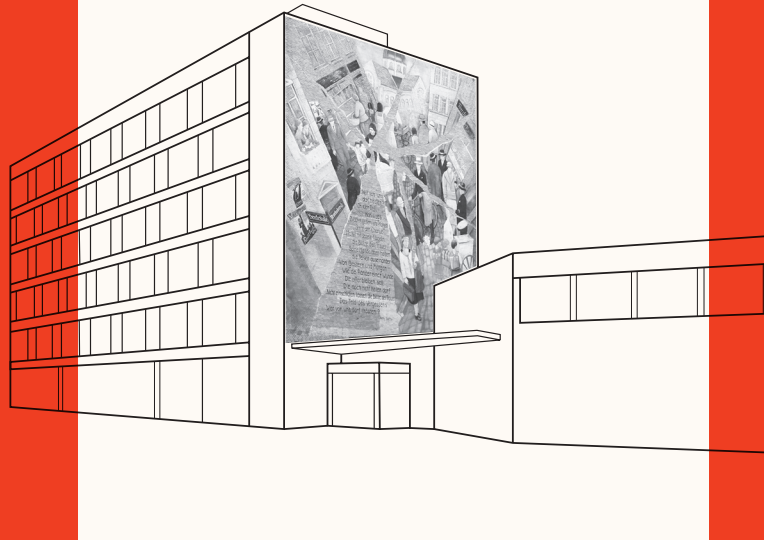




Karsten Nowrot

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(and What Not to Expect)
from Arbitrators when
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Rechtswissenschaftliche
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A. Background:

The Ongoing Transformation of International Investment Law and the Challenges Associated with Investment Tribunals Therein*

Already the official title of our panel “International Investment Law and Environmental Protection: How Protective of Host States’ Environment Can (and Should) Investment Tribunals Be?” as chosen by the organizers of the present symposium serves – at least when taking a slightly closer look at it – as a comparatively clear additional indication for the current transformation processes taking place in the realm of international investment law and the overall considerably changing public perceptions accompanying these developments. Although at first sight potentially relatively easy to overlook, it seems nevertheless noteworthy that the heading of the panel does not initially refer to – or even include at all – the question ‘whether’ it appears possible as well as desirable to entrust the arbitrators in investor-state dispute settlement proceedings also with the task to concern themselves with issues related to environmental protection or other aspects of what is nowadays quite frequently referred to as the rather broad concept of sustainability. Rather, the wording of the title clearly takes the overall possibility and general desirability of such an environmentally-concise approach more or less simply for granted and expects the author – as well as most certainly also the reader – to focus primarily on the extent and arguably also suitable means and options available to the members of investment tribunals to address and to take into account environmental concerns in the course of international investment arbitration proceedings.

Considered in light of the evolution of international investment law as whole, however, this underlying perception is far from self-evident. Until round about two decades ago, the topic of the present contribution would have probably been regarded by most scholars and practitioners interested in the field of investment law as belonging to the realm of issues that for example the former German Chancellor *Gerhard Schröder* – albeit in a different context – once summarily qualified as ‘Gedöns’; a term that could be loosely translated as ‘hullabaloo’. While this previously dominant view has surely contributed to the fact that the potential significance of non-economic concerns such as the issue of environmental protection for and within the area of investment law was for a long time frequently perceived as being devoid of practical importance and hardly attracted substantial scholarly attention, already the title of our panel might serve as an admittedly minor indication that there are as of today increasingly few people – as well as fewer and fewer countries and other international actors – that would at least strictly adhere to what might be labeled the ‘hullabaloo-perspective’ when discussing the interrelationships between issues like environmental protection and sustainable development on the one side, and international investment law on the other side. Quite to the contrary, it is for a variety of reasons by now ever more recognized among governments of countries in the Global South and the Global North, practitioners and scholars alike, that at the level of drafting investment agreements as well as in particular also in the realm of investor-state arbitration proceedings, the central challenge lawmakers and arbitrators are faced with is to provide for a suitable and thus acceptable balance between the legally protected economic interests of foreign investors and the domestic and international governance capacity or “policy space”¹

* The contribution is based on a presentation given by the author at the Panel “International Investment Law and Environmental Protection: How Protective of Host States’ Environment Can (and Should) Investment Tribunals Be?” in the context of the Symposium “Navigating Sustainable Legal Compliance Challenges in the Digital Age” organized and hosted by the Faculty of Law of Thammasat University in Bangkok/Thailand on 23 to 25 June 2025.

of host states to allow the latter to pursue the promotion and protection of other public interest concerns like in particular also the protection of the environmental as well as additional sustainable development objectives.²

The underlying reasons for the currently visible policy shift, that started round about two decades ago to gain increasing momentum on the international scene more broadly, and the resulting ongoing transformation of the international legal framework on the protection of foreign investments³ are most certainly manifold. Prominently among them are on the one side external factors whose implications reach well beyond the rather specific realm of international investment relations. In this connection, it is worth recalling the growing importance of, and attention more recently devoted to, the activities of non-state actors in the international system as well as the corresponding intensified discussion on whether and how to integrate them into the global legal order as addressees of rights, but especially also of responsibilities concerning the promotion of global community interests.⁴ These broader discourses and developments in practice, that first and foremost also focus on the status of transnational corporations as being the dominant type of foreign investors,⁵ undoubtedly also exercise a considerable influence

- 1 See thereto, e.g., *Tietje*, ICSID Review – Foreign Investment Law Journal 24 (2009), 457 (461) (“The need for a ‘policy space’ for governments, i.e. autonomy in national policy-making without constraints by international law and particularly international investment protection law, is one of the most significant consequences of the proliferation of investment law and the fragmentation of international law in general. We are currently witnessing discussions about the necessary policy space in the area of foreign investment, on both the national and international levels.”). See also for example *Artamonova*, New Developments in International Investment Agreements, 36 *et seq.*; *Baltag/Joshi/Duggal*, ICSID Review – Foreign Investment Law Journal 38 (2023), 381 (385 *et seq.*); *Griebel*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 106 *et seq.*; *Broude/Haftel/Thompson*, in: Roberts/Stephan/Verdier/Versteeg (eds.), Comparative International Law, 527 *et seq.*; *Lee*, in: Chaisse/Lin (eds.), International Economic Law and Governance, 131 *et seq.*; *Angin*, ICSID Review – Foreign Investment Law Journal 40 (2025), 11 (15 *et seq.*); *VanDuzer*, in: Delimatsis (ed.), Research Handbook on Climate Change and Trade Law, 434 (454 *et seq.*); *Roberts*, American Journal of International Law 112 (2018), 410 *et seq.*; *Nowrot*, in: Justenhoven/O’Connell (eds.), Peace Through Law, 187 (195 *et seq.*); *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (232); as well as the quite comprehensive analyses by *Titi*, The Right to Regulate in International Investment Law, 32 *et seq.*; and *Mouyal*, International Investment Law and the Right to Regulate, 8 *et seq.*, each with numerous further references.
- 2 Generally on these developments see for example UNCTAD, World Investment Report 2025: International Investment in the Digital Economy, 2025, 106 *et seq.*; UNCTAD, World Investment Report 2017, Investment and the Digital Economy, 2017, 119 *et seq.*; UNCTAD, World Investment Report 2016, Investor Nationality: Policy Challenges, 2016, 1 *et seq.*; UNCTAD, World Investment Report 2012, Towards a New Generation of Investment Policies, 2012, 89 *et seq.*; *Kulick*, Global Public Interest in International Investment Law, 11 *et seq.*; *VanDuzer/Simons/Mayeda*, Integrating Sustainable Development into International Investment Agreements, 2012; the contributions in *Cordonier Segger/Gehring/Newcombe* (eds.), Sustainable Development in World Investment Law, 2011; as well as *Dubava*, in: Cremona/Hilpold/Lavranos *et al.* (eds.), Liber Amicorum for Ernst-Ulrich Petersmann, 389 *et seq.*; and *Nowrot*, Journal of World Investment and Trade 15 (2014), 612 *et seq.*; see in this regard also, e.g., UN GA Res. 74/199, Promoting Investments for Sustainable Development, UN Doc. A/RES/74/199 of 13 January 2020.
- 3 On this perception see, e.g., UNCTAD, World Investment Report 2023: Investing in Sustainable Energy for All, 2023, 75 (“Other notable developments continued the trend towards reforming the international investment regime and highlighted the growing need for its adaptation to meet emerging global objectives and challenges. These include greater attention to investment facilitation and climate change.”); *Puig/Shaffer*, American Journal of International Law 112 (2018), 361 (“The tide is turning. Ferment is in the air. Reform or even transformation of foreign direct investment governance appears on the way.”); *Miles*, in: Lewis/Frankel (eds.), International Economic Law and National Autonomy, 295 *et seq.*; *Mann*, Lewis and Clark Law Review 17 (2013), 521 *et seq.* See also UNCTAD, World Investment Report 2014, Investing in the SDGs: An Action Plan, 2014, 126 (“The IIA regime is undergoing a period of reflection, review and reform.”).
- 4 The contributions on the role played by non-state actors in international law are by now more than legion. See generally for example *Clapham*, Human Rights Obligations of Non-State Actors, 2006; *Alston*, in: Alston (ed.), Non-State Actors and Human Rights, 3 *et seq.*; *Nowrot*, Indiana Journal of Global Legal Studies 6 (1999), 579 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 906 *et seq.*; *Noortmann/Reinisch/Ryngaert* (eds.), Non-State Actors in International Law, 2015; *d’Aspremont* (ed.), Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law, 2011; *Klabbers*, in: Petman/Klabbers (eds.), Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi, 351 *et seq.*
- 5 See also, e.g., *Tietje*, in: Tietje (ed.), International Investment Protection and Arbitration, 17 (32); *Kulick*, Global Public Interest in International Investment Law, 57; *Hellwig/Nowrot*, Towards Investors’ Responsibilities in International

on the current policy shift in international investment law. Indeed, even within these general discussions it is precisely the comparatively strong protection enjoyed by non-state economic actors under international investment law that is frequently referred to as indicating the need to also highlight the responsibilities of investors and the corresponding obligations of states to protect and promote public interest concerns vis-à-vis private actors.⁶ A second, albeit closely related, external aspect worth mentioning is the increasingly important role played by civil society groups on the international scene. While previously largely absent from the evolution of the normative structure on foreign investments, non-governmental organizations (NGOs) are more recently also actively involved in, and concerned with, the rule-making and enforcement processes in this field of law, with calls as well as suggestions for an international regulation of foreign investors being quite high on their agenda.⁷

Aside from these external causes and influences, however, in particular also internal factors and thus structural developments within the realm of international investment law itself have most certainly to be taken into account when assessing the reasons for the current policy shift and the overall changing public perceptions resulting from it. The previous transformation and transition processes from what might be labeled ‘first generation’ bilateral investment treaties (BITs) concluded since the end of the 1950s to the ‘second generation’ investment agreements entered into mostly in the 1980s, the 1990s as well as the first decade of the new century were overall characterized by an enhancement of the legal protection of foreign investors and their activities based on a broad political consensus recognizing these protective aims as the sole – or at least primary – purposes pursued by respective treaty regimes.⁸ This treaty practice, aimed at establishing and fostering an “international investment protection law” in the true sense of the term, saw the introduction of improved levels of substantive guarantees for investors as well as – and particularly noteworthy – also the stipulation of investor-state dispute settlement provisions that were far from common in older BITs and other investment-related agreements.⁹

As a result of these developments, the international legal framework on the protection of foreign investments has since the middle of the 1990s emerged as one of the most dynamic and

Investment Agreements, 9.

- 6 See for example UN Human Rights Council, Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 30; UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/8/5 of 7 April 2008, para. 12 (“Take the case of transnational corporations. Their legal rights have been expanded significantly over the past generation. This has encouraged investment and trade flows, but it has also created instances of imbalances between firms and States that may be detrimental to human rights. The more than 2,500 bilateral investment treaties currently in effect are a case in point. While providing legitimate protection to foreign investors, these treaties also permit those investors to take host States to binding international arbitration, including for alleged damages resulting from implementation of legislation to improve domestic social and environmental standards - even when the legislation applies uniformly to all businesses, foreign and domestic.”).
- 7 Generally concerning the importance of NGOs as a contributing factor to the current policy shift in investment law see also, e.g., *Radi*, Rules and Practices of International Investment Law, 16-17; *Muchlinski*, in: Alvarez/Sauvant (eds.), The Evolving International Investment Regime, 30 (33 *et seq.*).
- 8 Generally on the differences between first, second and third generation investment agreements see also already *Nowrot*, in: Hindelang/Krajewski (eds.), Shifting Paradigms in International Investment Law, 227 (230 *et seq.*); *Nowrot*, The Other Side of Rights in the Processes of Constitutionalizing International Investment Law, 5 *et seq.*
- 9 On this last-mentioned issue see for example *Radi*, Rules and Practices of International Investment Law, 13 (“It is worth mentioning that the first BITs concluded provided only for an inter-State dispute settlement mechanism.”); *Muchlinski*, Multinational Enterprises and the Law, 680 (“Early BITs did not cover disputes between the host state and the investor.”); *Tietje/Sipiorski*, in: Bjorklund/Reinisch (eds.), International Investment Law and Soft Law, 192 (193, 205 and 217 *et seq.*); *Tietje/Nowrot/Wackernagel*, Once and Forever? The Legal Effects of a Denunciation of ICSID, 18 *et seq.*

practically important fields of international law in general and international economic law in particular.¹⁰ At the same time an ever-increasing number of states from the Global North and the Global South as well as other actors like trade unions and civil society organizations have in recent years for a variety of reasons more clearly become aware of the fact that the expanding scope of application as well as the notably increased effectiveness of this regime also have considerable repercussions on the relationship between the host countries on the one side and foreign investors on the other side. On the one hand, this former transformation period first and foremost resulted in foreign investors experiencing a notable strengthening of their status and international legal protection, thereby also “marking another step in their transition from objects to subjects of international law”, particularly on the basis of access to effective international legal remedies.¹¹ On the other hand, however, it is by now quite well-known that certain questions arose as to the respective consequences resulting from these developments for the regulatory autonomy enjoyed by the host states. Although a number of congruent interests of foreign investors and host countries do in fact exist, international investment law has with regard to its overarching scheme always primarily also been shaped and influenced by a certain tension between the economic interests pursued by investors and the necessary policy space of host states.¹² In this connection, it has already for a number of years and in particular also more recently frequently and rightly been emphasized in the legal literature that the enhanced normative effectiveness of international investment law – in the same way as for example of the transnational normative regime established by the World Trade Organization (WTO)¹³ –

10 On this perception see for example *Collins*, International Investment Law, 1-2 (“Yet, within a relatively short period of time this area of law witnessed a phenomenal growth to become one of the most dynamic and intensively studied spheres of international law.”); *Reinisch*, International Investment Law, 2 (“Other than the rather scarce case law of international courts, investment tribunals offered ‘international law in action’.”).

11 *Plama Consortium Ltd. v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, para. 141 (“For all these reasons, Article 26 ECT provides to a covered investor an almost unprecedented remedy for its claim against a host state. [...] By any standards, Article 26 is a very important feature of the ECT which is itself a very significant treaty for investors, marking another step in their transition from objects to subjects of international law.”); concerning the international legal status of foreign investors on the basis of investment agreements see also, e.g., *David Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Award of 18 September 2018, para. 738 (“Under international law of investments, particularly under DR-CAFTA, the investors enjoy by themselves a number of rights both substantive and procedural, including the right to sue directly the host State when it breaches its international obligations on foreign investment (Section A of Article 10 in DR-CAFTA).”); *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145 (“The proliferation of bilateral investment treaties has effected a profound transformation of international investment law. Most significantly, under these instruments investors are entitled to seek enforcement of their treaty rights by directly bringing action against the State in whose territory they have invested.”); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008, paras. 167 *et seq.* (“In the Tribunal’s view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. [...] In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them.”); *Tietje*, The Applicability of the Energy Charter Treaty, 13 (“[...] Art. 26 ECT and its consequent substantive investment protection regulations of Part III ECT clearly indicate that investors gain the status of subjects of international law under the ECT.”); *Spiermann*, Arbitration International 20 (2004), 179 (185) (“It would take an excessively narrow, albeit not unprecedented standard of interpretation to find that bilateral investment treaties do not vest rights in the investor as a subject of international law.”); *Nowrot*, Indiana Journal of Global Legal Studies 18 (2011), 803 (825 *et seq.*); *Douglas*, The International Law of Investment Claims, 10 *et seq.* For a more critical perception see, e.g., *Reinisch*, in: Noortmann/Reinisch/Ryngaert (eds.), Non-State Actors in International Law, 253 (262) (“Ultimately, the question whether investors are partial subjects of international law or not retains an artificial flavor.”).

