of rules of law" (ICJ Statute, Article 38(1)).

The International Law Association (ILA), which consists of several thousands of international lawyers and whose aim is the study and clarification of contemporary public international law, released a declaration in 2002 entitled 'Declaration of Principles of International Law in the Field of Sustainable Development',[151] and released another declaration in 2012 confirming those principles (and adding an implementation guide for adjudicative bodies).[152]

4.5.2 SD and international organisations

International organisations amount to entities which are established by two or more States or international organisations and which have the capacity to have a will of their own.[153] Even though international organisations exhibit 'the capacity to have a will of their own', they still amount to agents of their members because their au-

140, "The need to reconcile economic development with the protection of the environment is aptly expressed in the concept of sustainable development". *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ, Judgment, 20 April 2010, at para 177, "the balance between economic development and environmental protection ... is the essence of sustainable development".

[151] ILA New Delhi Declaration of Principles of International Law in the Field of Sustainable Development, Resolution No 3/2002, The 70th Conference of the International Law Association, New Delhi, India.

[152] ILA Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Resolution No 7/2012, The 75th Conference of the International Law Association, Sofia, Bulgaria.

[153] ARIO 2011, Article 2(a), "'international organization' means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities". Regarding 'the capacity to have a will of their own', see ILC (2003), at 11, "The entity further needs to have acquired a sufficient independence from its members so that it cannot be regarded as acting as an organ common to the members."

Schmalenbach (2006), at paras 9 et seq., "Historically as well as in the present day, members of international organizations are predominantly States. However, international organizations themselves become increasingly active as founders and/or members of other organizations, if the latter's constitution so provides."

tonomy is restricted.[154] As agents, we can reasonably suppose that the behaviour of international organisations to some degree reflects (at least some of) their members' views.

Multiple UN conferences and declarations, which are generally not legally binding for UN members,[155] held that there exists a 'right to development';[156] and that this right to development is part of an overarching sustainable-development goal.[157] Most clearly, it declared in 2005 that "sustainable development in its economic, social and environmental aspects constitutes a key element of the overarching framework of United Nations activities".[158] Also, a number of UN conferences have explicitly been concerned with sustainable development: the 1992 'United Nations Conference on Environment and Development' (Rio Summit; Earth Summit) held in Rio de Janeiro;[159] the 2002 'United Nations World Summit on Sustainable Development' (Rio+10) held in Johannesburg;[160] and the 2012 'United Nations Confer-

[154]The members restrict their autonomy: Hartwig (2011), at para 2, "Member States create the international organizations and define their objectives, functions, and powers".

[155]Bunn (2012), at 129, "On certain matters regarding the international management of the UN, such as budgetary resolutions, the General Assembly may take decisions which are binding on member states. But in most matters, including human rights, it can only make recommendations."

[156]The 'right to development' as a 'human right' was reaffirmed in 1993 during the United Nations World Conference in Vienna: Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24, 25 June 1993, Article I(10), "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights." Furthermore, the 'right to development' has been invoked at multiple UN World Conferences (each of which focuses on different issues); for a list, see e.g. Bunn (2012), at 50 et seq.; including, amongst others, 'The Conference on Environment and Development', 'The International Conference on Population and Development', 'The World Food Summit', and 'The World Conference against Racism, Xenophobia and Related Intolerance'.

[157]Rio Declaration on Environment and Development, UN Doc A/CONF.151/26(Vol I), 14 June 1992, Principle 3, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

[158]2005 World Summit Outcome, GA Res 10/1, adopted without vote 16 September 2005, at para 10.

[159]Rio Declaration on Environment and Development, UN Doc A/CONF.151/26(Vol I), 14 June 1992, Principle 27, "States and people shall cooperate . . . in the further development of international law in the field of sustainable development."

[160]Johannesburg Declaration on Sustainable Development, UN Doc A/CONF.199/20, 4 September 2002, Annex, at para 5, "we assume a collective responsibility to advance and strengthen the interde-

ence on Sustainable Development' (Rio+20) held in Rio de Janeiro.[161] At Rio+20, member States agreed to develop a set of sustainable-development goals;[162] and at the United Nations Sustainable Development Summit in 2015 adopted a set of 17 sustainable-development goals (with 169 associated targets).[163] Finally, UN publications also suggest that it understands sustainable development as a goal of the international community; seminally, its so-called Brundtland Report from 1987 entitled 'Our Common Future';[164] and, most notably for our purposes, its 2012 booklet entitled 'Investment Policy Framework for Sustainable Development'.[165]

Multiple WTO ministerial declarations also suggest that it understands sustainable development as a goal of the international community;[166] for instance, by stating in 1998 that "we shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development".[167]

Similarly, OECD publications also suggest that it understands sustainable development as a goal of the international community as exemplified by its 2008 book entitled 'Sustainable Development: Linking Economy, Society, Environment'.[168]

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pendent and mutually reinforcing pillars of sustainable development — economic development, social development and environmental protection".

[161] United Nations (2012).

[162] United Nations, 2014, Open Working Group on Sustainable Development Goals (available at http://sustainabledevelopment.un.org/owg.html), Introduction, at para 1, "The Rio+20 outcome document, *The future we want*, inter alia, set out a mandate to establish an Open Working Group to develop a set of sustainable development goals for consideration and appropriate action by the General Assembly at its 68th session.", and at para 4, "People are at the centre of sustainable development and, in this regard, Rio+20 promised to strive for a world that is just, equitable and inclusive, and committed to work together to promote sustained and inclusive economic growth, social development and environmental protection and thereby to benefit all".

UNCTAD (2014c), at 136, these sustainable-development goals are likely to set targets in the following dimensions: education; economic growth; employment; environmental preservation; food security; gender equality; health; inclusive societies (i.e., inclusive political institutions); poverty eradication; rule of law; sustainable agriculture; water and sanitation.

[163] United Nations (2015).

[164] United Nations (1987).

[165] UNCTAD (2012a).

[166] Gehring and Newcombe (2011), at 7.

[167] Geneva Ministerial Declaration, WTO Document WT/MIN(98)/DEC/1, 25 May 1998, at para 4.

[168] Strange and Bayley (2008).

An ILO declaration in 2008 also suggests that it understands sustainable development as a goal of the international community.[169]

4.6 Practical implications of SD

> The essence of sustainable development in practice is ... morally based problem solving.
>
> — Jeffrey D. Sachs[170]

In the following, the general implications of relying upon the concept of sustainable development as the overarching normative framework are mentioned explicitly.

4.6.1 Implications for decision-making

The previous discussion implies that for decision-making to be aligned with justice (and thus 'sustainable development'), it ought to take the form of impartial and rational reasoning; more precisely, it ought to engage in ***impartial and rational consideration of all SD-relevant aspects***: the various dimensions that are relevant for quality of life, the quality of life of all individuals within a generation, and the quality of life across generations (Sections 4.4.1 and 4.4.2).[171]

More specifically, decision-makers must first rationally and impartially reason their way to three aggregation/weighing formulae (Sections 4.4.1.2 and 4.4.2): relevant-dimensions aggregation/weighing formula, intra-generational aggregation/weighing formula, inter-generational aggregation/weighing formula. Decision-

[169] International Labour Conference, ILO Declaration on Social Justice for a Fair Globalization, 10 June 2008, Preface, "The Declaration ... contributes to policy coherence for sustainable development in national policies ... bringing together social, economic and environmental objectives", and Preamble, "Convinced that in a world of growing interdependence and complexity and the internationalization of production: the fundamental values of freedom, human dignity, social justice, security and non-discrimination are essential for sustainable economic and social development and efficiency".

[170] Sachs (2015), at 43.

[171] Put differently, the requirements of a justice theory (Section 4.2) imply such consideration and weighing.

makers must second assess the consequences of any decision in terms of its effects on the scope of freedom to choose (capabilities) in each of the relevant dimensions (Section 4.4.1.1) for all individuals. And finally, decision-makers must choose the decision which yields the best overall consequences for the scope of freedom to choose by ranking the various decisions – this last step is thus a optimisation procedure (i.e., 'formal-efficiency procedure', 'instrumental-rationality procedure').[172]

As such, the previous discussion (and therewith 'sustainable development') implies a *procedural norm* (Section 4.1.2) holding that one ought to consider all SD-relevant aspects to determine what is 'just'. Furthermore, it implies an optimisation of the consequences (as valued in terms of those elements) to determine what is 'just' and therewith amounts to a *consequential theory* (Section 4.1.3).

Hence, for a decision to be aligned with justice (and thus 'sustainable development') – namely, for a theory not to be rejected as a justice theory – it must be supported by impartial and rational reasoning; more precisely, it must be supported by impartial and rational consideration of all SD-relevant aspects.

4.6.2 Implications for institutional design

The previous discussion implies that for institutions to be aligned with justice (or 'sustainable development'), their design ought to be the result of impartial and rational consideration of all SD-relevant aspects.[173]

More specifically, the previous discussion implies that an institutional design which amounts to a combination of human-rights norms, environmental-protection norms, and democratic norms cannot be rejected as a 'justice theory'. Indeed, these norms capture the SD-relevant aspects so that satisfaction of these norms implies an explicit consideration and weighing of all of these aspects.

[172] For the identity between 'optimisation', 'formal efficiency', and 'instrumental rationality', see generally (although in German) Aaken (2003), at 289 et seqq.

Sen (1987), at 48, "the [formal] concept of 'efficiency' is as much open to plural interpretations as is equality, since the non-existence of another feasible state more advantageous ... [is] dependant on the chosen concept of advantage".

[173] Similarly: Brower (2009), at 347, "no legal regime can maintain legitimacy while ignoring the fundamental needs and values of affected populations".

Actually, insofar as people engaging in impartial and rational reasoning agree that the choice of aggregation/weighing formulae should be left to an impartial mechanism (read: separation-of-powers norm; i.e., impartial judiciary), the requirements of a justice theory would imply an institutional structure taking the form of western-countries-style constitutions which capture the SD-relevant aspects but do not provide a specific weighing formula of the norms contained therein (the weighing formula is left for an impartial mechanism to decide in any specific instance where a conflict exists). If so, then western-countries-style constitutions would amount to the institutional representation of justice (and of 'sustainable development); in other words, if so, then only these constitutions would be aligned with justice (or 'sustainable development').[174]

Nota bene This is arguably an interesting implication because human rights tend (even today) to be morally defended on the basis that they are self-evident – both by the legal documents containing them as well as by their supporters (human rights activities, public international law scholars).[175] Such an approach is clearly, as we have seen in Section 4.2, an insufficient basis for assessing whether the human-rights

[174]Reaching such a conclusion by arguing that the most well-known 'justice theories' all imply such institutions: Aaken (2003), at 315, "Es wird anerkannt, dass es keine umfassende absolute Erkenntnis des richtigen Sollens gibt ... [aber] dass die Frage nach dem richtigen Recht ... dennoch durch (zumindeset minimale) universale Gerechtigkeitsaussagen, die begründbar (wenn auch nicht beweisbar) sind, beantwortet bzw. begrenzt werden kann" (emphasis omitted), and at 320 et seq., "[Es kann] festgestellt werden ... dass alle Gerechtigkeitstheorien ... sich ... in operationalisierter Form in den Verfassungen demokratischer Staaten wiederfinden ... Dies sind insbesondere subjektive Grundrechte (inklusive dem Gleicheitsprinzip) sowie ein Existenzminimum. Hinzu kommen objective Verfassungsprinzipien, wie etwas das Demokratieprinzip und die Gewaltenteilung." (emphasis omitted).

[175]Take for instance the 'American Declaration of Independence' (July 1776) which states that "[w]e hold these truths to be self-evident"; or the French 'Declaration of the Rights of Man and Citizen' (August 1789) which states that "the natural, inalienable, and sacred rights of man"; or the United Nations' 'Universal Declaration of Human Rights' (December 1948) or 'International Covenant on Civil and Political Rights' (March 1976) which states that "[r]ecognizing that these rights derive from the inherent dignity of the human person".

Sen (2009), at 356, "Human rights activists are often quite impatient with this intellectual scepticism, perhaps because many of those who invoke human rights are concerned with changing the world".

theory qualifies as a 'justice theory'.[176]

4.6.3 Implications for adjudicative bodies

The following 'implications' apply if the applicable norms are, directly or indirectly, created by States;[177] most notably, when the applicable norms amount to national law or public international law.

4.6.3.1 Consideration of all SD-relevant aspects

The 'decision-maker' in the present context is a combination of an entity deciding the applicable norms (legislative body) and an entity deciding on the application of those norms (adjudicative body). It follows from Section 4.6.1 that both of these 'decision-makers' must impartially and rationally consider all SD-relevant aspects – clearly, however, the latter 'decision-maker' (i.e., the adjudicative body) is bound by the interpretational freedom provided by the applicable norms.

4.6.3.2 Explicit consideration of all SD-relevant aspects

Sustainable development implies that adjudicative bodies must actually explicitly consider all SD-relevant aspects when applicable norms amount to standards (i.e., applicable norms formulated in broad and vague terms).[178] Sustainable development

[176] Concurring: Sen (2009), at 355 et seqq., "the basic idea of human rights, which people are supposed to have simply because they are human, is seen by many critics as entirely without any kind of a reasoned foundation ... Many philosophers and legal theorists see the rhetoric of human rights as just look talk ... conceptual doubts about the idea of human rights must be addressed and its intellectual basis clarified, if it is to command reasoned and sustained loyalty. It is important to consider seriously the questioning of the nature and basis of human rights, and to respond to the long – and well-established – tradition of precipitately dismissing these claims."

[177] They are 'indirectly' created by States if they are 'directly' created by international organisations.

[178] Observe that this view is not uncommon in public international law, where it is often held that adjudicative bodies must explicitly consider all public international law (which arguably captures all SD-relevant aspects; see Section 4.6.2) when applying standards.

In the context of trade law, the WTO Appellate Body held so: *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, at 17, "[WTO law] is not to be read in clinical isolation from public international law". And in the context

implies so because, although the absence of explicit consideration does not imply a failure to do so,[179] explicit consideration increases the likelihood that the regime furthers SD. First, it furthers SD because it increases the likelihood of the decisions being aligned with SD: by increasing the likelihood that adjudicative bodies impartially and rationally consider all these aspects (heuristic-device rationale); and by increasing the likelihood that the legislative body takes the right measures(s) to avoid the deficit in the future (improvement rationale) since it makes it easier to pinpoint the exact source of a potential SD deficit (i.e., to identify whether the decision's underlying empirical claims are false, the rule's underlying weighings cannot be supported by some rational and impartial reason, and/or the decision's underlying overall reasoning is internally inconsistent).[180] Second, it furthers SD because it increases the likelihood of moral acceptance of the regime of those individuals adversely affected thereby by showing the decision's impartiality and rationality:[181] which increases the likelihood of survival of the regime by making it easier to defend a decision finding a State in violation against populist (read: unfounded) critique/opposition and therewith reduce the risk of emotional overreaction;[182] and which increases the like-

of international investment law, the view is widespread amongst IIL commentators; instead of many, see Aaken and Lehmann (2013), at 336, "IIL is being increasingly criticised, mainly because it is regarded as not taking other areas of special international law sufficient into account – [namely, because] it is read in 'clinical isolation'."

Not sharing this view: Weeramantry (2012), at 40 et seq., "Requiring all elements to be dealt with thoroughly each time an interpretation is made may result in a cumbersome or unnecessarily detailed decision, which may not be suitable for an award or may unduly delay the decision-making process."

[179] Similarly: Berman (2007), at para 5, "even while the Tribunal failed to describe what rules of treaty interpretation it was applying, ... [there is] no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation".

[180] For instance, 'false empirical claims' or 'internal inconsistency' may only require a better provision of information, whereas 'non-impartial or non-rational weighing' may require a change in the applicable norms so as to make it possible for the adjudicative body to put a positive weight on all dimensions relevant for quality of life.

[181] Note that scholars sometimes use 'procedural justice' to refer to 'the decision's impartiality and rationality'; for examples, see footnote 183.

[182] Supporting this view in the context of IIL: von Staden (2012), at 3, "standards of review [which balance different values] can enhance the legitimacy [read: moral acceptance] of investor-state arbitration ... and may thus be able to mitigate some elements of the frequently asserted 'legitimacy crisis' of, and

lihood of voluntary compliance with the decision (i.e., compliance without external enforcement, through intrinsic motivation).[183]

4.6.3.3 Clarity

Sustainable development implies that adjudicative bodies' decisions must exhibit clarity because it increases the likelihood that the regime furthers SD. Everything that has been said in Section 4.6.3.2 applies here as well.

4.6.3.4 Third-party participation (or 'amicus curiae')[184]

Sustainable development implies third-party participation during adjudicative bodies' decision-making because it increases the likelihood that the regime furthers SD.

First, it furthers SD because it increases the likelihood of the decisions being aligned with SD: adjudicative bodies may lack the informational basis to properly consider all SD-relevant aspects so that third parties may provide the needed information.[185]

'backlash' against, investment arbitration" (footnotes omitted).

[183]Empirical studies indeed suggest that showing the decision's impartiality and rationality ('procedural justice') yields higher moral acceptance and higher voluntary compliance amongst those individuals adversely affected by the decision. See, for instance, Winter and May (2001); Tyler (2006); Murphy, Tyler, and Curtis (2009), which suggests that an increase in a decision's impartiality and rationality increases the moral acceptance of those individuals adversely affected by the decision even when those individuals find the applicable norms to be in conflict with their moral views, and that this increase in moral acceptance induced by an increase in a decision's impartiality and rationality is higher when the applicable norms are in conflict with one's moral views (it finds that the increase in voluntary compliance is higher in that instance).

[184]Bernasconi-Osterwalder et al. (2012), at 46, "[a] non-party participant is commonly referred to as an amicus curiae (Latin for 'friend of the court')".

[185]This follows from the realisation that 'justice' is a non-solitary exercise in practice, see Section 4.2.3.

Supporting the view that 'third-party participation' may increase the quality of the decisions (in the context of IIL): Brown (2011), at 176, "not all international disputes raise environmental and sustainable development issues [on their own] . . . In such cases, these issues will have to be raised before international tribunals in a different way"; Bernasconi-Osterwalder et al. (2012), at 46, "*Amici curiae* can play an important role in investment treaty arbitration. They can provide expertise on points of law, offer historical and cultural context to a dispute, and reveal how a particular dispute has wider ramifications beyond the

Second, it furthers SD because it increases the likelihood of moral acceptance of the regime of those individuals adversely affected thereby by showing the decision's impartiality and rationality by considering various points of view. Everything that has been said in Section 4.6.3.2 with respect to moral acceptance applies here as well.

Remark that although sustainable development implies some strictly positive level of third-party participation, it does not imply that all third parties must be allowed to participate (i.e., it does not imply a right for all third parties to participate): third-party participation is time consuming, and therewith involves a cost, so that it is suboptimal to always allow all third parties to participate.[186]

Observe, finally, that a prerequisite of third-party participation is transparency (Section 4.6.3.6).

4.6.3.5 Representativeness

Sustainable development implies that adjudicative bodies' composition must be representative (reflect the diversity) of those affected by their decisions because it increases the likelihood that the regime furthers SD.

First, it may further SD because it increases the likelihood of the decisions being aligned with SD: adjudicative bodies may lack the informational basis to properly consider all SD-relevant aspects so that increased diversity may alleviate this problem by providing additional points of view.[187]

Second, it furthers SD because it increases the likelihood of moral acceptance of the regime of those individuals adversely affected thereby by showing the decision's

interests of the disputing parties."

[186] McLachlan (2011), at 172, "Increased participation of third parties must ensure that proceedings are not unduly delayed or undermined."

[187] This follows from the realisation that 'justice' is a non-solitary exercise in practice, see Section 4.2.3.

Supporting the view that 'representativeness' may increase the quality of the decisions: Swigart (2010), at 241.

A recent empirical study supports this view: Sommers (2006), which finds that diversifying mock jury panels created broader information exchanges and decreased the risk of error.

impartiality and rationality by considering various points of view.[188] Everything that has been said in Section 4.6.3.2 with respect to moral acceptance applies here as well.

4.6.3.6 Transparency

Sustainable development implies transparency with respect to adjudicative bodies both regarding the existence of an ongoing proceeding as well as its outcome.

Sustainable development, however, does not necessarily imply full transparency:[189] on the one hand, full transparency furthers third-party participation (Section 4.6.3.4) and political participation (which amounts to a quality-of-life dimension; Section 4.4.1.1); on the other hand, confidentially may further the material living standards, personal security, and/or economic security (which amount to quality-of-life dimensions; Section 4.4.1.1) of the parties to the dispute.[190] The so-required weighing may yield different optimal levels of transparency depending on the specific case.

4.6.3.7 Consistency

Trivially, increased consistency in adjudicative bodies' decision-making (i.e., in norm application) ceteris paribus furthers SD because it increases the institution's predictability – it increases legal certainty.

[188] Supporting the view that 'representativeness' may contribute to showing the decision's impartiality and rationality ('procedural justice'): Grossman (2012), at 652, "even if men and women do not 'think differently,' sex representation matters for sociological legitimacy because relevant constituencies believe they do nonetheless. Constituencies who believe sex affects outcomes will view unrepresentative courts as lacking justified authority."; Franck et al. (2015), at 496 et seqq.

[189] Namely, SD does not necessarily imply publication of all documents or publication of the entire decision (i.e., of the entire legal rationale).

[190] Regarding political participation: Van Harten (2007), at 159, "If adjudication ... were not fully open and transparent, it would be immune from public scrutiny"; Choudhury (2008), at 809, "Transparency enhances democracy by increasing citizens' access to information, thus ... raises the accountability".

Regarding the value of confidentiality for the parties to the dispute: McLachlan (2011), at 172, "Protection of sensitive commercial information is the rationale for confidentiality in investment arbitration, and this must be given serious consideration."

Note that increased consistency in norm application may reduce resource utilisation by increasing the likelihood of a settlement.[191]

4.6.3.8 'Res judicata' and 'lis alibi pendens'

Sustainable development forbids adjudicative bodies from judging a matter that has already been judged. More precisely, SD implies the concept of *res judicata* ('a matter already judged'), which forbids adjudicative bodies from deciding a dispute which exhibits identity of the parties (same claimant(s) and respondent(s)), identity of the petition (same sought relief for same respondent behaviour), and identity of the cause of action (same legal grounds; same merits) with an existing adjudicative body's decision.[192] 'Res judicata' is generally accepted as a general principle of international law.[193]

Moreover, sustainable development forbids multiple adjudicative bodies from simultaneously judging the same matter. More precisely, SD implies the concept of *lis alibi pendens* ('dispute elsewhere pending'), understood as forbidding multiple adjudicative bodies simultaneously deciding disputes which exhibit the aforementioned three identities;[194] which one of these adjudicative bodies must first decide the dispute may vary.[195] Although the concept of 'lis alibi pendens' is widely accepted in national laws, its understanding by national adjudicative bodies in cross-border disputes is too heterogeneous (i.e., they do not always require the three identities) for it to be accepted as a general principle of international law.[196]

Sustainable development implies these concepts because, unless the adjudicative body which already judged the matter made grave mistakes in its norm application, there is no impartial and rational reason for not having 'res judicata' and 'lis alibi

[191] Bjorklund (2013a), at 312, "Settlement negotiations are facilitated when liability is clear".

[192] This (traditional) understanding of 'res judicata' is nicely expressed in the dissenting opinion of PCIJ Judge Anzilotti: "three traditional elements for identification, persona, petitum, causa petendi" (Anzilotti, 1927, at 23). For a more general study of 'res judicata', see e.g. Dodge (2006).

[193] Anzilotti (1927), at 27; Cheng (1953), at 336 et seqq.

[194] See e.g., International Law Association (2006), at 3 and 6; Yannaca-Small (2008), at 1022.

[195] In civil-law countries, 'lis alibi pendens' tends to contain a 'first-in-time rule' (Yannaca-Small, 2008, at 1021).

[196] Reichert (1992).

pendens': not having them would merely result in wasted resources, would result in claimants increasing their odds of winning, and may result in contradictory decisions (which could reduce the likelihood of survival of the regime).[197]

4.7 Implications of SD for IIL

In the following, the specific implications for IIL of relying upon the concept of sustainable development as the overarching normative framework are mentioned explicitly.

4.7.1 Implications for IIL rules

The concept of 'IIL rules' describes the rights and obligations that apply in specific cases under IIL. If IIL's applicable norms amount to standards (i.e., if applicable norms are formulated in broad and vague terms), then we must look at the decisions of IIL's adjudicative bodies to get a sense of IIL's rules since applicable norms are compatible with a broad (finite) set of different rules.[198]

4.7.1.1 Existence of an obligation

There must be an IIL-based obligation not to engage in some future State measure, which adversely affects foreign investors, if and only if such an IIL-based obligation is SD furthering from today's perspective. Whether such an obligation is SD furthering requires an impartial and rational comparison of the consequences on all SD-relevant aspects in the presence (i.e., of forbidding such a future State measure) and in the absence (i.e., of allowing such a future State measure) of such an IIL-based obligation from today's perspective.[199]

[197] Mentioning these reasons: International Law Association (2006), at 4; Kaufmann-Kohler (2008), at 110.

[198] The implicit underlying descriptive norm-application theory is known as 'legal realism'; see Section 2.3 for a brief description.

[199] For a brief summary of the SD-relevant aspects, see Section 4.6.1.

To be sure, this evaluation also includes foreign investors; namely, the variation in the quality of life of

As such, there must be an IIL-based obligation not to engage in future State measures that are not SD furthering: allowing future measures that are not SD furthering when they are undertaken in the future cannot be SD furthering from today's perspective. Most notably, this includes future State measures that are not even SD furthering when they are undertaken in the future for the host State's population alone (i.e., when (the adversely affected) foreign investors are not taken into account); such measures tend to be referred in the literature as 'measures which cannot be motivated by a legitimate host State public purpose' or 'arbitrary measures'.[200]

Importantly, it is not a priori clear that there should be no IIL-based obligation not to engage in future State measures that are SD furthering: it may very well be SD furthering from today's perspective to have an IIL-based obligation not to engage in future measures that are SD furthering when they are undertaken in the future because such an obligation may increase foreign-investment flows (which may be SD furthering; Section 3.1.2).

Note finally, that future State measures motivated by a legitimate public purpose (e.g., environment, health, safety) need not even be SD furthering when they are undertaken in the future: SD implies an impartial and rational consideration of all SD-relevant aspects, but a given legitimate public purpose only considers a subset of those aspects (typically, a legitimate public purpose only considers one of those aspects).

4.7.1.2 Inter-temporal stickiness

Sustainable development implies that IIL rules must exhibit a certain inter-temporal stickiness (i.e., a certain degree of stability over time) because stickiness is necessary for IIL to fulfil its desirable functions.[201] Inter-temporal stickiness translates into IIL having a *binding effect* on States or, equivalently, into IIL amounting to a *commitment device* for States.

foreign investors resulting from shifting from the absence to the presence of the IIL-based obligation in question is also taken into account.

[200] Instead of many, see Vandevelde (2010b), at 54.

[201] See Chapter 3.

The importance of stickiness is perhaps best illustrated through IIL's risk-reduction function.[202] Since foreign investments are to some extent 'sunk', foreign investors' discounted expected profits are influenced by IIL's rules in the future. If existing IIL rules will only be operative until the foreign investment is 'sunk' and will then be replaced by IIL rules less favourable to foreign investors, then IIL cannot fulfil its insurance function (e.g., it cannot reduce the risk of 'regulatory opportunism').[203]

The importance of stickiness is also clear for IIL's norm-internalisation function and for IIL's foreign-investor-accountability function:[204] the process of norm internalisation takes time and therefore requires that norms exhibit some degree of stability over time; and foreign-investor accountability requires that home States cannot readily change the norms binding them.

Remark, however, that although IIL allows States to bind themselves, they are by construction not irreversibly bound: the States vis-à-vis which a State has IIL-based obligations (e.g., the States party to an IIA) can all consent to terminate or modify those obligations;[205] yet, because future termination and modification is conditional on all States consenting, IIL allows States to somewhat bind themselves. This (unavoidable) possibility is problematic because it may lead to States in the future all consenting to renege on IIL-based obligations that are SD furthering from today's perspective (Section 4.7.1.1).[206]

[202] See Section 3.1 for a detailed description.

[203] For a description of 'regulatory opportunism', see footnote 2 in Chapter 3.

[204] See Sections 3.2 respectively 3.3 for a detailed description.

[205] See Section 5.13.1 for a discussion of 'joint termination of an IIA' and 'amendment of an IIA'.

[206] Let us again consider IIL's insurance function to illustrate this point: take for instance 'regulatory opportunism' – IIL-based obligations preventing 'regulatory opportunism' are SD furthering (Section 4.7.1.4). Although IIL reduces the risk of it, IIL cannot guarantee its absence: all States vis-à-vis which a State has IIL-based obligations that prevent 'regulatory opportunism' may all consent to terminate those obligations because they all want to engage in 'regulatory opportunism' (e.g., because the desired investments in their countries are all 'sunk' now); however, since the probability of them all wanting to engage in 'regulatory opportunism' is clearly lower than the probability of any given State wanting to engage therein, IIL indeed reduces the risk of it.

4.7.1.3 Monetary-compensation obligation: non-unitary-state perspective

Importantly, whether or not an IIL-based obligation not to engage in some State measure is SD furthering (Section 4.7.1.1) does not readily tell us whether an IIL-based obligation to pay compensation for engaging in it is SD furthering. Most surprisingly perhaps, the fact that an IIL-based obligation not to engage in some State measure is SD furthering does not necessarily imply that an IIL-based obligation to pay compensation for engaging in the said State measure is also SD furthering; namely, an IIL-based obligation to pay monetary compensation for engaging in it may not be SD furthering even though the absence of the State measure in question is SD furthering.

This implication follows from taking a non-unitary-state perspective which makes it clear that those directly responsible for the State measures may not be the ones paying the compensation.[207] This scenario may most notably occur in a dictatorship, wherein the dictator is directly responsible but the masses will ultimately pay the compensation.

There is clearly an impartial and rational reason for requiring compensation if: (i) those directly responsible end up paying the compensation; or (ii) those paying the compensation have the power to influence the behaviour of those directly responsible (making those paying the compensation 'indirectly responsible').[208] In both cases, compensation punishes those responsible for the State measure and may prevent such a State measure in the future.

However, if none of those two conditions is fulfilled, it is not a priori clear whether there should be an IIL-based obligation to pay monetary compensation. Resolving this issue requires impartial and rational consideration of the consequences of the compensation on all SD-relevant aspects for those actually paying it.

[207] See Chapter 8 for a conceptual framework allowing to take a non-unitary-state perspective.

[208] Those paying the compensation have such power if they amount to 'relevant influencers', see Section 8.1.4.

4.7.1.4 Specific assurance

Sustainable development implies that there must be an IIL-based obligation for States to generally fulfill their specific assurances because such an obligation is SD furthering from today's perspective (Section 4.7.1.1). Most notably, this implies that there must an IIL-based obligation generally preventing 'regulatory opportunism'.[209]

Indeed, there is generally speaking no impartial and rational reason for not having an IIL-based obligation not to renege on specific (explicit or implicit) assurances a State made to its foreign investors. If there is no IIL-based obligation to obey one's specific assurances, then specific assurances loose all their credibility; and since we can reasonably expect that the availability for a State of 'credible specific assurances' to be SD furthering, there should generally speaking be an IIL-based obligation to fulfill specific assurances. If this seems too extreme, then remember that nothing prevents a State from making specific assurances that are conditional (e.g., conditional on the body of scientific evidence available at the time of the dispute).

Such an IIL-based obligation is, however, only SD furthering if the specific assurance itself is SD furthering. Hence, one exception is as follows: there must be no IIL-based obligation for State to fulfill their specific assurances which are not SD furthering. This scenario may most notably occur in dictatorships.

Another exception may exist in the presence of an emergency situation (Section 4.7.1.6).

4.7.1.5 No frozen legal framework

Sustainable development implies that there must be no IIL-based obligation for States to freeze their legal framework because such an obligation is not SD furthering from today's perspective (Section 4.7.1.1).

Indeed, there is no impartial and rational reason for having an IIL-based obligation to freeze the legal framework as it exists at the time of any foreign investment. Although there can be an impartial and rational reason to freeze the legal framework for some specific foreign investment (which would amount to a 'specific assurance';

[209] For a description of 'regulatory opportunism', see footnote 2 in Chapter 3.

Section 4.7.1.4), there is no reason to expect that doing so for all foreign investments is SD furthering.

4.7.1.6 Emergency situations

States may face emergency situations; namely, when their country's sustainable development is threatening to go, or already is, on a dangerous downward path.

Sustainable development therefore implies that there must be no IIL-based obligation for States not to engage in State measures which are arguably necessary for resolving the emergency situation (irrespective of whether there is such an IIL-based obligation in the absence of the emergency situation) because such an obligation is not SD furthering from today's perspective (Section 4.7.1.1).[210]

Indeed, there is no impartial and rational reason for having an IIL-based obligation not to engage therein since none of the positive consequences of having such an IIL-based obligation can compensate for the immense negative consequences of not resolving the emergency situation.

Furthermore, there is no impartial and rational reason for having an IIL-based obligation to pay monetary compensation for engaging in State measures which are arguably necessary for resolving the emergency situation if having such an obligation threatens to jeopardise the resolution of the emergency situation. To be sure, States are also not required to pay compensation for failure to fulfill 'specific assurances' if this condition is met. This condition is most likely to be satisfied when the emergency situation amounts to an economic/financial crisis; even if the the com-

[210]The idea that 'necessity' should not give rise to an obligation not to engage in some State measure is arguably also contained, though in a much more restrictive form than the one supported in this work (the difference is expressed by using 'arguably necessary' rather than 'necessary'), in customary international law (i.e., in public international law): ARSIWA 2001, Article 25, 'Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act . . . is the only way for the State to safeguard an essential interest against a grave and imminent peril'.

The norms contained in ILC's 'Articles on the Responsibility of States for International Wrongful Acts 2001' arguably reflect CIL (see e.g., Crawford, 2006, at para 3). Moreover, it is generally accepted that specifically Article 25 reflects CIL – at least since *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ, Judgment, 25 September 1997, at para 51 et seq.

pensation is only due after the resolution of the emergency situation because (i) the compensation requirement makes the State a lower-quality debtor, therewith making it more difficult for the State to get access to capital, which could deepen/lengthen its emergency situation and (ii) a State out of an emergency situation remains fragile and having to pay compensation may throw it back into an emergency situation.[211] However, it is not a priori clear whether this condition is satisfied when the emergency situation amounts to an energy crisis or an epidemic.

4.7.1.7 Home-State obligations

Section 3.3 reminded us that a host State may have a difficult time de facto enforcing an SD-furthering compensation requirement against a foreign investor.

Sustainable development therefore implies (i) that there must be an IIL-based obligation for home States to enact national legislation that make its investors liable for SD-hindering behaviours of their controlled or owned investments abroad and (ii) that other States have the right the initiate an international (adjudicative) proceeding against States violating this IIL-based obligation.[212]

Indeed, because of the difficulty of de facto enforcement in the host State, there is no impartial and rational reason to expect liability in the home State for SD-hindering behaviours in the host State not to be SD-furthering from today's perspective (Section 4.7.1.1)

4.7.2 Implications for adjudicative bodies

Since IIL is directly created by States, the general implications for adjudicative bodies (Section 4.6.3) also apply to IIL's adjudicative bodies. In the following, additional implications are mentioned.

[211] Also arguing against a requirement to pay monetary compensation in cases of economic/financial crises: Aaken (2006), at 564.

[212] Supporting this view: Bernasconi-Osterwalder et al. (2012), at 36 et seq., "home states could help ensure that their investors are contributing positively to sustainable development in the host states ... for example, by establishing a mechanism under the treaty to review and decide complaints, and/or allowing civil suits against the investor in the investor's home state to recover for harms caused by the investor in the host state. Investment treaties could also commit home states to regulate investors' conduct abroad."

4.7.2.1 Maximise the achievement of SD-implied IIL rules

First and foremost, sustainable development implies that adjudicative bodies must maximise the achievement of the rules implied by SD (Section 4.7.1) within the limits of the applicable norms.

4.7.2.2 Deferential standard of review[213]

Sustainable development implies a deferential standard of review of State measures – namely, to leave States a *margin of appreciation*.[214] The concept of 'margin of appreciation' holds that a certain degree of deference (i.e., a margin of appreciation, though not an unlimited margin; some degree of unilateral ex post control) should be given to national authorities; most notably, depending on the applicable norms, it may imply a degree of deference regarding the ends (e.g., legitimate public interest) and/or regarding the means-ends relationship (e.g., necessary means).[215]

Sustainable development implies a deferential standard of review for several reasons.[216] This implication follows from remembering that SD may take multiple forms since it requires the choice (read: value judgment) of multiple aggrega-

[213] 'Standards of review' have found extensive treatment in IIL scholarship in the context of emergency situations; their relevance, however, goes beyond those situations.

[214] Supporting the reliance upon a deferential standard of review in IIL: Slaughter and Burke-White (2005b); Aaken (2006); Burke-White and von Staden (2010), at 286; Kurtz (2010), at 365 et seq.; Bonnitcha (2014).

The ECtHR has most notably relied upon a deferential standard of review (it coined the term 'margin of appreciation'). Seminally, see *Handyside v United Kingdom*, ECtHR, App. No. 5493/72, Merits, 7 December 1976, ECHR Series A No. 24.

WTO Panels and the WTO Appellate Body have also applied a deferential standard of review (although they do not use the terminology of 'margin of appreciation'); see Kot (2007), at paras 25 et seqq. Most clearly, see *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, 16 January 1998, at para 117, "the applicable standard is neither de novo review as such, nor 'total deference'".

[215] For a brief overview, see Kot (2007); Brownlie (2008), at 576.

[216] Whether or not ex post control should be provided involves an optimisation problem unless this ex post control does not include/provide the power to make (de jure or de facto) amendments (Section 14.5.1). In casu, we do not face an optimisation problem because the ex post control provided by a deferential standard of review does not include/provide such power.

tion/weighing formulae (Section 4.6.1).[217] It also follows from the fact that States typically have an informational advantage vis-à-vis international bodies regarding the consequences of some State measure because the consequences are, to some degree at least, determined by the domestic (formal and informal) institutional context (culture, historical background, social norms, etc.) which influences how people will react to specific measures; this rationale is especially important in means-ends-relationship assessments.[218] Finally, it follows from the fact that it increases the probability of survival of IIL because it reduces the risk that States fully exit the regime by giving them a say on the required value judgments.[219]

More precisely, sustainable development implies that the margin amounts to the set of State measures that can be supported by a rational and impartial reason. The so-implied deferential standard of review thus amounts to a *good-faith review*, which holds that the margin amounts to the set of State measures performed in good faith.[220]

The set of State measures captured by the margin is not constant: the set varies

[217] Arguing so: *Handyside v United Kingdom*, ECtHR, App. No. 5493/72, Merits, 7 December 1976, ECHR Series A No. 24, at para 48,

> it is not possible to find . . . a uniform European conception of morals . . . the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements

See also, Burke-White and von Staden (2011), at 371 et seq.

[218] Also pointing out this rationale: Aaken (2015c), at 39 et seq.

[219] See footnote 66 in Chapter 14.

[220] "As a standard of review, good faith has two basic elements: first, whether the state has engaged in honest and fair dealing [read: impartiality] and, second, whether there is a rational basis for the action taken by the government." (Burke-White and von Staden, 2010, at 312). See also, International Whaling Commission (2001), "'good faith' requires fairness, reasonableness, integrity and honesty in international behaviour".

Supporting a deferential standard of review in the form of a good-faith review: Slaughter and Burke-White (2005b), at para 8; Aaken (2006), at 562; Aaken (2014b), at 846.

Rejecting its utilisation: Burke-White and von Staden (2010), at 312, "the paucity of jurisprudence on the principle of good faith means that the practical standards for undertaking a good faith review are underdeveloped and arbitrators may find the standard lacking specificity".

with the factual circumstances in which the measures were taken. Most notably, when applied to State measures taken during emergency situations, the standard must be more deferential (i.e., the margin wider) to properly account for the fact that States are likely to have limited time – namely, limited information and limited thinking – to choose measures.

Other standards of review In the context of means-ends relationships, other standards of review have also been advanced in the literature: 'reasonable-least-restrictive-means test', which tests whether the chosen means is the least restrictive alternative while also taking into account the costs of the means;[221] 'proportionality test', which tests whether the means is suitable for achieving the ends, whether the means is necessary for achieving the ends (i.e., least-restrictive means), and whether the means are proportional to the ends (i.e., weighing the benefits against the costs of the means);[222] and 'deferential proportionality test' (or 'rational-connection test'), which is different from what has traditionally been referred to as 'proportionality test' because it provides a higher degree of deference.[223]

[221] Kurtz (2010), at 369, "In a simple LRM test, the adjudicator would look to whether the alternative measure ... achieves the same level of benefit at less restriction to foreign investment than the chosen measure ... [A reasonable LRM test does] not only identify a less restrictive alternative but assess whether it is a reasonable alternative given the different costs involved".

This test has been applied by WTO Panels. See e.g. *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, WT/DS10/R, Report of the Panel, 5 October 1990, at para 75, "the import restrictions imposed by Thailand could be considered to be 'necessary' in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives."

Supporting such a test: Kurtz (2010), at 368 et seq.

[222] This test (i.e., Geeignetheit, Erforderlichkeit, Angemessenheit (or 'Verhältnismässigkeit im engeren Sinne')) was developed by the jurisprudence of the German Constitutional Court (Bundesverfassungsgericht). Instead of many, see Grabitz (1973); Grimm (2007); Stone Sweet and Mathews (2008).

Supporting such a test: Stone Sweet (2010), at 49.

[223] This test is, however, oftentimes simply referred to as 'proportionality test' which may create considerable confusion.

This test has been applied by the ECtHR. Indeed, the ECtHR explicitly interprets 'necessary' in the ECHR as invoking the 'principle of proportionality' within a 'margin-of-appreciation approach' (Burke-White and von Staden, 2010, at 307 et seq.,) so that its approach does not amount to what is traditionally

The 'deferential proportionality test' arguably yields similar results as the 'good-faith review'.

4.7.3 Addendum: reasoning by analogy

It is common practice in IIL scholarship to justify one's normative stance (read: policy prescriptions) based on analogical reasoning. Specifically, by making an (explicit or implicit) analogy with public law by pointing out that there is substantial overlap between the issues which international investment law handles and those which are handled by domestic public law (administrative/constitutional law);[224] in so doing,

referred to as 'proportionality test' (Stone Sweet, 2010, at 71). Specifically, "when the Court grants a wide margin of appreciation to states in a given issue area, it then transforms that wide margin into a greater degree of deference to the national government in the proportionality balancing process which follows. A wide margin results in a less stringent proportionality test. A narrow margin leads to stricter review in the proportionality test." (Burke-White and von Staden, 2010, at 307). See e.g., *Handyside v United Kingdom*, ECtHR, App. No. 5493/72, Merits, 7 December 1976, ECHR Series A No. 24, at paras 48 et seq.; *Dudgeon v United Kingdom*, ECtHR, App. No. 7525/76, Merits, 22 October 1981, ECHR Series A No. 45, at para 53; *Silver and Others v United Kingdom*, ECtHR, App. Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Merits, 25 March 1983, ECHR Series A No. 61, at para 97; more generally, see Brownlie (2008), at 577 et seqq.

Supporting such a test: Burke-White and von Staden (2010); Bonnitcha (2014), at 304 (referring to it as 'rational-connection test').

[224] Arguing for such a public-law characterisation: Van Harten and Loughlin (2006), at 121, "investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration ... since investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state", and at 149, "Being constituted at the international level ... the investment arbitration tribunal forms a novel and unique extension to the conceptual architecture of administrative law." See also Burke-White and von Staden (2010), at 285, "[investment-treaty] arbitrations are not merely another form of private law commercial arbitration, with one party now being a state, but that they are more fittingly understood as a form of dispute settlement that, like many domestic judicial proceedings, also operates in a public law context. Many of the ICSID arbitrations currently pending against Argentina and other states raise issues that can only be properly understood as public law questions." (footnote omitted); Schill (2011a), at 60, "It relies on the observation that the problems dealt with in investor-state arbitration are not novel as such. Instead, the same problems concerning the relation of private economic actors and governmental power arising in investment treaty arbitration today, including questions of nondiscrimination, the respect for due process, and the protection of property and economic interests against expropriation and other undue government interferences, have already played

these commentators characterise international investment law as part of a 'global administrative/constitutional law'.[225]

Such a normative approach is, however, incomplete because it presumes that the other object's dealing of the substance is normatively desirable.[226] The normative approach followed in this work, on the other hand, requires no such presumption.

a role in domestic administrative and constitutional litigation ... Accordingly, these problems should be viewed in the context of the rich experience of such other, often more advanced, public law systems."

[225] For a more general analysis (i.e., not restricted to international investment law) of the trend towards the creation of a 'global administrative law', see Kingsbury, Krisch, and Stewart (2005).

[226] Also criticising the analogical approach: Roberts (2013), at 46 et seq., "Investment treaties have traditionally been short and vaguely worded, while the system as a whole is new and undertheorized. As a result, participants routinely draw on comparisons with other legal fields when seeking to fill gaps, resolve ambiguities, or understand the system's nature ... this 'clash of paradigms' appears in competing conceptualizations of the investment treaty system as a subfield within public international law, as a species of international arbitration".

Chapter 5

International investment law

This Chapter[1] discusses contemporary international investment law, the arguably fastest evolving subfield of international economic law.[2] The goal of this Chapter is to provide a general overview of contemporary IIL, to provide the inputs needed for the assessment of contemporary IIL's alignment with SD (Chapter 7), as well as the inputs needed to suggest reforms to further IIL's alignment with SD (Parts III, IV, and V).[3] The reader familiar with international investment law may wish to skip this Chapter (and to come back later to the specific topics when this work explicitly relies upon them).

The Chapter is organised as follows. Sections 5.1 and 5.2 describe the institutional structure of contemporary IIL; specifically, they show that it consists of two elements – international investment agreements and investment arbitral tribunals. Section 5.3 briefly overviews the methodology of investment arbitral tribunals' application/interpretation of international investment agreements. Section 5.4 discusses

[1] This Chapter somewhat borrows from Section 3 of Lehmann (2012).

[2] Juillard (2009), at 273.

[3] Although some information provided in this Chapter is not directly relevant for assessing IIL's alignment with SD (i.e., not directly relevant in Part II), the information is nonetheless presented in one place (i.e., in this Chapter) for two reasons: because providing a general overview of IIL in one Chapter makes it more convenient for the reader; and because it is more convenient to provide this information in a distinct Chapter as most of the information will be relied upon at multiple places later in this work.

States' consent to the jurisdiction of investment arbitral tribunals in international investment agreements.

The Chapter then turns to the jurisprudence developed by investment arbitral tribunals of the most important applicable norms of contemporary IIL: Section 5.5 (right of establishment); Section 5.6 (expropriation); Section 5.7 (fair and equitable treatment); Section 5.8 (national treatment); Section 5.9 (most favoured nation); Section 5.10 (umbrella clause); Section 5.11 (emergency defenses). These applicable norms are formulated in broad and vague terms (i.e., amount to standards).[4]

Section 5.12 then discusses remedies of contemporary IIL for violation thereof. Section 5.13 studies the termination and amendment of international investment agreements. Finally, Section 5.14 shows that contemporary IIL has recently changed quite a bit (due to a backlash by States against it).

5.1 International investment agreements (IIAs)

This Section presents the most important source of contemporary IIL: IIAs – which come in different forms. The Armana Letters indicate that IIAs have been concluded between sovereign States since antiquity.[5]

5.1.1 Friendship, commerce and navigation (FCN) treaties

The first treaty of this kind was signed between the United States and France in 1778.[6] Although the signature of FCN treaties has become increasingly rare since the late 1970s, many FCN treaties remain in operation today between OECD States (as most developing States refused to sign such treaties).[7] To take two examples at

[4] Rogers (2013), at 262, "Investment treaties establish skeletal frameworks for the substance of international investment law and for investment arbitration procedures ... international arbitrators are the ones putting meat on those bones".

[5] Skinner, Miles, and Luttrell (2010), at 260, footnote 5.

[6] Paulus (2011), at para 2.

[7] Paulus (2011), at para 4.

random, the United States has FCN treaties in force with both Germany and Japan.[8]

FCN treaties are bilateral treaties promoting trade and investments. However, until the end of the nineteenth century, these treaties mainly covered trade through, most notably, MFN and non-discrimination provisions; later treaties have tended to also cover investments through, for instance, expropriation provisions ('no expropriation without prompt, adequate, and effective compensation').[9] FCN treaties furthermore provide for inter-State dispute settlement;[10] typically before the ICJ.[11]

5.1.2 Modern international investment treaties (IIAs)

Even though the modern IIA regime emerged in the middle of the twentieth century, namely with the signature between West Germany and Pakistan in 1959 of a BIT, it only really took off after the Cold War. In 1980, almost 200 modern IIAs had been signed around the world; in 1990, almost 450 IIAs; in 2000, around 2000 IIAs; and in 2014, over 3271 IIAs.[12] The curve of cumulative IIAs seems to exhibit an S-shape with an inflection points in the middle of the 1990s (it clearly exhibits an exponential form before that point); the curve of the number of annual IIA signings peaked during the middle of the 1990s, exhibits an exponential form before that point, and steadily (almost linearly) decreases since then.[13]

Bilateral investment treaties (BITs) BITs amount to the most important source of contemporary IIL.[14] Table 5.1 provides a summary of the number of BITs signed and of those in force.

[8] The US–Germany FCN treaty was signed 29 October 1954 and entered into force 14 July 1956. The US–Japan FCN treaty was signed 9 April 1953 and entered into force 30 October 1953.

[9] Paulus (2011), at paras 3 et seq.

[10] Roberts (2014b), at 2, "Claims were espoused by the investor's home state on the basis of diplomatic protection, which meant that the home state adopted the wrong against its national as a wrong against itself and pursued a claim on its own behalf. The home state had complete discretion over the commencement, prosecution, and settlement of such a claim, as well as the disposal of any damages awarded."

[11] See, for instance, Aaken and Kurtz (2010a), at 521.

[12] For a graphical representation, see UNCTAD (2015), at 106.

[13] For a graphical representation, see UNCTAD (2013), at 101 et seq.

[14] Dolzer and Schreuer (2012), at 13.

Table 5.1: Number of bilateral investment treaties

	Year 1990	2000	2014
Total			
Signed	457 (100%)	2062 (100%)	3084 (100%)
In force			2250
Developed-Developed BITs			
Signed	11 (2%)[i]	15 (1%)[ii]	20 (1%)[iii]
In force			15
Developed-Developing BITs			
Signed	369 (81%)	1098 (53%)	1512 (49%)
In force			1227
Developing-Developing BITs			
Signed	77 (17%)	949 (46%)	1552 (50%)
In force			1008

[i] Most of them signed with Malta. [ii] New ones signed either with Cyprus or Malta [iii] New ones signed either with Cyprus or Malta

The data was gathered using UNCTAD's 'International Investment Agreement Navigator' (available at: http://investmentpolicyhub.unctad.org).
The following States were defined as developed: Australia; Austria; Belgium; Canada; Cyprus; Denmark; Faeroe Islands; Finland; France; Germany; Gibraltar; Greece; Greenland; Holy See; Iceland; Ireland; Israel; Italy; Japan; Luxembourg; Malta; Netherlands; New Zealand; Norway; Portugal; Saint Pierre and Miquelon; San Marino; Spain; Sweden; Switzerland; United Kingdom; United States of America.[15]
Developed-Developing BITs are oftentimes referred to as North-South BITs, and Developing-Developing BITs as South-South BITs.[16]

5.1.3 Multifaceted IIAs

IIAs have become multifaceted as they have increasingly dealt with other issues, most notably trade, in addition to international investments.[17] This trend is driven by the increasing complementarity between foreign investments and international trade.[18]

[15] This definition appears to closely match the one used by UNCTAD in the past: UNCTAD (2000), at 4, finds 11 Developed-Developed BITs by the year 2000; whereas I find 15 such BITs.

[16] See e.g. Poulsen (2011), at 186.

[17] Joubin-Bret, Rey, and Weber (2011), at 19, "The system ... is *multifaceted* since it not only deals with investment, but also, increasingly with other issues (such as trade in goods, trade in services, etc.)."

[18] Echandi and Sauvé (2013), at 2, "With trade and investment increasingly exhibiting complementary features, there is a genuine need to assess and study both phenomena in a more integrated manner";

There exist over 300 such agreements, most of which are FTAs with investment provisions.[19] Most notable amongst these FTAs are the 'North-American Free Trade Agreement' (NAFTA) between Canada, Mexico, and the United States, and the 'Dominican Republic-Central America FTA' (CAFTA) between Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, the Dominican Republic, and the United States.

5.1.4 Plurilateral IIAs

From the above, it follows that the landscape of modern IIAs, although dominated by, is not limited to bilateral investment treaties.

States have increasingly signed intra- and inter-regional IIAs,[20] creating substantial overlap with existing IIAs (read: BITs).[21] Examples are NAFTA and CAFTA (see above).

In addition, there exists, to the best of my knowledge, a single sectoral agreement

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Broude (2013), at 140, "Had the need (or opportunity) arisen today to draw up an international system of international economic law from scratch, it is unlikely that trade and investment would have been treated so separately."

[19] UNCTAD (2014c), at 114, there exist 334 international agreements with investment provisions – most of them are FTAs with investment provisions.

Footer (2013), at 118, "The first of these [FTAs with investment provisions] was the US–Canada Free Trade Agreement of 1988, which formed the basis of the conclusion of the NAFTA in 1993" (footnotes omitted).

[20] UNCTAD (2012b), at 86, "the balance is gradually shifting from bilateral to regional treaty making"; Alschner (2014), at 271, "This regionalization of investment law takes place intra-regionally either as part of an organization's deeper economic integration agenda, such as ASEAN's Comprehensive Investment Agreement (ASEAN CIA) entered into force in 2013, or ad hoc, like the Trilateral China–Japan–South Korea Investment Treaty signedin 2012. Moreover, the trend towards regionalization also encompasses inter-regional agreements connecting different parts of the globe as evidenced by the on-going negotiations of a Transpacific Partnership (TPP), an African Tripartite Agreement, or the Transatlantic Trade and Investment Partnership (TTIP) be-tween the European Union and the USA." (footnotes omitted).

[21] An empirical investigation of 2309 IIAs (comprising 180 States) finds that every fourth existing IIA is affected by such overlap: Alschner (2014), 276, "About 24% of bilateral relationships between the countries in our dataset are governed by more than one investment treaty. Put differently, every fourth investment agreement overlaps with another investment agreement."; Joubin-Bret, Rey, and Weber (2011), at 19, "The system is *multi-layered* in nature".

which exhibits foreign-investment provisions: the 'Energy Charter Treaty' (ECT).[22]

5.1.5 Multilateral IIAs

Failed attempts In 1959, the major capital-exporting (i.e., developed) States proposed the 'Draft Convention on Investment Abroad' (also known as the 'Abs-Shawcross Draft', or the 'Charter'/'Magna Carta' of private investors); this multilateral agreement was never adopted because of opposition from capital-importing (i.e., developing) States.[23]

In 1960, the OECD drafted the 'Draft Convention on the Protection of Foreign Property';[24] this multilateral agreement was never adopted, again, because of opposition from developing States.[25] In spite of its non-adoption, its norms subsequently found their way into international investment law because the draft later served as a model for European BITs,[26] as well as for the ECT.[27]

In 1995, the OECD again began drafting a multilateral agreement on investment (referred to as 'MAI'); this agreement was intended as one of the 'covered agreements' under the WTO (DSU Appendix 1).[28] The draft was arguably more protective than many BITs (read: more protective than European BITs) because it included a 'right-of-establishment clause'.[29] The draft, however, also allowed States to exempt certain industries;[30] but no agreement was ever reached about that provision.[31] This

[22] Dolzer and Schreuer (2012), at 15, "The ECT of 1994 essentially grew out of the desire of European states to cooperate closely with Russia and the new states in Eastern Europe and Central Asia in exploring and developing the energy sector" (footnote omitted).

[23] Subedi (2012), at 21.

[24] Organisation for Economic Co-operation and Development Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, OECD Pub. No. 23081, 7 I.L.M. 5.

[25] Muchlinski (2000), at 1036.

[26] Bubb and Rose-Ackerman (2007), at 297. Other OECD States developed their own model: "This was the case of the United States ... of which one of the most distinctive features is the so-called 'establishment clause.'" (Juillard, 2009, at 278).

[27] Muchlinski (2000), at 1036.

[28] Mavroidis (2011), at 97.

[29] MAI Draft Text, Chapter III, para 1 (as of 24 April 1998).

See Section 5.5 for a presentation of the 'right-of-establishment clause'.

[30] MAI Draft Text, Chapter IX (as of 24 April 1998).

[31] Muchlinski (2000), at 1042.

draft was again never adopted due to a combination of reasons: it lacked support by the United States because it felt that the level of protection granted to foreign investors would be insufficient due to the many compromises, most notably with respect to the 'right-of-establishment clause' (a clause which was included in an uncompromised manner in all US BITs);[32] it faced opposition by France and Canada because they were concerned that a 'right-of-establishment clause' would make their cultural industries to be swamped by the US entertainment industry;[33] it faced opposition by developing States publicly justifying their position by holding that they refuse to sign a treaty if they were not part of its negotiations;[34] and it faced opposition by anti-globalisation NGOs because the MAI did not include environmental and human-rights obligations for MNCs.[35] The MAI was officially declared dead in 1998.

In 1996, the European Union and Canada argued for the creation of a multilateral framework for investments under the WTO that would be modelled after the OECD's MAI.[36] In 2004, The WTO's efforts to conclude a multilateral investment agreement also failed because of opposition by developing States, especially Brazil and India, feeling that their regulatory space would be too severely restricted.[37]

[32] Dolzer and Schreuer (2012), at 10; Van Harten (2007), at 22, "Eventually, the [US] investor lobby also cooled to the idea, fearing that a watered-down multilateral treaty could be worse than none at all."

[33] Sornarajah (2010), at 258, "There was a fear [in Canada and France] that unrestricted access to markets, which the MAI intended to achieve, would lead to the swamping of these [cultural] industries by the US entertainment industry."

[34] Mavroidis (2011), at 98, "Early on, developing countries disputed its global character because they did not participate in the negotiations ... developing country members of the WTO were not willing to sign up for an instrument in the negotiation of which they had not participated. This is more or less the official excuse. One can, nonetheless, wonder whether there are other, deeper reasons explaining their stance." (footnote omitted).

[35] Sornarajah (2010), at 258; Mavroidis (2011), at 98 et seq., "civil society demonstrated an unambiguous opposition to the MAI; an unprecedented coalition of antiglobalists who feared the impact of the MAI on society, including workers and the environment (over 600 nongovernmental organizations (NGOs) from 70 countries), were reportedly involved in opposing the MAI." (footnotes omitted).

[36] Weiss (2008), at 188.

[37] See e.g. Dolzer and Schreuer (2012), at 11.

Existing treaties While there exists a comprehensive multilateral agreement covering international trade, there is, as we have seen above, no comprehensive multilateral agreement covering international-investment flows. There are, however, a couple of multilateral IIAs.

ICSID Convention (or 'Washington Convention')[38] establishes an investor-State arbitration institution for international-investment disputes – importantly, it only imposes procedural rules, and as such, is mute on substantive issues.[39]

A number of *WTO agreements* impose foreign-investment-related public international legal obligations on its member States. Indeed, the AGP (note: not obligatory for all WTO member States), GATS, and TRIPS impose (indirect) obligations in relation to the entry and treatment of foreign investments; and the TRIMS and SCM impose obligations in relation to performance requirements and investment incentives.[40] Let us briefly have a look at two of these agreements.

The GATS captures FDIs because, although its *ratione materiae* is limited to 'trade in services', it also covers the establishment of a 'commercial presence' in the other State which is established to provide a service. In consequence, its core principles apply to FDIs: most-favoured-nation treatment, Market Access, and national treatment.[41] Note, however, that the GATS only applies to sectors which States have explicitly agreed to open to foreign providers of services.

The TRIMS deals with trade-related aspects of foreign investments: it requires member States not to impose investment measures that violate national treatment as contained in Article III GATT or that violate the prohibition of quantitative restrictions as contained in Article XI GATT. As such, it forbids host States from requiring foreign investors to utilise a certain amount of domestic inputs (e.g., in proportion to its production or to its exports), to quantitatively limit the import of its inputs, to

[38] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (entered into force 14 October 1966), 575 UNTS 159, 150 ratifying members by the end of 2014.

[39] These procedural rules are discussed in Section 5.2.

[40] Weiss (2008), at 192.

[41] Regarding Market Access and NT: Weiss (2008), at 194, "While [Market Access and NT are] proximate to the concept of a 'right to establishment', it only involves that amount of cross-border movement of capital necessary to effectively supply a service to foreign customers" (footnote omitted).

limit its imports through a quantitative limit on its access to foreign exchange, or to quantitatively limit the export of its outputs.

Addendum: de facto multilateralisation It has been shown that the *MFN clause*[42] has produced some degree of multilateralisation of IIL even in the absence of a comprehensive multilateral IIA.[43]

It has furthermore been argued that because investment arbitral tribunals' have found that the ICSID Conventions' and IIAs' nationality requirements (ratione personae)[44] to be easily satisfied, a host State is de facto subject to a given IIA for all its foreign investors.[45]

5.2 Investment arbitral tribunals

IIAs typically include a consent (by the States party thereto) to the jurisdiction of some arbitral body.[46] This consent takes one of two forms: a consent to arbitration under some arbitration institution such as ICSID, ICSID Additional Facility,[47] or some commercial arbitral institution;[48] or a consent to arbitration under some specific procedural rules (a 'consent to ad hoc arbitration') such as the UNCITRAL

[42] See Section 5.9 for a discussion of the jurisprudence.

[43] Schill (2009).

[44] See Sections 5.2.2.1 respectively 5.4.2 for a discussion of the jurisprudence.

[45] Legum (2006), at 525, "The reality that foreign capital is highly fungible and the breadth of the definitions of investor and investment thus combine to effectively transform the facially bilateral obligations of the BIT into an obligation that the host State must consider potentially applicable to all investors."

[46] See Section 5.4.

[47] Note that the 'ICSID Additional Facility' is not governed by the ICSID Convention, but by the 'Additional Facility Rules'.

[48] Born (2012), at 834 et seq.

Notable commercial arbitration institutions with their own procedural rules (although they generally allow for usage of alternative rules, such as UNCITRAL Rules) include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce (SCC); the Permanent Court of Arbitration (PCA)'s procedural rules are based on UNCITRAL 1976 (Yannaca-Small, 2010b, at 249; Dolzer and Schreuer, 2012, at 241 et seq.).

(Arbitration) Rules.[49] In general, the consent to arbitration involves several institutions and/or procedural rules so that foreign investors have de facto a right to choose between these procedural rules.[50]

This Section focuses on ICSID and UNCITRAL because they amount to the two most frequently relied upon adjudicative bodies.[51]

5.2.1 Procedural law: preliminary observations

The procedural law applicable to investment arbitral proceedings is roughly the same as the one applicable to international commercial arbitrations.[52] This similarity is, undoubtedly, part of the reason for the prominence in investor-State investment arbitrations of lawyers trained in, and still practicing in, international commercial arbitration.[53]

5.2.1.1 Composition of tribunal

Investment arbitral tribunals are typically composed of three arbitrators. Both the ICSID Convention and the UNCITRAL Rules provide as a default rule that tribunals shall be composed of three arbitrators.[54]

[49] Dolzer and Schreuer (2012), at 238, "If arbitration is not supported by a particular arbitration institution, it is referred to as ad hoc arbitration."

[50] Dolzer and Stevens (1995), at 129 et seq., "In fact, most modern treaties allow for the possibility of a choice between different arbitral regimes."

[51] See Section 7.1.2; for a graphical representation, see UNCTAD (2013), at 110 et seq.

For a brief discussion of further (besides UNCITRAL) non-ICSID tribunals, see e.g. Onwuamaegbu (2010).

[52] Instead of several, see Schill (2011b), 888, "the procedural law applicable to investment treaty arbitrations was either the same as that applicable to commercial arbitrations, as in the case of investment arbitrations under UNCITRAL Arbitration Rules, the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules), or the Rules of the International Chamber of Commerce (ICC Rules), or modelled on commercial arbitration procedure, as in the case of ICSID arbitrations."; see also Born (2012), at 834, "The arbitration provisions of the ICSID Convention and the associated ICSID Arbitration Rules are modeled closely on international commercial-arbitration rules."

[53] Schill (2011b), at 878 et seq.

[54] ICSID Convention, Article 37(2), 'Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed

There are two types of arbitrators: party-appointed arbitrators and non-party-appointed arbitrators. Three-member tribunals are typically composed of two party-appointed and one jointly-appointed arbitrator (i.e., one non-party-appointed arbitrators); however, the party-appointed arbitrator is institutionally-appointed if the party fails to appoint an arbitrator, and the jointly-appointed arbitrator is institutionally-appointed if the two parties fail to agree on an arbitrator.[55]

Differences occur for the procedure underlying institutionally-appointed arbitrators.

ICSID Article 38 in combination with Article 5 ICSID Convention holds that the appointing institution ('the Chairman') is the President of the World Bank; in practice, the appointing institution follows the recommendation of ICSID's Secretary-General (i.e., the Secretary-General amounts to the de facto appointing institution).[56] Article 40(1) holds that the appointing institution may only appoint an arbitrator from the so-called 'Panel of Arbitrators'. Articles 12 and 13 hold that the 'Panel of Arbitrators' amounts to a list of arbitrators composed of four names provided by each State party to the ICSID Convention and of 10 names provided by the President

by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.'

UNCITRAL Rules, Article 7(1), 'If the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.'

[55]ICSID Convention, Article 37(2), 'one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties' and Article 38 holds 'If the Tribunal shall not have been constituted within 90 days after notice of registration ... the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed'.

UNCITRAL Rules, Article 9, '(1) If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. (2) If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator. (3) If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by the appointing authority'.

[56]Puig (2014), at 398 et seq.

of the World Bank;[57] these arbitrators are selected for a period of 6 years (Article 15(1)).

UNCITRAL Article 6 UNCITRAL Rules holds that if an appointing institution ('appointing authority') must be relied upon, then the Secretary-General of the PCA designates the appointing institution.

5.2.1.2 (Ir)relevance of the seat

ICSID Article 44 ICSID Convention holds that the tribunal shall decide any procedural question insofar as it is not covered by the ICSID Convention or the ICSID Arbitration Rules 2006 – the ICSID Convention amounts the the *lex arbitri*. Therefore, it is irrelevant in which of the member States an ICSID tribunal physically takes foot.[58]

UNCITRAL The seat matters in arbitrations governed by UNCITRAL Rules. In consequence, the mandatory national laws of the State in whose territory the arbitration takes place will apply to the arbitration – most notably, in relation to 'confidentiality and transparency' (Section 5.2.3) as well as to 'finality of awards' (Section 5.2.7). Remark that most States have enacted specific national laws for international arbitrations within their territories; these laws, most notably, follow the UNCITRAL Model Law.[59]

5.2.2 Jurisdiction

The constituting documents of investment arbitral tribunals require consent to jurisdiction by all the parties to the dispute. States have in the past consented to jurisdiction either in public international law, typically within an international investment

[57] Rogers (2013), at 253, "despite recurring pleas from ICSID, less than half of the parties to the ICSID Convention (and disproportionately few from among developing economies) avail themselves of the right to make nominations to the List of Arbitrators".

[58] Jagusch and Sullivan (2010), at 97.

[59] The 'UNCITRAL Model Law' was prepared by UNCITRAL and provides a set of rules to govern international arbitration that States may adopt within their national legal frameworks.

agreement (see Section 5.4 for an extensive discussion), or in their own national law, referred to as 'foreign investment laws'.[60]

The ICSID Convention is unique amongst international arbitral tribunals in that it, in addition to consent, exhibits ratione-materiae and ratione-personae jurisdictional requirements.[61]

5.2.2.1 ICSID[62]

Article 25(1) ICSID Convention limits the jurisdiction of such a tribunal to: a legal dispute; arising directly out of an investment; between a national of a member State and another member State (i.e., home and host States must be party to the ICSID Convention); insofar as both parties to the dispute have consented in writing to the tribunal's jurisdiction.

Ratione materiae: investment Article 25 ICSID Convention uses the term 'investment'; the ICSID Convention, however, does not provide a definition of that concept.[63] Different ICSID tribunals have reached different, even conflicting, interpretations of the term 'investment'.[64] These differences manifest themselves at two levels.

First, ICSID tribunals distinguish themselves in whether they follow as so-called *objectivist approach* or a *subjectivist approach*. The 'objectivist approach' views the term 'investment' in the ICSID Convention as having an autonomous meaning; namely, a meaning detached from the meaning which the parties to the particular

[60] Instead of several, the following investment arbitration was based on a consent by the host State grounded in its domestic law (in casu: the Egyptian Foreign Investment Law of 1974): *SPP v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992 (Egyptian Law).

[61] Jagusch and Sullivan (2010), at 85.

[62] The following discussion heavily borrows from Section 3.1.1 of Lehmann (2012). For a more detailed analysis of the jurisdiction of ICSID, see Schreuer et al. (2009), at 71 et seqq.

[63] Dupont (2011), at 245, "[t]he absence of definition . . . [is] one of the major problems facing arbitration under investment treaties".

[64] *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (Netherlands–Turkey BIT), at para 97, "[t]he proposed solutions are inconsistent, if not conflicting, and do not provide any clear guidance to future arbitral tribunals."

dispute want to give it – and therefore a meaning disconnected from any particular dispute. Tribunals following this approach argue that Article 25 ICSID Convention would be meaningless were it not to have an autonomous meaning. This approach therefore requires a dual interpretation of the term investment (a 'double keyhole' for jurisdiction): 'investment' within the ICSID Convention; and 'investment' in the consent by the parties to the dispute.[65] Tribunals following an objectivist approach have generally defined the concept of 'investment' in terms of four criteria (generally referred to as the *Salini criteria*): (i) a substantial commitment by the investor; (ii) a certain duration of the project; (iii) the existence of risk for the investor; and (iv) a significant contribution to the economic development of the host state.[66] The 'subjectivist approach' views the term 'investment' as fully determined by the parties to the particular dispute; as such, this approach gives complete deference to the will of parties to the particular dispute.[67]

Second, ICSID tribunals distinguish themselves in whether they rely upon an

[65] Dolzer and Schreuer (2012), at 61.

[66] See e.g. Dolzer and Schreuer (2012), at 67 et seqq.

Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (Italy–Morocco BIT), at para 52, "[t]he doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction ... one may add the contribution to the economic development of the host State of the investment".

Note that the Salini tribunal itself relied upon four of the five criteria advanced in *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (Netherlands–Venezuela BIT), at para 43, "[t]he basic features of an investment have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development." (footnote omitted).

[67] Yannaca-Small (2010b), at 261.

Decisions which have followed a subjectivist approach include: *Azurix Corporation v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (United States–Argentina BIT); *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (Germany–Philippines BIT), at para 305, "the word 'investment' is a term of art, whose content in each instance is to be determined by the language of the pertinent BIT which serves as a *lex specialis* with respect to Article 25 of the Washington Convention"; *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 (United Kingdom–Tanzania BIT), at para 317.

intuitive method or a *deductive method* within the 'objectivist approach'; namely, they distinguish themselves in how they use party-to-dispute-unrelated criteria (such as the 'Salini criteria').[68] Although ICSID tribunals overall do not agree on the set of criteria, one portion of them follows the 'intuitive method' by holding that some set of criteria need not be cumulatively satisfied (i.e., they only function as a benchmark facilitating the determination of whether a particular transaction amounts to an investment),[69] while the other follows the 'deductive method' by holding that some set of criteria needs to be cumulatively satisfied.[70]

[68]Seminal for proposing this categorisation of the seemingly chaotic decisions of investment arbitral tribunals is Gaillard (2009), at 407 et seqq.

[69]These tribunals look at the criteria which scholars have pointed out and/or which previous tribunals relied upon.

Decisions that applied the 'intuitive method' include: *Československa Obchodní Banka, A.S. (CSOB) v Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (Czech Republic–Slovak Republic BIT), at para 90; *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina BIT), at para 42; *M.C.I. Power Group L.C. and New Turbine, Inc. v Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007 (United States–Ecuador BIT), at para 165; *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, (Austria–Ukraine BIT), at para 314.

[70]Decisions that applied the 'deductive method' and relied on 3 criteria, namely the Salini criteria except 'contribution to the economic development', include: *Consortium Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/08, Award, 10 January 2005 (Algeria–Italy BIT), at para II.13(iv); *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008 (Spain–Chile BIT), at para 233; *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (Netherlands–Turkey BIT), at para 110.

Decisions that applied the 'deductive method' and relied on the 4 Salini criteria include: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (Turkey–Pakistan BIT), at para 130; *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 (Belgium-Luxembourg Economic Union–Egypt BIT), at para 91.

Decisions that applied the 'deductive method' and relied on 5 criteria, namely the 4 Salini criteria and 'regulatory of profit', include: *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (Netherlands–Venezuela BIT), at para 43; *Joy Mining Machinery Ltd v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2006 (United Kingdom–Egypt BIT), at para 53; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, 17 October 2006

Finally, note that ICSID tribunals have found that both *intangible assets* as well as *indirect investments* are covered by the ICSID Convention.[71]

Ratione personae: nationality of investor Article 25(2) ICSID Convention holds that the nationality of natural persons in the ICSID Convention is primarily determined by the national laws of the State whose nationality is being claimed.[72] In particular, an ICSID tribunal has found that a genuine link, such as (permanent) residence, with a State is not relevant for the question of nationality.[73]

Article 25(2) ICSID Convention holds that the nationality of juridical persons in the ICSID Convention is primarily determined by the agreement of the parties to the dispute.[74] De facto, the nationality of juridical persons may therefore be determined by the IIA containing the consent to jurisdiction by the host State (see Section 5.4.2) or by an investor-State contract.[75] Importantly, ICSID tribunals have found that the ICSID Convention only allows a juridical person having the nationality of the host

(Denmark–Egypt BIT), at para 77.

Decisions that applied the 'deductive method' and relied on 6 criteria, namely the 4 Salini criteria and 'in accordance with the law of the host state' as well as 'in good faith', include: *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (Israel–Czech Republic BIT), at para 114.

[71] See the decisions by ICSID tribunals in Section 5.4.1.

[72] ICSID Convention, Article 25(2), "National of another Contracting State' means: (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute'.

For a brief description of relevant cases, see e.g. Dolzer and Schreuer (2012), at 45 et seqq.

[73] *Siag and Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007 (Italy–Egypt BIT), at para 199.

[74] Dolzer and Schreuer (2012), at 51, "The application of Article 25(2)(b) requires an agreement between the host state and the investor."

ICSID Convention, Article 25(2), "National of another Contracting State' means: ... (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute ... and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.'

[75] It has, however, been argued that a teleological interpretation perspective of the ICSID Convention sets boundaries to the permissible nationality criteria; most notably, Weil (2004), at para 19, "the silence of the Convention on the criterion of corporate nationality does not leave the matter to the discretion of the Parties [once the teleological interpretation is also taken into consideration]".

State to be treated as a national of another State if the parties to the dispute have agreed so *and* if there exists 'foreign control'.[76]

Consent Article 25(1) ICSID Convention holds that all the parties to the dispute must have consented in writing to such a tribunal's jurisdiction; it furthermore makes it clear that the fact that a State is a member to the ICSID Convention does not by itself amount to a consent of that State to the jurisdiction of such a tribunal.

The Article says nothing about the form one's consent may take (insofar as it is in writing). As such, States may for instance give their consent in IIAs (see Section 5.4), in their respective domestic laws, or in an investor-State contract; consent may even be given on a conditional basis (Section 5.4.3) and thus considered as non-existent until the condition is satisfied.[77]

No exhaustion of local remedies Article 26 ICSID Convention does not require exhaustion of the host State's local (administrative or judicial) remedies unless one of the parties to the dispute's consent to jurisdiction is conditional thereupon (Section 5.4.3).

5.2.2.2 UNCITRAL

Article 1(1) UNCITRAL Rules only holds that all the parties to the dispute must have consented in writing to the tribunal's jurisdiction.

[76] For a brief description of relevant cases, see e.g. Dolzer and Schreuer (2012), at 51 et seq., "Although the agreement between the parties contained an ICSID clause and the Tribunal accepted that the ICSID clause implied an agreement to treat the claimant as a foreign national, the Tribunal found that it had to examine the existence of foreign control as a separate requirement".

[77] See e.g. Jagusch and Sullivan (2010), at 86.

5.2.3 Confidentiality, transparency, and third-party participation

5.2.3.1 ICSID

When a request for arbitration is registered by ICSID, that request (i.e., the existence of a dispute) is published on ICSID's website; the subject matter of the dispute and the identities of the arbitrators are later added.[78]

Article 48(5) ICSID Convention holds that the pleadings and evidence submitted by the parties are not published, unless all the parties to the dispute agree otherwise. Although Article 48(4) ICSID Arbitration Rules 2006 holds that ICSID can only publish the final award with the consent of both parties, it also holds that ICSID *must* publish excerpts of the legal reasoning of each decision.

Finally, Article 37(2) ICSID Arbitration Rules 2006 permits tribunals to allow third parties (i.e., non-disputing parties) to file a written submission about the matter of the dispute (so-called *amicus curiae*).[79] ICSID tribunals have actually permitted such submissions even prior to this 2006 amendments to the ICSID Arbitration Rules (and even though the applicable law was silent on this matter).[80]

5.2.3.2 UNCITRAL

Article 28(3) UNCITRAL Rules holds that the hearings are in 'in camera' unless all the parties to the dispute agree otherwise; it has been argued that 'in camera' should be understood as excluding non-disputing parties.[81] Article 34(5) UNCITRAL Rules holds that the final award can only be published if both parties consent to it. Because

[78] Jagusch and Sullivan (2010), at 93.

[79] Bernasconi-Osterwalder et al. (2012), at 46, "Under this article, an ICSID tribunal must consult with the disputing parties, although neither party can block *amicus* submissions."

[80] See, for instance, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Participation as Amicus Curiae, 19 May 2005 (Argentina–France BIT and Argentina–Spain BIT); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Participation as Amicus Curiae, 17 March 2006 (Argentina–France BIT and Argentina–Spain BIT).

[81] See e.g. Jagusch and Sullivan (2010), at 95.

UNCITRAL Rules say nothing about the existence of the proceedings themselves, it has been argued that the UNCITRAL Rules impose no confidentiality duty regarding the proceedings on anyone involved therein.[82]

Since the entry into force of the 'UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration' ('UNCITRAL Transparency Rules') in 2014, however, UNCITRAL arbitrations require that both documents and hearings be made available to the public (Articles 3 and 6 and UNCITRAL Transparency Rules 2014), unless the information is protected or amounts to confidential business information (Article 7 UNCITRAL Transparency Rules 2014). Article 4 UNCITRAL Transparency Rules 2014 permits tribunals to allow third parties (i.e., non-disputing parties) to file a written submission about the matter of the dispute (so-called *amicus curiae*). Importantly, however, Article 1(2) UNCITRAL Transparency Rules 2014 carves out all investment treaties concluded before 1 April 2014 from its scope unless the States party to the treaty or the parties to the dispute have explicitly 'opted in'.[83]

Note, finally, that the UNCITRAL Rules are complemented by the arbitration rules included in the national law of the State of the arbitration (Section 5.2.1.2); these laws tend to impose duties of confidentiality on the parties.[84]

5.2.3.3 Addendum: UN Transparency Convention

If both the State of the claimant (i.e., home State) and the respondent State (i.e., host State) have concluded the 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration' ('UN Transparency Convention'), then the 'UNCITRAL Transparency Rules' (Section 5.2.3.2) apply to all investor-State dispute settlements (i.e., not only to UNCITRAL proceedings) based on an IIA concluded before 1 April 2014 by these States.

[82] Caron and Caplan (2013), at 37, "we conclude that they [Articles 28(3) and 32(5)] alone cannot give rise to a general duty of confidentiality."

[83] Johnson (2014), "For these thousands of existing treaties, this provision effectively turns the Transparency Rules into optional guidelines."

[84] Jagusch and Sullivan (2010), at 95.

5.2.4 Merits: decision criteria (or 'applicable norms/law')

5.2.4.1 ICSID

The ICSID Convention provides no substantive norms to settle the dispute, it only provides procedural ones.[85]

Article 42(1) ICSID Convention holds that the tribunal ought to decide the dispute by applying the decision criteria ('rules of law') agreed to by the parties to the dispute;[86] and that in the absence of such an agreement, the tribunal ought to apply the law (including its 'rules on the conflict of laws') of the State party to the dispute as well as public international law as applying to that State.

5.2.4.2 UNCITRAL

Article 35(1) UNCITRAL Rules holds that the tribunal ought to decide the dispute by applying the decision criteria ('rules of law') agreed to by the parties to the dispute; and that in the absence of such an agreement, the tribunal ought to apply the law of its choosing.

5.2.4.3 Agreement of the parties to the dispute

Most IIAs do not exhibit a choice-of-law provision.[87] IIAs including such a provision tend to state that the dispute ought to be decided 'in accordance with the provisions of this IIA', in accordance with 'the principles of international law', in accordance with 'the applicable rules of international law' (including: customary international law and treaties), in accordance with 'any contract relating to the in-

[85] Schreuer et al. (2009), at 550.

[86] Banifatemi (2010), at 196, "the ICSID Convention gives the parties considerable freedom in that they can choose the 'rules of law' as opposed to an entire system ... namely, any national legal system ... selected rules of that system, rules common to certain legal systems, general principles of law, lex mercatoria, or international law" (emphasis and footnotes omitted).

[87] Banifatemi (2010), at 197.

Exhibiting a 'choice-of-law provision': US Model BIT 2004 and 2012, Article 30, "the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law".

vestment', and/or in accordance with 'the law of the host State'.[88]

Investment arbitral tribunals have held that the ex ante consent to jurisdiction by a host State in an IIA containing a choice-of-law provision and the consent to jurisdiction by foreign investors do not, strictly speaking, amount to an agreement about the applicable law. The tribunals have, however, interpreted those two consents as implying that both parties agreed to the IIA, and therewith to its choice-of-law provision, as representing the applicable law.[89]

5.2.4.4 Conflicts

How investment arbitral tribunals have resolved conflicts between different legal systems, namely between public international law and national law or between IIAs and public international law more generally, is discussed in Section 5.3.4.

[88] See, for instance, Banifatemi (2010), at 197 et seq., for examples of IIAs relying upon these formulations; see also Dolzer and Schreuer (2012), at 290.

See for instance: NAFTA, Article 1128, "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law"; US Model BIT 2012, Article 30(1), "the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law".

[89] Instead of several, see *Antoine Goetz et consorts v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (Belgium-Luxembourg Economic Union–Burundi BIT), at para 94 (for an English translation, see van den Berg (2001), at 36),

> Sans doute la détermination du droit applicable n'est-elle pas, à proprement parler, faite par les parties au présent arbitrage (Burundi et investisseurs requérants) . . . le Tribunal estime cependant que la République du Burundi s'est prononcée en faveur du droit applicable tel qu'il est déterminé dans la disposition précitée de la Convention belgo-burundaise d'investissement en devenant partie à cette Convention et que les investisseurs requérants ont effectué un choix similaire en déposant leur requête d'arbitrage sur la base de ladite Convention.

5.2.5 Arbitral practice: application of decision criteria (including 'interpretation')

Investment arbitral tribunals' application of the 'decision criteria' (or 'applicable law') is discussed in the next Sections.

Remark that the literature generally discusses the practice of investment arbitral tribunals under the headings of abstract (substantive or procedural) standards of protection without differentiating between the underlying IIAs.[90]

Such a practice may give rise to the impression that the various investment arbitral tribunals' decisions – are leading and/or should be leading – towards a consistent interpretation of those abstract standards of protection (i.e., towards a homogeneous jurisprudence). Such an impression is problematic for two reasons. First, the view that this jurisprudence is homogeneous is problematic since current jurisprudence is actually quite heterogeneous (it oftentimes even exhibits conflicts) and does not appear to be converging towards consistent interpretations.[91] Second, the view that this

[90] See Schill (2011b), at 882, "Dolzer and Stevens [Dolzer and Stevens (1995)] did not review BIT practice in relation to a specific country, nor did they present their monograph as a collection of country reports. Instead, their approach was to provide an overview of BIT practice as it related to all the provisions found in a typical BIT. This work laid the foundation for perceiving investment treaties not as isolated instances of bilateral treaty-making but as an emerging international practice giving rise to common standards of investment protection. The book by Dolzer and Stevens, thus, is at the origin of seeing investment treaty law as a uniform discipline in international law." (footnote omitted).

[91] Aaken and Kurtz (2010a), at 506, "The jurisprudence of investor-state arbitral tribunals on most of the major doctrinal questions—whether implicating national treatment, the fair and equitable standard, guarantees against expropriation or exceptions for state conduct—is not only unsettled but often directly contradictory."

The most famous example of conflicting decisions while applying the same legal standard (though each applying a different IIA) to the same facts is: *CME v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 14 March 2003 (Netherlands–Czech Republic BIT); *Lauder v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 3 September 2001 (United States–Czech Republic BIT); one tribunal found that there was a breach of the FET standard and awarded significant damages, the other found that there was no breach.

For further evidence of this lack of consistency in the application of these abstract standards, see the case law for the expropriation clause (Section 5.6), FET clause (Section 5.7), NT clause (Section 5.8), MFN clause (Section 5.9), umbrella clause (Section 5.10), and NPM clause and State defenses under CIL (Section 5.11). See also Banifatemi (2013), at 204 et seqq.

jurisprudence should be converging towards consistent interpretation is also quite problematic (see Section 7.6.1).

In spite of these issues, this work too will present the practice of international investment tribunals under the headings of abstract standards of protection. At the risk of repeating myself: this presentation is only meant to be descriptive.

5.2.6 Decisions

5.2.6.1 Decision-making procedure

ICSID Article 48(1) ICSID Convention holds that decisions are reached by majority when there is more than one arbitrator. Article 48(2) requires that the decision be signed by all arbitrators who voted in favour of it.

UNCITRAL Article 33(1) UNCITRAL Rules holds that decisions are reached by majority when there is more than one arbitrator. Article 34(4) holds that if one of the arbitrators does not sign the decision, then the tribunal must indicate the reasons for the failure to sign.[92]

5.2.6.2 Separate (concurring and dissenting) opinions

ICSID The ICSID Convention explicitly allows arbitrators to attach separate opinions to decisions of the tribunal.[93]

UNCITRAL The UNCITRAL Rules are silent on the topic of separate opinions. The parties to the dispute are therefore free to decide whether or not such opinions shall be allowed. In the absence of them explicitly expressing such a desire, the seat of the arbitration is taken as indicative of the parties' will.[94]

Believing in the development over time of a jurisprudence constante (i.e., consistency in the application of these abstract standards): Bjorklund (2008).

[92] The typical reason is that the non-signing arbitrator dissents with the decision (Sanders, 2004, at 122).

[93] ICSID Convention, Article 48(1), 'Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.'

[94] Caron and Caplan (2013), at 751 et seqq.

5.2.7 Finality of awards

5.2.7.1 ICSID

Article 53(1) ICSID Convention holds that the award may only be subject to the remedies provided for in the Convention itself; that is, one may not have recourse to national tribunals or international (arbitral) tribunals to review or annul a decision by an ICSID tribunal.

Review[95] Article 51(1) provides a *ground for review* of an award: if new facts come to light and these new facts decisively affect the award. This should arguably be understood as requiring that knowledge of the facts would have led to a different award.[96] Article 51(3) provides that the tribunal which rendered the award shall consider these new facts; a new tribunal shall be established only if that tribunal cannot be re-constituted.

Annulment[97] Article 52(3) holds that upon receipt of the application for annulment, the President of the World Bank appoints an ad hoc committee of three persons.

Article 52(1) provides an exhaustive list of *grounds for annulment* of an award:[98] the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; a member of the tribunal was corrupt; the tribunal made a serious departure from a fundamental rule of procedure; or the award did not state the reasons underlying it.

[95] "Revision is not widely used in international adjudication. Other documents regulating international arbitration rarely provide for it." (Schreuer et al., 2009, at 879).

[96] Schreuer et al. (2009), at 883, "Revision is contingent upon the discovery of new facts that are capable of affecting the award decisively . . . It must be of such a nature that it would have led to a different decision had it been known to the tribunal."

[97] Schreuer et al. (2009), at 901, "A decision-maker exercising the power to annul has only the choice between leaving the original decision intact or declaring it void. It can destroy a *res judicata* but cannot create a new one."

[98] Dolzer and Schreuer (2012), at 301, "Only awards are subject to annulment; there is no annulment in respect of other decisions, such as decisions upholding jurisdiction or decisions on provisional measures, except if they are subsequently incorporated into the award. A decision by a tribunal declining jurisdiction is an award an therefore subject to annulment."

ICSID annulment committees have found that deciding a matter for which a tribunal lacks jurisdiction or failure/refusal to decide a matter for which the tribunal has jurisdiction both amount to a *manifest excess of powers*.[99] ICSID annulment committees have furthermore found that an error of law – the application by the tribunal of a different law than the 'applicable law' (i.e., different than the one to which the parties to the dispute consented) – amounts to a 'manifest excess of powers' only if the error is not only 'arguable';[100] importantly, an error in the application of the applicable law (including interpretation thereof) does not amount to such an excess of powers.[101]

[99] See e.g. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Argentina–France BIT), at para 86, "an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have . . . but also if it fails to exercise a jurisdiction which it possesses"; *Malaysian Historical Salvors, SDN, BHD v Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009 (Malaysia–United Kingdom BIT), at para 80.

For a brief description of the relevant cases, see e.g. Yannaca-Small (2010a), at 611 et seqq.

[100] *MTD Equity v Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007 (Malaysia–Chile BIT), at para 47, "An award will not escape annulment if the tribunal, while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest', not arguable"; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007 (United States–Argentina BIT), at para 51.

Concurring with this interpretation: Dolzer and Schreuer (2012), at 305, "Article 51(1) of the ICSID Convention does not, in express terms, provide for annulment for failure to apply the proper law. But the provisions on applicable law are an essential element of the parties' agreement to arbitrate. Therefore, the application of a law other than that agreed to by the parties may constitute an excess of powers".

[101] *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986, (Indonesian Law), at para 23,

> The law applied by he Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutinity is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the the Tribunal did in fact apply the law it was bound to apply to the dispute.

See also: *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, at para 61, "the annulment process of Article 52 of

ICSID annulment committees have found that a tribunal deciding the case based, in part or fully, on its own arguments (rather than those presented to it by the parties) does not amount to a *serious departure from a fundamental rule of procedure*.[102]

ICSID annulment committees have found that only a complete lack of comprehensible reasoning amounts to a *failure to state the reasons*.[103] Namely, only if it is impossible for a reader to follow the tribunal's reasoning; the fact that the motivation for the award could have been clearer is not enough.[104]

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the [ICSID] Convention does not . . . have 'the mission to state whether the issues were properly or poorly judged, but whether the judgment is to be annulled'"; *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, at para 5.04; *CDC Group plc v Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on the Application for Annulment, 29 June 2005 (English Law), at para 45; *Repsol YPF Ecuador, S.A. v Empresa Estatal Petróleos Del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, 8 January 2007, at para 38.

For a brief description of relevant cases, see e.g. Yannaca-Small (2010a), at 614 et seq.; and Knahr (2010), at 155 et seq.

[102] Most clearly, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, at para 91, "arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties . . . it obviously does not follow that they therefore commit a 'serious departure from a fundamental rule of procedure' [in so doing]".

[103] Knahr (2010), at 157.

[104] See, for instance: *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 December 1989, at para 5.08, "it must enable the reader to follow the reasoning of the Tribunal on points of fact and law"; *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 5 February 2002 (Egypt–United Kingdom BIT), at para 81, "The object of both provisions is to ensure that the Parties will be able to understand the Tribunal's reasoning. This goal does not require that each reason be stated expressly. The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision."; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Argentina–France BIT), at para 65, "This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision."

Summarising the case law: Dolzer and Schreuer (2012), at 307, "an award will not be annulled if the reasons for a decision, though not stated explicitly, are readily apparent to the ad hoc committee. Implicit reasoning is sufficient as long as it can be inferred reasonably from the terms and conclusions of the award."

Addendum: stay of enforcement Article 52(5) gives broad discretion to the annulment committee regarding a stay of enforcement of an award having an annulment decision pending; that is, if the committee considers 'that the circumstances so require'.[105] Committees have held that the likelihood of a success of the annulment procedure does not influence the decision about a stay of enforcement.[106]

Annulment committees have virtually always granted a stay when requested to do so.[107] They have unconditionally granted a stay except in extreme circumstances. Such circumstances include a high risk of non-compliance with the award if the award is upheld on annulment or an irreparable injury to the non-prevailing party in case of immediate enforcement. In the presence of such extreme circumstances, committees have had a tendency to grant the stay conditionally, that is, to attach the grant to the fulfillment of some conditions by the non-prevailing party; such conditions have included the provision of a written assurance from the non-prevailing party that it will comply with the award within a fixed period of time if the award is upheld, the provision of an unconditional and irrevocable bank guarantee, or the placement of the award into an escrow account.[108]

5.2.7.2 Non-ICSID

States have no public international legal obligation to not review non-ICSID awards in their domestic courts (whereas the ICSID Convention contains such an obligation). Consequently, non-ICSID awards may be submitted for review to national courts of the State of the arbitration. The applicable grounds for such a review are thus provided by the respective national laws.

Many States have adopted national laws similar to the norms contained in the ICSID Convention regarding the review of arbitrations in their domestic courts; most

For a brief description of relevant cases, see e.g. Yannaca-Small (2010a), at 615 et seqq.; Knahr (2010), at 157 et seq.

[105] ICSID Convention, Article 52(5), 'The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.'

[106] See Vicien-Milburn and Andreeva (2010), at 312, footnote 118, for a list of decisions involving Argentina.

[107] Yannaca-Small (2010a), at 618.

[108] See e.g. Vicien-Milburn and Andreeva (2010), at 322 et seqq.

notably, by adopting the UNCITRAL Model Law.[109] Most importantly, the UNCITRAL Model Law forbids a review of the award's merits; hence, national courts of States having adopted it cannot review the correctness of the factual and legal issues of the award.[110]

5.2.8 Enforcement of awards

The enforcement of an ICSID award is easier than the enforcement of a non-ICSID award.[111]

5.2.8.1 ICSID

Article 54(1) ICSID Convention holds that all member States of the ICSID Convention must enforce ICSID awards as if they were final judgments of their own domestic judiciary.[112] Article 54(2) furthermore holds that a party to the dispute wishing to enforce the award only has to provide the competent authority of a member State with a copy of the award certified by the Secretary General of ICSID.

Article 54 applies for awards against foreign investors as well as against host States.[113]

5.2.8.2 Non-ICSID (including: ICSID Addtional Facility arbitrations)

IIAs sometimes themselves provide their member States with a public international legal obligation to enforce awards resulting from their consent to jurisdiction pro-

[109] Hobér and Eliasson (2010), at 639.

[110] Hobér and Eliasson (2010), at 639, "Instead, the review is limited to four main categories: (i) the jurisdiction of the arbitral tribunal, (ii) irregularities with regard to the independence or impartiality of arbitrators, (iii) procedural irregularities and violations of due process, and (iv) public policy and arbitrability." (footnotes omitted).

[111] Alexandroff and Laird (2008), at 1173.

[112] Broches (1972), at 400, "Article 54 affirms its external finality, i.e., vis-à-vis domestic courts. The is *res judicata* in each and every Contracting State."

[113] Schreuer et al. (2009), at 1119, "Art. 54 does not distinguish between the recognition and enforcement of awards against investors on the one side, and against host States on the other. Therefore, it ca be used by either party to the arbitration proceedings." (footnote omitted).

vided therein. An example is NAFTA.[114]

If not, then States may still have a public international legal obligation to enforce a foreign award if, most notably, they are members of the *New York Convention*.[115] The New York convention provides several grounds (for a member State) to refuse enforcement. Article V New York Convention (V(1) is mirrored in UNCITRAL Model Law Article 34) provides for the following grounds: lack of procedural fairness, lack of jurisdiction, improper composition of the tribunal, the award is not legally binding, the State's domestic laws do not allow the subject matter of the dispute to be settled via arbitration; or enforcement would by contrary to the State's public policy.[116]

5.2.8.3 Restricted enforcement jurisdiction: State immunity

Public international law States may consent vis-à-vis other States to restrict their legislative, adjudicative and enforcement jurisdiction over foreign States – thereby creating zones of *State immunity*.

There exist only two treaties which deal with the issue of State immunity broadly speaking. Most importantly, there is the 'United Nation Convention on Jurisdictional Immunities of States and their Property' (UNCSI)[117] which, although not yet in force (because the required number of ratifications has not been reached), is generally held to reflect customary international law.[118] The other treaty is the 'European Convention on State Immunity'[119] which, however, has currently only eight members.

[114] Article 1136(4) states that "Each Party shall provide for the enforcement of an award in its territory."

[115] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (entered into force 7 June 1959), 330 UNTS 38, 154 members by the end of 2014.

Born (2012), at 837, "BIT awards rendered pursuant to the ICSID Convention are subject to ICSID's enforcement provisions, whereas non-ICSID BIT awards are generally governed by both the New York Convention and national implementing legislation." (footnotes omitted).

[116] For a brief description of relevant cases, see e.g. Reinisch (2010a), at 677 et seqq.

[117] United Nation Convention on Jurisdictional Immunities of States and their Property, 2 December 2004 (not yet in force); the Convention was developed by the ILC.

[118] Reinisch (2010a), at 683.

[119] European Convention on State Immunity, 16 May 1972 (entered into force 11 June 1976), European Treaty Series No 74.

Consequently, customary international law arguably contains a norm (UNCSI, Article 2(1)(b)(iii)) holding that an asset amounts to a 'State asset' if that asset is entitled to exercise and actually does exercise sovereign authority; and it arguably also contains a norm (UNCSI, Article 19) holding that foreign States' assets serving a governmental purpose are immune from enforcement (so-called 'State enforcement immunity' or 'State execution immunity'), unless the foreign State has expressly consented thereto – and hence that assets serving commercial purposes are not immune.[120]

It has, however, been pointed out that both whether an asset amounts to a State asset and whether a State asset serves a commercial purpose are oftentimes not readily clear, so that the issue of State-enforcement immunity is associated with considerable uncertainty (and thus variability amongst national jurisdictions).[121]

ICSID Article 55 ICSID Convention states that enforcement of ICSID awards is subject to the national laws and public international legal obligations relating to 'State enforcement immunity' of the State wherein enforcement is sought.[122]

Non-ICSID States (i.e., their domestic courts) have held that the enforcement obligation under the New York Convention is subject to one's public international legal obligations relating to 'State enforcement immunity'.[123]

5.3 Overview of tribunals' interpretation and interpretation methodology

Before turning to investment arbitral tribunals' interpretation of some of the most important standards of protection of contemporary IIL, this Section makes some general

[120] Note that several domestic laws provide for this kind of restricted immunity of enforcement. Amongst others, the United States (US Foreign Sovereign Immunities Act of 1976) and the United Kingdom (UK State Immunity Act of 1978).

[121] See generally, Aaken (2015a).

[122] Reinisch (2010a), at 693.

[123] For a brief description of relevant cases, see e.g. Reinisch (2010a), at 681 et seq.

observations about their interpretation methodology.

5.3.1 Expansive interpretation of jurisdictional issues

A recent empirical study analysing whether investment arbitral tribunals' interpretation of jurisdictional issues can be qualified as 'expansive' (more favourable for the claimant investor) or 'restrictive' (less favourable for the claimant investor) suggests a strong tendency towards expansive interpretations within the limits of the applicable norms/law.[124] Importantly, this empirical finding cannot readily be relied upon to conclude that investment arbitral tribunals are biased in favour of investors because this requires the assumption that an unbiased adjudicative body's interpretation would have been less expansive.[125]

Specifically, see the jurisprudence regarding the jurisdictional condition of ratione materiae and ratione personae (in investment arbitral tribunals' constituting documents and in IIAs),[126] the MFN clause,[127] and the umbrella clause.[128]

5.3.2 Articles 31 and 32 of the Vienna Convention[129]

Empirical studies suggest that between 1990 and 2011, the percentage of investment arbitral tribunals referring to or utilising (i.e., without explicitly referring to) the interpretation Articles of the Vienna Convention slightly increased over time and

[124] Van Harten (2012a), at 237 and 248, based on all publicly-available decisions before May 2010 that are available in English and that deal with jurisdictional matters (140 decisions); at 227 et seq., for a description of the adopted coding of 'expansive interpretation' and 'restrictive interpretation'.

[125] The author of the relevant study himself cautions against drawing such a conclusion: Van Harten (2012a), at 215, "An initial caveat is that the findings do not establish evidence regarding actual bias on the part of any individual or in any particular case.", and 225, "The language of 'pro-investor' or 'pro-state' was avoided on the basis that it is not necessarily the case that an expansive approach, as coded, is pro-investor and so on."

[126] See Sections 5.2.2.1 respectively 5.4.

[127] See Section 5.9.

[128] See Section 5.10.

[129] For a detailed discussion of those Articles, see Chapter 6.

stabilised at around 70 percent;[130] the studies furthermore suggest that 53 percent of investment arbitral tribunals referred to or utilised Article 31(1) VCLT, 26 percent did so with Article 32, 19 percent with Article 31(2), 5 percent with Article 31(3),[131] and 1 percent with Article 31(4).[132] The empirical studies thus raise serious doubts that investment arbitral tribunals properly consider all the mandatory interpretational perspectives contained in Article 31 VCLT when interpreting IIAs – and that they instead select ex post the interpretational perspectives which support their preferred outcome.[133]

[130]The average over this period over all investment arbitral tribunals is 66 percent; the average in different arbitral tribunals tends to vary between 60 and 70 percent.

[131]That is, international investment tribunals tend to interpret IIAs in 'clinical isolation' from the rest of public international law (this terminology was introduced in *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, 29 April 1996, at 17).

[132]See Weeramantry (2012), at 219 et seqq., who analysed 258 decisions by investment arbitral tribunals based on the following selection mechanism: all the awards publicly available on the Investment Treaty Arbitration website (http://italaw.com) and rendered between 1990 and June 2011, unless the award amounts to agreed terms, is not available in English, deals with investor-state contracts or national laws, or relates to procedural order or provisional measures. Put briefly: "Rarely do FIATs [foreign investment arbitral tribunals] carry out a detailed examination of each of these mandated requirements [i.e., under Article 31 VCLT] in the interpretations they undertake." (Weeramantry, 2012, at 39).

Regarding the 'teleological perspective': Dolzer and Schreuer (2012), at 29, "Tribunals have frequently interpreted investment treaties in light of their object and purpose, often by looking at their preambles.", and at 29, footnote 9, for a list of decisions relying thereupon.

Regarding the 'historical perspective': Dolzer and Schreuer (2012), at 31, "In practice, resort to *travaux préparatoires* seems to be determined primarily by their availability . . . The drafting history of the ICSID Convention is document in detail, readily available and easily accessible through an analytical index. As a consequence, ICSID tribunals frequently have resorted to its *travaux préparatoires*. By contrast, the negotiating history of BITs is typically not, or only poorly, documented. Therefore, tribunals do not usually have the possibility of relying on the *travaux préparatoires* even if they are minded to do so." (footnotes omitted).

[133]Also suggesting that investment arbitral tribunals have recourse to the perspectives only ex post: Wälde (2009), at 746, "In modern—post-2000 awards—reference [to the interpretation Articles of the Vienna Convention] is more frequent, but it is difficult to find a tribunal which formally and properly applies . . . [the perspectives] step by step. Rather, a reference is made to the Convention and then the tribunal picks some terms from Articles 31 or 32 (eg ordinary meaning, purpose, or history) which seem to support its approach and conclusion."

5.3.3 Prior awards

Investment arbitral tribunals heavily refer to prior investment-arbitral decisions in their own decisions.[134]

Importantly, such a practice of referencing prior decisions does not imply that investment arbitral tribunals simply follow previous decisions – namely, this practice cannot readily be understood to mean that they feel (de facto) bound by prior decisions (i.e., to mean that prior awards have a 'de facto precedential value', that there exists a 'de facto rule of precedent' or a 'doctrine of precedent').[135] Indeed, investment arbitral tribunals may simply refer to prior decisions because of the quality of the arguments made therein.[136] Also rejecting such an implication is the fact that there do not seem to be leading cases, that investment arbitral tribunals appear to feel uncompelled to follow existing case law, and ever more often explicitly criticise past

[134] Weeramantry (2010), at 112 et seq.; Fauchald (2008), at 335, "Case law from ICSID was used as an interpretive argument in 90 of the 98 [ICSID tribunals'] decisions . . . this was by far the most widely used and most important interpretive argument"; Roberts (2010), at 179, "their jurisprudence frequently resembles a house of cards built largely by reference to other tribunal awards and academic opinions, with little consideration of the views and practices of states in general or treaty parties in particular".

[135] Pauwelyn and Elsig (2013), at 456, "there is a difference between referring to a precedent and generally feeling bound by it".

[136] *AES Corporation v Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (United States–Argentina BIT), at para 30, "Each tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a different solution for resolving the same problem; but decisions on jurisdiction dealing with the same or very similar issues may at least indicate some lines of reasoning of real interest".

decisions.[137]

Nonetheless, it is common in international legal scholarship to understand this practice as capturing a de facto rule of precedent.[138]

5.3.4 Interactions with non international investment law

An investment arbitral tribunal's decision criteria (or 'applicable law') may include: both international law and national law; and/or both public international investment law and public international non-investment law.[139]

5.3.4.1 Interaction between public international law and national law

It seems that when the applicable law includes both public international law and the host State's domestic law, investment arbitral tribunals have generally found public international law to prevail in the event of conflicts between the two systems of law.[140]

[137] Schreuer and Weiniger (2008), at 1196, "At times, they simply adopted a different solution without distancing themselves from the earlier decision. At other times, they referred to the earlier decision and pointed out that they were unconvinced by what another tribunal had said and that, therefore, their decision departed from the one adopted earlier. Increasingly, tribunals are following this latter path."; regarding ICSID tribunals: Fauchald (2008), at 337 et seq., "The general impression from ICSID case law is that it is difficult to identify cases that have generally been regarded as leading cases. In most instances, it is possible to find tribunals that have disregarded or criticized decisions which other tribunals have regarded as particularly important ... many ICSID tribunals were willing to deviate explicitly from previous case law ... Even if tribunals often made an effort to distinguish their cases from previous cases, the extent to which ICSID tribunals in general felt free to criticize and deviate from the findings in previous case law was remarkable." (footnotes omitted).

[138] Instead of many, see: Schreuer and Weiniger (2008), at 1196; Reed (2010), at 95 et seq., "Why else would the parties and the arbitrators in investment arbitration devote so much ink and time to citing, discussing and distinguishing prior awards and decisions of other investment arbitration tribunals? Why else would there be those ever-longer footnotes? There is no denying that we operate in a *de facto* precedent regime in investment arbitration."

[139] See Section 5.2.4.

[140] Dolzer and Schreuer (2012), at 291 and 293.

5.3.4.2 Interaction between public international investment law and public international non-investment law

A State's public international investment legal obligations, captured by its IIA obligations and its public international non-investment legal obligations (most relevant perhaps: international environmental law and human-rights law), may clearly be in conflict.[141]

The couple of investment arbitral tribunals which have considered public international non-investment law have not relied upon the principles developed by non-investment international tribunals to resolve such conflicts – the risk of discrepancies between decisions (on identical or similar disputes) of investment arbitral tribunals and non-investment international tribunals is thus high.[142] Arguably, these investment arbitral tribunals broadly rank international investment law above public international non-investment law and therefore explicitly apply a norm of *lex specialis*.[143]

5.4 Consent to jurisdiction and scope thereof in IIAs

The jurisdiction of investment arbitral tribunals, as indicated in Section 5.2.2, requires consent to jurisdiction by the parties to the dispute.

Most IIAs include a unilateral (ex ante) consent to jurisdiction of States to future potential disputes with foreign investors from the other State(s) party to the treaty.[144]

[141] Aaken (2008a), at 93, "For example, if a state regulates emissions based on a multilateral environmental treaty while having concluded a concession contract with an investor that shields the investor from regulatory changes ... the potential for conflict is high. Investment, especially investments in natural resources may carry heavy environmental consequences and thus conflict with norms set out in multilateral environmental treaties; there may also be international human rights law involved if people are negatively affected by the investment; the protection of the rights of minorities or indigenous peoples may be at issue; the establishment of an investment may involve corruption, bribery, and fraud" (footnote omitted).

[142] Hirsch (2008), at 173, "Investment tribunals have opted to develop their own rules in a sporadic manner ... providing specific answers to the particular questions that arise in each case."

[143] Arguing so: Kammerhofer (2011), at 87 et seqq., "Decisions are mostly based on the lex specialis – the particular IIA in question."

[144] Alexandrov (2005), at 23, "in the great majority of BITs: the treaty itself contains the State's advance consent to arbitrate".

Such a consent is typically restricted in scope in terms of *ratione materiae* and *ratione personae*, and may furthermore require that certain conditions be met.

These IIAs typically contain two ex ante consents to jurisdiction: an ex ante consent to State-State arbitration (contained in a 'State-State dispute-settlement clause') and an ex ante consent to investor-State arbitration (contained in an 'investor-State dispute-settlement clause').[145]

Note that although the BIT signed between West Germany and Pakistan in 1959 is generally described as representing the first modern IIA, the first IIA including an ex ante consent to investor-State arbitration was the BIT signed between Indonesia and the Netherlands in 1968 (previous IIAs only included a State-State dispute-settlement clause).[146] Actually, until the 1980s, the large majority of IIAs did not include an ex ante consent to investor-State arbitration.[147]

5.4.1 Ratione materiae: investment

The unilateral (ex ante) consent to jurisdiction contained in IIAs is typically restricted in scope in terms of *ratione materiae*; specifically, it is restricted to 'investments'.

These treaties typically contain a definition of term 'investment' in the form of a list of assets – a so-called 'asset-based definition'.[148] Such an 'asset-based definition' is usually quite broad: it tends to start off by mentioning 'every kind of asset', and then continues by mentioning a non-exhaustive list of covered assets.[149]

In spite of this 'asset-based definition', a couple of investment arbitral tribunals have relied upon a set of IIA-unrelated criteria when interpreting the term 'invest-

[145] Dolzer and Schreuer (2012), at 234.

[146] Newcombe and Paradell (2009), at 44, "Until 1968, BITs only provided for state-to-state dispute resolution through the establishment of an arbitral tribunal or submission of dispute to the ICJ."

[147] Yackee (2008b), at 428 et seqq.

[148] Schlemmer (2008), at 52, this is in contrast to domestic laws dealing with foreign investments which tend to follow a "'transaction-based' model, which protects the underlying capital transfer rather than the assets owned or controlled by the investor ... [or] an 'enterprise-based' model, which defines protected investment in terms of the business organization of the investment through an enterprise".

[149] See e.g. Schlemmer (2008), at 57 et seq.; and Yannaca-Small (2010e), at 245.

For a notable example of an IIA providing an exhaustive list of covered assets: NAFTA, Article 1139.

ment'.[150]

The consequence of such an 'asset-based definition' is that the term 'investment' may cover, amongst others, both *intangible assets* as well as *indirect investments*.[151]

5.4.1.1 Intangible assets

Investment arbitral tribunals have indeed found that debt instruments (e.g., bonds), as well as controlling and non-controlling, majority and minority, shareholding positions amount to 'investments' under the relevant IIA.[152]

In *Eureko v Poland* the tribunal found that the (contractual) right to an IPO, in addition to the shares which the claimant had already purchased, also amounts to an 'investment' under the relevant IIA.[153]

[150] Yannaca-Small (2010b), at 250, "However, in practice, several non-ICSID tribunals have used some 'objective' criteria in their analysis." (footnote omitted).

These tribunals include: *Société Générale v Dominican Republic*, UNCITRAL ad hoc Tribunal, LCIA Case No. UN 7929, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (France–Dominican Republic BIT), at paras 35 et seqq.; and *Romak S.A. v Republic of Uzbekistan*, UNCITRAL ad hoc Tribunal, Award, 26 November 2009 (Switzerland–Uzbekistan BIT), at paras 212 et seqq.

[151] For a more general list of covered assets, see Yannaca-Small (2010b), at 251 et seqq.

[152] Tribunals having found that minority and non-controlling shareholding positions amount to covered investments include: *Lanco International Inc. v Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction, 8 December 1998 (United States–Argentina BIT), at paras 10 and 48; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (United States–Argentina BIT); *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina BIT), at paras 49 and 58 et seqq.; *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (United States–Argentina BIT), at paras 2 and 78; *GAMI Investments Inc. v United Mexican States*, UNCITRAL ad hoc Tribunal, Final Award, 15 November 2005 (NAFTA), at para 37; *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005 (United States–Argentina BIT), at 93.

For a brief description of further relevant cases, see e.g. Yannaca-Small (2010e), at 236 et seqq., and Schlemmer (2008), at 83 et seqq., "[t]he percentage of shareholding is never an issue".

[153] *Eureko B.V. v Republic of Poland*, UNCITRAL ad hoc Tribunal, Partial Award, 19 August 2005 (Netherlands–Poland BIT), at para 157 et seq., "the Republic of Poland contracted obligations and Eureko acquired rights [in respect of the conduct of the IPO] ... which were entitled to protection under the Treaty".

In *Abaclat v Argentina* and *Ambiente Ufficio v Argentina* the tribunals held that sovereign bonds amount to an 'investment' under the relevant IIAs, whereas in *Poštová v Greece* the tribunal held that sovereign bonds do not amount thereto.[154]

Finally, note that exchanges of (equity or debt) stocks on international financial markets, without any new funds entering the host State's territory, also amounts to an 'investment in the territory'.[155]

5.4.1.2 Indirect investments

Even when IIAs do not explicitly include 'indirect investments' – namely, a (debt or equity) position in a company which directly or indirectly owns an investment within a State party to the IIA –, investment arbitral tribunals have tended to view indirect investments,[156] irrespective of whether they amount to a controlling or majority position, as amounting to 'investments' under the relevant IIA.[157] Tribunals

[154] *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, (Argentina–Italy BIT), at paras 347 et seqq.; *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, (Argentina–Italy BIT), at paras 471 et seqq.; *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Cyprus–Greece BIT, Greece–Slovakia BIT), at paras 331 et seqq.

More generally on the issue of sovereign bonds, see Waibel (2007, 2011c).

[155] Seminally, *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (Netherlands–Venezuela BIT), at para 40, "although the identity of the investor will change with every endorsement, the investment itself will remain constant".

More generally, see Alexandrov (2005), at 45 et seq.

[156] Tribunals having found so include: *Sedelmayer v Russian Federation*, International Court of Arbitration at the Chamber of Commerce in Stockholm, Award, 7 July 1998 (Germany–Russia BIT); *Mobile Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (Netherlands–Venezuela BIT); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (Netherlands–Venezuela BIT).

For further cases, see Vandevelde (2010a), at 139 et seq.

[157] Tribunals having not considered the size of the position within the intermediate company include: *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina BIT); *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June

have found the nationality of this intermediate company to be irrelevant; namely, that company may have the same nationality as the entity holding the position in it, the nationality of the host State, or of any third State.[158] They have also found that indirect investments exhibiting multiple intermediate companies amount to 'investments' under the relevant IIA; and that different shareholding positions within the same ownership chain also amount to such 'investments'.[159]

2005, (Spain–Argentina BIT).

For a brief description of further relevant cases, see e.g. Yannaca-Small (2010e), at 238 et seqq.

[158] Valasek and Dumberry (2011), at 51 et seqq.

Tribunals having found that the intermediate company may have the same nationality as the indirect owner of the investment include: *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (Germany–Argentina BIT); *Mobile Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (Netherlands–Venezuela BIT).

Tribunals having found that the intermediate may have the same nationality as the host State include: *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina BIT); *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004 (United States–Argentina BIT); *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, (Spain–Argentina BIT).

Tribunals having found that the intermediate may have the nationality of some third State include: *Sedelmayer v Russian Federation*, International Court of Arbitration at the Chamber of Commerce in Stockholm, Award, 7 July 1998 (Germany–Russia BIT); *Lauder v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 3 September 2001 (United States–Czech Republic BIT); *Azurix Corporation v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (United States–Argentina BIT); *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (NAFTA); *Noble Energy, Inc. and Machalapower Cia. Ltda. v Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 (United States–Ecuador BIT); *Société Générale v Dominican Republic*, UNCITRAL ad hoc Tribunal, LCIA Case No. UN 7929, Award on Preliminary Objections to Jurisdiction, 19 September 2008 (France–Dominican Republic BIT); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 (Netherlands–Venezuela BIT).

[159] In *CEMEX v Venezuela*, for instance, the tribunal found that the shareholding positions owned by two different shareholders amount to investments under the IIA despite that one of these judicial persons fully owned the other; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December

Finally, note that investment arbitral tribunals have found that an 'indirect investor' can only claim violation of the IIA for its own debt or equity position (i.e., cannot claim a violation of the IIA for the assets of the company in which it holds a debt or equity position).[160]

5.4.2 Ratione personae: nationality of the investor

The unilateral (ex ante) consent to jurisdiction contained in IIAs is typically restricted in scope in terms of *ratione personae*; specifically, it is restricted to investments by a 'national' of another State party to the treaty.

Investment arbitral tribunals have, however, not accepted a transfer in the ownership of the investment as relevant for the 'nationality requirement' when the dispute had already arisen and the purpose of that transfer was to gain access to the arbitral tribunal (except if the host State consents to the transfer).[161]

5.4.2.1 Nationality of natural persons

The nationality of natural persons in IIAs is primarily determined by the national laws of the State whose nationality is being claimed.[162] In particular, arbitral tribunals have found that a genuine link, such as (permanent) residence, with a State is

2010 (Netherlands–Venezuela BIT), at para 158. See also *Mobile Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 (Netherlands–Venezuela BIT), at para 206.

[160] Summarising the case law: *Poštová banka, a.s. and ISTROKAPITAL SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (Cyprus–Greece BIT, Greece–Slovakia BIT), at paras 229 et seqq., "shareholders do not have claims arising from or rights in the assets of the companies in which they hold shares".

[161] For a brief description of relevant cases, see e.g. Dolzer and Schreuer (2012), at 53 et seq., "It appears from these cases that prospective planning ... will be accepted by tribunals ... What appears to be impossible is to create a remedy for grievances, in particular after a dispute has arisen, by arranging for a desirable nationality."

[162] See e.g. Dolzer and Schreuer (2012), at 45 et seqq.

Take for instance the 2004 U.S. Model BIT Article 1, "'national' means: (a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act" (bold omitted); ECT Article 7(a)(i); NAFTA Article 201.

not relevant for the question of nationality.[163]

5.4.2.2 Nationality of juridical persons

The determination of the nationality of a juridical person is more complex than that of a natural person.

Most IIAs either rely upon the *place of incorporation* (i.e., siège statuaire; incorporation theory)[164] or the *seat of the effective management* (i.e., siège social; the place of central adminstration) to determine the nationality of a juridical person.[165] Investment arbitral tribunals have refused to 'pierce the corporate veil' when the relevant IIA relied upon the place of incorporation; thus accepting intermediate mailbox (or 'shell') corporations as having the nationality of their place of incorporation.[166]

Both of these formal criteria make the grabbing of a nationality quite easy (a practice known as 'nationality planning' or 'treaty shopping').[167] In order to prevent such a practice, some IIAs require, in lieu of or in combination with one or both

[163] *Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000 (NAFTA), at paras 27 et seqq.; *Siag and Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, 11 April 2007 (Italy–Egypt BIT), at para 199.

[164] The 'place of incorporation' criterion arguably amounts to customary international law. For making such a statement, see seminally *Barcelona Traction Light and Power Company Limited (Belgium v Spain)*, ICJ, Judgment, 5 February 1970, at para 70.

[165] Dolzer and Schreuer (2012), at 48.

[166] Seminally, in *Tokios Tokelės v Ukraine*, the (majority of the) tribunal found that even though 99 percent of the claimant's shares were held by nationals (natural persons) of the host State, the claimant amounts to a national of the foreign State; *Tokios Tokelės v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (Lithuania–Ukraine BIT), at para 21 et seqq. This decision was, however, accompanied by a dissenting opinion of the tribunal's president Prosper Weil (Weil, 2004). In *Saluka v Czech Republic* the tribunal, although it explicitly recognised that the claimant was merely a shell company, nevertheless found that the claimant had the nationality of its place of incorporation; *Saluka Investments B.V. v Czech Republic*, UNCITRAL ad hoc Tribunal, Partial Award, 17 March 2006 (Netherlands–Czech Republic BIT), at para 240 et seq.

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 48.

[167] Most notable here are The Netherlands: Kahale (2011), "Companies from all over the world having little if anything to do with The Netherlands seek to acquire Dutch nationality to take advantage of the protections offered by Dutch BITs."

of these formal criteria, an *economic connection* with the State whose nationality is being claimed. More specifically, they may require 'effective control' of the juridical person by natural persons having the nationality of the said State (read: piercing the corporate veil) or they may require a 'genuine economic activity' of the juridical person within the said State.[168]

Notice that instead of requiring an economic connection for nationality, some IIAs allow the host State to deny the benefits of the treaty to juridical persons which have no economic connection within the IIA-party State of their nationality – known as a 'denial-of-benefits clause'.[169]

5.4.3 Conditional consent

The unilateral (ex ante) consent to jurisdiction contained in IIAs sometimes takes the form of a 'conditional consent'.

Waiting period Most IIAs require a certain period of time to have elapsed since the notice of intent to adjudicate.[170]

Most investment arbitral tribunals have not found such a clause to give rise to a 'conditional consent' and therewith have not found such a clause to amount to a jurisdictional requirement.[171]

[168] Dolzer and Schreuer (2012), at 49.

[169] Dolzer and Schreuer (2012), at 55 et seq.

[170] Instead of many, see US Model BIT 2012, Article 24(2), 'At least 90 days before submitting any claim to arbitration . . . a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent").'; ECT, Article 26(2).

[171] Tribunals having found that it does not amount to a jurisdictional requirement include: *Ethyl Corporation v Government of Canada*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction, 24 June 1998 (NAFTA), at paras 58 et seqq.; *Lauder v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 3 September 2001 (United States–Czech Republic BIT), at para 187; *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (Switzerland–Pakistan BIT), at paras 90 et seqq.

Tribunals having found that it amounts to a jurisdictional requirement include: *Antoine Goetz et consorts v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (Belgium-Luxembourg Economic Union–Burundi BIT), at paras 90 et seqq.; *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina

Exhaustion of local remedies Only a small number of IIAs, mostly older ones, require the foreign investor to exhaust the host State's local (administrative or judicial) remedies.[172]

The large majority of investment arbitral tribunals has not found such a clause to give rise to a 'conditional consent' and therewith has not found such a clause to amount to a jurisdictional requirement.[173]

Customary international law arguably contains a norm requiring the exhaustion of local remedies before a claim based on an alleged violation of an alien's rights can be pursued before an international tribunal.[174] When the IIA is silent on the matter of exhaustion, investment arbitral tribunals have, however, not found an obligation

BIT), at para 88, "Such a requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction."

For a brief description of further relevant cases, see e.g. Aaken (2010), at 740 et seq.

[172] Dolzer and Schreuer (2012), at 265.

[173] Tribunals having found that it does not amount to a jurisdictional requirement include: *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (Argentina–Spain BIT), at paras 54 et seqq.; *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, (Spain–Argentina BIT), at paras 24 et seqq.; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 (Argentina–France BIT and Argentina–Spain BIT), at paras 52 et seqq; *National Grid plc v Argentine Republic*, UNCITRAL ad hoc Tribunal, Decision on Jurisdiction, 20 June 2006 (Argentina–United Kingdom BIT), at paras 80 et seqq.; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006 (Argentina–France BIT and Argentina–Spain BIT), at paras 52 et seqq.

Tribunals having found that it amounts to a jurisdictional requirement include: *Wintershall AG v Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Argentina–Germany BIT), at paras 158 et seqq.

[174] Bernasconi-Osterwalder et al. (2012), at 39, "Exhaustion of local remedies is a principle of customary international law according to which, for an international claim to be brought against a state based on alleged violations of rights of another state's national, all remedies available in the domestic legal system of the respondent state must be exhausted . . . There are some exceptions to the requirement to exhaust local remedies, such as when there are no reasonably available remedies to provide effective redress or if the available remedies do not provide reasonable possibility of redress . . . this principles . . . [is] applied in international human rights cases".

for foreign investors to exhaust local remedies.[175]

Utilisation of local remedies (local-remedies first) A number of IIAs require the foreign investor to use the host State's local (administrative or judicial) remedies for a specific time period (e.g., 12 months).[176]

The large majority of investment arbitral tribunals has not found such a clause to give rise to a 'conditional consent' and therewith has not found such a clause to amount to a jurisdictional requirement.[177]

Fork in the road IIAs sometimes make the consent of the parties to the treaty conditional on the foreign investor not having previously relied upon the host State's local (administrative or judicial) remedies to resolve the dispute.[178]

[175]ICSID tribunals (recall that the ICSID Convention explicitly says so; Section 5.2.2.1) having decided so include: *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Application for Annulment, 16 May 1986, (Indonesian Law), at para 63; *AES Corporation v Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 (United States–Argentina BIT), at paras 69 et seq.; *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009 (Bangladesh–Italy BIT), at paras 174 et seqq.

Non-ICSID tribunals having decided so include: *CME v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 14 March 2003 (Netherlands–Czech Republic BIT), at para 412; *Nykomb Synergetics Technology Holding AB v Republic of Latvia*, International Court of Arbitration at the Chamber of Commerce in Stockholm, Award, 16 December 2003 (ECT), Section 2.4.

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 265 et seq.

[176]Dolzer and Schreuer (2012), at 266.

[177]Tribunals having found that it does not amount to a jurisdictional requirement include: *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (Argentina–Spain BIT), at para 54; *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (Germany–Argentina BIT), at para 57; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (ECT), at para 224; *TSA Spectrum de Argentina v Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008 (Argentina–Netherlands BIT), at paras 110 et seqq.

Tribunals having found that it amounts to a jurisdictional requirement include: *Wintershall AG v Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (Argentina–Germany BIT), at 114 et seqq.

For a brief description of further relevant cases, see e.g. Aaken (2010), at 741 et seqq.

[178]Dolzer and Schreuer (2012), at 265, "Such a [fork-in-the-road] clause provides that the investor must choose between the litigation of its claims in the host state's domestic courts or through arbitration

The large majority of investment arbitral tribunals has interpreted such a clause narrowly by requiring that the three-identity conditions of *lis alibi pendens* be met (Section 4.6.3.8) for the clause to apply;[179] in so doing, these tribunals have found that the clause does not apply because of a lack of identity of the cause of action (IIL vs national laws).

In accordance with the national laws of the host State IIAs frequently require that the 'investment' be acquired/established in accordance with the national laws of the host State.[180]

Investment arbitral tribunals have found such a clause to amount to a jurisdictional requirement.[181] Specifically, tribunals have refused jurisdiction in the presence of such a clause if an illegal act was performed to acquire/establish the investment and this act was necessary for the acquisition/establishment, if the illegality existed under the host State's national law at the time of the acquisition/establishment of the

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and that the choice, once made, is final."

Take, for instance, the Argentina–France BIT, Article 8(2), 'Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final.'

[179] Tribunals having decided so include: *Eudoro Armando Olguín v Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000 (Peru–Paraguay BIT), at para 30; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000 (Argentina–France BIT), at paras 53 et seq.; *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 January 2001 (Estonia–United States BIT), at paras 330 et seqq.; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003 (United States–Argentina BIT), paras 77 et seqq.; *Azurix Corporation v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003 (United States–Argentina BIT), at paras 37 et seqq.; *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (Argentina–France BIT), at paras 442 et seq.

[180] See e.g. Bottini (2010), at 298.

Take, for instance, the Italy–Morocco BIT, Article 1(1), 'the term "investment" designates all categories of assets invested . . . in accordance with the laws and regulations of the aforementioned party [read: host State]'.

[181] Some tribunals have found such a clause to give rise to a 'conditional consent', while others have found it to give rise to a '*ratione materiae* requirement' (i.e., to a requirement for an investment to amount to an 'investment' under the relevant IIA).

investment, and if the host State did not accept or induce the illegal behaviour.[182] Notice that investment arbitral tribunals have generally found similarly in the absence of such a clause.[183]

Corruption In spite of the frequency of corruption of public officials, the issue of corruption has almost never been discussed in (published) decisions by investment arbitral tribunals.[184]

A couple of investment arbitral tribunals have refused jurisdiction if the IIA contains a clause holding that the investment must be made 'in accordance with the national laws of the host State', if the corruption was necessary for the acquisition/establishment of the investment, and if the national law contains an anti-corruption norm at the time of the acquisition/establishment of the investment.[185]

[182]Tribunals having decided so include: *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 (Italy–Morocco BIT), at para 46, "to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal."; *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 (Germany–Philippines BIT), at para 401.

For a brief description of relevant cases, see e.g. Schill (2012); Douglas (2014), at 174 et seqq.

[183]Tribunals having decided so include: *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 (investor-State contract), at para 164; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (ECT), at para 139, "In accordance with the introductory note to the ECT '[t]he fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues [. . .]' . . . The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law." (emphasis omitted).

For a brief description of relevant cases, see e.g. Schill (2012), at 320 et seqq.

[184]Yackee (2012b), at 729.

For a discussion of relevant investment arbitral decisions based on investor-State contracts (rather than IIAs), see Raeschke-Kessler and Gottwald (2008).

[185]Tribunals having decided so include: *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (Israel–Uzbekistan BIT), at paras 372 et seq., "the Tribunal comes to the conclusion that corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan . . . Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) ['Each Contracting Party hereby consents to submit

It is, however, not inconceivable that some tribunals would refuse jurisdiction if the corruption was necessary for the acquisition/establishment of the investment irrespective of whether the IIA contains such a clause or whether the national law contains an anti-corruption norm at the time of the acquisition/establishment of the investment.[186]

5.4.4 Counter-claims

The unilateral (ex ante) consent to jurisdiction contained in IIAs does typically not explicitly allow for counter-claims. Only a couple of investment arbitral tribunals have dealt with this issue.[187]

On the one hand, some investment arbitral tribunals have found that they have jurisdiction over counter-claims if the unilateral (ex ante) consent to jurisdiction holds that 'all disputes ... concerning an investment' and if the foreign investor accepted the host State's offer of consent.[188] On the other hand, the tribunal in *Goetz v Bu-*

to ICSID ... any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former'] and is not covered by Uzbekistan's consent."; *Inceysa Vallisoletana S.L. v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006 (El Salvador–Spain BIT), at para 258.

[186] Suggesting so: *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006 (investor-State contract), at para 157, "this Tribunal is convinced that bribery is contrary to the international public policy ... Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."; *Gustav F W Hamester GmbH & Co KG v Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010 (Germany–Ghana BIT), at paras 123 et seq., "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct ... These are general principles that exist independently of specific language to this effect in the Treaty."

[187] Kalicki (2013), at 3, "State defenses ... are rarely framed as counterclaims seeking affirmative relief ... [possibly due to the] perceived limits to the jurisdiction of international tribunals to hear State counterclaims."

[188] *Saluka Investments B.V. v Czech Republic*, UNCITRAL ad hoc Tribunal, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004 (Netherlands–Czech Republic BIT), at para 39.

Investment arbitral tribunals have found that they do not have jurisdiction over counter-claims if the unilateral (ex ante) consent to jurisdiction holds that 'disputes between an investor ... and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall if possible be settled ... [or] the investor concerned may submit the dispute';

rundi found that any unilateral (ex ante) consent to jurisdiction in an IIA includes a consent to counter-claims.[189] In any event, however, even if the tribunal has jurisdiction over counter-claims, most IIAs do not contain obligations for investors and therefore preclude counter-claims for lack of a cause of action.[190]

Investment arbitral tribunals have furthermore found that they have jurisdiction over counter-claims if there exists an investor-State contract which contains a consent to jurisdiction.[191] Furthermore, if the IIA contains an umbrella clause,[192] then the IIA allows for counter-claims because the investor-State contract provides a cause of action (investor-State contracts tend to also contain obligations for investors).[193]

5.5 Right of admission and of establishment

Although the two concepts are oftentimes used interchangeably, they must arguably be distinguished.[194] A 'right of admission' requires host States to let foreign investors enter into those sectors of their economy to which it applies; that is, it re-

see e.g. *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Decision Concerning the Respondent's Counter-Claim (not public), 31 March 2009 (Greece–Romania BIT), wherein [t]he majority found this was a narrow offer to arbitrate only investor claims, not a consent to arbitrate State counterclaims" (Kalicki, 2013, at 4).

[189] *Antoine Goetz & Others and S.A. Affinage des Metaux v Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012 (Belgium-Luxembourg Economic Union–Burundi BIT), at paras 278 et seq.

Concurring with this interpretation of unilateral (ex ante) consent to jurisdiction: Reisman (2011a).

[190] Crawford (2008), at 364, "The core problem with counterclaims in BIT arbitration is that the treaty commitments of the host state towards the investor are unilateral . . . it [i.e., the investor] will be argued that no counterclaim is possible because the host state's counterclaim would not 'arise out of the same contract'".

[191] Kalicki (2013), at 3, "contracts generally allow either party to assert claims for breach".

See e.g. *Atlantic Triton Company v Republic of Guinea*, ICSID Case No. ARB/84/1, Award, 21 April 1986; *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Award, 6 January 1988.

[192] An umbrella clause may elevate violations of an investor-State contract to violations of the IIA; see Section 5.10.

[193] Crawford (2008), at 366; Laborde (2010), at 120.

[194] Gómez-Palacio and Muchlinski (2008), at 229 et seq.

quires host States to open those sectors of their economy to foreign investors. A 'right of establishment' requires the host State to allow foreign investors to actually carry out their business activity.

There is no such right of admission and/or of establishment under customary international law.[195] The WTO exhibits a right to establishment insofar as the foreign investment aims at providing a service within the host State (Article 2(c) GATS; known as 'mode 3').

5.5.1 Admission

Whereas IIAs signed by the United States, Canada, and Japan have historically included a provision granting a 'right of admission' to foreign investors by restricting the controls host States may impose on the entry of foreign investors, those signed by European States have not included such a provision.[196] A right of admission is typically not unrestricted as it tends to be accompanied by a list of applicable sectors (using a positive or negative list of sectors); and it typically takes the form of national treatment.[197]

5.5.2 Establishment

IIAs signed by the United States and Canada have historically included a provision granting a 'right of establishment' to foreign investors by forbidding host States

[195] See e.g. Muchlinski (2000), at 1035, "all states have accepted the right to control the entry and establishment of foreign investors into the territory of the receiving state unless the latter is bound by treaty to accord such rights to investors"; Dolzer and Schreuer (2012), at 88, "each government ... [can] decide whether to close the national economy to foreign investors or whether to open it up, fully or with respect to certain sectors. This includes the right to determine the modalities for admission and establishment of foreign investors."

[196] Juillard (2009), at 278, whereas the so-called 'European model' (the name follows from the fact that most European States adopted that approach) does not include such a provision, the 'US model' does include one – the latter model seems to be gaining the upper hand nowadays.

[197] See, for instance, Dolzer and Schreuer (2012), at 89 et seq.

Take, for instance, US Model BIT 2012, Article 3(1), 'Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment'.

to impose requirements (so-called 'performance requirements') on foreign investors for them to be allowed to carry out their businesses.[198] A right of establishment is typically not unrestricted as it tends to be accompanied by a list of forbidden requirements.[199]

5.6 Expropriation

The public international legal norm governing the expropriation of alien property is central as it captures the most severe form of property interference.

5.6.1 International investment agreements

Virtually all IIAs' expropriation clauses are violated if the following conditions are not cumulatively met: (i) the expropriation serves a public purpose; (ii) the expropriation is not arbitrary or discriminatory; and (iii) the expropriation is accompanied by prompt, adequate, and effective compensation. Some IIAs additionally require that the expropriation satisfies the principles of due process.[200]

Adequate compensation The concept of 'adequate compensation' can be equated with 'fair market value' of the expropriated investment – namely, the price at which a transaction at arm's length would in general have taken place in a competitive market. Most IIAs actually explicitly say so.[201] And even in the absence of an explicit mentioning thereof, some investment arbitral tribunals have also interpreted

[198] See, for instance, Dolzer and Schreuer (2012), at 90.

[199] For instance: US Model BIT 2012, Article 8(1)).

[200] Instead of several: US Model BIT 2012, Article 6, 'Neither Party may expropriate or nationalize a covered investment ... except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).'

[201] Dolzer and Schreuer (2012), at 296.

Take, for instance, the US Model BIT 2012, Article 6(2), 'The compensation referred to in paragraph 1(c) [i.e., 'prompt, adequate, and effective compensation'] shall ... be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation')'.

that concept to mean 'fair market value'.[202]

Expropriation IIAs' expropriation clauses capture both direct and indirect expropriations.[203] A *direct expropriation* (or 'formal expropriation') directly affects the legal title to the property of the owner (i.e., of the foreign investor); that is, it captures instances wherein a transfer of ownership occurs.[204] An *indirect expropriation* (or 'de facto expropriation')[205] leaves the legal title to the property intact.

The following focuses on the conditions under which investment arbitral tribunals have found a State measure to amount to 'indirect expropriation' because 'direct expropriations' have become quite rare.[206]

5.6.1.1 Indirect expropriation

Let us start off by considering examples of State measures which investment arbitral tribunals have found to qualify as indirect expropriations.[207] The withdrawal of a previously granted certificate of free zone conferring tax and/or custom exception;[208] the de facto withdrawal of a previously granted certificate of free zone by prohibiting the the import of commodities necessary for business operation;[209] the refusal to renew a licence, which had to be extended every year, necessary to operate a waste

[202] See *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability, 27 October 1989 (investor-State contract), 95 ILR 184, at 211.

[203] Instead of many: NAFTA Article 1110(1) 'take a measure tantamount to nationalization or expropriation'; 2012 U.S. Model BIT Article 6(1) 'directly or indirectly through measures equivalent to expropriation or nationalization'.

[204] Dolzer and Schreuer (2012), at 101.

[205] Reinisch (2008), at 422, "the term is frequently used interchangeably with expression such as . . . disguised, constructive, regulatory, consequential, or creeping expropriation".

[206] Because direct expropriations have become rare, "[t]oday the most difficult question for a tribunal faced with an allegation of expropriation is not so much whether the requirements for a legal expropriation have been met but whether there has been an expropriation in the first place" (Schreuer, 2005, at 3).

[207] For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 107 et seqq.

[208] *Antoine Goetz et consorts v Republic of Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999 (Belgium-Luxembourg Economic Union–Burundi BIT).

[209] *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (Greece–Egypt BIT).

landfill that had been acquired at a public auction two years ago;[210] or the unilateral modification of tariffs in a previously granted concession for a water and sewage business.[211]

Furthermore, investment arbitral tribunals have found that a breach of a contract (read: of an investor-State contract) by a host State can only amount to an indirect expropriation if the State acted in its official capacity; that is, a breach of contract which could have resulted from the behaviour of a non-State actor does not qualify.[212]

The decisions by investment arbitral tribunals on the determination of indirect expropriations exhibit the following patterns.

Effects matter, intentions do not. When the IIA's expropriation clause does not explicitly mention the intentions of the host State, investment arbitral tribunals have generally found that only the effects on the foreign investor matter – this is known

[210] *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT).

[211] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (Argentina–France BIT).

[212] This is most clearly expressed in *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Germany–Argentina BIT), at paras 248 and 253,

> to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract ... for the State to incur international responsibility it must act as such, it must use its public authority. The actions of the State have to be based on its 'superior governmental power'.

SGS Société Générale de Surveillance S.A. v Republic of Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004 (Switzerland–Philippines BIT), at para 161, "A mere refusal to pay a debt is not an expropriation of property"; *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (NAFTA), at para 174, "The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts".

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 128 et seq.

as the 'sole-effects doctrine'.[213]

Substantial deprivation IIAs tend to state that 'the measure ought to be tantamount to direct expropriations'. Investment arbitral tribunals have interpreted this to mean that there must exist a 'substantial deprivation' of the economic benefit (taking into account: usus, fructus, and abusus) of the investment.[214] A substantial deprivation has been found to exist, for instance, when the rights are rendered so useless that

[213] Schneiderman (2010a), at 911 et seq., "'sole-effects' doctrine: determinations as to whether there has been a violation of investment disciplines are made solely with reference to the effects of measures on investors."

Tribunals having decided so include: *Starrett Housing Corp. v Government of the Islamic Republic of Iran*, Final Award, 14 August 1987 (Treaty of Amity), 16 Iran-US CTR 112, at 154; *Tippetts, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineers of Iran*, Award, 22 June 1984 (Treaty of Amity), 6 Iran-US CTR 219, at 225 et seq.; *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction and Liability, 27 October 1989 (investor-State contract), 95 ILR 184, at 209, "the tribunal need not establish those motivations to come to a conclusion"; *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (NAFTA), at para 111, "The tribunal need not decide or consider the motivation or intent"; *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at para 116, "intention is less important than the effects of the measures'"; *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Germany–Argentina BIT), at para 270, "The Treaty refers to measures that have the effect of an expropriation; it does not refer to the intent".

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 112 et seqq.

[214] See, for instance, *Pope & Talbot Inc. v Canada*, UNCITRAL ad hoc Tribunal, Interim Award, 26 June 2000 (NAFTA), at para 102, "under international law, expropriation requires a 'substantial deprivation'"; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at para 262, need to "The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation"; *CME v Czech Republic*, UNCITRAL ad hoc Tribunal, Partial Award, 13 September 2001 (Netherlands–Czech Republic BIT), at para 599, "substantial devaluation of the Claimant's investment"; *Telenor Mobile Communications A.S. v Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 (Norway–Hungary BIT), at para 64, "must be such as to have a major adverse impact on the economic value of the investment".

Aaken and Kurtz (2010a), at 531, "Adjudicators will typically examine three ... elements of the notion of property ... *usus* (the ability to use the property and to benefit from its utilization), *fructus* (the enjoyment of and the possibility to gain from the property) and *abusus* (disposal of the property)."

they must be deemed to have been expropriated, the fundamental rights of ownership have been deprived, the rights are rendered practically useless, or the economical use and enjoyment are radically deprived.[215]

Investment arbitral tribunals have found that this substantial deprivation need not have been caused by a single measure, but may be the result of a series of measures (this special case is known as 'creeping expropriation').[216] Clearly, for an investment to experience a substantial deprivation, the underlying measure need not be permanent.[217] Finally, notice that some tribunals split the entire foreign investment into sub-investments and then separately consider whether each sub-investment experienced a substantial deprivation.[218] For instance, in *Middle East Cement v Egypt* the host State engaged in measures preventing the foreign investor from making use of its import licence and utilising its ship; the tribunal separately considered whether those measures amounted to an indirect expropriation of the import licence and whether they amounted to an indirect expropriation of the ship.[219]

[215] See, for instance, *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (NAFTA), at para 103: "interference with the use of the property which has the effect of depriving the owner, in whole or in significant part, of the use or ... economic benefit of property"; *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at para 115, "if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder"; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 (Argentina–France BIT), at para 7.5.11, "complete or near complete deprivation of value".

For further examples, see Fortier and Drymer (2004), at 305.

[216] See, for instance, *Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at para 76, "the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership"; *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at para 114, "may be carried out through a single action, through a series of actions in a short period of time or through simultaneous actions".

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 125 et seq.

[217] Schreuer (2005), at 29.

[218] For a brief description of relevant cases, see e.g. Dolzer and Schreuer (2012), at 119.

[219] *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002 (Greece–Egypt BIT), at paras 101 et seqq.

Legitimately expected economic benefits A couple of investment arbitral tribunals have held that only legitimately expected economic benefits (or 'reasonably-to-be-expected economic benefit' if you prefer)[220] can be indirectly expropriated. These tribunals seem to have generally found legitimately expected economic benefits (or simply 'legitimate expectations') in the presence of specific explicit or implicit assurances by the host State.[221] They have, for instance, found that an explicit assurance by the host State that all environmental regulations are being complied with to give rise to such legitimate expectations;[222] or that an implicit assurance that the operation of a landfill would be a long-term endeavour to give rise to such expectations.[223]

Investment tribunals have, however, not found that existing environmental regulations or a long-standing practice of reimbursing certain value-added taxes give rise to legitimate expectations.[224]

[220]This terminology was used in *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (NAFTA), at para 103. See also *International Thunderbird Gaming v United Mexican States*, UNCITRAL ad hoc Tribunal, Award, 26 January 2006 (NAFTA), at para 147, "the concept of 'legitimate expectations' relates ... to a situation where ... [State] conduct creates reasonable and justifiable expectations on the part of an investor".

[221]This is most clearly expressed in *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (United States–Argentina BIT), at para 318,

> These expectations ... are not necessarily based on a contract but on assurances explicit or implicit, or on representations, made by the State which the investor took into account in making the investment.

[222]In *Metalclad v Mexico* the host State granted the investor a permit to develop a hazardous waste landfill, the tribunal found that the host State's assurances that the project complied with all environmental and planning regulations both gave individually rise to legitimate expectations; *Metalclad Corp. v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (NAFTA), at para 104.

[223]In *Tecmed v Mexico* the tribunal found that the host State's refusal to renew a licence (which had to be extended every year) necessary to operate a waste landfill that the investor had acquired at a public auction two years ago amounted to a disappointment of legitimate expectations; *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at 149.

[224]Regarding existing environmental regulations, see *Methanex v United States*: *Methanex Corp. v United States of America*, UNCITRAL ad hoc Tribunal, Final Award, 3 August 2005 (NAFTA), at paras 7 et seqq., "No such commitments were given to Methanex. Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions

Intentions strike back: legitimate public purpose A couple of investment arbitral tribunals have recognised that State measures taken to further legitimate public purposes – which seem to be understood to include public health, safety, taxation, environmental concerns, and the protection of cultural property – may not qualify as indirect expropriations even though they would in the absence of such a legitimate public purposes.[225] These tribunals can be classified into two groups: the first group views (non-discriminatory) measures furthering a legitimate public purpose to never qualify as indirect expropriations;[226] the second group views that whether such measures qualify as indirect expropriations requires a weighing between the legitimate public purpose and the foreign investor's property right (read: proportionality test) – insofar as the realised legitimate public purpose is in proportion to the restriction of the foreign investor's (legitimately) expected economic benefits, no indirect expropriation exists.[227]

. . . commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons . . . Methanex entered the United States market aware of and actively participating in this process. It did not enter the United States market because of special representations made to it."

In *Occidental v Ecuador* the tribunal found that the host State's decision to change its long-standing value-added-tax practice by henceforth denying reimbursement of value-added taxes does not amount to a disappointment of legitimate expectations; *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), at para 89.

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 115 et seqq.

[225] Reinisch (2008), at 435.

[226] See, for instance, *Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (NAFTA), at para 103, "governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may seek compensation"; *Saluka Investments B.V. v Czech Republic*, UNCITRAL ad hoc Tribunal, Partial Award, 17 March 2006 (Netherlands–Czech Republic BIT), at para 255, "It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 120 et seqq.

[227] Seminal for applying a 'proportionality test' is: *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at paras 121 et seq.,

> we find no principle stating that regulatory administrative actions are per se excluded

5.6.2 Customary international law

In the absence of an applicable IIA, the content of the public international legal norm (read: the customary international legal norm) governing the expropriation of alien property has long been – and probably still is – contested. One may argue that during the early twentieth century, CIL held that expropriation of alien property requires 'prompt, adequate and effective' compensation (known as the 'Hull Rule') as the world's principal States, which included many States with colonies, consented to this norm.[228]

During the middle of the twentieth century, newly independent States (read: former colonies), especially Latin American States, argued that there was no public international legal obligation under CIL to provide foreign investors with a higher level of protection than domestic investors (the so-called 'Calvo doctrine').[229] De-

> from the scope of the Agreement, even if they are beneficial to society as a whole ...
>
> ...the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments ...There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.

See also *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006 (United States–Argentina BIT), at para 331, "This proportionality will not be found if the person concerned bears 'an individual and excessive burden'."; *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (United States–Argentina BIT), at para 189, "to establish whether State measures constitute expropriation under ...the Bilateral Treaty, the Tribunal must balance two competing interests".

[228] Guzman (1998), at 641 and 644 et seqq., because during the early 20th century "the world's principal nations shared the view that ...the taking of an alien's property by a host nation required compensation that was 'prompt and adequate'."

[229] Guzman (1998), at 641 and 647.

The *Calvo doctrine* is named after the leading nineteenth-century Latin American jurist Carlos Calvo of Argentina and says that laws ought (moral principle) to not discriminate on the basis of nationality, implying that foreign investors cannot have better rights than domestic ones, nor can domestic investors have better rights than foreign ones (read: national treatment). To be sure, the Calvo doctrine says that this moral principle underlies both national laws as well as public international law. More generally, see Oschmann (1993), at 25 et seqq.

veloped States, however, continued to support the Hull Rule. During the 1970s, two UN General Assembly Resolutions essentially restated the Calvo doctrine.[230] It has been held that since the mid-1970s, at the latest, the Calvo doctrine describes the customary international legal norm governing the expropriation of alien property.[231]

5.7 Fair and equitable treatment (FET)

The FET standard[232] has become the most frequently invoked protection standard by foreign investors in investment arbitration; it reportedly amounts to the protection standard most likely to be found violated by investment arbitral tribunals.[233] An FET clause is found in virtually all IIAs and FTAs with investment chapters.[234]

Note that some FET clauses found in IIAs explicitly refer to the 'minimum standard of customary international law' (Section 5.7.2).[235] It appears, however,

[230] G.A. Res. 3171 U.N. Doc. A/9030 (1973); and G.A. Res. 3201, U.N. Doc. A/9559 (1974).

[231] See e.g. Guzman (1998), at 641 et seqq.

[232] Such an IIA clause typically writes: 'Investment shall at all times be accorded fair and equitable treatment' (Argentina–United States BIT, Article II(2)(a)).

[233] Dolzer and Schreuer (2012), at 130, "this concept is the most frequently invoked standard in investment disputes. It is also the standard with the highest practical relevance: the majority of successful claims pursued in international arbitration are based on a violation of the FET standard."; Yannaca-Small (2010c), at 385, "It has been increasingly used as an alternative and more flexible way to provide protection to investors in cases where the test for indirect expropriation is too difficult to achieve".

[234] Yannaca-Small (2010c), at 387.

[235] With no such reference, take e.g. the Swiss Model BIT: "Investments and returns of Investors of each Contracting Party shall at all times be accorded fair and equitable treatment".

With such a reference, see e.g. the US Model BIT 2012: "For greater certainty, paragraph 1 [i.e., fair and equitable treatment] prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' ... do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights."

Another example of such a reference is NAFTA: in 2001, all the NAFTA parties (Canada, Mexico, and the United States) jointly published a statement of interpretation regarding, amongst others, the relation of NAFTA's FET clause to the 'minimum standard of CIL' (NAFTA holds that such joint interpretations are binding on tribunals applying NAFTA). See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

that investment arbitral tribunals have come to interpret the FET clause similarly whether or not it includes such a reference: they adopt, as is generally accepted, a dynamic/evolutionary interpretation of the normative content of the 'international minimum standard' and then, which is contentious, argue that the regime of IIAs has changed the normative content of the 'international minimum standard'.[236] In so doing these tribunals have understood this 'international minimum standard' to be much broader than in the the past (i.e., to be more restrictive for States than in the past).

Note also that just as under the 'expropriation clause', investment arbitral tribunals have broadly found that a breach of a contract (read: of an investor-State contract) by a host State can only amount to a violation of IIAs' FET clause if the State acted in its official capacity.[237]

Let us now turn to how investment arbitral tribunals have interpreted the vague FET clause found in IIAs.

[236] For a list of cases, see e.g. Yannaca-Small (2010c), at 393.

[237] Tribunals having decided so include: *Consortium RFCC v Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003 (Italy–Morocco BIT), at para 51, "Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l'Accord bilatéral, il faut qu'elle résulte d'un comportement exorbitant de celui qu'un contractant ordinaire pourrait adopter"; *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005 (Italy–Pakistan BIT), at para 268, "the matter does not concern any exercise of 'puissance publique' by the State. Accordingly, these claims do not enter within the purview of Article 2(2) of the BIT [i.e., 'at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party']"; *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (Ecuador–United States BIT), at para 342, "At least in the context of provisions other than the umbrella clause, it is now a well-established principle that in and of itself the violation of a contract does not amount to the violation of a treaty.", and at 345, "in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power".

For an exception, see *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (Switzerland–Paraguay BIT), at para 146, "a State's non-payment under a contract is, in the view of the Tribunal, capable of giving rise to a breach of a fair and equitable treatment requirement, such as, perhaps, where the nonpayment amounts to a repudiation of the contract, frustration of its economic purpose, or substantial deprivation of its value".

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 152 et seqq.

5.7.1 Arbitral practice: instances of violation

5.7.1.1 Legitimate expectations

Investment arbitral tribunals have virtually always understood this clause as only protecting a foreign investor's legitimate expectations; namely, that only a violation of legitimate expectations violates the FET clause.

Numerous tribunals have found that 'legitimate expectations' is broader under the FET clause than under the expropriation clause.[238] Tribunals have found that *explicit and implicit assurances* by the host State give rise to legitimate expectations.[239]

Furthermore, tribunals have also found that the legal framework as it stands at the time of the investment to give rise to legitimate expectations; namely, that a *stable legal framework*, and sometimes even a *frozen legal framework*, amounts to a legitimate expectation.[240] In one case, for instance, the tribunal found that the host

[238]This is clearly expressed in *National Grid plc v Argentine Republic*, UNCITRAL ad hoc Tribunal, Award, 3 November 2008 (Argentina–United Kingdom BIT), at para 173, "this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned".

[239]Tribunals having decided so include: *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007 (Estonia–Finland BIT and Estonia–Germany BIT), at para 263, "in the opinion of the Tribunal having regard to all the circumstances in which the letter was made at that time, these terms constituted an unequivocal representation by the Respondent [read: host State] to the Banks by which the Banks could reasonably and justifiably expect, as they did, that the balance of the Loan . . . would eventually be repaid by RAS Ookean at the direction of the Board and, in turn, the Respondent": *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008 (Ecuador–United States BIT), at para 359 et seq., "Electroquil entered into the PPA 96 with the expectation that the Ministry of Finance would comply with the payment mechanism . . . The expectations which this commitment created cannot be deemed 'mere' contractual expectations. The Ministry of Finance was not Electroquil's regular contract counterpart. It intervened in the contract framework for the sole purpose of providing the State's payment guarantee. That guarantee entailed the exercise of sovereign power as it implied that funds would be drawn from the Ministry and Public Credit's account."

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 149 et seqq.

[240]Tribunals having decided so without requiring a freezing of the legal framework include: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at para 274, "There can be no doubt . . . that a stable legal and business environment is an essential element of fair and equitable treatment."; *Parkerings-Compagniet AS v Republic of*

State's decision to change its long-standing value-added-tax practice by henceforth denying reimbursement of value-added taxes does not amount to a disappointment of legitimate expectations under the expropriation clause,[241] but does amount to a disappointment thereof under the FET clause as it violates a frozen legal framework.[242] More recently, however, a couple of tribunals have tended to require a stable legal framework only if specific stabilisation promises had been made.[243]

Legitimate public purpose There appears to be a recent trend by investment arbitral tribunals to view State measures taken to further legitimate public purposes

Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007 (Lithuania–Norway BIT), at paras 332, "A State has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilisation clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time . . . [but] an investor has a right to a certain stability and predictability of the legal environment of the investment"; *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (United States–Argentina BIT), at paras 300 et seqq.

Tribunals having decided so by requiring a freezing of the legal framework include: *Tecmed v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (Spain–Mexico BIT), at para 154, "The foreign investor expects the host State to act in a consistent manner . . . so that it may know beforehand any and all rules and regulations that will govern its investments"; *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), at para 191, "there is certainly an obligation not to alter the legal and business environment in which the investment has been made".

[241] See footnote 224.

[242] *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), at para 191.

[243] This is clearly captured in *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (Argentina–France BIT), at para 164,

> changes to general legislation, in the absence of specific stabilization promises to the foreign investor, reflect a legitimate exercise of the host State's governmental powers that are not prevented by a BIT's fair and equitable treatment standard and are not in breach of the same

See also *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (Argentina–United States BIT), at para 258; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/03/13, Award, 8 October 2009 (Romania–United Kingdom BIT), at para 217.

as not necessarily violating the FET clause even though these measures would have violated the FET clause in the absence of such legitimate public purposes.

More precisely, tribunals appear to support a weighing of the investor's legitimate expectations and the host State's legitimate public purpose.[244] One tribunal went one step further and specified the weighing rule that shall be applied: a proportionality test, which holds that insofar as the realised legitimate public purpose is in proportion to the restriction of the investor's legitimate expectations, no violation of the FET clause exists.[245]

5.7.1.2 Fair procedure

Investment arbitral tribunals have found that a lack of fair procedure – namely, 'denial of justice' (including: lack of access to judicial review) and 'lack of due process'

[244]Tribunals having decided so include: *Saluka Investments B.V. v Czech Republic*, UNCITRAL ad hoc Tribunal, Partial Award, 17 March 2006 (Netherlands–Czech Republic BIT), at para 306, "The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008 (ECT), at para 177; *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 (United States–Ukraine BIT), at para 500, "The protection of the legitimate expectations must be balanced with the need to maintain a reasonable degree of regulatory flexibility on the part of the host State in order to respond to changing circumstances in the public interest."; *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (United States–Argentina BIT), at para 358, "a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its economy in the public interest"

[245]This is nicely captured in *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010 (Argentina–France BIT), at para 309,

> The host State's right to regulate domestic matters in the public interest has to be taken into consideration as well. Therefore the circumstances, reasons (importance and urgency of the public need pursued) and modalities (non-discrimination, due process, advance notice if possible and appropriate) for carrying out a change impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in accordance with a standard of reasonableness and proportionality, are relevant.

– violates the FET clause. Tribunals have, amongst others, found violations in cases of prejudice during domestic judicial proceedings against the foreign investor based on its nationality (lack of due process),[246] and of the government's failure to enforce the decision (rendered in favour of the foreign investor) of its national courts (denial of justice).[247]

Investment arbitral tribunals have thus clearly interpreted the FET clause as imposing a *minimum procedural standard*.

5.7.1.3 Good faith

Investment arbitral tribunals have broadly found that a lack of good faith is sufficient to yield a violation of the FET clause; State measures are in bad faith if, amongst others, they aim at inflicting damage upon a foreign investor, if they are driven by unfair motivations, or if they are driven by discriminatory intent.[248] It should be clear by now that tribunals have not found bad faith to be necessary for a violation of the FET clause.[249]

[246] *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 January 2003 (NAFTA), at paras 132 et seqq.

[247] *Waguih Elie George Siag and Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (Italy–Egypt BIT), at paras 453 et seqq.

[248] See, for instance, *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (NAFTA), at para 138, "A basic obligation of the State under Article 1105(1) [read: fair and equitable treatment] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (Turkey–Pakistan BIT), at para 250, "the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT"; *Frontier Petroleum Services Ltd. v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 12 November 2010 (Canada–Czech Republic BIT), at para 300, "Bad faith action by the host state includes the use of legal instruments for purposes other than those for which they were created. It also includes a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government, and expulsion of an investment based on local favouritism." (footnotes omitted).

[249] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009 (Turkey–Pakistan BIT), at para 181, "such a breach …does not presuppose bad faith on the part of the State"; *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (United States–Argentina BIT), at para 372, such

5.7.1.4 Lack of arbitrariness and non-discrimination

Several investment arbitral tribunals have found that arbitrariness or discrimination are sufficient to yield a violation of the FET clause.[250] It should again be clear by now that tribunals have not found arbitrariness or discrimination to be necessary for a violation of the FET clause.[251]

5.7.2 Customary international law

The obligation under customary international law a State has vis-à-vis foreigners is generally referred to as *international minimum standard*. It is generally accepted that the normative content of this standard evolves over time; namely, that a dynamic/evolutionary interpretation of its normative content must be adopted.[252] The original understanding was very narrow and is best captured in the following oft-quoted passage of the *Neer Claim*

> the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency

a violation does not require subjective bad faith on the part of the State".

For a list of further cases, see e.g. Dolzer and Schreuer (2012), at 158, footnote 220.

[250] Tribunals having decided so include: *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (NAFTA), at para 98; *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at 290. "any measure that might involve arbitrariness or discrimination is in itself contrary to the fair and equitable treatment"; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (Kazakhstan–Turkey BIT), at para 681.

For a brief description of the relevant cases, see e.g. Yannaca-Small (2010c), at 408 et seq.

[251] *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (United States–Argentina BIT), at 162, "characterizing the measures as non-arbitrary does not mean that such measures are characterized as fair and equitable".

[252] See e.g. Aaken (2006), at 556.

For a comparison of the 'static approach' and the 'dynamic/evolutionary approach', see Section 6.1.

— Commissioner Neilson[253]

It has been held that the understanding of this customary international legal obligation has evolved into reflecting 'adequate treatment' (broadening of its scope) in the form of sensitivity for 'fairness' and for 'legitimate expectations'.[254]

5.8 National treatment (NT)

The NT clause[255] requires host States not to treat foreign investors worse than domestic investors; namely, it amounts to a 'one-sided non-discrimination requirement'. Such a clause is found in virtually all IIAs and exhibits a certain homogeneity across those IIAs.

Let us now turn to how investment arbitral tribunals have interpreted the NT clause found in IIAs. Roughly speaking, tribunals have generally considered the following issues when assessing whether a State measure violates the NT clause.[256]

Likeness condition Investment arbitral tribunals have generally required some degree of competition between the foreign and the domestic investors; that is, a foreign investor is 'like' a domestic investor if they are in competition.[257]

[253] *L. F. H. Neer and Pauline Neer (United States) v United Mexican States*, US–Mexican General Claims Commission, 15 October 1926, Reports of International Arbitral Awards Vol. 4, 60–66, at para 4.

[254] Holding such a view: Herdegen (2013), at 72 et seq.

[255] Such an IIA clause typically writes '[foreign investors are] accorded treatment no less favourable than that which the host state accords to its own investors'; the United States' IIAs specify furthermore that it applies when foreign and domestic investors stand 'in like circumstances' or 'in like situations' (see e.g., Dolzer and Schreuer, 2012, at 198).

[256] See e.g. Dolzer and Schreuer (2012), at 199.

The first three criteria (likeness, less-favourable treatment, and legitimate purpose) were advanced in *Pope & Talbot Inc. v Canada*, UNCITRAL ad hoc Tribunal, Award on the Merits of Phase 2, 10 April 2001 (NAFTA), at paras 78 et seq.

[257] Analysing this issue in detail would get us too far off topic. The interested reader is referred to the excellent description of relevant cases in Aaken and Kurtz (2010a), at 523.

The following two decisions therefore amount to outliers: *Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (NAFTA), at para 171, wherein the tribunal held that 'likeness' requires a comparison between foreign and domestic investors which are exactly in the same

Less-favourable-treatment condition Investment arbitral tribunals have generally required that foreign investors be treated no less favourably both de jure and de facto.[258] Tribunals seem furthermore to have adopted a broad interpretation of de facto discrimination (i.e., discrimination based on origin-neutral law-making): it is sufficient that a single 'like' domestic investor is de facto treated more favourably than a foreign investor.[259]

Legitimate public purposes Investment arbitral tribunals have generally – although most of them do not say so explicitly – accepted that a *de facto but not de jure* less-favourable treatment of a like foreign investor may be justified if there exists a legitimate public purpose.[260] In *GAMI v Mexico* the tribunal found that the solvency of an important domestic industry qualifies as legitimate public purpose.[261]

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business, in casu exporting of cigarettes (i.e., too narrow interpretation); and *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), at para 173, wherein the tribunal held that 'likeness' requires a comparison between foreign investors and domestic investors in general (i.e., too broad interpretation).

[258]Tribunals having decided so include: *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, (NAFTA), at para 157, "The Investor did not sustain its burden of proving that the U.S. measures imposed (de jure or de facto) upon ADF International" (emphasis omitted); *International Thunderbird Gaming v United Mexican States*, UNCITRAL ad hoc Tribunal, Award, 26 January 2006 (NAFTA), at para 177, "It is not expected from Thunderbird that it show separately that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favourably than a national investor."; *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 (NAFTA), at para 138, "the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that . . . 'less favourable treatment' was satisfied".

For a brief description of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 200 et seq.

[259]See, for instance, Aaken and Kurtz (2010a), at 524.

[260]Tribunals having decided so include: *S.D. Myers Inc. v Canada*, UNCITRAL ad hoc Tribunal, First Partial Award, 13 November 2000 (NAFTA), at para 250, "The assessment . . . must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."; *GAMI Investments Inc. v United Mexican States*, UNCITRAL ad hoc Tribunal, Final Award, 15 November 2005 (NAFTA), at para 114.

[261]*GAMI Investments Inc. v United Mexican States*, UNCITRAL ad hoc Tribunal, Final Award, 15 November 2005 (NAFTA), at para 114,

Discriminatory intent? Investment arbitral tribunals do not agree on whether a 'discriminatory intent' by the host State is necessary.[262]

5.9 Most favoured nation (MFN)

MFN treatment[263] requires host States not to treat foreign investors from a certain State worse than they treat foreign investors from third States. Some IIAs restrict the clause to the post-establishment phase and/or specific material standards of protection (e.g., to the expropriation clause or the FET clause).[264]

There is no MFN treatment contained in customary international law.[265]

> Mexico determined that nearly half of the mills in the country should be expropriated in the public interest. The reason was not that they were prosperous and the Government was greedy. To the contrary: Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense ... That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.

[262] Tribunals having found that 'discriminatory intent' is not necessary include: *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007 (Germany–Argentina BIT), at para 321, "intent is not decisive or essential for a finding of discrimination"; *Corn Products International, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 (NAFTA), at para 138, "the existence of an intention to discriminate is not a requirement for a breach".

Tribunals having found that 'discriminatory intent' is necessary include: *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 January 2001 (Estonia–United States BIT), at para 369, "Claimants have failed to prove that the withdrawal of EIB's license was done with the intention to harm the Bank or any of the Claimants in this arbitration"; *Methanex Corp. v United States of America*, UNCITRAL ad hoc Tribunal, Final Award, 3 August 2005 (NAFTA), at Part IV, Chapter B, para 12, "Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors".

For a brief description of relevant cases, see e.g. Aaken and Kurtz (2010a), at 525 et seq.

[263] Such an IIA clause typically writes 'Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party' (US Model BIT 2012, Article 4).

[264] See, for instance, Acconci (2008), at 370 et seq.

[265] Dolzer and Schreuer (2012), at 206.

5.9.1 Material provisions

Investment arbitral tribunals have clearly understood this provision to mean that foreign investors have a right to benefit from the material standards of protection (e.g., expropriation, FET, NT) granted to foreign investors in IIAs signed by the host State with third States; that is, they have understood the MFN clause to import those material standards of protection.[266]

5.9.2 Procedural provisions

Only a small portion of IIAs explicitly states that the MFN clause does, or does not, capture dispute settlement.[267]

In the absence of such explicit indication, there is broad disagreement amongst investment arbitral tribunals on whether the MFN clause provides foreign investors with the right to benefit from the procedural standards of protection (read: dispute-settlement clauses) granted to foreign investors in IIAs signed by the host State with third States; that is, whether the MFN clause allows importing procedural standards of protection from other treaties relating to the same subject matter (read: IIAs).[268]

[266] Tribunals having found that the MFN clause allows importing FET clauses include: *MTD Equity v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004 (Malaysia–Chile BIT), at para 104; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 (Turkey–Pakistan BIT), at paras 230 et seqq.