12 On this perception see also already for example *Tietje*, Internationales Investitionsschutzrecht, 5 *et seq.*; *Krajewski*, Wirtschaftsvölkerrecht, para. 547; *Garcla-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (2009), 464 *et seq.*; *Nowrot*, Ein notwendiger “Blick über den Tellerrand”, 15; *Nowrot*, International Investment Law and the Republic of Ecuador, 16; *Perkams*, Internationale Investitionsschutzabkommen, 21 *et seq.*

13 See thereto, e.g., *Tietje*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 164 (197 *et seq.*).

has led to a growing influence of this branch of international economic law on the content and shape of domestic legal standards and administrative actions as well as thus, more generally, to increased constraints on the regulatory autonomy of the respective host countries, also as far as the adoption of measures aimed at environmental protection is concerned.¹⁴

The ‘privatization’ of international law enforcement in the realm of investment protection plays undoubtedly – as for example also evidenced in other areas such as certain regional human rights regimes like the one established by the European Convention on Human Rights – a key role in the respective dynamization of a legal regime. Nevertheless, these quite far-reaching consequences are not exclusively to be attributed to the increased recognition of direct access by foreign investors to international arbitration. Rather, these effects can more accurately be described as resulting from processes of mutual reinforcements of procedural and substantive law factors. In the realm of substantive investment law, attention needs to be drawn in this regard to the fact that the arbitral practice is currently no longer primarily confronted with the classical types of direct expropriations or large-scale nationalizations, but rather with cases involving for example the protection against indirect expropriation as well as the guarantee of fair and equitable treatment as also being stipulated in most modern BITs and other international investment agreements. Both are traditionally quite broad, with regard to their regulatory content still controversially discussed and thus somewhat elusive stipulations.¹⁵ And both have, *inter alia*, by setting certain standards for domestic administrative procedures, in particular in light of the occasionally quite far-reaching understanding of some investment arbitration tribunals developed a considerable potential to codetermine – and predetermine – certain segments of the domestic legal orders of host states; again, last but surely not least, when deciding on domestic measures related to the protection of the host states’ environment.¹⁶

To be sure, it hardly needs to be emphasized that stipulating restrictions on the ‘policy space’ of host countries on the basis of international legal obligations and thus providing conditions of legal certainty for foreign investors are among the central – and in principle indispensable – purposes of BITs and other international investment agreements. However, it also has to be recalled in this connection, that the regulatory autonomy enjoyed by host states is very far from being merely an end in itself. Rather, it is first and foremost a means to pursue – and indeed even finds its justification and legitimation exclusively in the pursuit of – the promotion and protection of public interest concerns,¹⁷ among them human rights, development needs, social and labor standards as well as, last but surely not least, environmental issues. In light of the enhanced effectiveness and considerably expanded scope of application of international investment law, the possibility of disputes increasingly arises which involve impairments of economic interests of foreign investors covered by respective protection standards of BITs and other investment agreements that are justified by the host state in question under recourse to public interest concerns.¹⁸ And indeed, it is well-known and, considering the comparatively high number of international investor-state arbitration proceedings, also hardly surprising that respective constellations have in particular in recent decades also already materialized in practice. And this finding applies, again, first and foremost also to a variety of host states’

14 See for example *Tietje*, Internationales Investitionsschutzrecht, 10 *et seq.*; *Dolzer*, New York University Journal of International Law and Politics 37 (2005), 953 *et seq.*

15 See thereto also *infra* under C.

16 See also, e.g., *Kaushal*, Harvard International Law Journal 50 (2009), 491 (525 *et seq.*); *Tietje*, Internationales Investitionsschutzrecht, 11 *et seq.*

17 See also for example *Montt*, State Liability in Investment Treaty Arbitration, 7 (“Put differently, it [the state] has the constitutional duty to allocate burdens and benefits across society in its permanent quest for the public good.”); *Nowrot*, European Republicanism in (Legitimation) Action, 7.

18 For respective scenarios see, e.g., *Voon/Mitchell*, Journal of International Economic Law 14 (2011), 515 *et seq.*

regulatory measures that are intended to protect the environment.

And it is precisely in light of these findings that, as already indicated above, it becomes obvious, that – at the level of designing international investment agreements as well as most certainly also in the realm of investor-state arbitration proceedings – the central challenge legislators and arbitrators are as of today ever more faced with is to provide for an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors on the one side and the domestic as well as international governance capacity of host countries for the protection and promotion of public interest concerns on the other side. It is submitted that probably very close to everybody involved in and affected by international investment law would readily subscribe to this rather general conclusion. To the contrary, it is precisely the underlying issues of how to achieve, and of what exactly constitutes, an appropriate balance between host countries and foreign investors as well as in particular also the question whether the current predominant approach in this area of law has achieved or is even capable of achieving a respective proper equilibrium, that are at the heart of the at present again increasingly controversial debate on the current situation of, and future perspectives for, the international legal regime on the protection of foreign investors.

Far from being confined to certain parts of the world or certain types of countries, this debate is indeed global in character. Thereby, it is from a structural perspective first and foremost also the challenges arising from the current institutional design of investor-state arbitration which have in recent years given rise to concerns among states, stakeholders and academics,¹⁹ but also for example respective institutions of the European Union.²⁰ In addition to the problem of inconsistent decisions frequently – and at least to a certain extent rightly – associated with the present system of arbitration tribunals which considerably limits the predictability of the outcome of future cases for contracting state parties and investors,²¹ it is first and foremost the quite broad delegation of competences to individual investment tribunals who are authorized and required to interpret and thus clarify very indeterminate legal terms such as fair and equitable treatment or the distinction between indirect expropriation and legitimate regulatory measures that has received increasing attention. This is especially the case since in the course of their adjudicatory tasks, investment tribunals thus also have to decide on the existence and scope of the public policy discretion enjoyed by the host states as well as conflicting international legal obligations under other regimes like international environmental law. In light of these findings as well as the potentially far-reaching political and financial consequences of tribunal decisions, the question ‘who decides’ – quite well-known also from the domestic context²²

19 See thereto also for example the respective observations by *Schreuer*, in: Reinisch/Knahr (eds.), *International Investment Law*, 3 (5) (“The future of investment arbitration is by no means certain. The enthusiasm of States, especially those that have been on the losing side in several major cases, has been severely dampened. Even former champions of investors’ rights, such as the United States, have lost much of their eagerness after finding themselves in the role of respondents.”); *Crawford*, *Brownlie’s Principles of Public International Law*, 609 (“The case against investment arbitration is overstated, but for the time being, at least, its future is in doubt.”); as well as, e.g., *Van Harten*, in: Lim (ed.), *Alternative Visions of the International Law on Foreign Investment*, 103 *et seq.*; *Choi*, *Journal of International Economic Law* 10 (2007), 725 (740); *Ryan*, *University of Pennsylvania Journal of International Law* 29 (2008), 725 (745 *et seq.*); *Donath*, *Proliferation und Legitimation der internationalen Investitionsschiedsgerichtsbarkeit*, 31 *et seq.*; *Miles*, *European Yearbook of International Economic Law* 7 (2016), 273 *et seq.*

20 See, e.g., European Parliament, Resolution on the EU-China Negotiations for a Bilateral Investment Agreement of 9 October 2013, para. 41 (“Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling-out of legitimate public regulations; [...]”).

21 Generally on the issue of inconsistency by the arbitral tribunals when deciding similar issues see for example *Angin*, *ICSID Review – Foreign Investment Law Journal* 40 (2025), 11 (30 *et seq.*); *Reinisch*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 113 (115 *et seq.*); *Wells*, in: *ibid.*, 341 (342); *Tams*, *An Appealing Option?*, 18 *et seq.*; *Tietje*, *Internationales Investitionsrecht im Spannungsverhältnis*, 17 *et seq.* See thereto also *infra* under C.

22 From of the very numerous contributions on this issue, see for example the by now already classical treatises by *Bickel*,

– and thus also the issues of qualification and in particular ‘backgrounds’, policy preferences as well as the preconception (*Vorverständnis*) of arbitrators become ever more important and much closer subject to public scrutiny.²³

In addition and from a broader perspective, it is increasingly and in principle rightly questioned whether the currently still quite close structural orientation of investor-state arbitration on the model and concepts of international commercial arbitration adequately reflects the differences between these two types of dispute settlement.²⁴ Two central arguments not infrequently brought forward in this connection are worth recalling here. First, the fact that international investor-state arbitration proceedings – in this regard clearly following the model of commercial arbitration – are still predominantly governed by the principle of confidentiality is more and more regarded as inappropriate, especially in light of the far-reaching consequences of, and public interest concerns involved in, these dispute settlement mechanisms.²⁵ Second, and somewhat related to the aforementioned finding, as well as of particular importance in the present context, is the quite frequent observation that the differences between these two dispute settlement mechanisms first and foremost also relate to the kinds of interests involved. Whereas commercial arbitration is primarily concerned with competing private interests, investor-state arbitration typically involves first and foremost also the common good and thus public interests, or – in other words – requires investment tribunals and their individual arbitrators to adjudicate on the existence of as well as weight to be attached to respective public interests, often prominently among them issues of environmental protection, in the case at issue.²⁶

The Least Dangerous Branch, 1 *et seq.*; and Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, 1970.

- 23 See thereto, e.g., *van Aaken*, Finnish Yearbook of International Law 17 (2006), 91 (124 *et seq.*); *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 18; *Peterson*, Human Rights and Bilateral Investment Treaties, 45; *Ketcheson*, in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law*, 97 (104 *et seq.*); *Peterson*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 483 (484, 486 *et seq.*); *Van Harten*, *Investment Treaty Arbitration and Public Law*, 122 *et seq.*, 167 *et seq.*; as well as the assessment by *Park*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 189 *et seq.* See thereto also *infra* under C.
- 24 See for example *García-Bolívar*, ICSID Review – Foreign Investment Law Journal 24 (2009), 464 (484-485) (“However, the disputes that arise under the international law of foreign investment are unique in terms of the subjects. The interpretation of concepts and principles that are peculiar to States and public international law cannot be left to the view of ever-changing arbitrators. Therefore, the use of concepts borrowed from international commercial arbitration needs to be reconsidered for purposes of foreign investments. It has been said that international arbitration is similar to local arbitration just as sea lions are similar to jungle lions: the similarities end with the name. The same can probably be said of investment arbitration and international commercial arbitration. Whereas investment arbitration deals with issues of international law and public policy and the interests of sovereign States, that is rarely the case in typical international commercial arbitrations.”).
- 25 See, e.g., Human Rights Council, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/11/13 of 22 April 2009, para. 34 (“When an investor brings a claim regarding a bilateral investment treaty or host Government agreement to binding international arbitration, depending on the rules incorporated in-to the agreements, little or nothing about the case may be made public. This is at variance with precepts of transparency and good governance. While confidential business information must be protected, under some rules not even the existence of a case against a country is known to its public, let alone its substance. This impedes more responsible contracting by companies and Governments, and contributes to inconsistent rulings by arbitrators, undermining the system’s predictability and legitimacy.”); as well as *Choudhury*, *Vanderbilt Journal of Transnational Law* 41 (2008), 775 (808 *et seq.*); *García*, *Florida Journal of International Law* 16 (2004), 301 (354 *et seq.*); *Sweetland Edwards*, *Shadow Courts*, 13 *et seq.*; *Tams/Zoellner*, *Archiv des Völkerrechts* 45 (2007), 217 (222 *et seq.*); *Delaney/Magraw*, in: Muchlinski/Ortino/Schreuer (eds.), *International Investment Law*, 721 (756 *et seq.*).
- 26 See, e.g., *Tietje*, Internationales Investitionsrecht im Spannungsverhältnis, 18; *Van Harten*, in: Waibel *et al.* (eds.), *The Backlash Against Investment Arbitration*, 433 (434 *et seq.*); *Werner*, in: Dupuy/Francioni/Petersmann (eds.), *Human Rights in International Investment Law*, 115 (116); *Choudhury*, *Vanderbilt Journal of Transnational Law* 41 (2008), 775 (790 *et seq.*). On the still disputed review competence of tribunals concerning the existence of public interest concerns and a respective margin of appreciation enjoyed by the host states see for example on the one hand *Libyan American Oil Company (LIAMCO) v. Libya*, Award of 12 April 1977, ILR 62 (1981), 140 (194) (“Motives are indifferent to international law, each state being free to judge for itself what it considers useful or necessary for the public good”); as well as on the other hand *ADC Affiliate Ltd. et al. v. Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006,

Against this background and in light of these findings, the present contribution intends to provide in the following some thoughts, no more than that, on the – only at first sight straightforward and comparatively easy to deal with – question and issue of what to expect, and what not to expect, from investment tribunals and their arbitrators when addressing issues of environmental protection in international investor-state dispute settlement proceedings. For these purposes, an attempt will be made to approach and address this research subject in three main steps. The first part will address the question what cannot and thus also should not legitimately be expected from investment arbitrators in the present context, in particular in light of the character of investor-state arbitration proceedings as an almost always law-based and law-determined mechanism of international dispute settlement (B.). The subsequent second step is aimed at identifying and articulating our legitimate expectations as far as the approaches of investment tribunals are concerned when addressing issues of environmental protection, with a particular emphasis on the challenges potentially arising in this connection (C.). Moreover, in the third analytical step – and final part of this contribution – an attempt will be made to somewhat broaden the research perspective by at least briefly also addressing the question what to expect from other actors that are actively participating in, or are interested in, investor-state dispute settlement proceedings dealing with issues of environmental protection, thereby also assessing the potential role of the members of investment tribunals in this connection (D.).

B. What Not to Expect from Investment Arbitrators: On the Law-Based Character of Investor-State Dispute Settlement and its Consequences

When first assessing the topic here at issue from the perspective of what not to expect from investment arbitrators when dealing with aspects related to the protection of host states' environment, it seems useful to start by recalling also in the present context the – under ordinary circumstances and in particular also in almost all respective cases in the arbitral practice – law-based and law-determined character of investor-state arbitration proceedings.

Admittedly, it is surely the case that most, potentially even all, BITs and other international investment agreements that stipulate respective dispute settlement clauses also explicitly foresee a potential recourse to political or quasi-diplomatic methods such as negotiations or mediations²⁷ in order to solve disputes between foreign investors and host states. A more recent example is provided by Article 24 (1) of the BIT concluded between Japan and Zambia on 6 February 2025, stating that “[i]n the event of an investment dispute between the claimant and the respondent, they should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures”.²⁸ However, once the

para. 432 (“In the Tribunal’s opinion, a treaty requirement for “public interest” requires some genuine interest of the public. If mere reference to “public interest” can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”).

27 Generally on the different methods of the settlement of international disputes see, e.g., *Merrills/De Brabandere*, *Merrills’ International Dispute Settlement*, 38 *et seq.*; *Tanaka*, *The Peaceful Settlement of International Disputes*, 29 *et seq.*; *De Brabandere*, in: Evans (ed.), *International Law*, 528 (533 *et seq.*); *Epping*, in: Ipsen (ed.), *Völkerrecht*, § 59, paras. 6 *et seq.*; *Tomuschat*, in: Simma/Khan/Nolte/Paulus (eds.), *Charter of the United Nations*, Vol. I, Article 33, paras. 25 *et seq.*; *Shaw*, *International Law*, 882 *et seq.*; *Collier/Lowe*, *The Settlement of Disputes in International Law*, 20 *et seq.* On the distinction between political and legal methods of international dispute settlement see for example *Krajewski*, *Völkerrecht*, § 8, para. 48; *von Arnould*, *Völkerrecht*, paras. 445 *et seq.*

28 Agreement between Japan and the Republic of Zambia for the Promotion and Protection of Investment of 6 February

parties to the dispute have chosen and initiated an investor-state arbitration proceeding, they have – normally and in light of the very dominant practice in investment arbitration – consented to an exclusively law-based approach to the settlement of their dispute.²⁹

Thereby, and that said, it should also not be entirely left unmentioned that, in the same way as for example Article 38 (2) of the Statute of the International Court of Justice and Article 293 (2) of the United Nations Convention on the Law of the Sea, all major international arbitration rules and regimes commonly used in international investment arbitration include provisions allowing the parties to agree to settle their investment dispute on the basis of *ex aequo at bono*,³⁰ and thus to permit the arbitrators to resolve the dispute in accordance with their personal views of what they consider to be right and just by also taking into account, among others, considerations of fairness and equity. Respective options to adopt the arbitral decision on the basis of extra-legal arguments and considerations are recognized for example in Article 42 (3) of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), Rule 68 (2) of the 2022 ICSID Additional Facility Arbitration Rules, Article 35 (2) of the 2021 UNCITRAL Arbitration Rules, Article 27 (3) of the 2023 Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Rule 28.2 of the 2017 Investment Arbitration Rules of the Singapore Arbitration Center (SIAC), Article 21 (3) of the 2021 International Chamber of Commerce (ICC) Arbitration Rules, as well as in Article 22 (4) of the 2020 Arbitration Rules of the London Court of International Arbitration (LCIA). Nevertheless, such an option to decide the dispute not on the basis of positive law but – more or less subjectively determined and applied – extra-legal considerations of justice and fairness has until now only very rarely been agreed upon by the parties to an investor-state arbitration proceeding.³¹ And in the absence of a respective authorization based on a consent by the parties to the dispute, an investment arbitration tribunal is expected – and indeed also required – to decide the case exclusively on the basis of the applicable positive law and thus to refrain from taking recourse to other concepts, considerations and principles it might consider equitable.³²

It follows from the foregoing assessment that, except under rare circumstances being moreover hardly ever of practical relevance in the arbitral practice, it is the role and function of the members of international investment tribunals to resolve disputes between foreign investors and host states according to the applicable law only, rather than on the basis of his or her own personal and thus necessarily also to a certain extent subjective views of what an abstract

2025, available on the internet under: <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/5177/japan---zambia-bit-2025->> (accessed 4 September 2025).

29 On this perception see also for example already *De Brabandere*, Investment Treaty Arbitration as Public International Law, 91.

30 See thereto, e.g., *Pellet/Müller*, in: Zimmermann/Tams (eds.), The Statute of the International Court of Justice – A Commentary, Article 38, paras. 161 ff.; *Dörr*, in: Ipsen (ed.), Völkerrecht, § 23, para. 9; *Schröder*, in: Proelß (ed.), Völkerrecht, 823 (879); *Kotzur*, Ex aequo et bono, paras. 1 ff., in: Peters (ed.), Max Planck Encyclopedia of Public International Law, available on the internet under: <www.mpepil.com/> (accessed 4 September 2025).

31 For respective examples see *Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award of 8 August 1980, paras. 4.1 *et seq.*; *Atlantic Triton Company Limited v. People's Revolutionary Republic of Guinea*, ICSID Case No. ARB/84/1, Award of 21 April 1986. See thereto also *Schreuer*, ICSID Review – Foreign Investment Law Journal 11 (1996), 37 *et seq.*; *Jovanovic*, Revija Kopaoničke škole prirodnog prava 3 (2021), 147 *et seq.*; *Bjorklund/Vanhonnaeker*, in: Fouret/Gerbay/Alvarez (eds.), The ICSID Convention, Regulations and Rules – A Practical Commentary, Article 42, para. 4.270; *Kriebaum*, in: Schill/Malintoppi/Reinisch/Schreuer/Sinclair (eds.), Schreuer's Commentary on the ICSID Convention, Vol. I, Article 42, paras. 328 *et seq.*

32 See also, e.g., *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985, para. 79; *Schreuer*, ICSID Review – Foreign Investment Law Journal 11 (1996), 37 (53 *et seq.*); *Kriebaum*, in: Schill/Malintoppi/Reinisch/Schreuer/Sinclair (eds.), Schreuer's Commentary on the ICSID Convention, Vol. I, Article 42, para. 340.

concept of justice might suggest in the case at issue.³³ Consequently, investment arbitrators are neither expected nor – based on their professional responsibilities – even entitled to, for example, “displace, by reference to general policy considerations concerning investor protection, the”³⁴ applicable legal rules as stipulated in the investment agreement or other relevant source of positive law aimed at protecting the host state’s environment and safeguarding the country’s respective right to regulate in order to promote this public interest concern. However, in light of these overarching legitimate expectations, they are most certainly also equally barred, in the absence of a sufficient basis in the applicable law and thus ultimately *sine lege* or even *contra legem*, from simply taking into account – merely alleged and empirically unproven or even real-life – changes in governmental as well as societal expectations and perceptions concerning the overall importance of environmental protection or certain aspects thereof as an increasingly central policy and public interest concern for political communities around the world, with the supposedly ‘good intention’ to foster and strengthen the respective regulatory policy space of host states vis-à-vis foreign investors in the dispute at hand. Both forms of what might be referred to as a kind of ‘extra-judicial activism’ are, already in the interest of legal certainty and in light of the duties bestowed upon investment arbitration tribunals, undoubtedly rather improper and thus unacceptable means for investment arbitrators when trying to contribute to an appropriate and thus acceptable balance between the legally protected economic interests of foreign investors on the one side and the domestic as well as international governance capacity of host countries for the promotion of public interest concerns like the protection of the environment on the other side.

The fundamental importance of ensuring this law-based and law-determined character of investor-state arbitration proceedings arguably finds its manifestation also in a number of overarching central principles and concepts of arbitral procedure; principles and concepts that are for valid reasons not infrequently considered as at least also serving the purpose of promoting and encouraging legally-guided decision-making processes of investment arbitrators.

This applies for example to the requirement that arbitrators must decide a dispute impartially.³⁵ Although not infrequently used interchangeably with the term and – at least in part complementary – concept of ‘independence’ and despite the difficulties connected with defining its precise meaning,³⁶ impartiality should and can be regarded as an autonomous normative principle that “denotes the absence of prejudice or bias”.³⁷ Summarizing its settled case law on

33 See also for example already *Landau*, in: van den Berg (ed.), 50 Years of the New York Convention, 187 (188 and *passim*); *De Brabandere*, Investment Treaty Arbitration as Public International Law, 91; *Perrone*, Investment Treaties and the Legal Imagination, 109. On this issue see also, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 613 (“The fair and equitable treatment standard must be objective, not based on personal opinions of the arbitrators or personal expectations of a party.”).

34 *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 95 (“Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.”).

35 Generally thereto as well as on the closely connected duty of disclosure of investment arbitrators see for example *Fach Gómez*, Key Duties of International Investment Arbitrators, 25 *et seq.*

36 See, e.g., *Cleis*, The Independence and Impartiality of ICSID Arbitrators, 20 *et seq.*, with further references.

37 European Court of Human Rights (ECHR), *Ramos Nunes de Carvalho E Sá v. Portugal*, Appl.-No. 55391/13, 57728/13 and 74041/13, Judgment of 21 June 2016, para. 71; see also, e.g., *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19 *et al.*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal of 12 May 2008, para. 28 (“Impartiality, [...], concerns the absence of a bias or predisposition toward one of the parties.”); see thereto

the requirement of an ‘impartial tribunal’ within the meaning of Article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights more recently held that the “existence of impartiality [...] must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality”.³⁸ Impartiality of arbitrators is universally – and rightly – considered as a fundamental component of due process and thus an, in principle, indispensable prerequisite for any fair judicial and arbitral proceeding.³⁹ However, this requirement is not only of immanent importance to the respective parties of an individual investment dispute but – viewed from an overarching perspective – first and foremost also to the integrity of, and confidence in, the today increasingly disputed system of international investor-state arbitration as a whole.⁴⁰ Moreover, and somewhat closely related to the two aforementioned aspects, the principle and requirement of impartiality, or the rather similar notion and concept of (a lack of) ‘out-come preferences’ on the side of individual arbitrators as not infrequently used in international commercial arbitration,⁴¹ arguably also assists in the creation of even more favorable conditions for exclusively law-oriented decision-making processes by international investment tribunals.

The same holds true for the duty of arbitrators to provide a reasoned award as being “firmly rooted in the treaty provisions, rules, and laws applicable to virtually all investment arbitrations worldwide”.⁴² The importance of this principle in the context of arbitration proceedings is already indicated by the fact that some of the major international arbitration rules and regimes commonly used in international investor-state arbitration do not even allow the disputing parties to waive this requirement and thus transform the tribunal’s duty to state reasons into a mandatory element of the arbitration proceedings from which no derogation is possible. This applies for example to Article 48 (3) of the ICSID Convention and Article 32 (2) of the 2021 ICC Arbitration Rules. However, even if the arbitration rules chosen by the parties contain the possibility to agree otherwise and thus waive the requirement of a reasoned award as for example foreseen in Rule 70 (1) (i) of the 2022 ICSID Additional Facility Arbitration Rules,

also, e.g., *Brekoulakis/Howard*, ICSID Review – Foreign Investment Law Journal 38 (2023), 644 (647 *et seq.*). Generally on the difference between the concepts of “independence” and “impartiality” see also for example *Luttrell*, *Bias Challenges in International Commercial Arbitration*, 21 *et seq.*

38 ECHR, *Ramos Nunes de Carvalho E Sá v. Portugal*, Appl.-No. 55391/13, 57728/13 and 74041/13, Judgment of 21 June 2016, para. 71; see also subsequently for example ECHR, *Ramljak v. Croatia*, Appl.-No. 5856/13, Judgment of 27 June 2017, para. 26 with further references. On the meaning of impartiality in the present context see also, e.g., *Cleis*, *The Independence and Impartiality of ICSID Arbitrators*, 21; *Park*, *San Diego Law Review* 46 (2009), 629 (635 *et seq.*); *Donahey*, *Journal of International Arbitration* 9 (No. 4, 1992), 31 (32).

39 See, e.g., International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*, Practitioners Guide No. 1, 2007, 27 *et seq.*; *Olbourne*, *The Law and Practice of International Courts and Tribunals* 2 (2003), 97 *et seq.*; *Guillaume*, *The Law and Practice of International Courts and Tribunals* 2 (2003), 163; *Brown*, *The Law and Practice of International Courts and Tribunals* 2 (2003), 63 *et seq.*; *Shelton*, *The Law and Practice of International Courts and Tribunals* 2 (2003), 27; *Giorgetti*, *George Washington International Law Review* 49 (2016), 205 (231 *et seq.*). On the stipulation of the principle of impartiality in major international arbitration rules and regimes commonly used in international investment arbitration see, e.g., *Nowrot/Sipiorski*, *Arbitrator Intimidation and the Rule of Law*, 12 *et seq.*

40 Generally on this perception see also already, e.g., *Reinisch/Knahr*, in: Peters/Handschin (eds.), *Conflict of Interest in Global, Public and Corporate Governance* 103 (104); *Nowrot/Emily*, *The Law and Practice of International Courts and Tribunals* 17 (2018), 178 (185); *Bottini*, *Suffolk Transnational Law Review* 32 (2009), 341.

41 See only *De Brabandere*, *Investment Treaty Arbitration as Public International Law*, 81, with further references.

42 On this perception see more recently *Simma/Ortiges*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (355).

Article 34 (3) of the 2021 UNCITRAL Arbitration Rules, Article 22 (2) of the 2020 LCIA Arbitration Rules, and in Article 42 (1) of the 2023 SCC Arbitration Rules, this option to opt out of this obligation is – as far as I’m aware of it – never taken recourse to in the practice of investor-state dispute settlement.⁴³

The underlying reasons for this normative expectation as addressed to the members of investment tribunals to provide a reasoned award are surely manifold.⁴⁴ Prominently among them are, to mention but a few examples, the need to sustain and foster governmental and public faith in the integrity of the processes of investment arbitration,⁴⁵ the internal, self-regulatory function for the decision-makers during the decision-making processes that lead to the judgement or award,⁴⁶ the usefulness of this requirement as a safeguard against arbitrary and biased decision-making by tribunals,⁴⁷ the desirability to increase the acceptance of a decision and thus also the compliance with an award,⁴⁸ the function to enable a review process of the judgement or award,⁴⁹ the function to guide the parties and other relevant and interested actors

43 See also, e.g., *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (355 footnote 8).

44 The literature on the advantages associated with the duty to provide a reasoned decision in general and in international arbitration practice in particular are by now more than legion. See for example *Bingham*, *Arbitration International* 4 (1988), 141 *et seq.*; *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*, 187 *et seq.*; *Kischel*, *Die Begründung*, 39 *et seq.*; *Lalive*, *Journal of International Dispute Settlement* 1 (2010), 55 *et seq.*; *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 *et seq.*; *Schmitt*, *Gesetz und Urteil*, 82 *et seq.*; *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 463 *et seq.*; *Towfigh*, *Die Pflicht zur Begründung*, 11 *et seq.*; *Schill*, *Leiden Journal of International Law* 23 (2010), 401 (424 *et seq.*); *Kneubühler*, *Die Begründungspflicht*, 94 *et seq.*; *Mashaw*, *Fordham Law Review* 70 (2001), 17 (18 *et seq.*); *Ortino*, *Journal of International Dispute Settlement* 3 (2012), 31 (33 *et seq.*).

45 See thereto also, e.g., *Glamis Gold Ltd. v. USA*, UNCITRAL Arbitration, Award of 8 June 2009, para. 8 (“Third, it is important that a NAFTA tribunal provide particularly detailed reasons for its decisions. All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal’s view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organizations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. Second, while a corporate participant in arbitration may withdraw from utilizing arbitration in the future or from doing business in a particular country, the three NAFTA State Parties have made an indefinite commitment to the deepening of their economic relations. In this sense, not only compliance with a particular award, but the long-term maintenance of this commitment requires both governmental and public faith in the integrity of the process of arbitration. Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards. However, the time and expense of such annulments are to be avoided. The detailing of reasons may not avoid the initiation of an annulment procedure, but it is hoped that such reasons will aid the reviewing body in a prompt resolution of such motions.”); on this aspect see also for example *De Brabandere*, *Investment Treaty Arbitration as Public International Law*, 91 *et seq.*

46 On this aspect see already *Bingham*, *Arbitration International* 4 (1988), 141 (142 *et seq.*); *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*, 187 (190 *et seq.*); *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (365); *Cheng/Trisotto*, *Suffolk Transnational Law Review* 32 (2009), 409 (412); *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 463 *et seq.*; *Schmidt-Aßmann*, *Das allgemeine Verwaltungsrecht als Ordnungsidee*, 287; *Hepburn*, *International and Comparative Law Quarterly* 61 (2012), 641 (644); *Cohen*, *Archiv für Rechts- und Sozialphilosophie* 96 (2010), 1 (11); *Kischel*, *Die Begründung*, 40 *et seq.*; *Skouris*, *Die Begründung von Rechtsnormen*, 51 *et seq.*; *Classen*, *Gute Verwaltung im Recht der Europäischen Union*, 320.

47 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of 23 December 2010, para. 250 (“The obligation to give a reasoned award is a guarantee that the Tribunal has not decided in an arbitrary manner.”); *Bingham*, *Arbitration International* 4 (1988), 141 (142); *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*, 187 (189 *et seq.*).

48 *Glamis Gold Ltd. v. USA*, UNCITRAL Arbitration, Award of 8 June 2009, para. 8; *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (365); *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 463; *Engel*, *Rechtstheorie* 32 (2001), 23 (37 *et seq.*); *Kischel*, *Die Begründung*, 52 *et seq.*; *Everling*, *Europarecht* 1994, 127 (131); *Krüger*, *Allgemeine Staatslehre*, 746; *Lücke*, *Begründungszwang und Verfassung*, 72; *Saurer*, *Verwaltungs-Archiv* 100 (2009), 364 (365); *Burghart*, *Die Pflicht zum guten Gesetz*, 95; *Streinz*, *Archiv des öffentlichen Rechts* 135 (2010), 1 (25).

49 *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (365); *Bingham*, *Arbitration International* 4 (1988), 141 (142); *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*,

in their future conduct⁵⁰ as well as the for valid reasons rightly shared idea that the giving of reasons enhances the rationality of the decisions taken and awards rendered.⁵¹

Moreover, and admittedly somewhat closely related to the above-mentioned underlying reasons as well as of particular importance in the present context, the duty to give reasons and provide a reasoned award allow for the retraceability of the arbitrators' decision-making processes and thus enables the parties to verify that the decision was taken based on a rational application of the applicable legal rules and principles and thus not, for example, on extra-legal factors such as their own personal and subjective views of the justice of the dispute at issue,⁵² thereby again providing an important safeguard and mechanism to ensure the exclusively law-oriented decision-making processes by international investment tribunals.