[267] See, for instance, Acconci (2008), at 387.

[268] Tribunals having found that the MFN clause allows such an importation include: *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 (Argentina–Spain BIT), at para 56, "From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle." *Gas Natural SDG, S.A. v Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, (Spain–Argentina BIT), at para 49, "Unless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method . . . most-favored-nation provisions in BITs should be understood to be applicable to dispute settlement."; *National Grid plc v Argentine Republic*, UNCITRAL ad hoc Tribunal, Decision on Jurisdiction, 20 June 2006 (Argentina–United Kingdom BIT), at paras 92 et seq.; *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October

It seems that tribunals allowing such an importation tend to interpret the clause by focusing on a 'teleological interpretation perspective', whereas those refusing such an importation tend to focus on a 'textual interpretation perspective'.[269]

Because of this uncertainty, States, such as Argentina and Panama, have exchanged diplomatic notes wherein they state that the MFN clause included in their existing IIAs does not capture the IIAs' dispute-resolution clause.[270]

5.10 Umbrella clause

IIAs' so-called 'umbrella clause'[271] aims at bringing a host State's violations of certain legal obligations it has vis-à-vis a specific foreign investor within the scope of the relevant IIA, that is, it aims at qualifying those legal violations as violations of the relevant IIA.[272] Although the wording of this clause does not generally refer to 'contracts' or 'contractual obligations', investment arbitral tribunals have restricted it thereto by arguing that a broader understanding would render an IIA's other sub-

2011 (Argentina–Germany BIT), at para 72, "the Tribunal is satisfied that the MFN provision is in principle applicable to the pursuit of dispute settlement procedures".

Tribunals having found that the MFN clause does not allow such an importation include: *Salini Costruttori S.p.A. and Italstrade S.p.A. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004 (Italy–Jordan BIT), at para 119, "the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned"; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (ECT), at para 223, "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions . . . unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them".

For a list of further relevant cases, see e.g. Dolzer and Schreuer (2012), at 270 et seqq.

[269] See, for instance, Weeramantry (2012), at 180 et seq.

[270] Dolzer and Schreuer (2012), at 208.

[271] Other formulations include: 'mirror effect', 'elevator', 'parallel effect', 'sanctity of contract', 'respect clause', and 'pacta sunt servanda' (see e.g., Yannaca-Small, 2010d, at 479).

[272] For instance: United States–Argentina BIT, Article II(2)(c), 'Each party shall observe any obligation it may have entered into with regard to investments.'; Switzerland–Philippines BIT, Article X(2), 'Each party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.'

Not all IIAs contain such a clause. Most notable amongst those not containing one is perhaps NAFTA.

stantive protections useless.[273] In short, tribunals have tended to limit the application of this clause to *obligations contained in investor-State contracts*.

There is no uniform interpretation of such clauses by investment arbitral tribunals.[274] We may classify tribunals' interpretations into two groups.[275]

5.10.1 Restrictive interpretation

One line of interpretation originated in *Vivendi v Argentina*; the tribunal held that the umbrella clause does not transform all claims arising out of a contract between a foreign investor and a state to the level of IIA claims.[276] Following this approach,

[273] Seminally, and instead of many, see *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (United States–Argentina BIT), at para 76.

[274] Dolzer and Schreuer (2012), at 169, "Ever since this ruling [*SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (Switzerland–Pakistan BIT)], the purpose, meaning, and scope of the clause have caused controversy and given rise to disturbingly divergent lines of jurisprudence."; specifically on ICSID tribunals, see also Fauchald (2008), at 338.

[275] For a detailed overview of the reasoning underlying the main arbitral decisions in both camps, see Potts (2011), at 1011 et seqq.; and Dolzer and Schreuer (2012), at 169 et seqq.

[276] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (Argentina–France BIT), at paras 95 et seq.,

> A state may breach a treaty without breaching a contract, and *vice versa* . . . whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract

Tribunals having decided similarly include: *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (Switzerland–Pakistan BIT), at paras 166 et seq.; *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (United States–Argentina BIT), at para 79; *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (Argentina–United States BIT), at para 103, "the Tribunal does not exclude the possibility that States decide to consider, in a BIT, that the slightest violation of a contract between a State and a foreign investor amounts to a violation of the Treaty, but then this has to be stated clearly and unambiguously"; *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (United States–Argentina BIT), at paras 310 et seqq.

the arbitral tribunal in *El Paso v Argentina* was more specific and held that one must distinguish whether the host State acted in its capacity as a sovereign or whether it simply acted as any contracting party could have; it then went on to say that only contractual violations brought about by a host State acting as a sovereign are covered by the umbrella clause.[277]

5.10.2 Broad interpretation

The other line of interpretation originated in *SGS v Philippines*; the tribunal found that the umbrella clause transforms all claims arising out of a contract between a foreign investor and a host State to the level of IIA claims.[278]

It reached this conclusion based on a 'textual interpretation perspective' as well as a 'teleological interpretation perspective', wherein it understood the purpose of

For a brief description of further relevant cases, see e.g. Yannaca-Small (2010d), at 488 et seqq.

[277] *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (United States–Argentina BIT), at para 79, "it is necessary to distinguish the State as merchant from the State as sovereign". Tribunals having decided similarly include: *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (United States–Argentina BIT), at paras 310 et seqq., "The Tribunal fully shares the view that ordinary commercial breaches of a contract are not the same as Treaty breaches".

[278] *SGS Société Générale de Surveillance S.A. v Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004 (Switzerland–Philippines BIT), at para 128,

> Article X(2) [Umbrella clause] makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.

Tribunals having decided similarly include: *Eureko B.V. v Republic of Poland*, UNCITRAL ad hoc Tribunal, Partial Award, 19 August 2005 (Netherlands–Poland BIT), at para 260, "the Tribunal concludes that the actions and inactions ofthe Government of Poland that are in breach of Poland's obligations under the Treaty ... are in breach of its commitment under Article 3.5 [Umbrella clause] of the Treaty". *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (Romania–United States BIT), at para 62, "the Tribunal therefore considers the Claimant's claims of breach of contract on the basis that any such breach constitutes a breach of the BIT"; *SGS Société Générale de Surveillance S.A. v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010 (Switzerland–Paraguay BIT), at para 167.

For a brief description of further relevant cases, see e.g. Yannaca-Small (2010d), at 490 et seqq.

the treaty to be solely the protection of foreign investments.[279]

5.11 State-emergency defenses

This Section considers the defenses available to host States when it finds itself in an emergency situation.

5.11.1 IIAs: non-precluded-measures (NPM) clause

Such an NPM clause provides that in certain emergency situations the measures of host States are not subject to the IIAs' standards of protection. Such a clause is widespread in IIAs – although European countries have at times refrained from including one in their IIAs.[280] Such a clause may, for instance, exclude the application of the treaty's standards of protection to State actions that are 'necessary' for the protection of essential security interests or the maintenance of public order (which would be referred to as a 'necessity NPM clause').[281]

Two types of NPM clauses must be distinguished: not explicitly self-judging ones and explicitly self-judging ones.

[279] *SGS Société Générale de Surveillance S.A. v Republic of Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004 (Switzerland–Philippines BIT), at para 115 et seq., "According to the preamble it is intended 'to create and maintain favourable conditions for investment by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments."

[280] Emergency-situations NPM clauses are widespread in IIAs, see Burke-White and von Staden (2011), at 318 et seqq.; Dolzer (2013), at 188.

IIAs containing such a clause include: Canada Model BIT 2004, Article 10(4); India Model BIT 2015 (draft), Article 17; UK Model BIT 2008, Article 7(1); US Model BIT 2004 and 2012, Article 18.

IIAs not containing such a clause include: German Model BIT 2008.

[281] An example of such a clause is: US–Argentina BIT, Article XI, 'This treaty shall not preclude the application by either Party of any and all measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests'.

Not explicitly self-judging formulation A couple of of investment arbitral tribunals held that 'necessity NPM clauses' must be interpreted similarly to the necessity norm contained in customary international law (Section 5.11.2), and have consequently interpreted those NPM clauses very restrictively by requiring the host State to show that no non-IIA-violating measure was available to respond to the threat (notwithstanding the overall costs of the measures) – thus giving little deference to the host State's judgment.[282] Note, however, that two out of several ICSID annulment committees heavily criticised the interpretation of the necessity NPM clause as identical to the customary norm of necessity;[283] and that one of these two annulment

[282]Tribunals having equated the NPM clause with the CIL norm of necessity include: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT); *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (United States–Argentina BIT); *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (United States–Argentina BIT); Kurtz (2010), at 329, "[this approach] is clearly the dominant and most restrictive approach in the jurisprudence to date, whereby tribunals expressly conflate the treaty defence with the customary plea of necessity", and at 341 et seqq.

Tribunals not having equated the NPM clause with the CIL norm of necessity and found that the NPM clause amounts to lex specialis include: *LG&E Energy Corp. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (United States–Argentina BIT), at para 245; Burke-White (2010), at 419, "the *LG&E* tribunal takes an approach somewhat closer to the margin of appreciation doctrine in European human rights law, according to which an international tribunal will give discretion to the state to craft its policies within a margin of international supervision . . . something close to a good faith review . . . [In so doing, it] finds that states, rather than ICSID tribunals, are often in the best position to craft appropriate policy responses to emergency situations"; *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008 (Argentina–United States BIT), at paras 221 et seq.; *El Paso Energy International Co. v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011 (United States–Argentina BIT), at para 552, "Article XI [NPM clause] is the *lex specialis*, Article 25 [CIL necessity norm], the *lex generalis*"

[283]Annulment committees having criticised equating the NPM clause with the CIL norm of necessity are: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007 (United States–Argentina BIT), at paras 128 et seqq., "it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it". *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (United States–Argentina BIT), at para 199, "It is apparent from this comparison that Article 25 [CIL necessity norm] does not offer a guide to interpretation of the terms used in Article XI [NPM clause]. The most that can be said is that certain words or expressions are the same or

committees even annulled the award because it considered the interpretation of the necessity NPM clause to amount to a 'manifest excess of powers'.[284]

Explicitly self-judging formulation[285] Such a clause typically states that the necessity of the measures is judged by the host State alone. Importantly, however, such a clause still allows for review by an investment arbitral tribunal: although the tribunal may not review whether the means are 'necessary', it can still review whether the 'emergency situation' (i.e., the purpose) exists in the first place. For this reason, it would be more appropriate to refer to such clauses as 'explicitly purpose-restricted self-judging clauses'.[286]

Notice that even when an NPM clause were entirely explicitly self-judging (i.e., even regarding the purpose), some commentators have argued that the host State's judgment should still be subject to review by an investment arbitral tribunal – namely, subject to a good-faith review.[287]

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similar".

For criticism from within international legal scholarship, see Kurtz (2010).

[284] *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (United States–Argentina BIT), at para 208 et seq., "the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law. The Committee is therefore driven to the conclusion that the Tribunal has failed to conduct its review on the basis that the applicable legal norm is to be found in Article XI of the BIT, and that this failure constitutes an excess of powers within the meaning of the ICSID Convention."

[285] More recent IIAs exhibit explicitly self-judging necessity NPM clauses. Instead of several: US Model BIT 2004 and 2012, Article 18, 'Nothing in this Treaty shall be construed . . . to preclude a Party from applying measures *that it considers* necessary for the' (emphasis added).

[286] This terminology was introduced by Aaken (2014b), at 843.

[287] Nolan and Sourgens (2012), at 408 and 417, "There is broad agreement that the self-judging elements of a non-precluded measures clause are subject to review whether they were invoked in good faith by a tribunal. This requirement arises directly out of Article 26 of the Vienna Convention on the Law of Treaties . . . Self-judging non-precluded measures clauses do not provide host States with carte blanche." (footnote omitted); Burke-White and von Staden (2010), at 339, footnote 280, "the good faith standard still forces states to internalize and justify its own balancing of rights and interests, thereby imposing some constraint on state behavior, even where states only have a self-judging obligation".

5.11.2 Customary international law

Customary international law arguably contains defenses in cases of 'force majeure', 'distress', and 'necessity'. It is generally held that ARSIWA 2001 reflects those CIL norms in Articles 23 (force majeure), 24 (distress), and 25 (necessity).[288] Only the 'necessity defense' will be discussed as it has most frequently been invoked by host States in IIL-based adjudications.

Necessity Necessity may excuse State measures violating a public international legal obligation which are necessary to safeguard an essential interest. Investment arbitral tribunals have generally held that ARSIWA 2001 Article 25 reflects the CIL norm of necessity.[289] As such, these tribunals have understood this norm to give little deference to the host State's judgment; specifically, they have interpreted the norm quite narrowly by requiring the host State to show that no non-IIA-violating measure was available to respond to the threat – notwithstanding the overall costs of the measures.[290]

5.12 Remedies[291]

This Section discusses the available remedies for violations of public international law generally, and international investment law specifically.

[288] Dolzer and Schreuer (2012), at 183 et seq.

[289] ARSIWA 2001, Article 25, "Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act ... is the only way for the State to safeguard an essential interest against a grave and imminent peril'.

Discussing ICSID tribunals: Burke-White (2010), at 421, "tribunals accept the ILC's Draft Articles as the definitive interpretation of the necessity defense in customary law and apply the criteria specified in the Draft Articles".

[290] For a brief description of relevant cases, see e.g. Dolzer and Schreuer (2012), at 184 et seqq.

This interpretation is nicely illustrated in: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at para 324, "The International Law Commission's [which drafted the ARSIWA] comment to the effect that the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient,' is persuasive".

[291] For a more extensive treatment, see e.g. Wälde and Sabahi (2008).

5.12.1 Public international law

There are no widely-applicable public international legal norms requiring States, and by extension tribunals, to apply some specific remedy to repair injuries emanating from acts violating public international law.[292] This view is most notably supported by ARSIWA 2001, which arguably reflects customary international law, whose Article 34 states that reparation for acts violating a public international legal obligation may take the form of restitution, compensation, or satisfaction. As such, tribunals are free to choose between the following remedies: restitution, compensation, and/or satisfaction.[293]

Customary international law arguably contains a norm requiring 'full reparation' for the injuries caused by an act violating public international law; namely, that compensation for injuries caused by such acts should, as much as possible, restore the situation which would have existed had no violation taken place.[294] Observe that full reparation is a subjective standard: the reparations need to reflect the damages actually suffered by the foreign investor.[295]

[292] See e.g. Aaken (2010), at 731.

[293] This view was seminally embraced by the PCIJ in *Factory at Chorzów (Germany v. Poland)*, PCIJ, Merits, 13 September 1928, PCIJ Reports (Series A) No. 17, at 47,

> Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it.

The ICJ has followed this view. For a list of relevant cases, see e.g. Aaken (2010), at 731 et seq.

[294] Article 31(1) ARSIWA 2001, which arguably reflects customary international law, states full compensation. Furthermore, it is widely held that the compensation standard of full compensation advanced by the PCIJ in the *Chorzów Factory* case represents customary international law. *Factory at Chorzów (Germany v. Poland)*, PCIJ, Merits, 13 September 1928, PCIJ Reports (Series A) No. 17, at 47,

> reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

[295] Dolzer and Schreuer (2012), at 295.

5.12.2 International investment law

Arbitral investment tribunals have virtually always ordered pecuniary remedies for IIA violations.[296] In so doing, they made IIAs to de facto operate as a system of *liability rules*.[297] Remark, however, that investment arbitral tribunals do not order pecuniary remedies because they believe that they do not have the powers to order different remedies.[298] Two main reasons can be advanced for the prevalence of pecuniary remedies: claimants (i.e., foreign investors) may themselves be asking primarily for monetary remedies because they see the relationship with the host State's government as damaged in any event (adjudication is seen as an exit strategy from the host State); and there is a clear practical advantage of monetary remedies in terms of enforceability.

Pecuniary remedies for IIA violations

Investment arbitral tribunals have generally ordered full compensation for injuries caused by acts violating IIAs;[299] that is, their jurisprudence largely follows the full-reparation standard advanced by the PCIJ in the *Chorzów Factory* case (and which arguably amounts to customary international law).[300] Although such a compensation does generally not cover moral damages, it does cover consequential damages as well as incidental benefits caused by the IIA-violating act.[301]

[296] Dolzer and Schreuer (2012), at 293 et seq., "In investment arbitration, the remedy nearly always consists of monetary compensation."

[297] Aaken (2010), at 745, "we can equate property rules with primary remedies and liability rules with secondary remedies [i.e., pecuniary remedies]".

[298] Clearly recognising the availability of non-pecuniary remedies: *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (United States–Argentina BIT), at para 79, "An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal no doubt about the fact that these powers are indeed available."

[299] Dolzer and Schreuer (2012), at 294 et seq.

[300] See footnote 294.

[301] See, for instance, Dolzer and Schreuer (2012), at 295.

Special case: IIA-violating expropriation Virtually all IIAs' expropriation clauses are violated if the expropriation is not accompanied by, amongst others, 'adequate compensation' (which amounts to the expropriated investment's fair-market value).[302] That is, if no adequate compensation is provided, then the expropriation amounts to an IIA-violating act.

There is still disagreement about the compensation standard to be applied to IIA-violating expropriations.[303] One approach is to also apply the fair-market-value-compensation standard for a violation of the expropriation clause.[304] A different approach is to apply the same compensation standards for a violation of the expropriation clause as for any other IIA violation.[305] Both approaches may lead to markedly different compensations since the former amounts to an objective standard whereas the latter to a subjective standard.[306]

5.13 Termination and amendment of IIAs

This Section discusses the termination and amendment of IIAs. The concept of 'termination' of a treaty describes the disappearance of that party's public international legal obligation towards the other parties to the treaty to observe the treaty's norms (Article 70(1) VCLT). Termination may be 'unilateral' (by one party to a treaty) or 'joint' (by all the parties to a treaty).

[302] See Section 5.6.

[303] Kinnear (2010), at 557 et seqq., "It is difficult to resolve the debate ... [because many] awards do not turn expressly on the distinction between lawful and unlawful expropriation".

[304] Supporters of this view argue that "fair market value is incorporated by treaty as the uniform standard ... for any type of expropriation" (Kinnear, 2010, at 558).

[305] Supporting this view: Vandevelde (2010a), at 308 et seq.; Dolzer and Schreuer (2012), at 100.

[306] Dolzer and Schreuer (2012), at 100 et seq.; Kinnear (2010), 558, "[compensation] could be greater than fair market value if the evidence establishes that the investor actually suffered loss over and above the fair market value of the asset".

5.13.1 Unilateral termination: denunciation or withdrawal[307]

Most IIAs contain a provision explicitly addressing its unilateral termination; such a provision is referred to as an 'exit clause'.[308] This exit clause typically provides the parties to the treaty with a 'conditional right to denunciation' by holding that the treaty can unilaterally be terminated after some initial period of existence.[309]

Most IIAs' exit clause furthermore holds that the the treaty remains effective for a certain period of time for investments made while the treaty was in force (known as 'sunset clause' or 'survival clause'); namely, the provision holds that the parties to the treaty continue to have a public international legal obligation towards the other parties to the treaty to observe the treaty with respect to certain investments for a certain period of time.[310]

If an IIA does not contain such an 'exit clause', then the Vienna Convention (if applicable) holds that unilateral termination is not allowed unless it can be established that the parties to the treaty intended to allow for it or the treaty's nature implies such a right (Article 56(1) VCLT).[311]

[307] Aust (2006), at para 1, "Although denunciation is also used in relation to a multilateral treaty, the better term is withdrawal." (emphasis omitted).

[308] See e.g. Salacuse (2010a), at 472 et seq.

[309] Instead of many, see German Model BIT 2008, Article 13(2); US Model BIT 2012, Article 22(2), 'A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.'

[310] Instead of many, see German Model BIT 2008, Article 13(3); US Model BIT 2012, Article 22(3), 'For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination'.

[311] Aust (2006), at paras 17 et seqq., "Since this is expressed as an exception, the onus is on the party wishing to invoke it ... Since it is now very common to include provisions on withdrawal (even for human rights treaties), when a treaty is silent it may be that much harder for a party to establish the grounds for the exception ... treaties which are unlikely to be capable of withdrawal are treaties of peace, disarmament treaties, and those establishing permanent regimes, such as for the Suez Canal. Most universal human rights treaties do provide for withdrawal."

5.13.2 Joint termination

Joint termination includes explicit consent by all the parties to the treaty to terminate the treaty (e.g., in the context of treaty re-negotiation). Note that the Vienna Convention (if applicable) holds that joint termination may also take the form of a conclusion of a later treaty if the norms of the later treaty are so significantly in conflict that both treaties cannot be applied jointly (Article 59(1) VCLT).

There is an ongoing debate on whether States can jointly terminate an IIA with immediate effect (or with retroactive effect) – namely, whether joint termination, if the States party to the IIA so desire, can make it impossible for existing foreign investors to claim violation of the 'jointly-terminated IIA' for future measures (or for past and future measures) of a State party to the 'jointly-terminated IIA'. This debate centres on whether IIAs grant direct rights to foreign investors and on whether the Vienna Convention applies to them.[312]

The Vienna Convention (if applicable) holds that even if a right has arisen for third States (i.e., for States not party to the treaty) from a treaty, the parties to that treaty can modify the treaty (e.g., jointly terminate it) without the consent of those third States unless the parties to the treaty intended this right to only be modifiable with the consent of those third States (Article 37(2) VCLT).[313] There is arguably a high threshold for establishing such an intention.[314]

[312] For a recent review, see Voon, Mitchell, and Munro (2014), at 468 et seqq.

[313] Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, 114 ratifying members by the end of 2014.

Putting it succinctly: Roberts (2010), at 211, "Whether a treaty right is granted to a third party and whether it is irrevocable are different questions, and each depends on the intention of the treaty parties."

[314] The drafting history (historical interpretation perspective) of the VCLT supports a presumption against the existence of an intention that this right is only modifiable with the consent of the said third States: ILC (1966), at 230,

> The Commission took note of the view of some Governments that the 1964 text went too far in restricting the power of the parties to revoke or modify a stipulation in favour of the third State and in giving the latter a veto over any modification of the treaty provision ... No doubt, it was desirable that States should not be discouraged from creating rights in favour of third States ... by the fear that they might be hampering their freedom of action in the future ... The irrevocable character of the right would normally be established

It has been argued that existing foreign investors are granted direct rights under IIAs.[315] Under the view that IIAs grant direct rights to existing foreign investors, it may be argued that the Vienna Convention (if applicable) also applies to existing foreign investors.[316] Such an interpretation will, however, need to confront the difficult problem that there seems to be a difference between third parties in the form of 'States' and in the form of 'foreign investors' because the latter do not have the capacity to create public international law.[317]

If it can, furthermore, be held that it was the treaty parties' intention to make such a modifications subject to the consent of third parties granted a direct right under the IIA, then a 'jointly-terminated IIA' is terminated with immediate effect: if all foreign investors consent thereto (which is very unlikely); or if the interpretation of the 'jointly-terminated IIA' yields that the treaty parties' intention was for a joint termination of the IIA to have immediate effect.[318]

Finally, observe that it has also been held that an interpretation of the 'jointly-terminated IIA' is necessary to uncover the parties' intention regarding the effects of a joint termination even if IIAs do not grant direct rights to existing foreign investors, if the Vienna Convention is not applicable, and/or if it was not the treaty parties' intention to make such a modifications subject to the consent of third parties granted a direct right under the IIA.[319] This view is flawed: if one of these conditions is not

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either from the terms or nature of the treaty provision giving rise to the right or from an agreement or understanding arrived at between the parties and the third State.

[315] This direct-right view is, however, highly contentious. For a review of the arguments underlying the two views (direct-rights view and derivative-rights view), see Douglas (2009), at 10 et seqq.; Roberts (2010), at 184, who further distinguishes within the direct-rights view between investors being granted only procedural direct rights and investors being granted both procedural and substantive direct rights; Paparinskis (2013), at 622 et seqq.; Braun (2014), at 83 et seqq.

[316] Supporting such an argument by analogy: Roberts (2010), at 211.

[317] Paparinskis (2013), at 624.

[318] If none of these conditions is satisfied, then a 'joint termination with immediate effect' would violate a PIL obligation the States party to the IIA have vis-à-vis the other States party to the Vienna Convention (specifically: the PIL obligation contained in Article 37(2) VCLT).

[319] Holding this view: Lavopa, Barreiros, and Bruno (2013), at 882.

Such interpretation, amongst others, would consider whether the terminated IIA's survival clause (see Section 5.13.1) also applies to joint terminations.

satisfied, then an IIA only creates PIL obligations for a State vis-à-vis the other States party to the IIA; hence, if the joint termination is desired to be with immediate effect, then this implies the complete extinction of those obligations so that the object (the treaty) does not exist anymore and can therefore not be subject to interpretation.[320]

5.13.3 Amendment

Everything that has been said in Section 5.13.2 about the 'consequences of a joint termination' applies to the 'consequences of an amendment' as well; simply replace 'joint termination' and 'jointly-terminated IIA' by 'amendment' respectively 'amended IIA'.

5.13.4 Special case: withdrawal from ICSID Convention

Article 71 ICSID Convention holds that a member State may withdraw from the Convention by a written notice; and that the withdrawal takes effect six months after receipt of the notice.

Article 72 ICSID Convention holds that a withdrawal shall not affect rights or obligations under the Convention that have arisen out of a 'consent to ICSID jurisdiction' prior to the notice.[321] It is well accepted that pending cases qualify as such a 'consent to jurisdiction' and are therefore not affected by a withdrawal. It begs, however, the question of whether a State's 'ex ante unilateral consent to ICSID jurisdiction' (or 'offer of consent to jurisdiction'), given for instance in an IIA or in that State's national laws, qualifies as such a 'consent to jurisdiction'. This question is still contentious.[322] It has, for example, been argued that unilateral consents do not qualify unless they have, by the time of the reception of the notice, been accepted by a foreign investor through its consent to jurisdiction.[323]

[320] Arguing similarly: Voon, Mitchell, and Munro (2014), at 467.

[321] ICSID Convention, Article 72, 'shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary'.

[322] For a summary of the arguments see Lavopa, Barreiros, and Bruno (2013), at 874 et seqq.

[323] Arguing so: Schreuer (2010), at 355 et seqq.; and Schreuer et al. (2009), at 1280, "Art. 72 preserves

5.14 Backlash by States against contemporary IIL

This Section provides an overview of the substantial changes contemporary IIL has recently experienced.

We have been witnessing a backlash by ever more States against contemporary IIL during the last ten years.[324] Specifically, States have acted both through *exit* by voting with their feet as well as through *voice* by adopting new formulations.[325] Much of this backlash is arguably a reaction to the substantial amounts that have been awarded to foreign investors by investment arbitral tribunals (Section 7.1.3), to the types of State measures that have been subject to IIL-based claims (Section 7.1.4), and to some of the arguably bad decisions of investment arbitral tribunals (Section 7.2.1).[326]

5.14.1 Unilateral terminations

Several States have decided to entirely withdraw from IIAs: the Plurinational State of Bolivia, Ecuador, and Venezuela all have unilaterally terminated many of their

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the 'rights or obligations under this Convention ... arising out of consent' from the consequences of the denunciation. A mere offer of consent contained in legislation or in a treaty ... that has not been accepted by the investor does not create any rights or obligations under the Convention ... It follows that the reference to consent in Art. 72 can only refer to perfected consent. Consent to jurisdiction is perfected only after its acceptance by both parties."

[324]The possibility of a backlash by States against the IIA regime has long been known to IIL commentators. Take, for instance, Paulsson (1995), at 257, "Future prospects for this development in international arbitration may depend on whether national governments—many of whom may not have appreciated the full implications of the new treaty obligations ...—take fright and reserve tracks. That may in turn depend on the degree of sophistication shown by arbitrators when called upon to pass judgment on governmental actions ... A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash."

Seminal for observing the early signs of this backlash is Aaken (2008b), at 22, "; more generally, see the contributions in Waibel et al. (2010a).

[325]The terminology of 'exit' and 'voice' was introduced in Hirschman (1970a).

[326]Similarly: Muchlinski (2013), at 413, "[States internal] debates [over international investment law] have shown that ... there is anxiety that the balance of BITs favours investor protection over legitimate state regulation."

IIAs since 2008; and Indonesia and South Africa announced in 2014 that they would seek to terminate their existing IIAs.[327]

Even more States have decided to withdraw from investor-State dispute settlement (ISDS). By withdrawing from the ICSID Convention: the Plurinational State of Bolivia (3 November 2007), Ecuador (7 January 2010), and Venezuela (25 July 2012). By withdrawing from IIAs containing an ISDS clause: amongst others, India, Indonesia, and South Africa.[328] And by refusing to conclude new IIAs containing an ISDS clause: most notably, Germany.[329]

5.14.2 New formulations: renegotiations, model-treaty updating, etc.

Over the past 15 years, multiple States have taken steps to modify the design of IIL by reformulating their IIAs. There seems to have been two primary purposes pursued by these reformulations.

On the one hand, we have reformulations aiming at *restricting investment arbitral tribunals' interpretational freedom* – in effect shifting the interpretational authority back to the treaty parties (a 'recalibration of interpretational authority').[330] This is, most notably, achieved by formulating provisions in less broad and vague terms (i.e., moving from standards towards rules), by including (general-)exceptions clauses, by specifying the relation to customary international law, by including interpretative statements making future joint interpretations of the treaty parties binding on the tribunal, and by making certain concepts explicitly self-judging for the host State.[331]

[327] For Indonesia, see IISD (2014a); for South Africa, see Carim (2013).

[328] Economist (2014c), "South Africa says it will withdraw from treaties with ISDS clauses and India is considering doing the same. Indonesia plans to let such treaties lapse when they come up for renewal."

[329] See IISD (2014a) and IISD (2014b).

[330] Roberts (2014a), "In newer-style investment treaties, states are increasingly protecting and enhancing their role in interpreting and applying their treaties."

[331] Roberts (2011), at 171, "By increasing the specificity of their commitments, States are playing a greater role in defining their investment treaty obligations and, correspondingly, the breadth of interpretive authority delegated to arbitral tribunals is being reduced. Some States are also asserting their ongoing interpretive role as treaty parties through the use of subsequent agreements and practice ... States are also seeking to recalibrate their interpretive balance of power with tribunals by re-asserting their rights as

On the other hand, we have reformulations aiming at *clarifying that concerns beyond foreign investors' property rights matter* by explicitly mentioning public-interest considerations (sustainable development, development, economic development, environment, health, human rights, etc.).[332]

sovereigns ... [through] clauses in which States expressly reserve the right to regulate in the public interest"; Roberts (2014a), "The more 'rule-like' a treaty prescription, the more treaty parties decide ex ante what categories of behavior are acceptable and unacceptable; the more 'standard-like' the prescription, the more often this determination is left to be made ex post by investment tribunals. These newer-style treaties evidence a shift on the standards-to-rule spectrum, though many of the clarifications remain vague and open-ended compared to more rule-based regimes like international trade law ... many states are including interpretive mechanisms that permit treaty parties to provide an interpretation of the treaty that is binding on investor-state tribunals ... many states are giving host states individually or treaty parties collectively the power to determine certain sensitive issues"; Spears (2010), at 1044, "some [new-generation] IIAs incorporate interpretive statements that refine the principal investment disciplines to ensure that they are not interpreted so expansively as to prohibit host states from pursuing legitimate non-investment policy objectives ... while others incorporate general exceptions clauses that provide states an escape from investment disciplines when certain other policy objectives are at stake ... some new-generation IIAs place certain social and environmental policy objectives on the same normative plane as investment policy objectives. They do this by incorporating new preambular language indicating that the parties to the treaty intend to achieve their investment policy objectives in a manner that is compatible with or that furthers other specified policy objectives, including in some cases the objective of sustainable development"; Johnson and Sachs (2014), at 222 et seq., "Of the investment treaties signed in 2011 and 2012, the majority contained additional language seeking to clarify the expropriation and fair and equitable treatment (FET) obligations ... new language on expropriation tended to elaborate upon the obligation and explain that regulatory measures of general applicability taken in pursuit of legitimate welfare objectives will rarely, if ever, constitute and indirect expropriation ... new provisions on FET explained that the standard required no more than the minimum standard of treatment of aliens required under customary international law".

Regarding binding joint interpretations: NAFTA, Article 1131(2); US Model BIT 2004 and 2012, Article 30(3), 'A joint decision of the Parties ... declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.'; US Model BIT 2004 and 2012, Article 30(3); Canada Model BIT 2004, Article 40(2); CETA (consolidated draft, 1 August 2014), Chapter 10, Section 6, Article X.27(2). For further examples, see e.g. Ewing-Chow and Losari (2015), at 99.

[332] Fauchald (2011), at 34, "The integration of environmental concerns into IIAs has been on the agenda of negotiators from a number of countries during the past fifteen years. The issues has been controversial, and it has contributed to increased attention from politicians. In some countries, this has led to significant debates on how to approach future negotiations of IIAs."; Gordon and Pohl (2011), conclude, based on a survey of 1600 IIAs, that "convergence of investment treaty making toward environmental policy be-

These new formulations have been implemented through multiple avenues. First, a recent empirical study finds that States have renegotiated an increasing number of IIAs in recent years.[333] Second, States have also engaged in repeated updating of their model investment treaties. Most notably, the United States have updated their model BIT in 2004 and again in 2012; it has been observed that some of the changes to the US model BIT 2004 were motivated by a discontent with how investment arbitral tribunals had used their discretion when interpreting IIAs.[334] Other States having

gan about a decade ago, but ... 'profound harmonization' of investment and climate change policy is still some time away ... Until relatively recently, references to environmental concerns in investment treaties were exceedingly rare. Indeed, no investment treaty concluded between 1958 and 1985 contained any reference to the environment, and fewer than 10% of treaties concluded in any given year from 1985 to 2001 contained this feature. References to environmental concerns in such treaties have increased sharply since 2002. The share of newly concluded IIAs with explicit environmental references exceeded 50% for the first time in 2005 and reached 89% in 2008."; Sauvant and Ortino (2014), at 9, "the growth of state-controlled entities as investors and concerns about national security have caused some developed countries to take a more nuanced approach to investment policy. Rather than viewing all foreign investment as a good thing, governments are becoming more nuanced in their approach. Increasingly, the focus is on how states can attract the right kind of investment for their circumstances"; Johnson and Sachs (2014), at 234, "In contrast to the relatively small number of investment treaties that directly address the subject of investment and labor, the vast majority of 2011/2012 investment treaties ... do contain a number of provisions specifically addressing the issue of investment and the environment." (emphasis and footnote omitted); Gordon, Pohl, and Bouchard (2014), at 10 et seq., find, based on a sample of 2107 IIAs (2094 BITs and 13 multilateral treaties, 70 percent of all IIAs), that more than 75 percent of all IIAs signed between 2008 and 2013 contain an explicit reference to at least one of these dimensions, that this percentage is steadily increasing, and that an environmental reference was virtually always present in any IIA exhibiting one or more references.

[333] Haftel and Thompson (2014), at 3, "some governments have grown dissatisfied with the design of their original BITs and about 200 have been renegotiated, a trend that began in the 1990s and gained momentum in recent years".

[334] Most notably, the preambles of the 2004 and 2012 US Model BIT now says "Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights", whereas the 1984 and 1994 US Model BIT did not contain such a statement.

Vandevelde (2011), at 309 et seq., "changes in the 2004 model reflected reactions to the claims submitted to investor-state arbitration, which had focused the attention of the United States on the uncertain scope of some BIT obligations and consequently on the broad discretion left to arbitral tribunals to interpret those provisions ... The 2004 model sought to reduce the discretion exercised by investor-state

updated or are in the process of updating their model investment treaties include Argentina, Bolivia, Ecuador, France, Germany, Morocco, Norway, and Turkey.[335] And third, investment arbitral institutions have also revised their tribunals' constitutive documents; most notably, in relation to transparency and third-party participation.[336]

arbitral tribunals when reviewing host state conduct by clarifying the meaning of several important BIT provisions, such as the requirement of fair and equitable treatment and the provision on indirect expropriation, generally providing much more detailed language than had appeared in earlier models." (footnotes omitted).

[335] See e.g. Spears (2010), at 1043 et seq., footnotes 27 and 29; UNCTAD (2010b), at 85, at least 14 States (Argentina, Austria, Colombia, Ecuador, the Plurinational State of Bolivia, France, Germany, Mexico, Morocco, Russia, South Africa, Turkey, United States, and the Bolivarian Republic of Venezuela) reviewed or are reviewing their model BIT since 2000, typically to better align it with public interest and to improve its balance of investors' and host States' interests.

[336] See Section 5.2.3.

Chapter 6

Treaty interpretation under public international law

This Chapter discusses the most important public-international-legal norms relating to treaty interpretation; namely, the most important public-international-legal obligations that States face in relation to treaty interpretation. The goal of this Chapter is to provide the inputs needed for the assessment of contemporary IIL's alignment with SD (Chapter 7), as well as the inputs needed to suggest reforms to further IIL's alignment with SD (Parts III, IV, and V).[1] The reader familiar with treaty interpretation may wish to skip this Chapter (and to come back later to the specific topics when this work explicitly relies upon them).

The Chapter is organised as follows. Section 6.1 presents an important distinction amongst approaches to interpretation which will help characterise the aforementioned public-international-legal norms. Section 6.2 shows that the treaty-interpretation norms of the 'Vienna Convention on the Law of Treaties' arguably amount to the most important public-international-legal norms of treaty interpretation. Sections 6.3 and 6.4 then present in detail the jurisprudence relating to the

[1] The rationale for providing this information in one place is the same as for Chapter 5. The reader is consequently referred to the justification presented in that Chapter.

VCLT's central treaty-interpretation norms: articles 31 and 32; they find that these articles refer to a 'textual/grammatical perspective', 'systematical perspective', 'teleological perspective', and 'historical perspective'. Section 6.5 briefly mentions article 26 VCLT because it can be understood to imply, under certain circumstances, an obligation of consistency with prior interpretations. Finally, Section 6.6 mentions several 'interpretational principles', which have been relied upon by international tribunals, that are arguably in conflict with the VCLT's treaty-interpretation norms.

To be sure, this Chapter only provides a description of the jurisprudence of the most important public-international-legal norms relating to treaty interpretation – it makes no normative statement. As such, this Chapter clearly rejects the sometimes-expressed view that the best way to learn how to interpret treaties ('the art of treaty interpretation') is to analyse the practice of international tribunals, namely, the view that readily takes the positive to amount to the normative (in the scientific, and not the legal, sense)[2].[3]

6.1 Important distinction: static vs dynamic approach

Any interpretation may aim at following/uncovering the **common intentions of the parties** to the treaty – namely, the treaty's normative content – either at the time of its conclusion or at the time of its interpretation. As such, an interpretation may either aim at uncovering the meaning of the treaty's provisions at the time of its conclusion (*static approach*) or at the time of its interpretation (*dynamic/evolutionary approach*). The Vienna Convention provides no answer to this question explicitly and thus leaves it to the discretion of the interpreters.

To avoid a widespread confusion, we must distinguish between the normative and factual content of treaties. The 'common intentions of the parties' to the treaty is captured by the treaty's normative content; this normative content ineluctably builds

[2] In social science, a 'normative analysis' captures 'what ought to be', and a 'positive analysis' captures 'what is'.

[3] Waibel (2011a), at 572, footnote 2, citing Sir Michael Wood.

upon empirical concepts (factual content) and therewith (implicitly) makes reference to real-world facts. Consequently, a static approach with respect to the 'common intentions of the parties' is not in conflict with, and hence does not preclude, dynamic considerations for operationalising (read: defining) the underlying empirical concepts by considering contemporary factual knowledge – most notably, contemporary scientific (descriptive) causal theories (from both the natural and social sciences).[4] It can be argued that such a combination is actually necessary when following a static approach for determining the normative content: to fulfill as best as we can the 'common intentions of the parties' at the time of the treaty's conclusion, we must take into consideration all factual knowledge that we possess.

6.2 Vienna Convention on the Law of Treaties

The 'Vienna Convention on the Law of Treaties' has been ratified by most States.[5] Furthermore, it is nowadays generally accepted that articles 31–33 VCLT, namely those article of the VCLT explicitly relating to treaty interpretation, are norms of customary international law;[6] specifically, it is widely accepted that these principles were already part of customary international law at the time of their codification in 1969.[7]

The Vienna Convention therefore definitely applies to the interpretation of all treaties between States which are party to the VCLT – and it arguably applies to the interpretation of all treaties. As such, unless all the parties to the treaty in question

[4] International tribunals have actually used this combination of a 'static approach' with 'dynamic considerations'; see e.g., Dörr (2012a), at 533 et seq., who specifically mentions the ICJ's interpretation of the Spanish term 'comercio' and the WTO's interpretation of the terms 'natural resources' and 'distribution'.

[5] Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, 114 ratifying members by the end of 2014.

[6] Gardiner (2008), at 142.

The ICJ, for instance, shares this view: *Maritime Dispute (Peru v. Chile)*, ICJ, Judgment, 27 January 2014, at para 57, "[the Court applies] customary international law of treaty interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties".

[7] See e.g., Dörr (2012a), at 523 et seq., citing multiple decisions of international tribunals and international arbitral tribunals which explicitly share this view.

have consented to utilising different interpretation principles, the VCLT's treaty-interpretation norms apply (i.e., they amount to the *default rules*). As such, the VCLT's treaty-interpretation norms can be taken to amount to the most important norms of treaty interpretation under public international law.

Finally, note that the VCLT's treaty-interpretation norms contain multiple principles but does not provide precise instructions on how to combine them.[8] As such, the VCLT only marginally contributes to a harmonisation of the interpretation methodology of different international tribunals.[9]

6.3 Article 31 VCLT

Although article 31 VCLT uses mandatory formulation, it does not state a mandatory priority ranking between the interpretational perspectives it mandates. Article 31, and more precisely its four paragraphs, should be understood as forming a single integrated approach.[10]

Whereas paragraphs 1 and 2 capture a *static approach* for determining the normative content of the treaty, paragraphs 3 and 4 bring in a *dynamic approach* for determining it.

Paragraph 1

Article 31(1) VCLT requires that the interpretation of a treaty focuses on the treaty's terms, namely its words and sentences.[11] The treaty's terms are defined as including

[8] This fact has led some scholars to state that the Vienna Convention merely transcribed the hitherto interpretation-principle disagreements amongst international legal practitioners and scholars into written form (Allott, 2002, at 305).

[9] Schreuer (2012), at 1, "Different tribunals, even if they faithfully apply Articles 31-33 of the VCLT, are likely to reach different results."

[10] This follows (systematical perspective) from article 31's heading 'General rule of interpretation' being expressed in the singular; see, for instance, Gardiner (2008), at 36, "the singular 'rule' ... indicating how article 31 is to be applied, emphasising the unity of its several paragraphs".

[11] Article 31(1) actually refers to 'terms of the treaty', which should be understood as capturing both words and provisions; see e.g., Gardiner (2008), at 164, who reaches that interpretation by looking at the usage (systematical perspective) of the word 'terms' in article 2 VCLT.

both the treaty's preamble as well as its annexes.[12]

Article 31(1) VCLT first and foremost requires that interpreters restrict themselves to an 'ordinary meaning' of the treaty's terms. Since all the parties to the treaty (i.e., States) and the treaty's main addressees (i.e., States themselves or a specific class of individuals) can generally be assumed to have some reasonable knowledge of the subject matter, we should understand 'ordinary meaning' as a meaning that a reasonably informed person, where reasonable is dependent on the subject matter, would give to a term.[13] In other words, a meaning that results from generally accepted and accessible linguistic definitions and rules within the specific subject matter (**textual/grammatical perspective**). Dictionaries, perhaps even specialised ones, seem a natural source of information for discovering ordinary meanings of some term. One may, arguably, also build upon definitions included, for instance, in other treaties (independently of whether all parties to the treaty in question are also party to those treaties).[14]

The textual perspective virtually always leads to multiple possible meanings: single words generally have multiple ordinary meanings, and even when they do not, the sentences built from them may still exhibit multiple ordinary meanings.[15] To narrow the set of possible meanings,[16] article 31(1) VCLT requires that the inter-

[12] This follows from (systematical perspective) article 31(2) defining the text of the treaty as including both the treaty's preamble and annexes.

[13] Allowing for such a view, although not fully endorsing it: Gardiner (2008), at 174, "[it] is not necessarily what the ordinary person would understand a term to mean but could . . . [seek] what a reasonably informed person would make of the terms as a starting point".

[14] For an example of usage of a treaty in a similar manner as one would use a dictionary, see: in *EC – Biotech* the WTO Panel held that both the 1992 'Convention on Biological Diversity' nor the 2000 'Cartagena Protocol on Biosafety to the Convention on Biological Diversity', to which not all WTO Members were parties, could be considered for the interpretation of the WTO Agreement because "they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do" (*European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291–3/R, Report of the Panel, 29 September 2006, at para 7.92).

[15] Gardiner (2008), at 164, "ordinary meaning . . . [is] a thing of potential variety rather than objectively ascertainable in most cases", and at 169, "That there are so many dictionary meanings makes almost inevitable immediate recourse to context and the other aids prescribed by the rules for selection of the appropriate ordinary meaning."

[16] Article 31(1) VCLT's usage of 'to be given' in 'the ordinary meaning to be given' captures the idea

preter considers the terms' context (**systematical perspective**) as well as the treaty's 'object and purpose', namely its ultimate purpose (**teleological perspective**).[17] The sources of information that must be considered within the 'systematical perspective' are stated in article 31(2–3) VCLT (see below).[18] When applying the 'teleological perspective', the interpreter must keep in mind that a treaty need not exhibit a unique purpose, but may exhibit several (possibly conflicting) ones,[19] and thus requires the interpreter to take all of them into consideration (i.e., to give a strictly positive weight to all of them). The interpretation of the treaty's preamble usually serves as a natural starting point for the teleological perspective. Remark that the preamble's text must itself be interpreted using the different interpretational perspectives: a teleological perspective always amounts to a second-order perspective because it inevitably relies on information interpreted through the other interpretational perspectives.

Finally, article 31(1) VCLT also requires that the process of interpretation be **in good faith**. This principle tends to be generally associated in international law with – and specifically within the Vienna Convention – the principle of 'pacta sunt servanda',[20] which should be understood as saying that the common intentions of the

that the interpreter ought to select among multiple ordinary meanings.

[17] Remark, however, that from a 'grammatical perspective', article 31(1) VCLT does not contain a 'full' teleological perspective because the analysis of the purpose is limited to the treaty as a whole, whereas a 'full' teleological perspective also considers the purpose of the specific provision whose meaning the interpreter wants to uncover – article 31(1) has, however, generally been understood more broadly than what would follow from a purely grammatical perspective (i.e., it has been understood as requiring a 'full teleological perspective').

See, for instance, *United States – Shrimp*: "It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning ... is equivocal or inconclusive ... light from the object and purpose of the treaty as a whole may usefully be sought." (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998, at para 114).

[18] Herdegen (2010), at para 12.

[19] Sinclair (1984), at 130, "most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes".

[20] Regarding international law generally: see for instance Weeramantry (2012), at 45, footnote 32, for sources.

Regarding the Vienna Convention specifically: it follows from (systematical perspective) article 26 VCLT which under the heading of 'Pacta sund servanda' states "Every treaty in force is binding upon the

parties to the treaties ought to be respected. This, in turn, should be understood as a barrier to excessive reliance on any single one of these interpretational perspectives because a 'plurality of interpretational perspectives' substantially increases, I believe,[21] the objectivity of the interpretation process (not least by reducing the risk of deliberate misusage of the process of interpretation by focusing on the perspective that yields one's preferred meaning).[22]

Remark also that a sole focus on the text of the treaty would imply that the interpreter is only required to capture the 'common intentions of the parties' inasmuch as it is represented therein. Article 31(2–4) VCLT explicitly broadens the information base underlying the systematical perspective by allowing information from outside the treaty to influence the interpretation process.[23]

Paragraph 2

Article 31(2) VCLT explicitly requires that the text of the whole treaty, including its preamble and annexes, be taken into consideration.[24]

Furthermore, article 31(2) VCLT requires consideration of treaty-external information that satisfy the following four requirements: (i) the content of the material was accepted by all the parties to the treaty;[25] (ii) one or more of the parties to the

parties to it and must be performed by them in good faith."

[21] Of identical opinion: Reisman (2009), at para 7, "International law's canons for interpreting international agreements have been codified in the Vienna Convention on the Law of Treaties ... A failure to apply the rules of interpretation perforce distorts the resulting interpretation of the parties' agreement and is a species of the application of the wrong law."

[22] See, for instance, Gardiner (2008), at 151 et seq., "It [in good faith] signifies an element of reasonableness qualifying the dogmatism that can result from purely verbal analysis ... [so as to produce] an outcome that is more likely to reflect effectively the true intentions recorded in the text than would a purely textual approach".

For different interpretations of this term, especially by international tribunals, see Gardiner (2008), at 152 et seqq.

[23] Dörr (2012a), at 523.

[24] This includes, in addition to other provisions, the titles, headings, chapeaux and overall structure of the treaty (Gardiner, 2008, at 180 et seqq.). The preamble has been used by multiple international tribunals to interpret a specific provision; for examples, see Dörr (2012a), at 544, footnote 141.

[25] There is no presumption of acceptance in the absence of explicit opposition so that the interpreter

treaty must be at the origin of the material; (iii) the content of the material must be in relation to the treaty's substance; and (iv) the acceptance must have taken place in a certain temporal proximity to the conclusion of the treaty itself.[26] Such treaty-external information include: protocols on interpretation, protocols of signature, other treaties signed by the same parties on the same day, and joint press releases by all parties.[27]

Paragraph 3

Article 31(3) VCLT requires further treaty-external information to enter the interpretation of the treaty relating to *all* the parties to the treaty. It is helpful to separate the discussion of this provision in two parts.

'Subsequent agreements' and 'subsequent practice' The first part, article 31(3)(a,b), requires consideration of two types of subsequent information (i.e., information that did not exist at the time of the conclusion of the treaty in question) relating to the parties.

Litera a mentions 'subsequent agreements' between all the parties to the treaty in question: these agreements need not have been mentioned before the conclusion of the treaty, they are not bound to a treaty form, and must not amount to public international law (i.e., need not create a public international legal obligation); however, the parties must not see them as of lower rank than the treaty in question.[28] A notable

must show the existence of an acceptance if he or she desires to rely on such material (Dörr, 2012a, at 552).

[26] Dörr (2012a), at 550 et seq.

[27] Gardiner (2008), at 212 et seq.; Weeramantry (2012), at 78 et seq.

[28] Dörr (2012a), at 553 et seq.; Roberts (2010), at 199, "A subsequent agreement turns on the fact of an agreement between the treaty parties, not its form. The agreement need not be in binding or treaty form but must demonstrate that the parties intended their understanding to constitute an agreed basis for interpretation." (footnotes omitted).

For an example of a subsequent agreement of lower rank: in *Chile – Price Band System* the WTO Panel did not accept a subsequent agreement (Economic Complementarity Agreement No. 35) between Chile and MERCOSUR as satisfying article 31(3)(a) VCLT because the agreement's preamble stated that its provisions shall adjust to the WTO Agreement thereby ranking it below the WTO Agreement (*Chile* –

example of 'subsequent agreements' are 'subsequent joint interpretations' (see also article 31(4) VCLT) by all the parties to the treaty in question.[29]

Litera b mentions 'subsequent practice' that encompasses all the parties to the treaty: State behaviour is not bound to any particular form and thus not only captures the behaviour of the government itself, but of any formal entity officially acting on its behalf; State behaviour must be a consistent sequence of acts or pronouncements (an isolated behaviour cannot establish practice); arguably, not all parties to the treaty need to engage actively in the practice, but all parties need to consent to the practice set by the others (absence of opposition is taken as tacit consent).[30] Notable examples of 'subsequent practice' include: official statements or manuals, diplomatic correspondence, transactions, votes on resolutions in international organisations, national legislative decisions, and national judicial decisions;[31] it may arguably furthermore include the application of a treaty by international judicial organs and other international bodies.[32]

Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS2007/R, Report of the Panel, 3 May 2002, at paras 7.83 et seq.).

[29]The most well-known example of such a 'joint statement' is provided by NAFTA: in 2001, all the NAFTA parties (Canada, Mexico, and the United States) jointly published a statement of interpretation regarding, amongst others, NAFTA's FET clause. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[30]Dörr (2012a), at 554 et seqq., most notably "'practice' ... is not limited to the central government authorities of States, rather any public body acting in an official capacity can contribute to demonstrating the state's position towards its treaty commitments ... 'agreement' presupposes ... the knowledge or awareness of other parties of a certain practice: internal documents or acts that have never been made known to other parties cannot qualify" (bold omitted); Sinclair (1984), at 137, "A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act, or even by several individual applications."; Gardiner (2008), at 239, "It is sufficient if there is practice of one or more parties and good evidence that the other parties have endorsed the practice."

[31]Dörr (2012a), at 554 et seqq.

[32]Herdegen (2010), at para 19, "The application of a treaty by international judicial organs and other international bodies set up by the parties for the purpose of implementation or supervision of compliance may be attributed to the parties as subsequent practice."

Applicable relevant rules of public international law The second part, article 31(3)(c), requires consideration of certain norms beyond those contained in the treaty in question.[33]

This provision captures public international legal norms,[34] unless the parties view them as of lower rank; independently of whether they already existed at the time of the conclusion of the treaty,[35] and independently of whether they apply to all states around the world (i.e., independently of whether they amount to ius cogens or customary international law).[36] The provision should, arguably, be understood as only capturing norms which all the parties to the treaty (rather than only those to the dispute) have a public international legal obligation to observe;[37] remember,

[33]This provision views the international-legal order as forming a single system for any specific combination of States; so, for instance, McLachlan (2005), at 280, "Article 31(3)(c) expresses a more general principle of treaty interpretation, namely that of *systemic integration* within the international legal system. The foundation of this principle is that treaties are themselves creatures of international law."; Aaken (2009a), at 495, "a treaty norms [sic] may be unclear and another PIL norm may be used to clarify the meaning".

[34]Herdegen (2010), at para 22, "Art. 31 (3) (c) VCLT ... includes not only treaties, but also customary international law". Dörr (2012a), at 567, "[however,] even if the external rules may have in principle binding effect on 'the parties', their applicability between them must not be excluded for reasons of estoppel or through admissible reservations to a treaty" (bold omitted).

[35]This follows (systematical perspective) from the explicit mention of 'subsequent' in both litera a and b and omission in litera c of article 31(3); see, e.g., Greig (2001), at 46.

[36]This follows from (grammatical perspective) the wording of the provision itself: "The further specification 'applicable in the relations between the parties' [see the text of article 31(3)(c)] tends to support the conclusion that ...[non-customary] obligations are covered by article 31(3)(c) [since 'applicable' would be void otherwise]." (Gardiner, 2008, at 263); as well as from (historical perspective) the Vienna Convention's preparatory work: the draft included 'general international law' instead of 'international law' and a proposition to modify it to 'customary international law' was not followed either (Gardiner, 2008, at 262).

[37]Doing otherwise would undermine the unity of the treaty by yielding different interpretations for different parties and would thereby fail to follow the common intentions of all the parties to the treaty. This view follows from (systematical perspective) article 31(3)(b) wherein 'the parties' refers to 'all the parties to the treaty'; see, for instance, Dörr (2012a), at 566; Herdegen (2010), at para 24, "Reliance on other agreements not ratified by all parties of the relevant treaty calls for considerable caution. For such an approach might erode the effectiveness of the treaty to be interpreted."

For an example of a tribunal following a restrictive interpretation of this clause: in *EC – Biotech* the WTO Panel held that neither the 1992 'Convention on Biological Diversity' nor the 2000 'Cartagena Pro-

however, that under this interpretation, the information provided in norms which not all parties to the treaty have a public international legal obligation to observe may still be considered within the textual perspective in the same manner as one would use a dictionary.[38]

Article 31(3)(c) therefore indisputably requires consideration of norms which all the parties to the treaty have a public international legal obligation to observe – and therefore, most notably, include ius cogens and CIL norms.

To be sure, there is a fundamental difference between directly relying upon some norms not contained in the treaty in question because they are part of the applicable law and indirectly relying upon these norms during the interpretation process (as required by article 31(3)(c) VCLT): these norms may lead to a conflict with the norms contained in the treaty in question in the former case, but cannot do so in the latter case.[39]

Paragraph 4 (joint interpretation)

Article 31(4) VCLT requires that if the parties to the treaty have agreed upon a specific interpretation of a term or a clause, then their interpretation takes precedence over the interpretation that would have been reached by the interpreter in the absence of such a joint interpretation.[40] It is consequently clearly not sufficient that one of

tocol on Biosafety to the Convention on Biological Diversity' are required for consideration within the interpretation of the WTO Agreement because they are not applicable to all parties to the WTO Agreement (*European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291–3/R, Report of the Panel, 29 September 2006, at paras 7.53 et seqq.).

Of different opinion: Marceau (2002), at 781, points out that if 'all the parties to the treaty' rather than 'all the parties to the dispute' is followed, then the more parties a treaty has the more likely it is that that treaty will be read in isolation (because the less likely it is that all the parties to the treaty are subject to some given international legal norm).

[38] See the discussion of article 31(1) VCLT above.

[39] Kurtz (2014), at 280 et seq., "[there] is a key distinction between direct applicability of international law rules compared to their use as external interpretative guidance under VCLT Article 31(3)(c) . . . This distinction . . . is sometimes elided."

[40] Dörr (2012a), at 523; Gardiner (2008), at 32, "That the agreement of the parties on an interpretation trumps other possible meanings seems obvious enough, given the nature of a treaty as an international agreement between its parties."

the parties uses a term or provision of the treaty in a specific way.[41]

Article 31(4) VCLT makes no explicit reference to the type of informational sources that the interpreter can have recourse to; we should, however, understand the provision to allow for any kind of evidence.[42] Most notably, a definition article in the treaty itself;[43] the position of preparatory work is, however, unclear.[44]

If the 'joint interpretation' amounts to 'subsequent information' and if this 'subsequent information' qualifies under article 31(3) VCLT, then article 31(4) in combination with article 31(3) VCLT holds that this 'subsequent joint interpretation' takes precedence over all other possible interpretations of the treaty.

6.4 Article 32 VCLT

Article 32 VCLT allows for reliance upon additional interpretational perspectives; contrary to article 31 VCLT, reliance thereupon is not mandatory but left at the the interpreter's discretion.[45]

Utilisation of additional perspectives: subsidiary means?

It is generally held (grammatical perspective) that article 32 VCLT plays a subsidiary role in the interpretation: it is to be used to confirm the meaning reached under article 31 or to determine the meaning amongst the set of possible ones reached under article 31 (article 31(a) VCLT); and it is only when the (set of) meanings reached under article 31 are 'manifestly absurd or unreasonable' that these additional perspectives

[41] Dörr (2012a), at 569.

[42] This follows from (systematical perspective) the informational sources that must be considered in article 31(1-3).

[43] Dörr (2012a), at 569.

[44] From a textual perspective: Dörr (2012a), at 569, "[because article 31(4)] contains no restriction in this respect, it seems plausible that all the evidence available ... may play a role in showing that a 'special meaning' was intended". And from a systematical perspective: Gardiner (2008), at 297, "Where a special meaning is recorded in the preparatory work, its effect on interpretation is probably no different from that of other statements or declarations in preparatory work".

[45] Dörr (2012b), at 582.

are allowed to lead the interpreter to reach a meaning beyond the one's based on article 31 VCLT, that is, to determine a new meaning (article 31(b) VCLT).[46]

Recently, it has been argued that article 32 VCLT was never meant to play only a subsidiary role. The argument starts by observing that the relationship between article 31 and article 32 VCLT is unclear and therefore warrants consideration of additional perspectives. The Vienna Convention's own preparatory work (historical perspective) reveals that the drafters did not have a hierarchy between these two articles in mind.[47] Since the 'application of a treaty by international judicial organs' may amount to 'subsequent practice' under article 31(3)(b) VCLT, it has, however, been argued that the interpretation based on a historical perspective should not be followed because it is in conflict with 'subsequent practice' as international judicial organs have repeatedly applied the VCLT by interpreting article 32 VCLT as playing a subsidiary role.[48]

In any event, since nobody can verify the interpretation process going on in one's head, the interpreter has a great deal of freedom in the utilisation of these additional perspectives and can easily use article 31 VCLT as an ex post justification but present it as an ex ante inquiry. In practice, therefore, additional perspectives should not be expected to be solely of subsidiary use, but to be generally constitutive of the set of meanings that the interpreter views as being possible under article 31 VCLT.[49]

[46] Dörr (2012b), at 582 et seqq.; Mortenson (2013), at 780.

[47] Mortenson (2013), at 781, "the drafters repeatedly reiterated that any serious effort to understand a treaty should rely on a careful and textually grounded resort to travaux, without embarrassment or apology . . . In any seriously contested case, interpreters were expected automatically to assess the historical evidence about the course of discussions, negotiations, and compromises that resulted in the treaty text—in short, the travaux. The modern view that Article 32 relegated travaux to an inferior position is simply wrong."

[48] Linderfalk (2014).

[49] Concurring: Gardiner (2008), at 308 et seq., "the reality is that if the interpreter finds that the preparatory work suggests a meaning which was not the one which would . . . not have immediately struck the interpreter as within the obvious range of interpretative options, the interpreter will . . . reconsider the position".

Types of additional perspectives

Article 32 VCLT explicitly, but non-exhaustively, mentions the 'preparatory work' (or 'travaux préparatoires') and the 'circumstances of its conclusion' as additional information sources for the interpreter. As such, it explicitly refers to the historical circumstances (**historical perspective**).

Preparatory work (travaux préparatoires) Preparatory work captures information that was part of the negotiation process (subjective-historical perspective). Notable examples of preparatory work include: drafts of the treaty, codification conference records (including expert consultants), memoranda, commentaries and other statements of negotiating parties, diplomatic exchanges between negotiating parties, uncontested interpretative statements by the chairman of a drafting committee.[50]

The information may in particular help uncover the parties' underlying motivations (read: the purpose they had in mind) for concluding the treaty – it may thus also amount to a source of information for the 'teleological perspective'.

The Vienna Convention sets a limit to the utilisation of preparatory work during the interpretation process: if states accede to the treaty later on, then preparatory work can only be relied upon if all the acceding states had access to it prior to their accession.[51] This is obviously not the case for bilateral treaties; recall that IIAs

[50] Aust (2010), at 87 et seq.; Dörr (2012b), at 574 et seqq., "statements of individual governments or State representatives outside the treaty negotiations, national legislative documents, explanations given to a legislative body as part of a national ratification process . . . can only be taken into account if they were at some point introduced into the negotiation process, at least brought to the knowledge of other participants in the negotiations".

[51] This follows from article 26 VCLT which states that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

Utilisation of preparatory work that was not available to all parties to the treaty prior to their accession should be excluded in *any* dispute arising out of the said treaty; namely, it should be excluded independently of whether the parties to the dispute had themselves access to the preparatory work prior to their joining. Doing otherwise would undermine the unity of the treaty by yielding different interpretations for different parties and would thereby fail to follow the common intentions of all the parties to the treaty. Arguing so: Sinclair (1984), at 89 et seq., "recourse to travaux préparatoires does not depend on the participation in the drafting of the text of the State against whom the travaux are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpre-

mainly take the form of BITs.[52]

Circumstances of the treaty conclusion The circumstances of the treaty conclusion captures the factual circumstances existing at the time of the conclusion as well as the historical (factual) background of the treaty conclusion (objective-historical perspective).[53]

The information may in particular help uncover the parties' underlying motivations (read: the purpose they had in mind) for concluding the treaty – they may thus also amount to a source of information for the 'teleological perspective'.[54]

6.5 Article 26 VCLT

Arguably, consistency with **prior decisions** (read: follow prior tribunals' interpretations) may under certain circumstances follow from article 26 VCLT which holds that the treaty's obligations, and therewith its interpretation, is limited to what is perceived in good faith.[55]

If disputes arising out of a given treaty are adjudicated by a permanent body, then it seems reasonable to expect – in good faith – this body to generally decide future cases identically (including the weighing of different interpretational perspectives)

tation should be employed, the one for States that participated in the travaux préparatoires and the other for States who did not participate. One qualification should, however, be made. The travaux préparatoires should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. Travaux préparatoires which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States."

[52] See Section 5.1.

[53] Dörr (2012b), at 578 et seqq., "the economic, political and social condition of the parties, their adherence to certain groupings or their status, for example, as important or exporting countries may be taken into account ... Also, legislative acts and court judgments of some of the negotiating States" (bold omitted).

[54] Gardiner (2008), at 194, "the 'circumstances of its conclusion' ... shed light on the object and purpose".

[55] VCLT, Article 26, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

to past ones.[56] It is, however, unclear whether the same can be said when disputes arising out of a given treaty are adjudicated by a non-permanent body (i.e., by an ad hoc arbitral body).

6.6 Conflicting interpretational principles

The following principles have readily been relied upon by international tribunals to interpret treaties. Since application of articles 31 and 32 VCLT does not always yield those principles, readily relying upon them is in conflict with the Vienna Convention (unless the parties to the treaty explicitly require the application of those principles).

Principle of expansive/restrictive interpretation This principle holds that one must favour the interpretation which yields a stronger/lesser obligation for the treaty's parties. These principles have been relied upon by international tribunals in the past, but appear no longer to play a significant role in their decision-making.[57]

Clearly, there is no reason to always expect the 'common intentions of the parties' to amount to the expansive or restrictive meaning.[58]

[56] Although it does not reference the Vienna Convention, the WTO Appellate Body in *United States – Shrimp* seems to concur with this view: "Adopted panel reports are an important part of the GATT acquis ... They create *legitimate expectations* among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute ... This reasoning applies to adopted Appellate Body Reports as well." (*United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, Report of the Appellate Body, 22 October 2001, at para 108 et seq., emphasis added). The ICJ seems also to follow this view in the *Land and Maritime Boundary* case: "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case ... The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, ICJ, Preliminary Objections, 11 June 1998, at para 28).

[57] Dörr (2012a), at 538 et seq.

An exception is: *Methanex Corp. v United States of America*, UNCITRAL ad hoc Tribunal, Partial Award, 7 August 2001 (NAFTA), at para 103, "A doctrine of restrictive interpretation should be applied in investor-state disputes ... Wherever there is any ambiguity in clauses granting jurisdiction over disputes concerning states and private persons, such ambiguity is always to be resolved in favor of maintaining state sovereignty."

[58] Sharing this view: *Mondev International Ltd v United States of America*, ICSID Case No.

Rule of effectiveness This principles holds that a norm must only be given a meaning which does not render any of the norms of the treaty superfluous, that is, which does not deprive any norm of its effect.[59]

Clearly, the parties to the treaty would not have included a norm had they not wanted to give it some effect. This is, however, different from presuming that the correct interpretation is the one which does not render any norm of the treaty ineffective since the parties to the treaty may not have anticipated the resulting ineffectiveness of some other norm. In consequence, restricting the meaning to those interpretations which do not render some other norm in the treaty ineffective need not always best reflect the 'common intentions of the parties'.

ARB(AF)/99/2, Award, 11 October 2002 (NAFTA), at para 43, "there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties" (footnote omitted); *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (Germany–Argentina BIT), at para 81, "The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention."

[59] For examples of its usage, see e.g. Dörr (2012a), at 539 et seq.

Remark that the 'rule of effectiveness' has also been used in the following way: a provision must be given the meaning that provides maximum effect to the treaty, thus implying an expansive interpretation (see e.g., Schreuer, 2012, at 1 et seq.).

Chapter 7

Contemporary international investment law and its discontents: SD deficits

> In theory, the only power governments are giving up is the right to behave badly ... The idea is a good one ... Unfortunately, there are growing problems with implementation
>
> — The Economist[1]

> We have a shared concern for the harm done to the public welfare by the international investment regime
>
> — Gus Van Harten et al.[2]

[1] Economist (2014b).

[2] Van Harten et al. (2010); this publication amounts to a well-publicised critique of contemporary international investment law drafted by around 50 well-known academics of various jurisdictions and various fields of expertise.

Contemporary international investment law is under siege – although recent years have seen an intensification, critiques thereof are not new.[3] The backlash by ever more States against contemporary IIL shows that States are also joining the ranks of the critics.[4]

This work does not blindly/readily join these critics: it studies whether contemporary IIL fulfills the implications of the overarching normative framework (read: sustainable development) advocated in this work.[5] This Chapter therefore analyses whether contemporary IIL is aligned with SD. It finds that several aspects of contemporary IIL are in conflict with SD. Parts IV and V will propose measures (policy prescriptions) that aim at tackling those SD deficits

The remainder of this Chapter is organised as follows. Section 7.1 discusses why SD deficits of IIL are to be taken seriously. Section 7.2 presents the aspects of contemporary IIL that are not aligned with SD; in so doing, it provides a list of contemporary IIL's SD deficits. Sections 7.3, 7.4, and 7.5 suggest that the sources of these SD deficits are found in its adjudicative bodies' norm application, in the design of its dispute-settlement mechanism, respectively in the design of its applicable norms. Section 7.6 finally discusses several often-heard critiques of contemporary IIL which are not justified from an SD perspective.

7.1 IIL's relevance for SD, or: why does IIL matter for SD?

Chapter 3 already showed that IIL is relevant for SD because IIL exhibits several functions that have the potential to further SD. This Section shows that IIL is also relevant for SD because IIL has the potential to hinder SD; namely, it shows that if IIL is in conflict with SD, then not only does IIL not further SD but it may negatively

[3] For an overview of the most important critiques of IIL in 2004, see e.g. Sornarajah (2004), at 259 et seqq.

[4] See Section 5.14 for a description of this backlash.

[5] Chapter 4 presents the overarching normative framework; Sections 4.6 and 4.7 mention its implications.

affect SD.

Consequently, studying whether contemporary IIL is aligned with sustainable development is not a purely abstract/theoretical exercise – but a practically-relevant endeavour. The fact that we are experiencing a backlash by States against international investment law is further support (arguably proof) of this inquiry's practical relevance.

7.1.1 Investment arbitral tribunals' decisions are final

The decisions of investment arbitral tribunals can generally not be annulled or reviewed: neither an international (arbitral) tribunal nor a national (arbitral) tribunal is typically allowed to annul or review those decisions; and even when they are allowed to do so, the grounds for annulment or revision are very limited.[6] Furthermore, the decisions of investment arbitral tribunals are generally directly enforceable in a majority of States around the world as enforcement can only be opposed on very limited grounds.[7]

Investment arbitral tribunals' decisions can therefore without loss of generality be considered to be final. As such, IIL's alignment with SD is indeed of relevance.

7.1.2 All States are at risk

All States having concluded IIAs nowadays face the risk of being at the receiving end of an investment-treaty claim by one of their foreign investors – the SD discussion is therefore of interest for virtually all States.

Because modern IIAs provide both foreign investors and States with a direct right to pursue an IIA-based claim before an investment arbitral tribunal,[8] the current number of claims and decisions by investment arbitral tribunals is unparalleled in international law.[9]

[6] For the rules governing ICSID and UNCITRAL tribunals, see Section 5.2.7.

[7] For the rules governing ICSID and UNCITRAL tribunals, see Section 5.2.8.

[8] See Section 5.4.

[9] Reinisch (2010b), at 113, "Traditional international lawyers accustomed to expect one or two important International Court of Justice (ICJ) judgments per year that would then undergo intensive scholarly

In the middle of the 1990s, the number of known initiated investor-State IIA-based arbitrations (i.e., of IIA-based claims filed by investors) was virtually 0; in 2000, it was around 50; and in 2015, it is 608 – with the majority of claims brought under the ICSID Convention or the ICSID Additional Facility Rules, followed by the UNCITRAL Rules.[10] Claims have been filed against 99 different States from all geographic regions and all levels of development;[11] by 2015, most cases had been filed against Argentina (56), Venezuela (36), Czech Republic (29), Egypt (24), Canada (23), Mexico (21), Ecuador (21), India (16), Ukraine (16), Poland (15), and the United States (15).[12] Also, most cases have been initiated based on an alleged BIT violation (around 80 percent), followed by an alleged NAFTA violation (around 15 percent) and an alleged ECT violation (around 5 percent).[13] Approximately 13 percent of these claims concerned cancellations of an agreement/permit; 12 percent concerned expropriations/nationalisations; 12 percent concerned regulatory changes; 9 percent concerned currency measures; 8 percent concerned unfulfilled contractual/payment obligations; 4 percent concerned refusals to grant a licence/permit; and other types of measures amount each to less than 2 percent.[14] Finally, by far most cases seem to have involved the energy sector (around 23 percent; other industries exhibit at most 7 percent).[15]

By 2015, the overall number of known concluded investor-State arbitrations reached 405; around 26 percent of these cases were settled (the specific terms of the settlement typically remain confidential); around 27 percent were decided in favour

scrutiny for months have had to become used to the new speed".

[10] UNCTAD (2015), at 112 et seqq.

Specifically: in 2013, out of 514 known initiated investor-State IIA-based arbitrations, 314 cases were brought under the ICSID Convention or the ICSID Additional Facility Rules and 131 under the UNCITRAL Rules; see UNCTAD (2013), at 110 et seq.

[11] UNCTAD (2015), at 112.

Most claims (around 70 percent) were brought against non-OECD States, and only 3.7 percent were brought against the least-developed States; see Franck (2007a), at 32 et seq.

[12] UNCTAD (2015), at 115.

[13] Joubin-Bret, Rey, and Weber (2011), at 18.

[14] Phillips Williams (2014), at 4, based on an analysis of 490 investor-State arbitration claims (insufficient information precluded usage of the remaining 48 claims).

[15] Franck (2007a), at 42 et seq.

of the foreign investor (monetary compensation awarded); and around 36 percent were decided in favour of the host State (dismissed either on jurisdictional grounds or on the merits).[16] When only considering decisions on the merits, 60 percent were decided in favour of the foreign investor and 40 percent in favour of the host State.[17]

Note finally that there appears to be only a handful of known initiated State-State IIA-based arbitrations (i.e., of IIA-based claims filed by States).[18]

7.1.3 Disputes involve large sums

Substantial amounts have been awarded by investment arbitral tribunals to foreign investors when tribunals found that the host State's behaviour violated IIL. Consequently, if the investment arbitral tribunals' decisions are not aligned with SD, then the State's SD may be substantially hindered because: (i) in the event of an adverse award against the State,[19] resources will leave the State to fulfil the award,[20] which negatively impact the SD of the State since these resources could have been used by the said State to pursue SD-furthering projects;[21] and/or (ii) the threat of potential future costs associated with enacting SD-furthering policies may let the State ex ante refrain from enacting them – such an undesirable 'de facto reduction in policy space' is known as 'regulatory chill'.[22]

References to IIA-based arbitration tend to focus on outliers because the largest known IIA-based awards are indeed quite eye-catching – the highest IIA-based

[16] UNCTAD (2015), at 116.

In 2013, the overall number of known concluded investor-State arbitrations was 274, 26 percent of cases were settled, 31 percent of cases were decided in favour of the foreign investor, and 43 percent of cases were decided in favour of the host State; see UNCTAD (2014a), at 10.

[17] UNCTAD (2015), at 116.

[18] Bernasconi-Osterwalder (2014), at 1, "As the number of investor–state arbitration cases has grown exponentially, state-state arbitration has taken a backstage role—to our knowledge only four such cases have occurred under investment treaties."

[19] Namely, in the event of what economists refer to as an 'efficient breach'.

[20] Contemporary IIL de facto operates as a system of liability rules, see Section 5.12.

[21] Commentators oftentimes overlook this issue by solely considering regulatory chill. Amongst others, Bonnitcha (2014), at 113 et seqq.

[22] See Section 3.1.1.3 for a more general discussion of 'de facto reduction in policy space'.

awards amount to USD 50 billion,[23] USD 1.77 billion,[24] USD 1.4 billion,[25] and USD 935 million.[26] To put these awards into perspective: the USD-353-million award against the Czech Republic in 2003[27] was equivalent to the country's entire health-care budget; and would have been equivalent (adjusted for population size and GDP) to a USD-19-billion award against the United Kingdom, and a USD-26-billion award against Germany, and a USD-131-billion award against the United States.[28] However, a thorough assessment of IIA-based awards cannot stop here, but must rely upon proper empirical research.

An empirical study of IIA-based awards prior to 2007 suggests:[29] that the average amount claimed is USD 343.4 million (the median is USD 59 million; the highest amount claimed is USD 9.4 billion);[30] and that the average amount awarded is USD 10.4 million (the median is 0; the highest amount awarded is USD 269.8 million).[31]

Another empirical study of IIA-based awards prior to 2007 suggests:[32] that the development status of the respondent State[33] does not exhibit statistically significant

[23] *Yukos Universal Limited v Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 (ECT).

[24] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012 (United States–Ecuador BIT)(USD 1.8 billion amounted to 5.5 percent of Ecuador's annual State budget in 2013).

[25] *Mobile Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 (Netherlands–Venezuela BIT).

[26] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v Libya and others*, Ad hoc Tribunal, Final Award, 22 March 2013 (The Unified Agreement for the Investment of Arab Capital in the Arab States).

[27] *CME v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 14 March 2003 (Netherlands–Czech Republic BIT).

[28] Van Harten (2007), at 7.

[29] Franck (2007a), at 17 and 24, based on the sample of 102 IIA-based awards (involving 82 different cases; 17 cases produced multiple awards) publicly available before 1 June 2006.

[30] These findings are based on 82 cases (Franck, 2007a, at 57 et seq.).

[31] These findings are based on 52 final awards, of which 2 were settled (Franck, 2007a, at 58 et seq.).

[32] Franck (2009), at 454, footnote 105, based on the sample of 102 IIA-based awards (involving 82 different cases) publicly available before 1 June 2006.

[33] Using both the OECD's two-category variable and the World Bank's four-category variable (Franck, 2009, at 455).

differences in the probability that a given side wins;[34] and that the development status of the respondent State does not exhibit statistically significant differences in average amounts awarded.[35]

Yet another empirical study of IIA-based awards prior to 2007 suggests:[36] that the average shifted legal costs are of USD 655'407 and the average tribunal and administrative costs are USD 581'333;[37] that tribunal and administrative costs are by far most often shared by the parties (68 percent; other splits exhibit at most 8 percent);[38] and that tribunal and administrative costs are positively related to the amount claimed.[39]

7.1.4 Claims in SD-very-relevant domains

Investment arbitral tribunals' decisions have oftentimes involved SD-very-relevant domains; namely, domains which have a substantial impact on a State's SD. Hence, if history is of any indication, then a 'regulatory chill' can be expected to substantially impact a State's SD since SD-furthering measures in SD-very-relevant domains will not be undertaken.

Disputes before investment arbitral tribunals, amongst others,[40] have involved or

[34]This finding is based on only 47 awards; approximately 40 percent exhibit a winning claimant side (Franck, 2009, at 460 et seqq.).

[35]This finding is based on only 49 awards; approximately 60 percent exhibit a developed respondent State (Franck, 2009, at 465 et seqq.).

[36]Franck (2011b), at 806, based on the sample of 102 IIA-based awards (involving 82 different cases) publicly available before 1 June 2006.

[37]These findings are based on only 11 awards that quantify shifted legal costs, and on only 17 awards which quantify tribunal and administrative costs (Franck, 2011b, at 814, footnote 225).

[38]This finding is based on 50 awards which mention that percentage (Franck, 2011b, at 814).

[39]This finding is based on only 13 awards which quantify tribunal and administrative costs and mention the amount claimed (Franck, 2011b, at 836).

[40]They have furthermore involved: Bernasconi-Osterwalder et al. (2012), at 7, "The measures subject to challenge have included measures imposing and attempting to collect taxes; measures changing domestic fiscal policy; decisions regarding whether to grant development permits; efforts to renegotiate investment contracts; efforts to resist renegotiation of investment contracts; government bans on harmful chemicals; bans on mining; environmental restrictions on the manner in which mining can take place; requirements for environmental impact assessments; regulations regarding transport and disposal of hazardous waste; regulations governing health insurance; measures aiming to reduce smoking; measures

currently involve a State's disposal of hazardous wastes, its distribution of vital resources such as water and energy, the integrity of its judicial system, its environmental policies, its energy-sector policies, its military counter-insurgent operations;[41]

affecting the price and delivery of water; regulations aiming to improve the economic situation of minority populations; and measures aiming to increase revenues gained from production and export of natural resources."

[41] See e.g., *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, (Sri Lanka–United Kingdom BIT), wherein the host State executed a military counter-insurgent operation during which a foreign investment was destroyed; *Ethyl Corporation v Government of Canada*, UNCITRAL ad hoc Tribunal, Award on Jurisdiction, 24 June 1998 (NAFTA), wherein the host State enacted a ban on ethyl due to its carcinogenic potential; *S.D. Myers Inc. v Canada*, UNCITRAL ad hoc Tribunal, First Partial Award, 13 November 2000 (NAFTA), wherein the host State enacted a ban on hazardous waste exports; *Methanex Corp. v United States of America*, UNCITRAL ad hoc Tribunal, Final Award, 3 August 2005 (NAFTA), wherein the host State engaged in measures aimed at protecting the domestic water supply; *Glamis Gold, Ltd. v The United States of America*, UNCITRAL ad hoc Tribunal, Award, 8 June 2009 (NAFTA), wherein the host State engaged in measures aimed at protecting the culture and health of indigenous people; *Piero Foresti, Laura de Carli & Others v Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010 (Italiy–South Africa BIT and Belgium-Luxembourg–South Africa BIT), wherein foreign mining investors challenged South Africa's post-apartheid 'equal opportunities and land rights policy' aiming at correcting the past injustices (read: racial discrimination) during the Apartheid regime; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No. ARB/09/6, 11 March 2011 (ECT), wherein a Swedish foreign investor challenged Germany's requirement of (costly) installations of greenhouse-gas-emission controls on its planned coal-fired power plant (the case was settled in August 2010).

A foreign investor reportedly announced to Austria that it would challenge Austria's planned implementation of the European Union Emissions Trading System before an investment (international) arbitral tribunal (Firger and Gerrard, 2012, at 519).

More recently, a large number of claims has been filed against States which have revised their solar-energy-sector-incentive policies (for a list of cases, see Luca (2014), footnotes 1–3). A claim has also been filed against Germany, in the aftermath of the March 2011 Fukushima nuclear accident in Japan, for its decision to shut down of its older nuclear reactors in 2011 (those which went online before 1981) and for its decision to accelerate the phasing out of nuclear power: *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Award pending. Furthermore, claims have been filed against Uruguay and Australia's new legislations on tobacco packaging: *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award pending (Switzerland–Uruguay BIT); *Philip Morris Asia Limited v. Australia*, UNCITRAL, PCA Case No. 2012-12, Award pending (Australia–Hong Kong BIT).

State measures which are necessary for the State's fulfillment of its human-rights obligations;[42] as well as State measures during economics/financial crises.[43]

7.2 List of sustainable-development deficits

This Section presents the aspects of contemporary international investment law that are not aligned with sustainable development.

We will see that the sources of these SD deficits are found in contemporary IIL's adjudicative bodies' norm application (Section 7.3), in contemporary IIL's design of its dispute settlement (Section 7.4), and in contemporary IIL's design of its applicable norms (Section 7.5).[44]

Romson (2011), at 38, footnote 3, "My survey of publicly known IIA cases suggests that by July 2010 there were about thirty-five cases where the company claimant disputed measured concerned health or environmental regulations such as denial of environmental permits, revocation of environmental liability schemes or restrictions on use of chemicals or fishing and hunting rights. Another one hundred and fifty cases concern activities linked directly to natural resources and energy services ... The total number of IIA cases were [sic] 357 by the end of 2009"; for detailed discussions of cases concerning environmental matters, see Tienhaara (2009), at 151 et seqq.