C. What Can and Should We Legitimately Expect from Investment Tribunals?: On the Inherent Vagueness of Legal Language, Individual Policy Preferences and Reasons for a Certain Hope

In the previous section we have seen or reminded ourselves of the finding that whatever to expect from investment arbitrators, whatever they can and should do to protect host states' environment in the course of investor-state dispute settlement proceedings, must normally always be based on legal reasoning and thus the legal rules and principles applicable in the respective dispute. While this is undoubtedly true, basically undisputed and well-established, a certain caution is nevertheless certainly also warranted when trying to draw conclusions from this fact about the possibility to identify and articulate precise outcome expectations as far as the dogmatic approaches to, and overall 'handling' of, issues of environmental protection by individual investment tribunals in specific cases are concerned. In order to further explain and substantiate this – at least at first sight at least to some readers probably slightly surprising or potentially even somewhat disturbing – proposition, it seems useful to draw attention to five, to a certain extent interrelated, overarching aspects.

The first of them concerns what might be referred to as the inherent vagueness of legal language and the resulting limits of normative governance instruments to guide and determine the behavior and conduct of the addressees and users of the law. The to a certain degree existing

187 (190 *et seq.*).

50 See thereto, e.g., *Bingham*, *Arbitration International* 4 (1988), 141 (142); *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*, 187 (188 *et seq.*).

51 *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (364); *Cheng/Trisotto*, *Suffolk Transnational Law Review* 32 (2009), 409 (411 *et seq.*); *Sen*, *The Idea of Justice*, 31 *et seq.*; *Cal-liess*, *Prozedurales Recht*, 169; *Alexy*, *Theorie der juristischen Argumentation*, 43; *Peters*, *European Journal of International Law* 20 (2009), 569 (572) ("The obligation to give reasons [...] would still force the member to rationalize its decision."); *Cohen*, *Archiv für Rechts- und Sozialphilosophie* 96 (2010), 1 (7 *et seq.*); *Hoffmann-Riem*, in: Schmidt-Aßmann/Hoffmann-Riem (eds.), *Strukturen des Europäischen Verwaltungsrechts*, 317 (377); *von Arnould*, *Jahrbuch des Öffentlichen Rechts NF* 59 (2011), 497 (513); *Kriele*, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 29 (1971), 46 (68).

52 On this important aspect see also for example already *Bingham*, *Arbitration International* 4 (1988), 141 (142); *Simma/Ortices*, in: Fach Gómez/Titi (eds.), *The Award in International Investment Arbitration*, 353 (365); *De Brabandere*, *Investment Treaty Arbitration as Public International Law*, 91; *Cheng/Trisotto*, *Suffolk Transnational Law Review* 32 (2009), 409 (412); *Landau*, in: van den Berg (ed.), *50 Years of the New York Convention*, 187 (188).

“indeterminacy of language”⁵³ or respective “inherent defects of language”⁵⁴ and, as a consequence, the often given ambiguity also of the language of law⁵⁵ as well as the resulting “limit, inherent in the nature of language, to the guidance which general language can provide”⁵⁶ have so frequently been emphasized in the legal literature that they can be by now safely be regarded as something like common knowledge among legal scholars and practitioners.⁵⁷ While this finding applies in principle basically to all legal rules in virtually all domestic and international legal regimes,⁵⁸ it, at least traditionally, particularly holds – according to a frequently and rightly shared perception – true for certain regulatory features of BITs and other international investment agreements. Especially a number of substantive protection standards frequently stipulated in investment treaties like the concept of fair and equitable treatment, the protection against indirect expropriations as well as the guarantee of full protection and security are – not only, but in particular also by investment tribunals themselves – often considered to be rather vaguely phrased and thus with regard to their specific regulatory content quite indeterminate legal concepts.⁵⁹

The realization of the at least to a certain extent inherent vagueness of legal language and,

- 53 *Elias/Lim*, Paradox of Consensualism, 178 *et seq.*; see also from a legal perspective for example *Kirchhof*, in: Wilke/Weber (eds.), *Gedächtnisschrift für Friedrich Klein*, 227 (234); *Hofmann*, *Abwägung im Recht*, 144 *et seq.*
- 54 *Merkouris*, in: Fitzmaurice/Elias/Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties*, 1 (6).
- 55 See thereto, e.g., *Alexy*, *Theorie der juristischen Argumentation*, 17; *Dworkin*, *Law’s Empire*, 104 *et seq.* (“The Flexibility of Legal Language”); *Bix*, *Law, Language and Legal Determinacy*, 7 *et seq.*; *Bianchi*, in: Bekker/Dolzer/Waibel (eds.), *Essays in Honour of Detlev Vagts*, 34 (36 *et seq.*); as well as also already *Madison*, *The Federalist* No. 37, in: *The Federalist Papers*, 175 (179) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).
- 56 *Hart*, *Concept of Law*, 126; see also, e.g., *MacCormick/Summers*, in: MacCormick/Summers (eds.), *Interpreting Statutes*, 511 (516 *et seq.*); *Fastenrath*, in: Fastenrath *et al.* (eds.), *Essays in Honour of Judge Bruno Simma*, 58 (64).
- 57 On this perception see already *Morlok*, *Verfassungstheorie*, 85; *Röhl/Röhl*, *Allgemeine Rechtslehre*, 606; *MacCormick*, *Rhetoric and the Rule of Law*, 121; *Augsberg*, *Die Lesbarkeit des Rechts*, 14 *et seq.*; *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 97; *Felder*, in: Christensen/Pieroth (eds.), *Rechtstheorie in rechtspraktischer Absicht*, 73 *et seq.*
- 58 See, e.g., *Hill*, *Aust’s Modern Treaty Law and Practice*, 238 (“there is no treaty that cannot raise some question of interpretation”); *Dörr*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary*, Article 31, paras. 1 and 14; *Ransiek*, *Gesetz und Lebenswirklichkeit*, 4; *Esser*, *Grundsatz und Norm*, 253 *et seq.*; *Adrian*, *Rechtstheorie* 41 (2010), 521 (531); *Augsberg*, *Die Lesbarkeit des Rechts*, 27 *et seq.*; *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 97.
- 59 See for example *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, Rn. 273 (“The Treaty, like most bilateral investment treaties, does not define the standard of fair and equitable treatment and to this extent Argentina’s concern about it being somewhat vague is not entirely without merit.”); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 296 (“The Tribunal finds the Respondent to be right in arguing that fair and equitable treatment is a standard that is none too clear and precise. This is because international law is itself not too clear or precise as concerns the treatment due to foreign citizens, traders and investors. This is the case because the pertinent standards have gradually evolved over the centuries.”); *Rumeli Telecom A.S. et al. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, Rn. 610; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*, ICSID Case No. ARB/11/24, Award of 30 March 2015, paras. 599 *et seq.*; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 611; *Roberts*, *American Journal of International Law* 107 (2013), 45 (50) (“investment treaties have traditionally been brief and broadly worded, leaving many gaps and ambiguities”); *Roberts*, *Harvard International Law Journal* 56 (2015), 353 (358); *Alvarez*, *New York University Journal of International Law and Politics* 42 (2009), 17 (24) (“the typical BIT is a relatively concise (and perhaps somewhat cryptic) document as compared to the voluminous substantive and procedural details contained in the GATT covered agreements”); *Gazzini*, *Interpretation of International Investment Treaties*, 91 (“International investment treaties often contain provisions that are intentionally or accidentally drafted in vague terms.”); *Batifort/Larkin*, *ICSID Review – Foreign Investment Law Journal* 38 (2023), 322; *Oeter*, in: Ipsen (ed.), *Völkerrecht*, § 51, para. 41; *de Nanteuil*, *International Investment Law*, 249; *Bernasconi-Osterwalder*, in: Lim (ed.), *Alternative Visions of the International Law on Foreign Investment*, 324 (327); *Krajewski*, *Wirtschaftsvölkerrecht*, para. 641; *Nowrot*, „Long Live Deglobalization“ vs. „Free Trade Saves Lives“, 14; *Griebel*, *Internationales Investitionsrecht*, 69; *Schöbener/Herbst/Perkams*, *Internationales Wirtschaftsrecht*, 271; *Van Harten*, *The Trouble with Foreign Investor Protection*, 57.

as a consequence, the limits of normative governance instruments such as legal rules and principles to guide and determine the behavior and conduct of the addressees in a precise manner, in particular as far as quite broadly worded and thus indeterminate legal concepts like certain substantive protection standards traditionally very frequently enshrined in BITs and other international investment agreements are concerned, leads us to the second overarching aspect worth recalling in the present context. In light of this finding, it becomes apparent that the task of interpreting legal provisions and of applying them to factual situations with the aim to settle a controversy or dispute on the basis of law is very often quite far from being comparable to something like a mathematical operation leading to only one correct result and outcome.⁶⁰ Rather, it is today overwhelmingly recognized among legal scholars that the respective processes of concretizations and applications of legal rules, undertaken by individual persons, also entail certain voluntative, evaluative and creative elements and are thus also influenced by the individual and necessarily to a certain extent rather subjective preconception (*Vorverständnis*) and policy preferences of these persons.⁶¹ It is already for this reason that legal practitioners, among them in particular also judges, are in most cases – contrary to a claim famously made by *Montesquieu* – not merely “la bouche qui prononce les paroles de la loi”.⁶²

And it is, thirdly, precisely against this background that the challenges become quite obvious that we not infrequently encounter when trying to identify and articulate precise outcome expectations as far as the dogmatic approaches to, and overall ‘handling’ of, issues of environmental protection by individual investment tribunals in specific cases are concerned. At the same time, these above-mentioned findings explain why the international treaty regime on the protection of foreign investments as largely also characterized by rather broadly worded and thus indeterminate investment protection standards has – in many segments of the international community and by an increasing number of actors, among them also the general public in the countries belonging to the Global South and the Global North alike – more recently become again quite controversially perceived. The vagueness of some investment protection standards alone was initially not considered to be overly problematic. In fact, this feature is in principle already well-known for quite some time and has been emphasized in the legal literature at

60 On this perception see also already for example *Radbruch*, Einführung in die Rechtswissenschaft, 249 *et seq.*; *Esser*, Vorverständnis und Methodenwahl, 30 *et seq.*, 53 *et seq.*, and *passim*; *Alexy*, Theorie der juristischen Argumentation, 17; *Alexy*, Ratio iuris 16 (2003), 433 (434); *Schönberger*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 71 (2012), 296 (300 *et seq.*); *Kaufmann*, in: Horn (ed.), Festschrift für Helmut Coing, Vol. I, 537 (539 *et seq.*); *Hart*, Concept of Law, 204; *Neumann*, in: Gabriel/Gröschner (eds.), Subsumtion, 311 *et seq.*; *Schiffauer*, Wortbedeutung und Rechtserkenntnis, 132; *Clemens*, Strukturen juristischer Argumentation, 46 *et seq.*; *Nowrot*, Das Republikprinzip in der Rechtsordnungsgemeinschaft, 179 *et seq.*, with numerous additional references.

61 See thereto also, e.g., *Klabbers*, International Law, 56 (“Interpretation is to some extent an art rather than a science, and is most assuredly a political enterprise; typically, if not invariably, interpretation serves to bolster a conclusion reached on the basis of intuition or political preference, rather than as the mechanistic application of a set of rules to a set of facts in a political vacuum.”); *Bianchi*, in: Bianchi/Peat/Windsor (eds.), Interpretation in International Law, 34 (36); *Esser*, Vorverständnis und Methodenwahl, 21 *et seq.*, and *passim*; *Ehmke*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 20 (1963), 53 (56 *et seq.*); *Wieacker*, in: Bubner/Cramer/Wiehl (eds.), Hermeneutik und Dialektik II, 311; *Nowrot*, Das Republikprinzip in der Rechtsordnungsgemeinschaft, 180; *Larenz*, Methodenlehre, 273 *et seq.*; *Engisch*, Einführung in das juristische Denken, 63 *et seq.*; *Kriele*, Theorie der Rechtsgewinnung, 47 *et seq.*; *Zweigert*, Studium Generale 7 (1954), 380 *et seq.*; *Sendler*, in: Ziemke *et al.* (eds.), Festschrift für Martin Kriele, 457 (458 *et seq.*); *Hänni*, Vom Gefühl am Grund der Rechtsfindung, 50 *et seq.*; *Petersen*, Jahrbuch des öffentlichen Rechts NF 58 (2010), 137 (141); *Stein*, in: Delbrück/Ipsen/Rauschning (eds.), Festschrift für Eberhard Menzel, 3 (13).

62 *Montesquieu*, De l’Esprit des Lois, Vol. 1, 176; for valid reasons against *Montesquieu*’s perception of judges and other legal practitioners see also already for example *Drath*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 9 (1952), 17 (93 *et seq.*); *Tomuschat*, in: Bröhmer *et al.* (eds.), Festschrift für Georg Röss, 857; *Bernhardt*, in: Breitenmoser *et al.* (eds.), Liber amicorum Luzius Wildhaber, 91 (93); *Voßkuhle*, Rechtsschutz gegen den Richter, 60; *Kirchhof*, Neue Juristische Wochenschrift 1986, 2275 (2280); *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91; *Depenheuer*, in: Kluth/Krings (eds.), Gesetzgebung, § 6, para. 6; *Bülow*, Gesetz und Richteramt, 16; *Ransiek*, Gesetz und Lebenswirklichkeit, 6; *Krey*, Studien zum Gesetzesvorbehalt, 101 *et seq.*

least since the 1950s.⁶³ In principle not unlike certain situations well-known from the science and practice of chemistry, it was only through the addition of a second (structural) element in the legal practice of international investment law that the normative indeterminacy of certain protection standards stipulated in BITs and other investment agreements became more or less suddenly a ‘quasi-explosive’ issue.⁶⁴ And this second element was of course the already above mentioned⁶⁵ and in particular since the 1980s in the practice of investment treaty-making increasingly common inclusion of investor-state dispute settlement provisions that were far from common in older BITs and other investment-related agreements.

The fact that the enforcement of substantive investment protection standards vis-à-vis host states was no longer an exclusive task and right of the home states of foreign investors, and thus entities, that only very rarely took recourse to respective state-state investment arbitration mechanisms, had a profound transformative effect on the international legal regime concerned with the protection of foreign investments as a whole. In order to illustrate and explain the resulting consequences, it seems appropriate to recall that – in domestic legal systems as well as in the international legal order – the degree and level of determinacy of legal provisions first and foremost also shapes and influences the ‘division of labor’ and ‘delimitation of competences’ between legislative actors and judicial or quasi-judicial bodies.⁶⁶ Thereby, it is in particular the combination of rather vague legal rules and the existence of independent dispute settlement institutions that regularly results in a kind of power shift towards the later type of actors.⁶⁷ This phenomenon becomes especially visible and important, if the respective dispute settlement mechanisms are not merely established but are in legal practice actually also taken recourse to by affected and interested actors on a regular basis.⁶⁸ And that is precisely what happened in recent decades, in particular since the end of the 1990s, as a consequence of the ‘privatization’ of international law enforcement in the realm of investment protection. Once foreign investors began to make use of the options granted to them in investment treaties

63 See thereto in principle already for example *Walker*, Minnesota Law Review 42 (1958), 805 (811 *et seq.*); *Fatouros*, Government Guarantees to Foreign Investors, 138 (“Moreover, since a great number of possible situations has to be covered, the relevant provisions have to be couched in general language. The certainty of absolute standards is thus in fact diminished, since the more general a term is, the more numerous are the ways in which it can be interpreted.”); and *ibid.*, 215 (“The generality and abstraction of these standards, however, remains an important drawback. It is generally difficult to determine whether a certain measure is in accordance with them, that is to say whether, in the usual treaty terms, it is ‘just’, ‘reasonable,’ or ‘equitable.’”); *Mann*, British Yearbook of International Law 52 (1981), 241 (242 *et seq.*); United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, 1988, 41; *Mo*, Journal of World Trade 25 (No. 3, 1991), 43 (52).

64 See thereto also already *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 (92).

65 See thereto already *supra* under A.

66 On this perception see also for example *Abbott/Keohane/Moravczik/Slaughter/Snidal*, International Organization 54 (2000), 401 (413) (“The more ‘rule-like’ a normative prescription, the more a community decides *ex ante* which categories of behavior are unacceptable; such decisions are typically made by legislative bodies. The more ‘standard-like’ a prescription, the more a community makes this determination *ex post*, in relation to specific sets of facts; such decisions are usually entrusted to courts.”); *Schulze-Fielitz*, in: Dreier (ed.), Grundgesetz-Kommentar, Vol. II, Article 20 (Rechtsstaat), para. 131; *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 (92).

67 See generally, e.g., *Abbott/Keohane/Moravczik/Slaughter/Snidal*, International Organization 54 (2000), 401 (415) (“generality frequently produces a broader delegation of authority”); *Kelsen*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 5 (1929), 30 (69 *et seq.*); as well as specifically in the present context of investor-state arbitration see for example also *van Aaken*, Journal of International Economic Law 12 (2009), 507 (527); *Van Harten*, Investment Treaty Arbitration and Public Law, 122 *et seq.*; *Nowrot*, International Investment Law and the Republic of Ecuador, 19; *Roberts*, American Journal of International Law 104 (2010), 179 (190) (“The net result is to shift interpretative power from the treaty parties to investment tribunals: [...]”).

68 Generally on these effects on the dynamization of law-realization processes see also *Keohane/Moravczik/Slaughter*, International Organization 54 (2000), 457 (481 *et seq.*); *Masing*, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts, 50 *et seq.*; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 48; *Krajewski*, Zeitschrift für Umweltrecht 2014, 396 (397); *Streinz*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 61 (2002), 300 (341 *et seq.*).

and started to quite frequently initiate international investment arbitration proceedings against host states, the challenges and uncertainties associated with the inherent vagueness of legal language and with the processes of interpreting and applying legal rules as identified above and initially primarily discussed in connection with the powers exercised by domestic courts and their individual judges became quite relevant also in the practice of international investment law. In other words, it became obvious – and was in principle hardly surprising – that also investment arbitrators are not merely ‘bouchés de la loi’ when interpreting and applying broadly worded and thus indeterminate legal concepts such as fair and equitable treatment when authoritatively settling disputes between foreign investors and host states on the basis of law.⁶⁹ Moreover, it became in this connection – again almost naturally – also apparent that, in the same way as domestic judges and other legal practitioners, also investment arbitrators are, when executing their tasks of settling investment disputes, at least at times to a certain extent influenced by their individual and necessarily to a certain extent rather subjective preconception (*Vorverständnis*), backgrounds and policy preferences.⁷⁰

And whereas, fourthly, in many domestic legal and judicial systems these potential challenges to legal certainty and predictability are somewhat remedied on the basis of the existence of a hierarchy of courts with the respective highest judicial bodies frequently providing by way of their jurisprudence a quite reliable basis for a consistent interpretation and application of initially rather vague legal terms and concepts by all relevant courts,⁷¹ this finding and compensatory factor does not apply to the traditional as well as also currently still predominant structure of international investor-state arbitration proceedings. Rather it is overall in many ways characterized by decentralized and non-hierarchical features.

First, there is the very decentralized regime of applicable legal rules. International investment law at present comprises, among others,⁷² of more than 2.840 bilateral investment treaties together with roughly 480 other international agreements that provide for investment provisions,⁷³ more than 100 domestic investment statutes usually aimed at encouraging and controlling foreign investments⁷⁴ as well as an unknown number of so-called ‘state contracts’;

69 On this perception see also already *Giorgetti*, *Santa Clara Journal of International Law* 12 (2013), 263 (266) (“Empirical research on international investment arbitration provides support for the proposition that arbitrators are not merely ‘bouchés de la loi’ [...]”); *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (92); *van Aaken*, in: *Douglas/Pauwelyn/Viñuales* (eds.), *The Foundations of International Investment Law*, 409 (426).

70 See thereto for example *Waibel/Wu*, *Are Arbitrators Political? Evidence from International Investment Arbitration*, 2 *et seq.*; *Müller*, *Reformhindernisse im internationalen Investitionsrecht*, 35 *et seq.*; *Ketcheson*, in: *Hindelang/Krajewski* (eds.), *Shifting Paradigms in International Investment Law*, 97 (104 *et seq.*); *Van Harten*, *The Trouble with Foreign Investor Protection*, 83 *et seq.*; *Traxler*, *Journal of International Economic Law* 27 (2024), 54 *et seq.*; *Polanco Lazo/Desilverstro*, *The Law and Practice of International Courts and Tribunals* 17 (2018), 18 (19 *et seq.*), each with further references.

71 Generally on this compensatory factor for indeterminate legal terms and concepts see for example *Middelschulte*, *Unbestimmte Rechtsbegriffe und das Bestimmtheitsgebot*, 216 *et seq.*; *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (93), each with further references.

72 On the various different sources of international investment law see, e.g., *Dolzer/Kriebaum/Schreuer*, *Principles of International Investment Law*, 15 *et seq.*; *Reinisch*, in: *Tietje/Nowrot* (eds.), *Internationales Wirtschaftsrecht*, 454 (457 *et seq.*); *Salacuse*, *The Law of Investment Treaties*, 52 *et seq.*

73 UNCTAD, *World Investment Report 2025: International Investment in the Digital Economy*, 2025, 104.

74 See for example UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 2 (“UNCTAD research finds that at least 108 countries have an investment law.”). See in this connection also the regularly updated UNCTAD database on domestic investment laws under: <<https://investmentpolicy.unctad.org/investment-laws>> (accessed 4 September 2025). On the overarching purposes pursued by domestic investment laws see also, e.g., *Salacuse*, *The Three Laws of International Investment*, 90; UNCTAD, *Investment Laws – A Widespread Tool for the Promotion and Regulation of Foreign Investment*, *Investment Policy Monitor*, Special Issue, November 2016, 2; *Hepburn*, *American Journal of International Law* 112 (2018), 658 *et seq.*; *Lisenco/Nowrot*, *The 2018 Pridnestrovian Law on State Support for Investment Activities*, 19 *et seq.*; *McLachlan/Shore/Weiniger*, *International Investment Arbitration*, 44; *Burgstaller/Waibel*, *Investment Codes*, para. 2, in: *Peters* (ed.), *Max Planck Encyclopedia of Public International Law*, available on the internet under: <www.mpepil.com>

contractual arrangements concluded between public authorities of the host state and foreign investors.⁷⁵ Second, the decentralized character of international investment arbitration finds its manifestation in the fact that investment tribunals are established on an *ad hoc* basis for every individual dispute with the disputing parties enjoying a considerable influence on the composition of the respective tribunals. Third, the absence of centralized and hierarchical elements in the realm of investor-state dispute settlement mechanisms is also indicated by the fact that, despite more recent efforts in this regard,⁷⁶ until now no appellate structures have been established that would be comparable to the hierarchy of courts in domestic settings and could provide for more uniformity and consistency in the interpretation and application of the rules that make up this legal regime. Fourth and finally, in light of the aforementioned characteristics, and although often significant weight is attached to the findings of earlier investment tribunals in practice by disputing parties and tribunals themselves,⁷⁷ there can be obviously no doctrine of *stare decisis* in the sense that international investment tribunals would be bound by precedents;⁷⁸ a perception that finds its normative expression also for example in Article 14.D.13 (7) of the 2020 United States-Mexico-Canada Agreement (USMCA): “An award made by a tribunal has no binding force except between the disputing parties and in respect of the particular case.”

Against this background, it seems indeed most certainly not untrue that “[e]ach tribunal remains sovereign and may retain, as it is confirmed by ICSID practice, a *different solution for resolving the same problem*; [...]”⁷⁹ As a consequence of this overall rather decentralized and

mpepil.com/> (accessed 4 September 2025).

75 On state contracts see, e.g., *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 122 *et seq.*; *Lim/Ho/Paparinakis*, International Investment Law and Arbitration, 37 *et seq.*; *Nowrot*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 68 (112 *et seq.*); *Nowrot*, Normative Ordnungsstruktur und private Wirkungsmacht, 339 *et seq.*

76 In particular the European Union is already for a number of years aiming to establish a Multilateral Investment Court to replace the existing investment arbitration system. See thereto, e.g., *Bungenberg/Reinisch*, Draft Statute of the Multilateral Investment Court, 8 *et seq.*, with numerous further references.

77 See thereto, e.g., *Quiborax S.A. and Non Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction of 27 September 2012, para. 45 (“Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.”); *ibid.*, para. 46 (“The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. Specifically, it deems that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further deems that, subject to the specifics of the Treaty and of the circumstances of the actual case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator’s role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.”); *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 52 (“Finally, as both parties have in their submissions cited extensively to the awards of various other international investor-State and State-to-State tribunals, the Tribunal deems it appropriate to comment upon the weight to be attributed to such decisions. The Tribunal agrees with the parties in noting that there is no system of precedent in investor-State arbitration, nor indeed could there be, given the large and diverse set of treaties presently applicable to various investor-State claims. Each case must be decided on the basis of the applicable treaty texts and in the light of the relevant facts. On the other hand, the Tribunal acknowledges that it is a fundamental principle of the rule of law that “‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones.” This latter consideration will weigh more or less heavily depending upon: a) how “like” the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear jurisprudence constante has emerged in respect of a particular legal issue; and c) the Tribunal’s independent estimation of the persuasiveness of prior tribunals’ reasoning.”).

78 See also for example *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award of 9 October 2018, para. 288; *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, para. 292; *Dolzer/Kriebaum/Schreuer*, Principles of International Investment Law, 45; *Gazzini*, Interpretation of International Investment Treaties, 291 *et seq.*; *Radi*, Rules and Practices of International Investment Law, 35.

79 *AES Corp. v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 26 April 2005, para. 30 (emphasis added).

non-hierarchical structure of investor-state dispute settlement, as for example *Rudolf Dolzer* once reminded us, “we all know, the current system of investment arbitration has not been designed in order to promote uniformity or consistency of either rule-making or rule-interpretation, with the sprawling consequences which we have seen, producing diversity of approaches to most rules”.⁸⁰

And in fact, this phenomenon of applying different solutions for solving the same legal issue and, in the course of these processes, of producing a diversity of dogmatic approaches has – and this concerns the fifth overarching aspect – most certainly also materialized in arbitral practice. A quite well-known example in this regard – and indeed of particular practical relevance in the field of environmental protection – is provided by the various conceptual approaches applied in investor-state arbitration to distinguish between cases of indirect expropriation giving rise to claims for compensation by affected foreign investors on the one hand and legitimate regulatory measures in furtherance of general welfare objectives like environmental protection that do not require compensation by the host state on the other hand.⁸¹ When trying, also in this connection, to somewhat reduce the existing normative complexities by way of systemization,⁸² it seems possible to broadly distinguish in this regard between five main different approaches to addressing the respective relevance of the effects of the measure on the foreign investors on the one hand and the importance to be attached to the intentions of, and purposes pursued by, the host states on the other hand; different approaches that in practice not infrequently also lead to different outcomes. The first of them is characterized by the fact that investment arbitration tribunals base their respective finding exclusively on the economic effects of the measure on the foreign investor and is, consequently, often termed the ‘sole effects doctrine’. For example, the investment tribunal in *Telenor v. Hungary* emphasized that “[i]n considering whether measures taken by government constitute expropriation the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as the result of them”.⁸³ As a consequence of this doctrine, in the words of the investment arbitration tribunal in the case of *Santa Elena v. Costa Rica*, “[e]xpropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains”.⁸⁴ Other investment tribunals base their findings primarily on the economic effects without denying, however, that the host state’s intention are not entirely irrelevant; an approach that might appropriately be termed the ‘preponderance of effects doctrine’. In applying this doctrinal approach in practice, the investment tribunal in *Tecmed v. Mexico* stated that the “government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than

80 *Dolzer*, Santa Clara Journal of International Law 12 (2013), 7 (15).

81 See, e.g., *Sabahi/Rubins/Wallace*, Investor-State Arbitration, 600 (“The signal problem is defining with precision when an exercise of regulatory or police power crosses the line and becomes compensable, and a vast literature makes clear that the line is neither bright nor clear.”); *Bücheler*, Proportionality in Investor-State Arbitration, 125 (“major points of controversy”).

82 Generally on this underlying purpose pursued by approaches of systemization or categorization see, e.g., *Luhmann*, Kölner Zeitschrift für Soziologie und Sozialpsychologie 19 (1967), 615 (618 *et seq.*); *Luhmann*, Soziale Systeme, 12, 50 and *passim*; as well as already *Bruner/Goodnow/Austin*, A Study of Thinking, 12 (“A first achievement of categorizing has already been discussed. By categorizing as equivalent discriminable different events, the organism *reduces the complexity of its environment.*”) (emphasis in the original).

83 *Telenor v. Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, para. 70.

84 *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, para. 72.

its actual effects”.⁸⁵ The tribunal in the case of *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd v. Romania* pointed out that “while the intent to deprive a foreign investor of the use, benefit, or value of its investment may be relevant in determining whether there has been an unlawful interference, it is ultimately the effect of a State’s measures rather than its intent that determines whether the interference rises to the level of an expropriation”.⁸⁶ The tribunal in the case of *Spyridon Roussalis v. Romania*, to mention but one other example, emphasized that the “intention or purpose of the State is relevant but is not decisive of the question whether there has been an expropriation”.⁸⁷

On the opposite end of the spectrum from the ‘sole effects doctrine’ is what might fittingly be labelled the ‘sole intentions doctrine’ or, more frequently referred to as the ‘strong police powers doctrine’ and encompasses those investment tribunals that rely more or less exclusively on the legitimacy of the purposes pursued by the host state’s measures. For example, the tribunal in the case of *Saluka v. Czech Republic* expressed the following opinion in this regard: “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”.⁸⁸ The fourth and fifth approach both introduce and rely on a balancing test in order to distinguish between cases of indirect expropriation and legitimate regulatory measures. On the one hand we find in this regard tribunals that take recourse to a kind of ‘modified proportionality test generally in favor of the host state’. A respective early example is provided by the investment tribunal in the case of *LG&E Energy Corp. et al. v. Argentina* which nicely summarized this doctrinal approach in the following way: “With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is obviously disproportionate to the need being addressed.”⁸⁹ On the other hand we also see, and this concerns the fifth and final main approach, those tribunals that actually apply an ‘ordinary’ or – compared to the previously mentioned approach – ‘strict proportionality test’ that does not favor the host state. The investment tribunal in the case of *Marfin v. Cyprus* stated in this connection: “The Tribunal considers that the economic harm consequent to the non-discriminatory application of generally applicable regulations adopted in order to protect the public welfare do not constitute a compensable taking, provided that the measure was taken in good faith, complied with due process and was proportionate to the aim thought to be achieved.”⁹⁰

In light of these five, to a certain extent interrelated, overarching aspects it becomes obvious that despite the requirement of exclusively law-oriented decision-making processes by international investment tribunals there are for a variety of reasons obvious limits to the possibility to identify and to articulate precise outcome expectations as far as the dogmatic

85 *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 116.

86 *Gabriel Resources Ltd. and Gabriel Resources (Jersey) Ltd v. Romania*, ICSID Case No. ARB/15/31, Award of 8 March 2024, para. 931.

87 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, para. 330.

88 *Saluka v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 255.

89 *LG&E Energy Corp. et al. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 195.

90 *Marfin v. Cyprus*, ICSID Case No. ARB/13/27, Award of 26 July 2018, para. 826. See also, e.g., *Casinos Austria v. Argentine Republic*, ICSID Case No. ARB/14/32, Award of 5 November 2021, para. 336 (“In order to avoid abuse of the host State’s regulatory powers, their exercise must be bona fide and in line with principles of international investment law, such as good faith, non-discrimination, and the prohibition of arbitrariness, and result in measures whose impact on investments is proportionate to the interest(s) protected.”). Specifically on the discretion enjoyed by a tribunal when applying the principle of proportionality see for example *PL Holdings S.à.r.l. v. Republic of Poland*, Partial Award of 28 June 2017, para. 355 (“Application of the principle of proportionality inevitably entails an exercise in judgment on the part of a court or tribunal, and this case is no exception.”).

approaches to, and overall ‘handling’ of, issues of environmental protection by individual investment tribunals in specific cases are concerned.⁹¹

That said, and despite these noticeable limits to the predictability of the outcome of future cases for contracting state parties and investors, there are also reasons for a certain hope. The starting point for this perception is the already above-mentioned duty of investment arbitrators to provide a reasoned award that allows for the retraceability of the arbitrators’ decision-making processes and thus enables the parties to verify that the decision was taken based on a rational application of the applicable legal rules and principles and thus not, for example, on extra-legal factors such as their own personal and subjective views of the justice of the dispute at issue.⁹² Consequently understood as a reference to a legally relevant reasoning, this obligation first and foremost requires the investment arbitrators to take recourse to legal methodology in order to rationalize in an objectively convincing manner the specification and application of legal rules and principles,⁹³ in particular on the basis of applying the recognized rules of interpretation.⁹⁴

In light of these observations, it is thus the role and function of the members of international investment tribunals – and we can consequently legitimately expect from them – to also address environmental issues in investor-state arbitration proceedings on the basis of applying the established rules of interpretation. In illustrating the practical relevance of this finding in the present context, I will confine myself to two respective examples. First, investment arbitration tribunals are under the general rules of treaty interpretation as codified in the Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (VCLT)⁹⁵ asked and required to take

91 See in this connection also, e.g., already UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, 2007, 92 (“The broader and more imprecise a particular text is, the more likely that it will lead to different, and even conflicting, interpretations. This will increase not only the likelihood of a dispute arising between the investor and the host country, but also the possibility of delegating to the arbitral tribunal the task of identifying the meaning that the disputed provision should have. Clearly, one of the objectives of IIAs is to foster predictability and certainty for investors, but also for host countries, and in this regard, having investment provisions that are drafted broadly and imprecisely does not serve the interests of either of those parties.”).