[42] Khalfan (2011), at 53 et seq., "Investment arbitrations have begun to address instances in which States ... have sought to justify non-compliance with investment treaties on the grounds that ... such compliance interferes with actions necessary for a State to realize its legal obligations under human rights law ... for example, requirements to ensure affordability and access to basic social services, such as health, education, water, and sanitation, and obligations to ensure that attention is given to the needs of marginalized groups".

[43] Salacuse (2010b), at 593, "Serious regional and global economic crises, like the one that struck Argentina in 2001 ... pose external threats to the international investment regime. Countries under great stress, faced with potential social and political upheaval as a result of rapidly declining standards of living, often seek radical solutions and are impatient with international investment rules that may restrict their latitude of action"; Kurtz (2010), at 326, "The financial crisis that enveloped Argentina in late 2001 has revealed a new legal subject with the serious potential to constrain State autonomy in mitigating adverse effects of such crises. This is the network of international investment treaties that grant foreign investors the right to challenge signatory State laws for breach of treaty commitments in a range of arbitral institutions."; see also Aaken and Kurtz (2010a,b).

[44] Policy prescriptions focusing on the first source may be called 'controlling interpretational methods', those focusing on the second source may be called 'institutional control', and those focusing on the third source may be called 'controlling substantive law'; see Aaken (2015c), at 196.

7.2.1 International investment law's rules

It was argued in Section 4.7.1 that sustainable development has implications for IIL's rules.

The concept of 'contemporary IIL rules' describes the rights and obligations that apply in specific cases under contemporary IIL. To identify those rules, we must look at the decisions of IIL's adjudicative bodies – namely, at the outcome of IIL cases – since contemporary IIL's applicable norms amount to standards (i.e., applicable norms are formulated in broad and vague terms) and are therefore compatible with a broad (finite) set of different rules.[45]

To be sure, most contemporary IIL rules (i.e., most of the decisions of IIL's adjudicative bodies) do not seem to be in conflict with SD – although at first sight many decisions may seem harsh because they deal with sensitive issues,[46] at second sight many decisions are quite reasonable once one has taken the time to read the actual facts of the case.

Nonetheless, if history is of any indication, then contemporary IIL rules will not always be aligned with SD in the future so that there is room for improvement. In the following, a qualitative empirical approach is followed by presenting several specific instances of SD-conflicting contemporary IIL rules.[47] Especially SD-conflicting contemporary IIL rules applying to emergency situations are troublesome: SD-conflicting rules in such situations can have wide negative consequences for SD because of the fragility of a State facing an emergency situation.[48]

[45] The implicit underlying descriptive norm-application theory is known as 'legal realism'; see Section 2.3 for a brief description.

Chapter 5 shows that contemporary IIL's most important applicable norms amount to standards.

[46] See Section 7.1.4 to get an idea of the sensitivity of the issues to which IIL has been applied.

[47] Section 7.2.1.4 discusses the problems which a quantitative empirical approach faces when studying whether contemporary IIL rules are normatively desirable.

[48] The focus on how IIL deals with emergency situations is widespread amongst IIL commentators; instead of several, see Aaken (2006); Juillard (2009), at 273; Burke-White (2010); Kurtz (2010); Salacuse (2010b), at 592 et seq.

7.2.1.1 Emergency situation: economic/financial crisis

In 2001, Argentina faced a severe emergency situation in the form of an economic/financial crisis: between 1999 and 2002 the GNP shrank by 25 percent; by 2002, unemployment in cities reached 25 percent and almost half of the population was living in poverty; and in one day alone in 2001 the Peso lost 40 percent of its value.[49] These facts clearly describe an emergency situation as sustainable development was definitely on a downward spiral:[50] material living standards, health, personal activities, and personal and economic security were all negatively affected to a dangerous extent for a large fraction of the current generation; namely, the quality of life of a large proportion of the population was, or was threatening to become, negligible.[51]

In response to the crisis, Argentina amongst others cancelled the contractual right (read: specific assurance) of a foreign investor (a gas transportation company) to calculate its tariffs in USD, to adjust those tariffs according to USD inflation, and to convert those tariffs at the prevailing USD–Peso exchange rate; these rights had been granted in the early 1990s for thirty-five years in an investor-State contract.[52] This State measure is arguably necessary for resolving the emergency situation because the Peso had strongly been devaluing vis-à-vis the USD so that setting the tariffs in USD had become very expensive for the State and hence strongly reduced the State's ability to tackle the emergency situation by heavily draining an already reduced State budget.

In *CMS v Argentina* the investment arbitral tribunal held that Argentina's measures violate IIL and that they are subject to compensation for the resulting damages to the foreign investor; it awarded around USD 130 million to the foreign investor.[53]

[49] For a more extensive description, see e.g. Economist (2002).

[50] See Section 4.4.3 for the definition of sustainable development.

[51] Further SD-relevant aspects (i.e., education, political participation, social connections, and environmental conditions) do a priori not seem to be affected. For a brief summary of the SD-relevant aspects, see Section 4.6.

[52] The contract was granted by Decree No. 2457/92 on the 18 December 1992 (licence).

[53] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT).

Although it is generally true that sustainable development requires compensation when specific assurances are violated,[54] this is not the case if the State is in an emergency situation, if the State measure is arguably necessary for resolving the emergency situation, and if such compensation threatens to jeopardise the resolution of the emergency situation.[55] In casu, requiring monetary compensation can reasonably be expected to worsen Argentina's economic/financial crisis. Hence, the outcome of the case is in conflict with sustainable development.

In *Enron v Argentina* and *Sempra v Argentina* the investment arbitral tribunals were faced with the same facts and reached identical decisions.[56] Although both decisions were later annulled by ICSID annulment committees,[57] they nonetheless remain an important indication that IIL's rules with respect to emergency situations are likely to be in conflict with SD: had those claims not been brought before ICSID tribunals, the two tribunals' decisions could most likely not have been annulled (or modified).[58]

7.2.1.2 SD-furthering measures

Tax-law change In 2001, Ecuador changed its tax law with respect to the oil sector; specifically, it changed a long-standing value-added-tax practice by henceforth denying reimbursement of some value-added taxes. In *Occidental v Ecuador* the investment arbitral tribunal held that Ecuador's measure violates IIL, amongst others because it amounts to an alteration of the legal framework, and that it is subject to compensation for the resulting damages to the foreign investor; it awarded around

[54] See Section 4.7.1.4.

[55] See Section 4.7.1.6.

[56] *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (United States–Argentina BIT); *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (United States–Argentina BIT).

[57] *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010 (United States–Argentina BIT); *Enron Corp. and Ponderosa L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010 (United States–Argentina BIT).

[58] On the possibilities for annulment or review of decisions by non-ICSID tribunals, see Section 5.2.7.

USD 70 million to the foreign investor.[59]

Sustainable development does not imply a frozen legal framework; on the contrary, sustainable development implies the absence of such an obligation.[60] Hence, this part of the decision of the tribunal is in conflict with sustainable development.

More generally, the outcome of the case would arguably anyways have been in conflict with sustainable development because an obligation not to engage in such a measure is quite likely to be SD hindering.[61] Indeed, the absence of such an obligation is arguably SD furthering because: (i) allowing the measure increases the State's revenues (which is desirable since it amounts to a redistribution of resources from the rich (foreign investors) to the poor (Ecuador)); and (ii) allowing the measure is not very likely to substantially decrease foreign-investment flows since natural-resource foreign-investment decisions are arguably quite irresponsive to political risk (i.e., natural-resource foreign investments are arguably quite inelastic to political risk).

Utilisation of government budget For almost a decade, the land of a foreign investor (purchased to develop a conference centre and game farm) in South Africa was repeatedly subject to incursions, thefts, and vandalism by residents of a nearby settlement. In *Swiss Investor v South Africa* the investment arbitral tribunal held that South Africa's measures to stop these attacks violate IIL because there was no effective policing and that it is hence subject to compensation for the resulting damages to the foreign investor.[62]

The outcome of the case is arguably in conflict with sustainable development because an obligation of 'effective policing in all parts of its territory' (which the tribunal implicity requires) is quite likely to be SD hindering for a developing State (with a low government budget).[63] Indeed, the absence of such an obligation is arguably SD furthering because: (i) all States have limited available resources which

[59] *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), specifically at paras 185 and 191.

[60] See Section 4.7.1.5.

[61] See Section 4.7.1.1.

[62] *Swiss Investor v Republic of South Africa*, UNCITRAL, Partial Award (not public), July 2003 (South-Africa–Switzerland BIT); for the details of the case, see Investment Arbitration Reporter (2008).

[63] See Section 4.7.1.1.

they have to allocate on various activities and not every allocation of these resources amongst those activities is SD furthering; (ii) for a developing State, providing effective policing in all parts of its territory may very well amount to spending too much resources on that activity relative to the other activities; and (iii) the negative consequences of such overspending can arguably not be compensated by a possible increase in foreign-investment flows.

7.2.1.3 Home-State obligations

Contemporary IIL's rules do arguably not contain obligations for home States to enact national legislation that make its investors liable for behaviours abroad.[64]

Indeed, there has, to the best of my knowledge, not been a decision by an investment arbitral tribunal yielding such an obligation for the home State. Furthermore, although contemporary IIL's applicable norms amount to standards, it seems very unlikely that future investment arbitral tribunals find such obligations because those applicable norms do not explicitly mention such obligations.[65]

7.2.1.4 Addendum: problems of quantitative empirical studies

It is important to realise that quantitative empirical studies have a hard time telling us whether contemporary IIL's rules are normatively desirable – namely, whether those rules are aligned with SD.

Most importantly, and contrary to what is oftentimes implicitly held, the winning percentage by itself does not readily provide any normative implication. For instance, the fact that respondent States win more often than claimant investors (Section 7.1.2) does not empirically falsify that contemporary IIL's rules are in conflict with SD; to empirical falsify it, we would need to know what winning percentage results under SD-aligned IIL rules in the same circumstances (i.e., a counterfactual

[64] Agreeing with this reading of contemporary IIL's rules: Cordonier Segger and Newcombe (2011), at 113, "[a] broad critique focuses on the asymmetry of obligations [between home and host States] in IIAs"; Bernasconi-Osterwalder et al. (2012), at 36 et seq.

[65] Bernasconi-Osterwalder et al. (2012), at 37.

impossible to reproduce).[66]

7.2.2 Adjudicative bodies

It was argued in Section 4.6.3 that sustainable development has, amongst others, the following implications for adjudicative bodies (including: IIL's adjudicative bodies): their decisions should exhibit explicit consideration of all SD-relevant aspects if they apply standards; their decisions should exhibit clarity; their proceedings should allow third-party participation; their composition should be representative; and their proceedings should exhibit a certain level of transparency. And it was argued in Section 4.7.2 that sustainable development implies that IIL's adjudicative bodies should apply a deferential standard of review (specifically: a good-faith review).

7.2.2.1 Explicit consideration of all SD-relevant aspects

Since contemporary IIL's applicable norms amount to standards,[67] IIL's adjudicative bodies must explicitly consider all SD-relevant aspect in their decisions.

Generally speaking, decisions of IIL's adjudicative bodies have, however, not tended to explicitly consider SD-relevant aspects beyond the foreign investor's material well-being (i.e., beyond foreign investors' property); and even when the decisions have done so, they seem not to have taken those SD-relevant aspects seriously.[68]

[66] Failing to recognise this benchmark problem (by implicitly holding that the normatively correct winning percentage is 50 percent): Franck (2011a), at 89, "the [empirical] results begin to undercut the potential case for radical rebalancing, overhaul, or abandonment of [contemporary IIL]"; Schwebel (2014), "of 144 publicly available awards as of January 2012, states won 87 cases when arbitrators resolved a dispute arising under a treaty, while investors won 57 . . . These findings hardly suggest bias against states [read: hardly suggest that contemporary IIL has a normative problem]."

[67] See footnote 45.

[68] Brower (2009), at 356 et seqq., "one finds only a small line of cases openly and systematically addressing the public interest . . . Beyond that, considerations flows largely below the surface, along unspoken paths that emphasize the inferior and precarious role that the public interest plays in the resolution of investment disputes."; Gordon, Pohl, and Bouchard (2014), at 22 et seq., find, based on a sample of investment-arbitral decisions, that only 26 percent make explicitly reference to one or more sustainable-development dimensions (defined in this study as: environment, labour standards, corruption, human

Let us take a closer look at the application of some of these standards.

Expropriation clause[69] The 'expropriation clause' has generally been applied to 'indirect expropriation' by only explicitly considering the effects of the State's measure on the foreign investor's material well-being (the so-called 'sole-effects doctrine'); only a couple of adjudicative bodies have explicitly considered the 'legitimate public purpose' (or 'public interest'), under which SD-relevant aspects may be subsumed, of the contentious State measures.

FET clause[70] The 'FET clause' has historically been applied without explicit consideration of SD-relevant aspects; more recently, however, ever more adjudicative bodies have explicitly considered the 'legitimate public purpose' (or 'public interest'), under which SD-relevant aspects may be subsumed, of the contentious State measures.

NT clause[71] The 'NT clause' has been applied by a fraction of adjudicative bodies with explicit consideration of the 'legitimate public purpose' (or 'public interest'), under which SD-relevant aspects may be subsumed, of the contentious State measures.

7.2.2.2 Clarity

It has been observed that the decisions of IIL's adjudicative bodies have become lengthier and more detailed over the past years, but that these details have tended to reduce rather than to increase the clarity of the decisions.[72]

rights) – whether these decisions take these dimensions seriously is another question as the study only searched for key words.

[69] For a review of the jurisprudence, see Section 5.6.

[70] For a review of the jurisprudence, see Section 5.7.

[71] For a review of the jurisprudence, see Section 5.8.

[72] To the point: Abi-Saab (2011), at para 3, "one of the basic reasons of my unease with this excessively long award, is its style of turning around the main issues and drowning them into an ocean of minutia and elaborated details, rather than confronting them frontally and treating them thoroughly".

7.2.2.3 Third-party participation

Contemporary IIL's problems with respect to third-party participation is mainly related to its lack of transparency (without transparency, third-party participation is impossible); the reader is therefore referred to the discussion in Section 7.2.2.5.

7.2.2.4 Representativeness

It has been observed that the composition of IIL's adjudicative bodies have been far from representative of those affected by their decisions: around 95 percent of all adjudicators were men; and around 70 percent of adjudicators were nationals of OECD States.[73]

7.2.2.5 Transparency

It has been observed that IIL's dispute settlement has lacked transparency: the public was not always aware of ongoing proceedings and their decisions were not always published.[74]

[73] Franck (2007a), at 75 et seqq., finds, based on the sample of 102 IIA-based awards (involving 82 different cases; 17 cases produced multiple awards) publicly available before 1 June 2006, that 75 percent of adjudicators were from OECD States and that 3.5 percent were women; Van Harten (2012b), "Investment arbitration has a remarkably poor record on representation of women. This calls for reform of the appointments process for arbitrators, who make important policy choices in the context of global governance. In 249 known investment treaty cases until May 2010, there were 631 appointments. Of these, 41 were appointments of women – just 6.5% of all appointments. Worse, of the 247 individuals appointed as arbitrators across all cases, only 10 were women. Women thus comprised 4% of those serving as arbitrators." For ICSID: Puig (2014), at 404 et seq., "around 93 per cent of all the appointments are of male arbitrators ... It gets even worse: only two women, Professors Stern and Kaufmann-Kohler combined, held three-quarters of all female appointments."; ICSID (2014), at 18, by June 2014 almost 70 percent of all ICSID adjudicators (ICSID tribunals and ad hoc committees) were nationals of either Western Europe or North America.

[74] New York Times (2001), "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed; Van Harten et al. (2010); Bernasconi-Osterwalder and Johnson (2011), at 13, "Although many investor–state decisions are not publicly disclosed, a growing number have been released by one or both of the disputing parties."; Subedi (2012), at 172, "Many of their proceedings are held in camera and the rulings are not always published ... Given the degree of impact of certain awards of investment tribunals on the economic and social policy of host states concerned,

Observe, however, that IIL's adjudicative bodies have changed quite a bit recently with respect to transparency, which should yield increased transparency in the future.[75]

7.2.2.6 Deferential standard of review

CMS v Argentina, *Enron v Argentina*, and *Sempra v Argentina* showed that IIL's adjudicative bodies have not always applied the proper deferential standard of review (i.e., good-faith review) in emergency situations since there are impartial and rational reasons to support the contentious State measures adopted in those cases.[76]

7.2.3 Potential sustainable-development deficits

Sections 7.2.1 and 7.2.2 presented instances wherein contemporary IIL was not aligned with SD. There are, however, further aspects of contemporary IIL that are not aligned with SD because they create the possibility of SD deficits beyond the ones which contemporary IIL has already experienced. For the sake of tractability, the reader is referred to Section 7.5.4 for a presentation of these 'potential SD deficits'.

7.3 Source of deficits: norm application

> A common refrain emanating from ... IIL reformers has been that the arbitral tribunals tasked with deciding the first few hundred cases have

such awards ... [have] been described as amounting to subversion of democracy".

An example of an unpublished decision is *Swiss Investor v Republic of South Africa*, UNCITRAL, Partial Award (not public), July 2003 (South-Africa–Switzerland BIT); a search of 'not public' on http://www.italaw.com shows that there are many more unpublished decisions.

Criticising IIL for its lack of transparency: Van Harten (2007), at 159; Choudhury (2008), at 783 et seq.; Tienhaara (2009), at 275.

[75] See Section 5.2.3 for a presentation of IIL's past and present applicable norms relating to transparency.

[76] See page 240 for a description of those cases.

Many IIL commentators have criticised contemporary IIL for its improper standard of review in emergency situations: seminally, Aaken (2006); Kurtz (2010); Burke-White and von Staden (2010, 2011).

> done a horrid job of construing international investment agreements
>
> — Todd Weiler[77]

As we shall see, however, this 'common refrain' has some truth in it: the norm application of contemporary IIL's adjudicative bodies is partly responsible for contemporary IIL's SD deficits (Section 7.2).

7.3.1 International investment law's rules

Section 7.2.1 showed that contemporary IIL's rules have been in conflict with the rules implied by SD. In the following, it is shown that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit because their norm application does not maximise the achievement of these SD implications within the limits of the applicable norms.

In *CMS v Argentina*, *Enron v Argentina*, *Sempra v Argentina* the adjudicative bodies' decisions could have been aligned with SD because the applicable norms allowed for it.[78] Indeed, the applicable norms in all these cases were determined by the same IIA (United States–Argentina BIT) which states 'economic development' as a purpose and which requires the application of all applicable norms of PIL.[79] An adjudicative body could therefore easily have argued that articles 31 and 32 VCLT are part of the 'applicable norms' since it is widely accepted that these articles amount to norms of customary international law.[80] A 'teleological interpretation', which is

[77] Weiler (2014), at 299.

[78] See page 240 for a description of those cases.

[79] Regarding the purpose: United States–Argentina BIT, Preamble, 'Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties".

Regarding the applicable norms: United States–Argentina BIT, Article VIII, "Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision *in accordance with the applicable rules of international law*" (emphasis added).

[80] See Section 6.2.

required under article 31(1) VCLT,[81] implies that there should be no obligation to pay monetary compensation for engaging in the contentious State measures because doing so would threaten the treaty's purpose (read: economic development) – hence, the 'teleological interpretation' implies the same rule as does SD.

The adjudicative bodies in those cases found violations of the IIA's FET clause and umbrella clause, and found that the IIA's NPM clause does not apply.[82] Because both the FET clause and the umbrella clause amount to standards, the adjudicative bodies could have given primacy to the 'teleological interpretation', which would have led them to find no violation of those clauses; doing so would have yielded a decision/rule aligned with SD. Finally, even if the adjudicative bodies had found a violation of one of these clauses, they could have found that the NPM clause applies (Section 7.3.4); doing so would have yielded a decision/rule aligned with SD.

In *Occidental v Ecuador* the adjudicative bodies' decisions could also have been aligned with SD because the applicable norms allowed for it.[83] Indeed, applicable norms in this case are determined by an IIA (United States–Ecuador BIT) which again states 'economic development' as a purpose and which requires the application of all applicable norms of PIL.[84] The same reasoning as above applies. A 'teleological interpretation' implies that there should be no obligation not to engage in the contentious State measure because engaging therein furthers the treaty's purpose (read: economic development) – hence, the 'teleological interpretation' implies the same rule as does SD. The adjudicative body found violations of the IIA's FET clause

[81] See Section 6.3.

[82] See, for instance, *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at paras 273 et seqq. (FET clause), at paras 299 et seqq. (umbrella clause), and at 353 et seqq. (NPM clause).

[83] See page 241 for a description of the case.

[84] Regarding the purpose: United States–Ecuador BIT, Preamble, "Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties".

Regarding the applicable norms: United States–Ecuador BIT, Article VII "Any dispute between the Parties concerning the interpretation or application of the Treaty which is not resolved through consultations or other diplomatic channels, shall be submitted, upon the request of either Party, to an arbitral tribunal for binding decision *in accordance with the applicable rules of international law*" (emphasis added).

and NT clause.[85] Since these clauses amount to standards, the adjudicative bodies could have given primacy to the 'teleological interpretation' for the FET clause and could have followed the 'dominant interpretation' of the NT clause,[86] which would have led them to find no violation of those clauses; doing so would have yielded a decision/rule aligned with SD.

7.3.2 Explicit consideration of all SD-relevant aspects

Section 7.2.2.1 showed that the vast majority of adjudicative bodies' decisions has not explicitly considered any SD-relevant aspects beyond foreign investors' material well-being. In the following, it is shown that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit because adjudicative bodies do not maximise the achievement of this SD implication within the limits of the applicable norms. The focus is on IIAs because the applicable norms faced by contemporary IIL's adjudicative bodies are virtually always determined by IIAs.

Most modern IIAs require or allow the application of all applicable norms of PIL.[87] It could therefore easily be argued that articles 31 and 32 VCLT are part of the 'applicable norms' since it is widely accepted that these articles amount to norms of customary international law.[88]

Most modern IIAs have 'economic development', 'development', 'prosperity', or 'sustainable development' as a purpose.[89] A 'teleological interpretation', which is

[85] *Occidental Exploration and Production Co. v Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004 (United States–Ecuador BIT), at paras 185 et seqq. (FET clause), and at paras 173 et seqq. (NT clause).

[86] For the dominant interpretation of the NT clause, see Section 5.8.

[87] Since most IIAs do not contain a 'choice-of-law provision' , investment arbitral tribunals tend to require or allow the application of all applicable norms of PIL; see Section 5.2.4.

[88] See Section 6.2.

[89] Salacuse (2010c), at 114, "for a state ... [IIAs] may be about 'economic cooperation', 'economic development', or 'mutual prosperity'. A careful reading of investment treaty preambles reveals these long-term objectives."; Stern (2011), at 189 et seqq.

Instead of many: Germany–Pakistan BIT (i.e., the first modern IIA), Preamble, "Recognizing that an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States"; Niger–Switzerland (i.e, Switzerland's first IIA), Preamble, "Reconnaissant qu'une protection contractuelle de ces investissements

required under article 31(1) VCLT,[90] allows to explicitly consider most SD-relevant aspects during the application/interpretation of the IIA's applicable norms: either, trivially, because they are part of the definition of the IIA's purpose (i.e., because they are intrinsically related thereto); or because it can be argued that they are relevant for the attainment of the IIA's purpose (i.e., because they are instrumentally related thereto).

Most States have public international legal obligations in the form of human rights and/or environmental-protection norms.[91] On the one hand (indirect applica-

est susceptible de stimuler l'initiative économique privée et d'augmenter la prospérité des deux nations"; ECT, Preamble, "implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy"; France Model BIT 2006, Preamble, "Convinced that the promotion and protection of these investments would succeed in stimulating transfers of capital and technology between the two countries in the interest of their economic development"; German Model BIT 2008, Preamble, "recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations"; US Model BIT 2004 and 2012, Preamble, "Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties; Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards; ... Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights" (emphasis omitted).

ICSID Convention, Preamble, "Considering the need for international cooperation for economic development, and the role of private international investment therein" (bold omitted). One can furthermore argue based on a 'historical interpretation' that its purpose is development (rather than economic development) because "[the ICSID Convention] was negotiated under the auspices of the World Bank ... [which] would not have had a mandate for negotiation had it not been for the goal of development" (Aaken and Lehmann, 2013, at 317). Similarly, García-Bolívar (2012), at 4, "ICSID is, of course, part of the World Bank Group, together with the IBRD and other multilateral institutions. As portrayed by the World Bank Group on its website, ICSID complements the overall mission of the group by helping '[p]eople help themselves and their environment by providing resources, sharing knowledge, building capacity and forging partnerships in the public and private sectors.'"

[90] See Section 6.3.

[91] Regarding human rights, see e.g.: International Covenant on Economic, Social and Cultural Rights , 16 December 1966 (entered into force 3 January 1976), 993 UNTS 3, 164 members by the end of 2014; International Covenant on Civil and Political Rights, 16 December 1966 (entered into force 23 March 1976), 999 UNTS 171, 168 members by the end of 2014.

Regarding environmental protection, see e.g.: Convention on International Trade in Endangered

tion), a 'systematic interpretation', which is required under article 31(1) in relation to 31(3)(c) VCLT,[92] allows to explicitly consider most SD-relevant aspects during the application/interpretation of the IIA's applicable norms. And on the other hand (direct application), since these PIL norms are part of the IIA's applicable norms, application of those norms allows to explicitly consider most SD-relevant aspects.

7.3.3 Clarity

Section 7.2.2.2 suggested that the decisions of contemporary IIL's adjudicative bodies have failed to exhibit clarity. Trivially, adjudicative bodies' norm application is fully responsible for this SD deficit.

7.3.4 Deferential standard of review

Section 7.2.2.6 showed that adjudicative bodies have sometimes failed to apply a deferential standard of review. In the following, it is shown that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit because their norm application does not maximise the achievement of this SD implication within the limits of the applicable norms.

In *CMS v Argentina*, *Enron v Argentina*, and *Sempra v Argentina* the adjudicative bodies' decisions could have applied a deferential standard of review because the applicable norms allowed for it.[93] Indeed, the applicable norms in all these cases were determined by the same IIA (United States–Argentina BIT) which contains an NPM clause holding that the treaty's protections do not apply to measures that are necessary for the maintenance of public order or the protection of essential security

Species of Wild Fauna and Flora, 3 March 1973 (entered into force 1 July 1995), 993 UNTS 243, 180 members by the end of 2014; United Nations Convention on the Law of the Sea, 10 December 1982 (entered into force 16 November 1994), 1833 UNTS 3, 167 members by the end of 2014; Vienna Convention for the Protection of the Ozone Layer, 22 March 1985 (entered into force 22 September 1988), 1513 UNTS 293, 197 members by the end of 2014; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997 (entered into force 16 February 2005), 2303 UNTS 148, 192 members by the end of 2014.

[92] See Section 6.3.

[93] See page 240 for a description of those cases.

interests.[94] Since the economic/financial crisis faced by Argentina can be held to have threatened public order and/or essential security interests,[95] adjudicative bodies could have applied a deferential standard of review by interpreting 'necessary' broadly (i.e., not as synonymous with 'indispensable' or with 'the only way') so as to leave States with a margin of appreciation.[96]

Note that the legal reasoning underlying these adjudicative bodies' applications of the NPM clause has also heavily been criticised by IIL commentators,[97] and has even been criticised from within international investment law.[98] In so doing, these critics actually go a step further by holding that these adjudicative bodies not only 'could have' applied the NPM clause differently, but 'should have' done so from a legal perspective because their interpretation cannot be supported by the applicable norms.

[94] United States–Argentina BIT, Article XI, "This Treaty shall not preclude the application by either Party of 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 of its own essential security interests."

[95] Concurring: Slaughter and Burke-White (2005a), at paras 56 et seqq.; Slaughter and Burke-White (2005b), at para 25.

The investment arbitral tribunal in *CMS v Argentina* allowed for the possibility that the clause captures economic/financial crises: *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT), at paras 359 et seq., "While the text of the Article does not refer to economic cris of that particular kind . . . there is nothing in . . . the object and purpose of the Treaty that could on its own exclude major economic crises from the scope of Article XI . . . If the concept of essential security interests were to be limited to immediate political and national security concerns, particularly of an international character, and were to exclude other interests, for example, major economic emergencies, it could well result in an unbalanced understanding of Article XI."

[96] Supporting this view: Burke-White and von Staden (2011), at 370 et seq.

Interpreting 'necessary' broadly is nothing new as many international tribunals have followed such an approach; see footnotes 221 and 223 in Chapter 4.

[97] Slaughter and Burke-White (2005b); Aaken (2006); Burke-White (2010); Kurtz (2010); Burke-White and von Staden (2011).

[98] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision, 25 September 2007 (United States–Argentina BIT), at paras 128 et seqq.

7.3.5 Addendum: sovereignty-restriction critique

The critique of the norm application of contemporary IIL's adjudicative bodies is sometimes expressed under the heading of 'sovereignty restriction'.[99]

State sovereignty (or equivalently 'State equality')[100] is arguably the foundational element of public international law,[101] and holds that a State's legal position cannot be altered without its consent.[102]

'Sovereignty restriction' therefore holds that a State's legal position was altered without the said State's consent. In casu, the critique holds that adjudicative bodies' norm application is methodologically wrong; namely, that their decisions cannot possibly have been reached from the applicable norms. The commentators criticising contemporary IIL from this perspective, however, do not provide real support for their claim as they merely observe that not all applicable norms were explicitly considered; as such, we can readily subsume this critique under Section 7.3.2.

7.4 Source of deficits: IIL design – dispute settlement

The design of contemporary IIL's dispute-settlement mechanism is partly responsible for contemporary IIL's SD deficits (Section 7.2). Measures for resolving these sources of SD deficits are advanced in Chapter 13.

[99] Instead of several: Cheng (2005), at 507; Choudhury (2008), at 777; Sornarajah (2008b), at 205.

[100] 'State equality' and 'State sovereignty' cannot exist without one another: since someone must have sovereignty over the territory, unless all States have sovereignty over their own territory, equality is not possible.

[101] Besson (2011), at para 2, "Most of the other, if not all institutions and principles of international law rely, directly or indirectly, on State sovereignty". Although adopting a 'Grundnorm perspective', the idea is the same: Tomuschat (2001), at 161, "These latter principles, although politically of the highest importance, may be logically classified as pertaining to a secondary normative category since they are designed to ensure and guarantee the effectiveness of sovereign equality, still the Grundnorm (basic principle) of the present-day international legal order."

[102] See, for instance, Brierly (1944), at 99, "states are 'sovereign', and one of the consequences of sovereignty is that a state's legal position cannot be altered without its [direct or indirect] consent"; *S.S. Lotus (France v. Turkey)*, PCIJ, Judgment, 7 September 1927, PCIJ Reports (Series A) No. 10, at 18, "International law governs relations between independent States. The rules of law binding upon States therefore [must] emanate from their own free will".

7.4.1 International investment law's rules

Section 7.2.1 showed that contemporary IIL's rules have been in conflict with the rules implied by SD, and Section 7.3.1 showed that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit. In the following, it is shown that contemporary IIL's dispute-settlement design (most notably with respect to: appointment of adjudicators; third-party participation) may influence adjudicative bodies' norm application and therewith may be indirectly, at least partially, responsible for this SD deficit.

Appointment of adjudicators On the one hand, the contemporary dispute-settlement design does not prevent the appointment of adjudicators with conflicts of interest resulting from these individuals wearing multiple hats: sitting as counsels in one arbitration, as experts in another arbitration, and as arbitrators in yet another arbitration.[103] Since we cannot be sure that adjudicators are solely driven by a political-ideology motivation,[104] these conflicts of interest may let adjudicators behave, within the limits of the applicable norms, according to the interests of foreign investors – so that adjudicative bodies' norm application may not maximise the achievement of the rules implied by SD within the limits of the applicable norms.

On the other hand, even in the absence of conflicts of interest, the contemporary dispute-settlement design of utilising disputing-party-appointed ad hoc adjudicators (i.e., of utilising private ad hoc judges) may lead to adjudicative bodies' norm application not maximising the achievement of the rules implied by SD within the limits of the applicable norms because: adjudicators may be driven by a re-appointment motivation (or 'judicial-survival motivation'); and even if they are solely driven by a political-ideology motivation, their political ideology may be in conflict with SD.

[103] Mann (2011), at 24 and 28; Eberhardt and Olivet (2012), at 43, "Over the last few years these multiple roles have become the subject of some debate ... [William W.] Park explained the conundrum: 'On occasion, an arbitrator must address, in the context of an arbitration, the very same issue presented to him or his law firm as advocate in another case, or to himself as scholar in academic writings. It is not difficult to see why such situations might compromise the integrity of the arbitral process'." (footnote omitted).

[104] See Section 12.2.1 for a description of this motivation.

The 'descriptive theory of investor-State arbitration' in Chapter 12 lends strong support to these concerns.

Third-party participation Even if adjudicators (and therewith adjudicative bodies) wanted to maximise the achievement of the rules implied by SD within the limits of the applicable norms, they may fail to do so because they might lack all the relevant information. This lack of relevant information is arguably partly due to the limited third-party participation resulting from the lack of transparency in contemporary IIL's dispute settlement (see Section 7.4.3).

7.4.2 Explicit consideration of all SD-relevant aspects

Section 7.2.2.1 showed that the vast majority of adjudicative bodies' decisions has not explicitly considered any SD-relevant aspects beyond foreign investors' material well-being, and Section 7.3.2 showed that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit. Everything that has been said in Section 7.4.1 applies here as well; hence, contemporary IIL's dispute-settlement design may be indirectly, at least partially, responsible for this SD deficit.

7.4.3 Transparency

Section 7.2.2.5 showed that contemporary IIL's dispute settlement has lacked transparency.

Contemporary IIL's dispute-settlement design is fully responsible for this SD deficit because, before the recent applicable-norm changes, it made publication of information subject to the consent of all the disputing parties.[105]

7.4.4 Deferential standard of review

Section 7.2.2.6 showed that adjudicative bodies have sometimes failed to apply a deferential standard of review, and Section 7.3.4 showed that adjudicative bodies'

[105] See Section 5.2.3 for a presentation of IIL's past and present norms relating to transparency.

norm application is, at least partially, responsible for this SD deficit. Everything that has been said in Section 7.4.1 applies here as well; hence, contemporary IIL's dispute-settlement design may be indirectly, at least partially, responsible for this SD deficit.

7.5 Source of deficits: IIL design – applicable norms

The design of contemporary IIL's applicable norms is partly responsible for contemporary IIL's SD deficits (Section 7.2). Measures for resolving these sources of SD deficits are advanced in Chapters 15 and 14.

7.5.1 International investment law's rules

Section 7.2.1 showed that contemporary IIL's rules have been in conflict with the rules implied by SD, Section 7.3.1 showed that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit, and 7.4.1 showed that the dispute-settlement design may be indirectly, at least partially, responsible for this SD deficit.

Although the applicable norms would have allowed to yield the rules implied by SD, contemporary IIL's applicable-norms design may, at least partially, be responsible for this SD deficit: if it cannot reasonably be expected that adjudicative bodies' norm application maximises the achievement of these SD implications within the limits of the applicable norms, then IIL's applicable-norms design did not sufficiently restrict adjudicative bodies' interpretational freedom and is therewith, at least partially, responsible for this SD deficit.

7.5.2 Explicit consideration of all SD-relevant aspects

Section 7.2.2.1 showed that the vast majority of adjudicative bodies' decisions has not explicitly considered any SD-relevant aspects beyond foreign investors' material well-being, Section 7.3.2 showed that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit, and 7.4.2 showed that the dispute-settlement design may be indirectly, at least partially, responsible for this SD deficit.

Most modern IIAs do not have 'sustainable development' as a purpose and some States may not have public international legal obligations in the form of human right and/or environmental-protection norms.[106] Contemporary IIL's applicable-norms design is thus also, at least partially, responsible for this SD deficit since it does not necessarily allow for the consideration of all SD-relevant aspects.

Furthermore, everything that has been said in Section 7.5.1 regarding the restriction of adjudicative bodies' interpretational freedom applies here as well.

7.5.3 Deferential standard of review

Section 7.2.2.6 showed that adjudicative bodies have sometimes failed to apply a deferential standard of review, Section 7.3.4 showed that adjudicative bodies' norm application is, at least partially, responsible for this SD deficit, and Section 7.4.4 showed that the dispute-settlement design may be indirectly, at least partially, responsible for this SD deficit. Everything that has been said in Section 7.5.1 regarding the restriction of adjudicative bodies' interpretational freedom applies here as well; hence, contemporary IIL's applicable-norms design may, at least partially, be responsible for this SD deficit.

7.5.4 Potential sustainable-development deficits

In the following, it is suggested that contemporary IIL exhibits possible SD deficits beyond those which contemporary IIL has already experienced and that contemporary IIL's applicable-norms design is, at least partially, responsible for these 'potential SD deficits'.

First, if contemporary IIL cannot satisfy the SD implications because contemporary IIL's applicable-norms design does not allow for it. This is the case when contemporary IIL's applicable norms make it impossible for adjudicative bodies to behave as is implied by SD (Sections 4.6.3 and 4.7.2) and/or make it impossible for adjudicative bodies to yield (through norm application) the rules implied by SD (Section 4.7.1). Chapters 14 and 15 show that contemporary IIL's applicable norms

[106] See Section 7.3.2.

make it sometimes impossible to satisfy the aforementioned SD implications and therewith show that contemporary IIL's applicable-norms design is responsible for the resulting potential SD deficits.

Second, if contemporary IIL does not satisfy the SD implications even though contemporary IIL's applicable-norms design would have allowed for it. This is the case when it cannot reasonably be expected that adjudicative bodies' norm application maximises the achievement of the SD implications within the limits of the applicable norms. Chapters 14 and 15 show that if one accepts this expectation, then contemporary IIL's applicable norms do not sufficiently restrict adjudicative bodies' interpretational freedom and therewith show that IIL's applicable-norms design is, at least partially, responsible for the resulting potential SD deficits.

7.6 Arguably-non-SD-relevant critiques of IIL

Several often-heard critiques of contemporary IIL are not justified from a SD perspective because these critiques focus on aspects of contemporary IIL that are not in conflict with SD.[107]

7.6.1 Norm application: consistency

Contemporary IIL has been criticised for its lack of consistency in norm application because of its adverse effect on predictability; this consistency critique tends to be undifferentiated by simply criticising the lack of consistency in the application of 'identically-worded or similarly-worded abstract standards' in the same context (i.e., for a similar dispute).[108]

[107] Actually observing that 'lack of coherence' (or 'lack of consistency') and 'fragmentation' (or 'parallel proceedings') have been the two main critiques expressed by IIL commentators: Spears (2010), at 1039.

[108] Echandi and Sauvé (2013), at 5, "[it is] one of the challenges more frequently raised by investment stakeholders". For a literature review, see e.g. Waibel et al. (2010b), at xxxiv et seqq.

For evidence of this lack of consistency in the application of 'identically-worded or similarly-worded abstract standards', see the case law for the expropriation clause (Section 5.6), FET clause (Section 5.7), NT clause (Section 5.8), MFN clause (Section 5.9), umbrella clause (Section 5.10), and NPM clause and

It is true that increased consistency in norm application is ceteris paribus SD furthering.[109] This statement, however, only holds if all other things are equal – which most notably requires that the applicable norms and the entities having created those norms are unchanged.

Consequently, this consistency critique is unconvincing for two reasons since these 'identically-worded or similarly-worded abstract standards' may be found in different IIAs (contemporary IIL is made up of over 3'000 IIAs; Section 5.1).[110] First, even if different IIAs produce identical applicable norms, these IIAs were created by different States, which may exhibit different motivations for concluding them and/or which may have faced different circumstances when concluding them;[111] insofar as a 'historical interpretation' should be considered,[112] such differences may yield different interpretations of identical applicable norms. Second, even if different IIAs contain some 'identically-worded or similarly-worded abstract standards', these IIAs may not produce identical applicable norms since they may, for instance, exhibit different preambles or different treaty structures; insofar as a 'teleological interpretation' and/or a 'systematical interpretation' should be considered,[113] such differences may yield different interpretations of these 'identically-worded or similarly-worded abstract standards'.

State defenses under CIL (Section 5.11).

[109] See Section 4.6.3.7.

[110] Sharing this view: Wälde and Weiler (2002), at 166, "one should never assume an automatic precedential effect on any individual tribunal award. Modern investment treaties have many commonalities and their text is mostly derived from previous treaties, but there are often substantial differences . . . One needs therefore to find a balance between common and emerging trends in interpretation, without failing to give sufficient counterweight to the peculiarities of the text, context and purpose of a particular treaty such as the NAFTA, ECT or bilateral treaties."; Bernasconi-Osterwalder et al. (2012), at 44, "it is not clear that even when two investment treaties contain identical provisions, the contracting parties meant the same thing by them"; UNCTAD (2014b), at 193, "absolute consistency and certainty would not be achievable in a legal system that consists of more than 3,000 legal texts; different outcomes may still be warranted by the language of specific applicable treaties".

[111] A non-unitary-state perspective, which considers country-internal dynamics, indeed suggests that States may have different motivations for concluding IIAs; see Chapters 8 and 9.

[112] Article 32 VCLT captures this 'historical interpretation' (Section 6.4).

[113] Article 31 VCLT captures the 'teleological interpretation' and 'systematical interpretation' (Section 6.3).

Further support for the rejection of this consistency critique is provided by the observation that States deliberately created a system that relies upon ad hoc adjudication without a de jure rule of precedent; that is, a system that is likely to yield heterogeneous decisions.[114]

7.6.2 IIL design: consistency

Contemporary IIL has been criticised for its lack of consistency in IIL design generally and in applicable norms specifically.[115]

This undifferentiated critique is unconvincing because it fails to recognise that different States may prefer different IIL designs.[116] Hence, whether consistency in IIL design is desirable involves a weighing (read: optimisation) of the benefits of increased consistency against the possible costs in terms of deviating from one's preferred IIL design.[117]

[114] Reed (2010), at 98, "It was States that developed this web of bilateral and multilateral investment treaties, knowing full well that they could face arbitration with private investors (represented by determined lawyers) on a purely ad hoc basis. So, one cannot assume that States cared (or care) about predictability per se. If they did, they would have considered bilateral 'mini' claims tribunals or standing tribunals, which they did not."; Dolzer (2013), at 405, "[a] concern for consistency in arbitral jurisprudence was deliberately not built into the *modus operandi* of ICSID either when it was created in 1965 or as it exists today ... if jurisprudential homogeneity had been a major concern, the states would not have aimed at a scheme that requires, in principle, that each case is decided by three different arbitrators, with no formal obligation based on the principle of precedent".

[115] Instead of several, Franck (2005), at 1584, "Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules"; Dolzer and Schreuer (2012), at 33, "A coherent case law strengthens the predictability of decisions and enhances their authority."

[116] 'Different States' goes beyond differences in factual circumstances such as being a 'capital-importing State' or a 'capital-exporting State'. A non-unitary-state perspective, which considers country-internal dynamics, suggests that States may be driven by different motivations (irrespective of the factual circumstances); see Chapters 8 and 9.

[117] Sharing this view: Bjorklund (2013b), at 175, "whether uniformity is desirable depends largely on whether one agrees with the rule that emerges"; Reinisch (2013), at 237, "Clearly, states may have different preferences as to what they want to see included as protected investments, how far they are ready to define indirect expropriation, what meaning and scope they wish to give to a most-favoured nation (MFN) clause, or what level of protection they deem appropriate under fair and equitable treatment. Here,

7.6.3 IIL design: parallel proceedings

The concept of 'parallel proceedings' (also, and less confusingly, referred to as 'multiple proceedings') describes the situation wherein multiple adjudicative bodies (simultaneously or successively) decide disputes which exhibit identity of the parties (same claimant(s) and respondent(s)) and identity of the petition (same sought relief for same respondent behaviour).

Contemporary IIL has sometimes been criticised because it enhances the possibility of parallel proceedings (by increasing the number of adjudicative bodies with overlapping jurisdictions).[118] Since contemporary IIL, amongst others, enhances the possibility of parallel PIL-based proceedings (by increasing the number of international adjudicative bodies with overlapping jurisdictions), this critique can be partly subsumed under the 'fragmentation critique of PIL'.[119]

7.6.3.1 Scenarios

This critique has historically focused on the situation wherein a foreign investor brings an IIL-based claim (before an international adjudicative body) against a State as well as a national-law-based claim (before a national adjudicative body) against the same State (i.e., different causes of action) for its treatment of the foreign investor's investment in that State's territory; clearly, this situation amounts to parallel proceedings since all claimants are de jure the same and the respondent is the same.[120] A so-called 'fork-in-the-road clause' has (unsuccessfully) been relied upon to preclude such parallel proceedings.[121]

More recently, this critique has tended to focus on the situation wherein two

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the appeal of greater coherence is much less evident."

[118] Cosbey et al. (2004), at 7; Yannaca-Small (2008), at 1009, "The multiplication of investment agreements ... has raised the risk of multiple ... awards, as the same dispute can lead to awards under different treaty regimes, as well as under different contracts"; Subedi (2012), at 173; Kaufmann-Kohler (2014), at 3, "The public discourse about investment arbitration has not yet focused on another issue that creates increasing difficulties: multiple proceedings."; Alschner (2014), at 288 et seqq.

[119] See Section 7.6.4 for a brief description of the fragmentation critique of PIL.

[120] Instead of many, Schreuer et al. (2009), at 379 et seq.

[121] See Section 5.4.3.

foreign investors at different positions in the ownership chain (i.e., one investor is an investor in the other one) rely on different IIAs (i.e., different causes of action), because they have different nationalities, to each bring an IIL-based claim against a State for its treatment of their (direct or indirect) investment in that State's territory;[122] this situation amounts to parallel (IIL-based) proceedings since, although these claimants are not de jure the same, they are de facto the same since they focus on the same investment and the respondent is the same.[123] The most frequently cited cases in this regard are *Lauder v Czech Republic* and *CME v Czech Republic*: Lauder (a US national) had invested in the Czech Republic through CME (a Dutch company); Lauder claimed that a State measure violated IIL with respect to its (indirect) investment in the Czech Republic and CME claimed the same with respect to the same investment in the Czech Republic.[124]

This critique has also observed the existence of overlapping IIAs, a situation that has become ever more frequent in recent years,[125] which allows a foreign investor to rely on different IIAs (i.e., different causes of action) and therewith to launch multiple IIL-based claims against a State for its treatment of the foreign investor's investment in that State's territory; again, this situation clearly amounts to parallel (IIL-based) proceedings.[126]

This critique has also considered the existence of arbitration clauses in investor-State contracts, which allows a foreign investor to rely on the investor-State contract and on IIL (i.e., different causes of action) to launch multiple claims against a State for its treatment of the foreign investor's investment in that State's territory; again, this situation clearly amounts to parallel proceedings.[127]

[122] Sections 5.2.2.1 and 5.4.1.2 showed that 'indirect investments' satisfy the jurisdictional condition of ratione materiae.

[123] Reinisch (2007), at 212 et seq.; Yannaca-Small (2008), at 1010 et seqq; Subedi (2012), at 173.

[124] *Lauder v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 3 September 2001 (United States–Czech Republic BIT); *CME v Czech Republic*, UNCITRAL ad hoc Tribunal, Final Award, 14 March 2003 (Netherlands–Czech Republic BIT).

[125] See Section 5.1 for data on this rise in overlapping treaties.

[126] Alschner (2014), at 275, "Where overlapping treaties exist, an investor can bring the same claim to international arbitration under a BIT and, if unsuccessful, try again under an overlapping regional treaty.", and at 288 et seqq.

[127] Yannaca-Small (2008), at 1012; Subedi (2012), at 173, "The possibility of both contract-based and

Finally, this critique has also observed the existence of overlapping jurisdictions with non-IIL international adjudicative bodies which may allow a foreign investor to additionally rely on non-IIL (i.e., different causes of action) and therewith to launch multiple claims against a State for its treatment of the foreign investor's investment in that State's territory; again, this situation clearly amounts to parallel proceedings.[128]

7.6.3.2 Rationale underlying the rejection of this critique

Although sustainable development implies that (simultaneously or successively) parallel proceedings must be forbidden insofar as they exhibit identity of the cause of action (same legal grounds),[129] it implies no such thing in the absence of such an identity.

This conclusion follows from observing that there is no impartial and rational reason for always precluding parallel proceedings based on multiple causes of action. Think, for instance, of a State that has already granted all of its foreign investors some rights under IIL and created an adjudicative body to apply those rights; this State may now wish to grant additional rights (i.e., different cause of action) to some of its foreign investors and may, in this endeavour, rationally create another adjudicative body with overlapping jurisdiction (since it also deals with matters relating to foreign investors) because it wants those additional rights to be applied by an adjudicative body specialising therein.

An argument against parallel proceedings based on multiple causes of action is the resulting difficulty of coordination between adjudicative bodies if the sought relief is monetary compensation for the damages to the investment: it may be difficult to ensure that the various adjudicative bodies coordinate so that the total compensation (i.e., the sum of all adjudicative bodies' compensation requirements) is appro-

treaty-based arbitration may give rise to the multiplication of proceedings".

[128] Yannaca-Small (2008), at 1012 et seq., "For instance, a case of indirect expropriation of property belonging to a foreign investor might give rise to ... [adjudication under IIL] (based on a BIT, an investment contract, or another investment agreement), under universal and human rights procedures such as the HRC and the ECHR (under human rights treaties) and inter-state adjudication, for example the ICJ." See more generally Section 7.6.4.

[129] Specifically, SD implies the concepts of 'res judicata' and 'lis alibi pendens'; see Section 4.6.3.8.

priate.[130]

It has been held that parallel proceedings based on multiple causes of action must be avoided because they entail the risk of conflicting decisions.[131] This position is not convincing because different causes of action cannot be rationally expected to always yield identical decisions.

It has been held that parallel proceedings based on multiple causes of action must be avoided because they waste resources (i.e., judicial economy).[132] This position is not convincing because different causes of action are no duplications and cannot therefore a priori be held to waste resources.

7.6.4 Addendum: fragmentation critique of PIL

Over the last decades, PIL has witnessed an impressive rise in the number of international adjudicative bodies; and, with that, a large increase in international adjudicative bodies with, at least partially, overlapping jurisdictions.[133] The cause for these overlapping jurisdictions is arguably the perception that specialised adjudicative bodies are necessary to deal with certain matters.[134] Arguably the most notable

[130] Schreuer et al. (2009), at 379 et seq., "[Parallel proceedings] require coordination and measures to avoid double-dipping."

[131] Yannaca-Small (2008), at 1009; Schreuer et al. (2009), at 380, "Even worse is the prospect of conflicting decisions [in parallel proceedings]."

[132] Yannaca-Small (2008), at 1014; Schreuer et al. (2009), at 379.

[133] Regarding the rise in the number of international adjudicative bodies: think, International Tribunal for the Law of The Sea, International Criminal Court, International Criminal Tribunal for the Former Yugoslavia, WTO dispute settlement, and international-investment arbitral tribunals; Romano (1999), at 709, "When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age."

Regarding partially overlapping jurisdictions: instead of several, see Born (2012), at 784, footnote 11, "For example, interstate boundary disputes can be submitted, variously, to the ICJ, to ad hoc interstate or commercial arbitral tribunals, to regional courts, to conciliation mechanisms, and to national courts ... Similarly, expropriation claims by or on behalf of foreign investors can be submitted, again variously, to the ICJ, to international commercial arbitration, to investment arbitration, to claims-settlement tribunals, or to national courts."

[134] See Pellet (2011), at para 68, "rightly or wrongly, the ICJ is seen as badly equipped to deal with technical matters like the law of investments, trade law, and environmental law, and this justifies the booming

example of a situation wherein these overlapping jurisdictions became practically relevant is the so-called 'Canada – United States softwood lumber dispute'.[135]

The concept of *fragmentation* captures the fact that one's legal rights and obligations depend on whom (i.e., which adjudicative body) one asks; fragmentation hence necessitates, at least partially, overlapping jurisdictions.[136] It is important to observe that any legal regime is to some degree fragmented so that the focus should be on the degree of fragmentation rather than, as is usually the case, on whether there is fragmentation.[137]

The 'fragmentation critique of PIL' thus essentially attacks PIL for the possibility that its adjudicative bodies differently decide disputes which exhibit identity of the parties (same claimant(s) and respondent(s)) and identity of the petition (same sought relief for same respondent behaviour).

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of the ICSID and 'ICSID-like' arbitrations, the institution of the dispute settlement mechanism within the WTO, and the recurrent proposals for the creation of an International Court for the Environment".

[135] "Consider the softwood lumber dispute between the United States and Canada. Begun prior to NAFTA's entry in force, it was heard by eleven NAFTA Chapter 19 panels, four NAFTA Chapter 11 panels [read: adjudication under IIL], and was featured in six WTO disputes, as well as in several U.S. Court of International Trade and federal court decisions" (Raustiala, 2013, at 297); for a more detailed treatment of these cases, see Dunoff (2007).

[136] "[Fragmentation] exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule" (ILC, 2006, at para 24) so that "[a]nswers to legal questions become dependent on whom you ask" (ILC, 2006, at para 483). In so doing, "[this] report [i.e., ILC (2006)] identifies conflicts of norms as one source of the fragmentation of international law" (Kammerhofer, 2011, at 83).

Observe that this definition is narrower than the one adopted, for instance, in Pauwelyn (2006), at para 4, who simply defines it as the absence of unity in treaty making, that is, as the proliferation of treaties: "functional or issue-area fragmentation [e.g., human rights law, international economic law, environmental law] . . . and geographical or regional fragmentation [e.g., ACHR, ECHR, NAFTA]".

[137] Koskenniemi (2011), at 82, "in fact, the law is always already full of conflicts . . . We do not always feel these contradictions, however, and whether or not we do depends on how deeply we ourselves believe that the law fairly represents a system of social relationships – compromises between social values and distribution of public goods between different groups – that we find, by and large, to be acceptable."

Part III

Practical likelihood of SD alignment

Overview

Chapter 7 suggests that contemporary IIL is not aligned with SD. This Part answers the second research question: whether alignment of IIL with SD is likely in practice (Section 1.1). Since the central source of contemporary IIL are treaties,[1] it specifically focuses on whether aligning IIAs with SD is likely in practice.

To answer this question, this Part starts by advancing a descriptive (positive) theory of States' IIA ratifications (*IIA ratifications as explanandum*); that is, it advances a theory of the causal factors underlying a State's decision to ratify an IIA. More specifically, it is argued that such a descriptive theory should take a non-unitary-state perspective – namely, that it should explicitly build upon state-internal dynamics. Chapter 8 constructs such a 'non-unitary-state theory of state decision-making'; and Chapter 9 then applies this theory to IIA ratifications to construct a 'non-unitary-state theory of IIA ratifications'.

Finally, Chapter 10 utilises this 'non-unitary-state theory of IIA ratifications' to study the conditions under which SD alignment is likely in practice. After identifying these conditions, the Chapter concludes with a set of measures (policy prescriptions) which help increase the likelihood of those 'conditions' being satisfied in practice.

[1] See Section 5.1.

Chapter 8

State decision-making

This Chapter presents a descriptive (causal) theory of state decision-making; namely, it presents a theory wherein the state's behaviour is the variable to be explained (*state as explanandum*). More precisely, it presents a theory that builds upon state-internal factors to describe the decision-making of states – it therewith constructs a *non-unitary-state theory*. This non-unitary-state theory is constructed by relying upon the conceptual framework of economics. To start off, a couple of definitions are in order.

The concept of *state* describes any entity that has de facto sovereign power over some territory. The decision-making of a state is therefore de facto enforceable (or 'de facto binding') on all residents of the said territory. The concept of *state decision-making* can consequently be equated with 'centralised decision-making' or 'policy-making'; and, as such, captures formal-institution-making (including 'formal-constitution-making', '(non-customary-)law-making', 'regulation-making') as well as informal state behaviour (e.g., the act of going to war).

The concept of *leader* (or 'state manager') describes the person or the group of persons whose behaviours amount to state decision-making.[1] A leader may, most

[1] Bueno de Mesquita (2006), at 838, "leaders—not nations—make policy decisions".

A leader may amount to a single individual (e.g., dictator, monarch, president) or it may amount to a set of individuals (e.g., a parliament); see also Bueno de Mesquita et al. (2003), at 38.

notably, amount to a dictator, a (public) judge, a monarch, or a politician (legislator or president). Although this should be clear by now, a territory may exhibit multiple leaders: depending on the type of decision-making, a given territory's leader may vary; for instance, a territory may have an executive, judicial, and legislative branch (and each sometimes amounts to the leader).

The remainder of this Chapter is organised as follows. Section 8.1 presents the core of the non-unitary-state theory of state decision-making; the following Sections then present in more detail the central elements of this theory. Section 8.2 studies the realism of the assumption regarding the leader's motivation. Section 8.3 discusses the empirical evidence regarding the influence of internal factors on state decision-making. Section 8.4 shows that contemporary theories of the organisability of interest groups are not satisfactory and that 'organisability' hence amounts to an empirical question. Section 8.5 discusses one of the key internal factors: the masses. And Section 8.6 considers how external factors may influence state decision-making.

Observe finally that this Chapter's theory applies to state decision-making in both internal and external relations. As such, this Chapter's theory captures state decision-making occurring in the context of *inter-state relations* (more commonly referred to as 'international relations') and hence belongs to the class of theories known as 'liberal theories of international relations'.[2]

[2]We can distinguish between four dominant conceptual frameworks within the study of international relations.

The perspective known as *realism* holds: (i) that the fundamental actors in between-State relations are States themselves because they share some common identity and thus exhibit some form of within-group solidarity (nationalism); (ii) that these States exhibit fixed self-interested preferences (e.g., a survival preference), and that these preferences materialise into a desire for power (i.e., they lead to so-called 'power politics'); and (iii) that between-State relations are characterised by anarchy because they lack a centralised enforcement mechanism. For an extensive treatment of realism, see Wohlforth (2008); for brief overviews, see e.g. Snidal (1997), at 482; and Slaughter (2011), at paras 2 et seqq.

The perspective which may be referred to as *institutionalism* holds: (i) that, like realism, States amount to the fundamental actors in between-State relations; (ii) that, like realism, States exhibit fixed self-interested preferences which materialise into a desire for power; and (iii) that there may exist institutions in between-State relations – namely, that between-State relations may, contrary to realism which views them as anarchic, be constrained (i.e., causally influenced) by some set of rules. For an extensive treatment of realism, see Stein (2008). Note that 'regime theory' is nowadays generally referred to as

8.1 Non-unitary-state theory: core structure

> Every leader answers to some group that retains her in power
>
> — Bruce Bueno de Mesquita, Alastair Smith, Randolph M. Siverson, and James D. Morrow[3]

> To understand politics properly, we must modify one assumption in particular: we must stop thinking that leaders can lead unilaterally.
>
> — Bruce Bueno de Mesquita and Alastair Smith[4]

This Section presents the core structure of this Chapter's non-unitary-state theory of state decision-making.

8.1.1 Primary motivation: political survival

The non-unitary-state theory developed in this Chapter fundamentally builds upon the so-called 'selectorate theory'.[5]

'institutionalism' since a 'regime' is an institution (Slaughter, Tulumello, and Wood, 1998, at 368).

The perspective known as *liberalism* holds: that, contrary to realism and institutionalism, intra-State elements amount to the fundamental actors in between-State relations – that is, state-internal dynamics are the central causal factors of State behaviour; it follows therefrom that a State's preferences are derived from the preferences of some set of intra-State decision-makers (States therefore need not exhibit self-interested preferences). For an extensive treatment of realism, see Moravcsik (2008); for seminal works, see, amongst others, Waltz (1959)'s 'first image' and 'second image', Putnam (1988), and Moravcsik (1997); see also Bueno de Mesquita (2014).

The perspective known as *constructivism* holds: (i) that, contrary to realism and institutionalism, State preferences are endogenous; and (ii) that they may therefore be influenced by the inter-State realm (read: by the international sphere). For an extensive treatment of constructivism, see Hurd (2008).

We may view liberalism and constructivism as conceptual perspectives that make us think about the origins of State preferences; see e.g. Guzman (2008), at 21, and Bueno de Mesquita (2014), at 25.

[3] Bueno de Mesquita et al. (2003), at 7.

[4] Bueno de Mesquita and Smith (2011), at 1.

[5] The core structure of the so-called *selectorate theory* was developed in Bueno de Mesquita et al. (2002, 2003); in their own words, they provide "a simple, skeletal theory—one without bureaucrats, without subunits of the polity, without explicit political parties or ideology—in the hope that others will

The 'selectorate view of politics' starts from the observation that every leader requires the *political support* of some group of people in order to stay a leader in some given territory.[6] Based thereupon, it argues that leaders should be viewed as primarily motivated by *political survival*.[7] The realism of this political-survival assumption is discussed in Section 8.2.1.

It follows that a leader will primarily behave so as to ensure the political support of some group of people.[8] And it hence follows that state decision-making is primarily driven by political support.[9]

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find it of sufficient interest to participate in efforts to elaborate and build on it" (Bueno de Mesquita et al., 2003, at 34). The theory seeks "to unify the study of the differences within and across the traditional [political] regime classifications of democracy, autocracy and monarchy" (Bueno de Mesquita et al., 2002, at 560).

[6]Bueno de Mesquita et al. (2003), at 28 et seq.

[7]Bueno de Mesquita et al. (2003), at 9.

[8]Bueno de Mesquita et al. (2003), at 14, "support is only forthcoming if a leader provides ... more benefits than they might expect to receive under alternative leadership or government", and at 58, "leaders maintain themselves in office by rasing taxes and then spending some portion of government revenue on public and on private goods". These goods may amount to private contracts for services or products, inactivity in case of monopolies/oligopolies, tariff and tax advantages, or subsidies; see e.g. Harrington (1990) and Mitnick (2011).

[9]The modern focus on political support to describe state decision-making has its source in the American economist Anthony Downs' seminal book *An Economic Theory of Democracy* (Downs, 1957); at 52, "[leaders adopt] those acts of spending which gain the most votes by means of those acts of financing which lose the fewest votes". The so-called 'Stigler-Peltzman model of regulation' (Peltzman, 1976; Stigler, 1961), for a description of that model see e.g. Becker (1976b), then extended the sources of political support in democracy beyond votes; their political-support approach has come to be known as the 'political-support-function approach' in the political-science literature because it explicitly states a functional form for the political support.

The political-support-function approach has especially been developed in the context of trade policies by, most notably, Hillman (1982, 1989), van Long and Vousden (1991), and Hillman and Moser (1995). It was popularised by Grossman and Helpman (1994, 1995) who explicitly modelled the strategic interactions between those providing political support and the leader using the game-theoretic framework known as 'common-agency game' (Bernheim and Whinston, 1986a,b). The common-agency framework was later extended in Mitra (1999) by endogenising the formation of organised interest groups.

The political-support approach has also been developed in the context of intellectual-property policies (Elkin-Koren and Salzberger, 2013, at 236 et seqq.); as well as in the context of migration policies (Trachtman, 2009, 2014).

8.1.1.1 Selectorate (or 'potential political influencers')

The concept of *selectorate*, S, describes the set of (natural and juridical) persons which have the power to influence the selection of the leader (and therewith influence the current leader's political survival);[10] put differently, it describes the set of individuals which can provide political support.[11] Political support includes, amongst others, voting, political contributions, peaceful demonstrations, and violent protests (brute force).[12]

Selectors are assumed to be only subsidiarily motivated by their relative affinity[13] for a potential leader when making their political-support decision; that is, they are assumed to be primarily motivated by the *assumed effects of the policies* rather than by the individual amounting to the leader.

Clearly, the selectorate amounts to a heterogeneous group.[14] Most importantly for our purposes, selectors vary in terms of the strength and type(s) of their political support.[15] Indeed, not all selectors may have the capacity to vote in democracies (think of firms and foreign residents) and not all selectors may have the capacity to make political contributions, provide military support, engage in street protests, and/or strike.

[10] The concept of 'selectorate' was introduced in Shirk (1993).

[11] By not restricting the selectorate to residents, the approach adopted herein implicitly allows for 'foreign selectors' to influence state decision-making, either directly or indirectly through their own home state (by directly influencing the decision-making of their home state).

[12] Types of political support are discussed in detail in Section 8.3.1.

[13] "The factors that influence affinity may be clustered, as in ethnic or religious preferences, or they may be tied to tastes about personality, ideology, political-party identification, experience, family, ties, charisma, or what have you." (Bueno de Mesquita et al., 2003, at 61).

[14] Note that in the selectorate theory's original formulation, all selectors were assumed to be equal in terms of political support; see, e.g., Bueno de Mesquita et al. (2003), at 77.

[15] An illustrative example regarding variations in the strength of political support is provided by twelve-century England where barons could provide different political support than normal people: "To be king required support from ... a majority of knights fees they [the barons] controlled ... Knights fees provide a useful albeit imperfect index of the wealth of each baron (or baroness) and of his or her ability to muster military might in support of his or her candidate for the crown ... The winning coalition, then, consisted of a subset of the barons such that the subset controlled a sufficient number of knights. Control over knights, however, was not evenly distributed." (Bueno de Mesquita et al., 2003, at 52).

It is important to realise that the selectorate is generally not defined by the state's *formal/written political institutions* (e.g., written constitution).[16] Specifically, it is only defined thereby if there is no threat of a revolution or of a foreign invasion.[17]

Finally, the concept of *elite* describes those individual selectors which have the capacity to provide a lot of political support (and therewith have the potential to substantially influence state decision-making).[18] Under this definition, elites need not be closely connected to one another; that is, this definition does not presume the existence of an elite network (or 'power elite') producing a de facto ruling class.[19]

8.1.1.2 Leader's winning coalition (or 'relevant political influencers')

The concept of *winning coalition*, W, describes a subset of the selectorate. More precisely, it describes the minimal-political-support subset whose political support

[16]Note that in the selectorate theory's original formulation, the selectorate readily derives from the formal/written political institutions: Bueno de Mesquita et al. (2003), at 42 et seqq., "members of the selectorate (denoted S) have a government-granted [i.e., institutionally-granted] say in the selection of leaders ... We define the selectorate as the set of people whose endowments include the qualities or characteristics institutionally required to choose the government's leadership ... One function of political rules and institutions is to distinguish the subset of residents who possess the characteristics required for membership in the selectorate ... Virtually all societies throughout human history have sorted people into and out of the selectorate".

[17]Bueno de Mesquita and Smith (2009), at 171, "Threats to political survival can arise from three distinct sources: rivals within the current political order; domestic mass movements that seek to revolutionize the extant political system by replacing it with new institutions of governance [revolutionary threats]; and foreign enemies who seek to take control of national resources or policies [foreign invasions]."

[18]This work thus follows: Higley (2010), 163, "Elites may be defined as persons who ... are able to affect political outcomes regularly and substantially" (emphasis omitted); Burton and Higley (2001), at 182, "Political elites are the several thousand persons who hold top positions in large or otherwise powerful organizations and movements and who participate in or directly influence national political decision-making."; Burton, Gunther, and Higley (1992), at 8, "[elites] are made up of people who may hold widely varying attitudes towards the existing social, economic, and political order".

[19]This work does thus not follow 'classical elite theory' which always assumes the existence of an elite network. Classical elite theory is associated with Mosca (1936 [1896]), Pareto (1968 [1901]) who held that "History is a graveyard or aristocracies." (Pareto, 1935 [1916], at 1430, paragraph 2053), Michels (1915 [1911]) who introduced the concept of 'iron law of oligarchy', as well as Mills (1956) who introduced the term 'power elite'; they viewed elites as socially homogeneous arguing that they were mainly recruited from the upper class of society (Blondel and Müller-Rommel, 2007, at 820 et seq.).

is sufficient for a given leader's political survival (whoever the challenger is).[20] Because selectors vary in terms of their strength and type(s) of political support, the winning coalition typically amounts to a set of conditions for each type of political support, where the conditions specify a lower bound on political support.[21] In a utopian stable democracy wherein 'voting' is the only type of political support, the winning coalition would simply amount to the majority of the set of voters. In a more realistic stable democracy, the winning coalition typically also requires a certain amount of campaign contributions (this type of political support is necessary in order to obtain the majority of the set of voters).

The concept of the *leader's winning coalition*, W_L, describes the set of selectors whose political support the leader wants; namely, the selectors to whom the leader attempts to provide a higher level of expected utility than they would get if the challenger were to depose the leader.

Finally, observe that if the winning coalition of any potential leader always includes a specific selector or small set of specific selectors, then state decision-making may be said to be 'captured'.[22] Note that the empirical support for capture in democ-

[20]Note that the definition adopted in this work is different from the one adopted in the selectorate theory's original formulation (Bueno de Mesquita et al., 2003, at 51) because this work allows for heterogeneity amongst selectors (see footnote 14 and the text surrounding it). The definition adopted herein reduces to the one adopted in the original formulation when heterogeneities do not exist.

[21]When there exists a threat of a revolution, the condition for political support in the form of brute force has been called a 'revolution constraint' (Acemoglu and Robinson, 2006, at 120 et seq.).

[22]The concept of *capture* describes a situation wherein some interest group has a *persistent control* over state decision-making: Carpenter and Moss (2014), at 13 et seq.,

> Many of capture theory's problems boil down to the lack of a clear definition of the central concept ... our definition is as follows: *Regulatory capture* is the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself ... the fact that an industry is well served by regulation is deeply insufficient for a judgment of capture. Both intent and action on the part of the regulated industry are required ... one could replace the word *industry* with *interest* in the definition, reflecting the fact that other regulated actors, such as labor unions, have the potential to twist regulation

See also: Mitnick (2011), at 35, "Capture ... reflects a condition that goes beyond incidental influences ... Capture presupposes control ... [which is] relational and stable" (emphasis omitted); Yackee (2014), at

racies is quite weak.[23]

8.1.2 Subsidiary motivations[24]

A leader's subsidiary motivations are assumed to only dictate state decision-making if political survival is not affected; that is, subsidiary motivations determine the choice amongst several available options which all yield the same (or similar) probabilities of political survival. Therefore, although leaders are assumed homogeneous with respect to their primary motivation, the theory sets no restrictions on subsidiary motivations. These subsidiary motivations can be mapped onto a line going from a self-interested motivation (private-interest theories) to a political-ideology motivation (public-interest theories).[25]

If a leader exhibits a self-interested subsidiary motivation, then (natural and juridical) persons may also influence state decision-making by providing (non-political) support in the form of private benefits (read: bribery) through immediate material benefits or the promise of future material benefits (revolving doors);[26] as such, even non-selectors may influence state decision-making. Clearly, persons vary in terms of the strength and type(s) of their non-political support.

8.1.3 Incomplete information[27]

The leader may not be aware of all the consequences of some of its policies. If so, then (natural and juridical) persons may influence state decision-making by providing information to the leader;[28] as such, even non-selectors may influence state

296, "Agency capture is the control of agency policy decision making by a subpopulation of individuals or organizations outside of the agency."

[23] For a review, see Bó (2006), at 220; seminally, see Becker (1986).

[24] Note that the selectorate theory in its original formulation (Bueno de Mesquita et al., 2003) does not consider subsidiary motivations.

[25] Subsidiary motivations are discussed in Section 8.2.2

[26] Types of non-political support are discussed in detail in Section 8.3.2.

[27] Note that the selectorate theory in its original formulation (Bueno de Mesquita et al., 2003) does not consider incomplete information.

[28] Types of information provision are discussed in detail in Section 8.3.3.

decision-making. Clearly, persons vary in terms of the strength and type(s) of their information provision.

8.1.4 Causal factors: relevant influencers

The previous analysis suggests that (natural and juridical) persons may influence state decision-making by providing political support, non-political support, and/or information.[29]

Potential influencer Even where a person fundamentally has the capacity to influence state decision-making, if that person views itself as part of a larger group of persons which are similarly affected by state decision-making – namely, if it views itself as part of an *interest group* – then that group must overcome a collective-action problem for any of its members to actually influence state decision-making.[30] An interest group which is able to overcome this problem is called an organised interest group. There currently exists no satisfactory theory to explain/predict organisability – whether some interest group is organised therefore requires one to consider historical data and make an inference thereupon (i.e., organisability is an empirical question).[31]

Because of this lack of satisfactory theory, a person which fundamentally has the capacity to provide some form of support is hereinafter referred to as a *potential influencer* rather than as an 'influencer'. Amongst others, it includes the the of 'potential political influencers' (Section 8.1.1.1).

Insofar as not all interest groups are able to organise, some persons will enjoy a disproportionate influence on state decision-making, leading to a so-called 'mobilisation bias' in state decision-making.[32]

[29] This approach is broader than the one adopted in the selectorate theory's original formulation which focuses on influencers providing political support (i.e., which restricts its analysis to selectors).

[30] One may, for instance, primarily view themselves as a consumer, capital owner (someone whose income mainly takes the form of profits, interests, and/or rents), or labourer (someone whose income mainly takes the form of wages).

[31] See Section 8.4 for a more extensive discussion of the issue of 'organisability'.

[32] McCubbins, Noll, and Weingast (2007), at 1670, "Mobilization bias refers to systematic over-

Finally, remark that state decision-making usually creates both winners and losers since individuals (and 'interest groups') tend to have *conflicting preferences* over policies.[33]

Potentially relevant influencer The well-beings of different individuals (or 'interest groups') are, however, not only differently affected by state decision-making, they tend also to be affected with varying intensity. Under the reasonable assumption that substantially-affected individuals (or 'interest groups') who are aware that they are substantially affected are likely to react most strongly (i.e., likely to provide most support to a potential leader), an instrumentally-rational leader will primarily aim at satisfying the preferences of these substantially-affected-and-aware potential influencers when making policies so as to 'ensure' their future support in exchange.

A substantially-affected-and-aware potential influencer is hereinafter referred to as *potentially relevant influencer*. Importantly, the set of potentially relevant influencers may vary (i) over time as well as (ii) across policies.[34]

Relevant influencer A potentially relevant influencer which can reasonably be thought of as actually substantially influencing state decision-making is hereinafter referred to as *relevant influencer*. Amongst others, it includes the set of 'relevant political influencers' (Section 8.1.1.2).

8.1.5 Applying the theory

This Section concisely summarises how this work's non-unitary-state theory is applied to some specific issues.

representation of some preferences relative to others in political decision-making".

[33]This is in line with Acemoglu and Robinson (2006), at 20, "politics is inherently conflictual ... [individuals] have conflicting preferences over policies, and every policy choice creates *winners* and *losers*"; Higley (2010), at 162, "a fundamental and universal fact of life ... [is] the absence in any large collectivity of a robust common interest ... The satisfactions some of ... [its] members seek are only partly compatible with the satisfactions sought by other members."

[34]For instance, the set of potentially relevant influencers may not be the same for trade policies than say for foreign-investment-protection policies because different individuals (or 'interest groups') may be substantially affected by those policies.

Step 1: Think in terms of 'interest groups' Since virtually all state decision-making affects different persons similarly, a researcher can without loss of generally think in terms of interest groups rather than in terms of individual influencers.[35] Doing so substantially increases the tractability of the theory.

Step 2: Identify 'potentially relevant influencers' A researcher shall theoretically (and perhaps based on existing empirical studies) identify the set of 'potentially relevant influencers' for the specific issue under investigation. In other words, he or she shall identify the set of interest groups whose members: (i) have fundamentally the capacity to provide some form of support; (ii) are substantially-affected by policies in the context of the specific issue; and (iii) are aware of being substantially effected thereby.

This focus allows reducing the real-world complexity to a small finite set of potential causal factors – in so doing, it guarantees tractability and parsimony of the theory.

Step 3: Empirically identify 'relevant influencers' A researcher must finally study real world data in order to identify the set of 'relevant influencers' (read: the causal factors) amongst the set of 'potentially relevant influencers'.

Word of caution It is important to realise that the extended selectorate theory may not tell us the exact form of state decision-making (i.e., which exact policy will be adopted), but it certainly provides us with relative dynamics: if some given interest group becomes a relevant influencer, then state decision-making can be expected to shift to some extent towards that interest group's preference (i.e., towards its preferred policy).

[35] In the special case wherein a single person is differently affected than everybody else, that person's interest group would simply be composed of one person (itself).

8.2 Leaders' motivation(s)

This Section discusses the realism of the key assumption underlying this work's theory: that state decision-making is best explained by viewing leaders as primarily motivated by political survival. It furthermore discusses subsidiary motivations in some detail.

8.2.1 Overarching motivation: Political survival

> When [in the eighteenth century] the English philanthropist Robert Owen tried to convince the Austrian government to adopt some social reforms in order to ameliorate the conditions of poor people, one of Metternich's assistants . . . replied, 'We do not desire at all that the great masses shall become well off and independent . . . How could we otherwise rule them?'
>
> — Daron Acemoglu and James A. Robinson[36]

It is reasonable to view leaders as primarily motivated by political survival because the process underlying the road to become and to stay a leader amounts to an evolutionary-selection mechanism, selecting at each step on the road (e.g., lower-level elections or intra-party elections in a democracy) the one (consciously or unconsciously) maximising political support.[37] This even holds for individuals who

[36] Acemoglu and Robinson (2012), at 224 et seq.

[37] Bueno de Mesquita et al. (2003), at 23, "We have no doubt that many people value other things above political survival. It is just that such people are not likely to find themselves in high office and so need not overly occupy our interest."

History suggests that this is also true for leaders in autocracies and monarchies; for a list of examples, see Bueno de Mesquita et al. (2003), at 16 et seq., "[take for instance] the Safavid dynasty in Persia (1502–1736) it was a virtual custom for the successor to the throne to engage in the wholesale execution of brothers, sons, and others nobles who might represent rivals for the crown", and at 28 et seq., "Hitler was well aware of this fact. Members of the German army, for instance, plotted against Hitler in 1938 and attempted to assassinate him in 1942 and 1944. Following the 1944 attempt, Hitler ordered the deaths of thousands of military and intelligence officers, including Erwin Rommel, one of his best and most popular generals."

have become leaders by chance (e.g., hereditary succession) since these individuals will sooner or later face challengers, whom they will not overcome unless they behave (consciously or unconsciously) so as to maximise political support.

8.2.2 Subsidiary motivations

Although it is reasonable to view leaders as primarily motivated by political survival, this does not preclude other motivations to subsidiarily be relevant as well – namely, insofar as the probability of political survival does not suffer.[38]

Discussing subsidiary motivations essentially amounts to studying a given leader's *deeper underlying motivations*. We can broadly distinguish between two types of motivations: self-interested motivation (private-interest theory) and political-ideology motivations (public-interest theory).

8.2.2.1 Private-interest theory[39]

Private-interest theory holds that leaders are really motivated by *self-interest*, be it in the form of material self-interest, survival self-interest, power, or status.

We cannot exclude the possibility of leaders being motivated by such motivations.[40] The existence of *corruption* indeed suggests that there are leaders out there

[38] Bueno de Mesquita et al. (2003), at 23, "We treat political survival as a necessary, but not a sufficient, condition for leaders to achieve other personal objectives, whether those other objectives involve policy goals, personal venality, or whatever."; Elster (2007), at 297, "The leap from a concern with election to an exclusive concern is not justified, however." (emphasis omitted).

[39] The literature sometimes refers to these theories instead as 'interest-group theories', 'special-interest theories', or 'capture theories'; I refrain from using these titles because the key underlying assumption concerns leaders' preferences.

[40] Concurring: Bueno de Mesquita et al. (2003), at 18, "It is pleasant to think that the brutish behavior of a King John or a Genghis Khan, his approximate contemporary, is a thing of the past, a relic of a less civilized age ... We are agnostic on the question of whether modern-day leaders are more high minded than their predecessors."

The views expressed by former dictator (Congo) Mobutu Sese Seko provides support for this position: "What is important here is cash ... [A] leader needs money, gold and diamonds to run his hundred castles, feed his thousand women, buy cars for the millions of boot-lickers under his heels, reinforce the loyal military forces and still have enough change left to deposit into his numbered Swiss accounts" Arusha

which are driven by a self-interested motivation.

Remark that even when leaders behave in a manner that one would describe as civic-minded, the underlying motivations may still be self-interested.[41]

8.2.2.2 Public-interest theory

Public-interest theory, also known as 'benevolent theory', holds that leaders are really driven by a political-ideology motivation; as such, it views the leader as a benevolent actor.[42]

Britain arguably provides us with a nice example that a political-survival motivation is compatible with public-interest motivations. After Britain's prime minister David Cameron met with Tibet's exiled spiritual leader, the Dalai Lama, in 2012, China blocked British firms' access. After these firms complained, Mr Cameron publicly stated that Britain does not advocate Tibetan independence and does not intend to meet the Dalai Lama again.[43]

If leaders are motivated by public interest, then deliberations amongst politicians and intellectuals may affect state decision-making.[44]

Times (as quoted in 2005).

[41] Elster (2000), at 694, "One could gather more evidence by paying careful attention to sources that illuminate the beliefs and goals of the actors. When we look at the public justifications given for the votes in the first French constituent assembly, for instance, it appears that all deputies had lofty public-spirited motivations. When we read the letters they wrote to their wives, it is apparent that some voted against bicameralism or against an absolute veto for the king because they feared for their life if they did not (Egret 1950)."

[42] Instead of many, see Baldwin, Cave, and Lodge (2012), at 40 et seq., "The 'public interest' world is a world in which bureaucracies do not [aim to] protect or expand their turf, in which politicians do not seek to enhance their electoral or other career prospects".

[43] Economist (2013b).

[44] For an overview, see Fischer (2003); see also Black (2002) for a treatment of 'regulatory conversations'.

8.3 Mechanisms of influence: empirical support

This Section discusses the empirical evidence regarding the influence of state-internal factors on state decision-making. Amongst others, it discusses the different types of influence which internal factors may exhibit: political support, non-political support, and information provision.

Observe that it has been argued that engaging in non-voting behaviours so as to influence state decision-making in one's favour, even if these types of influence are legal under domestic laws, amounts to corruption.[45]

8.3.1 Causal mechanism I: political support

The concept of *political support* describes all behaviours that have the capacity to influence a leader's political survival.

The provision of political support is costly. Consequently, if persons are instrumentally rational, then they will only make such an investment if they believe that this will *cause* the leader to modify its behaviour in a way that increases their utility.[46] In other words, they only invest if they see the investment as part of a (non-enforceable) exchange contract wherein the leader promises to alter its behaviour in their favour in return.

Persons engaging in such behaviour are said to engage in 'political-rent seeking'.[47]

[45] Arguing so: Kaufmann (2005), at 82, "we offered an alternative, broader definition of what constitutes corruption, namely, 'the privatization of public policy,' ... According to this more neutral definition, an act may not necessarily be illegal for it to be regarded as corrupt in a broader sense. Consider the situation in which legislative votes or executive decisions ... have been unduly influenced by either private campaign contributions to legislators, or by private favors provided to decision-makers. In such a case, corruption would be considered to have taken place, even if the act was not strictly illegal."; Sandel (2012), at 34, "To corrupt a good or a social practice is to degrade it, to treat it according to a lower mode of valuation than is appropriate to it."

[46] Note that they may make such an investment out of a non-self-interested motivation: for instance, because they exhibit an internal moral norm providing them with the feeling that it is 'the right thing to do'.

[47] The concept of political-rent seeking was introduced by the American lawyer Gordon Tullock (Tul-

8.3.1.1 Vote

The act of voting by the masses trivially amounts to political support in democratic states.

8.3.1.2 Direct political contributions: material contributions

Material contributions, most importantly in the form of cash and military equipment, amount to political support because they can amongst others be used to buy the support of the military and/or to strengthen the military.[48]

8.3.1.3 Direct political contributions: campaign contributions[49]

Campaign contributions amount to political support because they can amongst others be used to cover the costs of canvassing, campaign organisation, and political advertising.