92 See *supra* under B.

93 Generally on this finding see also for example *Hart*, *Concept of Law*, 205 (“it may be made acceptable as the reasoned product of informed impartial choice”); *Alexy*, *Theorie der juristischen Argumentation*, 15; *Röhl/Röhl*, *Allgemeine Rechtslehre*, 608; *Raisch*, *Juristische Methoden*, 136 *et seq.*, 209 *et seq.*; *Böckenförde*, in: *Achterberg/Krawietz/Wyduckel* (eds.), *Festschrift für Hans Ulrich Scupin*, 317 (330); *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 180 *et seq.*, with additional references. See, however, for a more skeptical view, e.g., *Haverkate*, *Gewißheitsverluste im juristischen Denken*, 18 and *passim*; *Kriele*, *Theorie der Rechtsgewinnung*, 340 *et seq.* On the importance of such a rationalization see specifically in the realm of investor-state arbitration also for example *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 611 (“The meaning of the requirement of fair and equitable treatment cannot be left for the exclusive discretion of the arbitral tribunal seized with a particular case. Such an approach would lead to arbitrary divergence between investor tribunals, which, while not avoidable in all cases, cannot be considered as an inherent objective of a fair and equitable treatment clause. It would also be in a striking contrast to the objective of creating a secure environment for investment protection.”).

94 Generally thereto see, e.g., *Jestaedt*, in: *Funke/Lüdemann* (eds.), *Öffentliches Recht und Wissenschaftstheorie*, 17 (23 *et seq.*); *Möllers*, in: *Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle* (eds.), *Grundlagen des Verwaltungsrechts*, Vol. I, § 3, paras. 18 *et seq.*; *Nowrot*, *Das Republikprinzip in der Rechtsordnungsgemeinschaft*, 182 *et seq.* Specifically in the field of international investment dispute settlement also for example *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Opinion of Michael Reisman of 22 March 2010, para. 19 (“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 within the meaning of Article 52 of the ICSID Convention.”).

95 Vienna Convention on the Law of Treaties of 22 May 1969, 1155 UNTS 331. On the customary international law status and applicability of the means of treaty interpretation as stipulated in the Articles 31 to 33 VCLT see, e.g., ICJ, *Case Concerning Kasikili/Sedudu Island*, (Botswana v. Namibia), ICJ-Reports 1999, 1045 (1059); WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body of 4 April 2012, WT/DS406/AB/R, para. 258; *Saluka Investments BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award of 17 March 2006, para. 296; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 75; *Malaysian Historical Salvors SDN BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application

into account the preambular language of the respective investment agreement.⁹⁶ And indeed, in the present context of environmental protection, a respective practical example in this regard is provided by the reasoning of the investment tribunal in the case of *Adel A Hamadi Al Tamimi v. Sultanate of Oman*: “See also the Preamble to the US–Oman FTA, which includes as one of the Treaty’s objectives the desire to ‘strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation’: a further clear indication by the State parties that the Treaty is to be interpreted to give effect to the objectives of environmental protection and conservation.”⁹⁷

Second, observance and application of the rules of treaty interpretation entails the expectation that arbitrators also take into account certain public interest concerns, among them most certainly issues of environmental protection, not explicitly incorporated into the investment agreement at issue, at least in case these concerns have already found their manifestation in other norms of public international law applicable to the treaty parties. Article 31 (3) (c) VCLT requires that when interpreting a treaty also “any relevant rules of international law applicable in the relations between the parties” have to be taken into account.⁹⁸ In this connection it is important to recall that the parties in the sense of Article 31 (3) (c) VCLT are not the foreign investor and the host state as parties to the dispute, but the home and the host state as parties to the respective investment agreement. Although investment tribunals are so far still

for Annulment of 16 April 2009, para. 56; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Ecuador*, UNCITRAL Arbitration, Partial Award on the Merits of 30 March 2010, paras. 159 *et seq.*; Jennings/Watts, Oppenheim’s International Law, Vol. I, Parts 2 to 4, 1271; Van Damme, Treaty Interpretation, 50; Villiger, Commentary, Article 31, paras. 37 *et seq.*; Article 32, para. 13; Dörr, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 6; Weeramantry, Treaty Interpretation in Investment Arbitration, 24.

96 Generally on the functions and importance of preambles from the perspective of treaty interpretation, see for example ICJ, *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Judgment of 17 December 2002, ICJ Reports 2002, 625 (652, para. 51); ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ Reports 1950, 266 (282); ICJ, *Case Concerning Rights of Nationals of the United States of America in Morocco* (France v. USA), Judgment of 27 August 1952, ICJ Reports 1952, 176 (196); European Court of Human Rights, *Golder v. United Kingdom*, Application No. 4451/70, Judgment of 25 February 1975, para. 34; Gardiner, Treaty Interpretation, 205 *et seq.*; Dörr, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 49. Specifically in the context of investor-state dispute settlement see for example *Discovery Global LLC v. Slovak Republic*, ICSID Case No. ARB/21/51, Award of 17 January 2025, paras. 405 *et seq.*; *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.4.4; de Nanteuil, International Investment Law, 378–379; Boknik/Gazzini, in: Tams/Schill/Hofmann (eds.), International Investment Law and General International Law, 80 (92 *et seq.*); Dönnwald, Bilateral and Multilateral Investment Treaties, 102 *et seq.*; Gazzini, Interpretation of International Investment Treaties, 157 *et seq.*; as well as, specifically in the present context of environmental protection also, e.g., UNCTAD, The International Investment Treaty Regime and Climate Action, IIA Issue Note, Issue 3, September 2022, 4 (“Well-drafted preambular clauses serve to clarify the application of substantive provisions.”).

97 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award of 3 November 2015, para. 389 fn. 777. See thereto also for example *Robert-Cuendet*, in: Krajewski/Hoffmann (eds.), Research Handbook on Foreign Direct Investment, 596 (602).

98 For a general account of this provision see, e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskeniemi, UN Doc. A/CN.4/L.682 of 13 April 2006, paras. 410 *et seq.*; Dörr, in: Dörr/Schmalenbach (eds.), Vienna Convention on the Law of Treaties, A Commentary, Article 31, para. 92 *et seq.*; Gardiner, Treaty Interpretation, 289 *et seq.* Specifically on the function of this interpretative guideline in the context of international investment law see for example Gazzini, Interpretation of International Investment Treaties, 210 *et seq.*; Yotova, in: Kulick (ed.), Reassertion of Control over the Investment Treaty Regime, 182 *et seq.*; Simma/Kill, in: Binder *et al.* (eds.), Essays in Honour of Christoph Schreuer, 678 (691 *et seq.*); Simma, International and Comparative Law Quarterly 60 (2011), 573 (584 *et seq.*); Alvarez, Recueil des Cours 344 (2009), 193 (466 *et seq.*); Hölken, Systemische Integration von Investitionsschutzabkommen, 91 *et seq.*; Wälde, in: Binder *et al.* (eds.), Essays in Honour of Christoph Schreuer, 724 (769 *et seq.*); Hirsch, in: Muchlinski/Ortino/Schreuer (eds.), International Investment Law, 154 *et seq.*; Scheu, Systematische Berücksichtigung von Menschenrechten, 160 *et seq.*; Prislán, in: Baetens (ed.), Investment Law within International Law, 450 (465 *et seq.*); Radi, North Carolina Journal of International Law and Commercial Regulation 37 (2012), 1107 (1124 *et seq.*).

comparatively reluctant to consider other fields of public international law – including international environmental law – when interpreting provisions stipulated in investment agreements, and despite occasional fervent pleas to the contrary in arbitral practice,⁹⁹ it was and is in light of Article 31 (3) (c) VCLT in principle always beyond reasonable doubt and has also been explicitly emphasized that also investment treaties “cannot be read and interpreted in isolation from public international law and its general principles”.¹⁰⁰ And indeed, and again in the present context of environmental protection, attention can be drawn in this regard for example to the reasoning of the investment tribunal in the case of *S.D. Myers, Inc. v. Canada* where the arbitrators, among others, took into account and assessed the obligations of Canada under the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.¹⁰¹

Moreover, as part of their legal reasoning, arbitrators are also expected to respect and apply those international legal norms that enjoy an hierarchically higher status than the investment agreement at issue. This applies in particular to those fundamental rules of public international law that – due to their peremptory character as recognized by the international community – enjoy unconditional primacy over other provisions like those stipulated in investment agreements;¹⁰² a legal effect that finds its prominent manifestation in the Articles 53 and 64 VCLT. And indeed, the potential significance – albeit limited to rather extraordinary scenarios – of these international *jus cogens* norms in the context of investor-state arbitration proceedings has for example been clearly highlighted in the form of an *obiter dictum* by the arbitration tribunal in the case of *Phoenix Action, Ltd. v. Czech Republic*: “To take an extreme example, nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.”¹⁰³ Furthermore, the award of 11 June 2012 in the case of *EDF International S.A. et al. v. Argentina* includes the following finding: “It is common ground that the Tribunal should be sensitive to international *jus cogens* norms, including basic principles of human rights. As defined by

99 See for example *Bernhard von Pezold and Others v. Zimbabwe*, ICSID Case No. ARB/10/15 and *Border Timbers Ltd., Border Timbers International et al. v. Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2 of 26 June 2012, paras. 57 *et seq.* (“The Arbitral Tribunals agree in this regard with the Claimants that the reference to ‘such rules of general international law as may be applicable’ in the BITs does not incorporate the universe of international law into the BITs or into disputes arising under the BITs. [...] The Petitioners provided no evidence or support for their assertion that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete.”).

100 *Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78, explicitly referring to the by now already famous statement in WTO, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body of 29 April 1996, 17. See also subsequently, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1200 (“The BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT’s special purpose as a Treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.”).

101 *S.D. Myers, Inc. v. Canada*, UNCITRAL Arbitration, Partial Award of 13 November 2000, paras. 209 *et seq.*

102 Generally on *jus cogens* norms see, e.g., Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006, paras. 361 *et seq.*; Crawford, Brownlie’s Principles of Public International Law, 581 *et seq.*; Hernández, International Law, 59 *et seq.*; Shaw, International Law, 104 *et seq.*; Orakhelashvili, Akehurst’s Modern Introduction to International Law, 52 *et seq.*; Stein/von Buttlar/Kotzur, Völkerrecht, § 12, paras. 2 *et seq.*; Schmahl, Universeller Menschenrechtsschutz, 58 *et seq.*; see also more recently for example ICJ, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of 19 July 2024, para. 233.

103 *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 78.

Article 53 of the Vienna Convention, such norms include standards ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’.¹⁰⁴

Admittedly, as already indicated by these examples, it is incontrovertible that these considerations related to peremptory norms of international law are, at best, of very limited practical relevance as far as issues of environmental protection are concerned. Nevertheless, it is submitted here that the expectation that arbitrators respect and apply international legal rules enjoying a higher status is, if viewed from a more overarching perspective, of considerable importance also in the field of environmental measures because these hierarchically-inspired and public interest-oriented perspectives indeed arguably form the basis for a rebuttable presumption¹⁰⁵ that host states, when entering into investment agreements, have not relinquished their entitlement to regulate without paying compensation in order to protect global public interest concerns, including the environment. Thereby, the normative basis of this presumption is the increasing community-interest orientation of the international legal order as a whole. It has already frequently – and rightly – been highlighted that the international legal order has undergone quite substantial, if not to say paradigmatic changes over the past few decades. While previously comprising basically a set of rules – often merely of a procedural nature – which limited and guided states as almost the sole subjects of international law in their interactions with each other,¹⁰⁶ international law has more recently transformed into what has already been called ‘a comprehensive blueprint of social life’,¹⁰⁷ a ‘humanity law’¹⁰⁸ and the evolution of a ‘world (internal) law’.¹⁰⁹ In the course of these transformation processes, the international legal order is more and more independent of the will and interests of individual states, with its substantive norms increasingly focusing on the realization of transnational community interests.¹¹⁰ Specifically also with reference to international environmental law, this structural

104 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award of 11 June 2012, para. 909. See also, e.g., *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award of 8 December 2016, para. 1203 (“Another illustration is given by peremptory norms of general international law (*ius cogens*) to the extent they may be of interest in an investment matter. If so, such norms must certainly prevail over any contrary provision of the BIT, as per the express statement in Article 53 of the Vienna Convention.”).

105 Generally on the relevance of presumptions in public international law see, e.g., *Grossen*, *Les Présomptions en Droit International Public*, 53 *et seq.*; *Cheng*, *General Principles of Law*, 304 *et seq.*; *Pauwelyn*, *Conflict of Norms*, 240 *et seq.*; *Nowrot*, *Normative Ordnungsstruktur und private Wirkungsmacht*, 562 *et seq.*, each with additional references.

106 On this perception of the traditional international legal order see for example also *Delbrück*, *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 11 (2001), 1 (3 *et seq.*); *Nowrot*, *Global Governance and International Law*, 14 *et seq.*; *Hobe*, *Einführung in das Völkerrecht*, 20 *et seq.*; *Habermas*, in: *Habermas*, *Der gespaltene Westen*, 113 (117 *et seq.*); *Fatouros*, in: *Festschrift Nicolas Valticos*, 131 (139); *Zemanek*, *Recueil des Cours* 266 (1997), 9 (112); *Zacher*, in: *Rosenau/Czempiel* (eds.), *Governance Without Government*, 58 (59 *et seq.*).

107 *Tomuschat*, *Recueil des Cours* 281 (1999), 9 (63).

108 *Teitel*, *Humanity’s Law*, 3 *et seq.*; for a related perception see also, e.g., *Häberle*, in: *Gaitanides/Kadelbach/Iglesias* (eds.), *Festschrift für Manfred Zuleeg*, 80 (83 *et seq.*).

109 *Delbrück*, *Indiana Journal of Global Legal Studies* 9 (2002), 401 *et seq.*

110 Generally on this perception see also for example *Wellens*, in: *Komori/Wellens* (eds.), *Public Interest Rules of International Law*, 15 (“Indeed, rules protecting public interests of the international community occupy a prominent place in modern international law.”); *Simma*, *Recueil des Cours* 250 (1994), 217 (229 *et seq.*) (“community interests”); *Frowein*, in: *Hailbronner/Ress/Stein* (eds.), *Festschrift für Karl Doebring*, 219 *et seq.*; *Wolfrum*, in: *Fastenrath et al.* (eds.), *Essays in Honour of Judge Bruno Simma*, 1132 *et seq.*; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/3, 778 *et seq.*; *Delbrück*, in: *Götz/Selmer/Wolfrum* (eds.), *Liber amicorum Günther Jaenicke*, 17 *et seq.*; *Riedel*, in: *Delbrück* (ed.), *New Trends in International Lawmaking*, 61 *et seq.*; *Oeter*, in: *Brugger/Kirste/Anderheiden* (eds.), *Gemeinwohl*, 215 *et seq.*; *Benvenisti/Nolte* (eds.), *Community Interests Across International Law*, 2018; *Fassbender*, in: *Münkler/Fischer* (eds.), *Gemeinwohl und Gemeinsinn im Recht*, 231 *et seq.*; *Nowrot*, in: *Tietje/Nowrot* (eds.), *Verfassungsrechtliche Dimensionen des Internationalen Wirtschaftsrechts*, 57 *et seq.*; *Tietje*, *Zeitschrift für Rechtssoziologie* 2003, 27 (39 *et seq.*); *Paulus*, *Die internationale Gemeinschaft im Völkerrecht*, 250 *et seq.*; *Brunnée*, in: *Bodansky/Brunnée/Hey* (eds.), *The Oxford Handbook of International Environmental Law*, 550 (553 *et seq.*); *Kotzur*, in: *Blankenagel/Pernice/Schulze-Fielitz* (eds.), *Liber Amicorum für Peter Häberle*, 289 (301 *et seq.*); *Payandeh*, *Internationales Gemeinschaftsrecht*, 61

changes have been for example vividly summarized by the former Vice-President of the International Court of Justice (ICJ), *Christopher Gregory Weeramantry*, in his separate opinion in the *Gabčíkovo-Nagymaros Project* case: “We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. [...] International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.”¹¹¹

Finally, it is also submitted here that this increasing community-interest orientation of the international legal order as a whole can itself be normatively based on a systematic interpretation of the Articles 55, 56, and 103 of the Charter of the United Nations (U.N. Charter).¹¹² According to Article 103 U.N. Charter, the obligations of the member states of the United Nations under the Charter prevail over the obligations of these states under any other international agreement. Contrary to its restrictive wording, this provision’s scope of application – in light of its object and purpose – is not limited to other obligations enshrined in treaties, but also covers obligations deriving from any other international legal source, such as customary international law.¹¹³ Among these Charter obligations are also the various duties to cooperate that are listed in the Articles 55 and 56 of the U.N. Charter that, when read together, are intended to contribute to the realization of global community interests.¹¹⁴ Although environmental protection as well as for example the necessity of combatting climate change are not explicitly mentioned in these provisions since the enormous relevance of these policy issues were only generally and publicly realized and acknowledges in the decades following the adoption of the U.N. Charter in 1945,¹¹⁵ it is submitted here that in light of its character as a ‘flexible, living constitution’ and thus a ‘living instrument’¹¹⁶ these obligations to cooperate as stipulated in these provisions are today also including other global public interest concerns, prominently among them issues of environmental protection. Consequently, in light of Article 103 U.N. Charter, investment arbitrators are also legitimately expected to interpret and apply the provisions of investment agreements in a way that takes into account, and gives effect to, the obligations to protect and promote global community interest as stipulated in the Articles 55 and 56 of the U.N. Charter, including those related to the public interest concern of environmental protection.¹¹⁷

et seq.