Campaign contributions in democracies are substantial: campaign contributions in the United States increased from 159.3 million USD in 1990 to 454.3 million USD in 2012.[50] Under the reasonable assumption that (natural and juridical) persons are instrumentally rational, they would not make political contributions if they were not to expect a return on their investment – we should therefore understand campaign contributions as amounting to political support. Furthermore, an empirical study finds that political contributions increase significantly in the weeks surrounding US

lock, 1967). The concept of political-rent seeking is oftentimes denoted in the literature as 'directly unproductive profit-seeking' (Bhagwati, 1982) or simply as 'rent-seeking' (Krueger, 1974).

[48] Mobutu Sese Seko, "What is important here is cash . . . [A] leader needs money, gold and diamonds to . . . reinforce the loyal military forces" as quoted in Arusha Times (2005).

[49] Stiglitz (2006), at 191, "In sophisticated economies such a that of the United States, outright bribery has been largely replaced by political campaign contributions".

[50] According to www.opensecrets.org/lobby.

Even the US technology industry has recently engaged in such activities through FWD.us which campaigns for immigration reform (letting in more skilled workers and easier path to citizenship for those working in the US without proper permission). The lobbying group was created in April 2013 by a handful of personalities who made their fortune in technology. It hired two Washington firms to lobby on its behalf (Roll Call, 2013); and it spent several millions for television advertisement supporting three senators playing an important role in the progress of the immigration bill (New York Times, 2013).

congressional votes,[51] which again suggests that campaign contributions amount to political support.

Further empirical evidence that campaign contributions amount to political support in democracies is provided by co-variational studies. These studies find, for instance, that campaign contributions in democracies are positively correlated with the votes of legislators (US House of Representatives) on government farm subsidies and on financial services as well as with the time US legislators spend on the relevant legislation.[52] There also seems to be a correlation between campaign contributions and tax breaks.[53]

Finally, there exists empirical support for campaign contributions' underlying causal mechanism (which provides additional evidence that campaign contributions amount to political support). The assumed causal mechanism is as follows: the masses have imperfect information regarding leaders and challengers' positions on policies (at the extreme: uninformed), so that leaders and challengers may influence (read: sway) the masses' political-support decision by providing them with information (e.g., debate framing, provision of dirt on opposing candidate) through political advertising. This provision of information is, however, costly. In most democracies, leaders and challengers must use private resources, such as political contributions, to cover these campaign expenditures.[54] In non-democracies, most notably in dictatorships, the current leader will instead typically have recourse to government revenues to cover such expenses (if the leader engages in such behaviour at all). Empirical support for the causal mechanism is provided by the fact that most campaign contributions are spent on political advertising,[55] and the fact that there is widespread

[51] Stratmann (1998).

[52] For sources, see, e.g., Stratmann (2004), at 59 et seq.; and Grossman and Helpman (2001), at 13, footnote 17.

[53] Stiglitz (2006), at 191, "Forty-one companies ... which invested—'contributed'—$150 million to political parties and campaigns for U.S. federal candidates between 1991 and 2001, enjoyed $55 billion in tax breaks in three tax years alone."

[54] There is an extensive theoretical literature on political contributions which builds upon the assumption that campaign expenditure increases the number of votes a candidate receives from uninformed voters. See, seminally, Ben-Zion and Eytan (1974); see also Grossman and Helpman (1994, 1996a, 2001).

[55] See e.g. Prat (2006), at 50, "television advertising ... gets the lion's share of US campaign spending"

empirical evidence that the masses' opinion about an issue depends on how the issue is framed.[56]

8.3.1.4 Violent protests and brute force

Brute force, in the form of military coups, revolutions, or inter-state wars, indisputably amounts to a source of political support.

Think for example of the United States' covert interventions during the second half of the twentieth century in oil-producing states to protect its own interests.[57] Those interventions influenced state decision-making in those countries, at the very least indirectly, by changing the relative political support of leaders and challengers.

Furthermore, an empirical study finds that larger expenditures on the military increases the survival probability of the leader by reducing the occurrence of coups.[58]

8.3.2 Causal mechanism II: non-political support

The concept of *non-political support* describes all behaviours that have the capacity to influence a leader's decision-making, but do not influence a leader's political survival.

Non-political support may influence state decision-making if the leader has the choice between several alternatives which yield the same or similar political support. Whether a given type of non-political support influences state decision-making ultimately depends on the leader's *subsidiary motivation* (Section 8.2.2).

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citing Ansolabehere and Iyengar (1995).

[56] Druckman (2013), at 617, "Framing effects of this sort have been shown to occur across social and political issues ranging from campaign finance (free speech versus special interests), abortion (rights of mother or rights of unborn child?), gun control (right to bear arms or public safety?), affirmative action (reverse discrimination or remedial action?), welfare policy (humanitarianism or overspending?) and elections (economy or foreign affairs?)." (footnote omitted); see, e.g., Schaffner and Sellers (2010).

See also Aklin and Urpelainen (2013), who, at 1225, find, based on survey data of two samples of 1000 and 2000 Americans, that in the context of clean-energy policies the provision of a counter-frame cancels out the effect of the original frame.

[57] Iran in 1953, Iraq in 1963, and Indonesia in 1965; see, e.g., Vitalis (2007).

[58] Leon (2014), at 379, based on a panel-data analysis of coups in 153 countries between 1964 and 1999 (681 observations).

In the following, the two most widespread forms of non-political support are briefly presented.

8.3.2.1 Bribery

If the leader's subsidiary motivation is self-interested, then state decision-making may be influenced by personal (material) benefits.[59]

Under the reasonable assumption that (natural and juridical) persons are instrumentally rational, they would not make these provisions if they were not to expect a return on their investment – we should therefore understand the existence of bribery as evidence that it influences state decision-making.

8.3.2.2 Revolving door[60]

The concept of 'revolving door' captures the idea that influence on state decision-making may also result from back and forth employments between the private and the public sector. Revolving doors indeed appear to be widespread in the real world, both with national centralised institutions as well as international ones.[61]

If the leader's subsidiary motivation is self-interested, then state decision-making may be influenced by the promise of future lucrative employments in the private sector (known as 'pantouflage' in France).

Furthermore, experience within a given industry may have let the leader internalise the norms of (indoctrination) or to develop some form of loyalty towards that industry. In other words, such leaders may have developed an ideology (read: preferences) friendly towards that industry. Hence, even if the leader's subsidiary motivation is non-self-interested, state decision-making may be influenced by revolving doors.

[59] Mueller (2003), at 475, footnote 5, "supplying a candidate with money that she can use for other purposes [than to win an election] ... is illegal in most democratic countries."

[60] Shiller (2012), at 88, "'bribery can take subtle forms ... a congressman who supports business interests can often expect to be rewarded with a lucrative private-sector job after his term of government service is done" (emphasis omitted)."

[61] For empirical evidence, see Section 12.5.2.

8.3.3 Causal mechanism III: information provision

Leaders may not be aware of all the consequences of some policies. Individuals may therefore influence state decision-making through (self-serving) information provision.

An example is Czech Republic's decision on whether to allow the use of derivatives: it reportedly fell back on (the expertise of) foreign investors for explanation of the consequences of these complex instruments.[62]

8.3.3.1 Demonstration

Demonstration captures, amongst others, the peaceful acts of marching and blocking streets. Think of Martin Luther King Jr.'s walk down Washington.

An ingenious empirical study analyses the impact of the size of a protest on state decision-making by using the weather as an exogenous variation thereupon (i.e., rainfall yields less attendance). It finds that good weather exhibits a significant positive correlation, which should be understood as causality, with favourable state decision-making.[63] This finding provides empirical support that demonstration (as well as the size thereof) influences state decision-making.

8.3.3.2 Lobbying[64]

Lobbying is the direct act of conveying leaders with information about the consequences of their policies.[65] A lobbyist may, for instance, inform a leader that some policy will make its principal willing to build a new factory (i.e., to create jobs) within the leader's territory.

[62] Jensen et al. (2012), at 22.

[63] Madestam et al. (2013), at 1633, find, based on cross-sectional data of the coordinated rallies by the Tea Party movements across the United States on Tax Day (15 April 2009), that good weather in a district increases the likelihood of its current congressmen to vote more in accordance with the Tea Party's ideology; they furthermore find support for the causal mechanism: good weather increases the likelihood of the masses voting for the Tea Party.

[64] For a more thorough treatment of lobbying, see Grossman and Helpman (2001).

[65] Baron (2002), at 1224, "Lobbying is the strategic presentation of information"; Grossman and Helpman (2001), at 4, "those [activities] intended to educate and persuade lawmakers".

Reported lobbying expenditures in the United States increased from 1.45 billion USD in 1998 to 2.38 billion USD in 2013 (reaching a peak at 3.55 billion USD in 2010).[66] Under the reasonable assumption that (natural and juridical) persons are instrumentally rational, they would not make such expenditures if they were not to expect a return on their investment – we should therefore understand these substantial lobbying expenditures as evidence that lobbying influences state decision-making.

8.3.4 Specific cases of influence

In the following, specific cases suggesting that state-internal factors influenced state decision-making are presented.

8.3.4.1 State decision-making relating to FDIs

Several quantitative and qualitative empirical studies find that a State's FDI policies reflect the interests of that State's relevant influencers weighted by the strength of their respective political influence – the relative strength of the relevant influencers is captured by the ideology (pro-labour or pro-capital) of the government of the said State. In other words, these studies provide empirical support that state-internal factors influence a State's FDI-policy-making.

Quantitative studies find a strong and robust correlation between whether a State is pro-labour or pro-capital and this State's FDI policies: a pro-labour government is more likely to adopt FDI-inflow-friendly policies; and that this pattern is strongest in manufacturing.[67]

Case studies of Argentina's and South Korea's FDI-inflow policies during the twentieth century also suggest that a pro-labour leader is more likely to adopt FDI-

[66] According to www.opensecrets.org/lobby.

[67] Pinto (2013), at 98 et seqq., find, based on a panel-data analysis of FDI regulation for a subset of 27 OECD States between 1980 and 2000 (96 observations), that "partisanship is correlated with the measure of investment policy orientation [capturing a State's openness to FDI inflows] in the direction predicted"; and at 113, footnote 24, find, based on cross-section data of FDI regulation at the sectoral level for a subset of 28 OECD States for the year 2000, that "[a pro-labour government] is associated with lower restrictions across the board, but especially in manufacturing".

inflow-friendly policies.[68] Case studies furthermore point out that a pro-capital leader is likely to adopt FDI-friendly policies when FDI inflows can be anticipated to increase the profits of domestic firms (e.g., because of technology transfers).[69]

8.3.4.2 Foreign firms' influence on host-state decision-making

A recent empirical study finds that a 1 percent increase in the FDI stock in a State in economic transition is associated with a roughly 6 percent increase in economic reform.[70] This finding may be interpreted as evidence that foreign firms influence host-state decision-making because a larger FDI stock increases foreign investors' willingness to influence policies (since foreign investors now have more at stake).

Anecdotal evidence furthermore suggests that foreign firms influence their home State to put pressure on their host State(s) to behave in a more favourable manner. This reportedly happened in the context of compulsory-licence issuance,[71] and in the context of renegotiation of money-losing contracts.[72]

[68] Pinto (2013), at 142 et seqq. and 205 et seqq.

[69] Take for instance pro-capital South Korea (arguably captured by the chaebols): "The chaebols were interested in acquiring technology but worried about foreign firms competing with them in the Korean product and factor markets. Foreign investment was thus [desired, but] limited [by law] in form to minority joint ventures followed by divestment after technology had been transferred to the local partner." (Pinto, 2013, at 24).

[70] Malesky (2009), based on a panel-data analysis of economic reforms in 27 transition States (eastern Europe and former Soviet Union) between 1991 and 2004. To address the potential endogeneity of FDI inflows (since expected economic reform may cause FDI inflows) the study instruments FDI stock with the predicted nominal exchange rate: "[the] counterfactual comparison that results from this approach is between two similarly situated countries, but where one country experienced a large shift in the share of FDI in its economy as a result of exogenous changes in the international economy and the other did not" (Malesky, 2009, at 62); "Exogenously determined exchange rates offer a useful instrument because investors will often swoop in to take advantage of fire sales on assets when international price movements cause exogenous declines in the exchange rate." (Jensen et al., 2012, at 127).

[71] Stiglitz (2008), at 477, "A U.S. pharmaceutical company will pressure the U.S. government to compel a foreign country to reconsider issuing a compulsory license ... This was the case with the recent issuance of a compulsory license by the Thai government for an AIDS medication."

[72] Stiglitz (2008), at 477, "MNCs will pressure their governments to renegotiate a money-losing contract, as a result of underbidding (as was the case of some of Argentina's water concessions) ... Pressure for renegotiation is often done behind closed doors, and is therefore difficult to document. As Chief

8.4 Interest groups: capacity to organise

This Section discusses theories attempting to explain why some interest groups are able to organise while others are not (i.e., it focuses on 'organisability theories'). It will show that current theories are unsatisfactory – and that organisability is therefore an empirical question.[73]

To start off, a couple of definitions are in order. The concept of *interest group* is understood herein to refer to a group of persons which are similarly affected by state decision-making.[74] If a member of an interest group influences the leader, then that member is taking 'collective action'[75] since that member's behaviour is benefiting the interest group as a whole (i.e., the entire collectivity). An interest group whose members, at least some of them, influence state decision-making (read: engage in collective action) is said to be 'organised' and is referred to as *organised interest group*.

The problems of current organisability theories are twofold. First, theories have no explanation for the members preferences/motvations, namely whether they exhibit self-interested or non-self-interested motivations. Although there exists experimental evidence for the existence of both types of motivation, such evidence does not easily transfer to real-world interest groups. As such, these theories require an ad hoc assumption about the members' motivations. Second, theories building upon self-interested motivations mainly provide comparative dynamics, that is, they hold that the existence of some factor increases the likelihood of organisability. As such,

Economist of the World Bank, however, I saw ample evidence that this was occurring."

[73] It somewhat follows the critique of 'organisability theories' by Croley (2010).

[74] It thus follows Grossman and Helpman (2001), at 1, "There is little consensus among social scientists about the appropriate definition of a special interest group (or SIG, for short). Some authors use the term broadly to refer to any subset of voters who have similar social or demographic characteristics, or similar beliefs, interests, and policy preferences. Others reserve the term for membership organizations that engage in political activities on behalf of their members ... we entertain the broader definition of an interest group ... we take a SIG to be any identifiable group of voters with similar preferences on a subset of policy issues".

[75] The term 'collective action' describes an action that improves the well-being of the group as a whole; namely, an action that furthers/satisfies a collective/common interest and therewith improves the well-being of all the members of the group.

these theories cannot tell whether an interest group will actually be organised.

8.4.1 Self-interested motivations

If the interest group's members are solely motivated by (material or survival) self-interest, then the incentive structure each member perceives themselves to be facing amounts to a 'voluntary-contributions game' (of which the 'prisoner's dilemma' is a special case) when they engage in collective action (i.e., when they independently decide whether to contribute to the group's common interest). This game structure follows from observing that group contributions amount to a collective-goods provision, since all group members benefit therefrom, and that contributions entail a private cost to the person engaging therein. This one-period game has a unique equilibrium wherein no instrumentally-rational member contributes (i.e., they all free-ride) when members act independently and are homogenous.

The free-rider literature has advanced several factors which supposedly affect the likelihood of an interest group to be organised.[76]

Individual rewards (exclusion) and sanctions If the leader or the challengers can exclude those interest-group members which do not contribute from some benefits or if they can impose sanctions on these members, then the likelihood that an interest group is organised increases.[77]

It appears that revolutionary challengers tend to provide such private benefits for those fighting alongside them.[78]

Enforceable agreements Groups can get together and agree (read: bargain) to make some contributions.[79] Remark, however, that the execution of the agreed upon

[76] See, seminally, the late American economist Mancur Olson's classic book *The Logic of Collective Action* (Olson, 1965).

[77] Olson (1965), at 2.

[78] For several case studies, see Acemoglu and Robinson (2006), at 124 et seqq., "most real-world revolutionaries try to generate private benefits, monetary or otherwise, for taking part in revolutionary activities that participants can keep, even if the revolution fails".

[79] See Olson (1965), at 49 et seq., discussing the possibility of bargaining.

behaviour again amounts to a voluntary-contributions game unless their agreement is enforceable (e.g., by entering a contract (legally enforceable) stating that they all contribute a given amount of money).

If the agreement is enforceable, however, then interest-group members no longer act independently anymore.

Small group size[80] The size of the group negatively impacts the capacity to organise in several ways. First, the smaller the group, the easier it is for leaders and challengers to identify which members have contributed; knowledge thereof allows to produce more individual rewards and sanctions.[81] Second, the smaller the group, the more easily the members can get together and agree to make some contributions.[82]

Overall empirical studies tend not to find a correlation between political activity and concentration.[83] A notable study, however, finds a significant negative correlation (arguably: causation) between industrial concentration and trade liberalisation in manufacturing sectors in Brazil.[84] Also, empirical studies seem to find that in poor countries, where the agricultural sector is rather large, farmers receive small or even negative subsidies, and in rich countries, where this sector is small, they tend to receive large subsidies.[85]

Charisma and ideology Charisma or ideology of the leader or challenger should be classified as non-self-interested-motivations theories (see below).[86]

[80] The idea that small groups can better organise themselves than majorities can be traced back to the Italian political scientist Gaetano Mosca (see e.g. Higley, 2010, at 161).

Arguing theoretically against such an effect is Hardin (1982), at 41.

[81] See, e.g., Mueller (2003), at 12 et seq.

[82] Olson (1965), at 49 et seq.

[83] For a review, see Hansen, Mitchell, and Drope (2005), at 151 et seq.

[84] Ferreira and Facchini (2005), find, based on a panel-data analysis of the protection granted to various Brazilian manufacturing industries between 1988 and 1994, that an increase in concentration by 20 percent leads to an increase in protection of 5 to 7 percent.

[85] For sources, see Mueller (2003), at 475; and Anderson, Rausser, and Swinnen (2013), at 455.

[86] Olson (1965), at 159 et seqq.

8.4.1.1 Non-self-interested motivations

If members exhibit non-self-interested motivations, then each member of an interest group may *not* perceive themselves to be facing a 'voluntary-contributions game' when engaging in collective action (i.e., when contributing to the group's common interest). Such motivations may produce an equilibrium wherein instrumentally-rational members contribute even if they act independently and are homogeneous.[87]

Many scholars have emphasised the importance of ideology in the context of revolutions.[88] For instance, charisma appears to have been nurtured deliberately and extensively by the Nazi regime's leaders.[89]

The most notable example that members of interest groups may exhibit non-self-interested motivations is provided by the voting behaviour of the masses.[90]

8.5 Key interest group: the masses

This Section discusses the interest group known as 'the masses', which undoubtedly amounts to one of the key interest groups of a state. The concept of *the masses* can be thought of as capturing the 'median resident of a state' or 'the public'.[91]

Observe at the outset that the masses amount to a potentially relevant influencer (Section 8.1.4) independently of the state's formal/written political(-selection) institutions.[92]

[87] For a review, see, e.g., Ostrom (1998).

[88] Acemoglu and Robinson (2006), at 126.

[89] Kirsch (2004), at 185.

[90] See Section 8.5.2.2.

[91] This work thus follows Acemoglu and Robinson (2006).

[92] Bueno de Mesquita and Smith (2009), at 171, "Threats to political survival can arise from . . . domestic mass movements that seek to revolutionize the extant political system by replacing it with new institutions of governance [revolutionary threats]".

As recent events have shown, a revolutionary threat clearly exists in non-democracies: "The citizens are excluded from the political system in nondemocracy, but they are nonetheless the majority and they can sometimes challenge the system, create significant social unrest and turbulence" (Acemoglu and Robinson, 2006, at 25). This revolutionary threat is, however, arguably not particularly high in authoritarian regimes: "each citizen knows that if she acts alone against the regime, she risks severe punishment. Only if a great many citizens act in concert do they have a hope of overthrowing the regime. This is a coordi-

This Section first discusses the types of influence which we can expect from the masses. It then studies theoretically what type of preference is likely to drive the masses' decision to influence state decision-making. And finally, it considers empirical evidence regarding the preference underlying this influence decision.

8.5.1 Types of influence

The masses can be expected to potentially have the capacity to provide political support in the form of voting as well as violent protests and brute force.[93] They are, however, unlikely to have the capacity to provide political support in the form of political contributions because they typically lack the financial resources to so do.

They are furthermore unlikely to have the capacity to provide non-political support.[94] They are unlikely to have the capacity to provide non-political support in the form of bribery, because they typically lack the financial resources to so do, or in the form of revolving doors, because the masses by definition do not capture large firms.

They can finally be expected to potentially have the capacity to provide information through demonstrations.[95] They are, however, unlikely to have the capacity to provide information in the form of lobbying because they typically lack the financial resources to so do.

8.5.2 Influence decision

This Section theoretically discusses the masses' influence decision. It suggests that the masses' influence decision may very well be driven by a sustainable-development preference.

8.5.2.1 Self-interested motivations

A leader can only target utility-enhancing policies at a minority of the masses (i.e., it can only provide private goods to a minority of them): because a utility-enhancing

nation game; specifically, a tipping game." (North, 2006, at 1007).

[93] See Section 8.3.1.

[94] See Section 8.3.2.

[95] See Section 8.3.3.

policy targeted at one member might be a utility-reducing policy for another member (i.e., because of a structural impossibility); and/or because the leader has limited resources he or she might not be able to enact all these policies.

Therefore, if the proportion of the masses in the winning coalition W is larger than the aforementioned minority, then a leader cannot provide private goods to all the members of the masses whose support it needs (i.e., to all the members of the masses which are in the leader's winning coalition W_L). When the masses amount to relevant influencers, we can generally expect the proportion of the masses in the winning coalition to be larger than the aforementioned minority. In other words, when the masses amount to relevant influencers, the leader is unlikely to be able to provide private goods to all the members of the masses whose support it needs.

Instrumentally-rational masses know that because they are so numerous, if a leader engages in targeted-utility-enhancing policies, then only a minority of those providing support will see their utility enhanced. Since one does not know ex ante who will be part of this minority, the masses can reasonably be expected to generally provide support to a leader that engages in policies which enhance the utility of the masses as a whole (i.e., policies from whose benefits one cannot be excluded) – namely, to a leader providing *public goods*.[96] Hence, the masses' influence decision may very well be driven by a sustainable-development preference.[97]

Notice, however, that if policies are available that allow to enhance the utility only of the members of the masses which are in the leader's winning coalition (i.e., policies from whose benefits some members of the masses can be excluded) – namely, if *club goods* are available –, then the members of the masses which are in the leader's winning coalition may provide support to a leader that engages in such policies since a club good is likely to yield a higher utility for them than would a

[96] Bueno de Mesquita et al. (2003), at 91, "as [the wining] coalition size increases, so does the effective cost of private goods. In response, leaders switch to more publicly oriented policies—that is, as the size of the winning coalition increases, leaders reduce their provision of private goods in favor of the now relatively cheaper public goods."

[97] There is no certainty because whether the public-goods provision furthers sustainable development depends on whether the public-goods provision in question can be supported by impartial and rational consideration of all SD-relevant aspects; see Section 4.6.

public good.[98] This observation shows that even if the masses amount to relevant influencers (as they generally do in democracies), minorities may still see policies enacted against them – namely, minorities may still be discriminated. Empirical evidence indeed suggests that club goods (public goods) are more likely to be provided in the presence of ethnic minorities (ethnic homogeneity).[99]

8.5.2.2 Non-self-interested motivations

If the masses have a fundamental non-self-interested preference, then their influence decision may very well be driven by a sustainable-development preference.[100]

The strongest empirical support for the masses exhibiting non-self-interest motivations arguably comes from the substantial participation in elections. Electoral participation suggests that the masses exhibit an internal non-self-interested moral norm providing a sense of duty to vote.[101] Indeed, if the masses are solely driven by a self-interested motivation and if they are instrumentally rational, then they would not participate in elections because the probability that one's vote influences the election is infinitesimal so that the expected self-interested benefits of participating is by definition smaller than the costs one has to bear for participating.[102]

[98] See Sen (2009), at 352 et seqq., "Much will depend on the ... [existence of] tolerant values, and there is no automatic guarantee [thereof] ... by the mere existence of democratic institutions."; Singer (2011), at 265, "The case for majority rule should not be overstated. No sensible democrat would claim that the majority is always right. If 49 percent of the population can be wrong, so can 51 percent." For a more formal exposition, see Arena and Nicoletti (2014).

[99] Besley and Persson (2011), at 18, "we find a strong partial correlation in the data between ethnic homogeneity and [public-goods provision]".

See also Alesina, Baqir, and Easterly (1999), at 1243 et seq., finds, based on a cross-sectional analysis of US cities (1020 observations), metropolitan areas (304 observations), and urban counties (1386 observations) in 1990, that "where politicians have ethnic constituencies, the share of spending that goes to public goods [such as education, roads, sewers] is low ... [and that these] results are mainly driven by how white majority cities react to varying minority group sizes".

[100] There is no certainty because whether the non-self-interested preference furthers sustainable development depends on whether the norms implied by this non-self-interested preference can be supported by impartial and rational consideration of all SD-relevant aspects; see Section 4.6.

[101] Seminally, Riker and Ordeshook (1968).

[102] See, e.g., Ansolabehere (2006), at 39, "Marginal expected benefits approach zero ... if one's vote has an imperceptible effect on the election outcome."

8.5.3 Influence decision: empirical evidence

This Section finds empirical evidence suggesting that the masses' influence decision tends to be driven by a development preference or, at the very least, by an economic-development preference.

8.5.3.1 Political-support decisions

Anecdotal and empirical evidence suggests that when the masses' political-support decision seems to be driven by a economic-development motivation.

Carlos Manuel Rodríguez, Costa Rica's former environmental minister, for instance pointed out that "Latin America's politicians can mess up on health, literacy and the environment but if they provide jobs and growth, they will get re-elected".[103]

Furthermore, multiple empirical studies, over different time periods and for different States, generally find that voters' political-support provision for the incumbent government is: positively affected by real-income growth (though the strength of the effect varies); is negatively (if at all) affected by inflation; and is negatively (if at all) affected by variations in unemployment.[104]

[103] Economist (2012).

[104] For a summary of the findings of these empirical studies, see Table 19.1 in Mueller (2003), at 430 et seqq. Seminally, see Kramer (1971).

Most notably amongst these studies is perhaps: Hibbs (2000) who finds, based on a time-series analysis of aggregate votes for the incumbent US President's party between 1949 and 1996, that only the 'growth rate of real income over the entire term' and the 'total number of US military personnel killed in action over the entire term' to be statistically significant explanatory variables; more precisely, he finds that real-income growth explains around 90 percent of variations in aggregate votes and that an increase in the growth rate of 1 percent roughly increases the incumbent party's share of votes by 4 to 5 percent.

The different findings of these quantitative studies are arguably the result of 'government responsibility' and/or of 'prospective voting' which these studies did not control for (rather than the result of errors in statistical methods and/or data collection). *Government responsibility* captures the fact that that voters tend to hold their governments accountable only to the degree they believe their incumbent government could actually influence the outcome (Hibbs, 2006, at 578 et seq., "This proposition forms the core of the 'clarity of responsibility' hypothesis ... This line of research has delivered persuasive evidence that macroeconomic effects on voting are indeed more pronounced under institutional arrangements clarifying incumbent responsibility"). *Prospective voting* captures the fact that someone's voting pattern may be influenced by how they expect their respective incumbent government to perform in the future (Hibbs, 2006,

Finally, a survey suggests that the masses support policies that may yield FDI inflows that create jobs, that is, policies which are expected to yield economic development.[105]

8.5.3.2 Policies

Furthermore, cross-variational empirical studies find that if the masses amount relevant influencers (Section 8.1.4), then state decision-making is more likely to be aligned with development. These findings suggest that the masses' political-support decision has been driven by a development preference.

Increased winning coalition Primary evidence is provided by empirical studies finding that an increase in the winning coalition, which increases the likelihood that the masses amount to relevant influencers,[106] makes state decision-making more aligned with development.

One empirical study finds that a larger winning coalition is ceteris paribus associated with higher levels of development: it finds that some measures of 'civil liberties', 'education',[107] and 'general health care',[108] are significantly positively correlated to the size of the winning coalition.[109] Another empirical study finds that a larger winning coalition is ceteris paribus associated with higher economic growth.[110]

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atat 569, "since the rational expectations revolution in economic theory, with its strong and often compelling emphasis on forward-looking behavior, pure retrospective voting frequently has been described as naive and irrational").

[105] Jensen et al. (2010), find, based on nationally representative survey of Americans (13'800 respondents), that the masses significantly increase their support for the incumbent government if the government enacted tax incentives that may yield increased FDI inflows in the form of 1'000 new jobs.

[106] Since a larger winning coalition ceteris paribus makes it more likely that the masses are included therein.

[107] When measured by 'number of education years of the average labour force participant', 'percentage of literacy', and 'percentage of secondary school students who are female'.

[108] When measured by 'infant survival', and 'immunisation rate of one-year olds for measles and DPT'.

[109] Bueno de Mesquita et al. (2008), at 397 et seq. (columns 5 and 6), based on a panel-data analysis.

[110] Bueno de Mesquita et al. (2008), at 397, based on a panel-data analysis with over 2'000 observations, controlling for region and year fixed effects.

Increased information Further evidence is provided by empirical studies finding that an increase in the masses' information about state decision-making, which increases the likelihood that the masses amount to relevant influencers,[111] makes state decision-making more aligned with development.

A recent empirical study finds that the more a US State capital is isolated from that State's population, the less that population is informed about State politics,[112] and the less that State spends on public goods (e.g., education, public welfare, health care) and the higher that State's level of corruption.[113]

8.5.4 Information sets

Although the masses may have little incentives to seek information on leaders and challengers on their own (because of the infinitesimal effect of their vote on state decision-making), they may still be assumed to get informed through political adver-

Furthermore, Acemoglu and Robinson (2012), at 3 et seq., "Countries such as Great Britain and the United States became rich because their citizens overthrew the elites who controlled power and created a society where political rights were much more broadly distributed, where the government was accountable and responsive to citizens".

[111] A recent ingenious empirical study (Dyck, Moss, and Zingales, 2013) indeed finds that providing the masses with information about state decision-making alters future state decision-making in their favour: the study analyses the impact in the early twentieth century of the first appearance of muckraking magazines (containing information about politicians' behaviours), which are mainly read by the masses and which were the only easily accessible source of information, in an era predating national radio and television, on leaders' policy-making. It finds, based on a panel-data analysis of circulation data (of the most prominent muckraking magazines: McClure's and Cosmopolitan) by congressional district and states between 1902 and 1917 and of roll call votes of US representatives on all domestic issues between that time span, that (i) a representative's voting behaviour on some regulatory issues diverges from their past voting behaviour (specifically, it diverges from the ideology (using Poole's classification) implied by their past voting behaviour) when the issue was previously covered in those muckraking magazines and that (ii) the divergence is greater, the higher the circulation in their respective districts.

[112] Newspapers in US States with isolated capitals give less coverage to State politics; individuals who live farther away from the State capital seem to display less interest in State politics but not in politics in general; and voter turnout in counties farther away from the State capital is lower (Campante and Do, 2014, at 2457 et seq.).

[113] Campante and Do (2014) based on cross-sectional data; they measure the 'level of corruption' using the number of federal convictions for corruption-related crime.

tising and/or media coverage.[114] This assumption makes sense because the masses are likely to read the information because of their 'scandalous, shocking, or titillating dimension' and thus become politically informed as a byproduct.[115]

We have seen in Section 8.3.1 that leaders and challengers in democracies spend most of their campaign contributions on political advertising. In consequence, even if at some point in time the masses are not informed about some fact, they can reasonably be expected to become informed about it sooner or later through the action of some potential leader.[116] As such, independently of whether the masses are actually informed about some fact, a leader can be expected to treat the masses as if they were already informed.

8.6 International interdependence: international diffusion of state decision-making

This Section briefly considers international interdependencies.[117] Specifically, it discusses the concept of *international policy diffusion* which describes the situation wherein the behaviour of other entities that are part of the international sphere in-

[114] Economist (2011), presenting the results of a field poll performed in California by the Public Policy Institute of California (PPIC): only one-third of respondents said that they relied on the information provided by the official voter-information guide issued by the secretary of state before an election and which is as impartial as it gets for it includes texts by both proponents and opponents; "[t]he rest said they relied on advertisements, the internet, media coverage and the like".

[115] Dyck, Moss, and Zingales (2013), at 523, "by repackaging information in a way that makes it entertaining, media create a compelling rationale for individuals to bear the small cost of obtaining the gathered information. Even if it is not in each individual's economic interest to become informed about a policy issue, the utility benefit provided by the entertainment component of a news story (for example, the scandalous, shocking, or titillating dimension) can more than compensate for the costs to the individual of obtaining the information, including the price of the newspaper and the time spent reading it."

[116] Kingdon (1989), at 60, a US congressmen tells him "I know that nobody will notice it right now. People never do. But it may be used against you in the next campaign ... your opponent will comb down through every aspect of your record, every vote you've ever cast, looking for dirt and using it".

[117] Seminally, Keohane and Nye (1977).

creases the likelihood that a given state behaves in a certain way.[118] Taking such a perspective therefore amounts to assuming that state decision-making does not occur in isolation from the international sphere, but is causally influenced thereby.[119]

The literature has advanced four theories for such diffusion of policies (i.e., four theorised causal mechanisms/pathways): coercion, competition, learning, and emulation.[120]

8.6.1 Coercion theories

Coercion theories hold that some powerful entity (e.g., a (hegemonic) State, an international institution, a multinational entity) uses carrots and sticks to bring States to adopt its preferred policies.[121]

Foreign States may, amongst others, use the following means to influence another State: providing military aid, providing foreign aid, or refraining from military intervention (known as 'gunboat diplomacy').

8.6.2 Competition theories

Competition theories hold that States adopt policies to get a competitive advantage vis-à-vis other States with which they compete for (foreign and local) investments and export-market shares.[122] These theories typically focus on economic policies (lower tax rates, lower export barriers, etc.).

[118] Simmons, Dobbin, and Garrett (2006), at 787, "International policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries (sometimes mediated by the behavior of international organizations or even private actors or organizations)."

[119] The relevance of this causal pathway was seminally pointed out in Gourevitch (1978), referring to that pathway as 'second image reversed' (in reference to Waltz (1959)'s 'second image' holding that domestic politics influence inter-state relations); see also Putnam (1988).

[120] For an in-depth review of the literature, see Simmons, Dobbin, and Garrett (2006) or Dobbin, Simmons, and Garrett (2007).

[121] Simmons, Dobbin, and Garrett (2006), at 782, "carrots (political and military support, as well as preferential access to U.S. markets) and sticks (from strings attached to financial assistance to threats of military coercion)".

[122] Simmons, Dobbin, and Garrett (2006), at 782; Elkins, Guzman, and Simmons (2006).

8.6.3 Learning theories

Learning theories hold that States adopt policies because of changes in one's beliefs due to novel information generated by *other States' behaviours and consequences thereof*.[123] This novel information is held to change a State's beliefs on how best (read: most efficiently) to pursue a given goal – namely, these theories view the beliefs about the appropriate means for achieving a given end to be endogenous. The causal mechanism is a process of 'norm internalisation'.

These theories distinguish themselves in terms of the learning process, amongst others: Bayesian learning (or 'rational learning'), sequential learning, or information heuristics (e.g., availability heuristic).

8.6.4 Constructivist theories

Emulation theories build upon the conceptual framework known as 'social constructivism' which holds that what one perceives as legitimate ends or as appropriate means is endogenous and therefore influenced by one's social environment that is, they are the product of one's social context and therefore amount to social constructs (hence the name 'constructivism').[124] The causal mechanism is a process of 'norm internalisation'.

A State's perception may change because of the opinions and/or behaviours of perceived experts, peers (perhaps based on common language, history, religion), or other States' behaviours.[125] Constructivism does not hold that such changes may only result from learning.[126] Instead, it allows for such changes to result from mindless emulation (or 'institutional copying'): States mimic the behaviour of others States which appear to be doing best even if they do not fully understand why these

[123] Simmons, Dobbin, and Garrett (2006), at 795, "For diffusion theories based on learning, the choices of others are important not because they affect the payoffs of a policy choice ..., but rather because others' choices generate new data that informs beliefs about causal relationships."; Dobbin, Simmons, and Garrett (2007), at 460, "Learning occurs when new evidence changes our beliefs."

[124] Dobbin, Simmons, and Garrett (2007), at 451.

[125] Simmons, Dobbin, and Garrett (2006), at 800 et seq.

[126] Constructivist theories therefore strictly include learning theories.

other States are doing best.[127]

[127] Dobbin, Simmons, and Garrett (2007), at 452, "mimic the success of leading states without fully comprehending the roots of that success".

Chapter 9

A non-unitary-state theory of IIA ratifications

This Chapter advances a descriptive (positive) theory of States' IIA ratifications (*IIA ratifications as explanandum*) – that is, a theory of the causal factors underlying a State's decision to ratify an IIA. Knowledge of such causal factors is important for several reasons.[1] First, such a theory is necessary in order to make sound predictions on how States are likely to behave in the future in the context of IIA ratifications and therewith for making sound predictions on where the contemporary IIL regime is likely heading. In so doing, the theory may for instance be used to assess the possible consequences of the recent 'backlash' by States against IL.[2] And the theory may also be used to investigate the conditions under which States will ratify IIAs that are

[1] Pauwelyn (2014), at 374 et seq., "The appropriate unit of analysis to understand FIL [foreign investment law] is not the overall system of FIL (and whether it is, for example, more like commercial arbitration, public international law or public or administrative law) but its constituent components, its myriad sources and actors and how they interact and have interacted over time." (footnote omitted).

Scholarship studying whether IIL is more like commercial arbitration, public international law, or administrative/public national law includes: Schill (2010a); Roberts (2013).

[2] See seminally, Aaken (2008b); see also the contributions in Waibel et al. (2010a). For a description of this backlash, see Section 5.14.

aligned with SD.[3] Second, such a theory is necessary to make realistic prescriptions on how to reform the regime since a thorough understanding of the functioning of State decision-making allows one to better assess whether some set of prescriptions is actually likely to be implemented by the States when ratifying future IIAs. Third, such a theory may also be of direct relevance to IIL's adjudicative bodies. On the one hand, the theory may be of interest to an adjudicative body when it decides on the question of 'admissibility',[4] because this question should be answered by considering the whole set of circumstances within which the dispute is taking place,[5] which arguably includes the consideration of the likely consequences of a decision on the IIL regime as a whole (which includes the consequences thereof on States' future IIA ratifications). On the other hand, the theory may be of interest to an adjudicative body when it interprets IIA's applicable norms: knowledge of the underlying (causal) factors which drove the States to sign the IIA in question (i.e., of the States' underlying motivations) may be relied upon in a 'teleological interpretation perspective' or a historical interpretation perspective'.[6]

This Chapter argues that such a descriptive theory should take a non-unitary-state perspective – that is, it should explicitly build upon country-internal dynamics. Such an approach is in contrast with the existing scholarly theoretical IIL literature which has almost exclusively taken a unitary-state perspective.[7] The current state of the IIL

[3]Chapter 10 investigates these conditions.

[4]Paulsson (2005), at 617, "admissibility: alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such".

[5]Rosenne (2006), at para 2, "Admissibility in this sense addresses the question of whether, *in the light of all the relevant circumstances*, that court or tribunal *should* entertain the case. It signifies that taken as a whole and given the circumstances, there is no reason why the court or tribunal seised of the case should not proceed to render a binding decision on the case. It may import an element of discretion that has to be exercised not whimsically but strictly in accordance with legal criteria *having regard to the place of judicial settlement of international disputes in the conduct of international affairs, the manner in which an international court or tribunal works, and how it obtains its authority to decide a case*."

[6]These interpretation perspectives are, most notably, contained in VCLT Articles; see Chapter 6 for an extensive discussion.

[7]Seminal within that descriptive IIL literature is Andrew Guzman's 1998 article *Why LDCs Sign Treaties That Hurt Them* (Guzman, 1998). See also Elkins, Guzman, and Simmons (2006).

Exceptions (adopting a non-unitary-state perspective to study IIL) are: Aaken and Lehmann (2013),

literature is in stark contrast to the trade-law literature which, for decades now, has also considered a non-unitary-state perspective.[8] Because of its usage in trade law, it is reasonable to also consider whether such a perspective can shed some new light on state decision-making in the context of international-investment policies.

This Chapter finds that even though a non-unitary state theory is by definition less parsimonious than a unitary-state theory, the proposed non-unitary-state theory remains nonetheless easy to understand and to use by a wide audience (i.e., it remains 'tractable').[9]

This Chapter furthermore finds that the proposed non-unitary-state theory is empirically consistent at both levels: at the predictive level – the theory is able to capture/explain the observed IIA ratifications; and at the assumption level – the theory's underlying causal factors appear to be realistic.[10] In particular, the proposed non-

at 323 et seqq., they sketch the skeleton of a non-unitary-state theory of IIA ratifications; and the recent 'partisan theory of FDI', developed in most detail in Pinto (2013), which holds that the partisan alignment of a State's government, namely whether it is pro-capital or pro-labour, strongly influences a State's FDI policies.

[8]For the non-unitary-state literature of trade law see, most notably, Hillman (1982), Sykes (1991), van Long and Vousden (1991), Grossman and Helpman (1994), Hillman and Moser (1995), Grossman and Helpman (1995), Mitra (1999), and Maggi and Rodríguez-Clare (2007). A subset of this trade-law literature has also examined how foreign investments affect trade policies; see, e.g., Brecher and Alejandro (1977), Bhagwati et al. (1987), and Grossman and Helpman (1996b).

[9]Dekel and Lipman (2010), at 262, "because models do not simply sit on a shelf but are to be used, tractability is valuable".

This point is important as a lack of tractability has often been advanced to reject the usage of a non-unitary-state perspective. See e.g. Guzman (2008), at 19, "It is difficult, and perhaps impossible, to construct a general, tractable, and predictive liberal theory [i.e., one that builds upon country-internal dynamics] of policymaking in a single state, let alone one that also captures the interactions of many states."

[10]I believe that theories should, if possible, be empirically consistent at both levels. The predictive level amounts to testing whether the theory's causal factors (in casu: country-internal factors) actually covary with the dependent variable (in casu: IIA ratification). And the assumption level amounts to testing the existence of the theory's causal mechanisms.

Also sharing the view that the realism of the assumptions (i.e., the assumption level) is relevant: Dekel and Lipman (2010), at 258, "Although the story need not be literally true for the model to be useful, it plays an important role. Confidence in the story of the model may lead us to *trust the model's predictions more*. Perhaps more importantly, the story affects our intuitions about the model and hence whether and

unitary-state theory makes predictions about the overall evolution of IIAs that are empirically consistent, and also allows explaining the IIA-ratification behaviour of several specific States. Additional empirical support for the proposed non-unitary-state theory is provided by the finding that a unitary-state perspective has difficulties in fully explaining several observed behaviours which the proposed non-unitary-state theory is able to explain (and thus to predict).[11]

A non-unitary-state perspective is finally shown to be valuable when interpreting empirical data. The proposed non-unitary-state theory shows that the common interpretation of one of the central empirical findings within IIL scholarship – namely, that there exists a positive statistical association (i.e., statistically significant correlation) between the probability of a developing State signing a BIT and its FDI-inflow competitors' BIT signings[12] – does actually not readily follow. Specifically, it shows that, contrary to what is generally held, this positive association does not necessarily imply that developing States ratified IIAs during the twentieth century to 'compete for capital'; namely, it shows that developing States' IIA ratifications were not necessarily driven by a competition-for-capital motivation.

At this point, a couple of remarks are in order. First, contrary to the existing IIL literature, this Chapter explicitly focuses on explaining IIA ratifications rather than

how we use and extend it." (emphasis added).

Remark, however, that orthodox empirical work in economics, amongst other social sciences, almost exclusively focuses on the predictive level. Such a view is most notably associated with the late Nobel laureate in economics Milton Friedman: "the relevant question to ask about the 'assumptions' of a theory is not whether they are descriptively 'realistic,' for they never are, but whether they are sufficiently good approximations for the purpose in hand. And this question can be answered only by seeing whether the theory works, which means whether it yields sufficiently accurate predictions" (Friedman, 1953, at 14 et seq.).

The concept of 'causal mechanism' is defined as the pathway/process through which the hypothesised causal factor affects the dependent factor; it is sometimes referred to as causal pathway, connecting principle, or intervening process. This definition of causal mechanism follows, amongst others, Kiser and Hechter (1991), at 5, and Seawright and Collier (2010), at 318.

[11] Empirical support for a theory coming from the empirical inconsistency of that theory's rival alternative theories is known as 'lateral (empirical) support' (Elster, 2007, at 20).

[12] This positive association was first empirically observed in Elkins, Guzman, and Simmons (2006).

IIA signings;[13] because the majority of signed IIAs have been ratified,[14] the present theory can in general also be applied to IIA signings.[15] We can, consequently, without loss of generality draw upon the empirical literature on IIA signings to test the present non-unitary-state theory of IIA ratifications. Second, even though this Chapter only tests the proposed non-unitary-state theory against State behaviour during the twentieth century, it can readily be relied upon to analyse contemporary IIL issues because its underlying causal factors are stable over time (read: the explanatory relevance of country-internal dynamics can readily be assumed to continue to exist).[16] Third, this Chapter does not explicitly consider negotiations and therefore does not readily explain the precise content of existing IIAs. Fourth, this Chapter does not provide a complete theory because it does not explicitly propose a theory of the organisability of interest groups;[17] the theory is meant to serve as a guide for what factors one should take into account (read: a guide for where to look) when trying to understand past or to predict future IIA ratifications. Fifth, this Chapter does not explicitly consider whether developing States ended up worse off by ratifying IIAs on a bilateral basis; in particular, it does not explicitly address the question of whether developing States faced a voluntary-contributions game (of which the popular prisoner's dilemma is a special case).[18]

[13] The existing theoretical and empirical IIA literatures have mainly focused on IIA signings. Seminal in this literature is Guzman (1998).

[14] By 2014, 2250 out of 3084 signed IIAs had been ratified. For the data, see Section 5.1.

[15] 'In general' because if the agency responsible for signing IIAs is under weak political oversight by the entity (typically the legislative body) responsible for ratifying IIAs, then a State may at some given point in time have a preference for signing an IIA but not for ratifying that IIA. Consequently, although it can be expected to hold on average (i.e., 'in general'), it need not hold for a specific State. Brazil is a case in point, see Section 9.4.2.2.

[16] This is confirmed in Chapter 10 which applies, and tests, the theory to State behaviour during the twenty-first century. Specifically, it studies the empirical consistency of the conditions, implied by the non-unitary-state theory proposed in this Chapter, under which States are likely to ratify IIAs that are aligned with SD.

[17] Whether some potentially relevant interest group is organised, and thus has the capacity to provide political support, must therefore be assessed by looking at the data; namely, 'organisability' is an empirical question. See Section 8.4.

[18] Seminally, see Guzman (1998), who argues that developing States faced a prisoner's dilemma in the context of BIT signings (and ratifications) during the twentieth century; that is, he argues that although

The remainder of this Chapter is organised as follows. Section 9.1 presents the traditionally perceived rationales of IIA ratifications. Section 9.2 develops a non-unitary-state theory of IIA ratifications. Sections 9.3 and 9.4 then apply this theory to developed respectively developing States' IIA ratifications during the twentieth century.

9.1 Perceived rationales of IIA ratifications

This Section briefly discusses the traditionally perceived rationales for ratifying IIAs by the regime's participants (i.e., by States).

Before continuing, remark that the desirable aspects of IIL identified in Chapter 3 – (political-)risk-reduction instrument, norm-internalisation instrument, and foreign-investor-accountability instrument – need not amount to the rationales of States for ratifying IIAs. First, since we can reasonably expect States not to exhibit altruism vis-à-vis other States,[19] norm internalisation is only a by-product of States' behaviours rather than a rationale thereof. Second, since States have hitherto arguably not considered an IIA as a foreign-investor-accountability instrument,[20] we can hereinafter neglect foreign-investor accountability as a rationale.

developing States are individually better off by signing (ratifying) BITs, if they all sign (ratify) BITs, then they all end up worse off than they would be in a world wherein no BITs are signed (ratified). This well-being ordering of these two worlds, he argues, follows from observing that in the middle of the twentieth century developing States rejected as a group that certain foreign-investor-protection norms were part of PIL, but later individually signed (ratifying) BITs precisely including such norms. Bubb and Rose-Ackerman (2007), however, point out that such a ratification does not readily follow from this mid-twentieth-century rejection because developing States may not have all supported those norms in the middle of the twentieth century because they first wanted to expropriate existing foreign investments before adhering to those norms (which make such expropriation a violation of PIL).

[19] Similarly: Aaken and Lehmann (2013), at 331, "We know of no theory of International Relations or International Law assuming altruistic states."

[20] The fact that contemporary IIL (and therewith contemporary IIAs) does not contain home-State obligations (Section 7.2.1.3) indeed strongly suggests that States have not considered an IIA as a foreign-investor-accountability instrument in the past.

9.1.1 Risk-reduction instrument

It can reasonably be held that IIAs are perceived by most States as entailing stronger promises vis-à-vis other States regarding the treatment of foreign investors than in the absence thereof; namely, that IIAs increase the level of foreign-investor protection required by States under PIL.[21]

Hence, IIAs may reduce the political risk faced by foreign investors; see Section 3.1 for a discussion of the consequences of such political-risk reduction for (home and host) States.

9.1.2 Signalling device

It has been argued that a State's participation in PIL – that is, adherence to norms followed by some group of States – may be driven by a rational calculus because of the existence of other States (and/or international institutions) which have internalised those norms and are willing to punish States who violate them as well as reward those who adhere to them (coercion theories).[22] Insofar as there exists a group of States which have internalised the norms contained in IIAs, other States may feel coerced to ratify IIAs.

9.1.3 Emulation (imitation) device

A State may copy (or 'emulate') the behaviours of States which it perceives either as modern or as successful because it wants to feel modern or be successful itself

[21] Generally speaking, "[IIAs] operate to narrow the permissible types of regulation by the state" (Kaushal, 2009, at 511).

More specifically, in the absence of IIAs, foreign investors' rights under PIL are contained in CIL. Developing States, and most notably Latin American States, held that there is no CIL-based obligation to provide foreign investors with a higher level of protection than domestic investors (the so-called 'Calvo doctrine'; see also Section 5.6.2); such a level of protection is clearly lower than the one provided in IIAs (Chapter 5). Additionally, two UN General Assembly resolutions during the 1970s (G.A. Res. 3171 U.N. Doc. A/9030 (1973); and G.A. Res. 3201, U.N. Doc. A/9559 (1974)), which essentially restated the Calvo doctrine, provided further support that there is no such CIL-based obligation. See more extensively on these two points Guzman (1998), at 641 et seqq.

[22] See Section 8.6.1 for a brief presentation of coercion theories.

(constructivist theories).[23] Such emulation may take the form of 'institutional copying'. Insofar as IIAs amount to 'the thing to do', they may allow a State to view itself as modern.[24] Insofar as successful States push for IIAs, they may be seen by less successful States as the path to success.

9.2 A non-unitary-state theory of foreign-investment policy-making

This Section builds upon the 'non-unitary-state theory of state decision-making' developed in Chapter 8 to construct a 'non-unitary-state theory of foreign-investment policy-making'.

Importantly, in spite of this Chapter's focus on IIA ratifications, this theory captures foreign-investment policy-making more generally – namely, it captures foreign-investment policy-making both under PIL (i.e., IIL), which strictly includes IIA ratifications, as well as under domestic law.

9.2.1 Potentially relevant influencers

In accordance with Section 8.1.5, we focus on 'interest groups' and start by identifying the set of 'potentially relevant influencers'.

9.2.1.1 Domestic interest groups

The masses The interest group known as 'the masses' has already been extensively discussed in Section 8.5. We can think of the masses as having labour (and not capital) as their main source of income.

If the masses primarily exhibit an economic-development preference, then their position vis-à-vis foreign-investment-protection policies is a priori unclear. If they only expect such policies to yield FDI inflows, then: we can expect them to support such policies if they believe that FDI inflows mainly create jobs, raise wages, and

[23] See Section 8.6.4 for a brief presentation of constructivist theories.

[24] Ginsburg (2005), at 117.

raise skills; or we can expect them to oppose such policies if, for instance, they believe that FDI inflows would mainly amount to stealing their natural resources (thus reducing their future expected income).[25] Generally speaking, however, they can be expected to support policies which are expected to only yield FDI inflows because FDI inflows have historically been associated with higher wage.[26] If they only expect such policies to yield FDI outflows, then we can expect them to oppose such policies since they involve a risk that jobs will be offshored.[27]

If the masses exhibit a sustainable-development preference (or development preference), then their position vis-à-vis FDI inflows depends on factors beyond economic development but remains a priori unclear. If they only expect such policies to yield FDI inflows and that FDI inflows mainly damage the biosphere or bring strategic sectors under the control of foreigners (threat to national security), then the masses will oppose such policies.

In any event, therefore, for the masses to be supportive of such policies, they must exhibit the following *dual causal belief*: that IIAs increase FDI flows; and that the increase in FDI flows furthers the satisfaction of their preferences.

Labour unions Labour unions (or 'trade unions') are strongly affected by foreign-investment-protection policies and may provide support in the form of peaceful demonstrations, strikes, and even brute force. Labour unions exhibit a preference for preventing job losses and for obtaining wage increases in the short term. This assumption appears plausible since labour unions have tended to (politically) support

[25] Under the assumption that beliefs are affected by empirical findings, these beliefs are quite plausible. For a detailed discussion of the empirical evidence, see Section 3.1.2.2.

[26] For a literature review of quantitative empirical studies, see e.g. Brown, Deardorff, and Stern (2004).

[27] Indeed, even contemporary politicians in democracies still endorse such a rhetoric — undoubtedly because the masses still mainly expect outflow FDIs to produce such effects. Moran (2011), at 99 et seq., "There has been growing concern across developed countries about the consequences for the home economy as multinational corporations (MNCs) spread technology and reposition production around the globe. Nowhere has this been more apparent than in the United States, where President Obama has pledged that his administration will 'end tax breaks for corporations that ship jobs overseas.'" For a description of instances wherein the masses opposed investment outflows, see e.g. Caves (2007).

FDI-inflow-promoting policies.[28]

Their position vis-à-vis foreign-investment-protection policies is equivalent to the position of the masses when they exhibit an economic-development preference.

Domestic firms Domestic firms (or 'capital holders') are strongly affected by foreign-investment-protection policies and may provide support in the form political contributions and bribery. We can reasonably hold that firms are solely driven by a material-self-interest motivation; namely, that they behave so as to maximise their profits.

We can expect *foreign-investment-making domestic firms* to support such policies, independently of whether the policies impact their foreign-investment decisions, if they believe that such policies reduce the risk of foreign investments (by reducing the political-risk component).

The position of *non-foreign-investment-making domestic firms* on such policies depends on whether a firm believes the policies to yield FDI inflows into its own sector: FDI inflows into a sector decrease the profits of the existing firms in that sector by increasing the degree of competition (in the extreme, by crowding out existing firms); whereas FDI inflows into another sector may increase profits by potentially producing horizontal externalities/spillovers in terms of knowledge and technology, and downstream externalities/spillovers in terms of higher quality inputs.[29] Since non-foreign-investment-making firms do not know with certainty whether FDI inflows will be directed at their sector, their position is likely to be generally driven by what they believe will happen if FDI inflows do enter into their sector – namely, we can expect them to generally oppose FDI inflows.[30]

[28] I thank Joel Trachtman for pointing this out. Pinto (2013), at 11, "Circumstantial evidence from Argentina's recent history suggests that workers in the auto industry and their representatives in SMATA (Sindicato de Mecánicos y Afines del Transporte Automor) – the union of steel and metal-mechanic workers – were eager to offer favorable shop conditions to foreign investors and lobbied for a change in the regulatory environment to lure them in."

[29] Under the assumption that beliefs are affected by empirical findings, these beliefs are quite plausible. For a detailed discussion of the empirical evidence, see Section 3.1.2.2.

[30] Anecdotal evidence indeed suggests that European domestic firms opposed investment inflows from Japan and South Korea; see Rowley (1989).

9.2.1.2 Foreign interest groups

Foreign firms with foreign investments are strongly affected by foreign-investment-protection policies. They may directly influence their host State's decision-making.[31] The types of support firms posses and how (foreign-investment-making) foreign firms stand on IIA ratifications have already been discussed above; the reader is therefore referred to the discussion of 'domestic firms'.

9.2.1.3 Foreign States

Clearly, foreign States may have the power to influence a State's decision-making (a situation described as 'international interdependence' within the international-relations literature)[32].

It is, however, important to remember that within a non-unitary-state theory, the 'State' is not the basic element of analysis – rather it is endogenous and its decision-making is assumed to be determined by country-internal (causal) factors. In consequence, if a foreign State engages in such influences, it must be because that decision is optimal given *its own set of relevant influencers*.[33]

9.2.2 Notable implication

Remarkably, a non-unitary-state theory implies that solely-capital-importing States may ratify IIAs solely to protect foreign investments (i.e., out of a 'foreign-investment-protection motivation').[34]

[31] For a review of the empirical evidence, see e.g. Schneiderman (2010a), at 934 et seqq., "We can . . . conclude, then, that foreign corporate actors within host states with operative representative democracies would not be voiceless and even would be 'represented' in ways similar to those of nationally based corporate actors. They might elect, however, to pursue less visible forms of political action [read: lobbying] for fear of being seen as illegitimately influencing national or local politics." For further empirical support, see Section 8.3.4.2.

[32] See Section 8.6 for a brief presentation of these interdependencies.

[33] For empirical evidence of foreign firms' indirect influence (through directly influencing their home State) on their host State's decision-making, see Section 8.3.4.2.

[34] This theoretical possibility is generally not recognized by scholars (who implicitly/unconsciously reason within a unitary-state framework); instead of many, García-Bolívar (2012), 3, "it is clear that states

Indeed, assume that nobody believes that IIAs increase FDI flows or that nobody believes that IIAs will further development. Under such conditions, no potentially relevant domestic interest group (Section 9.2.1.1) will support IIA ratifications;[35] and yet, a solely-capital-importing State may still ratify IIAs if foreign firms amount to relevant influencers and have a strong influence on the said State's decision-making.[36] Since foreign firms are only interested in protecting their foreign investments, these solely-capital-importing States, by extension, would be ratifying those IIAs solely to protect foreign investments.

In short, a non-unitary-state theory implies that developing States during the twentieth century, when they had virtually no capital-exporting capacity and thus amounted to solely-capital-importing States, may have ratified IIAs solely to protect foreign investment.

9.3 Application to developed States' IIA ratifications during the twentieth century

This Section applies the 'non-unitary-state theory of foreign-investment policy-making' developed in Section 9.2 to the IIA ratifications of developed States during the twentieth century.[37]

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enter into IIAs with the expectation that this will enhance the chances of attracting capital, and that this will, in turn, promote their economic development".

[35] Under such conditions, we can expect: (i) the masses either to be indifferent to IIA ratifications or to oppose IIA ratifications (if they believe that IIAs hinder the satisfaction of their preferences); (ii) labour unions to have a similar position to the masses; and (iii) domestic firms (which are by definition non-foreign-investment-making firms) to be indifferent to IIA ratifications.

[36] This situation is, obviously, most likely to occur in non-democratic developing States wherein the (military) government primarily requires financial and/or military resources to secure its political survival. Foreign investors may provide that government with financial resources (bribery), foreign aid (through their home States), and/or military aid (through their home States).

[37] This discussion somewhat borrows from Aaken and Lehmann (2013), at 323 et seqq.

9.3.1 Theory: potentially relevant influencers

Roughly speaking, developed States' formal (political-selection) institutions amount to democracies. We can therefore reasonably expect the masses to amount to potentially relevant influencers.

The masses It may be argued that the masses believed that IIA ratifications would, if anything, only marginally reduce their home State's political risk: because of the vague formulations of IIAs' provisions,[38] we can expect the masses to have believed that they only cover State behaviours closely resembling direct expropriations – namely, behaviours which only have a marginal likelihood to occur in developed States.[39] This view has two corollaries: that the masses did not expect IIA ratifications to substantially increase FDI inflows since the ensuing risk reduction would be limited; and that the masses viewed the probability of an IIA-based claim by a foreign investor to be quite small – experimental studies even suggest that individuals may treat marginal, but strictly positive, probabilities as zero.[40] Furthermore, we can

[38] See Chapter 5.

[39] In any event, it is difficult to imagine that the masses could anticipate how broadly investment arbitral tribunals would nowadays interpret IIAs' protection provisions; most notably, the expropriation clause and the fair-and-equitable-treatment clause; see Chapter 5 for a discussion of contemporary investment arbitral tribunal' interpretations.

Concurring with this view: Kenneth Vandevelde, the US chief BIT negotiator during the 1980s: "In preparing the model BIT negotiating text [all versions between 1977 and 1998 (the year when a Canadian investor launched a claim against the US under NAFTA)], the United States had not contemplated that it would be a respondent in an investor-state arbitration for at least two reasons. First, the BITs typically were with developing countries that had little investment in the United States. Second, *the United regarded itself as having a legal system that provided foreign investment with treatment under U.S. law that fully complied with the obligations of the BITs*, which meant that no legitimate claim was likely to arise." (Vandevelde, 2009b, at 285, emphasis added). Abner Mikva, former US Congressman and Chief Justice of the US Court of Appeals: "If Congress had known that there was anything like this [i.e., claims against the US] in NAFTA, they would never have voted for it" (New York Times, 2004).

[40] Individuals seem to either exaggerate or ignore low-probability states of the world (even if they are high-impact states of the word); for a review, Slovic (2000).

Seminal for finding, relying upon both qualitative data (survey and interviews) and quantitative data (panel-data analysis) of BITs signings, that such information-processing heuristics (read: 'non-Bayesian information processing' or 'non-Bayesian belief updating') drove State decision-making in the context of

expect the masses to have perceived IIA ratifications to potentially increase FDI outflows; indeed, if they believed that an IIA ratification would reduce the other States' political risk, then – and only then – they may have perceived the IIA ratification to increase FDI outflows and thus to possibly lead to job offshoring.

In consequence, we can expect the masses to have been generally neutral vis-à-vis IIA ratifications with developed States since they can be expected to have believed that FDI flows would not be affected because IIAs were not expected to reduce the political risk in developed States. And we can expect the masses to have been generally opposed to IIA ratifications with developing States because they can be expected to have believed that IIAs would reduce the political risk in developing States and therewith to potentially increase FDI outflows.

Labour unions The position of labour unions in developed States can be expected to have been similar to the position of the masses.

Domestic firms The position of domestic firms vis-à-vis IIA ratifications with developed States can be expected to have been indifferent: non-foreign-investment domestic firms are unlikely to have cared since IIAs were unlikely to increase FDI inflows (see above); and foreign-investment-making domestic firms are unlikely to have cared because IIAs were not expected to reduce the political risk in developed States (see above).

Their position can, however, be expected to have been supportive of IIA ratifications with developing States: non-foreign-investment-making domestic firms are unlikely to have cared since IIAs were unlikely to increase FDI inflows (see above); and foreign-investment-making domestic firms can be expected to have been supportive because IIAs could potentially reduce the political risk in developing States (see above).

Foreign firms Foreign-investment-making foreign firms generally can be expected not to have been supportive of IIA ratifications since IIAs were not expected to re-

IIL are: Poulsen and Aisbett (2013) for the 2000s; and Poulsen (2014) for the 1990s.

duce the political risk in developed States (see above).

9.3.2 Empirical support

9.3.2.1 General predictions

Without additional assumptions about the relative strength of different potentially relevant influencers, a non-unitary-state theory is indeterminate on whether developed States ratify IIAs at all. This is ultimately an empirical question as it requires a detailed study (read: a case study) of the State's country-internal dynamics. The raw theory, however, makes two predictions.

First, if a developed State were to ratify IIAs, then domestic firms, as the only potentially relevant influencers possibly supporting IIA ratifications, must have had substantial influence on State decision-making. This prediction appears consistent with the dynamics which were at play in the United States (Section 9.3.2.2).

Second, if a developed State were to ratify IIAs, then it would primarily ratify them with States it perceives as exhibiting high political risk – namely, with developing States.[41] This prediction is consistent with the data: virtually no BITs were ratified between developed States by the end of the twentieth century.[42]

9.3.2.2 The case of the United States

Kenneth Vandevelde, the US chief BIT negotiator during the 1980s, recalls that the business community was a key driver in the creation of the US BIT program.[43] He

[41] We can reasonably expect foreigners to have perceived developing States as exhibiting high political risk in light of the widespread expropriations that took place during the 1960s and 1970s. See e.g. Hajzler (2012), at 120.

[42] Only around 2 percent of all the BITs signed (and ratified) by developed States by the year 2000 were signed (ratified) with other developed States; see Section 5.1 for the data.

Only BITs are considered because they solely include foreign-investment-protection provisions. IIAs between developed States are somewhat more common (think of NAFTA), but since they also include non-foreign-investment-protection provisions, most notably trade provisions, their ratifications are likely to be influenced by additional considerations which are not taken into account in this Chapter.

[43] Vandevelde (2009a), at 32.

furthermore recalls that US BITs covered existing foreign investments, despite desires to the contrary by the United States' counter-parties, because "the Senate would be less likely to give its . . . consent to a BIT lacking the enthusiastic support of existing investors".[44] Both of these observations are consistent with the application of the non-unitary-state theory suggesting that foreign-investment-making domestic firms were the only supporters of IIA ratifications. Furthermore, Vandevelde points out that "US negotiators were candid about the lack of evidence that the BITs actually attract new investment".[45] Because this behaviour could lead to opposition by developing States to IIA ratifications, unless the US exhibited altruism vis-à-vis other States, this behaviour must be understood as aiming at reducing the risk of opposition to IIAs by the masses and labour unions within the US – which would again be consistent with the application of the non-unitary-state theory suggesting a possible opposition to IIA ratifications in developed States.

9.3.3 Synthesis

We have seen that a non-unitary-state theory's predictions about the overall evolution of IIA ratifications by developed States are empirically consistent. We have also seen, based on the case of the United States, that there is evidence that a non-unitary-state theory's causal factors are realistic; namely, that its assumptions are realistic.

9.4 Application to developing States' IIA ratifications during the twentieth century

This Section applies the 'non-unitary-state theory of foreign-investment policy-making' developed in Section 9.2 to the IIA ratifications of developing States during the twentieth century.

[44] Vandevelde (2009c), at 111. See also Vandevelde (1992).
[45] Vandevelde (2009c), at 110.

9.4.1 Theory

9.4.1.1 Potentially relevant influencers[46]

Even though IIA ratifications generally occurred under the radars of public discourse in developing States,[47] a State's leader is likely to consider the masses', labour unions', and domestic firms' respective position vis-à-vis IIA ratifications when deciding whether to ratify an IIA because of a latent revelation risk: a challenger may decide to reveal IIA ratifications to the public so as to decrease the leader's political survival; in other words, these interest groups amount to potentially relevant influencers whether or not they actually had knowledge of IIA ratifications.[48]

The masses We can expect that the masses generally believed that IIA ratifications have the potential to increase FDI inflows because IIAs could potentially reduce the political risk in developing States.[49]

Before 1990, we can reasonably expect the masses to have been opposed to FDI inflows and therewith opposed to IIA ratifications. The post World War II period was arguably characterised by an opposition to FDI inflows from developed States because of a combination of two beliefs: the period was marked by decolonisation, and these newly-independent States arguably perceived such foreign investments as yet another form of colonialism by developed States through the control of the means of production;[50] and the Soviet model of centralised economic organisation provided for a credible alternative to capitalism/decentralisation (and its free investment flows).

[46] Echandi (2011), at 13, "Numerous developing countries are often highly vulnerable to the influence of powerful economic and/or political interest groups because they have relatively weak legal and political institutions."

[47] See e.g. Poulsen (2014), at 2.

[48] See also Section 8.5.4.

[49] See Section 9.3.1.

[50] See e.g. Vandevelde (2009a), at 11; see also Vandevelde (1998), at 625, observing that this view is known as "dependency theory of foreign investment [in Marxist economics], which regards foreign investment as a form of neo-colonialism that subjects the local economy to foreign control" (footnote omitted).

After 1990, however, we can expect the masses to have switched their views regarding FDI inflows and being supportive of IIA ratifications. Indeed, even though the masses may still have been concerned by a neo-colonialism threat, and even though they may have been concerned that IIA ratifications may lead to IIA-based claims,[51] they can be expected to have taken their chances because of the dire economic prospects they were facing and the economic benefits which IIA ratifications were promising.[52]

In Latin America, for instance, these dire economic prospects resulted from the following facts. Latin America had experienced its most serious debt crisis in 1982 which led to an economic downturn, reduced income and increased unemployment to high levels. Also, traditionally relied upon financial sources disappeared as (private and official) lending as well as financial assistance from official aid institutions dropped in the aftermath of the debt crisis. Furthermore, the collapse of the Soviet Union meant the disappearance of yet another source of financial-aid flow.[53]

The perceived economic benefits promised by IIAs resulted from the following

[51] In any event, however, we can expect them to have perceived such a risk to be quite small since their home States' were switching to decentralised/liberal economic systems (as exemplified by the massive privatisations that took place during the 1990s in developing States around the world) and since a decentralised economic organisation is likely to have been perceived as not entailing behaviours which would violate IIAs. The second point follows from remember that not even the United States anticipated how broadly IIAs' provisions could/would be interpreted (see footnote 39); sharing this view is Stiglitz (2008), at 461, "If the United States, a country with a great deal of experience adopting such agreements, was not fully aware of NAFTA's import, developing countries are even less likely to understand the complexities of such agreements."

The experimental sciences actually even suggest that they may have perceived this small, but strictly positive, probability to be zero (see footnote 40).

[52] Because of these dire prospects, the masses were arguably perceiving the world through a so-called 'loss frame' and therefore were exhibiting risk-loving preferences.

Experimental studies have repeatedly found that participants tend to be risk averse when they face a choice between gains (i.e., a choice framed in terms of gains) and to be risk loving when they face a choice between losses (i.e., a choice framed in terms of losses). Seminal for the frame dependence of risk preferences are Tversky and Kahneman (1981), and Kahneman and Tversky (1984).

Noting that there was a belief that IIAs increase FDI flows and that FDI was vital for development: Anghie (2004), at 223.

[53] See e.g. Vandevelde (2009a), at 21.

facts. IIAs have the potential to reduce the political risk in developing States and therewith to increase FDI inflows. Contemporary economic growth theories held that higher investments, whatever their origin (i.e., independently of whether they come from abroad), increases economic growth;[54] Asian economies, fuelled by private foreign investments, provided support for these theories as they had been experiencing growth rates three times higher than Latin American and sub-Saharan African economies.[55] And the failure of the Soviet model of centralised economic organisation made the decentralised model, including free investment flows, appear as the only viable alternative for economic growth.

Labour unions The position of labour unions in developing States can be expected to have been similar to the position of the masses.

Domestic firms Domestic firms in developing States arguably amounted mainly to non-foreign-investment-making firms during the twentieth century. We can expect domestic firms to have been opposed to IIA ratifications because they can be expected to have believed that IIAs would reduce the political risk in their home States and therewith to potentially increase FDI inflows (see above).

Foreign firms We can expect foreign firms to have been supportive of IIA ratifications because IIAs could potentially reduce the political risk in their host States.[56]

[54] Modern growth theories (also referred to as 'endogenous growth theories') tend to assume that production is an increasing (though marginally decreasing) function in capital (i.e., in investments); arguably most notably therein is the AK theory developed by Frankel (1962) and Romer (1986). For a literature overview, see e.g. Howitt and Weil (2008).

Moran (2006), at 1 et seq., "During the heyday [read: 1980s and 1990s] of the 'Washington consensus,' conventional wisdom held that foreign direct investment was 'good' for development (as long as the foreign firms did not engage in flagrant worker abuse or environmental pollution), and the more the better".

[55] Vandevelde (2009a), at 21.

[56] Support for this view is provided by the fact that foreign-investment-making firms in developed States seem to have strongly supported the ratification of IIAs in their own home States (see Section 9.3.2.2).

9.4.1.2 Underlying cognitive process: rational cost-benefit calculus and imitation

The previous discussion implicitly assumed that potentially relevant influencers' positions vis-à-vis IIA ratifications solely result from a rational weighing of the pros and cons – namely, from a rational cost-benefit calculus. Clearly, however, other underlying cognitive processes, such as 'imitation', could be at play as well.[57] The non-unitary-state theory presented in this Chapter does not presume any specific cognitive process.

The following brief presentation of empirical studies suggests that although IIA ratifications by developing States were mainly driven by rational calculus, there is also some evidence of imitation.

Rational Calculus National-treatment clauses and transfer clauses are less constraining in developing-developing IIAs than in developed-developing IIAs.[58] This finding suggests rational calculus.

Before 1990, a developing State's probability of signing (and arguably of ratifying) a BIT is on average positively influenced by its FDI-inflow competitors' BIT signings.[59] This finding suggests rational calculus.

Developing States are more likely to sign (and arguably to ratify) an IIA with the United States, the higher the military aid received by the United States.[60] This finding suggests rational calculus.

Empirical studies suggest that the probability that a developing State signs (and arguably ratifies) a BIT during a given year increases on average if the State receives credits from the IMF during that year.[61] This finding suggests rational calculus.

Several observations suggest that the presence of foreign investments that could be expropriated on average negatively influenced a developing State's signing (and

[57] 'Imitation' is discussed in Section 9.1.

[58] See footnote 83 and the text preceding it.

[59] See Section 9.4.2.3.

[60] See footnote 71.

[61] See Elkins, Guzman, and Simmons (2006), at 840; and Jandhyala, Henisz, and Mansfield (2011), at 1067.

arguably ratification) of IIAs.[62] This finding suggests rational calculus.

Finally, an empirical study finds that during the 1990s, the probability that a developing State signs (and arguably ratifies) a BIT was on average substantially reduced if that State experienced a BIT claim in the near past.[63] This finding suggests rational calculus.

Imitation An empirical study finds that the probability that a developing State signs (and arguably ratifies) a BIT during the 1990s on average increases with the number of BITs signed by its 'peers'; it finds no statistically significant relation for the period between 1970 and 1990.[64] These findings may be interpreted as evidence that during 1990s imitation was a driver of IIA ratifications. This interpretation is further supported by the fact that developing States increasingly signed and ratified IIAs with other developing States since 1990 (they amounted to around half of the BITs signed during that period).[65] Indeed, since these developing States had no existing FDI flows amongst themselves and no prospects thereof in the near future, these findings do not seem to be driven by rational calculus and therefore rather suggest imitation.[66]

[62] See Section 9.4.2.4.

[63] See Section 10.2.1.

[64] Jandhyala, Henisz, and Mansfield (2011), at 1063. They find a statistically significant positive relation, while amongst others controlling for 'FDI-inflow competitors' BIT signings', for the following definitions of 'peers': according to bilateral trade relations, common language, common colonial history, common participation in international organisations; or common region.

[65] See Section 5.1 for the data.

[66] Elkins, Guzman, and Simmons (2006), at 818 et seq., " [some] of which involved noncontiguous, poor, highly indebted African countries for which it is difficult to imagine much benefits. (What are the chances that capital from Burkina Faso would flow to Chad, or investor from Benin would soon demand entrée to Mali?) ...This recent turn toward BITs between developing states is more difficult for our [competition-for-capital] theory to explain. It does seem to suggest that more political or sociological explanations may be increasingly relevant."

9.4.1.3 Explanatory relevance of potentially relevant influencers

There exists some empirical evidence that leaders in developing States sometimes signed IIAs merely to provide themselves with photo opportunities.[67] A photo-opportunity motivation can, however, by itself not explain the empirical patterns described in Section 9.4.1.2.

The non-unitary-state theory proposed in this Chapter, on the other hand, can both account for those empirical patterns as well as for IIA ratifications being driven by a photo-opportunity motivation. Indeed, a non-unitary-state theory allows for the possibility that a leader does not consider potentially relevant influencers (and is thus, for instance, only driven by the prospect of a photo opportunity) insofar as the leader's political survival is not affected by such non-consideration.[68] Consequently, the existence of such a photo-opportunity motivation underlying IIA ratifications does not reject the theory presented in this Chapter and therewith does not reject the causal/explanatory relevance of country-internal factors.

9.4.2 Empirical support

9.4.2.1 General predictions

Without additional assumptions about the relative strength of the different potentially relevant influencers, a non-unitary-state theory is indeterminate on whether developing States ratify IIAs at all. This is ultimately an empirical question as it requires a detailed study (read: a case study) of the State's country-internal dynamics. The raw theory, however, makes some general predictions.

First, it predicts that developing States' IIA ratifications are likely to have significantly increased since 1990 because the masses are likely to have supported IIA ratifications after that date, in both young democracies and military dictatorships.[69]

[67] Researchers have come across government files stating so. For Pakistan, for instance, see Poulsen and Aisbett (2013), at 280.

[68] This observation follows from remembering that subsidiary motivations drive a leader's behaviour insofar as political survival is not affected; see Section 8.1.2.

[69] Even military dictators face the threat of revolutions and therefore respond – to some degree – to the preferences of non-military interest groups (most notably, to the masses).

This prediction is consistent with the data: the number of signed (and ratified) IIAs exploded after the end of the Cold War.[70]

Second, it predicts that if a developing State did not ratify IIAs after 1990, it is most likely because domestic firms (which may oppose IIA ratifications) amounted to powerful relevant influencers. This prediction appears consistent with the dynamics which were at play in Brazil for instance (Section 9.4.2.2).

Third, it predicts that foreign firms may pressure their own home States to put pressure on the host State to ratify IIAs. This prediction appears consistent with the data: a recent empirical study of the United States' BIT ratifications finds that if a developing State received military aid by the United States, that developing State was significantly more likely to ratify a BIT with the United States.[71]

9.4.2.2 Short case studies

The following two short cases studies strongly suggest that a non-unitary-state perspective is better suited than a unitary-state perspective to account for some of the IIA ratifications. Because both studies deal with States having quite large economies, one may feel that there exists a case-selection bias – namely, that the superiority of a non-unitary-state theory only exists for States exhibiting large economies.[72] Although case studies of smaller economies are ultimately needed to resolve this issue, the goal of this Section is more modest: it only understands those two studies to suggest that such a superiority may exist more generally and that, until proven otherwise, it is worthwhile for a researcher to adopt a non-unitary-state perspective when thinking about IIA ratifications.

The case of Brazil Brazil is one of a couple of countries which have no IIA in force. Actually, Brazil signed fourteen BITs during the 1990s, but did not ratify a single one of them.

[70] See Section 5.1 for the data.

[71] Chilton (2014), at 19 et seq., "based on the United States 46 BITs that are in force today (45 of which entered into force during the twentieth century).

[72] I thank Eyal Benvenisti for suggesting this potential case-selection bias.

The following explanations for Brazil's non-ratifications are generally advanced – none of which appears convincing. First, although the existence of general opposition in Brazil against FDI inflows from developed States (and thus to IIA ratifications) cannot generally be rejected,[73] the case for it is rather weak during the 1990s: there seems to be no general opposition against the ratification of international treaties (i.e., against binding oneself under PIL) as Brazil concluded multiple ones during the 1990s;[74] and there seems to be no general opposition against FDI inflows because Brazil enacted multiple domestic investor-friendly laws since the middle of the twentieth century,[75] and because Brazil's media aggressively supported investor-friendly policies during the 1990s.[76] Second, the argument that IIAs were not ratified because they were perceived as violating the Brazilian constitution is also weak: the Brazilian constitution (enacted 5 October 1988) does not appear to represent a real barrier as it was amended over 64 times between 1988 and 2010.[77] Third, the argument that Brazil thought that it did not have to ratify IIAs because it already enacted domestic investor-friendly laws is also unconvincing: this argument misses the point because IIAs, as opposed to domestic law, give rise to PIL-based obligations and therethrough may reduce political risk. Fourth, the argument that Brazil thought that a reduction of its political risk through IIA ratifications would not impact FDI inflows because of its large market and/or natural resources is also unconvincing: a reduction in political risk could still increase FDI inflows by increasing the expected discounted profits of foreign investments.[78] In consequence, a

[73] See footnote 50 and the text preceding it for the arguments underlying the view that such an opposition may have existed.

[74] Including, most notably perhaps, double-tax treaties (Lemos and Campello, 2013, at 12), and Brazil's membership to the WTO on 1 January 1995.

[75] Brazil encouraged foreign investments in most manufacturing sectors during most of the second half of the twentieth century; see e.g. Schneider (2009), at 177.

[76] See e.g. Lemos and Campello (2013), at 8, "News in the early 1990s often urged Brazil to move fast to attract investors, in face of the competition entailed by the transition to capitalism of former communist countries and China. Argentina's privatization process was also extensively reported and used as justification for the need to adopt market friendly policies designed to attract investment."

[77] For a detailed description of those amendments, see Chamber of Deputies of Brazil (2010).

[78] Evidence that the inelasticity view was not widespread is given by "four treaties were tabled together at the threshold committee on November 1996 ... The rapporteurs were all members of the governing

unitary-state perspective does not seem to be able to explain Brazil's behaviour with respect to IIA ratifications.

A non-unitary-state theory suggests another explanation: domestic firms had substantial influence on State decision-making in the context of IIA ratifications and were therefore able to oppose such ratifications. There appears to be some evidence supporting the claim that big domestic firms had a strong influence on State decision-making in Brazil during the twentieth century,[79] which thus provides some preliminary support for the non-unitary-state-theory explanation of Brazil's non-ratifications. Further empirical research is required to confirm this explanation.

The case of South Africa South Africa started ratified IIAs in the middle of the 1990s, that is, during the decade marked by the disintegration of the Apartheid regime. Arguably in order to encourage affirmative-action measures aimed at increasing the black population's ownership and participation in the economy, the new Constitution, although promising compensation for expropriation, did not promise compensation at the 'fair market value' and only promised compensation for direct expropriation.[80] These standards were in clear opposition to the BITs South Africa started to ratify with developed States during that period, as these treaties required compensation amounting to the 'genuine value of the investment' (read: fair market value) for both direct and indirect expropriations.

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coalition, and their drafts received full approval. They revealed a pervading positive view of the treaties, which were expected not only to make Brazil more competitive vis-à-vis competing Asian countries (especially China)" (Lemos and Campello, 2013, at 18).

[79] Prior to the 1990s, Brazil's big domestic businesses had close ties to the government and tended to benefit from significant government support; see e.g. Schneider (2009), at 160, "[big domestic businesses] enjoyed protection (banking, steel, telecommunications, and transport) or received … sustained state assistance (construction and petrochemicals)".

Brazil's corporate-law revision in 2001 (Corporate law, Nr 6.404/1976, was amended, Nr 10.303/2001), in which it insufficiently increased the protection of minority shareholders by international standards and according to economic-development theories, may be understood as evidence that big domestic firms influence State decision-making. Actually even those political scientists who are generally sceptical about the business sector's substantial influence on State decision-making in Latin America tend to interpret this rejection in this way; see, perhaps most notably, Schneider (2008), at 397, endnote 50.

[80] See Poulsen (2014), at 7.

In 1995, South Africa signed a BIT with Canada (note: this BIT was never ratified) which included preferential measures towards Canada's aboriginal people, yet did not include any exclusion for affirmative-action measures in South Africa.[81]

It has been held that South Africa simply did not properly understand the norms it was agreeing to observe.[82] There is, however, some evidence suggesting that developing States generally, including South Africa, actually did understand quite well the norms they were signing: developing-developing BITs seem to exhibit significantly and substantially less constraining (i.e., restricting State behaviour less) 'national-treatment clauses' and 'transfer clauses' than developed-developing BITs;[83] this variation strongly suggests an understanding of these norms by developing States.[84]

A non-unitary-state theory proposes an alternative explanation (an explanation which does not require one to assume an ignorant South Africa): foreign firms may influence State decision-making in South Africa in the context of IIA ratifications. Since such influence is especially likely for developed-developing IIAs, because developed States exhibited powerful (foreign-investment-making) firms, we should expect developed-developing IIAs to be more constraining for developing States than developing-developing IIAs; this is consistent with the data. Furthermore, since we can expect foreign firms to have only focused on influencing State decision-making in the context of IIA ratifications (and not on constitutional issues) as only IIAs allow to decrease South Africa's political risk, we should expect IIAs to be more constraining than South Africa's constitution; this is again consistent with the data.

[81] See Poulsen (2014), at 9.

[82] For such a (bounded-rationality) explanation, see Poulsen (2014), at 7 et seq.

[83] Poulsen (2011), at 192 et seqq. and 201, based on a statistical analysis of a random sample of BITs signed by developing States between 1994 and 2006 (303 BITs; 191 of which were signed between 1994 and 2000; and 124 of which amount to developing-developing BITs). Although one may hold that the difference is solely driven by the BITs signed after 2000 (once the potential of BITs became widely known due to the rise of investment claims), this is unlikely: developing States already argued for such less-constraining clauses during the multilateral discussions on the 'UN Draft Code on Transnational Corporations' in the 1980s (see e.g. Poulsen, 2011, at 191 and 194).

[84] This is not to say that they correctly anticipated how investment arbitral tribunals would interpret these norms.

9.4.2.3 Positive statistical association between BIT signings and FDI-inflow competitors' BIT signings

Empirical studies of BIT signings during the twentieth century find a statistically significant positive association (i.e., positive correlation) between the probability of a developing State signing a BIT and its FDI-inflow competitors' BIT signings; an FDI-inflow competitor is defined as a State whose export markets are similar and/or which exports the same basket of goods.[85] Importantly, when only BIT signings during the 1990s are considered, empirical studies find that the strength of this positive association becomes substantially smaller (some studies even find that it becomes statistically insignificant).[86]

Traditional interpretation This positive statistical association tends to be interpreted as evidence that developing States 'competed for capital' and thus that developing States on average signed (ratified) IIAs during the twentieth century to, amongst others, 'compete for capital'; that is, because they exhibited an increased-FDI-inflow motivation (i.e., a competition-for-capital motivation).[87]

A non-unitary-state theory, however, points out that such an interpretation does not readily follow from this positive statistical association.[88]

[85] Seminally, Elkins, Guzman, and Simmons (2006), at 811, based on a panel-data analysis of all BITs signed between 1958 and 2000 (except developed-developed BITs), "The evidence suggests that potential hosts are more likely to sign BITs when their competitors have done so."; Jandhyala, Henisz, and Mansfield (2011), at 1063, based on a panel-data analysis of all BITs signed between 1970 and 2000.

[86] See respectively Jandhyala, Henisz, and Mansfield (2011), at 1063; and Poulsen and Aisbett (2013), at 300 (using the dataset from Elkins, Guzman, and Simmons (2006)).

[87] Seminal for spreading such an interpretation are the authors of the first empirical study finding such an association: Elkins, Guzman, and Simmons (2006), at 825 and 836, "The possibility of investment diversion means that governments may have competitive reasons to implement BITs ... [we interpret the data as] fairly convincing evidence of the importance of competition for capital among developing countries in explaining the proliferation of BITs".

[88] The competition-for-capital-motivation interpretation has also been attacked from a unitary-state perspective. None of these attacks is, however, convincing.

First, it has been argued that if such a motivation had existed, then we would have observed more investor-friendly IIAs (Montt, 2009, at 110, "there were more prefereable alternatives for investors ... that is, treaties that could have offered more convenient standards to foreign investors"). This argument is

Non-unitary-state interpretation Think of a world wherein: it is generally believed that IIAs increase FDI flows; the masses, labour unions, and domestic firms oppose IIAs; and foreign firms support IIAs. If foreign firms amount to relevant influencers and if the masses, labour unions, and/or domestic firms amount to relevant influencers, then developing State's IIA-signing patterns may still exhibit such a positive statistical association. Indeed, on the one hand, FDI-inflow-competing States' signings of IIAs do not affect the strength of the foreign firms' support since those signings do not affect the political risk to which their foreign investments are exposed. On the other hand, FDI-inflow competitors' signings of IIAs reduce the strength of the masses', labour unions', and domestic firms' opposition because those signings reduce the expected increase in FDI inflows (and thus reduces the expected negative consequences) that IIAs may potentially yield. In this thought experiment, the positive statistical association would be driven by foreign firms and therefore by a foreign-investment-protection motivation (rather than by a competition-for-capital motivation). In short, although the positive statistical association arises because of the existence of a competition for capital, it does not necessarily imply that developing States signed (and ratified) IIAs to 'compete for capital'.

Actually, this abstract thought experiment is not that farfetched and might capture developing States' IIA signings (and ratifications) before 1990. Indeed, Section 9.4.1.1 argued: during the twentieth century it was generally believed that IIAs could/would increase FDI flows; before 1990 both the masses, labour unions, and domestic firms in developing States opposed IIAs; and foreign firms supported IIAs

flawed for at least two reasons. On the one hand, developing States' IIA ratifications may be driven by a development motivation which may prevent them from offering better conditions to foreign investors. On the other hand, developed States may face domestic opposition to IIA ratifications by the masses; consequently, if more investor-friendly conditions would have led to domestic opposition (due to a threat of higher FDI outflows and/or a threat of IIA-based claims), then they would never have been on the table.

Second, it has been argued that if a competition-for-capital motivation had existed, then "their content should have become progressively more investor-friendly over time" (Poulsen, 2014, at 4). This argument is unconvincing. We can reasonably except developing States to have anticipated that other FDI-inflow competitors would also sign (ratify) IIAs in the future (and if not, then developed States would have pointed it out so as to get the best possible conditions for their foreign investors) and therefore that these States would sign (ratify) as investor-friendly IIAs as they are willing to sign (ratify) from the beginning.

during the twentieth century.

The fact that the positive association substantially decreased (possibly even disappeared) during the 1990s supports this non-unitary-state interpretation. Section 9.4.1.1 argued that the masses in developing States are likely to have become supportive of IIAs after 1990. Since we can hold that the masses primarily wanted to increase FDI inflows (rather than prevent a decrease in FDI inflows due to diversions to other States),[89] we can expect the masses to have wanted to sign (and ratify) IIAs as quickly as possible (i.e., irrespective of the IIA signings of FDI-inflow competitors) – which indeed leads to a decrease in the positive association.

Insofar as this argumentation is sound, we can hold that the observed positive statistical association suggests that a foreign-investment-protection motivation drove, amongst others, developing States' IIA signings (and ratifications) before 1990; and that an increased-FDI-inflow motivation and a foreign-investment-protection motivation drove, amongst others, developing States' IIA signings (and ratifications) during the 1990s.

9.4.2.4 Addendum: expropriation motivation

Nothing of what has been said thus far excludes the possibility that developing States may oppose IIAs because they first want to expropriate existing foreign investments (an act which would violate IIAs) in their respective territories.[90] In other words, nothing precludes the existence of an expropriation motivation.

There is indeed some empirical support for the existence of such a motivation.[91]

[89] The dire economic prospects that developing States were facing and the perceived economic benefits promised by IIAs (see Section 9.4.1.1) strongly suggest that the masses primarily wanted to increase FDI inflows.

[90] Suggesting an expropriation motivation is Sykes (2007), at 811 et seq., "An alternative hypothesis, of course, is that developing countries came to realise that their strategy in the United Nations was a mistake, and that retaining an opportunity to expropriate raised their cost of capital by more than the gains from any expected expropriation".

[91] Bubb and Rose-Ackerman (2007), at 306 et seq., noting that, on average, developing States seem to have started signing BITs at the same time as expropriations in those States became increasingly rare in the 1970s and observing that "[a]lmost all early treaties were signed between Germany and Switzerland, on the one hand, and poor countries, mostly in Africa. Of the 56 BITs signed between 1959 and 1967,

It is, however, doubtful that such an expropriation motivation was practically still relevant after 1980 because of the wave of expropriations that took place in developing States during the 1970s which left few potential expropriation targets (i.e., foreign investments).[92]

9.4.3 Synthesis

We have seen that a non-unitary-state theory's general predictions about the overall evolution of IIA ratifications by developing States are empirically consistent. It has also been shown that a unitary-state perspective has a difficult time explaining the IIA-ratification behaviour of specific developing States (in casu: Brazil and South Africa) and that a non-unitary-state theory provides plausible alternative explanations for those behaviours. Finally, we have seen that a non-unitary-state theory can explain the positive statistical association and, arguably more importantly, that a non-unitary-state theory makes it clear that, contrary to what is usually held, this posititive statistical association need not imply that developing States signed (ratified) IIAs to compete for capital (i.e., out of an increased-FDI-inflow motivation).

45 were signed by either Germany or Switzerland. Neither was a major colonial power, and they signed BITs with countries that would not have had much German or Swiss capital to expropriate."

[92] See, e.g., Hajzler (2012), at 120, "The virtual disappearance of expropriation during the 1980s [and 1990s] is in part attributed to the widespread confiscation of virtually all vulnerable investments in developing countries a decade earlier."

Chapter 10

Likelihood of SD alignment

We have seen in Chapter 7 that contemporary IIL is arguably not aligned with SD. This Chapter studies the conditions under which we can expect a better alignment of IIL with SD; specifically, it applies the non-unitary-state theory developed in Chapter 9 to study those conditions.[1]

This Chapter finds that unless the masses amount to 'relevant influencers', IIL is quite unlikely to be aligned with SD. It suggests that this condition is most likely to be satisfied when their home State recently faced an IIL-based claim. It furthermore argues that IIL commentators should aim at educating the masses on IIL's SD deficits and that States should rely upon public consultations when drafting IIAs.

The remainder of this chapter is organised as follows. Section 10.1 studies the factual conditions under which IIL is likely to be aligned with SD. Section 10.2 finds empirical support for those factual conditions. Finally, Section 10.3 studies means (policy prescriptions) to increase the likelihood that IIL is aligned with SD.

[1] Remember that although Chapter 9 focuses on IIA ratifications, the non-unitary-state theory developed therein applies to foreign-investment policy-making more generally (Section 9.2) – and thus applies to IIL more generally.

10.1 Factual likelihood conditions

This Section studies the factual conditions, implied by a non-unitary-state perspective, under which IIL is likely to be aligned with SD.

10.1.1 Generally

The theory of state decision-making developed in Chapter 8 suggests that we should generally expect leaders to make polices aligned with SD only if doing so maximises their political survival. This follows from observing, as we have seen, that we can expect leaders to be primarily driven by a political-survival motivation (independently of these leaders' fundamental motivations).[2]

We have also seen that the masses may exhibit a sustainable-development preference;[3] and that the masses seem to have exhibited a development preference or, at the very least, an economic-development preference.[4] In consequence, if the masses amount to 'relevant influencers', then we may expect a substantial increase in the likelihood that state decision-making is aligned with SD since leaders would need to make SD-aligned policies in order to capture the support of the masses.[5]

10.1.2 International investment law

The non-unitary-state theory developed in Chapter 9 suggests that the only 'potentially relevant influencer' whose influence decision may be driven by a (sustainable-)development preference are the masses.[6] Indeed, labour unions are primarily interested in jobs and wages, and are furthermore likely to be driven by short-term rather

[2] See Section 8.2 for the argumentation.

[3] See Section 8.5.2 for the theoretical argument.

[4] See Section 8.5.3 for empirical evidence.

[5] Sharing this view: Bernasconi-Osterwalder (2011), at 192, "Governments and institutions governed by ... community participation are more capable of reconciling the needs of present and future generations, balancing private and public interests, and harmonizing economic development with social and environmental needs."

[6] For the 'potentially relevant influencers' in the IIL policy-making context, see Section 9.2.1.

than development (i.e., long-term) considerations; and (foreign and domestic) firms can be expected to be driven by a profit-maximisation motivation.

If this reasoning is sound, then it follows that unless the masses amount to 'relevant influencers', IIL is quite unlikely to be aligned with SD.[7]

10.1.3 The masses as 'relevant influencers'

If the masses amount to 'potentially relevant influencers', then the masses amount to 'relevant influencers' (Section 8.1.4) if: (i) they are aware that their utilities are substantially affected by state decision-making on those issues; and (ii) they amount to an organised interest group.

Let us now consider these conditions in the context of IIL. The former condition is likely to be satisfied when the masses are acutely aware of the dangers of IIL – most notably, if their home State has *recently* faced a *claim by a foreign investor* under IIL. The latter condition is trivially satisfied in democracies, and unlikely (though not impossible) to be satisfied in non-democracies.

10.2 Empirical support

The empirical findings discussed hereinafter seem to support the non-unitary-state theory's implication that IIL is substantially more likely to be aligned with SD if the masses amount to 'relevant influencers'. These findings provide additional empirical support for taking a non-unitary-state perspective when studying IIL.[8]

[7] 'Unlikely' because even when the masses do not amount to 'relevant influencers', a non-unitary-state theory does not exclude the possibility that IIL is aligned with SD: we cannot exclude the possibility that the leader's fundamental motivation is aligned with SD, so that the leader's behaviour is aligned with SD when political survival is not affected (Section 8.1.2).

[8] Namely, they provide empirical support in additional to the empirical support discussed in Chapter 9.

10.2.1 Quantitative evidence

A recent empirical (quantitative) study finds that if a developing State experiences an IIL-based claim, then the probability of that State signing an IIA reduces by 35 percent and the probability of it ratifying an IIA reduces by 17 percent.[9] Another recent empirical (quantitative) study finds that if a State experiences an IIL-based claim, then that State is significantly more likely to re-negotiate IIAs; and finds that worldwide IIL-based claims do not (statistically significantly) modify a State's likelihood to re-negotiate IIAs.[10]

The traditional interpretation of these findings implicitly reasons from a unitary-state perspective: it is argued that this finding is best interpreted as evidence that the governments did not have knowledge about the possibility of an IIL-based claim prior to the filing of such a claim against their State and therefore exhibit bounded-rational learning (i.e., 'non-Bayesian information processing' or 'non-Bayesian belief updating').[11]

It is, however, quite unlikely that IIA negotiators, and thus governments, would not have knowledge of IIL-based claims being filed against other States and therewith not to have knowledge about the possibility of such a claim against their home State. Taking instead a non-unitary-state perspective provides a more reasonable interpretation of this empirical finding: the masses were less likely to amount to 'relevant influencers' prior to a claim being filed against their home State because they were not aware that their utilities could be substantially affected by IIL. In-

[9] Poulsen and Aisbett (2013), at 291 et seqq., based on a panel-data analysis of developing or transition States' BIT signings and BIT ratifications between 1990 and 2009 – controlling, most notably, for the global number of BIT-based claims as well as for the total number of BIT-based claims against States in the same region.

[10] Haftel and Thompson (2014), at 26, based on a panel-data analysis of BIT renegotiations between 1962 and 2007 (196 renegotiations); and at 26 et seq., "It therefore appears that governments fail to take into account the experience of other countries with investment tribunals in their decision to renegotiate BITs."

[11] They reach this conclusion by rejecting alternative explanations *within a unitary-state framework*; see Poulsen and Aisbett (2013), at 296 et seqq. They also conducted interviews with IIA negotiators from multiple developing States: the majority of IIA negotiators (unsurprisingly) held that they did not realise that IIAs involved risks until a claim was filed against them (Poulsen and Aisbett, 2013, at 279 et seqq.).

deed, considering the large amount of information with which the masses must deal and considering that they are unlikely to specifically seek for information about IIL-based claims against other States, it is plausible to assume that the masses exhibit bounded-rational learning and thus unlikely to have knowledge of the existence of IIL prior to the filing of a claim against their home State.[12] Once a claim has been filed and the masses become aware of IIL's dangers, we can expect the masses to oppose the signing/ratification of IIAs that are not aligned with SD. Since IIAs were unlikely to be aligned with SD in the past,[13] the masses can be expected to oppose the signing/ratification of IIAs having the same design as in the past – which produces a reduction in the signing and ratification of IIAs in the short and medium term. This prediction is consistent with the aforementioned empirical findings.

If the non-unitary-state interpretation of this empirical finding is sound, then this finding should be understood as providing support for the non-unitary-state theory's implication that IIL is substantially more likely to be aligned with SD if the masses amount to 'relevant influencers'.

10.2.2 Specific evidence

Experience of an IIL-based claim In the aftermath of an IIL-based claim against a given State, that State's IIAs tend to be more aligned with SD. Because IIA negotiators should be aware of IIL-based claims against other States, we can take the following observations to support the non-unitary-state theory's implication that IIL is substantially more likely to be aligned with SD if the masses amount to 'relevant influencers'. Further support for this interpretation is provided by the fact that most of these claims were challenging State decision-making on sensitive issues and the fact that most of the claims were heavily publicised – so that we can reasonably expect the masses to have become aware of IIL's dangers.

Although Switzerland has never experienced an IIL-based claim – in spite of

[12] Supporting this view: Eberhardt and Olivet (2012), at 35, "Investment arbitrators are hidden from public view, barely mentioned in international media. This is perhaps not surprising, given that most people's eyes glaze over at the mere mention of the words."

[13] See Chapter 7.

having signed over 160 IIAs (with over 150 in force), Switzerland was noticed in April 2014 by a foreign investor that it would file an IIL-based claim.[14] Before that notice, Switzerland's IIAs were badly aligned with SD: the content of its ratified IIAs did not significantly differ from IIAs of the early 1990s.[15] Following that notice, Switzerland heavily reviewed its approach to IIAs by aligning it more closely to SD; specifically, it updated its 'IIA guidelines' (which is a list of principles that its IIAs ought to fulfill; it is the closest thing it has to a model IIA),[16] and the first IIA it signed thereafter applied those new guidelines.[17] Although the masses were not aware of the notice during the revision, it can reasonably be held that leaders took into account that the masses will sooner or later become aware thereof.[18]

The earliest developed-State example is provided by the United States which faced multiple well-publicised IIL-based claims against itself at the turn of the century,[19] and then heavily reviewed its model investment treaty in 2004 by aligning it

[14]Neue Zürcher Zeitung (2015).

[15]Instead of several, see Switzerland–Tunisia BIT (signed in 2012; http://www.admin.ch/opc/de/classified-compilation/20122602/index.html) and Switzerland–Trinidad and Tobago BIT (entered into force in 2012; http://www.admin.ch/opc/de/classified-compilation/20112334/index.html). More extensively, see Bonzon (2014).

[16]The new elements of this updated 'IIA guidelines' most notably include (Siegenthaler, 2015): in the preamble that the object and purpose (teleological perspective) is central for the interpretation of the treaty; in the preamble that the purposes of the treaty are sustainable development, the respect of CSR standards, to prevent and combat corruption, etc.; coherence with other PIL obligations; a new article ('right to regulate') holding that nothing in the treaty prevents States from taking measures in the public interest insofar as those measures are not arbitrary or unjustifiable and do not amount to disguised protectionism; dispute-settlement article complemented by application of 'UNCITRAL Transparency Rules' (Section 5.2.3.2) to all investor-State dispute settlements (i.e., not only to UNCITRAL proceedings).

[17]Switzerland–Georgia BIT (signed 3 June 2014; available at http://www.news.admin.ch/NSBSubscriber/message/attachments/38087.pdf).

[18]See Section 8.5.4 for the argumentation.

[19]Most notable amongst these was arguably *Methanex Corp. v United States of America*, UNCITRAL ad hoc Tribunal, Partial Award, 7 August 2001 (NAFTA). New York Times (2001), "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. ... 16 NAFTA cases that have been filed so far in the United States, Canada and Mexico showed how corporations were using NAFTA not to defend trade but to challenge the functioning of gov-

more closely with SD.[20] Since then, the United States has faced several additional IIL-based claims and, although it did not loose any one of these cases, it had to spend millions of dollars defending itself which is likely to have kept the masses aware of IIL.[21] It again reviewed its model investment treaty in 2012 and, arguably,[22] aligned it even further with SD.[23]

Widely publicised cases include one faced by Australia. In 2011, Australia was threatened with an IIL-based claim against its new plain-packaging-tobacco laws,[24] and then decided to oppose the signing/ratification of IIAs exhibiting ISDS clauses for not being in the public interest.[25]

Another well-publicised case is faced by Germany. In 2012, Germany saw an IIL-based claim filed against its decision to shut down nuclear reactors in 2011 in the aftermath of the March 2011 Fukushima nuclear accident in Japan (it immediately

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ernment . . . Critics say the corporate victories have spawned even bolder and broader challenges, each one further undermining public policy. In a recent case that critics consider one of the most worrisome, the Methanex Corporation of Vancouver, British Columbia, is challenging California's decision to phase out the use of a gasoline additive containing methanol, which Methanex makes . . . The company wants $970 million in compensation, which rankles many Californians".

[20] Olivet and Eberhardt (2013), at 16, "The United States, having been sued several times by Canadian companies based on investment protection rules embedded in NAFTA, moved in 2004 to review the 1994 US Model BIT. The revised text included new language that gave the US state some policy space for regulation, particularly in the areas of health and environment."

[21] See, e.g., http://www.italaw.com.

[22] Of different opinion: Olivet and Eberhardt (2013), at 16 et seq., "Barack Obama himself, campaigning for president in 2009, vowed to review the 2004 model BIT to increase labour and environmental obligations. When the final revisions came out in 2012, no substantive changes were in fact included . . . the business lobbies, advocated against weakening investment protections measures".

[23] The US Model BIT 2012 exhibits improvements, most notably, with respect to transparency and public participation in investment-treaty arbitrations and with respect to labour and environment (in the form of a provision reaffirming the parties commitment to the ILO Declaration and recognising the importance of multilateral environmental agreements). See http://www.state.gov/r/pa/prs/ps/2012/04/188199.htm.

[24] The claim was later filed: *Philip Morris Asia Limited v. Australia*, UNCITRAL, PCA Case No. 2012-12, Award pending (Australia–Hong Kong BIT).

[25] Kelsey (2012), at 8, "Its resolve has strengthened following recent moves by American tobacco giant Philip Morris International (PMI) to challenge Australia's plain packaging tobacco laws using an Australia-Hong Kong BIT. Australia now [April 2011] has officially stated that it will no longer agree to any investor-state dispute settlement provisions in its FTAs."

shut down its eight oldest reactors and wants to shut down all other reactors by 2022).[26] Although Germany strongly supported IIAs exhibiting traditional ISDS clauses prior to this claim,[27] it then switched to strongly oppose such ISDS clauses for not being in the public interest.[28]

Canada has faced several IIL-based claims. Arguably one of the most well-publicised cases occurred in 2012 when Canada was noticed by a foreign investor that it would file a (500mio USD) IIL-based claim against its decision (Canadian courts' decision) to revoke two drug patents.[29] In the aftermath of this notice, Canada refused to ratify an already-signed IIA with China for not being in the public interest.[30]

[26] *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Award pending.

[27] Bernasconi-Osterwalder (2012), at 12 et seq., "in May 2012 the Directorate-General for Trade of the European Commission issued a first draft text on investor-state dispute settlement in EU investment treaties ... With its proposal, the Commission gives a clear signal that it wishes to include investor-state dispute settlement provisions in its negotiations with its current negotiating partners (Canada, India, Singapore) and most likely with future ones as well. The text also indicates that it is trying to grapple with some of the inherent concerns of the system that have crystallized over the past decade. Member states, however, appear divided on the need for the system to evolve. While the tone in a number of comments was generally positive, some members like Germany appear categorically opposed to any modernization and improvement proposed by the Commission ... Germany has expressed a preference to balance transparency against 'the rights of investors and States to keep the litigation secret' and that 'EU investors expect that their special situation is reflected in the drafting of transparency rules.' Besides being out of sync with recent trends, Germany's approach would arguably be contrary to citizens' access to information rights and would undermine the legitimacy of the investor-state arbitration even further."

[28] IISD (2014a), at 16, "Germany's Ministry of Economy announced in March [2014] that it opposed investor-State dispute settlement provisions in the EU-US trade pact that is currently under negotiation"; IISD (2014b), at 13, "On July 11th, Germany's upper parliament passed a resolution that highlights the 'substantial risks' of investment arbitration, and asks the European Commission to explain why it would be necessary in the TTIP."

[29] *Eli Lilly and Company v Government of Canada*, UNCITRAL ad hoc Tribunal (NAFTA).

[30] de Mestral (2014), "The Chinese and Canadian Prime Ministers signed the Canada-China bilateral investment treaty (BIT) in September 2012. This agreement was negotiated for many years, but it now appears that it will be some time before it is ratified ... [as] the Canadian government has held up ratification ... Instead of praise for securing better access to the difficult Chinese market, the Canadian government was immediately vilified for committing itself to an unbalanced sellout of Canadian interests by opening Canada to investment by powerful Chinese state-owned enterprises that might run roughshod

India took the decision to halt IIA signings/ratification after it faced multiple IIL-based claims against a decision of its Supreme Court.[31] South Africa took the decision to withdraw from IIAs after it faced IIL-based claims against State action aimed at increasing the participation in the economy of historically disadvantaged South Africans (i.e., under the Apartheid regime); that is, when it faced claims against affirmative-action policies.[32] Other examples of States which experienced an IIL-based claim and then changed their approach vis-à-vis IIAs include: Indonesia,[33]

over Canadian national interests. The Harper government was so shocked that it put the ratification of the Canada-China BIT . . . on hold . . . critics have focused on the ISDS provisions in the Canada-China BIT . . . ISDS is seen as driven by occult corporate interests, conducted by faceless and irresponsible international arbitrators, procedurally opaque, undemocratic, and in contempt of Canadian courts. The whole process is criticized as undermining legitimate public policies and threatening a 'regulatory chill,'".

[31] Hindu (2014), "[India] has ordered a freeze of all Bilateral Investment Protection Agreements (BIPA) negotiations . . . This follows a spate of . . . notices on the Government by foreign companies seeking to recover their investments under the agreement . . . Vodafone was first off the blocks . . . Its Dutch subsidiary Vodafone International Holdings BV served the notice. This was soon followed by another round of notices issued in the aftermath of Supreme Court cancelling 122 telecom licenses resulting in companies like Russian telecom giant Sistema, Norwegian telecom company Telenor and UAE-based Etislat."; Ranjan (2014), at 419, "India launched its BITs programme in 1994 as part of its overall strategy of economic liberalization. To date, India has entered into more than 80 BITs. However, India's BIT programme didn't receive much attention until recently when numerous foreign investors brought BIT claims against India challenging various regulatory measures such as cancellation of telecom licences and imposition of retrospective taxes."

[32] IISD (2012), at 13, "South Africa has terminated its bilateral investment treaty with Belgium and Luxembourg, and intends to phase out other treaties with European countries . . . In recent years South Africa has critically reviewed its investment treaty practices. That scrutiny came in the wake of a 2007 claim by several Italian citizens and a Luxembourg corporation filed a claim under the Belgium-Luxembourg BIT. The claimants charged that the 2004 Mineral and Petroleum Resources Development Act (MPRDA)—part of South Africa's efforts to increase participation by historically disadvantaged South Africans in the mining industry—amounted to the expropriation their mineral rights."; Carim (2013), "[South Africa] decided in July 2010 that . . . [it] would: refrain from entering into BITs unless there are compelling political or economic reasons to do so; terminate existing BITs and offer partners the possibility to re-negotiate BITs on the basis of a new model; develop a new Foreign Investment Act that is aligned with the constitution . . . [namely,] preserving the sovereign right of the government to pursue legitimate public policy objectives in line with constitutional requirements".

[33] IISD (2014a), at 16, "In March [2014] the Dutch Ministry of Foreign Affairs announced that Indonesia has decided to terminate its bilateral investment treaty with the Netherlands. Indonesia has faced a number of treaty-based claims in recent years."

and Peru.[34]

Elapsed time since last IIA-based claim The more time has past since an IIL-based claim against a given State, the less that State's new IIAs tend to be aligned with SD. Because IIA negotiators should not forget about the IIL-based claims their own State has faced and because IIA negotiators should be aware of IIL-based claims against other States, we can take the following observations to support the non-unitary-state theory's implication that IIL is substantially more likely to be aligned with SD if the masses amount to 'relevant influencers'.

Since the claim against its plain-packaging-tobacco laws in 2011, Australia has not faced any new IIL-based claim. In 2014, Australia signed an IIA with South Korea ('Korea-Australia FTA') exhibiting an ISDS clause in spite of having heavily opposed the inclusion of such a clause immediately after the aforementioned claim for not being in the public interest;[35] this IIA entered into force in December 2014.[36] Furthermore, in November 2014 Australia concluded the negotiations with China over an IIA ('China-Australia FTA') which will include an ISDS clause as well.[37] Additional support is arguably provided by the fact that foreign firms did not publicly oppose Australia's rejection of ISDS clauses in 2011, since such opposition could have lengthened the debate about the inclusion of ISDS clauses and therewith would have made the masses aware of the dangers associated with such clauses for much

[34] Kelsey (2012), at 8, "Peru's newly elected left-leaning government is under pressure to demand a similar carve out after the Renco Group lodged a case under the Peru-US FTA relating to its failure to remediate a highly-polluting metal smelter in La Oroya, Peru."

[35] IISD (2014c), at 12, "The Australian government has agreed [in December 2013] to investor-state arbitration in the investment chapter of a free trade agreement with Korea, abandoning the position of the previous government which had made a decision not to sign up to such commitments ... In the new agreement with Korea, the Australian government said that it 'has ensured the inclusion of appropriate carve-outs and safeguards in important areas such as public welfare, health and the environment.'"

IISD (2014c), at 12, "Investor-state arbitration has proven divisive in the Trans Pacific Partnership Agreement (TPP)—the mega regional trade and investment agreement that is currently under negotiation. Australia has not confirmed whether it would sign on to investor-state in the TPP, preferring instead to keep its options open."

[36] See http://www.austrade.gov.au/Export/About-Exporting/Trade-Agreements/kafta.

[37] See http://www.austrade.gov.au/export/free-trade-agreements/chafta.

longer,[38] but later did oppose the rejection publicly in 2012.[39]

In 2014, two years after the well-publicised notice of intent by a foreign investor to submit an IIL-based claim against Canada's decision to revoke two drug patents, Canada ratified an IIA with China which includes an ISDS clause;[40] remember, this is the treaty Canada refused to ratify for almost two years because it viewed that clause as not being in the public interest.

China Finally, additional support for the non-unitary-state theory's implication that IIL is substantially more likely to be aligned with SD if the masses amount to 'relevant influencers' is provided by China.

The theory predicts that the masses are very unlikely to amount to 'relevant influencers' in China in the IIL context: China has never faced an IIL-based claim so that the masses are unlikely to even be aware of (the dangers of) IIL; and even if the masses were aware of IIL's dangers, they would undoubtedly not amount to an organised interest group. This prediction is supported by empirical evidence suggesting that China is not pushing to align IIAs with SD.[41]

10.3 Policy prescriptions

This Section provides prescriptions that aim at increasing the likelihood that IIL is aligned with SD.

[38] Of similar opinion: Tienhaara and Ranald (2011), at 7, "What is perplexing is that foreign businesses with interests in Australia did not get involved in the debate [in 2011], when clearly some have a very strong interest in accessing ISDS ... Perhaps they reasoned that interfering in Australia's policy process would be counterproductive."

[39] See e.g. Kurtz (2012), at 83, "Domestically, peak industry groups such as the Australian Chamber of Commerce and Industry have now publicly called on the Australian Government to reconsider its policy stance on investor–State dispute settlement."

[40] Van Harten (2014), "[the Canada-China BIT] scales back Canada's and the other NAFTA states' position on transparency in investor-state arbitration. In particular, the treaty allows either government to settle an investor lawsuit without public knowledge after it is filed, but before an award is issued".

[41] de Mestral (2014).

10.3.1 Factual likelihood conditions

The previous Sections suggest that unless the masses amount to 'relevant influencers', States are unlikely to want to align IIL with SD (i.e., IIL is unlikely to be aligned with SD). Section 10.1.3 identified two necessary conditions for the masses to amount to 'relevant influencers': awareness and organisability.

The organisability of the masses is very difficult to influence externally, just think of the United States' struggles to spread democracy around the world.[42] The focus, therefore, should be on making the masses aware of the dangers that contemporary IIL potentially poses to their well-being and to SD. Since all States nowadays face the risk of seeing an IIL-based claim filed against them,[43] the masses everywhere are threatened by contemporary IIL.

Information provision[44] International organisations, NGOs, and academics should aim at spreading the knowledge that contemporary IIL has the potential to substantially (adversely) affect the utilities of the masses.

This spreading requires publications in non-specialised medias such as in newspapers and on news channels. The focus should be on concrete examples of IIL-based claims which other *developed* States have faced, such as the claim against Australia's plain-packaging-tobacco laws and the claim against Germany's decision to shut down its nuclear reactors, as well as on the substantial amounts of compensation which have been awarded against States.[45]

Giving voice to minorities We have seen that even if the masses amount to 'relevant influencers', they may support policies that discriminate against minorities

[42] Banerjee and Duflo (2011), at 241, "The central problem, ... is that it is easier to take over a country than to know how to make it run well. The disastrous effort of the United States to institute a market-friendly democracy in Iraq is just one recent example."

[43] See Section 7.1.2.

[44] Acemoglu and Robinson (2012), at 461, "One ... set of actors ... [which] can play a transformative role in the process of empowerment [of the masses]: the media. Empowerment of society at large is difficult to coordinate and maintain without widespread information about whether there are economic and political abuses by those in power."

[45] Such information is readily available, see Sections 7.1.3 and 7.1.4.

(which would clearly not be aligned with SD).[46] International organisations, NGOs, and academics should aim at giving voice to minorities in the hope of changing the masses' preferences by appealing to their sense of justice and/or to their emotions.[47]

Training of IIA negotiators Although the training of IIA negotiators is important, a non-unitary-state perspective suggests that it is not very useful by itself: independently of whether a leader knows how to align IIL with SD, a leader will only want to do so if it maximises their political survival. Hence, a precondition for 'IIA-negotiator training' to improve IIL's SD alignment is still for the masses to amount to 'relevant influencers'.

Addendum: success likelihood

These prescriptions have good chances to succeed in better aligning IIL with SD in spite of not being able to influence the organisability of the masses. Indeed, as soon as one of the States negotiating an IIA exhibits the masses as an organised interest group, those masses can be made aware of contemporary IIL's dangers. This constellation is generally satisfied when at least one developed State is part of the negotiations since developed States typically amount to democracies (so that the masses trivially amount to an organised interest group – as voters).

10.3.2 Public consultations

If a State wants to aligned IIL with SD, then they should rely upon public consultations. Indeed, leaders may lack the informational basis to properly consider all SD-relevant aspects so that public consultations may provide the needed information to reach SD-aligned decisions.[48] Consequently, IIAs should be subject to public

[46] See Section 8.5.2 for the argumentation.

[47] Such behaviour is close to one of the roles that a free media has: "media freedom has an important *protective function* in giving voice to the neglected and the disadvantaged" (Sen, 2009, at 336).

[48] This follows from the realisation that 'justice' is a non-solitary exercise in practice, see Section 4.2.3.

scrutiny so as to make them more likely to be aligned with SD. Both the European Commission and the United States have held such public consultations in the past.[49]

Doing so requires (publicly-available) *model IIA* or *IIA guidelines* because public consultations should be held before the signing of an IIA to avoid wasting resources.

Finally, to ameliorate the functioning of public consultations, there needs to be *transparency* with respect to IIL's rules (i.e., with respect to the decisions of IIL's adjudicative bodies) for learning effects to take place.[50]

[49] http://csis.org/publication/critical-questions-european-commissions-public-consultation-investment-policy.

[50] Further reasons for such transparency are mentioned in Section 4.6.3.6.

Part IV

Policy prescriptions: dispute settlement

Overview

Chapter 7 suggests that contemporary IIL's SD deficits are partly rooted in its dispute-settlement design (Section 7.4). This Part studies how to reform IIL in order to tackle this source of SD deficits. In so doing, this Part partly answers the third research question: how IIL should look like for it to be aligned with SD (Section 1.1).

Because the literature currently lacks such a theory, this Part starts off by advancing a descriptive (positive) theory of arbitral decision-making (*arbitral decision-making as explanandum*); that is, it advances a theory of the causal factors underlying an investment arbitral tribunal's decision. Chapter 11 reviews the empirical and theoretical literature on national and international tribunals' decision-making. And Chapter 12 then builds upon the so-gained insights to construct a 'theory of arbitral decision-making'.

Finally, Chapter 13 proposes a set of measures (policy prescriptions) that tackle this source of SD deficits by relying, amongst others, upon the insights gained by the aforementioned 'theory of arbitral decision-making'.

Terminology This Part adopts the following terminology relating to judges: *private judges* are appointed by the parties to the dispute; and *public judges* are appointed through state decision-making, either through a delegated procedure (e.g., by the executive branch) or a non-delegated procedure (e.g., through the election by voters).[1] Furthermore, (private or public) *permanent judges* are appointed for a cer-

[1] This work thus follows the terminology of Posner (2005), at 1260.

tain period of time, and (private or public) *ad hoc judges* (generally referred to as 'arbitrators')[2] are appointed for a specific case/dispute.

Also, because a 're-appointment or re-election motivation' is akin to the 'political-survival motivation' (Chapter 8), it is hereinafter referred to as *judicial-survival motivation* for the sake of consistency.

Lastly, for the sake of tractability, the 'set of reasonable interpretations of the applicable norms'[3] is henceforth referred to as the *set of possible decisions* – a subset of these decisions may (insofar as the applicable norms allow for it) be aligned with SD.[4]

[2]This follows, most notably, the definition adopted in the New York Convention (see Article 1(2)).

[3]The implicit underlying descriptive norm-application theory is known as 'legal realism'; see Section 2.3 for a brief description.

[4]For the conditions of such alignment, see Section 4.7.

Chapter 11

Judicial decision-making

> This model provides a theoretical alternative to the common view of judges as Prometheans or saints
>
> — Judge Richard A. Posner[1]

> Traditional legal analysis of law ... [perceives judges as] unconstrained by external forces.
>
> — Mathew D. McCubbins and Daniel B. Rodriguez[2]

This Chapter theoretically and empirically discusses (i) the motivations underlying judiciaries' decision-making as well as (ii) the external factors influencing judiciaries' decision-making.

The goal of this Chapter is to provide the inputs for the theory of investor-State arbitration (Chapter 12), as well as the inputs needed to suggest reforms to further the alignment with SD of the design of IIL's dispute settlement (Chapter 13).

The analysis relating to the decision-making of public judicial bodies provides transferable theoretical and empirical insights for the decision-making of arbitral

[1] Posner (1993), at 1.

[2] McCubbins and Rodriguez (2006), at 273.

bodies for at least two reasons.[3] First, if we find that public permanent judges are not solely driven by some political-ideology motivation, then we can reasonably expect the same for ad hoc judges (i.e., for arbitrators) because public permanent judges are more likely to be driven by political ideology due to their clear mandate to serve the 'public'.[4] Second, if we find that the decision-making of public permanent judges is influenced by external factors, then we can reasonably expect the same for ad hoc judges.

The Chapter finds strong empirical evidence that although public permanent judges exhibit a political-ideology motivation, this motivation is not the sole driver of their behaviour.[5] Furthermore, it provides theoretical reasons for expecting external factors to influence the decision-making of public permanent judges; and also finds some empirical support for these theoretical claims.

The Chapter is organised as follows. Section 11.1 focuses on the decision-making of national judiciaries. And Section 11.2 focuses on the decision-making of international judiciaries.

11.1 The national judiciary

This Section discusses the decision-making of the national judiciary; specifically, it discusses the motivations underlying public permanent national judges' decision-making and the external factors influencing their decision-making. The empirical evidence is presented in considerable detail because the literature hitherto lacks an encompassing review of the empirical studies relating thereto.

[3]Transferable empirical insights are especially important because there are virtually no empirical studies investigating the causal factors underlying the decision-making of investor-State arbitral bodies; see Section 12.1.

[4]Concurring: Choi, Gulati, and Posner (2013), at 145, "It is plausible that federal judges, having been selected through a political process, have stronger policy preferences than most of us."

[5]Agreeing with this reading of the empirical literature: Choi, Gulati, and Posner (2013), at 145; Epstein and Knight (2013), at 12, "Data and research developed by scholars ... have demonstrated that although the policy goal is crucial to understanding judicial behavior, it is not the only motivation; it may not even be dominant for many judges.", and at 19, "the choices judges makes ... are difficult to explain without reference to goals other than policy".

11.1.1 Public permanent judges' motivations

The following suggests that public permanent national judges are driven by various motivations.

11.1.1.1 Political-ideology motivation (extrinsic and/or intrinsic)

The concept of 'political ideology' describes a set of beliefs on how society should be organised. Remark that the empirical literature tends to use this concept without further precisions – which is problematic because policy implications are different depending on whether it amounts to an intrinsic or extrinsic motivation.[6]

An *intrinsic political-ideology motivation* describes the situation wherein the decision-maker (in casu: the judge) decides in accordance with his or her personal political ideology; namely, the situation wherein the decision-maker maximises the satisfaction of his or her political-ideology motivation.[7]

An *extrinsic political-ideology motivation* describes the situation wherein the decision-maker strategically decides in accordance with some political ideology because of some underlying more fundamental extrinsic motivation; most notably, because doing so allows him or her to maximise the satisfaction of his or her self-interest motivation (e.g., material well-being, prestige, popularity).[8]

[6]Rogers (2013), at 238, "This is an important distinction when assessing adjudicatory decision-making because self-conscious imposition of policy preferences [i.e., extrinsic political-ideology motivation] teeters close to bias or professional misconduct, whereas subconscious influence [i.e., intrinsic political-ideology motivation] is simply part of what it means to be human."

[7]The perspective holding that judges are solely driven by an intrinsic political-ideology motivation is known as the 'attitudinal approach': "[t]he attitudinal model holds that judges decide cases in light of their sincere ideological values" (Segal, 2008, at 24).

[8]The American legal scholar Richard Posner holds that judge's ideology motivation, insofar as such a motivation exists, is almost exclusively an extrinsic one and therefore disregards intrinsic ideology motivation: Posner (1973), at 415, "judges, like other people, seek to maximize a utility function that includes monetary and nonmonetary elements (the latter including leisure, prestige, and power)"; Posner (1993), at 3, "I assume that trying to change the world plays no role … [because] only a small minority, whom I shall largely ignore, have a visionary or crusading bent", and at 13 et seqq., "I exclude from the judicial utility function the desire to promote or maximize the public interest."

Intrinsic motivation It is virtually impossible to find empirical evidence for the existence (read: behavioural relevance) of an intrinsic political-ideology motivation: with real-world data, there will always be the possibility of other motivations driving the decision-making (e.g., a desire for promotion, popularity, or power may lead one to strategically behave as if they exhibited an intrinsic political-ideology motivation);[9] and with controlled-experimental data, there will always be the problem that we cannot be sure whether some intrinsic motivation observed in the experiment will also be driving the decision-making in the real world (i.e., the problem of external validity).

On the other hand, real-world data may allow us to reject the hypothesis that judges' decision-making is solely driven by an intrinsic political-ideology motivation. The following discussions indeed provide support for such a rejection.

Extrinsic or intrinsic motivation Several empirical studies of judges' decision-making suggest the existence (read: behavioural relevance) of such a motivation.

There is some strong empirical evidence showing that a US federal judge's behaviour (as measured by the behaviour's position in a political-ideology dimension) tends to be rather constant over time;[10] this temporal consistency may be the re-

[9] Fehr and Fischbacher (2004), at 65, "isolation of the different forces shaping [behaviour using real-world data] ... is extremely difficult if not impossible because too many uncontrolled factors simultaneously affect the results".

In the context of judicial decision-making: "researchers ... [have used] indirect sources and proxies for decision-makers' actual policy preferences. In research regarding the U.S. judiciary, for example, common sources for ascribing ideology are the political party of the appointing president, social background and experience, newspaper evaluations of judges, and prior judicial decisions. More recently, scholars have questioned whether reliance on ideology (even assuming that proxy measures were accurate gauges of ideology) adequately 'distinguish[es] between values as a self-conscious motive for decision-making [i.e., extrinsic political-ideology motivation] and values as a subconscious influence on cognition [i.e., intrinsic political-ideology motivation].'" (Rogers, 2013, at 238, footnotes omitted).

[10] The best test is provided by (i) a State's highest court, so that no promotion motivation or fear of being overturned may underlie the behaviour, and (ii) a court on which judges sit with life tenure, so that no judicial-survival motivation may underlie the behaviour.

The US Supreme Court satisfies these conditions. Empirical studies find a strong consistency in the ideological position of a US Supreme Court Justice's votes in different cases. For a list and brief descrip-

sult from judges having an intrinsic political-ideology motivation or from judges strategically behaving as if they adhered to some political ideology (i.e., extrinsic political-ideology motivation). A couple of studies find that US federal judges' respective voting patterns differ and that their voting tends to be related to the party of the US President who appointed them; namely, their votes are more likely to be aligned with the preferences of that party than not.[11] This finding also suggests the existence of an (extrinsic or intrinsic) political-ideology motivation.

A recent study of the US Supreme Court finds that a substantial fraction (30 percent) of its decisions are unanimous, that is, without a dissenting opinion.[12] A couple of studies of the US judiciary find that the likelihood of a dissenting opinion increases with the 'ideological' distance between a judge and the majority-opinion writer.[13]

tion of the empirical studies, see Segal (2008), at 26 et seq.

Lower US Courts do not satisfy these conditions. Unsurprisingly, therefore, empirical studies find a much lower consistency for US Courts of Appeals, find an even lower consistency for US state courts, and find no consistency for US state trial courts. For a list and brief description of the empirical studies, see Segal (2008), at 27 et seq.

[11] Sunstein et al. (2006), at 19 et seqq., find, based on a sample of US Federal Appellate Court judges' votes on three-judge panels using the most recent cases (6'408 decisions; 19'224 observations), that "there is strong evidence of ideological voting in the sense that Democratic appointees are far more likely to vote in the stereotypical liberal direction than are Republican appointees ... The overall difference is 12 percent—not huge, but substantial."

Epstein, Landes, and Posner (2013), at 8 and 112 et seq. (regression table), find, based on panel-data analysis of US Supreme Court Justices' votes between 1937 and 2009 (44 Justices; 41'980 observations), that "Justices appointed by Republican Presidents vote more conservatively on average than Justices appointed by Democratic ones".

[12] Epstein, Landes, and Posner (2013), at 124 et seq., based on all orally argued decisions of the US Supreme Court between 1946 and 2009.

[13] Epstein, Landes, and Posner (2011), at 129 et seqq. (regression tables), find, based on a panel-data analysis of the annual dissent rate in 12 US Courts of Appeals between 1991 and 2006 (204 observations; 2.8 percent of the decisions exhibit at least one dissenting opinion), that the likelihood of a dissenting opinion is increasing with the number of judges on the court, that it is increasing with the 'ideological' distance amongst the judges on the court, and that it is decreasing with the court's overall caseload.

Hettinger, Lindquist, and Martinek (2004), at 133 (regression table), based on a panel-data analysis of the opinions by US Courts of Appeals between 1970 and 1988 which are contained in the US Courts of Appeals Database (7767 opinions), also find that the greater the ideological distance between a judge and the majority-opinion writer, the more a dissenting opinion by this judge is likely; remark, however,

This latter finding is confirmed by a study finding that US federal judges' voting tends to somewhat shift into the direction of the political ideology (as measured by the party of the US President who appointed them) of the other panel members.[14] All three findings suggest the existence of panel effects taking the form of 'dissent aversion'[15] and thus suggest that other motivations, besides some political-ideology motivation, are also driving judges' decision-making.[16] Note that the latter two findings again suggest the existence of an (extrinsic or intrinsic) political-ideology motivation.

Finally, we will see that a judicial-survival motivation, a promotion motivation, and external-satisfaction motivations may reasonably be expected to materialise into an extrinsic political-ideology motivation.

11.1.1.2 Judicial-survival motivation (extrinsic)

This motivation captures the desire of re-appointment or re-election. Let it be pointed out at the outset: when judicial survival is pursued consciously, it is never an end in itself, but a means to an end (i.e., an instrumental goal).[17] Those underlying extrinsic motivations (the ends) may amount, most notably, to material well-being, popularity, power, influence, and/or prestige.[18]

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that they do not control for caseload and number of judges on the court. They take a judge's (extrinsic or intrinsic) ideological motivation to be equivalent to that of the appointing president's Poole common-space score (Poole, 1998), unless the president's party contains the senator representing the state in which the vacancy arises, in which case it is equivalent to the senator's score. Ideological distance is then defined as the difference between the majority-opinion writer and the dissenting judge.

[14] Sunstein et al. (2006), at 22 et seq., based on a sample of US Federal Appellate Court judges' votes on three-judge panels using the most recent cases (6'408 decisions; 19'224 observations).

[15] For introducing this terminology, see Posner (2008), at 31 et seqq.

[16] Epstein, Landes, and Posner (2013), at 8 et seq., "We interpret the substantial percentage of unanimous decisions [by the US Supreme Court]—more than 30 percent—to mean that the ideological stakes in many of the Court's cases are small enough to be overcome by mild dissent aversion [read: by some non-political-ideology motivation(s)] of Justices".

[17] Take for instance promotion: "Promotion within the judiciary is desirable because of the higher salary and the greater prestige that comes with sitting on a higher court, as well as the expanded ability of higher court judges to promote their policy preferences" (Drahozal, 1998, at 477, footnote omitted).

[18] Drahozal (1998), at 475, "Judges gain prestige simply by being judges. This type of prestige varies little with how a judge decides a case."

Several empirical studies of US judges' decision-making suggest the existence (read: behavioural relevance) of such a motivation. These studies find that judges who stand for periodical re-election by citizens on average alter their decisions towards the political ideology of the electing entity.[19]

Finally, note that a judicial-survival motivation may materialise into an (extrinsic) political-ideology motivation – since not behaving according to some political ideology may raise doubts about one's impartiality and therewith threaten one's judicial survival.

[19]Most notably, Huber and Gordon (2004) find, based on a panel-data analysis using real-world data of criminal cases during the 1990s in the US state of Pennsylvania (22'095 observations; 425 judges) where trial court judges (note: although juries convict, the trial judges have the sentencing authority) are subject to elections every 10 years, that trial-court judges become on average more punitive as re-election approaches (statistically significant change in behaviour); the effect is strongest in liberal states (lower-punishment preference), wherein they find a difference of over 10 months in the sentences between the days just before and just after the election in the most liberal states; and the effect is insignificant in conservative states (higher-punishment preference). The authors' story is that because voters are virtually uninformed about judge behaviour (lack of general information about the decisions a judge makes seems to be empirically supported) and because voters are more likely to have a feeling of under-punishment than over-punishment (e.g., because newspapers are more likely to report recidivism), judges motivated by judicial survival will primarily avoid being perceived as under-punishing and thus become significantly more punitive. Because judges on average are likely to reflect the ideology of their home state, they will tend to prefer less punishment in liberal states; which would explain why a significant adjustment over time is only found in liberal states.

In most US state supreme courts, judges are not appointed for life but must seek periodical re-election by citizens. Hall (1992) analyses the votes rendered by the judges of the Texas Court of Criminal Appeals (partisan election), the North Carolina Supreme Court (partisan election), the Louisiana Supreme Court (non-partisan election), and the Kentucky Supreme Court (non-partisan election) between 1983 and 1988 in death-penalty cases. Public-opinion polls conducted in these states suggest that the majority of the population strongly supports the death penalty as a punishment for murder. She finds that liberal judges (defined as those most likely to vote for the defendant in criminal cases) are less likely to vote in favour of the defendant in death-penalty cases as re-election approaches and as the margin with which they won their last election reduces. In combination with the public-opinion polls, she interprets her findings to mean that judges are more likely to vote in accordance with their constituency on issues most likely to provoke public debate (such as death-penalty cases), therefore strongly suggesting a re-election motivation.

11.1.1.3 Promotion motivation (extrinsic)

It has been observed that a promotion may not increase material well-being or prestige by a lot,[20] and that a position higher up the judicial hierarchy may be more isolating and thus not necessarily perceived as desirable.[21] What promotion, however, does is to provide a judge with greater influence on state decision-making; that is, greater possibility to shape society.[22] The existence of a promotion motivation may therefore point towards the existence of an underlying power motivation.

Several empirical studies of judges' decision-making suggest the existence (read: behavioural relevance) of such a motivation. These studies find that US judges up for promotion seem on average to modify their behaviour towards the political ideology of the appointing entity.[23]

[20] Discussing the US federal court system: Posner (2005), at 1265, "the salary and prestige differences between [US federal] district and circuit judges are small, though the workload is lighter in the appellate court".

[21] For instance, Cohen (1991), at 188, "For some [US federal] judges, moving from the district court to the circuit court would not be a 'promotion' at all. Many district court judges would likely find the appeals court to be quite isolating and prefer their current positions."

[22] For instance, US federal appellate judges' decision are statistically very unlikely to be reversed because their appeal court, the US Supreme Court, reviews so few cases (Posner, 2005, at 1273, "currently less than one percent"). The highest court obviously has a reversal risk of zero.

[23] Take for example the US federal court system wherein judges are nominated for appointment (including promotion) by the President and confirmed by the Senate. Federal judges who have been appointed by a given party in the first place will generally only get nominated for promotion by that same party. Several empirical studies, based on regression analyses, suggest that district judges with higher *exogenous* chances of promotion to an Appeals Court behave somewhat differently than those with lower chances; specifically, those with higher chances are more likely to decide according to the preferences of the party which appointed them to the federal system. Most notable amongst these studies, Sisk, Heise, and Morriss (1998), at 1433 (regression table) and at 1487 et seqq., find, based on the decisions rendered during 1988 by district courts on the *same* question of constitutionality of the US Sentencing Commission (there existed no precedent by the Supreme Court until January 1989), such an effect; actually, they only find an effect for those appointed by the Democratic Party but argue that this makes sense because only this party's position on the issue was clear.

Importantly, Sisk, Heise, and Morriss (1998) measured the chances of promotion based on the ratio of district court positions to court of appeals position in that state, the existence of current vacancies in the court of appeals, and the age of the oldest active circuit judge from that state (thus following Cohen, 1991, at 192). It therefore treats the promotions chances of the district judges within a given state as identical.

Finally, note that a promotion motivation may materialise into an (extrinsic) political-ideology motivation – since not behaving according to some political ideology may raise doubts about one's impartiality and therewith threaten one's chances of promotion.

11.1.1.4 Job-satisfaction motivation (extrinsic)

This motivation most importantly takes the form of a *collegiality* motivation.[24] A judge may experience collegiality costs in his or her non-case-related interactions with his or her colleagues (they may avoid him or her) as well as in his or her case-related interactions with them (they may not be responsive to his or her arguments/opinions).[25]

Several empirical studies of judges' decision-making suggest the existence (read: behavioural relevance) of such a motivation. Some studies find that judges do not always *dissent* when they arguably disagree (based on their political ideology)[26] with the majority opinion – this empirical observation is referred to as 'dissent aversion'.[27] This observation can be explained by the existence of a job-satisfaction motivation and/or of a leisure motivation (Section 11.1.1.7). The former motivation because a dissenting opinion creates a collegiality cost to the dissenter: majority judges dislike dissenters because a dissenting opinion imposes costs on them since it requires them

In particular, because it does not capture whether a given judge has voted against their appointing party in the past, the measure is likely to overestimate the promotion chances of some judges and therewith actually underestimate a possible promotion motivation.

The study also provides strong support for a promotion motivation. In 1987, the hitherto US federal judge Robert Bork was nominated to the US Supreme Court but not confirmed at the hearings mainly because of his extra-judicial writings. Gaille (1997), based on federal appellate judges' number of publications between 1983 and 1992, finds a significant drop after the Bork hearings; using a multiple regression, the drop could not be accounted for by other factors.

[24] Epstein and Knight (2013), at 19, "As most of us know all too well, maintaining good collegial relations is not some abstract, squishy concept; it has a direct effect on job satisfaction."

[25] See, for instance, Epstein, Landes, and Posner (2011), at 104.

[26] Based on the behaviour they should exhibit according to their Poole common-space score (Poole, 1998).

[27] See footnote 15 and the text surrounding it.

to write lengthier majority opinions (effort/time cost),[28] and/or since it negatively impacts their reputation (promotion/popularity cost).[29] And the latter motivation because a dissenting opinion creates an effort cost (higher workload) to the dissenter. Note that besides satisfying one's potential political-ideology motivation, a dissenting opinion appears to create little benefits to the dissenter as dissenting opinions are rarely cited.[30]

Another study seems to provide clearer support for such a motivation: it finds that the likelihood of a dissenting opinion increases with the number of judges sitting on a court.[31] Since an increase in the number of judges sitting on a court reduces the likelihood of sitting together on a future case,[32] it reduces collegiality costs and should thus be understood as supporting the existence of such a motivation.[33]

[28]This seems realistic: Epstein, Landes, and Posner (2011), at 102 and at 122 et seqq. (regression tables), based on 1025 published opinions by the US Court of Appeals between 1989 and 1991 (including 80 dissenting opinions), find that majority opinions in the US Court of Appeals are 20 percent longer when a dissenting opinion exists; and at 103, based on all published opinions by the US Supreme Court in 1963, 1980, and 1990 (446 opinions; including 62 percent dissenting opinions), which were selected so as to have opinions under three different chief justices, find that majority opinions tend to be longer in the presence of a dissenting opinion.

[29]Cross and Tiller (1998), at 2156 , "a 'whistleblower' ... [namely] a judge whose policy preferences differ from the majority's and who will expose the majority's manipulation or disregard of the applicable legal doctrine". For a game-theoretic model suggesting under which conditions a whisleblower effect can be expected, see Kastellec (2007).

[30]For empirical data on the US Courts of Appeals and the US Supreme Court, see Epstein, Landes, and Posner (2011), at 102 et seq. and at 127 (regression table), based on 1025 published opinions by the US Court of Appeals between 1989 and 1991 (including 80 dissenting opinions; less than 8 percent) and based on all published opinions by the US Supreme Court in 1963, 1980, and 1990 (446 opinions; including 62 percent dissenting opinions), which were selected so as to have opinions under three different chief justices. They point out that virtually all citations to an opinion occur during the first 20 years after its publication (Epstein, Landes, and Posner, 2011, at 102, footnote 4).

[31]See footnote 13.

[32]The number of judges on the court is generally bigger than the number of judges sitting on any given case. Therefore, the number of judges on the court is negatively related to the likelihood of sitting on a future case with the same judges.

[33]Epstein, Landes, and Posner (2011), at 103.

11.1.1.5 Power motivation (extrinsic)

It has been observed that judges tend to work harder (i.e., to take on more cases) than they would need to in order to keep their title (prestige) and salary (material well-being),[34] which could be interpreted as suggesting that judges care for power/influence.

There are also several historical instances showing that when judges' power/influence is being threatened (e.g., by the executive or legislative branch), judges tend to alter their decisions towards the preferences of those threatening them.[35] These adaptations may also be interpreted as suggesting that judges care for power/influence.

11.1.1.6 External-satisfaction motivations (extrinsic)

This motivation captures most notably a desire for celebrity/popularity and prestige.

It has been held that a bit of introspection should leave no doubt, at least to most us, that we enjoy being popular.[36] Judges are no different in this regard. Furthermore, judges themselves seem to believe that their co-workers are partly driven into the profession due to its prestige.[37]

Several empirical studies of judges' decision-making suggest the existence (read: behavioural relevance) of such a motivation. One recent empirical study of the US

[34] Posner (1993), at 13, based on his personal observations of fellow judges.

[35] Think of US Supreme Court Justice Owen J. Roberts changing his position on the New Deal legislation in the face of President Theodore Roosevelt's threat to increase the size of the Supreme Court which would have diluted the power of the current Supreme Court judges, known as 'the switch in time to save nine' (see e.g. McCubbins, Noll, and Weingast, 1995, at 1631) – this is, at least, the traditional interpretation of Justice Roberts' switch.

In June 2003, the British Prime Minister announced that the responsibility for appointment to the Court of Appeal should no longer remain with senior judges, but should be transferred to lay commissioners and politicians. Working out the details of the reform took until March 2005. During that time span, senior judges altered their appointment decisions significantly (Blanes i Vidal and Leaver, 2011, at 571).

[36] Posner (1993), at 13, "People like to be liked."

[37] "Judges normally reluctant to ascribe base motives to their group have been vocal in insisting that a substantial increase in the number of judges would ... [be] diluting judicial prestige ... [and thereby] increase the difficulties of recruitment." (Posner, 1993, at 14).

Supreme Court, to which judges are appointed for life, finds that its decisions tend to be aligned with public opinion.[38] This finding may be understood to mean that US Supreme Court Justices care for popularity. However, the statistical association may equally result from Justices being subject to the same external stimuli (culture, media, politics) as the public.[39]

Finally, note that an external-satisfaction motivation may materialise into an (extrinsic) political-ideology motivation – since not behaving according to some political ideology may raise doubts about one's impartiality and therewith threaten one's popularity.

11.1.1.7 Leisure motivation (intrinsic)

We have already seen in Section 11.1.1.4 that some empirical studies find that judges do not always *dissent* when they arguably disagree with the majority opinion, and that this observation can be explained by the existence of a job-satisfaction motiva-

[38] Epstein and Martin (2010), at 263, find, based on a time-series analysis of the ideological direction of US Supreme Court decisions between 1958 and 2008 (5'575 cases), that "When the 'mood of the public' is liberal (conservative), the Court is significantly more likely to issue liberal (conservative) decisions. But why is anyone's guess.", and at 280 et seq., "we are unwilling to make the leap from association to causality is we have neither posited nor tested a [causal] mechanism for the effect of public opinion on the Court".

Earlier empirical studies of the US Supreme Court, which used the proportion of liberal decisions as dependent variable, exhibit mixed findings: some find that public opinion influences the Court, others do not (for a review, see e.g., Epstein and Martin, 2010, at 264 et seq.). It has been pointed out that this term-by-term approach is flawed because "we know that the [US Supreme Court] Justices tend to reverse the decisions of the court below ... To account for this tendency, researchers modeling the ideological direction of the Court's decisions (liberal or conservative) almost always incorporate a variable encoding the direction of the lower court's decision (liberal or conservative). The idea is that even a very liberal (conservative) Supreme Court would be inclined to reverse a liberal (conservative) lower court decision given the majority's general propensity to reverse. It is easy to add this variable if the study models decisions on a case-by-case basis; it is impossible to do so if the study models decisions on a term-by-term basis ... The same holds for many other covariates of Court decisions ... Aggregating by term is not even an especially good strategy for considering the effect of the public's mood on the Court because it fails to exploit Stimson's quarterly data." (Epstein and Martin, 2010, at 271 et seq., footnotes omitted).

[39] Epstein and Martin (2010), at 281, "the same things that influence public opinion may influence the Justices, who are, after all, members of the public too".

tion (Section 11.1.1.4) and/or of a leisure motivation.

Further studies also seem to provide support for such a motivation: they find that the likelihood of a dissenting opinion decreases with the court's overall caseload.[40] Since an increase in the court's overall caseload increases the leisure costs associated with a dissenting opinion (under the reasonable assumption that the utility derived from leisure is marginally decreasing), this finding should be understood as supporting the existence of such a motivation.[41]

11.1.1.8 Material motivation (extrinsic)

Several empirical studies of US federal judges' retirement decisions suggest the existence (read: behavioural relevance) of such a motivation. These studies find that US federal judges, who are appointed by the US President (and confirmed by the Senate) and have life tenure, tend to retire when 'not retiring' no longer ameliorates their material well-being.[42]

11.1.2 External influence

The following suggests that external factors influence the decision-making of public permanent national judges.

11.1.2.1 Influence of the executive or legislative branch

Changing the rules of the game First and foremost, the legislative branch can simply enact new laws (including constitutional amendments), possibly with retroac-

[40] See footnote 13. Instead of several, see also Epstein and Knight (2013), at 22.

[41] Epstein and Knight (2013), at 22.

[42] Choi, Gulati, and Posner (2013), find, based on a cross-sectional analysis of the retirement decisions between 2000 and 2010 of all US federal judges who were active in 2001 or 2002, that (i) judges are more likely to retire once their retirement pay, which is guaranteed for life, equals active pay, and that (ii) judges are more likely to retire in the presence of an ideologically-like-minded president who can then appoint a new like-minded judge (known as 'political-timing effect'). Yoon (2006), finds, based on a cross-sectional analysis of the retirement decisions between 1869 and 2002 of US federal judges, that financial motivations strongly affect retirement decisions; but finds no support for an ideological concerns.

tive effect, to override the judiciary's interpretation or to limit/remove the court's jurisdiction.

Strategic (re-)appointment and promotion We have seen that judges seem to exhibit an (extrinsic or intrinsic) political-ideology motivation materialising into a certain degree of behavioural consistency over time.[43] The body responsible for (re-)appointment or promotion can therefore influence future judicial decision-making by selecting those judges whose behaviour is closest to its own preferences.

A notable empirical study suggests the existence of such influence. It finds that the Japanese body responsible for promotion decisions of judges seems to consciously select those judges whose past behaviour was in accordance with its own preferences.[44]

Stick and carrot The executive branch can theoretically threaten not to enforce a decision reached by the judiciary. The prospect of one's judgments potentially not being enforced by the executive branch may very likely have ex ante effects on judicial decision-making (nudging them towards the position of the executive branch).

More generally, the executive and legislative branches can threaten (possibly by enacting new laws): not to (re-)appoint or promote, to reassign to different courts, to impeach, to limit or remove the court's jurisdiction, to create new judgeships, to keep pension plans constant, to slash the judiciary's budget, to reduce the number of supporting staff, or to refuse to grant pay raises (in the face of inflation).[45] The occurrence of such threats appears to have been the norm rather than the exception.[46]

[43] See Section 11.1.1.1.

[44] In the Japanese judiciary, judges are reassigned every few years to more or less prestigious courts at the same level or to higher courts; Ramseyer and Rasmusen (2001), find, based on a cross-sectional analysis of the progress of over 400 judges in Japan, that Japanese judges' progress is significantly dependent on whether they have decided cases in line with the incumbent government's ideology.

[45] Landes and Posner (1975), at 885. More generally, see Perry (1982); Rosenberg (1992).

[46] Take for instance the US Supreme Court: on one count, US Congress made over 900 proposals that can be qualified as threats to the US Supreme Court between 1877 and 2006 (Clark, 2009).

Furthermore, Ramseyer and Rasmusen (2001), find, based on a cross-sectional analysis of the progress

The fact that judges, as we have seen,[47] are not solely driven by an intrinsic political-ideology motivation strongly suggests that the aforementioned threats are likely to influence judicial decision-making.

Several empirical studies suggest the existence of such influence. One empirical study of the US Supreme Court finds that its decisions tend to be aligned with the preferences of the executive and/or legislative branch;[48] this alignment should be interpreted as evidence that those two branches have some sort of influence on the US Supreme Court's decision-making. Another empirical study of of US judges up for promotion finds that they tend to modify their behaviour towards the preferences of the appointing entity (in casu: the executive branch);[49] this modification clearly shows the influence of the executive branch on US judicial decision-making. A couple of historical events furthermore suggest that the executive and legislative branches can influence judicial decision-making.[50]

11.1.2.2 Influence of interest groups[51]

This Section should more appropriately be called 'direct influence of interest groups' since interest groups can also (indirectly) influence judicial decision-making through their direct influence on state decision-making (i.e., through their direct influence on the decision-making of the executive and the legislative branch).

Strategic (re-)election and promotion The same that has been said for the executive and legislative branches also holds here; the reader is consequently referred to

of over 400 judges in Japan, that a Japanese judge's pay raise significantly depends on whether they have decided cases in line with the incumbent government's ideology.

[47] See Section 11.1.1.

[48] Segal, Westerland, and Lindquist (2011), at 96 (regression table) and at 99 et seqq., find, based on a time-series analysis of all US Supreme Court decisions on the constitutionality of a federal legislation between 1954 and 2004 (174 decisions), that the Court is more likely to decide that the legislation is constitutional the more Congress supports the legislation and the more the President supports the legislation. They measure ideology using the Poole common-space score (Poole, 1998).

[49] See footnote 23 for details of the empirical study.

[50] See footnote 35 for a description of such events.

[51] Seminally for the view that the judiciary is, like the rest of government, influenced by interest groups, see Dahl (1957) and Shapiro (1964).

Section 11.1.2.1.

Stick and carrot Interest groups can threaten: not to re-elect or promote. The fact that judges, as we have seen,[52] seem to exhibit a judicial-survival motivation as well as a promotion motivation strongly suggests that these threats are likely to influence judicial decision-making.

Several empirical studies of US judges' decision-making find that judges who stand for periodical re-election by citizens on average alter their decisions towards the political ideology of the electing entity;[53] this modification clearly shows the influence of interest groups on US judicial decision-making.

Causal mechanism: campaign contributions Judges standing for election by citizens, like politicians, need to conduct an electoral campaign and are therefore typically dependent on external contributions to finance such a campaign.[54]

Empirical studies show that judges' campaign contributions majoritarily come from lawyers whose paths the judge is likely to cross in court;[55] this makes theoretical sense since other interest groups do not know in advance whether they will ever face a given judge.[56]

Under the reasonable assumption that lawyers are instrumentally rational, they would not make costly campaign contributions if they were not to expect a return on their investment – and, thus, if campaign contributions were not actually able to

[52] See Section 11.1.1.

[53] See footnote for the details of the empirical studies.

[54] Tabarrok and Helland (1999), at 159 et seq., "Just like politicians in the legislative branches of government, [citizen-]elected judges must raise significant amounts of campaign funds in order be elected and reelected".

[55] Posner (2005), at 1267, "the primary donors to judicial election campaigns are the lawyers who litigate in the judge's court". For references of empirical studies for the states of Florida and Illinois, see Tabarrok and Helland (1999), at 160, footnote 8.

[56] Tabarrok and Helland (1999), at 159 et seq., "[contrary to politicians, most of] the interest groups do not know which of the thousands of judges will rule in their particular case ... The random assignment of judges to cases means that the most consistent contributors to judicial campaigns are trial lawyers. Unlike other participants [i.e., other interest groups], trial lawyers engage in repeated interactions with the same judges and so have the greatest incentive to make campaign contributions."

influence judicial decision-making. We should therefore understand the existence of such campaign contributions as evidence that interest groups beyond voters influence judicial decision-making.

11.2 The international judiciary

This Section discusses the decision-making of the international judiciary; specifically, it discusses the motivations underlying public permanent international judges' decision-making and the external factors influencing their decision-making.

11.2.1 Public permanent judges' motivations

The following suggests that public permanent international judges are driven by various motivations.

11.2.1.1 Political-ideology motivation (extrinsic or intrinsic)

A couple of empirical studies suggest the existence (read: behavioural relevance) of an (extrinsic or intrinsic) political-ideology motivation.

These studies find that a judge's behaviour (as measured by the behaviour's position in a political-ideology dimension) tends to be rather constant over time; they also find that judges' respective voting patterns differ and that their voting tends to be related to the political ideology of the government which appointed them (i.e., that their votes are more likely to be aligned with the preferences of the appointing government than not).[57]

[57] Voeten (2007), at 671, finds, based on a panel-data analysis of votes by ECtHR judges between 1955 and June 2006 but excluding votes by judges on their appointing State, that "the observed behavior of ECtHR judges correlates with the preferences for European integration held by the governments that appointed them".

Malecki (2012), at 71, finds, based on a panel-data analysis of a sample of ECJ *en banc* decisions (while individual behaviour is not directly observable, its system of chambers provides a potentially valuable window on the impact of individual decisions by subsets of the judges) relating to expanding the authority of the Court and EU between 1950 and 1997 (1549 observations; 296 unique combination of judges), that

11.2.1.2 Judicial-survival motivation (extrinsic)

A couple of empirical studies suggest the existence (read: behavioural relevance) of a judicial-survival motivation.

A study finds that ECtHR judges who reach the mandatory retirement age at the end of the current term are somewhat more likely to find violations against their appointing State.[58] Another study finds that ICJ judges vote in favour of their appointing State in roughly 90 percent of the cases and in favour of a non-appointing State in roughly 50 percent of the cases.[59]

11.2.2 External influence by States

The following suggests that external factors influence the decision-making of public permanent international judges.

Changing the rules of the game Although States may theoretically renegotiate existing treaties, possibly with retroactive effect, to override the international court's interpretation or to limit/remove the court's jurisdiction, such renegotiations are difficult because they tend to require unanimity amongst all States party to the treaty.[60]

judges' decisions "are weakly correlated with the Left-Right composition of government at the time of initial appointment"

[58] Voeten (2008), at 427, finds, based on a panel-data analysis of votes by ECtHR judges between 1960 and June 2006, that "there is some evidence that judges about to retire are ... [less] likely to favor their own government. The coefficient is, as expected, negative and significantly different from zero at the 5% level (one-tailed test) in the first model but not in the second model. The effect is sizeable: in model 1, a judge who faces retirement is 12% more likely to vote against the government than a judge from the new court who faces the prospect of re-election. But again, the effect is not robust to alternative model specifications."

[59] Posner and de Figueiredo (2005), at 615, find, based on a panel-data analysis of votes by ICJ judges, that party-appointed judges (independently of whether they are nationals of or ad hoc appointed by that party) vote for their appointing State 90 percent of the time and that non-party-appointed judges (i.e., judges appointed by a State which is not party to the dispute) vote for any of the two parties 50 percent of the time.

[60] Voeten (2013), at 434, "Legislative override is not always credible as it often requires unanimous consent of treaty parties."

However, unilateral termination (withdrawal) by a State, which removes the court's jurisdiction, is a real threat. A case in point is Trinidad and Tobago's denunciation in 1998 of the American Convention of Human Rights, which removed the jurisdiction of the IACtHR, following the Court's decision on the death penalty.[61]

Strategic (re-)appointment We have seen that judges seem to exhibit an (extrinsic or intrinsic) political-ideology motivation materialising into a certain degree of behavioural consistency over time.[62] The body responsible for (re-)appointment can therefore influence future judicial decision-making by selecting those judges whose behaviour is closest to its own preferences.[63]

Stick and carrot States can, most notably, threaten: not to enforce/implement the decision; and not to (re-)appoint, promote, or support.[64]

These possibilities are not merely theoretical: think for instance of Brazil's suspension of its annual contribution to the IACHR after it granted precautionary measures directed at Brazil regarding its Belo Monte dam.[65]

The fact that judges, as we have seen,[66] tend to exhibit a judicial-survival motivation suggests that the latter threats are likely to influence judicial decision-making.

[61] See e.g. Hunneeus (2011), at 500.

[62] See Section 11.2.1.1.

[63] Also recognising this avenue for external influence: Voeten (2013), at 431, "governments can select judges whom they expect to make decisions that match perceived government interests".

[64] Voeten (2013), at 433, "the most obvious 'carrot' is reappointment . . . Regardless of reappointment, international judicial careers depend heavily (although not exclusively) on government recommendations. Judges frequently move across [international courts] . . . or return to prestigious national posts."; Ingadottir (2013), at 608, "Because international adjudication bodies are funded by states, states can use funding to exercise a large degree of control over courts."

[65] Ingadottir (2013), at 610.

[66] See Section 11.2.1.

Chapter 12

A theory of investor-State arbitration

This Chapter advances a descriptive (positive) theory of investor-State arbitration (*investor-State arbitration as explanandum*) – that is, a theory of the causal factors underlying the decision-making of investor-State arbitral tribunals. The literature currently lacks such a theory.

Knowledge of such causal factors is important for at least two reasons. First, such a theory is necessary in order to make sound predictions on how IIL's adjudicative bodies are likely to behave in the future and therewith for making sound predictions on where the contemporary IIL regime is likely heading. Second, such a theory provides the inputs needed to suggest reforms to further the alignment of the design of IIL's dispute settlement with SD (Chapter 13).

Contemporary IIL's adjudicative bodies take the form of arbitral tribunals (i.e., composed of ad hoc judges).[1] More specifically, these adjudicative bodies are typically composed of three members: by default, two (disputing-)party-appointed arbitrators and one jointly-appointed arbitrator; but if one of the parties to the dispute fails to appoint its arbitrator or both parties cannot agree on a third arbitrator, then

[1] See Sections 5.2 and 5.4.

in both instances that arbitrator is appointed by some appointing institution.[2] Also, investment arbitral tribunals tend to reach their decision by majority, and generally allow any of the arbitrators to attach their own opinion (whether concurring or dissenting) to the tribunal's decision.[3] In practice, contemporary IIL's adjudicative bodies have virtually exclusively taken the form of investor-State arbitral tribunals with the disputing parties being the appointing entities (i.e., private ad hoc judges), with the investor having directly filed the claim, and with the investor being a party to the proceeding (thus the adjective 'investor-State').[4]

This Chapter suggests that we can think of arbitrators as driven by a political-ideology motivation and/or a judicial-survival motivation. It furthermore suggests that we can generally expect arbitrators to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party (irrespective of arbitrators' underlying motivations).[5]

Taking a non-unitary-state perspective, this Chapter finally points out that States facing an IIL-based claim may not engage in SD-furthering behaviour in the context of an IIL-based dispute (including when appointing an arbitrator); specifically, that we can generally expect such an SD-hindering preference unless the masses amount to 'relevant influencers'. It also finds that the likelihood of such SD-hindering behaviour is highest when a non-elected entity represents the State in the dispute and this entity is not effectively controlled by an elected body.

At this point, a couple of remarks are in order. First, the present theory abstracts from belief reversals. Clearly, we cannot exclude the possibility that in some given dispute an arbitrator is convinced by new insights/opinions advanced for instance by a (more-experienced, well-respected) co-arbitrator, in turn reverses his or her prior beliefs (e.g., political ideology) and therewith his or her behaviour. However, we can reasonably expect the possibility of prior-belief reversals to be quite low because:

[2] For the rules governing ICSID and UNCITRAL arbitral tribunals, see Section 5.2.1.1.

[3] For the rules governing ICSID and UNCITRAL arbitral tribunals, see Section 5.2.6.

[4] Virtually all IIA-based adjudications (note: IIL-based adjudications virtually exclusively amount to IIA-based adjudications) have taken the form of investor-State arbitration (Section 7.1.2).

[5] Namely, that arbitrators maximise the satisfaction of the preferences of their appointing party within the limits of the applicable norms.

(i) we can expect the subset of individuals who have the qualifications to function as arbitrators to be reasoned and self-conscious, and therewith to rarely modify their prior beliefs; and (ii) we can expect the appointing entities to anticipate this problem and therefore to only consider persons as arbitrators who are very unlikely to change their prior beliefs.[6] Second, the present theory abstracts from heuristics and cognitive biases. Clearly, we cannot exclude the possibility that the decision-making of arbitrators is affected by such cognitive processes. However, such cognitive processes amount to deviations from a rational-choice behaviour, and their investigation hence first requires a study of arbitrators' decision-making from a rational-choice perspective.[7] Note that the policy prescriptions drawn from the rational-choice theory presented in this Chapter hold independently of the existence of such cognitive processes.

The Chapter is organised as follows. Section 12.1 briefly reviews the existing theoretical and empirical literature relating to the decision-making of investor-State arbitral tribunals. Section 12.2 discusses the motivations underlying arbitrators' decision-making as well as their behavioural implications. Section 12.3 discusses external factors that are likely to influence the decision-making of arbitrators. Section 12.4 combines the previous Sections to draw implications for the likely decision-making of arbitrators. Section 12.5 finally adds a non-unitary-state perspective (i.e., relaxes the benevolent-government assumption) to the analysis.

12.1 Literature review

This Section briefly reviews the theoretical and empirical literature relating to the description of investor-State arbitration – it finds that the literature lacks both thorough theoretical and empirical analyses.

[6] Hence, we can expect arbitrators to amount to senior, well-respected individuals with the experience and legal expertise to defend their prior beliefs.

[7] Remark that there is an on-going experiment-based research project led by Anne van Aaken and Susan D. Franck on heuristics and cognitive biases of international arbitrators. This research project thus amounts to an extension of the rational-choice theory presented in this Chapter.

12.1.1 Theoretical literature

To the best of my knowledge, there exists no thorough descriptive (positive) theory of investor-State arbitration in the literature.[8]

Commentators nonetheless (i.e., without a thorough theoretical framework) make theoretical claims. Most notably, they tend to readily hold that if arbitrators in investor-State arbitration are driven by a self-interest motivation (i.e., by a judicial-survival motivation), then they will be fundamentally biased in favour of foreign investors.[9] Section 12.2.2 suggests that this theoretical claim is false.

12.1.2 Empirical literature

There are virtually no empirical studies investigating the causal factors underlying the decision-making of investor-State arbitral bodies. Indeed, existing empirical studies tend to amount to summary statistics (e.g., number of claims, amounts claimed, amounts awarded, winning percentage).[10] An exception is an ongo-

[8] Kapeliuk (2010), at 48 et seq., "In stark contrast to the abundance of scholarly writings on judicial behavior, scholars have paid limited theoretical ... attention to the decision making of private judges—namely, arbitrators."

[9] Instead of many: Van Harten (2007), at 5 et seq., "because they receive appointments only if investors bring claims, arbitrators may reasonably be perceived as having a financial stake in interpreting investment treaties so as to expand the system's compensatory promise for investors"; Brower and Schill (2009), at 489, "arbitration is said to institutionalize a pro-investor bias because arbitrators are influenced by their self-interest in being reappointed in future cases"; Roberts (2010), at 198, "Arbitrators may have an interest in increasing the size of the pie and their slice of it, but surely these interests are secondary to the pie's existence."; Menon (2012), at para 39, "it is ... in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits because this increases the prospect of future claims and is thereby business-generating"; Van Harten (2012a), at 219, "The asymmetrical claims structure and absence of institutional markers of judicial independence create apparent incentives for arbitrators to favour the class of parties (here, investors) that is able to invoke the use of the system."

[10] Kapeliuk (2010), at 69 et seq., "existing empirical studies mainly offer blunt descriptive data on investment-treaty arbitration, such as the number of arbitration cases, the number of arbitrators, their nationality and gender, the nationality of the parties, the amounts awarded, the costs of arbitration ... While these studies offer valuable information about the parties and their underlying disputes, they lack the necessary particulars to assess and evaluate the arbitrators' behavior and decision making." (footnotes and

ing empirical-research project investigating how the background of arbitrators in investor-State arbitration relates to their decisions.[11]

By necessity, therefore, we must rely upon the empirical findings relating to public permanent judges (Chapter 11). Remark, however, that, in spite of its necessity, such reliance is very uncommon in IIL scholarship.[12]

12.2 Arbitrators' motivations

This Section discusses the motivations underlying arbitrators' decision-making as well as their behavioural implications.

Chapter 11 finds that the decision-making of public permanent judges is driven by various motivations; in particular, it finds that although public permanent judges exhibit a political-ideology motivation, this motivation is not the sole driver of their behaviour. Since we can reasonably expect that public permanent judges are more likely than arbitrators to be driven by political ideology due to their clear mandate to serve the 'public', we can also expect arbitrators not to be solely driven by a political-ideology motivation.

The following suggests that *we can without loss of generality think of arbitrators as driven by a political-ideology motivation and/or a judicial-survival motivation*.

12.2.1 Political-ideology motivation (extrinsic or intrinsic)

Chapter 11 suggests the existence (read: behavioural relevance) of a political-ideology motivation.

The behavioural implication of a political-ideology motivation is an inter-temporal behavioural consistency; namely, that one exhibits a consistency over time

emphasis omitted).

See Sections 7.1.2 and 7.1.3 for an overview of those summary statistics.

[11] Waibel and Wu (2011).

[12] Rogers (2013), at 258, "Few scholars if any, however, have attempted to compare or integrate empirical findings from other international tribunals—including findings related to alleged decisional bias—with similar findings regarding investment arbitration."

An exception is Schneiderman (2010b).

in terms of the position of one's behaviour in a political-ideology dimension.