111 ICJ, *Case Concerning the Gabčíkovo-Nagymaros Project*, (Hungary v. Slovak Republic), Separate Opinion of Vice-President *Weeramantry*, ICJ-Reports 1997, 88 (118).

112 Charta der Vereinten Nationen of 26 June 1945, reprinted in: Documents of the United Nations Conference on International Organization, Vol. 15, 1945, 336.

113 See also, e.g., *Paulus/Leiss*, in: Simma/Khan/Nolte/Paulus (eds.), Charter of the United Nations, Vol. II, Article 103, paras. 73 *et seq.*; Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by *M. Koskenniemi*, UN Doc. A/CN.4/L.682 of 13 April 2006, paras. 344 *et seq.*

114 For a comprehensive analysis of the obligations stipulated in these provisions see for example *Stoll*, in: Simma/Khan/Nolte/Paulus (eds.), Charter of the United Nations, Vol. II, Article 55 (a) and (b), paras. 10 *et seq.*; *Hanschel/Frenz*, in: Simma/Khan/Nolte/Paulus (eds.), Charter of the United Nations, Vol. II, Article 55 (c), paras. 12 *et seq.*; *Stoll*, in: Simma/Khan/Nolte/Paulus (eds.), Charter of the United Nations, Vol. II, Article 56, paras. 4 *et seq.*, each with additional references.

115 See thereto also, e.g., *Nowrot*, 80 Jahre Vereinte Nationen, 17.

116 On this perception see also, e.g., *Delbrück*, in: Akkerman *et al.* (eds.), Liber Amicorum Bert V.A. Röling, 73 (79); *Fassbender*, The United Nations Charter, 130 *et seq.*; *Kadelbach*, in: Simma/Khan/Nolte/Paulus (eds.), Charter of the United Nations, Vol. I, Interpretation of the Charter, paras. 16 *et seq.*

117 Generally thereto see also already *Nowrot/Wardin*, Liberalisierung der Wasserversorgung in der WTO-Rechtsordnung, 47; *Tietje*, in: Tietje/Nowrot (eds.), Internationales Wirtschaftsrecht, 1 (66).

D. Broadening the Perspective: What to Expect from other Actors and the Respective Role of Investment Tribunals in this Regard

In the third analytical step – and final part of this contribution – an attempt will be made to somewhat broaden the research perspective by at least briefly also addressing the question what to expect from other actors that are actively participating in, or are interested in, investor-state dispute settlement proceedings dealing with issues of environmental protection, thereby also assessing the potential role of the members of investment tribunals in this connection. For this purpose, the analysis will focus on four different types of actors, namely foreign investors, NGOs, the general public (in particular – in line with the overarching scheme of our symposium – in the digital age) as well as the contracting parties to international investment agreements.

When first turning to foreign investors as the usual claimants in the present context, the question might arise whether considerations of corporate (social) responsibility are potentially of legal relevance when it comes to the initiation of certain investor-state arbitration proceedings that first and foremost also concern issues of environmental protection. In other words and more precisely: Could it be validly argued that for example applying the doctrine of abuse of rights or, as a sub-category, the doctrine of abuse of process – in principle well-recognized also in the realm of international investment dispute settlement¹¹⁸ – can at least under certain circumstances prevent an investment tribunal from hearing a foreign investor's claim in a dispute over the legality of measures adopted by a host state with the aim to protect the environment?

Admittedly, the issue of investors' public obligations towards the societies in which they operate has more recently clearly gained considerable momentum and is also unlikely to vanish from the discourses on, and practice of, international investment law any time soon.¹¹⁹ In particular in the last two decades we can see an emerging understanding that, first, foreign investors are – as a kind of *quid pro quo* for the legal protection they enjoy under investment agreements¹²⁰ – expected and required to contribute in the course of their business activities to the promotion and realization of other public interest concerns like the protection of human rights, core labor and social standards as well as the environment based on internationally recognized standards, and that, second, these expectations and obligations should be somehow addressed in international investment treaties as well as other sources of investment law themselves.¹²¹

118 Generally thereto see, e.g., *WM Mining Company, LLC v. Mongolia*, ICSID Case No. ARB/21/8, Award of 29 August 2024, paras. 119 *et seq.*; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award of 31 May 2017, paras. 539 *et seq.*; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 107; *Radi*, Rules and Practices of International Investment Law, 421; *Polonskaya*, Journal of International Dispute Settlement 11 (2020), 589 (590 *et seq.*); *De Brabandere*, Journal of International Dispute Settlement 3 (2012), 609 (612 *et seq.*), each with further references.

119 See also, e.g., *Krajewski*, Business and Human Rights Journal 5 (2020), 105 (113) ("Incorporating investor obligations in international investment treaties constitutes an important element of the reform process of international investment law."); *Low*, Journal of International Economic Law 26 (2023), 66 (76); *Lam/Guo*, Journal of International Economic Law 24 (2021), 321 (324); *Nowrot*, Fostering the Status of Asia's Sovereign Wealth Funds as Responsible Foreign Investors, 15 *et seq.*; *Bueno/Vastardis/Djeuga*, Journal of World Investment and Trade 24 (2023), 179 (182 *et seq.*); as well as the contributions in *Ho/Sattorova* (eds.), *Investors' International Law*, 2021.

120 See, e.g., UNCTAD, Social Responsibility, UNCTAD/ITE/IIT/22 (2001), 5; *Muchlinski*, in: *Muchlinski/Ortino/Schreuer* (eds.), *International Investment Law*, 637 (643).

121 On the underlying reasons for the linkages between investment protection and investors' responsibilities being now increasingly emphasized, and thus for the idea of a merger of respective rights and duties in investment treaties gaining ground, see for example *Hellwig/Nowrot*, Towards Investors' Responsibilities in International Investment Agreements, 9 *et seq.*, with additional references.

And indeed, we can find in the more recent treaty-making practice of a considerable number of states a clearly increasing number of international investment agreements that include provisions signaling a commitment to corporate social responsibility by the contracting parties, stipulating indirect obligations of conduct for foreign investors and/or even establishing direct obligations of conduct for these economic actors.¹²² Despite these in principle very notable developments and transformation processes, however, caution seems warranted when inferring from them, in the absence of explicit stipulations in the specific investment treaty at issue, the existence of respective normative restrictions as far as the entitlement of foreign investors to raise claims and initiate dispute settlement proceedings against the host state are concerned simply because of the fact that the members of the established investment tribunal have to address issues of environmental protection. Consequently, arbitrators are at least at present still expected to adopt a rather restrictive approach in this connection.

The second type of actors that are potentially of interest in the present context are NGOs. Although civil society organizations are not entitled to directly participate in investor-state dispute proceedings initiated by foreign investors against host states, a well-known option for an at least indirect involvement concerns the possibility to submit unsolicited *amicus curiae* briefs¹²³ to the investment tribunal and thus the opportunity to support the arbitrators on the basis of particular knowledge and expertise regarding the subject matter at issue,¹²⁴ in particular also as far as issues of environmental protection are concerned. Whereas the powers of tribunals to accept and take into account *amicus curiae* briefs by non-disputing parties without the consent of the disputing parties was initially somewhat controversially perceived and discussed in the practice of investment arbitration,¹²⁵ Rule 37 (2) of the 2006 ICSID Arbitration Rules as well as, currently, Rule 67 of the 2022 ICSID Arbitration Rules explicitly recognize such a competence as far as ICSID arbitration proceedings are concerned.¹²⁶ Moreover, this parti-

122 Generally on these three types of legal obligations of investors in the broader sense see already Nowrot, in: Bungenberg/Griebel/Hobe/Reinisch (eds.), *International Investment Law*, 1154 (1160 *et seq.*); Nowrot, *Corporate Legal and Social Responsibility as an Issue of International Investment Agreements*, 12 *et seq.*; as well as in principle also for example Abel, *International Investor Obligations*, 37 *et seq.*; Artamonova, *New Developments in International Investment Agreements*, 71 *et seq.*

123 Generally on the historical development and functions of *amicus curiae* submissions see for example already Krislov, *Yale Law Journal* 72 (1963), 694 *et seq.*; Wiik, *Amicus Curiae before International Courts and Tribunals*, 43 *et seq.*, 74 *et seq.*; Ruthemeyer, *Der amicus curiae brief im Internationalen Investitionsrecht*, 42 *et seq.*, 63 *et seq.*

124 On these as well as other issues related to *amicus curiae* submissions in investor-state arbitration proceedings see also, e.g., Levine, *Berkeley Journal of International Law* 29 (2011), 200 (208 *et seq.*); Fach Gómez, *Fordham International Law Journal* 35 (2012), 510 (534 *et seq.*); Wiik, *Amicus Curiae before International Courts and Tribunals*, 115 *et seq.*; Tams/Zoellner, *Archiv des Völkerrechts* 45 (2007), 217 *et seq.*; Ruthemeyer, *Der amicus curiae brief im Internationalen Investitionsrecht*, 78 *et seq.*; Zachariasiewicz, *Journal of International Arbitration* 29 (2012), 205 *et seq.*; Quingyuan, *US-China Law Review* 21 (2024), 171 (172 *et seq.*); Born/Forrest, *ICSID Review – Foreign Investment Law Journal* 34 (2019), 626 *et seq.*; Segger, *Der Amicus Curiae im Internationalen Wirtschaftsrecht*, 164 *et seq.*; Schill/Djanic, in: Benvenisti/Nolte (eds.), *Community Interests Across International Law*, 221 (240 *et seq.*).

125 See for example *Methanex Corporation v. USA*, UNCITRAL Arbitration, Decision of the Tribunal on Petitions from Third Persons to Intervene as “*amici curiae*” of 15 January 2001; *United Parcel Service of America v. Canada*, UNCITRAL Arbitration, Decision of the Tribunal on Petitions for Intervention and Participation as *amici curiae* of 17 October 2001; *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction of 21 October 2005, paras. 15 *et seq.*; *Aguas Argentinas et al. v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as *amicus curiae* of 19 May 2005; *Aguas Provinciales de Santa Fe S.A. et al. v. Argentina*, ICSID Case No. ARB/03/17, Order in Response to a Petition for Transparency and Participation as *amicus curiae* of 17 March 2006. See on these debates also for example Levine, *Berkeley Journal of International Law* 29 (2011), 200 (208 *et seq.*); Fach Gómez, *Fordham International Law Journal* 35 (2012), 510 (534 *et seq.*); Quingyuan, *US-China Law Review* 21 (2024), 171 (172 *et seq.*).

126 For the subsequent practice of ICSID investment tribunals see, e.g., *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 of 2 February 2007; *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, paras. 57 *et seq.*, 356 ff.; *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Procedural Order No. 8 of 23 March 2011; *Pac Rim Cayman LLC v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections of 1 June 2012, paras. 1.33 *et seq.*, 2.36 *et seq.*; 4.58 *et seq.*; Bernhard

icipatory option for NGOs and other private non-disputing actors is also sometimes explicitly stipulated in international investment agreements themselves. Respective examples are Article 8.36 (1) of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU in connection with Article 4 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective since 1 April 2014, Article 31 of the 2018 BIT between Canada and Moldova, Article 3 of Annex 8 (“Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions”) of the EU-Singapore investment agreement signed on 19 October 2018, as well as Article 31 of the 2016 BIT between Canada and Mongolia. In light of these developments and considering the potential benefits of such an indirect involvement by NGOs in particular also in investor-state disputes involving issues of environmental protection, it is submitted here that members of investment tribunals are expected and advised to adopt an open-minded approach towards this participatory option.

A third actor interested in investor-state arbitration proceedings that deal with issues of environmental protection is the general public. This term encompasses the population of the home and host states as contracting parties of respective investment agreements. There are obviously, as far as the general public is concerned, only rather limited possibilities – and also an overall limited desirability – to influence the course and outcome of individual ongoing investment arbitration proceedings. Quite to the contrary, however, not infrequently – most certainly also depending, among others, on the political system of the country in question – numerous different options exist for the people and the society as whole to exercise a certain direct or at least indirect influence on the shaping of the future investment policy approaches and related treaty-making activities of host as well as home states. Thereby, our digital age obviously allows for enhanced participatory opportunities, for example on the basis of online petitions addressed to political decision-makers.

Admittedly, the normative contractual design of foreign economic relations, including investment relations, has – viewed from the domestic perspective of most countries – for a long time primarily been the concern of a comparatively small circle of experts. In particular, international negotiations aimed at concluding multilateral, regional or bilateral treaties in the realm of international economic law have in previous decades normally not attracted a substantial attention on the side of the politically interested broader public. Consequently, the fact that these negotiations were traditionally largely conducted by governmental representatives – quasi or even literally – “behind closed doors”¹²⁷ usually didn’t give rise to critical discussions among the citizens of the political community concerned. As evidenced for example by the intensive and controversial public debates in a number of EU member states with regard to the negotiations leading to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which has been signed by the parties on 30 October 2016 and is

von Pezold and Others v. Zimbabwe, ICSID Case No. ARB/10/15 and *Border Timbers Ltd., Border Timbers International et al. v. Zimbabwe*, ICSID Case No. ARB/10/25, Procedural Order No. 2 of 26 June 2012, paras. 48 *et seq.*

127 See thereto, e.g., *Marceddu*, *Journal of International Economic Law* 21 (2018), 681-682 (“Traditionally, international negotiations were conducted by diplomatic or governmental representatives behind closed doors, with few official documents subsequently being released to the public, and without allowing public participation in any political debate. States tended to refrain from opening up the law- and policy-making process or from sharing sensitive information with the public. [...] Investment and trade policy-making did not constitute an exception to this trend. Indeed, they have fully conformed to the custom of secret negotiations: they have not traditionally been accompanied by democratic deliberations, and even parliaments have tended to play a minor role in the oversight of treaty-making.”); *Hepburn*, *American Journal of International Law* 112 (2018), 658 (662) (“often negotiated and concluded by the executive without parliamentary oversight”); as well as more generally also for example *Krüger*, *Allgemeine Staatslehre*, 507-508; *Tietje*, *Internationalisiertes Verwaltungshandeln*, 182 *et seq.*; *Tietje/Nowrot*, in: Morlok/Schliesky/Wiefelspütz (eds.), *Parlamentsrecht*, 1469 *et seq.*

provisionally applied since 21 September 2017,¹²⁸ as well as first and foremost the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the United States and the EU since July 2013 (with the negotiations being currently on hold), this situation has changed in an unprecedented way.¹²⁹ Foreign trade and investment policy today often enjoys a high degree of public attention in many countries, including controversial deliberations among and within political parties and has thus obviously turned into a politicised area of law in the true sense of the meaning.¹³⁰ From a broader perspective, this finding has for example more recently quite vividly been expressed by *Michael J. Trebilcock* stating that “popular and scholarly debates over the virtues and vices of economic globalization ensure that international trade policy has forever forsaken the quiet and obscure corners of trade diplomacy that it once occupied, and become a matter of ‘high politics’”.¹³¹

And in light of these developments it seem in principle also hardly surprising that a number of countries and supranational organizations have more recently also initiated specific public consultation processes in the context of envisioned trade and investment agreements and their regulatory content. For example, the European Commission has started an online public consultation process, in the period from 27 March 2014 until 13 July 2014, on investment protection and investor-to-state dispute settlement in the envisioned Transatlantic Trade and Investment Partnership Agreement with the United States of America. In this comparatively short period of time, the Commission received a total of nearly 150.000 replies;¹³² a fact that clearly underlines again the changing character of international economic law in general and international investment law in particular as an increasingly political law. Subsequent topics of public consultations initiated by the Commission included the future of EU-Mexico trade and economic relations (2 July to 31 August 2015), the future of EU-Australia and EU-New Zealand trade and economic relations (11 March to 3 June 2016), a possible modernization of the trade part of the EU-Chile association agreement (9 June to 31 August 2016), the negotiations on a deep and comprehensive free trade agreement between the EU and Tunisia (21 November 2016 to 22 February 2017), the implementation of the EU-Korea free trade agreement (8 December 2016 to 3 March 2017) as well as a multilateral reform of investment dispute resolution (21 December 2016 to 15 March 2017).¹³³ Moreover, the Netherlands initiated in May and June 2018 a public consultation process on the new Dutch Model BIT that was finalized and published on 22 March 2019.¹³⁴ The same applies, to mention but one additional example,

128 OJ EU L 11/23 of 14 January 2017.

129 On this observation see also for example European Commission, Trade for All – Towards a More Responsible Trade and Investment Policy, October 2015, 18 (“Trade policy is more debated today than at any time in recent years, with many asking whether it is designed to support broad European interests and principles or the narrow objectives of large firms.”); see also European Commission, Report on the Implementation of the Trade Policy Strategy Trade for All – Delivering a Progressive Trade Policy to Harness Globalisation, COM(2017) 491 final of 13 September 2017, 12-13; as well as *Oeter*, in: Ipsen (ed.), *Völkerrecht*, § 51, paras. 56 *et seq.*; *Calliess*, *ZEuS – Zeitschrift für europarechtliche Studien* 20 (2017), 421 (422 *et seq.*); *Schill*, *European Yearbook of International Economic Law* 7 (2016), 309 (310 *et seq.*).