Intrinsic It is virtually impossible to find empirical evidence for the existence of an intrinsic political-ideology motivation.[13]

Nonetheless, it has been argued that professional background may predispose individuals to favour one party over the other; namely, that their past led them to develop (e.g., through norm internalisation) some intrinsic political-ideology motivation. Specifically, it has been argued that because most investor-State arbitrators have a background in international commercial arbitration, they are predisposed to favour investors over States.[14] These claims, however, lack empirical support.

Extrinsic An extrinsic political-ideology motivation – that is, behavioural consistency over time – may follow from one's self-interest. Indeed, self-interest in the present context really takes the form of judicial survival and judicial survival may arguably be maximised by behaving as if one were driven by a political ideology (see Section 12.2.2).

Extrinsic or intrinsic It has been reported that law firms and States' legal departments spend considerable amount of time and effort to uncover a potential arbitrator's background.[15] Under the reasonable assumption that lawyers are instrumentally

[13] See Section 11.1.1.1 for the reasons of this impossibility. Sharing the view that we cannot know: Van Harten (2010), at 7, "One hopes and trusts that other considerations, values of fairness and integrity, will drive decisions."

[14] Sornarajah (2008a), at 41 et seq.; Roberts (2010), at 207, footnote 134, "many have a background primarily in international commercial arbitration rather than public international law . . . [which] may make these arbitrators less familiar with or concerned about public international law interpretive approaches, such as the relevance of subsequent agreements and practices of treaty parties".

[15] Mosk and Ginsburg (1999), at 275, "the parties are careful to select arbitrators with views similar to theirs": Waibel and Wu (2011), at 13, conclude, based on their personal conversations with arbitration practitioners in law firms, that "[t]he parties to investment arbitration cases and especially their counsel spend a great deal of time and effort to scrutinize the backgrounds of arbitrators, their relationship with the parties, published works and prior appointments."; Rogers (2013), at 252 et seq., "back in the 1980s, when international telephone rates were high, efforts by U.S. counsel at the Iran-U.S. Claims Tribunal [composed of nine arbitrators; three directly appointed by each party] to identify and investigate potential

rational, they would not make these costly investments if they were not to expect a return on them – and, thus, if these investments were not actually able to predict future behaviour. We should therefore understand the existence of such investments as evidence that arbitrators' decision-making is, to some degree at least, consistent over time – and therefore, to some degree at least, driven by an (extrinsic or intrinsic) political-ideology motivation.

12.2.2 Judicial-survival motivation (extrinsic)

Chapter 11 suggests the existence (read: behavioural relevance) of a judicial-survival motivation (i.e., a 're-appointment motivation'). In spite of some commentators' (especially arbitration practitioners) disbelief that arbitrators exhibit such a motivation,[16] we cannot a priori reject the existence thereof.

Judicial survival is never an end by itself, but a means to an end. A judicial-survival motivation may arguably follow from: a power motivation, since investment arbitral tribunals decide over sensitive issues and their disputes have wide-ranging consequences;[17] an external-satisfaction motivation (celebrity/popularity and prestige), for the same reasons; and/or a material motivation, since the fees in IIL-based arbitration are sizable (though arguably not at ICSID) and since the visibility and prestige arising from an appointment to investment arbitral tribunals entails positive publicity for the appointed arbitrators' respective employers (read: law firms).[18]

judges earned them a call from Washington for racking up exorbitant phone bills"; Puig (2014), at 400, "In arbitration, especially in a self-contained and delocalized arbitration setting like the ICSID Convention cases . . . litigants spend a great deal of time and effort scrutinizing the backgrounds of arbitrators."

[16] Brower and Schill (2009), at 489, "This critique, however, disregards that arbitrators are impartial and independent dispute resolvers".

To be fair, other well-known arbitration practitioners exhibit a different view. Take, for instance, Paulsson (1997), at 14, "Whatever their motivation, arbitrators tend to want to be reappointed" (emphasis omitted).

[17] See Section 7.1 for a description of typical disputes so as to gain a sense of their sensitivity.

[18] Regarding arbitration fees (i.e., short-term effect on material well-being): Eberhardt and Olivet (2012), at 35, "How much an arbitrator earns per case will depend on the case's length and complexity, but for a US$100 million dispute, arbitrators could earn on average up to US$350,000. It can be far more. The presiding arbitrator in the case between Chevron and Texaco v. Ecuador, received US$939,000."

The behavioural implication of a judicial-survival motivation is a so-called ***arbitrator-exchangeability mindset***: an arbitrator's decision-making is function of how he or she expects another potential arbitrator would have decided the current case, and then decides the current case in a way that fulfills the preferences of the appointing party/parties at least as much as another potential arbitrator would have fulfilled them.[19]

(footnotes omitted). Olivet and Eberhardt (2013), at 19, "Unlike judges, there is no flat annual salary. Their fees range from approximately US$375 to US$700 per hour depending on the amount claimed, and subject to where and under which rules the arbitration takes place. How much an arbitrator ultimately earns per case will depend in large part on the case's duration and complexity, with fees that can easily amount to several hundreds of thousands of US dollars per case." (footnote omitted), and at 19, endnote 26, "International Centre for Settlement of Investment Disputes (ICSID) fees are set at US$3000 a day ... The London Court of International Arbitration (LCIA) set the hourly rate at US$700 an hour (£450) ... Other arbitral institutions will calculate arbitrator's fee as a proportion of the amount in dispute (ICC)."; Puig (2014), at 398, footnote 61, "Privately, some arbitrators complain about the low rates of pay of ICSID (US$375) as compared to other arbitration venues. For one, the LCIA set the hourly rate at US$700 (£450). Also, other institutions calculate arbitrators' fee as a proportion of the amount in dispute. For example, in the ICC for a US$100 million dispute, arbitrators could earn on average up to US$350,000. One arbitrator interviewed said that this may deter arbitrators in high demand in better-remunerated facilities or with offices in costly locations such as London from participating in ICSID cases ... Another arbitrator acknowledged that some arbitrators, with a private law background, consider ICSID 'pro bono' and refuse to take many cases".

Regarding visibility (i.e., medium and long-term effect on material well-being): Bernasconi-Osterwalder et al. (2012), at 41, "It is common for lawyers to move between the roles of arbitrator and counsel (albeit in different cases), and arbitrators often hold senior partner positions in law firms that specialize in counselling investors and governments"; Puig (2014), at 398, "In addition to the visibility and reputational value of an appointment to an investor–state case, the financial incentives are considerable. At US$3,000.00 an eight-hour day (plus expenses), arbitrators make on average $200,000 per case." (footnotes omitted); Olivet and Eberhardt (2013), at 19, "In addition to the arbitrator fees, which are small in comparison to what counsel may earn, the role as an arbitrator can help law firms and law chambers, to which the arbitrator is affiliated, acquire clients. This leads to significant additional income streams for the arbitrator directly or his or her firm."; Casley Gera (2007), quotes Eric Schwartz, of LeBoeuf Lamb Greene & McRae, saying that "it's hard to get publicity for commercial arbitration work because of confidentiality. With investment arbitrations, you can boast".

[19] Ashenfelter (1987), at 343, "The parties to an arbitration decision are always allowed to express their preferences in the selection of the arbitrator who will handle their case. Each party will naturally rule out arbitrators whose historical decisions are unfavorable to their position. Arbitrators who have taken extreme positions relative to their colleagues are thus excluded from future selection by either one party or

The following discussion distinguishes between types of arbitrators based on who appointed them.[20]

12.2.2.1 Party-appointed arbitrators[21]

The best strategy for a party-appointed arbitrator who is driven by a judicial-survival motivation and who is appointed for the first time is to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party – namely, to maximise the satisfaction of the preferences of their appointing party within the limits of the applicable norms. Indeed, each appointing party presumably had good reasons to favour a different arbitrator. Consequently, if both arbitrators vote in accordance with the preference of their respective appointing party, then both appointing parties will continue to have a strict preference in the future for the arbitrator they have appointed; if only one of the two arbitrators votes in accordance with the preferences of their respective appointing party, then the appointing party of the arbitrator doing so will continue to have a strict preference in the future for this arbitrator (since that appointing party preferred this arbitrator ex ante and both arbitrators voting the same way cannot reverse that appointing party's preference) and the other appointing party will now have a strict preference in the future for another arbitrator than the one it appointed.[22] Importantly, this rationale is broader than it might seem at first

the other. Knowing this,the strategy of a successful (i.e., enduring) arbitrator is to provide decisions that are forecasts of the decisions *other* arbitrators will make in similar situations. This is the only systematic strategy".

[20]The literature generally fails to distinguish between types of arbitrators. An exception is Kapeliuk (2010) who distinguishes between 'party-appointed arbitrators' and 'presiding arbitrators'.

[21]Puig (2014), at 404 and 406, finds, based on all the appointments made in all ICSID Convention and ICSID's Additional Facility arbitration proceedings between 1972 (year when the first claim was registered) and February 2014 (1'468 appointments), that "the majority of appointments are party appointed with a slight advantage for the claimants, as respondents failed to appoint arbitrators on several occasions [385 versus 377 appointments]".

This work distinguishes between first-time-appointed and repeat-appointed arbitrators. Also doing so is Kapeliuk (2010), at 50.

[22]This rationale is only true if voting in accordance with the appointing party's preferences does not make the probability of future claims go to zero. We can, however, reasonably exclude this possibility since: (i) there will always be certain State behaviours which violate IIL even with the most pro-host-State

sight: it is not limited to a repeated game of the parties to the current dispute since the parties' respective counsels, which arguably de facto amount to the appointing parties, may represent other parties in other disputes (and thus take their preference for an arbitrator with them). Because of the very low probability of a first-time arbitrator to be selected as an arbitrator again in the future by different parties and by different counsels,[23] arbitrators are likely to focus on the effect of their votes on the preferences of the parties and counsels in the present case.

If the previous analysis is sound, then an arbitrator will, amongst others, not consider the impact of their voting (i) on the probability of future claims, (ii) on the survival of investor-State arbitration (unless their appointing party exhibits a survival preference), or (iii) on SD (unless their appointing party exhibits a sustainable-development preference).

The best strategy for a party-appointed arbitrator who is driven by a judicial-survival motivation and who has been appointed before is to vote similarly in a political-ideology dimension as they voted in previous appointment(s). First, because one's past voting behaviour best predicts the preferences of one's appointing party in the current dispute since appointing parties spend considerable amount of time and effort to uncover a potential arbitrator's background,[24] and key therein is one's voting in past cases which suggests that they expect consistent voting;[25] to vote,

interpretation thereof; and (ii) IIL will not instantly disappear (renegotiation/termination) even with the most pro-investor interpretation thereof (Section 12.3.1).

[23] Puig (2014), at 403, finds, based on all the appointments made in all ICSID Convention and ICSID's Additional Facility arbitration proceedings between 1972 (year when the first claim was registered) and February 2014 (1'468 appointments), that "419 different arbitrators sat on ICSID tribunals and ad hoc Committees during the period analysed. However, more than half of the individuals were appointed only to a single proceeding. What is more extreme is that 10 per cent of the total pool accounts for half of the appointments."; Olivet and Eberhardt (2013), at 17, "A very small group of arbitrators, numbering 15 across the world, have sat [i.e., at least one of these 15] in the panels of 55 per cent out of 450 investment-treaty disputes known today."; Eberhardt and Olivet (2012), at 38, "our research shows that within the close-knit community, there is indeed a group of 15 arbitrators that can be considered the movers and shakers of international investment arbitration", at 38 et seqq., for a brief presentation of each of these 15 individuals.

[24] See footnote 15.

[25] Puig (2014), at 419, "party appointments play a fundamental role ... [because they amount to an]

within the 'set of possible decisions', in accordance with the preferences of one's appointing party is desirable for the same reason as for first-time party-appointed arbitrators (see above). Second, because behavioural consistency over time in one's voting behaviour (i.e., exhibiting an extrinsic political-ideology motivation)[26] increases appointing parties' confidence in how one will vote, which increases one's chances of being re-appointed in the future.[27] And third, because inconsistent voting may give rise to appointment challenges by the opposing party, which decreases one's chances of being re-appointed in the future.[28]

effective means to signal identifiable preferences detectable to litigants", at 423, "those responsible for appointments place value on some level of expectation about the decision-making process and outcomes. Parties' attempts to navigate the complexity of possible arbitrator combinations are likely to produce heuristic solutions that are as much an art as a science, and may result in the recommendation and appointment of those who may deliver more predictable solutions, even if wrong or imperfect.", and at 424, the concentration of arbitral appointments results from the "limited cognitive scope or heuristic biases, risk aversion, and a desire for predictable outcomes on the part of those making the appointments"; Posner (2005), at 1262, "Lawyers observe the demeanor of the arbitrator in the hearings before him, and of course the outcome of the arbitration, and they form judgments, which they pass on to their clients, concerning the competence and biases (if any) of particular arbitrators."; Rogers (2005), at 968, "prior service as an arbitrator is the preeminent qualification for an arbitrator-candidate"; Rogers (2012), at 4, "The most important information sought is about the arbitrator's . . . approach to particular procedural and substantive issues".

[26] Similarly: Puig (2014), at 400, "The incentives for re-appointment may also affect an arbitrator's behaviour. Securing a reputation, for example, as 'conservative', 'progressive', or 'independent' . . . to ensure future appointments".

[27] This is supported by the observation that the arbitrator market is heavily concentrated (see footnote 23), which indeed suggests that appointing parties crucially base their choice on past voting.

Further support for the importance of consistent voting is given by the observation that several of the repeat-party-appointed arbitrators in ICSID were almost exclusively appointed by either the claimant or respondent: (Puig, 2014, at 404): Georges Abbi-Saab (only appointed by the host State); Charles N. Brower (23 times appointed by the investor out of 25 appointments); Pedro Nikken (only appointed by the host State); Brigitte Stern (44 times appointed by the host States out of 48 appointments); J. Christopher Thomas (only appointed by the host State).

Remark that consistency is not synonymous with partiality: behaving according to some given political ideology (i.e., inter-temporal behavioural consistency) is arguably perceived as of greater impartiality than switching one's behaviour depending on which party appointed oneself (which is much more naturally be perceived as opportunistic/strategic behaviour and hence as partial).

[28] Such a challenge, most notably, occurred in *BG Group Plc. v Republic of Argentina*, UNCITRAL ad

If the previous analysis is sound, then the system is characterised by some degree of path dependency since initial conditions matter, that is, which party first appointed an arbitrator matters for that arbitrator's present and future voting. Furthermore, if the previous analysis is sound, then, contrary to what is oftentimes held,[29] *arbitrators motivated by self-interest (i.e., judicial survival) are not fundamentally biased in favour of foreign investors* but instead are 'biased' in favour of the party which appointed them in their first investor-State arbitration.

12.2.2.2 Jointly-appointed arbitrators

It is oftentimes held that jointly-appointed arbitrators who are driven by a judicial-survival motivation exhibit a splitting-the-baby type of behaviour (or 'compromise behaviour'); that is, vote in the middle of the preferences (ideal points) of the two jointly-appointing parties within the 'set of possible decisions' so as to give both parties a partial victory.[30]

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hoc Tribunal, Final Award, 24 December 2007 (Argentina–United Kingdom BIT), at para 8, "On 6 June 2007 Argentina challenged Professor Albert Jan van den Berg pursuant to Article 11 of the UNCITRAL Rules. BG rejected the challenge by letter of 11 June 2007. Professor van den Berg stated his position by letter of 12 June 2007, declining to withdraw from office."; the reason for the challenge is explained in Argentina's petition before US Courts: *Republic of Argentina v BG Group Plc.*, United States District Court for the District of Columbia, Case No. 08-0485 (RBW), Petition to Vacate or Modify Arbitration Award, 20 March 2008, at paras 74 et seq., "inconsistency in the three decisions rendered by Berg involving identical facts, issues, measures and time period ... Due to his arbitrary and abrupt change of mind between the time of the LG&E and Enron decisions, which Berg never even tried to explain through a separate opinion, Argentina challenged Berg in this proceeding."

[29] See Section 12.1.1.

[30] Posner (2005), at 1260 et seq., "An arbitrator who gets a reputation for favoring one side or the other in a class of cases, such as cases of employment termination or disputes between investors and brokers or between management and unions, will be unacceptable to one of the parties in any such dispute, and so the demand for his services will wither. We can expect, therefore, a tendency for arbitrators to 'split the difference' in their awards, that is, to try to give each side a partial victory (and therefore partial defeat)."

Because this is time and again misunderstood: the relevant extremes are not necessarily given by what the parties express during the adjudication (e.g., one extreme is not necessarily given by the, oftentimes exaggerated, claimed amount of compensation); instead, the relevant extremes are given by the ideal points of the two jointly-appointing parties within the 'set of possible decisions', since it is only in the middle of these extremes that both parties will feel equally victorious.

This view, however, fails to fully capture 'arbitrator exchangeability' which also requires taking into consideration the alternative adjudication mechanism which would be used in the event that no agreement on appointing an arbitrator is reached by the jointly-appointing parties. Two scenarios must be distinguished.

First, if the alternative adjudication mechanism is expected to vote somewhere within the preferences (ideal votes) of the two jointly-appointing parties within the 'set of possible decisions', then the best strategy for a jointly-appointed arbitrator who is driven by a judicial-survival motivation is to vote close to where an alternative adjudication mechanism is expected to vote – in investor-State arbitration, it amounts to where the institutionally-appointed arbitrator is expected to vote (Section 12.2.2.3). Indeed, if the jointly-appointed arbitrator's vote is too far off the expected vote of the alternative adjudication mechanism, then one of the jointly-appointing parties to a future dispute will have a strict preference for the alternative adjudication mechanism over the said arbitrator and will therefore refuse to agree to appoint the said arbitrator.[31]

Second, if the alternative adjudication mechanism is expected to vote somewhere outside the preferences (ideal votes) of the two jointly-appointing parties within the 'set of possible decisions', then the the best strategy for a jointly-appointed arbitrator is to vote somewhere between those preferences (where exactly is, however, a priori unclear).

Taking 'arbitrator exchangeability' seriously hence reveals that splitting-the-baby behaviour is only implied when the alternative adjudication mechanism is expected to vote in the middle of the preferences (ideal votes) of the two jointly-appointing parties within the 'set of possible decisions'.[32]

[31] 'Too far off' because the parties to the dispute might be risk averse and therefore willing to accept a small deviation in order to avoid the risk associated with utilising the alternative adjudication mechanism (the risk arises because of the ex ante uncertainty of who specifically will adjudicate thereunder – in casu, of who will be appointed by the institution).

[32] As such, those arguing that jointly-appointed arbitrators 'split the baby' implicitly make this probabilistic assumption.

Let us illustrate that such an assumption is not always realistic. Take the instance wherein the the alternative adjudication mechanism amounts to a public permanent judge who must follow the doctrine of stare decisis and wherein hierarchically-superior tribunals have already decided the dispute. In such

Empirical findings Several empirical studies suggest that either a judicial-survival motivation is not the dominant motivation (i.e., intrinsic political-ideology motivation is the dominant one) or that a judicial-survival motivation for jointly-appointed arbitrators does not imply (as argued above) a splitting the baby between 0 and the claimed amount of compensation.

Two recent empirical studies in the context of international commercial arbitration do not find that jointly-appointed arbitrators generally award an amount lying in the middle of 0 and the claimed amount of compensation.[33] Furthermore, a recent survey of counsels in international commercial arbitration finds that counsels believe that splitting the baby occurred in 17 percent of their cases.[34]

12.2.2.3 Institutionally-appointed arbitrators

Everything that has been said for 'party-appointed arbitrators' (Section 12.2.2.1) applies here as well.

In short, the best strategy for an institutionally-appointed arbitrator who is driven by a judicial-survival motivation is to vote, within the 'set of possible decisions', in accordance with the preferences of the appointing institution – namely, to maximise the satisfaction of the preferences of the appointing institution within the limits of the applicable norms.[35]

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an instance, the alternative adjudication mechanism is ex ante expected by the parties to select with 100 percent certainty a given element within the 'set of possible decisions' (as defined in the counterfactual wherein there is no decision by some hierarchically-superior tribunal), and this element need not be in the middle of the extremes.

[33] Keer and Naimark (2005), find, based on a sample of 54 awards rendered in international private commercial arbitration through the American Arbitration Association between 1995 and 2000, that the distribution of the award in percentage of the amount demanded is bi-modal with mean and median approximately at 50 percent: one-third of claimants recovered between 0 and 10 percent; and one-third between 90 and 100 percent. Keer and Naimark (2001) (as cited in Keer and Naimark (2005), at 313, footnote 10), find, based on 4'479 awards rendered in international private commercial arbitration, that around 42 percent of cases recovered between 0 and 20 percent; and around 30 percent between 80 and 100 percent.

[34] Queen Mary University of London and White & Case (2012), at 38.

[35] Concurring: Van Harten (2007), at 169, "arbitrators who wish to win future appointments to tribunals have an interest in safeguarding their reputation among those who select arbitrators at the desig-

12.2.3 Other motivations

Chapter 11 furthermore suggests the existence (read: behavioural relevance) of a promotion motivation, a job-satisfaction motivation (collegiality), a power motivation (power/influence), an external-satisfaction motivation (celebrity/popularity and prestige), a leisure motivation, and a material motivation.

We can reasonably expect that a promotion motivation, a power motivation, an external-satisfaction motivation, and a material motivation are all aligned with a judicial-survival motivation (Section 12.2.2); namely, that their satisfaction is maximised by maximising judicial survival. Hence, we can without loss of generality abstract from these motivations as they are already captured by a judicial-survival motivation.

We can reasonably expect a leisure motivation not to affect the voting (i.e., the choice within the 'set of possible decisions') of arbitrators. Hence, we can without loss of generality disregard this motivation.

Job-satisfaction motivation (extrinsic) This motivation most importantly takes the form of a *collegiality* motivation.

An arbitrator may experience collegiality costs in their case-related interactions with colleagues as well as in their non-case-related interactions with colleagues. The former collegiality cost is not negligible: investor-State arbitral tribunals tend to sit in panels; and although the likelihood of sitting with another arbitrator again on a future investment arbitral tribunal is generally rather low because of the low probability of being appointed again in the future, this is not true for the group of individuals in whose hands the arbitral market is concentrated (the 'elite arbitrators').[36] The latter collegiality cost is negligible: although the investment-arbitral community seems

nated organizations", and at 171, "It would not be surprising, as suggested to be by one arbitrator, if most arbitrators studiously avoided criticizing ICSID; arbitrators are more likely to publicly defend ICSID and identify themselves as part of its constituency." (footnotes omitted).

[36]The arbitrator market is heavily concentrated, see footnote 23. Eberhardt and Olivet (2012), at 42, for a graphical representation of how often the 15 'elite arbitrators' sat together on a panel: "elite arbitrators regularly sit side-by-side as co-arbitrators . . . All members of the elite 15 have sat at least once and many twice with another elite arbitrator" and several sat up to 5 times together.

to meet and collaborate outside of investment arbitral tribunals,[37] nothing prevents subgroups based on shared/similar moral norms to form.

In any event, however, we can reasonably expect a political-ideology motivation and/or a judicial-survival motivation to take precedence over a job-satisfaction motivation. Indeed, if an arbitrator is driven by an intrinsic political-ideology motivation, then we should expect that motivation to virtually always trump collegiality concerns. And if an arbitrator is driven by a judicial-survival motivation, then that motivation trumps collegiality concerns because unless arbitrators keep being appointed in the future, none of the two collegiality costs matters anyways: the former does trivially not matter; and the latter does not matter because the arbitrator would no longer be part of that community.

In short, we can without loss of generality abstract from this motivation because we can expect arbitrators to be primarily driven by a political-ideology motivation and/or a judicial-survival motivation, and only secondarily by a job-satisfaction motivation.

12.3 External influence

Chapter 11 suggests the existence of external influences on the decision-making of public permanent judges.

12.3.1 Changing the rules of the game

States can change IIL's applicable norms by renegotiating or jointly terminating IIAs. This mechanism is, however, unlikely in the short run to influence the decision-making of arbitrators. Indeed, unless a State renegotiates or terminates all the IIA-based obligations it has towards other States, foreign investors can simply restructure their investments so as to get under the protection of a non-renegotiated and non-

[37] Eberhardt and Olivet (2012), at 37, "Members of the arbitration community tend to ... invite each other to conferences and to submit articles to journals."

terminated IIA.[38] Changing IIL's applicable norms is therefore time consuming and thus likely to only take effect in the medium run.

12.3.2 Strategic (re-)appointment

If arbitrators are driven by an (extrinsic or intrinsic) political-ideology motivation, then appointing parties can strategically (re-)appoint those arbitrators whose political ideology is closest to their own preferences.[39] Empirical evidence strongly suggests that this type of external influence exists.[40]

We can nowadays expect both foreign investors as well as States to be capable of using this avenue for influence: either because they have sophisticated in-house legal departments or because they rely on sophisticated outside legal counsel.[41] The second part of this statement follows from observing that profit-maximising (read:

[38]This follows from the observation that investment arbitral tribunals have found IIAs' ratione-personae jurisdictional requirement to be easily satisfied. See Sections 5.2.2.1 respectively 5.4.2 for a discussion of the jurisprudence.

[39]The implication holds for those driven by an intrinsic political-ideology motivation as well as for those driven by an extrinsic political-ideology motivation (i.e., for repeat-appointed arbitrators driven by a judicial-survival motivation; Section 12.2.2).

[40]See footnote 15 and the text surrounding it.

[41]Sharing the view that we can expect States to be capable of appropriately appointing arbitrators: Rogers (2013), at 252.

It has been reported that limited financial resources have sometimes prevented host States, especially developing ones, to hire a sophisticated outside legal counsel (Leon and Terry, 2006, at 7, "Sometimes financial resources may make a state unable to employ counsel who is experienced in international arbitration.") and that this has at times led host States to select arbitrators relatively randomly (Rogers, 2007, at 358, "Anna Joubin-Bret of the United Nations Conference on Trade and Development ('UNCTAD') reports that representatives from developing nations … have been known to resort to relatively random selection criteria, such as nominating an academic they happened to encounter at a conference on investment arbitration"). This description is, however, unlikely to still characterise contemporary IIL-based arbitrations: the rising number of published investment-arbitral-tribunal awards make knowledge of arbitrators' past behaviour readily available to both the parties to the dispute themselves as well as to their legal counsels (whether they are sophisticated or not). Consequently, although it may have been true in the past that "[i]n selecting an arbitrator, elite international law firms and large corporations with extensive experience in international arbitration typically have a significant advantage" (Rogers, 2012, at 4), it most likely is no longer the case today.

self-interested) outside legal counsels, which want to be re-hired in the future, face an incentive structure similar to the one which first-time party-appointed arbitrators face:[42] if they do not maximise the satisfaction of the preferences of their respective hiring party, then they do not maximise their probability of being re-hired in future investment-treaty arbitrations; hence, the best strategy for an outside legal counsel (who is driven by a profit-maximising motivation) is to recommend an arbitrator whose political ideology is closest to their hiring party's preferences.

12.3.3 Stick and carrot (threat of non-reappointment)

If first-time arbitrators are driven by a judicial-survival motivation, then they can be expected to vote in accordance with the preferences of their respective appointing party.[43]

There is some empirical evidence suggesting that appointing parties have made their preferences clear to potential arbitrators.[44]

12.4 Expected arbitrator decision-making

> It should not be surprising if party-appointed arbitrators tend to view the facts and law in a light similar to their appointing parties.
>
> — Richard M. Mosk and Tom Ginsburg[45]

[42] See Section 12.2.2.1.

[43] See Section 12.2.2.

[44] The most infamous example is provided by the United States' party-appointed arbitrator in *Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 January 2003 (NAFTA): "In December 2004, the American[-appointed] arbitrator . . . intervened in the course of a symposium where he reflected on his experience in *Loewen*. The symposium happened to be recorded . . . This included the revelation that the arbitrator had met with officials of the U.S. Department of Justice prior to accepting the appointment, and that they had told him: 'You know, judge, if we lose this case we could lose NAFTA.' He remembered his answer as having been: 'Well, if you want to put pressure on me, then that does it.'" (Paulsson, 2010, at 345 et seq., footnotes omitted).

[45] Mosk and Ginsburg (1999), at 275.

Actually, it follows from Sections 12.2 and 12.3 that we can reasonably expect party-appointed and institutionally-appointed arbitrators (irrespective of their underlying motivations) to vote, within the 'set of possible decisions', in accordance with the preferences of their respective appointing party.[46] It also follows that we can reasonably expect jointly-appointed arbitrators to vote somewhere between the preferences of the jointly-appointing parties (where exactly is, however, a priori unclear).

Indeed, if arbitrators are driven by an (extrinsic or intrinsic) political-ideology motivation (i.e., including repeat-appointed arbitrators driven by a judicial-survival motivation), then these behavioural implications follow from strategic (re-)appointment. And if first-time-appointed arbitrators are driven by a judicial-survival motivation, then these behavioural implications follow from the threat of non-reappointment.

Empirical findings The observation that a large majority of dissenting opinions have been written by the arbitrator appointed by the loosing party provides some empirical support for these behavioural implications.[47]

12.5 Non-unitary-state perspective

> Disputants tend to be interested in one thing only: winning. They exercise their right of unilateral appointment, like everything else, with that overriding objective in view. The result is speculation about ways and means to shape a favourable tribunal, or at least to avoid a tribunal favourable to the other side – which is logically assumed to be speculating with the same fervour, and toward the same end.

[46] Namely, that arbitrators maximise the satisfaction of the preferences of their appointing party within the limits of the applicable norms.

[47] van den Berg (2011), at 824, finds, based on investment arbitral decisions published before 31 December 2008 (approximately 150 decisions), that most dissenting opinions of investment arbitral tribunals are written by the arbitrator appointed by the loosing party (34 times), and that the non-party appointed arbitrator and the arbitrator appointed by the winning party only rarely dissent.

Empirical studies of dissenting opinions in international commercial arbitration find similar results. See, Redfern (2004); and Silva Romero (2005).

— Jan Paulsson[48]

This Section extends the previous analysis by taking a non-unitary-state perspective; namely, by relaxing the unrealistic assumption of benevolent governments. Such a perspective implies that a State party to a dispute behaves so as to maximise the utility of the *State entity* representing the said State in the dispute settlement – hence, a State party to a dispute may not, contrary to what is generally held, behave so as to win the dispute.

Section 12.4 suggests that we can reasonably expect arbitrators to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party. In consequence, a non-unitary-state perspective implies that a State-appointed arbitrator can reasonably be expected to vote in accordance with the preferences of the State entity responsible for the appointment decision – since this State entity de facto amounts to the appointing party.

Most notably, if this State entity exhibits a 'pro-investor preference', then the State does not engage in SD-furthering behaviour (i.e., and therewith exhibits a SD-hindering preference) in the context of an IIL-based dispute – including when appointing an arbitrator. The following discusses the conditions under which we can expect the State entity to exhibit a pro-investor preference. The discussion is separated into two parts: when the State entity amounts to an elected body; and when the State entity amounts to a non-elected body.

12.5.1 State entity: elected body

Elected bodies (executive or legislative body; politicians) may represent the State in the dispute either because they formally have that competence or because they have close political oversight of the agency to which the representation has been delegated.

[48] Paulsson (2010), at 352.

12.5.1.1 Theory

Chapter 8 provides a detailed development of a non-unitary-state theory. Section 8.1.5 argues that such a perspective requires one to focus on 'interest groups' and to start by identifying the set of 'potentially relevant influencers'.

12.5.1.2 Application to IIL-based arbitration

Potentially relevant influencers We can expect people to view the outcome of an IIL-based dispute as providing some information about the outcome of future IIL-based disputes even in the absence of binding precedent; namely, to expect an outcome in favour of the host State (of the foreign investor) as reducing (increasing) the perceived winning chances of a similar claim in the future.

We can distinguish between three interest groups which are substantially affected by the outcome of an IIL-based dispute. First, *the masses* are directly affected by the outcome because they will have to pay in case of an adverse outcome against their State and are indirectly affected thereby because the outcome may impact the likelihood of future adverse outcomes against their State. Second, *foreign-investment-making (domestic or foreign) firms* are indirectly affected by an outcome because it increases (decreases) the winning chances of a claim of their own in the future, which in turn decreases (increases) the expected discounted profits of their foreign investment (since the outcome decreases (increases) the riskiness of their foreign investment). And third, *legal practitioners* (law firms) are indirectly affected by a decision because by reducing (increasing) the winning chances of a similar claim in the future, it reduces (increases) the likelihood of a foreign-investment-making firm bringing an IIL-based claim in the future and therewith reduces (increases) future business opportunities.

All three interest groups may influence elected bodies: the masses have the capacity to provide political support in the form of votes, demonstration, and violent protests;[49] foreign-investment-making firms and legal practitioners have the capacity to provide political support in the form of campaign contributions, non-political sup-

[49] See Section 8.5.

port in the form of bribery or revolving door, and to provide information (lobbying).

We have also seen that the masses may exhibit a sustainable-development preference;[50] and that the masses seem to have exhibited a development preference or, at the very least, an economic-development preference.[51] We can reasonably expect foreign investors to be driven by a profit-maximisation motivation, materialising into a liability-maximisation preference, which amounts to an SD-hindering preference.[52] And we can reasonably expect legal practitioners to be driven by a profit-maximisation motivation, which materialises into a pro-investor preference (i.e., into maximising the profits of foreign investors) in the context of IIL-based adjudication.[53]

Prospects of SD-hindering preference If the identification of 'potentially relevant influencers' is sound, then we can generally expect the State entity to have a 'pro-investor preference' unless the masses amount to 'relevant influencers'.[54] Chapter 10 discusses the conditions under which the masses can be expected to amount to

[50] See Section 8.5.2 for the theoretical argument.

[51] See Section 8.5.3 for empirical evidence.

[52] See Section 13.2.1 for the argument.

[53] Empirical support for such a pro-investor preference is given by the following facts: "In 2004, the US government ... introduced a new BIT template (usually called a Model BIT) which modified the 1994 version. The revised text included new language that would afford the US state some policy space to regulate, particularly in the areas of health and environment ... prominent US arbitrator Judge Schwebel vocally condemned the changes. Price, who had helped to negotiate BITs on behalf of the US, also argued against weakening the provisions in the US Model BIT. Park said that 'this policy shift is highly problematic, and ultimately will cause significant harm to American interests abroad'. In 2009, Barack Obama vowed as a Presidential candidate to review the 2004 model BIT to increase labour and environmental obligations ... Judge Schwebel ... advocated a return to stronger investment protection as contained in the 1994 Model BIT ... At the same time, investment lawyers were confronted with the possibility of reform of investment treaties in the EU ... The EU Commission and the European Parliament seemed to be moving in [the direction of better balanced private and public interests] ... Arbitrators did not waste any time putting forward their 'neutral' points of view. Lalonde, for example, ... warned: 'A proviso would be that, we don't end up with a second rate product or a weaker product than what is available at the present time" (Eberhardt and Olivet, 2012, at 46 et seq., footnotes omitted).

[54] Note the consistency with the findings in Chapter 10, which argues that IIL is unlikely to be aligned with SD unless the masses amount to 'relevant influencers'.

'relevant influencers' in the context of IIL policy-making.

12.5.2 State entity: non-elected body[55]

Non-elected bodies (bureaucracy; administrative agencies) may represent the State in the dispute.

12.5.2.1 Theory

The bureaucracy is generally formally constrained through political oversight by some elected body (or subcommittee thereof).

There are, however, good reasons to expect the bureaucracy of being able to satisfy its own preferences to a reasonable extent. On the one hand, elected bodies are likely to perceive agencies as having technical expertise as well as practical knowledge, and are therefore likely to rely to a certain degree on agencies both for autonomous decision-making (i.e., decision-making delegation) and for advice (i.e., information-set construction).[56] On the other hand, even when elected bodies want to engage in close oversight, agencies possess a substantial information advantage (read: asymmetric information) due to private information which makes them difficult to monitor as well as due to time constraints on the part of the elected body which makes for weak monitoring;[57] and agencies can engage in strategic information provision so as to shift the elected body's decision-making towards their own preferences.[58]

[55] The political-economy approach was first applied to bureaucracies by the late American economist William Niskanen (Niskanen, 1971).

[56] Kaufman (2001), at 21; Gersen (2010), at 339, "a central premise of the administrative state is that agencies have better information and greater expertise than Congress; therefore, Congress ought to delegate to agencies"; Mitnick (2011), at 44, "The classical rationale for delegation to administrative agencies is ... The legislature lacks both the time and the expertise to develop detailed rules to implement regulatory mandates, and so would be obligated to entrust these essential legislative duties to the agency – it was indeed an *agency*."

[57] Acemoglu and Verdier (2000), at 194, "These bureaucrats are ... by virtue of their superior information, hard to monitor perfectly."

[58] Kelleher Palus and Yackee (2013), at 273, "We theorize that the political oversight of the bureaucracy by elected officials not only constrains the bureaucracy but also provides a pathway for agency

Motivations Agencies may be driven by a power motivation, an external-satisfaction motivation (celebrity/popularity and prestige), and/or a material motivation. It has been argued that agencies are primarily driven by a budget-maximisation motivation because larger budgets are associated with greater power, prestige, job security;[59] namely, because such a motivation may follow from any of the aforementioned more fundamental motivations.

External influences It has also been argued that regulatory agencies may be influenced by the regulated industry through the following avenues.

First, by influencing the elected body which oversees the agency.[60] The elected body's control emanates, amongst others, from their capacity to inflict sanctions thanks to their power to enact new legislation, to hold oversight hearing, and to control the budget;[61] this influence is, however, arguably limited because of legal protections that civil servants tend to enjoy.[62]

Second, by (strategically) providing the agency with information it needs to make its decisions, because agencies tend to be under-resourced and thus to lack the capacity to produce on their own the information.[63] The regulated industry has an advantage over other interest groups (read: the masses; public interest groups), even if all of them are organised: (i) the regulated industry is more likely to provide such information because it is better funded and is therefore better at monitoring regula-

officials to advance their preferences by communicating their policy expertise."

[59] Seminally, Niskanen (1971).

[60] See Section 12.5.1 for the means by which they may influence elected bodies.

Remark that many scholars implicitly assume perfect oversight by some elected body by treating (non-elected) regulators and the (elected) legislature as a single entity; seminal therein is Peltzman (1976).

The constellation emanating from perfect oversight has been called the 'iron triangle' because it aligns the interests of the legislature, the executive, and the regulated industry; see, for instance, Mitnick (2011), at 42; see also Bernstein (1955). Such a constellation thus produces a 'legislative dominance' (McCubbins, Noll, and Weingast, 1987, 1989).

[61] Instead of several, see Mitnick (2011), at 42.

[62] Yackee (2012a), 423, "Government employees may enjoy civil service protections that limit a state's ability to discipline them".

[63] See, for instance, Williamson (1975); Laffont and Tirole (1993); Zingales (2014), at 124, "Regulators depend on the regulated for much of the information they need to do their job properly".

tory changes;[64] and (ii), for a given amount of provided information, the regulated industry is more likely to convince the regulatory agency because it is more likely to adequately understand the complex issues and the regulated industry is more likely to provide information satisfying scientific standards because it is better funded.[65]

Third, by providing agency members with material benefits; through the prospect of future lucrative private-sector employment (i.e., revolving door),[66] or through bribery.[67] The regulated industry has a clear advantage over other interest groups for it can offer higher wages since it can make the most productive use of the expertise and knowledge of agency members.[68]

Fourth, by placing some of its own employees (those having a worldview favourable to the regulated industry) into those agencies (i.e., revolving door). Again, the regulated industry has a clear advantage over other interest groups since it can provide individuals with expertise in and knowledge of the industry.

Empirical findings A recent empirical study suggests that: (i) the regulated industry provides more information than other interest groups; and that (ii) for a given amount of provided information, the regulated industry is more likely to convince the regulatory agency (i.e., to change its mind).[69] For further empirical evidence regarding such information provision, see Section 8.3.3.

[64] See, for instance, Kerwin and Furlong (2010), at 158 et seqq.

[65] Yackee and Yackee (2006), at 130 et seq.

[66] Instead of several, see Mitnick (2011), at 41.

[67] See Section 8.3.2 for a discussion of these forms of non-political support.

[68] Zingales (2014), at 124, "career incentives play a big role. The regulators' human capital is highly industry-specific, and many of the best jobs available to them exist within the industries they regulators."

[69] Yackee and Yackee (2006), at 133 et seq., find, based on a cross-sectional analysis of a sample of changes in agency rules, between the first-draft version subject to input by the public (see below) and the final version, for 4 US agencies between 1994 and 2001 (40 different agency rules; 1'693 comments), that a given amount of information (i.e., a given number of comments) provided by business interests (i.e., the regulated industry) has a significantly and substantially larger impact on agency-rule changes than the same amount of information provided by other interest groups.

"[US] Federal agencies are required by law to solicit and take into account the views [read: comments] of concerned citizens prior to the promulgation of most final agency rules." (Yackee and Yackee, 2006, at 128).

Revolving doors indeed appear to be widespread in the real world, both for national and international agencies/institutions.[70] There is also strong evidence that a revolving door operates in the context of IIL.[71]

Potentially relevant influencers If an elected body effectively controls the agency, then the 'potentially relevant influencers' amount to those interest groups which are most strongly affected by the regulation.[72]

If not, then we can expect the 'potentially relevant influencers' in the context of agency decision-making to amount solely to the regulated industries since they can be expected to have the strongest external influence on agency decision-making (see 'external influences' above).

12.5.2.2 Application to IIL-based arbitration

Potentially relevant influencers If an elected body effectively controls the agency, then the 'potentially relevant influencers' are the same as in the instance wherein an elected body amounts to the State entity: the masses, foreign-investment-making firms, and legal practitioners.[73]

[70] In the United States: "The [US] Treasury has all but dug an underground passage to Wall Street: four of the past seven secretaries had close ties to investment banks." (Economist, 2013a); "The finance ministers and central bank governors typically are closely tied to the financial community; they come from financial firms, and after their period of government service, that is where they return. Robert Rubin, the treasury secretary ... cam from the largest investment bank, Goldman Sachs, and returned to the firm, Citigroup, that controlled the largest commercial bank, Citibank." (Stiglitz, 2002, at 19).

In Britain: "In Britain the revolving door is spinning ever ever more rapidly. Over the past decade 18 former senior ministers and civil servants have taken jobs with the biggest three accountancy firms, whose work include helping businesses minimise their tax bill and lobby the government ... The boards of British energy firms are packed with ex-ambassadors and ex-spies." (Economist, 2013a).

Regarding international institutions: "The number-two person at the IMF ... Stan Fischer, went straight from the IMF to Citigroup." (Stiglitz, 2002, at 19).

[71] For prominent examples, see Eberhardt and Olivet (2012), at 29 and 44, mentioning Anna Joubin-Bret, Barton Legum, Dan Price, and Regina Vargo.

[72] See Chapter 8 generally.

[73] See Section 12.5.1.2.

If not, then the 'potentially relevant influencers' amount to the regulated industries, which in this context are: foreign-investment-making firms and legal practitioners.

Prospects of SD-hindering preference If an elected body effectively controls the agency, then we can generally expect the State entity to have a 'pro-investor preference' unless the masses amount to 'relevant influencers'.[74]

If not, then we can generally expect the State entity to have a 'pro-investor preference' because: (i) if the agency is primarily driven by a budget-maximisation motivation, then it might be budget enhancing to exhibit a 'pro-investor preference' since a pro-investor decision in an IIL-based dispute is likely to increase the number of future claims and therewith the usage and relevance of the agency; and (ii) 'potentially relevant influencers' (i.e., foreign-investment-making firms and legal practitioners) have a pro-investor preference.[75] Hence, there is a real possibility of a 'pro-investor preference' if the agency is not effectively controlled by an elected body (or subcommittee thereof).

[74] See Section 12.5.1.2.
[75] See Section 12.5.1.2.

Chapter 13

IIL design: dispute settlement

The design of contemporary IIL's dispute-settlement mechanism has been the focus of most of IIL's critics.[1] And rightly so: Section 7.4 argues that its dispute-settlement mechanism is (partly) responsible for many of IIL's SD deficits. Section 5.14 furthermore shows that several States have taken issue with contemporary IIL's dispute-settlement mechanism; most recently, negotiations between the United States and the EU in the context of TTIP have faced public opposition over its investment dispute-settlement mechanism.[2]

This Chapter builds upon the conceptual descriptive frameworks developed in Chapters 11 and 12 to propose a dispute-settlement mechanism which aligns IIL (more closely) with SD.[3]

[1] For an overview of these critics, see Waibel et al. (2010a) generally; and specifically Waibel et al. (2010b), at xxxiv et seqq.

Most of these critics have focused on investor-State dispute settlement: Mann (2011), at 28 et seq., "most of the civil society groups that do believe it is worth the effort to try to reform international investment agreements ... reject the use of investor-state arbitration". In so doing, these critics have focuses on (i) investors' power to appoint adjudicators and on (ii) investors' power to initiate proceedings; these issues are discussed in Sections 13.2 respectively 13.4.

[2] Instead of several, see IISD (2015).

[3] Remark that reliance in IIL scholarship upon explicit descriptive theories seems to be the exception rather than the norm: Rogers (2013), at 228, "[hitherto, normative theories have been] based on anecdotal accounts of the system or more general dissatisfaction with, or support for, the substantive pol-

This Chapter finds that IIL's dispute-settlement mechanism should further consensual dispute resolution both between the disputing parties (through mediation) as well as between the parties to the applicable norms (most notably, between treaties parties; through joint-interpretation commissions). It finds that IIL's dispute-settlement mechanism should exhibit an international adjudicative proceeding, that States should amount to the appointing entities of adjudicators, that adjudicators should be jointly appointed, that adjudicators should be appointed on an ad hoc basis (i.e., reliance upon ad hoc judges) unless there exists a single IIL-based adjudicative body,[4] and that both States and foreign investors should have the right to initiate this international adjudicative proceeding. It furthermore finds that IIL's dispute-settlement mechanism should exhibit extensive transparency, should allow (but not require) for third-party participation, and should require reliance upon local remedies before an international adjudicative proceeding takes place.

Taking a non-unitary-state perspective, this Chapter finally finds that the masses must be made aware that adjudicators can reasonably be expected to vote, within the 'set of possible decisions', in accordance with the preferences of the State entity responsible for appointments; and that if a non-elected entity represents the State in the dispute, then that entity must be closely linked to (read: effectively controlled by) an elected body.

The remainder of this chapter is organised as follows. Section 13.1 considers consensual dispute-resolution mechanisms. Section 13.2 studies international adjudicative proceedings. Section 13.3 takes a non-unitary-state perspective. Section 13.4 analyses the right to initiate international adjudicative proceedings. Section 13.5 studies the issue of transparency. Section 13.6 discusses the issue of third-party participation. Section 13.7 considers the place of local remedies. And Section 13.8 finally discusses the likelihood of a single adjudicative body in practice.

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icy outcomes of particular cases. However, each hypothesis is predicated on certain often unarticulated empirical assumptions. These empirical assumptions have remained untested and largely been taken for granted."

[4] If there exists a single IIL-based adjudicative body, then adjudicators sitting thereon should be appointed for a certain period of time (i.e., reliance upon permanent judges).

13.1 International proceeding I: consensual

This Section discusses peaceful-dispute-settlement mechanisms besides adjudication (Section 13.2); namely, it discusses *consent-based-dispute-settlement mechanisms*.

The following argues that the design of IIL's dispute-settlement mechanism should promote the reliance upon investor-State mediation and allow for binding joint interpretations by States.

Note also that the focus hereinafter on mediation, rather than conciliation,[5] is motivated by the fact that since the jurisprudence of investment arbitral tribunals is quite heterogeneous (and even exhibits conflicts),[6] a conciliator will arguably have little added value because there is little guarantee that a future adjudicative body will decide according to his or her proposed resolution of the dispute.[7]

13.1.1 Disputing parties: mediation[8]

Roughly speaking, mediation describes the reliance upon a (neutral) third party to assist the disputing parties to reach a mutually agreeable resolution; as such, mediators do not resolve the dispute for the parties.[9]

The functioning of IIL-based adjudication utilises vast resources.[10] It has been

[5] "Conciliators focus on rights-based settlement options for parties to choose from (eg what a tribunal is likely to decide or be influenced by). Mediators, on the other hand, focus on the subjective interests of the parties as the basis for negotiated outcomes" (von Kumberg, Lack, and Leathes, 2014, at 139).

[6] See Chapter 5.

[7] This reasoning may explain why less than 2 percent of ICSID cases have gone to conciliation; see Echandi and Kher (2014), at 41, footnote 5.

Note that both ICSID and UNCITRAL explicitly provide procedural norms for conciliation; see ICSID Convention, Chapter III; UNCITRAL Conciliation Rules.

[8] Disputing-parties mediation includes both investor-State mediation (i.e., mediation between foreign investors and host States) as well as State-State mediation (i.e., mediation between home States and host States – when IIL contains home-State obligations and a violation thereof is claimed by the host State).

[9] Franck (2014), at 71 et seq., "Using process-based skills, mediators elicit parties' interests, identify zones of possible agreement and generally facilitate discussion that may (but also may not) result in a consensual solution."

[10] Franck (2014), at 77 et seq., "on average ITA disputes take approximately 3.5 years to resolve …each party is paying approximately US$5 million in lawyer fees and, jointly, approximately US$1 million on average for the tribunal" (emphasis omitted).

argued that mediation facilitates early settlements and therewith frees up resources for more productive usage.[11]

It has also been pointed out that the relationship between foreign investors and host States amounts to a long-term engagement and that adjudication (especially when it results in monetary compensation in favour of foreign investors), contrary to mediation, is likely to damage this potential mutually-beneficial engagement.[12]

Although most IIAs contain no explicit reference to mediation,[13] contemporary IIL somewhat encourages mediation because IIAs tend to require a 'waiting period' before an IIA-based claim can be brought before an IIA-based adjudicative body.[14] However, in light of the fact that a large percentage of IIL-based adjudications end up settled,[15] it seems likely that contemporary IIL is not pro-active enough in its promotion of mediation.[16]

Optimal design The optimal design should require a 'waiting period' of more than six months before adjudication (i.e., require a 'notice of intent to adjudicate' some time in advance),[17] refrain from referring to the 'waiting period' as a 'cooling-off

[11] Instead of many, see Franck (2014), at 77, "there may be considerable cost and time savings by using mediation ... mediation might permit parties to avoid the potentially expensive process of appointing and paying for arbitrators ... might avoid or minimize the costs related to formal discovery or other methods of evidence gathering ... there may be less of a need for expert witnesses".

[12] UNCTAD (2010a), at xxiii.

[13] Echandi (2013), at 279.

[14] See Section 5.4.3.

It has been held that this waiting period is meant to resolve the dispute consensually; see e.g. Schreuer (2004), at 238.

[15] Around 30 percent of IIL-based adjudications end up being settled before the rendition of an award; see Section 7.1.2.

[16] This view seems widely shared (amongst others): Salacuse (2007); Legum, Joubin-Bret, and Manassyan (2013); Stevens and Love (2013); Welsh and Kupfer Schneider (2013); von Kumberg, Lack, and Leathes (2014).

[17] This follows from observing that "it is easier to effect a negotiated settlement of a dispute if a mediator intervenes earlier rather than later in the conflict. Once a dispute has been submitted to international arbitration, the difficulties of its settlement increase" (Salacuse, 2007, at 181). Also, a "'cooling-off period' [of three to six months] is generally too short to allow for effective ADR to take place within that time" (UNCTAD, 2010a, at 41).

Concurring: IISD Model, Article 42(B), requires a minimum six months cooling-off period.

period',[18] explicitly indicate that the parties should attempt to resolve the dispute consensually,[19] include a 'unilateral (ex ante) consent to (a single) mediation by States', require that the 'notice of intent to adjudicate' (which starts the waiting period) contains a consent to mediation, hold that each disputing party has a right to start mediation until the dispute is resolved (i.e., during the waiting period as well as during a potential adjudication),[20] and hold that a 'consent to mediation' implies an obligation to participate (for some period of time) in the mediation process if the other disputing party requests mediation;[21] doing so provides each disputing party with a right to start mediation unless mediation has already (unsuccessfully) been attempted in the past.[22] The optimal design should, in the spirit of the underlying consensual character, arguably hold that mediator(s) be jointly appointed and that mediator(s) be appointed by some institution (e.g., ICSID) when the parties cannot agree.[23] Also, settlements should be required to be referred to as 'consent awards' so as to fall within the scope of the New York Convention.[24] This provides a broad outline of the optimal design; more detailed procedural norms can most easily be imple-

[18] UNCTAD (2010a), at 41, because 'cooling off' suggests inactivity.

[19] Salacuse (2007), at 184.

See e.g. US Model BIT 2012, Article 23.

[20] Similarly: IBA Rules on Investor–State Mediation 2012, Article 2(4), 'Mediation under these rules may take place at any time, regardless of whether court, arbitration or other dispute resolution proceedings have been initiated.'

[21] Coe (2011), at 46, "The investor and the respondent State would be under a duty of good faith to cooperate with the mediators and to participate meaningfully in the mediation process."

Similarly: IBA Rules on Investor–State Mediation 2012, Article 9(4), 'By agreeing to mediate under these rules, a party undertakes to participate in the mediation management conference. A party may withdraw from the mediation at any time after the mediation management conference.'

[22] A limited requirement to engage in mediation minimises the waste of resources in the event that one of the disputing parties is categorically opposed to resolve the dispute through mediation.

Such a scenario is most obvious when we take a non-unitary-state perspective: "In all too many cases an official might find it more politically expedient to postpone making decisions for which he would be accountable by letting an investor-state arbitration take its typically cumbersome, time-consuming course. In the event of a decision adverse to his government, if he still occupies the same position, he can blame the arbitral body." (Bjorklund, 2013a, at 312); see also Reisman (2011b), at 26.

[23] Relying upon such appointment rules: IBA Rules on Investor–State Mediation 2012, Article 4; CETA (consolidated draft, 1 August 2014), Chapter 10, Section 6, Article X.19.

[24] Suggesting so: von Kumberg, Lack, and Leathes (2014), at 140.

mented by additionally requiring the application of the IBA Rules on Investor–State Mediation (October 2012).

Finally, if we do not have absolute confidence in adjudicators' norm application, then IIL should not only include a 'waiting period' but also explicitly refer to it as a 'jurisdictional requirement'.

13.1.2 State-State: joint-interpretation commissions

Joint-interpretation commissions describe commissions which are composed of all the States party to some applicable norms (e.g., to an IIA) and which have the competence to publish 'joint interpretations' of those applicable norms, independently of whether there exists an actual dispute on precisely those applicable norms,[25] on behalf of all those States. The commission publishes a joint interpretation when a qualified majority accepts an interpretation.[26]

Contemporary IIL does not, generally speaking, exhibit joint-interpretation commissions.[27]

[25]This precision is important because joint-interpretation commissions may also be given this competence only if there exists an actual dispute and whose interpretation is only relevant for the dispute in question. Seminal for pointing out this distinction is Aaken (2015b).

Most notable for establishing joint-interpretation commissions only having this limited competence are the Canada Model BIT 2004 and US Model BIT 2012 (they actually require the dispute to be first referred to those commissions) in the context of certain disputes, such as prudential regulation of financial markets and taxation: Canada Model BIT 2004, Article 16 and 17; US Model BIT 2012, Article 20(3).

[26]Notice that such a joint-interpretation commission also de facto exists at the WTO: WTO Agreement, Article IX(2), holds that a three-fourth majority of member States can publish binding joint interpretations.

[27]There are a few notable exceptions: NAFTA, Article 1131(2) in combination with Article 2001, 'An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.'; CETA (consolidated draft, 1 August 2014), Chapter 10, Section 6, Article X.27(2), 'An interpretation adopted by the Trade Committee shall be binding on a Tribunal established under this Chapter. The Trade Committee may decide that an interpretation shall have binding effect from a specific date.'; US Model BIT 2012, Article 30(3), 'A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.'; Canada Model BIT 2004, Article 40(2) in combination with Article 51, 'An interpretation by the Commission of a provision of this Agreement shall be binding on a

Underlying optimisation problem Joint-interpretation commissions thus provide a framework making it easier, and thus more likely, to reach 'subsequent agreements' in the form of 'subsequent joint interpretations'; namely, they increase States' ex post control. It has been argued that one cannot generally say whether an 'interpretation', including 'joint interpretations', de facto amounts to a proper interpretation or an amendment of the applicable norms.[28]

Consequently, the reliance upon joint-interpretation commissions provides States with joint ex post control, which arguably includes/provides the power to make (de facto) amendments. Whether or not joint-interpretation commissions should be relied upon therefore involves an optimisation problem.[29] On the one hand, such commissions may be costly because the so-created joint ex post control reduces IIL's inter-temporal stickiness (i.e., reduces its degree of stability over time).[30] On the other hand, such commissions are beneficial because they allow States to choose their preferred form of SD; because they may, depending on the issue at hand, be composed of specialised agencies with subject-matter expertise and may therefore yield more-desirable interpretations than adjudicative bodies (because adjudicative bodies lack such expertise);[31] and because they may increase the survival of IIL by increasing States' ex post control.[32]

The benefits of joint-interpretation commissions arguably outweigh the cost thereof because the reduction in IIL's inter-temporal stickiness is likely to be marginal as 'joint interpretations' presume the consent by multiple States.[33]

Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation.'

[28] Kaufmann-Kohler (2011), at 191, "it will often be difficult to draw the line between a true interpretation and an amendment"; Simma (2013), at 46, "there is really no possibility for a third party to distinguish between acts of interpretation, modification or amendment of a treaty in the absence of a declaration or some other means of clarification provided by the parties to the treaty themselves".

[29] Concurring: Aaken (2014b), at 828, footnote 3.

The optimisation problem is described in more detail in Section 14.5.1.

[30] Observing so from a contract-theory perspective: Aaken (2014a), at 410 et seqq.

[31] Also arguing so: Aaken (2015b), at 42 et seqq.

[32] Ewing-Chow and Losari (2015), at 114.

[33] Remember that 'joint-interpretation commissions' provide States only with joint ex post control – and not with unilateral ex post control. See also Section 14.5.1.

Optimal design If the previous argumentation is sound, then the optimal design of IIL's dispute settlement should arguably contain a clause holding that States ought to create a joint-interpretation commission and that this commission yields 'joint interpretations' based on a qualified-majority rule.[34] The clause may also require the commission to always ask international organisations for (non-binding) opinions; for instance, the FAO for food crises, the IMF for financial regulation, the UNEP for environmental measures, and the WHO for health regulation.[35]

Adjudicative bodies are required to follow joint interpretations of such commissions because: articles 31 and 32 VCLT are part of the 'applicable norms' since it is widely accepted that these articles amount to norms of customary international law,[36] and 'joint interpretations' amount to 'subsequent agreements' under article 31(3) VCLT and hence fulfil article 31(4) VCLT holding that '(subsequent) joint interpretations' take precedence over all other possible interpretations.[37] Importantly, however, adjudicative bodies should not follow a so-called 'joint interpretation' when it amounts to a de facto amendment because States' intention was to create a joint-interpretation commission and not a PIL-amendment commission; namely, because they did not delegate PIL-making competence to the commission so that a de facto amendment does not amount to a 'subsequent agreement' of those States.

This clause should also hold that if the respondent State proposes some interpretation, then all the other States have an obligation to say whether or not they agree with that interpretation. This follows from observing that non-respondent States may otherwise simply refuse to express an opinion on the proposed interpretation.[38] Furthermore, this clause should hold that if a non-respondent State does not agree with

[34] A unanimity rule is arguably suboptimal because unanimity becomes increasingly difficult to achieve when the number of States party to the IIL-based applicable norms increases.

[35] Suggesting so: Aaken (2015b), at 47.

[36] See Section 6.2.

[37] See Section 6.3 for a detailed discussion of the jurisprudence of article 31 VCLT.

[38] Clodfelter (2015), at 189, "This was the situation faced by Argentina with regard to its essential security defense to numerous investor claims under the Argentine-U.S. BIT. One wonders how less burdened Argentine public finances might be today if the United States had joined Argentina [respondent State], as the latter desired, in a subsequent agreement on what appears to be their shared view of the self-judging nature of the essential security clause."

the proposed interpretation, then its view can be held against it in future potential disputes. This follows from taking a non-unitary-state perspective: Section 13.3 argues that non-respondent States are less likely to engage in SD-furthering behaviour in the context of an IIL-based dispute than respondent States (because the non-respondent State's masses are not directly affected by the outcome of the current dispute).

If we do not have absolute confidence in adjudicators' norm application, then the optimal design should explicitly mention that 'joint interpretations' are binding for adjudicative bodies. Contemporary IIL ever more frequently exhibits such a clause;[39] notice, however, that although IIAs tend to exhibit such a clause, most of them do not establish a joint-interpretation commission.[40] The clause should also explicitly hold that if the so-called 'joint interpretation' amounts to a de facto amendment, then adjudicative bodies shall not follow that interpretation.

13.2 International proceeding II: adjudication

This Section discusses peaceful-dispute-settlement mechanisms in the form of adjudication. From Section 13.1 it follows that: (i) 'consent-based-dispute-settlement mechanisms' take precedence over (i.e., preclude) adjudication if they resolve the dispute; and (ii) 'joint interpretations' (Section 13.1.2) amount to binding precedents for future disputes.

Since the peaceful-dispute-settlement mechanisms discussed in Section 13.1 may not resolve a dispute, the design of IIL's dispute-settlement mechanism must also ex-

[39] See Section 5.14.2.

Such lack of confidence is arguably warranted: the investment arbitral tribunal in *CMS v Argentina* (*CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (United States–Argentina BIT)) arguably failed to follow the 'joint interpretation' of the States party to the IIA. Arguing so: Slaughter (2004), at para 3, "Context and negotiating history, in turn, make clear that both the United States and Argentina understood the essential security clause to be self-judging." (as quoted in Aaken (2014a), at 419, footnote 51); Roberts (2014b), at 4, "Argentina argued that the treaty's essential security clause was self-judging and it could well have suspected that the United States agreed given that the United States had made the same argument with respect to a similarly worded FCN clause and had amended its Model BIT to clarify this point."

[40] Ewing-Chow and Losari (2015), at 99 et seq.

hibit international adjudication in order to clarify whether or not an IIL-based obligation was violated. Furthermore, mediation (Section 13.1.1) may require the prospect of future mandatory international adjudication to be pursued by both disputing parties.[41]

The following argues that IIL-based adjudication should exhibit States as appointing parties and have all adjudicators jointly appointed. The critical argument that doing so leads to a re-politisation of IIL is unconvincing per se: depolitisation is not a goal in itself – but only a means for achieving some overarching end, such as sustainable development.[42] Note also that having States as appointing parties is a natural continuation of creating 'joint interpretation commissions' (Section 13.1.2) and is implicitly captured by calls for a single IIL-based adjudicative body (Section 13.8).

The following furthermore argues that an IIL-based (first-instance or appellate) adjudicative body should amount to an arbitral body (i.e., be composed of ad hoc judges), with the home State and host State as jointly-appointing parties, unless only States have the right to initiate such a proceeding or unless there exists a single IIL-based adjudicative body. It finally argues that IIL-based adjudication may exhibit an appellate mechanism if the proceeding-initiating party amounts to foreign investors for the first-instance adjudicative body and to States for the appellate body, or if there exist multiple first-instance adjudicative bodies and a single appellate body. Note that Section 13.4 argues that foreign investors should also have the right to initiate international proceedings and that Section 13.8 argues that we can reasonably expect a single IIL-based adjudicative body to be unfeasible in practice

Adjudication under contemporary IIL is in practice in conflict with this optimal design: contemporary IIL's adjudicative bodies have virtually exclusively taken the form of investor-State arbitral tribunals with the disputing parties (i.e., foreign investors and host States) being the appointing entities.[43] Also, contemporary IIL does

[41] Reisman (2011b), at 26.

[42] Concurring: Roberts (2014b), at 1, "the goals of investor protection and the depoliticization of investor-state disputes are important, but not absolute".

[43] Virtually all IIA-based adjudications (note: IIL-based adjudications virtually exclusively amount to IIA-based adjudications) have taken the form of investor-State arbitrations (Section 7.1.2); and investor-

not exhibit an appellate mechanism.[44]

13.2.1 Arbitrator appointment

The following argues that if the adjudication amounts to an arbitration, then having all arbitrators jointly appointed by the home State and the host State maximises the likelihood that norm application is SD furthering because it maximises the likelihood that norm application (i.e., the decision-making of adjudicative bodies) maximises the achievement of the SD-implied IIL rules (Section 4.7.1) within the limits of the applicable norms.

Remark, that such an appointment mechanism is identical to the default rule to resolve international-trade disputes: WTO Panels, typically consisting of three ad hoc adjudicators, are all jointly-appointed by both States party to the dispute and institutionally-appointed (by the WTO's Director-General) in the absence of an agreement by these States.[45]

13.2.1.1 Foreign investors

We can reasonably expect foreign investors to be driven by a profit-maximisation motivation.

In the context of IIL-based adjudication, such a preference materialises into maximising the host State's liability (i.e., liability-maximisation preference)[46] because: (i) foreign investors arguably mainly care about short-term profits and thus do not care about the consequences of the decision on IIL (specifically, they do not care about whether States will weaken the protection of foreign investors under PIL in the future); and (ii) even if foreign investors care about long-term profits, they arguably still do no care about the consequences of the decision on IIL because the value of

State arbitrations exhibit foreign investors and host States as appointing parties under contemporary IIL (for the rules governing ICSID and UNCITRAL arbitral tribunals, see Section 5.2.1.1).

[44] See Sections 5.2 and 5.4.

[45] DSU, Article 8.

[46] Since contemporary international investment law de facto operates as a system of liability rules (Section 5.12), 'maximising the host State's liability' de facto amounts to 'maximising the amount of compensation to be paid by the host State'.

the current dispute is much larger than the present expected discounted value of some future potential dispute.[47] Such a liability-maximisation preference amounts to an SD-hindering preference

Section 12.4 argues that we can reasonably expect arbitrators to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party. Consequently, we can expect arbitrators appointed by foreign investors to maximise the host State's liability rather than to maximise the achievement of the SD-implied IIL rules – namely, the norm application of arbitrators appointed by foreign investors is likely to be SD hindering.

13.2.1.2 States

Section 12.5 argues that States may, but need not, engage in SD-furthering behaviour in the context of an IIL-based adjudication.

Section 12.4 argues that we can reasonably expect arbitrators to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party. Consequently, the norm application of arbitrators appointed by home States or host States may be SD furthering – and is therewith trivially more likely to be SD furthering than the norm application of arbitrators appointed by foreign investors.

Section 13.3 provides prescriptions that aim at increasing the likelihood that a State engages in SD-furthering behaviour.

Specifically: host State It has been observed that States have over the past decades mainly created international adjudicative bodies (i.e., accepted the jurisdiction thereof) in which they amount to an appointing party when they are party to the dispute.[48] This observation suggests that States are very unlikely to create an

[47] Also arguing that foreign investors exhibit a liability-maximisation preference: Lowe (2007), at 24; Sharpe (2015), at 194, "Claimants, by contrast, are in a fundamentally different position. They generally have no interest in the long-term integrity of the investment treaty. Companies hire counsel not to promote a balanced interpretation of the BIT, but to win cases."

[48] Born (2012), at 776, "an analysis of state treatymaking practice over recent decades shows that states have virtually never concluded treaties accepting the jurisdiction of traditional first-generation tribunals—concluding less than one treaty per year—whereas they have frequently accepted the jurisdiction of

adjudicative body in the context of IIL in which the host State does not amount to an appointing party.[49]

13.2.1.3 Joint appointments

Section 12.4 argues that we can reasonably expect jointly-appointed arbitrators to vote somewhere between the preferences of the jointly-appointing parties (where exactly is, however, a priori unclear). Consequently, in combination with Sections 13.2.1.1 and 13.2.1.2, the norm application of arbitrators jointly-appointed by the home and the host State is more likely to be SD furthering than the norm application of arbitrators jointly-appointed by the foreign investor and the host State (i.e., the disputing parties), which in turn is more likely to be SD furthering than the norm application of arbitrators appointed by foreign investors. As such, having the home State and the host State as appointing parties maximises the likelihood that norm application is SD furthering also for jointly-appointed arbitrators.

Hence, although moving from having some arbitrators individually appointed by the disputing parties (i.e., the status quo) to having all arbitrators jointly appointed by the disputing parties is SD furthering,[50] moving to having all arbitrators jointly-appointed by the home State and host State is even more SD furthering.

Furthermore, having all arbitrators jointly-appointed by the home State and host State arguably maximises the likelihood that norm application is SD furthering (i.e., it is arguably preferable to having some arbitrators individually appointed by them) because it alleviates the impact of non-rational drivers which the respondent State is likely to experience (a State facing a claim is likely to be in an emotional state and thus not to think clearly).

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second-generation tribunals . . . —accepting some fifty treaties per year", and at 859, "Second-generation tribunals are modeled in large part on international commercial arbitral tribunals—with relatively dependent decisionmakers selected by the parties for specific cases"; Rogers (2013), at 251 et seq., "States have a long history of preferring international tribunals in which they can control . . . the composition of the decision-maker panel."

[49] Concurring: Rogers (2013), at 251 et seq.

[50] Advocating this: Paulsson (2010), at 352.

13.2.1.4 Institutional appointments

It has been held that all arbitrators should be appointed by some institution.[51] Institutionally-appointed arbitrators are appointed by some person at the said institution.[52]

Section 12.5 argues that States may, but need not, engage in SD-furthering behaviour in the context of an IIL-based adjudication. Hence, if that person is directly or indirectly appointed by States, then that person may exhibit a SD-furthering preference. Section 12.4 argues that we can reasonably expect arbitrators to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party. Consequently, the norm application of arbitrators appointed by some institution may be SD furthering.

However, we can expect that having all arbitrators appointed by some institution to be unfeasible in practice: States are likely to refuse to give up so much control over the appointment decision of their adjudicators.[53]

13.2.1.5 Addendum: list of arbitrators

In the context of disputing parties as appointing parties, it has been held that arbitrators should be required to be chosen from a list of candidates established by States and/or some institution.[54]

We cannot exclude the possibility that arbitrators on that list are driven by a

[51] Holding this view: Paulsson (2010), at 352; Bernasconi-Osterwalder et al. (2012), at 42, "have institutions appoint all arbitrators (thereby getting rid of party-appointments)".

[52] For the person in the context of ICSID and UNCITRAL arbitral tribunals, see Section 5.2.1.1.

[53] For argument, see footnote 48 and the text surrounding it.

[54] Paulsson (2010), at 352, "An even more effective mechanism, provided that it is properly conceived, may be an institutional requirement that appointments be made from a preexisting list of qualified arbitrators. When composed judiciously by a reputable and inclusive international body, with built-in mechanisms of monitoring and renewal, such a restricted list may have undeniable advantages. Parties may freely select any one of a number of arbitrators, but each potential nominee has been vetted by the institution and is less likely to be beholden to the appointing party."; Bernasconi-Osterwalder et al. (2012), at 42, "a roster of permanent arbitrators, under tenure for a given number of years, which would help insulate arbitrators from economic and political pressures"; Park (2015), at 452.

judicial-survival motivation.[55] The best strategy for an arbitrator who is driven by a judicial-survival motivation and who is on the list may be to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party.[56] Indeed, although not voting in accordance with the preferences of those establishing the list will get one thrown off the list when it gets updated (and hence prevents one from being re-appointed in the long run), voting in accordance with the preferences of one's appointing party maximises the likelihood of re-appointment (until the list gets updated) when there exists no other candidate on the list whose voting in past cases is in accordance with the preferences of one's appointing party: one of the appointing parties in future disputes is likely to have roughly the same preferences as the said arbitrator's appointing party in the current dispute, hence being the only candidate on the list having voted in the past in accordance with these preferences makes the said arbitrator strictly preferred by those appointing parties.

Consequently, in combination with Sections 13.2.1.1 and 13.2.1.2, the norm application of arbitrators appointed by the home and the host State is more likely to be SD furthering than the norm application of arbitrators jointly-appointed by the foreign investor and the host State (i.e., the disputing parties) even when arbitrators must be chosen from a list, which in turn is more likely to be SD furthering than the norm application of arbitrators appointed by foreign investors even when arbitrators must be chosen from a list – adding a list does not save disputing parties as appointing parties. As such, having the home State and the host State as appointing parties maximises the likelihood that norm application is SD furthering also in the presence of a list of arbitrators.

13.2.2 Length of appointment

It has been held that IIL's adjudicative bodies should not take the form of arbitral tribunals; namely, that public permanent judges (i.e., judges with long-term appointments/tenure) rather than public ad hoc judges (i.e., judges with ad hoc appoint-

[55] See Section 12.2.2.

[56] The rationale is different than for party-appointed arbitrators who are driven by a judicial-survival motivation in the absence of a list of arbitrators (Section 12.2.2.1).

ments) should be relied upon.[57] To be sure, the appointing parties in the case of permanent judges must amount to States (i.e., public permanent judges) since the foreign investor changes between cases.

The following argues that IIL-based adjudication should amount to arbitration (i.e., ad hoc appointments), with the home and host State as appointing parties, unless only States have the right to initiate such a proceeding or unless there exists a single IIL-based adjudicative body.

We cannot exclude the possibility that public permanent judges are driven by a judicial-survival motivation and are influenced by external factors.[58] Two scenarios must be distinguishes: whether or not different adjudicative bodies allow for similar petitions against the same State; namely, whether or not similar relief for the same State behaviour can be sought before different adjudicative bodies.[59]

13.2.2.1 Adjudicative bodies allowing for similar petitions

If there exist different adjudicative bodies allowing for similar petitions against the same State, then the best strategy for a public permanent judge who is driven by a judicial-survival motivation is to vote, within the 'set of possible decisions', in accordance with the preferences of the party having the right to initiate such a proceeding. Indeed, although not voting in accordance with the preferences of the appointing

[57] Van Harten (2007), at 168 et seqq.; Choudhury (2008), at 821.

[58] See Chapter 11.

Concurring that empirical evidence relating to permanent public adjudicative bodies must be considered is Rogers (2013), at 260, "Comparative analysis may also help either refine or dilute other criticisms of investment arbitration. For example, critics ... often make generalized critiques that investment disputes are resolved by 'arbitrators' not 'judges.'"

Failing to consider the empirical evidence and therewith failing to see that that permanent judges need not be impartial or independent: Van Harten (2007), at 167 et seq., "freedom of judges from inappropriate influences ... is long and widely recognized ... [to rest] on judicial security of tenure ... The longer a judge's tenure, the less concern he or she will be seen to have about future employment." (footnotes omitted), and at 174, "adjudication is neither independent nor impartial where the adjudicator is appointed ... on a case-by-case basis".

[59] Commentators typically do not distinguish between these two scenarios. Instead of many, see García-Bolívar (2015), at 397, "the time has come to propose permanent investment tribunals [consisting of permanent judges]. These could be multilateral, regional, or bilateral."

parties will get one not re-appointed when the tenure ends (and hence prevents one from judging IIL-based disputes in the long run), voting in accordance with the preferences of the proceeding-initiating party maximises the likelihood of judging IIL-based disputes until the tenure ends. This conclusion follows from observing that these IIL-based adjudicative bodies are in competition: if one does not vote in accordance with the preferences of the proceeding-initiating party, then future IIL-based claims will be brought before other adjudicative bodies (because foreign investors can restructure their investments so as to fall under the jurisdiction of some other adjudicative body).[60]

Consequently, in combination with Sections 13.2.1.1 and 13.2.1.2, the norm application of arbitrators appointed by the home and the host State is more likely to be SD furthering than the norm application of a public permanent judge unless the proceeding-initiating party amounts to a State.[61]

This work consequently criticises the recent proposal of the EU (12 November 2015) for the establishment of an international investment court (i.e., for the reliance upon permanent judges) in the IIA (i.e., TTIP) being currently negotiated with the US; note, however, that this work supports (Section 13.2.1) the EU's proposal for having adjudicators appointed by States and for having them jointly appointed by these States.[62]

13.2.2.2 No adjudicative bodies allowing for similar petitions (single adjudicative body)

In practice, the only realistic possibility for not having different adjudicative bodies allowing for similar petitions against the same State is for IIL to exhibit a single

[60] In other words, public permanent judges who are driven by a judicial-survival motivation face an incentive structure known as a 'voluntary-contributions game' (of which the 'prisoner's dilemma' is a special case).

[61] This work therefore rejects the reliance upon bilateral investment tribunals with (public) permanent judges and with foreign investors having the right to initiate such a proceeding. It is thus in contrast to: Krajewski (2015), at 17 et seq., who supports the establishment of such a bilateral investment tribunal (between the EU and its contracting party).

[62] For the proposal, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396.

adjudicative body.[63]

If there do not exist different adjudicative bodies allowing for similar petitions against the same State, then the best strategy for a public permanent judge who is driven by a judicial-survival motivation is to vote, within the 'set of possible decisions', in accordance with the preferences of their appointing party (read: a State). Indeed, to vote otherwise will get one not re-appointed when the tenure ends and hence prevents one from judging IIL-based disputes in the long run; and it is not certain at all that to vote otherwise significantly increases the number of IIL-based disputes one resolves in the short run since factors beyond the control of the foreign investor influence the existence of a dispute (most notably, a dispute presumes a certain behaviour by the host State).

Consequently, the norm application of a public permanent judge is more likely to be SD furthering than arbitrators appointed by the home and the host State because norm application of permanent judges exhibits more (inter-temporal) consistency (Section 4.6.3.7) and because permanent judges are less likely to be subject to conflicts of interest.[64]

13.2.3 Appellate mechanism

It has been held that IIL's adjudicative mechanism should exhibit an appellate mechanism;[65] and some recent IIAs explicitly allow for (but do not require the establish-

[63] Indeed, the only other possibility is for each State to sign at most a single IIA so that each State can at most be a respondent in a single IIL-based adjudicative body. This possibility seems, however, very unrealistic – just remember that contemporary IIL is made up of over 3'000 IIAs (Section 5.1).

[64] Bottini (2014), at 12, "The advantage presented by members of a permanent body—who would not be able to engage in almost any other remunerated activity—over *ad hoc* arbitrators, in terms of reducing the possibilities of conflicts of interest, hardly requires explanation."

[65] It has mainly been expressed in the form of a call for a single IIL-based appellate body; see Section 13.8.

IISD Model, article 40, "A Dispute Settlement Body (DSB) is hereby established *to manage the dispute settlement processes under this Agreement*. The Dispute Settlement Body shall be composed of a Council of the Parties open to all Parties, a panel division and an *appellate division*." (emphasis added).

ment of) such a mechanism at the bilateral, regional or multilateral level.[66]

The analysis in Section 13.2.2 regarding the length of appointments applies to both IIL-based first-instance adjudicative bodies as well as IIL-based appellate bodies. As such, it argues that an IIL-based appellate body should exhibit ad hoc judges, with the home and host State as appointing parties, unless only States have the right to initiate an appeal proceeding or unless there exists a single IIL-based appellate body.

There are three constellations in which an IIL-based appellate mechanism is not redundant (i.e., does not have the same structure as an IIL-based first-instance adjudicative body). We will see, however, that only two of these three constellations are sensible, so that there exist two constellations in which an IIL-based appellate mechanism may be supported.

First, when the first-instance adjudicative body exhibits disputing parties as appointing parties and the appellate body exhibits States as appointing parties – this constellation is, however, not sensible (Section 13.2.1 argues against having disputing parties as amounting to appointing parties at any stage).

Second, when the first-instance adjudicative body exhibits also foreign investors as the proceeding initiating party and the appellate body exhibits only States as the proceeding-initiating party; if so, then it follows from Section 13.2.2 that the first-instance adjudicative body should exhibit ad hoc appointments and that the appellate body should exhibit long-term appointments.

Third, when there exist multiple IIL-based first-instance adjudicative bodies and there exists a single IIL-based appellate body;[67] if so, then it follows from Section

[66] US Model BIT 2012, Article 28(10), 'In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards . . . should be subject to that appellate mechanism.' (note that the 2004 version already allowed for it: US Model BIT 2004, Article 28(10); CETA (consolidated draft, 1 August 2014), Article X.42, 'an appellate mechanism could be created under the Agreement to review, on points of law, awards rendered by a tribunal . . . awards rendered under this Section could be subject to such an appellate mechanism developed pursuant to other institutional arrangements'.

[67] Namely, when there exist different first-instance adjudicative bodies allowing for similar petitions against the same State and there exist no different appellate bodies allowing to review similar petitions against the same State. This follows from Section 13.2.2.

13.2.2 that first-instance adjudicative bodies should exhibit ad hoc appointments and that the single appellate body should exhibit long-term appointments.

13.3 Non-unitary-state perspective

Section 12.5 argues that States may not engage in SD-furthering behaviour in the context of an IIL-based dispute; specifically, that we can generally expect such an SD-hindering preference unless the masses amount to 'relevant influencers'.

The following discusses prescriptions that aim at increasing the likelihood that a State engages in SD-furthering behaviour; specifically, that aim at increasing the likelihood that the masses amount to 'relevant influencers' of the State entity representing the said State in the dispute settlement (e.g., the entity involved in joint-interpretation commissions, the entity responsible for the appointment of adjudicators).

13.3.1 State entity: elected body

The most straightforward way to tackle this issue is that the State entity amounts to an elected body (or subcommittee thereof) so that the masses amount to 'potentially relevant influencers' thereof.[68]

If the masses amount to 'potentially relevant influencers', then the masses amount to 'relevant influencers' (Section 8.1.4) if: (i) they are aware that the appointment decision may substantially (adversely) affect their well-being; and (ii) they amount to an organised interest group. Since the organisability of the masses is very difficult to influence externally, we should focus on increasing the masses' awareness.[69]

Specifically, the masses must be made aware that contemporary IIL's rules have the potential to substantially (adversely) affect the well-being of the masses and that the behaviour of the said State entity strongly influences the form contemporary IIL's

[68] See Section 12.5.1.2 for a description of the 'potentially relevant influencers' in this context.

[69] See Section 10.3.1 for the rationale.

rules take. Most importantly, perhaps, the masses must be made aware that adjudicators can reasonably be expected to vote, within the 'set of possible decisions', in accordance with the preferences of the State entity responsible for appointments,[70] so that the masses can hold that State entity responsible for the behaviour of the adjudicators it appoints. Clearly, a prerequisite for such awareness is transparency in (read: knowledge of) IIL-based international proceedings (Section 13.5).

13.3.2 State entity: non-elected body

It may not be possible in practice to have the State entity to amount to an elected body due to a lack of time and/or lack of expertise.[71] If the State entity amounts to a non-elected body, then the masses do not amount to 'potentially relevant influencers' (and therewith cannot amount to 'relevant influencers') of that non-elected body unless an elected body effectively controls the said agency.[72] The following hence focuses on mechanisms which make that non-elected body more closely linked to an elected body.[73]

One mechanism is the creation of a *subcommittee* of an elected body responsible for monitoring the agency.[74] Explicitly making a subset of the members of an elected body responsible makes these members more likely to be sanctioned through non re-election for the actions of the agency and therewith increases their incentives to properly monitor the agency.[75]

Another mechanism is the creation of *specific procedures* which the agency is legally required to follow and which yield personal legal action against the agency's

[70] The reader is referred to Section 12.4 in combination with Section 12.5.

[71] These amount to the rationales commonly advanced for delegation of State competencies to agencies; see footnote 56 and the text preceding it.

[72] See Section 12.5.2.2 for a description of the 'potentially relevant influencers' in this context.

[73] See seminally McCubbins, Noll, and Weingast (1987) for a discussion of agency control through appropriate institutional design.

[74] Baldwin, Cave, and Lodge (2012), at 55, referring to this mechanism as 'police patrols' in the form, for instance, of parliamentary committees or specialised oversight bodies.

[75] If the elected body as a whole is responsible, then it is more difficult to finger point and therefore to sanction.

members if the agency fails to do so.[76] Such procedures should include the following elements. First, the agency should be required to notice the public with a list of individuals which it considers to appoint as arbitrator, to call the public to comment on its list, and then to update its list by considering these comments; this procedure is known as *notice and comment* in the United States.[77] Second, the agency should be required to submit the final list, including responses to the public's comments, to the overseeing elected body (or subcommittee thereof) for review before the appointment is officially made.

A final mechanism is the creation of the possibility of *direct notifications* of an elected body by the public of an agency's failure to follow the aforementioned specific procedures.[78]

13.3.3 Non-respondent States

It is important to realise that non-respondent States are less likely to engage in SD-furthering behaviour in the context of an IIL-based dispute than respondent States: the masses are less likely to amount to 'relevant influencers' in non-respondent States than in respondent States because the non-respondent State's masses are not directly affected by the outcome of the IIL-based international proceeding.

A non-respondent State's masses are, however, indirectly affected because be-

[76] Baldwin, Cave, and Lodge (2012), at 56, referring to this mechanism as 'deck-stacking'.

[77] Yackee (2012c), at 434, "In U.S. agency practice, one important ex ante control mechanism of agency outputs is the institution of notice-and-comment under Section 553 of the Administrative Procedures Act. U.S. agencies are required to provide the public with notice of many of their regulatory initiatives by publishing the text of the initiative as a proposed rule. The notice of the proposed rule must solicit public feedback (comments), and the agency must consider those comments when deciding whether to promulgate the proposal as is, or as modified, or to withdraw the proposal entirely." (footnote omitted).

Such a procedure has been used by a couple of States when reviewing their model IIAs: "Some states currently use notice-and-comment at the treaty-drafting stage, soliciting input from the public at large ... Norway, for example, used notice-and-comment when deciding whether to restart its investment treaty program ... Current U.S. practice is also to solicit public comments on proposed changes to its model investment treaty." (Yackee, 2012c, at 434).

[78] Baldwin, Cave, and Lodge (2012), at 55, referring to this mechanism as 'fire alarm'.

having badly (e.g., appointing a 'bad arbitrator') may entail future costs: the current respondent State may retaliate in the future by also behaving badly when one of the current non-respondent States is the respondent in a future dispute (retaliation costs); and one of the current non-respondent States may be the respondent in a future dispute wherein adjudicators may be influenced by the resolution of the current dispute (even in the absence of binding precedent).

13.4 Initiation of adjudicative proceeding

This Section discusses who should have the right to file a claim before an adjudicative body (Section 13.2) and therewith to be party to the adjudicative proceeding.

The following argues that both States and foreign investors should have such a right. It furthermore holds that it is unclear whether States should be allowed to file diplomatic-protection claims on behalf of their investors

13.4.1 States

Section 3.3 observes that IIL can serve the desirable function of helping to hold foreign investors accountable for their misbehaviours in host countries. And Section 4.7.1.7 holds that doing so requires IIL to contain obligations for the home State to enact national legislation that make its investors liable for such misbehaviours. Furthermore, Section 13.1.2 argues that States should have an obligation to express whether or not they agree with some interpretation when the respondent State proposes one.

Consequently, if a home State allegedly fails to enact such legislation or fails to express a view regarding a proposed interpretation, then an international proceeding is required to resolve the issue. Since host States are adversely affected by such a failure, host States must have the right to initiate an international adjudicative proceeding.

13.4.2 Investors

Section 3.1 observes that IIL can serve the desirable function of reducing a State's political risk as faced by foreign investors. And Section 4.7 holds that doing so requires IIL to contain obligations for host States not to engage in certain future State measures.

Consequently, if a host State allegedly fails to refrain from engaging in such measures, then an international proceeding is required to resolve the issue. Foreign investors are adversely affected by such a failure. Foreign investors should be given the right to initiate an international adjudicative proceeding.[79]

First, because only giving States the right to initiate such an international proceed, and therewith require foreign investors to petition their home State for diplomatic protection, would reduce IIL's risk-reduction function (Section 3.1): the likelihood of an international proceeding, and therewith of the recognition of host States' violation of an IIL-based obligation, is reduced because additional foreign-policy considerations enter the home State's decision to initiate such a proceeding.[80] And second, because the argument that only giving States the right to initiate such an international proceeding would reduce the risk of spurious or frivolous initiations by foreign investors can arguably be neglected: the risk of spurious or frivolous initiations of international proceedings by foreign investors is already reduced by having States play a greater role in the interpretation of IIL (Section 13.1) and by having States exhibit better control over adjudicators (Section 13.2.1).

In short, if IIL is to optimally function as a *(political-)risk-reduction instrument*,

[79] Most notably for not providing investors with such a right (i.e., by only including an ex ante consent to the jurisdiction of a State-State adjudicative body): Brazil Model BIT 2013 (referred to as 'Brazil Model CIFA'; not published, for details see Brauch (2015)).

[80] Arguing so: Franck (2005), at 1536 et seqq.; Alvarez et al. (2011), at xvi, "Such actions were, however, erratic, and constrained by broader foreign policy goals. By 1990, the United States, for example, had acted only twice under the Hickenlooper Amendment to cut off aid to a host country for taking property of U.S. investors. State Department arguments on broad foreign policy grounds—mainly that such actions would push the host toward the Communist camp—rather consistently trumped other departments' and congressional interest in protecting U.S. investors abroad."; Schreuer (2015), at 882 et seq.

Arguing that the main reason underlying the ICSID Convention was to remove the reliance upon diplomatic protection: Broches (1972), at 344.

then IIL must allow foreign investors to initiate international proceedings.[81]

13.4.3 Addendum: diplomatic protection

It is not clear whether States should be given the right to initiate an international adjudicative proceeding on behalf of foreign investors having their nationality; namely, whether States should be allowed to file diplomatic-protection claims on behalf of their investors. Indeed, because this work argues that States should amount to the appointing entities in international proceedings (Section 13.2) and that States party to the IIL-based applicable norms should have a right to participate (as a third party) in international proceedings (Section 13.6), the availability of diplomatic protection seems somewhat redundant. Also, the establishment of joint-interpretation commissions, as supported in this work (Section 13.1.2), further alleviates the possible benefits of diplomatic protection in terms of greater control of States. One situation, however, wherein diplomatic protection may be valuable is when multiple foreign investors are each affected in a relatively minor manner, but overall in a substantial manner, so that no foreign investor by itself has an incentive to initiate an international proceeding.[82]

Contemporary IIL widely allows for diplomatic-protection claims because most IIAs contain an ex ante consent to jurisdiction in the form of State-State adjudication.[83]

In the event of such an ex ante consent, it follows from Section 4.6.3.8 that only one international adjudicative proceeding should be undertaken because not doing so would de facto violate 'res judicata' and/or 'lis alibi pendens' since the State and the foreign investor are de facto the same (i.e., de facto identity of the parties) and since there exists de jure identity of both the petition and the cause of action.[84]

[81] Concurring: Schill (2010b), at 31, "The function of investor-state arbitration, in turn, is to enable host states to make credible commitments vis-à-vis foreign investors ... the abolition of investor-state arbitration would ... eviscerate the protection granted by investment treaties".

[82] Posner and Walter (2015), at 392.

[83] See Section 5.4.

[84] Concurring: Roberts (2014b), at 49, "Regardless of how the claims are prioritized ... only one claim should be allowed to continue".

This may, for instance, be achieved by explicitly forbidding a diplomatic-protection claim (i) if the foreign investor and host State have settled the dispute, or (ii) if the foreign investor has already filed a claim before an international adjudicative body;[85] and by explicitly forbidding a claim by a foreign investors if the home State has already filed a diplomatic-protection claim. Also, a diplomatic-protection claim should only be allowed after reliance upon local remedies.[86] Finally, in the event of diplomatic protection, the foreign investor, on whose behalf the home State acts, should have a right to participate (as a third party) in the international proceedings.

13.5 Transparency

Section 4.6.3.6 argues that sustainable development implies that dispute settlement, which includes both types of IIL-based international proceedings (Sections 13.1 and 13.2), must exhibit transparency with respect to the existence of an ongoing proceeding as well as its outcome; and that determining the optimal level of transparency more generally requires paying due regard to the value of transparency for third-party participation and for political participation as well as to the value of confidentiality for foreign investors.

Section 7.2.2.5 observes that contemporary IIL's adjudicative bodies have somewhat failed on these grounds. Section 7.4.3 holds that contemporary IIL's dispute-settlement design is fully responsible for this SD deficit.

The recent 'UNCITRAL Transparency Rules'[87] are quite close to the optimal design because they determine the optimal level of transparency by implicitly weighing

[85] A small number of IIAs explicitly holds so. Most notably, perhaps is ICSID Convention, Article 27(1), 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention'. Other IIAs include: Turkey–United States BIT (1985), Article VIII; Germany–Poland BIT (1989), Article 10. For further examples, see Roberts (2014b), at 46, footnote 209; Bernasconi-Osterwalder (2014), at 18.

[86] See Section 13.7 for the rationale.

[87] See Section 5.2.3.2.

the aforementioned considerations: everything must be published unless it amounts to protected or confidential business information. Hence, IIL should make the 'UNCITRAL Transparency Rules' apply to all IIL-based international proceedings (i.e., not only to UNCITRAL arbitral proceedings). The easiest way to do so is: (i) for future IIAs to include a clause holding that 'UNCITRAL Transparency Rules' apply to all international proceedings;[88] and (ii) for existing IIAs to join the 'UN Transparency Convention'[89] (which makes the 'UNCITRAL Transparency Rules' apply to existing IIAs if the home State and the host State both join the Convention).

If we do not have absolute confidence in adjudicators' norm application, then IIL should explicitly mention that the existence of an ongoing proceeding as well as its outcome (though not the decision in its entirety) must always be made public.[90]

13.6 Third-party participation

Section 4.6.3.4 argues that sustainable development implies that dispute settlement, which includes both types of IIL-based international proceedings (Sections 13.1 and 13.2), must exhibit third-party participation, but that it should not contain a right for all third parties to participate.[91]

Section 7.2.2.3 observes that contemporary IIL's adjudicative bodies' dealing with third-party participation is problematic mainly because of their lack of transparency (Section 13.5 proposes reforms aiming at improving transparency).

Although contemporary IIL's dispute-settlement design has arguably never precluded third-party participation, it only recently contains an explicit mentioning that

[88] Seminal for doing so: Switzerland–Georgia BIT, Article 10(3) (signed 3 June 2014; available at http://www.news.admin.ch/NSBSubscriber/message/attachments/38087.pdf).

Furthermore Switzerland's 'IIA guidelines 2014' (which is the closest thing it has to a model IIA; not published, information based on Siegenthaler (2015)) holds that its IIAs should include such a clause.

[89] See Section 5.2.3.3.

[90] Notice that the 'UNCITRAL Transparency Rules' arguably never prevent adjudicators from allowing such publication.

[91] Of different opinion (i.e., criticising contemporary IIL for not containing such a right): Van Harten et al. (2010), "The system also excludes the right for non-investor litigants and other affected parties to participate".

adjudicative bodies may allow third-party participation.[92] Consequently, contemporary IIL's dispute-settlement design is arguably quite close to the optimal design.

If we do not have absolute confidence in adjudicators' norm application, then the optimal design should explicitly contain a list of third parties which have a right of participation because the increase in the information basis which those third parties can provide arguably always outweighs the costs in terms of time delay; such a list would, most notably, include any of the States party to the IIA on which the claim is based as well as several international organisations (e.g., FAO, ICSID, ILO, IMF, UNCTAD, UNDP, UNEP, WHO, WTO) and certain NGOs.[93]

13.7 Reliance upon local remedies

This Section argues that IIL should require foreign investors to first rely upon local (administrative or judicial) remedies for a specific time period before providing them with access to international proceedings (Sections 13.1 and 13.2).

Contemporary IIL virtually never requires any reliance upon local remedies.[94]

Benefits The literature has argued that reliance upon local remedies has several benefits.

First, it has been argued that doing so would make IIL first rely upon so-called primary remedies, which aim at reviewing the (il)legality of the State behaviour,[95] and only second rely upon so-called secondary remedies, which aim at obtaining monetary compensation for the damages of the said State behaviour; and that having

[92] For the rules governing ICSID and UNCITRAL arbitral tribunals, see Section 5.2.3.

[93] Such a right for non-disputing States is, for instance, provided in: US Model BIT 2004 and 2012, Article 28, 'The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.'

[94] See Section 5.4.3.

[95] For the sake of clarity: Aaken (2010), at 724, "The term primary remedy is used if the action ... is directed against the (illegal) government act as such—the remedies are thus preventive or restitutive.", and at 745, "Primary remedies ... lead to the restoration of the *status quo ante* ... They basically prohibit the state from taking a measure by declaring it illegal or void, or they order the state to restore the *status quo ante*".

IIL to first rely upon primary remedies is desirable.[96] Contemporary IIL has virtually always readily relied upon secondary remedies.[97] Requiring reliance upon local remedies (which apply municipal law) makes IIL to first rely upon primary remedies because municipal law tends to first require primary remedies and only allows secondary remedies as last resort.[98] Remark, however, that this could arguably also be achieved by having IIL contain a clause holding that adjudicative bodies must first rely upon primary remedies and only second rely upon secondary remedies.

Second, it has been argued that doing so would provide local judicial remedies (i.e., courts) the incentive to behave better because a negative review by an international adjudicative body negatively affects prestige.[99] Remark, however, that such an incentive is in competition with the incentives provided by the executive branch to behave in its interests through its influence on re-appointment, promotion, material well-being, etc.[100]

Third, it has been argued that doing so would provide States the incentive to invest in improving domestic institutions because such improvement increases foreign investors' expected discounted profits (which may in turn increase foreign-investment inflows) if reliance upon local remedies is required.[101] Remark that improving domestic institutions (e.g., judicial independence, rule of law, private property) can reasonably be expected to benefit the host country as a whole and not just foreign investors.

[96] Arguing so: Aaken (2010), at 745, "Primary remedies give the possibility to the state to reconsider its decision"; UNCTAD (2010a), at 76, "Such an administrative review has the advantage that it may allow for an easy fixing of a problem initially not recognized by domestic central or local governments. Resulting from an administrative review, the host State may recognize the controversy of a measure and may hence decide to alter or reverse it at least to the extent it is willing to do so ... Alternatively, the State may take some appropriate measures to address the negative impact of a measure."

[97] See Section 5.12.

[98] Arguing so: Aaken (2010), at 749 et seqq.; UNCTAD (2010a), at 75 et seq.

[99] Aaken (2010), at 751, "due process might be adhered to if national courts know that their decision might come before an international court".

[100] For a detailed discussion and empirical evidence of external factors' influence on the decision-making of public permanent judges (i.e., on the judiciary), see Chapter 11.

[101] Ginsburg (2005), at 119 and 122.

Costs Reliance upon local remedies may also have one clear cost: it may reduce foreign investors' expected discounted profits (which may in turn reduce foreign-investment inflows) because local remedies may exhibit political risk as well.[102]

Optimal design The potential benefits of reliance upon local remedies seem to outweigh the cost thereof.

If the previous argumentation is sound, then the optimal design of IIL's dispute settlement should arguably contain a clause holding that foreign investors must first seek resolution of the dispute using the host State's local (administrative or judicial) remedies for a specific time period before having access to international proceedings – namely, it must contain a *local-remedies-first clause*.[103] Indeed, requiring 'exhaustion of local remedies' possibly involves a lot of uncertainty with respect to the time period during which local remedies must be relied upon and may therewith involve an excessive reduction in foreign investors' expected discounted profits.

If we do not have absolute confidence in adjudicators' norm application, then the optimal design should explicitly mention that this 'local-remedies-first requirement' amounts to a jurisdictional requirement (i.e., gives rise to a 'conditional consent to jurisdiction to international adjudication').[104]

13.8 Addendum: single adjudicative body

It is oftentimes held that IIL should exhibit a single adjudicative body – either by calling for the establishment of a single investment court, to which any IIL-based claim must be brought, or by calling for a single appellate body, to which all deci-

[102] Political risk materialises here into lower awarded damages (lower compared to what an unbiased adjudicator would award).

[103] Similarly: Aaken (2010), at 751.

Most notably, see Norway Model BIT 2007 (discarded draft), Article 15(3), requires first the exhaustion of local remedies or reliance upon local remedies for three years unless there are no reasonably available local remedies.

[104] See, for instance, Norway Model BIT 2007 (discarded draft), Article 15.

sions by IIL-based adjudicative bodies can be appealed;[105] and it is sometimes held that IIL should exhibit a centralised body giving preliminary rulings.[106]

Such a single adjudicative body (or centralised body) necessarily requires that either all adjudicators sitting on the body (and appointed by the States party thereto) hear all disputes or that a random subset thereof hears a given dispute.[107] Indeed, if only the home State and the host State were to appoint the adjudicators to hear a given dispute (i.e., if the home State and host State amount to the appointing parties), then we would de facto have multiple adjudicative bodies – namely, one adjudicative body for each pair of States.

From what has just been said, we can expect a single adjudicative body to be unfeasible in practice: States are likely to refuse to give up so much control over the appointment decision of their adjudicators.[108]

In any event, however, remark that the main argument in favour of a single adjudicative body (or centralised body), that it will lead to consistency in norm application (i.e., to a jurisprudence constante), sometimes overstates its case.[109] Indeed,

[105] Supporters of a single investment court include: Van Harten (2007), at 180, "multilateral code that would establish an international court with comprehensive jurisdiction over the adjudication of investor claims. The court would have jurisdiction in the first instance over all claims filed by investors" (footnotes omitted); Choudhury (2008), at 821; Schreuer (2013), at 399.

Supporters of a single appellate body include: Van Harten (2007), at 152; Bottini (2015); Joubin-Bret (2015); Park (2015).

[106] Supporters of such a centralised body include: seminally, Kaufmann-Kohler (2004); Schreuer (2013), at 400, "Under such a system a tribunal would suspend proceedings and request a ruling on a question of law from a body established for that purpose."

[107] Supporting the random-subset alternative: Van Harten (2007), at 180, "the court would be staffed by judges appointed by states for a set term based on the model of other international courts . . . perhaps 12 or 15 judges would be required to allow several three-judge tribunals to sit simultaneously. The judges would be selected for tribunals on a rotating basis either by the president of the court or by random assignment" (footnotes omitted).

[108] For the general argument, see footnote 48 and the text surrounding it.

Specifically for a single appellate body: "ICSID suggested the establishment of an appellate body in 2004 but it was not received warmly, especially by OECD countries." (Bjorklund, 2014, at 23).

[109] See e.g. Van Harten (2007), at 152, "the lack of an appellate body to review awards makes it difficult, if not impossible, to unify the jurisprudence".

as long as IIL is made up of a multitude of IIAs,[110] the application of 'identically-worded or similarly-worded abstract standards' in similar disputes should not necessarily be consistent because the applicable norms and/or the entities having created those norms may vary between disputes.[111] And there are good reasons not to expect (any time soon) IIL to exhibit a single IIA (i.e., to have identity with respect to the applicable norms and the entities having created those norms between disputes).[112]

[110] Contemporary IIL is made up of over 3'000 IIAs, see Section 5.1.

[111] See Section 7.6.1 for a more detailed argumentation.

Concurring: UNCTAD (2014b), at 193; Legum (2015), at 438, "In this environment [of over 3'000 IIAs], an appellate mechanism would have little ability to achieve the consistency and coherence that many proponents have argued would be its crowning achievement."

[112] See Section 7.6.2 for a more detailed argumentation.

Part V

Policy prescriptions: applicable norms

Overview

Chapter 7 suggests that contemporary IIL's SD deficits are partly rooted in its applicable-norm design (Section 7.5). This Part studies how to reform IIL in order to tackle this source of SD deficits. In so doing, this Part partly answers the third research question: how IIL should look like for it to be aligned with SD (Section 1.1).

The analysis centrally builds upon the insights gained by the (descriptive and normative) theories described in previous Chapters. Most importantly, it relies upon the (normative) implications of SD for IIL (Section 4.7); and it relies upon the empirical findings regarding the relationship between IIL and foreign-investment flows as well as the relationship between foreign-investment flows and (sustainable) development (Section 3.1.2).

Specifically, Chapter 14 proposes a set of measures (policy prescriptions) that tackle this source of SD deficits by focusing on substantive norms. And Chapter 15 proposes a set of measures (policy prescriptions) that tackle this source of SD deficits by focusing on jurisdictional norms.

Chapter 14

IIL design: substantive norms

Section 7.5 argues that the design of contemporary IIL's substantive norms is (partly) responsible for many of IIL's SD deficits. This Chapter proposes a set of substantive norms which aligns IIL (more closely) with SD.

This Chapter finds that IIL's norm design should, most notably, explicitly provide guidelines for the norm application (interpretation methods, standard of review), provide protection to foreign investors (FET clause; possibly also: expropriation clause, NT clause, MFN clause), contain foreign-investor obligations (do no harm to host State's SD; possibly also: behaviour in accordance with national laws, refrain from engaging in corruption, meet standards of corporate social responsibility, comply with PIL-based environmental, labour and human-rights obligations), contain home-State obligations (enact national legislation making investors liable for violating their IIL-based foreign-investor obligations abroad), allow for claims and counter-claims by host States against foreign investors, specify non-precluded measures (State measures which are SD furthering from today's perspective; possibly provide a list of non-precluded measures), and specify unilateral and joint termination.

The remainder of this chapter is organised as follows. Section 14.1 considers norm application generally speaking. Section 14.2 discusses how to provide protection to foreign investors under PIL. Section 14.3 studies how to hold foreign investors

accountable for certain behaviours in host States. Section 14.4 considers how to ensure that certain State behaviours are not forbidden. Section 14.5 analyses the issue of ex-post control of States (also known as the issue of flexibility). And Section 14.6 finally studies how to improve de facto enforcement.

Before moving on, note that IIL commentators oftentimes advocate for less broad and vague formulations of IIL's substantive norms.[1] This Chapter does not readily advocate so; instead, it holds that the determination of substantive norms' formulations should be driven by the confidence we have in adjudicators' norm application – when assessing our level of confidence, we must recognise that future adjudicative bodies may behave completely differently than in the past if IIL's dispute-settlement mechanism is modified (Chapter 13).

14.1 Guideline norms

This Section discusses 'overarching norms' or 'guideline norms' which IIL should contain; these norms provide general guidelines for the norm application of adjudicative bodies – as such, these norms find application whenever a specific IIL-based norm is applied/interpreted.

14.1.1 Interpretation guidelines

Interpretation guidelines allow to control adjudicators' norm application.[2] As such, they amount to a means for maximising the achievement of SD within the limits of the applicable norms.

[1] Seminally, see Aaken (2009b). See also Newcombe and Paradell (2009), at 64; Franck (2013), at 383 et seq., "In their current shape, the broad standards in international investment treaties provide minimal guidance on the law and its application ... States may, therefore, do well to reclaim their regulatory space by providing greater detail in the text of their investment treaties."; Ortino (2013), at 153, "treaty makers should ... limit the role of certain investment norms by making sure that they operate as 'rules' and not as 'standards'".

[2] Observing so: Roberts (2013), at 85; Aaken (2014a), at 419.

Vienna Convention Section 6.1 observes that the goal of the interpretation is to uncover the 'common intentions of the parties' which created the applicable norms. This uncovering is arguably best achieved by combining a variety of interpretational perspectives.[3] The Vienna Convention on the Laws of Treaties does just that.[4] Consequently, IIL should contain a norm which explicitly mandates that the interpretation shall follow articles 31 and 32 VCLT.[5]

Contemporary IIL's norm design, to the best of my knowledge, does not explicitly mandate specific interpretation methods/perspectives – although there are signs that this situation may be about to change.[6]

Telos: sustainable development Section 4.6.3.1 argues that SD implies that adjudicative bodies must impartially and rationally consider all SD-relevant aspects when resolving the interpretational freedom provided by the applicable norms; namely, that the interpretation must be supported by impartial and rational consideration of all SD-relevant aspects. This is most readily achieved by having IIL's purpose to amount to sustainable development.[7]

Consequently, IIL should contain a norm which explicitly holds that SD amounts to its purpose.[8] Furthermore, because of the uncertainty associated with the concept of SD, this norm should also explicitly define the concept by holding that SD requires

[3]Concurring: Abi-Saab (2006), at 459.

[4]Waibel (2011b), at 29, "the Vienna Convention on the Law of Treaties provides an appropriate framework for the interpretation of bilateral investment treaties (BITs) and other international agreements in investment arbitration".

[5]Sharing this view: Aaken (2015c), at 197.

See Sections 6.3 and 6.4 for a detailed discussion of the jurisprudence of those articles.

[6]CETA (consolidated draft, 1 August 2014), Chapter 10, Section 6, Article X.27(1), 'A Tribunal established under this Chapter shall render its decision consistent with this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.'

Switzerland's 'IIA guidelines 2014' (which is the closest thing it has to a model IIA; not published, information based on Siegenthaler (2015)) holds that its IIAs' preambles should explicitly mention that the 'teleological perspective' is central for the interpretation of the treaty.

[7]For notable examples within PIL where SD amounts to the/a purpose, see Section 4.5.1.

[8]Concurring: Krajewski (2015), at 4; IISD Model, Article 1, 'The objective of this Agreement is to promote foreign investment that supports sustainable development'.

impartial and rational consideration of all SD-relevant aspects; as well as explicitly mention those SD-relevant aspects.[9]

Clearly, the less precise the to-be-interpreted IIL-based norm (i.e., the more it amounts to a standard), the more the purpose may determine the outcome of the interpretation.

Contemporary IIL's norm design does generally not explicitly mention SD as a purpose;[10] and it also does generally not explicitly mention the SD-relevant dimensions.[11]

Explicit consideration and clarity Section 4.6.3.2 holds that SD implies that adjudicative bodies must explicitly consider all these SD-relevant aspects. And Section 4.6.3.3 holds that SD implies that adjudicative bodies' norm application must exhibit clarity. Consequently, IIL should contain a norm which explicitly holds that adjudicative bodies must be explicit and clear about their entire interpretation rationale.

14.1.2 Good-faith review

Section 4.7.2.2 holds that SD implies that adjudicative bodies must adopt a deferential standard of review in the form of a 'good-faith review' when reviewing States' behaviours. Consequently, IIL should contain a norm which explicitly holds that

[9] For a brief summary of the SD-relevant aspects, see Section 4.6.1.

[10] Notable exceptions are: Brazil Model BIT 2013 (referred to as 'Brazil Model CIFA'; not published, for details see Brauch (2015)), Preamble, 'essential role of investment in the promotion of sustainable development'; CETA (consolidated draft, 1 August 2014), Preamble, 'Reaffirming their commitment to promote sustainable development ... in its economic, social and environmental dimensions'; Switzerland's 'IIA guidelines 2014' (which is the closest thing it has to a model IIA; not published, information based on Siegenthaler (2015)) holds that its IIAs' preambles should explicitly mention that the purposes of the treaty are, amongst others, sustainable development, the respect of CSR standards, and to prevent and combat corruption.

[11] Taillant and Bonnitcha (2011), at 59, "with a few exceptions, such as the 2004 US Model BIT and the Norwegian Model BIT, BITs continue to be made without any explicit reference to social, environmental, or human rights concerns" (footnotes omitted); Gordon, Pohl, and Bouchard (2014), at 10, find, based on a sample of 2107 IIAs (2094 BITs and 13 multilateral treaties, 70 percent of all IIAs), that only 12.1 percent of all IIAs contain such explicit references.

adjudicative bodies must adopt a 'good-faith review'. For the sake of precision, the norm may furthermore explicitly hold that means-end relationships must be resolved through a 'deferential proportionality test'.[12]

14.1.3 Applicable norms

Choice of law If we do not have absolute confidence in adjudicators' norm application, then IIL should contain a norm which explicitly specifies the applicable norms (i.e., whether the host State's domestic laws and/or non-investment PIL are included).

Contemporary IIL's norm design does generally not contain such a 'choice-of-law clause'.[13]

Hierarchy If we do not have absolute confidence in adjudicators' norm application, then IIL should additionally contain a norm which explicitly specifies the relationship (read: hierarchy) between these different legal systems in case of a conflict; namely, between PIL and national law and between IIL and non-investment PIL.

Contemporary IIL's norm design does generally not contain such a 'hierarchy norm'.[14] Investment arbitral tribunals seem to have generally given precedence to PIL over national laws and to IIL over non-investment PIL.[15]

14.2 Foreign-investor-protection norms

This Section discusses 'foreign-investor-protection norms' (or 'host-State-obligation norms') which IIL should contain; these norms provide foreign investors with protection under PIL.

[12] Similarly: Aaken (2014a), at 423, "states can advise tribunals to use the proportionality principle (and which form of proportionality)".

[13] Section 5.2.4.

[14] Since contemporary IIL does generally not contain a 'choice-of-law clause' (Section 5.2.4), it does neither contain a 'hierarchy norm'.

[15] Section 5.3.4.

If IIL is to function as a risk-reduction instrument (Section 3.1), then IIL must provide protection to foreign investors.

14.2.1 FET clause

IIL should arguably contain a norm which generally forbids State behaviours which adversely affect foreign investors when these behaviours are not SD furthering from today's perspective (Section 4.7.1.1).

A broadly and vaguely formulated 'FET clause'[16] does just that when combined with the 'guideline norms' (Section 14.1): holding that the purpose is SD is necessary for ensuring that 'fair and equitable treatment' is interpreted as 'behaviours that are SD furthering from today's perspective'. If we do not have absolute confidence in adjudicators' norm application, then the 'FET clause' should be formulated in less broad and vague terms;[17] for instance, by explicitly including an exhaustive list of behaviours that violate the clause;[18] or, at the extreme, by dropping the FET clause altogether.[19]

Contemporary IIL's norm design widely contains a broadly and vaguely formu-

[16] See Section 5.7.

[17] For examples of such formulations, see e.g. UNCTAD (2012a), at 51; UNCTAD (2015), at 137 et seq.

Remark that linking the FET clause to the 'minimum standard of customary international law' (Section 5.7) is unlikely to be sufficient: Bernasconi-Osterwalder et al. (2012), at 14 et seq.; Porterfield (2013), at 3, "[Tribunals' evolutionary interpretation of the 'international minimum standard'] suggests that more aggressive approaches [than simply a CIL-linked FET clause] may be necessary to deter tribunals from adopting increasingly broad interpretations of FET".

[18] Adopting such an approach: CETA (consolidated draft, 1 August 2014), Chapter 10, Section 4, Article X.9(2), 'Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment; or a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.'

[19] Although quite rare, some States seem to have adopted such an approach recently: India Model BIT 2015 (draft); Brazil Model BIT 2013 (referred to as 'Brazil Model CIFA'; not published, for details see Brauch (2015)).

lated 'FET clause'.[20] Investment arbitral tribunals' application/interpretation thereof has at times been aligned with SD because it fulfilled the 'guideline norms': violation of explicit and implicit assurances violate FET; instability of the legal framework may (but need not) violate FET; absence of fair procedure violates FET; absence of good faith violates FET; and the determination of a violation of FET requires a weighing between foreign investors' and the host State's interests.

14.2.2 Expropriation clause

Although the FET clause arguably captures such constellations, IIL may furthermore contain a norm that explicitly forbids expropriations unless doing so is SD furthering from today's perspective (Section 4.7.1.1).[21]

A broadly and vaguely formulated 'expropriation clause'[22] does just that when combined with the 'guideline norms' (Section 14.1). If we do not have absolute confidence in adjudicators' norm application, then the 'expropriation clause' should be formulated in less broad and vague terms;[23] for instance, by explicitly including an exhaustive list of behaviours that violate the clause or by only including a provision for 'direct expropriation' (i.e., by refraining from mentioning the broad and vague term 'indirect expropriation').[24]

Contemporary IIL's norm design widely contains an 'expropriation clause' with a broadly and vaguely formulated provision for 'indirect expropriation'.[25] Investment arbitral tribunals' application/interpretation thereof has mainly not been aligned with SD because it did not fulfil the 'guideline norms': the 'sole-effects doctrine' by definition does not consider all SD-relevant aspects. Note, however, that a couple of

[20] See Section 5.7 for a detailed description of the jurisprudence.

[21] Holding that IIL should contain such a norm: Aaken (2014b), at 852, "a provision for special circumstances allowing for damages, such as a bona fide direct expropriation, where damages have not been paid, or an indirect expropriation where a special sacrifice was demanded by the claimant, is necessary".

[22] See Section 5.6.

[23] For examples of such formulations, see e.g. UNCTAD (2015), at 138 et seqq.

[24] Examples include: IISD Model, Article 8(I), 'non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article'.

[25] See Section 5.6 for a detailed description of the jurisprudence.

tribunals have held that the determination of whether there exists an indirect expropriation requires a weighing between foreign investors' and the host State's interests, which is aligned with SD.

14.2.3 Non-discrimination clause

Although the FET clause arguably captures such constellations, IIL may furthermore contain a norm that explicitly forbids discriminations unless doing so is SD furthering from today's perspective (Section 4.7.1.1).

A broadly and vaguely formulated 'NT clause'[26] and 'MFN clause'[27] do just that when combined with the 'guideline norms' (Section 14.1). If we do not have absolute confidence in adjudicators' norm application, then those 'non-discrimination clauses' should be formulated in less broad and vague terms;[28] for instance, by specifying whether or not the MFN clause applies to the dispute-settlement provision.[29]

Contemporary IIL's norm design widely contains an 'NT clause' and an 'MFN clause' that are broadly and vaguely formulated.[30] Investment arbitral tribunals' application/interpretation of the 'NT clause' have generally been aligned with SD because it fulfilled the 'guideline norms': the determination of whether there exists a de facto discrimination requires a weighing between foreign investors' and the host State's interests.

Importantly, an 'MFN clause' must in any event explicitly hold that it applies only to future IIAs since the present IIA would otherwise import the 'bad' norms of previous IIAs (therewith precluding reformation of the system unless all IIAs are renegotiated).[31]

[26] See Section 5.8.

[27] See Section 5.9.

[28] For examples of such formulations, see e.g. UNCTAD (2015), at 136 et seq. and 144.

[29] China-New Zealand FTA, Article 139(2), 'For greater certainty, the obligation in this Article does not encompass a requirement to extend to investors of the other Party dispute resolution procedures other than those set out in this chapter.'

[30] See Sections 5.8 and 5.9 for a detailed description of the jurisprudence.

[31] An example is: Canada Model BIT 2004, Article 9(3).

14.2.4 Foreign-investor obligations

IIL should contain a norm which explicitly forbids foreign investors from engaging in SD-hindering behaviours (as evaluated from today's perspective; Section 4.7.1.1) because such a norm provides foreign investors with incentives to behave in a non-SD-hindering manner.[32]

A broadly and vaguely formulated 'foreign-investor-obligation clause' does just that when combined with the 'guideline norms' (Section 14.1). Such a clause may simply hold that foreign investors must 'do no harm' to the host State's SD.[33]

If we do not have absolute confidence in adjudicators' norm application, then the 'foreign-investor-obligation clause' should be formulated in less broad and vague terms; for instance, by explicitly including behaviours that violate the clause. Note, however, that a specific list of SD-hindering behaviours cannot be provided because whether or not some behaviour is SD-hindering will generally depend on the host State's level of development. Nonetheless, we can arguably hold that such a clause should require that: the investment be in accordance with the host State's national laws at the time of the acquisition/establishment of the investment and with reasonable modifications therefrom;[34] the foreign investor does not engage in corruption;[35] the investment meets the standards of corporate social responsibility (by referenc-

[32]The inclusion of foreign-investor obligations is widely advocated: Muchlinski (2008), at 638, "new concerns about the very effects of investor activities have ... arisen [in recent years]. These have led to increased calls for a new, more balanced, regime in international investment law ... Thus, not only investor rights should be the focus of international investment law but also investor responsibilities"; Cordonier Segger and Newcombe (2011), at 113, "[a] broad critique focuses on the asymmetry of obligations in IIAs. IIAs impose obligations on host States with respect to investment and investors. There are few corresponding international obligations imposed on foreign investors in the operation of investments".

[33]Notice that this requirement is much less demanding than requiring foreign investors to make the maximum possible contribution to the host State's SD. Supporting this 'maximum possible contribution': IISD Model, Article 16(A), requires that the investment makes the maximum feasible contributions to the sustainable development of the host State. Brazil Model BIT 2013 (referred to as 'Brazil Model CIFA'; not published, for details see Brauch (2015)), Article 10, 'carry out the highest level possible of contributions to the sustainable development of the host State and the local community'.

[34]Similarly: IISD Model, Article 11(A), requires compliance with the host State's laws.

[35]IISD Model, Article 13, requires that the investor does not engage in corruption.

ing e.g. the 'ILO Declaration on Fundamental Principles and Rights at Work'[36], the 'MNE Declaration'[37], and the 'OECD Guidelines'[38]);[39] the investment complies with PIL-based environmental, labour and human-rights obligations.[40]

These obligations should, generally speaking, be considered during the *merits phase*: they involve difficult questions and should therefore not be treated quickly during the jurisdictional phase; and treating them during the merits phase allows taking a more fine-grained approach than an all-or-nothing approach by allowing for mitigating effects on the awarded damages.[41]

Furthermore, such a 'foreign-investor-obligation clause' creates norm conflicts within IIL which adjudicators must resolve: both an IIL-based norm which forbids certain behaviours by States (e.g., FET clause, expropriation clause, non-discrimination clause) and an IIL-based norm which forbids certain behaviours by foreign investors may apply. If we do not have absolute confidence in adjudicators' norm application, then the 'foreign-investor-obligation clause' should additionally explicitly specify the relationship (read: hierarchy) between these norms in the event of a conflict and explicitly specify the effect on damages.

Contemporary IIL's norm design does generally not contain foreign-investor obligations (a fact referred to as 'obligation asymmetry' in IIL scholarship).[42]

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[36] ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, adopted 18 June 1998 (revised in 2010).

[37] Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration), ILO Governing Body, adopted 16 November 1977 (last amended in 2006).

[38] OECD Guidelines for Multinational Enterprises (OECD Guidelines), published 21 June 1976 (last revised in 2011).

[39] Supporting such an approach: Muchlinski (2008), at 638; Dumberry and Dumas Aubin (2013), at 9; IISD Model, Article 16(B,C), requires that the investment meets the standards of corporate social responsibility (as set by the ILO and OECD).

[40] IISD Model, Article 14, requires that the investment complies with international environmental, labour and human-rights obligations to which the host and/or home State are parties.

[41] Arguing so: Aaken and Lehmann (2013), at 335 et seq.

Sharing the conclusion: Bjorklund and Litwin (2012); IISD Model, Article 18, holds that the violation of some of these obligations may have mitigating effects on the merits of a claim and on the awarded damages.

[42] See e.g. Cordonier Segger and Newcombe (2011), at 113; Bernasconi-Osterwalder et al. (2012), at 35, "Perhaps the only real exception is that ... treaties may impose the rather basic duty on investors to

14.3 Foreign-investor-accountability norms

This Section discusses 'foreign-investor-accountability norms' which IIL should contain; these norms ensure that foreign investors are held accountable for engaging in SD-hindering behaviours (as evaluated from today's perspective; Section 4.7.1.1). The behaviours for which foreign investors should be held accountable are the same as those behaviours that are forbidden by 'foreign-investor obligations' (Section 14.2.4).

If IIL is to function as a foreign-investor-accountability instrument (Section 3.3), then IIL must contain such norms.

14.3.1 (Counter-)claim norm

IIL should contain a norm which explicitly holds that host States have the right to launch claims as well as counter-claims against foreign investors.[43] Remark that for such a (counter-)claim to be of any use, the applicable norms must contain a cause of action (i.e., legal grounds) for host States, that is, IIL must include 'foreign-investor obligations' (Section 14.2.4).

Several reasons support this position. First, and foremost, allowing (counter-)claims provides an effective means to hold a foreign investor accountable: Sections 5.2.7 and 5.2.8 show that IIL-based monetary awards can be de jure enforced in virtually all jurisdictions in the world. Second, allowing (counter-)claims avoids wasting resources because no separate (international or national) adjudicative proceeding is required to hold a foreign investor accountable. And third, allowing (counter-)claims may reduce the risk of bogus claims by foreign investors.

Importantly, for a (counter-)claim to be possible before an IIL-based adjudicative body, the foreign investor must first have consented to the adjudicative body's jurisdiction.[44] In the past, such a consent has taken the form of the foreign investor

establish their investments in accordance with the host state's laws and regulations."

[43] IISD Model, Article 18, provides the host State with a right to launch a counter-claim.

[44] Section 5.2.2. Although discussing ICSID, the statement applies more generally: Schreuer et al. (2009), at 214, "Consent by the investor must be expressed in some positive way and cannot be substituted by the BIT or simply assumed."

initiating an international adjudicative proceeding. But means exist to induce an (ex ante) consent by foreign investors: host States may require foreign investors to provide an (ex ante) consent as a condition for admission of the investment; or the unilateral (ex ante) consent to jurisdiction contained in IIAs may be conditional on a foreign investor having also (ex ante) consented thereto (conditional consent; Section 15.3).[45]

Contemporary IIL's norm design does not contain such an explicit '(counter-)claim norm'; and contemporary IIL does not seem to generally allow for claims or counter-claims.[46]

14.3.2 Home-State-obligation norm

For (counter-)claims to hold a foreign investor accountable, this foreign investor must have consented to the adjudicative body's jurisdiction. If IIL cannot guarantee (ex ante) consent by foreign investors, then IIL should contain a norm which holds that home States, and arguably States more generally, must enact national legislation (with extra-territorial jurisdiction) that make their investors liable for SD-hindering behaviours of their controlled or owned investments abroad (Section 4.7.1.7).[47]

Contemporary IIL's norm design does generally not contain home-State obligations.

Corruption In particular, IIL should contain a norm holding that home States must enact legislation against corruption abroad.[48]

States exhibiting the required national legislations with respect to corruption (i.e., with extra-territorial jurisdiction) most notably include the United States (US For-

[45] Schreuer (2008), at 837, "There are ways in which an investor may be induced to give consent. Submission to arbitration may be made a condition for admission of investment in the host State and may form part of the licensing process. BITs may provide specifically that their benefits will extend only to investors that have consented to arbitration."

[46] Regarding counter-claims, see Section 5.4.4.

[47] IISD Model, Article 31, requires the home State's laws to allow for the bringing of civil actions against investors for certain damages resulting from their investments abroad.

[48] IISD Model, Article 32, requires the home State to enact laws against corruption abroad.

eign Corrupt Practices Act (1977) after it was expanded in 1998) and the United Kingdom (UK Bribery Act (2011)).

14.4 NPM norms

This Section discusses 'non-precluded-measures norms' which IIL should contain; these norms ensure that certain State behaviours are not forbidden under IIL.

14.4.1 General-exceptions clause

IIL should contain a norm which ensures that State behaviours which are SD furthering from today's perspective are not forbidden (Section 4.7.1.1); namely, it should contain a norm which explicitly holds that such behaviours are not forbidden.[49]

A so-called 'general-exceptions clause' (sometimes referred to as 'right-to-regulate clause') does just that: it explicitly holds that measures which are in the public interest are not forbidden under IIL. If we do not have absolute confidence in adjudicators' norm application, then the NPM clause should exhibit additional precision;[50] for instance, by explicitly including a list of 'public purposes' (or 'public policy goals') and hold that measures motivated by one of them are not forbidden under IIL.[51]

[49] It has been argued that IIL should not contain a general-exceptions norm because the FET clause, expropriation clause, and non-discrimination clause (Section 14.2) do not apply when the general-exceptions norm would apply – namely, because the inclusion of a general-exceptions norm would be redundant. Arguing so: Newcombe (2011); Legum and Petculescu (2013); Lévesque (2013).

This view cannot be followed for at least two reasons. First, the view requires that those clauses are formulated in broad and vague terms: the more precise the formulation of those clauses, the less interpretational freedom adjudicators have, and therefore the less likely it is that adjudicators can find that those clauses do not apply when a general-exceptions norm would apply (unless, of course, those clauses themselves explicitly mention exceptions – but this would be akin to having IIL contain a general-exceptions norm). And second, the view presumes that adjudicators properly interpret those clauses: if we do not have absolute confidence in adjudicators' norm application, then a general-exceptions norm is warranted because such a norm adds precision and therewith reduces adjudicators' interpretational freedom. Sharing this work's position: UNCTAD (2015), at 135.

[50] For examples of such formulations, see e.g. UNCTAD (2015), at 140 et seq.

[51] The most notable example of such a clause is provided by GATT, Article XX, which mentions,

Contemporary IIL's norm design does generally not contain a 'general-exceptions clause' – although this may be about to change.[52]

14.4.2 Emergency-situations clause

If we do not have absolute confidence in adjudicators' norm application, then the NPM clause should exhibit even further precision to ensure that behaviours that are arguably necessary for resolving an emergency situation are not forbidden (Section 4.7.1.6).[53]

A so-called 'emergency-situations clause' (sometimes referred to as 'essential-security clause') does just that: it explicitly holds that measures that are necessary to resolve emergency situations (e.g., the maintenance of international peace or security, protection of one's essential security interests) are not forbidden under IIL.[54]

Contemporary IIL's norm design sometimes contains an 'emergency-situations clause'.[55]

14.4.3 Self-judging clauses

If we have absolute confidence in adjudicators' norm application, then the NPM norms should amount to a non-self-judging norm. Contemporary IIL's norm design

amongst others, the following purposes: protection of public morals; protection of human, animal or plant life or health; and the enforcement against monopolies.

[52] Instead of several, Sabanogullari (2015), at 4.

Notable examples of this recent trend are: Canada Model BIT 2004, Article 10(1,2); Switzerland's 'IIA guidelines 2014' (which is the closest thing it has to a model IIA; not published, information based on Siegenthaler (2015)) holds it should explicitly be mentioned that nothing in the treaty prevents States from taking measures in the public interest insofar as those measures are not arbitrary or unjustifiable and do not amount to disguised protectionism (and calls it a 'right-to-regulate clause'); CETA (consolidated draft, 1 August 2014), Preamble, 'the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity'; India Model BIT 2015 (draft), Article 16.

[53] For examples of such formulations, see e.g. UNCTAD (2015), at 141 et seq.

[54] The most notable example of such a clause is provided by GATT, Article XXI.

[55] See Section 5.11.1.

mainly contains non-self-judging NPM clauses.[56]

Purpose-restricted If we do not have much confidence in adjudicators' norm application, then the NPM norms should explicitly be self-judging with respect to the means-end relationship, but not with respect to the end; namely, they should explicitly be formulated as a 'purpose-restricted self-judging NPM clause'. Such a clause allows a State to judge by themselves (i.e., without review) whether a means is appropriate, but allows adjudicative bodies to review whether or not the end/purpose is fulfilled (e.g., whether there exists an emergency situation).[57]

Such a formulation provides States with unilateral ex post control, which includes/provides the power to make (de facto) amendments. Whether or not such a formulation should be relied upon therefore involves an optimisation problem.[58] On the one hand, such a formulation is costly because the so-created unilateral ex post control significantly reduces IIL's inter-temporal stickiness (i.e., reduce its degree of stability over time) since anything goes when the end/purpose is fulfilled if a State says so. On the other hand, all the benefits of such a formulation are already realised by mandating a 'good-faith review' (as contained in the 'guideline norms'; Section 14.1). Consequently, such a formulation should only be relied upon when we have little confidence in adjudicators' norm application – more precisely, in adjudicators' proper application of the 'good-faith review'.

Contemporary IIL's norm design at times contains a purpose-restricted self-judging NPM clause.[59]

[56] IIAs containing a NPM clause have historically been formulated in non-self-judging terms (Section 5.11.1). More recent IIAs containing a non-self-judging NPM clause include: Canada Model BIT 2004, Article 10(1,2,4); CETA (consolidated draft, 1 August 2014), Preamble; Switzerland's 'IIA guidelines 2014' (which is the closest thing it has to a model IIA; not published, information based on Siegenthaler (2015)); UK Model BIT 2008, Article 7(1).

[57] The most notable example of such a clause is provided by GATT, Article XXI.

[58] The optimisation problem is described in Section 14.5.1.

[59] IIAs containing such a clause include: Canada Model BIT 2004, Article 10(4); US Model BIT 2004 and 2012, Article 18; India Model BIT 2015 (draft), Articles 16 and 17.

Fully self-judging IIL should not contain a fully-self-judging NPM clause.[60] Indeed, such a formulation is infinitely costly because the so-created unilateral ex post control fully cancels out IIL's inter-temporal stickiness since anything goes if a State says so.[61]

14.5 Ex-post-control norms

This Section discusses ex-post-control norms (generally referred to as 'flexibility norms')[62] which IIL should contain; these norms provide States with (some degree of) control over the content of IIL's rules after the date on which the underlying IIL-based applicable norms were created.

Several ex-post-control norms have already been presented (and advocated for): *good-faith review* (Section 4.7.2.2) which provides unilateral ex post control; *joint-interpretation commissions* (Section 13.1.2) which provide joint ex post control; and *purpose-restricted self-judging NPM clause* (Section 14.4.3) which provides unilateral ex post control.

14.5.1 Underlying optimisation problem

The determination of the level of ex post control involves an optimisation problem.[63]

On the one hand, providing ex post control to States is costly *if* it allows States to (de jure or de facto) amend the applicable norms because such amendments reduce IIL's inter-temporal stickiness (i.e., reduce its degree of stability over time).[64] Remark that the reduction associated with unilateral ex post control is ceteris paribus larger than with joint ex post control because the latter requires the agreement by multiple States.

[60] Concurring: Aaken (2014b), at 847.

[61] The underlying optimisation problem is described in Section 14.5.1. We do not need to mention the benefits (which are the same as for a 'purpose-restricted self-judging NPM clause') because the costs associated with such a formulation cannot be compensated.

[62] Instead of several, see Helfer (2013); Aaken (2014b).

[63] Seminal for describing it in the context of IIL is Aaken (2009b); see also Aaken (2014b).

[64] For the importance/desirability of inter-temporal stickiness, see Section 4.7.1.2.

On the other hand, providing ex post control to States is beneficial for several reasons. First, it allows States to choose their preferred form of SD; remember that SD involves the choice (read: value judgment) of multiple aggregation/weighing formulae (Section 4.6.1).[65] Second, it allows States to take advantage of the informational advantage they have vis-à-vis international bodies; the consequences of some State measure are, to some degree at least, determined by the domestic (formal and informal) institutional context (culture, historical background, social norms, etc.) since these influence how people will react to specific measures. And third, it allows to increase the probability of survival of IIL (i.e., by securing/increasing States' participation);[66] since IIL is desirable (Chapter 3) it may avoid throwing the proverbial baby out with the bathwater.

14.5.2 Exit clause (unilateral termination)

IIL should contain a norm which explicitly holds that a State can unilaterally terminate (i.e., denunciate or withdraw) its IIL-based obligations with the termination taking effect sometime in the future for existing investments.[67]

Such a 'non-immediate-effect exit clause' (or 'exit clause' combined with a 'sunset clause') provides States with unilateral ex post control which by definition provides the power to make amendments. Whether or not such a clause should be relied upon therefore involves an optimisation problem.[68] On the one hand, such a clause is

[65] Put differently, it follows from remembering that there is a 'plurality of justices' (Section 4.2.2). See also footnote 217 in Chapter 4.

[66] The argument that providing States with some ex post control increases a regime's survival chances is not new. Seminal for advancing this survival argument is Koremenos (2001), at 289, "How can the corsets of international agreements be made more flexible and therefore more robust? Or, in the words of Jon Elster, how can Ulysses be loosely bound to the mast?" (footnote omitted); see also Helfer (2013), at 175. In the context of IIL, see Aaken (2014b), at 830, "Having overly strict commitments without allowing for adequate flexibility may lead to reactions by states that may endanger the system as a whole ... If states feel that they have insufficient voice ... they might exit the system".

[67] Concurring: IISD Model, Article 57. Supporting a five-year period: Mann et al. (2006), at 71, "In our view, a five-year extinguishment period is sufficient today to protect the rights of those who may have relied upon the agreement when making their investment. This is a significant adjustment period."

[68] The optimisation problem is described in Section 14.5.1.

costly because the so-created unilateral ex post control reduces IIL's inter-temporal stickiness.[69] On the other hand, such a clause is beneficial because it may increase the survival of IIL. The benefit of such a clause arguably outweighs the cost thereof because the reduction in IIL's inter-temporal stickiness is not too excessive since the termination only takes effect sometime in the future.

Contemporary IIL's norm design widely contains a 'non-immediate-effect exit clause'.[70]

14.5.3 Termination clause (joint termination)

IIL should contain a norm which explicitly holds that States can jointly terminate their IIL-based obligations with immediate (or retroactive) effect and without the consent of foreign investors – whether or not they choose to do so should be left for States to decide.[71]

Such a 'termination clause' provides States with joint ex post control which by definition provides the power to make amendments. Whether or not such a clause should be relied upon therefore involves an optimisation problem.[72] On the one hand, such a clause is costly because the so-created joint ex post control reduces IIL's inter-temporal stickiness. On the other hand, such a clause is beneficial because it may increase the survival of IIL. The benefit of such a clause arguably outweighs the cost thereof because the reduction in IIL's inter-temporal stickiness is likely to be marginal because it presumes the consent by multiple States.

Remark that whether or not one agrees with the previous weighing, IIL should contain a norm which explicitly deals with joint termination because Section 5.13.2

[69] Helfer (2012), at 648, "[the] concern is that a State will invoke a denunciation or withdrawal clause [read: exit clause] ... whenever economic, political, or other pressures make compliance costly or inconvenient. Seen from this vantage point, an exit provision enables a State to quit a treaty and, after the withdrawal takes effect, engage in conduct that would have been a violation had it remained a member of the agreement."

[70] Section 5.13.1.

[71] Concurring (since a 'termination' is a special case of an 'amendment'): IISD Model, Article 53, holds that the parties can at will amend their IIL-based obligations.

[72] The optimisation problem is described in Section 14.5.1.

shows that there is substantial disagreement/uncertainty in IIL scholarship surrounding the issue of joint termination.

Contemporary IIL's norm design does not contain a 'termination clause'.[73]

14.5.4 Amendment clause

IIL should contain a norm which explicitly holds that States can amend their IIL-based obligations with immediate (or retroactive) effect and without the consent of foreign investors.[74]

Everything that has been said for 'joint termination' (Section 14.5.3) applies here as well.

14.5.5 Subsequent information

Although the amendment clause implies so, if we do not have absolute confidence in adjudicators' norm application, then IIL should contain a norm which explicitly holds that adjudicative bodies' norm application must, irrespective of whether it yields an amendment, take into account subsequent information (e.g., in the form of subsequent practice or subsequent agreements) created by the States party to the applicable norms.[75]

[73] Section 5.13.2

[74] Concurring: IISD Model, Article 53, holds that the parties can at will amend their IIL-based obligations.

[75] Of different opinion when the subsequent information yields a (de facto) amendment: Roberts (2010), at 215, "The nature of investment treaties and investor rights justifies treatment by investment tribunals of subsequent agreements and practice as highly persuasive evidence, rather than as inherently suspect or necessarily binding."; Kaufmann-Kohler (2011), at 191 et seq., "the conduct of the host State of the investment must be measured on the basis of norms in effect when the conduct occurred and not of newly created norms. The latter may happen if the purported interpretation is issued after the conduct and is in reality an amendment ... The same issue does not arise if the interpretation is a true interpretation, i.e., an interpretation that clarifies what the norm has always been." (emphasis and footnote omitted).

Remark also that the ECtHR explicitly takes subsequent information into account when applying the ECHR (which grants rights to third parties); it is, however, unclear whether the ECtHR would do so when the subsequent information yields a de facto amendment: *Cruz Varas and Others v Sweden*, ECtHR, App. No. 15576/89, Merits and Just Satisfaction, 20 March 1991, ECHR Series A No. 201, at para 100,

14.6 Enforcement

This Section discusses enforcement norms; these norms facilitate the (de jure and/or de facto) enforcement of decisions by IIL-based adjudicative bodies.

Sections 5.2.7 and 5.2.8 show that de jure enforcement of IIL-based monetary awards is quite good. Section 3.1.1.2, however, suggests that the de facto enforcement of IIL-based monetary awards may be quite difficult in cases of non-voluntary compliance by the loosing State.

14.6.1 State-enforcement-immunity norm

Section 5.2.8.3 shows that enforcement is restricted by State enforcement immunity (or 'State execution immunity'); and that there is considerable uncertainty associated with whether a State asset is immune from execution.

IIL should therefore contain a norm which explicitly specifies certain assets as excluded from State enforcement immunity.[76] A State may, for instance, consent thereto through a unilateral declaration,[77] or within an IIA. The consent may be limited to decisions by IIL-based adjudicative bodies, or it may even be limited to decisions by adjudicative bodies established under the said IIA.

These assets may, for example, include State-owned enterprises and sovereign-wealth funds.[78]

"Subsequent practice could be taken as establishing the agreement of Contracting States regarding the interpretation of a Convention provision but not to create new rights and obligations which were not included in the Convention at the outset."; *Öcalan v Turkey*, ECtHR (Grand Chamber), App. No. 46221/99, Merits and Just Satisfaction, 25 March 1983, at para 163, "an established practice within the member States could give rise to an amendment of the Convention". For a more general overview of relevant ECtHR cases, see e.g. Roberts (2010), at 203 et seqq.

[76] Also suggesting so: Uchkunova and Temnikov (2014), at 202 et seq.

[77] For the conditions that a unilateral declaration amounts to PIL (i.e., gives rise to a PIL-based obligation), see seminally, *Nuclear Tests Case (Australia v. France)*, ICJ, Judgment, 20 December 1974, at paras 42 et seqq.; subsequent cases confirmed and elaborated these requirements (see e.g. Suy and Angelet, 2007, at paras 17 et seqq.).

[78] For a general analysis of which State assets should be covered by State enforcement immunity, see Aaken (2015a).

14.6.2 Collateral norm

IIL may contain a norm which holds that States must each create a fund abroad; that the fund must be constituted with foreign currency (to avoid strategic devaluation by one of the States); and that the fund's domestic legal structure must be such that States cannot unilaterally withdraw their contributions until the applicable norms (e.g., the IIA) are terminated.

Remark that such a norm exhibits positive externalities for the enforcement of PIL, and therewith IIL, more generally: a State's contribution to the fund may also be used to enforce monetary awards (against that State) rendered by adjudicative bodies not constituted under the applicable norms,

14.6.3 Addendum: non-compliance publication

IIL should also provide for a mechanism that spreads the information of which IIL-based decisions have not been voluntary complied with by States.

Arbitration institutions may, for instance, be required to publish this information.[79]

[79] Similarly: Stevens (2013), at 263, "include in the Centre's Annual Report a list of outstanding awards".

Chapter 15

IIL design: jurisdictional norms

Section 7.5 argues that the design of contemporary IIL's jurisdictional norms is (partly) responsible for many of IIL's SD deficits. This Chapter proposes a set of jurisdictional norms which aligns IIL (more closely) with SD.

This Chapter finds that IIL's norm design should, most notably, explicitly exclude certain types of investments (foreign investments in extractive industries, foreign portfolio investments, and secondary-market investments) if we do not have absolute confidence in adjudicators' norm application, restrict indirect investments to the first investor in the ownership chain outside of the territory of the host State, and make States' unilateral (ex ante) consent to jurisdiction conditional (on an (ex ante) consent by the foreign investor, on a waiting period having elapsed, on local remedies having been relied upon, on the investment having been made in accordance with national laws, and on the investment having not been made by engaging in substantial corruption).

The remainder of this chapter is organised as follows. Sections 15.1 and 15.2 study restrictions in the scope of States' unilateral (ex ante) consent to jurisdiction in terms of *ratione materiae* respectively *ratione personae*. And Section 15.3 discusses

conditions on States' unilateral (ex ante) consent to jurisdiction.

Before moving on, two remarks are in order. First, as in Chapter 14, the determination of jurisdictional norms' formulations should be driven by the confidence we have in adjudicators' norm application. And second, the following presumes that jurisdictional norms are combined with the 'guideline norms' (Section 14.1), which provide general guidelines for the norm application of adjudicative bodies.

15.1 Ratione materiae: investment

This Section discusses restrictions in the scope of States' unilateral (ex ante) consent to jurisdiction in terms of *ratione materiae*; namely, it studies which investments should be covered by IIL.

15.1.1 Types of investments

If we do not have absolute confidence in adjudicators' norm application, then IIL should contain a norm which explicitly covers or excludes certain types of investments depending on their likely contribution to SD.[1]

This follows from observing that if we do not have absolute confidence, then 'types of investments' with only a small expected contribution to SD should be excluded because the risk of a bad norm application is too large to be worth taking for those 'types of investments'.

15.1.1.1 Sector

Section 3.1.2.2 suggests that foreign investments' impact on (sustainable) development varies according to the sector. Specifically, it suggests that 'foreign investment in extractive industries' is not very likely to be SD furthering for the host country (there is some empirical evidence that it actually tends to be SD hindering for the host country). Furthermore, it suggests that 'foreign investment in manufacturing

[1] Similarly: UNCTAD (2012a), at 41, "Past disputes have demonstrated the potential of IIAs to be interpreted broadly ... it may thus be appropriate to ... exclude some types of financial transactions".

and assembly' and 'foreign investment in services' may be SD furthering – local conditions matter for whether they are SD furthering. Finally, it suggests that 'foreign investment in infrastructure' is likely to be SD furthering.

Consequently, if we do not have absolute confidence in adjudicators' norm application, then IIL should explicitly exclude 'foreign investment in extractive industries' from its coverage.

Contemporary IIL's norm design does generally not explicitly limit the coverage to certain sectors.[2]

15.1.1.2 Control

The issue of control tends to be discussed by reference to 'foreign portfolio investment' and 'foreign direct investment'; the former is generally defined as having an equity stake providing less than 10 percent of voting power, and the latter as having an equity stake providing more than 10 percent of voting power (i.e., as having control or a significant degree of influence).[3]

Foreign portfolio investments, as opposed to FDIs, may not involve knowledge and technology transfers and are therewith less likely to raise the human-capital stock, to bring the host country to the technological frontier, and/or to produce horizontal externalities/spillovers (such as 'entrepreneurship externalities' or 'ideas'). However, foreign portfolio investments provide an economy with additional capital and may thus nonetheless contribute to that economy's development.[4]

Consequently, IIL should include both 'foreign portfolio investment' and 'foreign direct investment' under its coverage. If we do not have absolute confidence in adjudicators' norm application, then IIL may exclude 'foreign portfolio investment' from its coverage.[5]

Contemporary IIL's norm design does generally not explicitly refer to control.

[2] See Sections 5.2.2.1 and 5.4.1.

[3] IMF (2009), at 100 et seq. and 110; OECD (1996), at 7 et seq.

[4] Sharing this view: UNCTAD (2012a), at 41, "Portfolio investment can make a contribution to development by providing financial capital."

[5] Excluding foreign portfolio investments from the coverage: IISD Model, Article 2(C)(a); India Model BIT 2015 (draft), Article 1(7)(iii).

Investment arbitral tribunals seem to have generally found controlling and non-controlling, majority and minority, shareholding positions to be covered.[6]

15.1.1.3 Market

If the investment amounts to a purchase of stocks, then we can distinguish between a 'primary market' and a 'secondary market'; the former involves funds actually flowing into the host country, while the latter need not involve such inflows since the stocks may be exchanged abroad.

Because of this potential lack of foreign-investment inflows, secondary-market investments are arguably less likely to further SD than primary-market investments. However, secondary-market investments may nonetheless contribute to SD: the existence of secondary-market investments (read: of secondary-market demand) increases the expected profits of primary-market investments, which may increase the quantity of such investments, because their existence increases the potential price at which a primary-market investment can be sold in the future; and although secondary-market investments do not involve foreign-investment inflows into the host country, they may still involve knowledge and technology transfers and therewith raise the human-capital stock, bring the host country to the technological frontier, and/or produce horizontal externalities/spillovers (such as 'entrepreneurship externalities' or 'ideas').[7]

[6] See Sections 5.2.2.1 and 5.4.1 for a detailed description of the jurisprudence; see especially Section 5.4.1.1.

[7] Failing to recognise this: Waibel (2007), at 727, "For debt instruments traded on secondary markets, the territorial link is especially tenuous. Suppose Ruritania's sovereign bonds being traded on the secondary market in Zurich changed hands. With secondary-market purchases, there is typically no flow of even financial resources into the issuing country. The debtor state receives funds only on issuance of the bonds, at a single time. In general, secondary-market purchases by bondholders lack a territorial link with the host country. For that reason, they are highly unlikely to contribute to the host country's development." (footnote omitted); Abi-Saab (2011), at 70 et seqq., "The award fails clearly to distinguish between purchases on the primary market, involving the issuer (Argentina) and the first buyers of the issue (the underwriters), and the secondary market, where previously issued securities are traded, without any involvement of the sovereign debtor ... the flow of funds triggered by transactions in the secondary market is exclusively between the buyer and seller of the security entitlements, its volume depending

Consequently, IIL should include both 'primary-market investments' and 'secondary-market investments' under its coverage. If we do not have absolute confidence in adjudicators' norm application, then IIL may exclude 'secondary-market investments' from its coverage.

Contemporary IIL's norm design does not explicitly limit the coverage in this manner. Investment arbitral tribunals seem to have generally found secondary-market investments to be covered.[8]

15.1.2 Indirect investments

Foreign investments typically exhibit an ownership chain with multiple intermediate companies; all of these companies, except the first in the ownership chain, amount to indirect investors.

If multiple companies in the ownership chain can initiate an IIL-based adjudicative proceeding, then this gives rise to parallel proceedings. Although Section 7.6.3.2 holds that parallel proceedings must not necessarily be prevented, it also holds that they should be prevented when it is difficult to ensure that the various adjudicative bodies coordinate so that the total compensation (i.e., the sum of all adjudicative bodies' ordered compensation requirements) is appropriate. Parallel proceedings involving claimants at different positions in the ownership chain pose such difficulties.

Consolidation of the adjudicative proceedings may not work for the present constellation because the claimants are at different positions in the ownership chain and/or because the claimants are relying upon different causes of action.

Consequently, IIL should contain a norm which explicitly holds that only the investment(s) of the first foreign investor(s) in the ownership chain are covered.[9]

Contemporary IIL's norm design generally covers indirect investments and does not explicitly limit indirect investments in this manner. Investment arbitral tribunals

on the conditions prevailing in that market, and bearing no visible relation to the lump-sum received by Argentina from the underwriters at issuance".

[8] See Sections 5.2.2.1 and 5.4.1 for a detailed description of the jurisprudence; see especially Section 5.4.1.1.

[9] The plural is added to allow for the possibility that there may be multiple investors at the same position in the ownership chain; namely, it is used because there may be multiple 'first foreign investors'.

have generally found indirect investments (wherever in the ownership chain) to be covered.[10]

15.1.3 Addendum: development-contribution criterion

It is impossible to determine whether some specific investment will contribute to SD in the future.[11] And since investments may only contribute to SD in the long run, it makes no sense to only consider whether a specific investment has contributed thereto in the past.[12]

Consequently, IIL should not contain a norm which explicitly holds that only investments which have contributed to SD are covered.[13] If we do not have absolute confidence in adjudicators' norm application, then IIL should contain a norm which explicitly covers or excludes certain types of investments depending on their likely contribution to SD (Section 15.1.1) – to be sure, this is different from covering or excluding specific investments.

Contemporary IIL's norm design does generally not explicitly require a development contribution. Investment arbitral tribunals have, however, at times found a

[10] See Sections 5.2.2.1 and 5.4.1 for a detailed description of the jurisprudence; see especially Section 5.4.1.2.

[11] Aaken and Lehmann (2013), at 334 et seq., "it does not make sense ... to integrate 'development' at the jurisdictional stage of the proceedings. It is impossible for a tribunal to decide whether a certain investment contributes to (economic) development or not ... The term investment is future-oriented. So could it be that the tribunal would need to decide whether the original investment would have contributed to development in future times, for example in thirty years?"

[12] Of different opinion: García-Bolívar (2012), at 6, "Economic development is certainly a concept that can be very broad and can, potentially, encompass many disparate elements. However, through a review of the relevant documents and cases, several factors have emerged that point to certain non–exclusive criteria for determining when an investment has made a contribution to the economic development of the host country. The jurisprudence indicates that an assessment will be made of the following: (a) the extent to which the investment benefits the public interest; (b) whether any transfer of technological knowledge or 'know-how' from investor to the host state has taken place; (c) the degree to which the investment has enhanced the GDP of the host country; and (d) whether the investment has had a positive impact on the host state's development."

[13] This work is therefore in contrast to: India Model BIT 2015 (draft), Article 1(2)(1)(iv).

'development contribution' to be relevant for whether an investment is covered.[14]

In any event, the investment's contribution to development is considered in the merits phase: Section 14.2.4 holds that foreign investors must make the maximum possible contribution to SD.

15.2 Ratione personae: nationality

This Section discusses restrictions in the scope of States' unilateral (ex ante) consent to jurisdiction in terms of *ratione personae*; namely, it studies which foreign investors should be covered by IIL.

15.2.1 Nationality of natural persons

IIL should contain a norm which explicitly holds that natural persons having the nationality of another State party to the applicable norms (e.g., party to the IIA) are covered; and which furthermore holds that for a natural person to have the nationality of some State, this natural person must have the nationality under the said State's national laws.

Contemporary IIL's norm design contains such a norm. Investment arbitral tribunals have, in particular, found a genuine link, such as (permanent) residence, not to be relevant for the determination of nationality.[15]

15.2.2 Nationality of juridical persons

IIL should contain a norm which explicitly holds that juridical persons having the nationality of another State party to the applicable norms (e.g., party to the IIA) are covered.

Section 14.3 argues that if IIL cannot guarantee (ex ante) consent by foreign investors, then IIL should contain a norm which holds that home States, and arguably

[14] See Section 5.2.2.1 and 5.4.1 for a detailed description of the jurisprudence.

[15] See Sections 5.2.2.1 and 5.4.2 for a detailed description of the jurisprudence.

States more generally, must enact national legislation (with extra-territorial jurisdiction) that make their investors liable for SD-hindering behaviours of their controlled or owned investments abroad. For such national legislation to be de facto enforceable, these investors must have some assets in those States (they are said to be 'judgment proof' otherwise).[16] Consequently, this norm should furthermore explicitly hold that for a juridical person to have the nationality of some State, this juridical person must have the 'seat of effective management' and a 'genuine economic activity' (i.e., economic connection) in the said State.[17]

Contemporary IIL's norm design at times contains such a norm (although nationality is oftentimes simply determined by the 'place of incorporation'). Investment arbitral tribunals have readily found the 'place of incorporation' to amount to the nationality of a juridical person when nationality was determined thereby in the applicable norms; as such, they have refused to 'pierce the corporate veil'.[18]

15.3 Conditional consent

This Section discusses conditions on States' unilateral (ex ante) consent to jurisdiction.

Ex ante consent by foreign investor IIL should arguably contain a norm which explicitly holds that States' consent is conditional on the foreign investor having provided a unilateral (ex ante) consent itself (Section 14.3).

Waiting period IIL should contain a norm which explicitly holds that States' consent is conditional on a period of more than six months having elapsed since the foreign investor's 'notice of intent to adjudicate' (Section 13.1.1).

[16] Concurring: Mann et al. (2006), at 7.

[17] Similarly: Krajewski (2015), at 7, requires a 'substantial business activity' for nationality; IISD Model, Article 2(I), requires either the 'seat of effective management' or a 'genuine economic activity' for nationality.

[18] See Sections 5.2.2.1 and 5.4.2 for a detailed description of the jurisprudence.

Local-remedies first IIL should contain a norm which explicitly holds that States' consent is conditional on the foreign investor having sought resolution of the dispute using the host State's local (administrative or judicial) remedies for a specific time period (Section 13.7).

In accordance with the national laws of the host State IIL should contain a norm which explicitly holds that States' consent is conditional on the investment having been made in accordance with host State's national laws (at the time of the acquisition/establishment of the investment).[19]

This norm complements a (merits-phase) 'foreign-investor obligation' dealing with the investment's relation to the host State's national laws after the investment has been made (Section 14.2.4).

Substantial corruption Although Section 14.2.4 holds that the issue of corruption should be dealt with in the merits phase, it should arguably also be dealt with during the jurisdictional phase because doing so may increase the probability of survival of IIL.[20]

IIL should contain a norm which explicitly holds that States' consent is conditional on the foreign investor having not engaged in substantially corruption unless this corrupt behaviour was not necessary for the acquisition/establishment of the investment.[21] Only 'substantial corruption' (i.e., corruption being of substantial gravity) precludes jurisdiction because it would otherwise allow States to avoid their IIL-based obligations too easily.[22] If we do not have absolute confidence in adjudicators' norm application, then the norm should be formulated in less broad and

[19] Similarly (because 'in accordance with' amounts to a *ratione materiae* requirement (i.e., for the investment to amount to an 'investment' under the IIA) rather than a conditional consent): Krajewski (2015), at 6; IISD Model, Article 2(C)(c).

[20] Yackee (2012c), at 4, "allowing tribunals to weigh and balance state and investor fault in a corrupt transaction-places BIT tribunals in a dangerous position ... [It may] exacerbate public dissatisfaction with the international investment law system by further inflaming popular misperceptions that the system is 'biased' against the well-meaning policy decisions of developing-country governments".

[21] Note that if the 'corrupt behaviour was not necessary', then corruption is still taken into account during the merits phase (Section 14.2.4) – namely, States are not given a free pass.

[22] Arguing so: Aaken and Lehmann (2013), at 336, "The host State could then easily avoid any obli-

vague terms; for instance, by explicitly including an exhaustive list of behaviours that qualify as 'substantial corruption'.

Contemporary IIL's norm design does generally not contain such a norm. Investment arbitral tribunals' norm application has mainly not been aligned with SD because they tend to reject jurisdiction in the presence of corruption.[23]

Parallel proceedings with de jure identity of parties To be sure, Section 7.6.3.2 holds that parallel proceedings must not necessarily be prevented.

If we want to prevent a given foreign investor from initiating multiple adjudicative proceedings – multiple international adjudicative proceedings are made possible by overlapping IIAs as well as by the existence of investor-State contracts (Section 7.6.3.1) –, then IIL should contain a norm which explicitly holds that States' consent is conditional on the foreign investor waving its right to initiate in the future any other adjudicative proceeding with respect to the allegedly-IIL-violating State behaviour.

Contemporary IIL's norm design at times contains such a 'waiver clause'.[24]

gation resulting from a contract tainted by corruption".

This work therefore rejects the view that corruption should always preclude jurisdiction. It is thus in contrast to: CETA (consolidated draft, 1 August 2014), Chapter 10, Section 6, Article X.17; India Model BIT 2015 (draft), Article 8(3) in combination with Article 9; IISD Model, Article 18(A).

[23] See Section 5.4.3 for a description of the jurisprudence.

[24] NAFTA, Article 1121, "disputing investor may submit a claim ... to arbitration only if ... [the investor] waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach"; US Model BIT 2012, Article 26(2).

Part VI

Conclusion and Outlook

Chapter 16

Conclusion and Outlook

This work asks three research questions.[1] First, it asks whether contemporary IIL is aligned with SD. Second, if SD deficits are found, then it asks whether alignment of IIL with SD is likely in practice. And third, if SD deficits are found and IIL can be aligned with SD, then it asks how IIL should look like for it to be aligned with SD.

This Chapter briefly summarises the findings of this work and provides an outlook for future research.

16.1 Summary of the findings

The following summarises this work's answers to the aforementioned research questions.

16.1.1 International investment law and sustainable development

Part II answers the first research question (i.e., whether contemporary IIL is aligned with SD) and therewith provides the normative justification of this work.

[1] See Section 1.1.

Overarching descriptive framework Chapter 4 presents this work's overarching normative framework: sustainable development. It argues that SD is synonymous with justice and that SD nowadays amounts to the international community's overarching normative objective. It furthermore provides, amongst others, the implications of SD for the rules of IIL and for adjudicative decision-making (generally as well as specifically within IIL).

International investment law Chapter 5 provides a general overview of contemporary IIL. Specifically, it describes the main building blocks of its institutional structure (international investment agreements and investment arbitral tribunals) and presents the jurisprudence relating to its most important norms.

Treaty interpretation under PIL Chapter 6 briefly presents the jurisprudence of the two most important PIL-based norms of treaty interpretation (i.e., articles 31 and 32 VCLT).

IIL's SD deficits Chapter 7 combines the previous Chapters to assess contemporary IIL's alignment with SD.

It finds that contemporary IIL exhibits several SD deficits both in its rules (i.e., the decisions of its adjudicative bodies) as well as in the decision-making of its adjudicative bodies. It suggests that the sources of these SD deficits are found in its adjudicative bodies' norm application, in the design of its dispute-settlement mechanism, and in the design of its applicable norms.

16.1.2 Practical likelihood of SD alignment

Part III answers the second research question (i.e., whether alignment of IIL with SD is likely in practice) and therewith provides the practical justification of this work.

State decision-making Chapter 8 advances a descriptive (positive) theory of state decision-making using a non-unitary-state perspective; namely, it advances a 'non-

unitary-state theory of state decision-making'. It furthermore provides empirical support for this theory.

A theory of IIA ratifications Chapter 9 applies the 'non-unitary-state theory of state decision-making' to foreign-investment policy-making (which strictly includes 'IIA ratifications') to advance a 'non-unitary-state theory of foreign-investment policy-making'. It then tests this non-unitary-state theory on States' IIA ratifications during the twentieth century and finds considerable empirical support for this theory; in particular, it finds that the non-unitary-state theory allows to explain IIA ratifications which a unitary-state perspective has a difficult time to fully explain.

Likelihood of SD alignment Chapter 10 relies upon the 'non-unitary-state theory of foreign-investment policy-making' to study the conditions under which SD alignment is likely in practice; namely, to derive the conditions under which we can expect a State to have a desire to behave in accordance with SD in the context of foreign-investment policy-making.

It finds that unless the masses influence state decision-making in the context of foreign-investment policy-making (i.e., unless the masses amount to 'relevant influencers'), IIL is quite unlikely to be aligned with SD and finds empirical support for this claim. For this to be the case, the masses must be aware of IIL's SD deficits and the deficits must negatively affect their well-being.

It finally proposes measures (policy prescriptions) aiming at increasing the likelihood that the masses influence state decision-making. Specifically, it holds that IIL commentators should aim at educating the masses on IIL's SD deficits and that States should rely upon public consultations when drafting IIAs.

16.1.3 Policy prescriptions: dispute settlement

Part IV partly answers the third research question (i.e., how IIL should look like for it to be aligned with SD) and therewith advances a set of policy prescriptions.

Judicial decision-making Chapter 11 reviews the empirical and theoretical literature on national and international tribunals' decision-making.

It finds strong empirical evidence that although public permanent judges exhibit a political-ideology motivation, this motivation is not the sole driver of their behaviour. It furthermore provides theoretical reasons for expecting external factors to influence the decision-making of public permanent judges; and also finds some empirical support for these theoretical claims.

A theory of investor-State arbitration Chapter 12 advances a theory of arbitral decision-making by relying, amongst others, on the insights gained in the previous Chapter.

It suggests that we can think of arbitrators as driven by a political-ideology motivation and/or a judicial-survival motivation. It then finds that we can generally expect arbitrators to vote, within the 'set of reasonable interpretations of the applicable norms', in accordance with the preferences of their appointing party (i.e., irrespective of arbitrators' underlying motivations).

Taking a non-unitary-state perspective, it finally points out that States facing an IIL-based claim may not engage in SD-furthering behaviour in the context of an IIL-based dispute (including when appointing an arbitrator); specifically, it finds that we can generally expect such an SD-hindering preference unless the masses influence state decision-making in this context (i.e., unless the masses amount to 'relevant influencers'). It also finds that the likelihood of such SD-hindering behaviour is highest when a non-elected entity represents the State in the dispute and this entity is not effectively controlled by an elected body.

IIL design: dispute settlement Chapter 13 proposes a set of measures (policy prescriptions) that tackle SD deficits relating to IIL's dispute-settlement mechanism by relying, most notably, on the theory of arbitral decision-making derived in the previous Chapter.

It holds that IIL's dispute-settlement mechanism should further consensual dispute resolution both between investors and host States (through mediation) as well

as between States themselves (through joint-interpretation commissions). It holds that IIL's dispute-settlement mechanism should exhibit an international adjudicative proceeding, that States should amount to the appointing entities of adjudicators, that adjudicators should be jointly appointed, that adjudicators should be appointed on an ad hoc basis (i.e., reliance upon ad hoc judges) unless there exists a single IIL-based adjudicative body, and that both States and foreign investors should have the right to initiate this international adjudicative proceeding. It furthermore holds that IIL's dispute-settlement mechanism should exhibit extensive transparency, should allow (but not require) for third-party participation, and should require reliance upon local remedies before an international adjudicative proceeding takes place.

Taking a non-unitary-state perspective, this Chapter finally holds that the masses must be made aware that adjudicators can reasonably be expected to vote, within the 'set of reasonable interpretations of the applicable norms', in accordance with the preferences of the State entity responsible for appointments; and that if a non-elected entity represents the State in the dispute, then that entity must be closely linked to (read: effectively controlled by) an elected body.

16.1.4 Policy prescriptions: applicable norms

Part V partly answers the third research question (i.e., how IIL should look like for it to be aligned with SD) and therewith advances a set of policy prescriptions.

IIL design: substantive norms Chapter 14 proposes a set of measures (policy prescriptions) that tackle SD deficits relating to IIL's substantive norms.

It holds that IIL's norm design should, most notably, explicitly provide guidelines for the norm application (interpretation methods, standard of review), provide protection to foreign investors (FET clause; possibly also: expropriation clause, NT clause, MFN clause), contain foreign-investor obligations (do no harm to host State's SD; possibly also: behaviour in accordance with national laws, refrain from engaging in corruption, meet standards of corporate social responsibility, comply with PIL-based environmental, labour and human-rights obligations), contain home-State obligations (enact national legislation making investors liable for violating their IIL-

based foreign-investor obligations abroad), allow for claims and counter-claims by host States against foreign investors, specify non-precluded measures (State measures which are SD furthering from today's perspective; possibly provide a list of non-precluded measures), and specify unilateral and joint termination.

IIL design: jurisdictional norms Chapter 15 proposes a set of measures (policy prescriptions) that tackle SD deficits relating to IIL's jurisdictional norms.

It holds that IIL's norm design should, most notably, explicitly exclude certain types of investments (foreign investments in extractive industries, foreign portfolio investments, and secondary-market investments) if we do not have absolute confidence in adjudicators' norm application, restrict indirect investments to the first investor in the ownership chain outside of the territory of the host State, and make States' unilateral (ex ante) consent to jurisdiction conditional (on an (ex ante) consent by the foreign investor, on a waiting period having elapsed, on local remedies having been relied upon, on the investment having been made in accordance with national laws, and on the investment having not been made by engaging in substantial corruption).

16.2 Outlook

Three avenues for future research can be identified.

First, the literature crucially lacks empirical studies focusing on the underlying motivations/preferences of arbitrators in IIL-based disputes.[2] Such research is important as motivation/preference assumptions always (implicitly) underlie policy prescriptions (whether relating to the dispute settlement or the applicable norms).

Second, the literature crucially lacks empirical studies focusing on the decision-making of arbitrators in IIL-based disputes.[3] Such research is important as assump-

[2] See Chapter 12. The exception being an on-going research project led by Michael Waibel and Yanhui Wu (Waibel and Wu, 2011).

[3] See Chapter 12. The exception being an on-going research project led by Anne van Aaken and Susan D. Franck.

tions on cognitive processes (e.g., heuristics and biases) always (implicitly) underlie policy prescriptions.

And third, further research is, most notably, required on the following specific issues: whether sovereign entities should be covered; whether sovereign bonds should be covered; and whether third-party funding should be allowed, and if so, whether disclosure of such funding should be required.

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List of cases

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Curriculum vitae

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Ph.D. candidate (withdrew), the Kellogg School, Northwestern University, 2008–09
M.Sc. in Economics (lic. oec.), HEC Faculty, University of Lausanne, 2008
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Awards and honours

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Kellogg School of Management Doctoral Scholarship, 2008–13
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