130 Generally on the notion of ‘political law’ see, e.g., *Isensee*, in: *Isensee/Kirchhof* (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. XII, 483 *et seq.*; *Stern*, *Das Staatsrecht der Bundesrepublik Deutschland*, Vol. I, 14 *et seq.*, each with further references.

131 *Trebilcock*, *Advanced Introduction to International Trade Law*, 9. On the perception of international economic law as political law see also, e.g., *Tietje*, in: *Tietje/Nowrot* (eds.), *Internationales Wirtschaftsrecht*, 1 (3); *Nowrot*, *Zeitschrift für Gesetzgebung* 31 (2016), 1 *et seq.*; *Nowrot/Tietje*, *Europarecht* 52 (2017), 137-138.

132 On this number as well as for further details see in particular also European Commission, Report – Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final of 13 January 2015.

133 Generally thereto also, e.g., *Nowrot*, *European Republicanism in (Legitimation) Action*, 12 *et seq.*

134 Dutch Model BIT of 22 March 2019, available on the internet under: <<https://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden>>

to the new Canadian Model BIT as published on 12 May 2021.¹³⁵ As far as this involvement of the general public is concerned, there are no expectations addressed to investment tribunals and their individual members. These participatory processes are exclusively intended to contribute to the decision-making processes of the (future) contracting parties of international investment agreements.

This observation leads us to the fourth and final category of actors participating and most certainly interested in investor-state arbitration proceedings dealing with issues of environmental protection, namely the contracting (state) parties themselves. These actors have of course – in principle as well as in treaty-making practice – many different options to influence the work of investment tribunals. They can, for example, introduce changes to the dispute settlement clauses stipulated in investment agreements, they can provide for more balanced preambles, they can include general exception and justification clauses, they can address the issue of investors' obligations and/or agree on provisions explicitly emphasizing the regulatory autonomy of host states in furtherance of certain public interest concerns.¹³⁶ All of these stipulations would also clearly give rise to the expectation that investment arbitrators observe them in the course of their exclusively law-oriented decision-making processes in investor-state dispute settlement proceedings, most certainly also as far as issues of environmental protection are concerned.

That said, for the purpose of this contribution I will nevertheless confine myself to a brief assessment of one additional regulatory option that is frequently and rightly regarded as one of the central elements of the current investment treaty reform movement,¹³⁷ namely the specification and modification of the scope of application of the, as already mentioned above,¹³⁸ traditionally rather broadly phrased and thus often quite indeterminate substantive protection standards enshrined in investment agreements. In this regard we can, by way of systemization, distinguish between two different approaches. The first one concerns the concretization of respective investment protection standards *ex ante* on the occasion of negotiations of new investment treaties or re-negotiations of existing contractual arrangements. This regulatory approach finds its manifestation in investment treaty-making practice currently for example in the form of increasingly elaborated stipulations of the guarantee of full protection and security as well as the most-favoured-nation treatment clause.¹³⁹

In addition, and probably most notable when addressing the issue of how to accommodate non-economic public interest concerns such as environmental protection within investment agreements, a growing number of treaty parties has in particular more recently – obviously also in reaction to the already above-mentioned inconsistent decisions in arbitral practice¹⁴⁰ – introduced provisions that provide for more specific guidance to investment tribunals faced with the task of drawing a line between cases of indirect expropriation giving rise to claims

(accessed 4 September 2025). Generally thereto see also, e.g., *Duggal/van de Ven*, *Arbitration International* 35 (2019), 347 *et seq.*; *Lavranos*, *Arbitration International* 36 (2020), 441 *et seq.*; *De Brabandere*, *ICSID Review – Foreign Investment Law Journal* 36 (2021), 319 *et seq.*

135 Canadian Model Foreign Investment Promotion and Protection Agreement of 12 May 2021, available on the internet under: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apic/2021_model_fipa-2021_modele_apic.aspx?lang=eng> (accessed 4 September 2025).

136 For an overview of these various approaches see, e.g., already *Nowrot*, *Journal of World Investment and Trade* 15 (2014), 612 (629 *et seq.*), with additional references.

137 On this perception see already *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91, with further references.

138 See *supra* under C.

139 See on the respective regulatory approaches for example *Radi*, *Rules and Practices of International Investment Law*, 213 *et seq.*; *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (96 *et seq.*); *Lim/Ho/Paparinskis*, *International Investment Law and Arbitration*, 394 *et seq.*

140 See thereto already *supra* under C.

for compensation by affected investors on the one hand and legitimate regulatory measures on the other hand. A respective example is provided by Annex 8-A (3) of CETA: “For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.” A very comparable regulatory approach is for example stipulated in paragraph 4 of Annex A of BIT concluded between New Zealand and the United Arab Emirates on 14 January 2025. Whereas these provisions can clearly be regarded as a codification of the above mentioned ‘modified proportionality test generally in favor of the host state’,¹⁴¹ we also find, among others, even stricter regulatory approaches from the perspective of foreign investors that do not foresee the possibility of exceptions in ‘rare circumstances’ and are thus in fact codifying the ‘sole intentions doctrine’, also referred to as the ‘strong police powers doctrine’.¹⁴² Article 6.5 of the BIT concluded between India and Uzbekistan on 27 September 2024 that entered into force on 15 May 2025 provides a telling example in this regard as far as the scope of indirect expropriations is concerned: “Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.” A quite similar provision can be found for example in Article 7 (4) of the China-Venezuela BIT of 15 November 2024 that entered into force on 14 January 2025.

Another substantive protection standard of particular practical importance also in many investor-state dispute settlement proceedings that concern issues of environmental protection is the requirement of fair and equitable treatment. Also in this connection we see more recently attempts by contracting parties to specify and modify this traditionally particularly vague normative concept. A respective example is Article 2.5 (2) of the EU-Vietnam investment agreement signed on 30 June 2019: “A Party breaches the obligation of fair and equitable treatment referred to in paragraph 1 where a measure or series of measures constitutes: [...] (b) a fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief [...]” A quite similar provision is for example stipulated in Article 2 (2) of the BIT concluded between Bahrain and Hungary on 4 September 2024 and entering into force on 7 July 2025.

The specification and modification of investment protection standards *ex ante* constitutes surely a regulatory option that allows the contracting parties to concretize their legitimate expectations vis-à-vis investment tribunals and enhances the predictability of the outcome of future cases, thereby clearly having the potential for an increased legal certainty for host states and foreign investors alike. Despite these benefits, however, there are also potential challenges that might arise in this connection. As already illustrated by the few examples given here from more recent investment treaty-making practice, the respective specifications not infrequently again take recourse to new rather indeterminate legal terms and concepts such as – in the context of indirect expropriation – the notions of ‘manifestly excessive’ or ‘so severe in light of its purpose’ and – as far as the protection standard of fair and equitable treatment is concerned – the legal requirements of ‘manifest arbitrariness’ or ‘fundamental breach of due process’; quite vague and open stipulations that again grants investment tribunals considerable leeway

141 See *supra* under C.

142 See again thereto already *supra* under C.

in their decision-making processes.¹⁴³ Moreover, some of these concretizations might give rise to new – and, not the least from the perspective of the rule of law, potentially undesirable – effects that might be qualified as ‘definitory tensions’. For example, one might legitimately ask the question whether ‘ordinary’ arbitrariness by host states in their treatment of foreign investors can really still be regarded as a fair and equitable treatment?¹⁴⁴ Finally, and if viewed from a more overarching perspective, it seems appropriate to recall also in the present context that broad and more abstract formulations of legal rules and principles are not necessarily and inherently negative. Rather, they allow for a certain flexibility to address the specific circumstances of every individual case and, in this connection, might very well be regarded as a suitable approach to facilitate individual fairness and justice; requirements that are often and rightly regarded as important components of the rule of law.¹⁴⁵ It is precisely for these reasons and based on these considerations that some domestic legal terms and concepts are at least as broadly and vaguely phrased as certain investment protection standards. As for example *Prosper Weil* has rightly emphasized already some years ago: “The standard of ‘fair and equitable treatment’ is certainly no less operative than was the standard of ‘due process of law,’ [...]”¹⁴⁶

Aside from this specification *ex ante*, the second regulatory approach concerns the concretization of respective investment protection standards *in progressu* and refers to the adoption of subsequent specifications of provisions in investment agreements that are already concluded and applied between the contracting parties. It should finally not go unnoticed that treaty parties intending to address broader public interest concerns in their investment agreements such as environmental protection do not only enjoy a number of regulatory options to modify and specify their legal commitments *ex ante*. Rather, adopting a procedural perspective, they might also take recourse to subsequent interpretative statements in order to clarify the meaning of their rights and obligations *ex post* or *in progressu*, thereby equally having the chance to limit the interpretative competences delegated to investment arbitration tribunals in particular also as far as cases dealing with issues of environmental protection are concerned.

It is in principle well-recognized under general public international law that the contracting parties – as being the so-called “masters of the treaty”¹⁴⁷ – retain the right to issue authoritative statements on the proper reading of the agreement even in the absence of explicit stipulations in the treaty at issue.¹⁴⁸ Nevertheless, states have traditionally overall displayed

143 See in this connection also already for example *Muchlinski*, in: Hindelang/Krajewski (eds.), *Shifting Paradigms in International Investment Law*, 41 (52) (“the exclusion of the above types of public policy measures from the indirect expropriation concept may not offer the clarity that this appears to give at first sight”); *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (95 *et seq.*); *Cox*, *Expropriation in Investment Treaty Arbitration*, 154.

144 On this issue see already, e.g., *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (100).

145 Generally on this perception see also for example *Schmidt-Aßmann*, *Das allgemeine Verwaltungsrecht als Ordnungs-idee*, 194 *et seq.*; *Dreier*, *Hierarchische Verwaltung im demokratischen Staat*, 171; *Reimer*, in: Hoffmann-Riem/Schmidt-Aßmann/Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts*, Vol. I, § 9, para. 62; *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (92). Specifically in the context of international investment law see, e.g., *Dolzer/Schreuer*, *Principles of International Investment Law*, 133 *et seq.*; *Vasciannie*, *British Yearbook of International Law* 70 (1999), 99 (104).

146 *Weil*, *ICSID Review – Foreign Investment Law Journal* 15 (2000), 401 (415).

147 On this perception see, e.g., *Wälde*, *Arbitration International* 26 (2010), 3 (16); *Dörr*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary*, Article 31, para. 19; *Roberts*, *American Journal of International Law* 104 (2010), 179 (202); *Krajewski*, in: Donath/Heger/Malkmus/Bayrak (eds.), *Festschrift für Rainer Hofmann zum 70. Geburtstag*, Vol. 2, 653 (660); *Polanco*, *The Return of the Home State to Investor-State Disputes*, 103; *Methymaki/Tzanakopoulos*, in: Kulick (ed.), *Reassertation of Control over the Investment Treaty Regime*, 155 (160).

148 See also for example ICJ, *Case Concerning Kasikili/Sedudu Island*, (Botswana v. Namibia), ICJ-Reports 1999, 1045 (1075 *et seq.*); *Jennings/Watts*, *Oppenheim’s International Law*, Vol. I, Parts 2 to 4, 1268 (“Such authentic interpretations given by the parties override general rules of interpretation.”); *Dörr*, in: Dörr/Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary*, Article 31, para. 19.

a rather reluctant attitude towards actively exercising their interpretative competences in the realm of investment agreements.¹⁴⁹ That said, there are also certain indications that this procedural approach is in particular more recently gaining ground in investment treaty practice. Among the oldest and best-known examples was the formal mechanism provided for by Article 2001 (2) lit. c in connection with Article 1131 (2) NAFTA by which the NAFTA Free Trade Commission (FTC) enjoyed the competence to issue interpretative statements on individual provisions that are binding on respective investment tribunals; a competence occasionally been taken recourse to in previous decades¹⁵⁰ and – largely – accepted as authoritative in arbitral practice.¹⁵¹ A quite similar mechanism is now established on the basis of Article 30.2 (2) lit. f in connection with Article 14.D.9 of the 2020 United States-Mexico-Canada Agreement (USMCA), the successor agreement to NAFTA. Other manifestations of this regulatory approach in investment agreements include Article 40 (3) of the 2009 ASEAN Comprehensive Investment Agreement, stipulating that “[a] joint decision of the Member States, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision”, Article 30 (3) of the 2008 BIT between Rwanda and the United States, Article 17 (2) of the 2006 BIT between Mexico and the United Kingdom, Article 32 (1) of the 2016 BIT between Canada and Mongolia, Article 26 of the 2024 BIT between India and Uzbekistan as well as Article 8.31 (3) of CETA.

The possibility to issue subsequent interpretative statements most certainly constitutes a suitable and effective approach to enhance legal certainty as well as the interpretative weight to be accorded to the promotion of public interest concerns such as environmental protection in the context of investor-state arbitration proceedings, including by way of specifying substantive investment protection standards *in progressu*. The contracting parties normally cannot anticipate at the time of concluding the treaty all interpretatory challenges that might arise once the agreement is in operation. Recourse to joint authoritative interpretations allows them – as a kind of compensatory regulatory mechanism – to, for example, respond subsequently in a flexible and timely manner to certain decisions by investment tribunals. In light of these considerations, the option of issuing binding interpretatory statements as explicitly provided for in an increasing number of investment agreements can be regarded as a kind of build-in learning process for the contracting parties.¹⁵²

Despite these advantages, however, certain potentially problematic challenges also arising from this option should not be left unmentioned. Aside from the well-known fact that it can be in practice rather difficult to clearly distinguish between reasonable legal interpretations on the one side and in many ways potentially more questionable *de facto* treaty amendments on the

149 On this perception see for example UNCTAD, Interpretation of IIAs: What States can do, IIA Issue Note No. 3, December 2011, 3; *Gazzini*, Interpretation of International Investment Treaties, 338.

150 See in particular FTC, Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2001; FTC, Statement on Non-Disputing Party Participation of 7 October 2003. See thereto also *Blackaby/Richard*, in: Waibel *et al.* (eds.), The Backlash Against Investment Arbitration, 253 (259 *et seq.*); *Harrison*, in: Dupuy/Francioni/Petersmann (eds.), Human Rights in International Investment Law, 396 (401 *et seq.*); *Nowrot*, in: Ehlers/Terhechte/Wolffgang/Schröder (eds.), Aktuelle Entwicklungen des Rechtsschutzes und der Streitbeilegung im Außenwirtschaftsrecht, 81 (90 *et seq.*).

151 See for example *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award of 9 January 2003, para. 177 (“No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.”), *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, paras. 90 *et seq.*; *Merrill & Ring Forestry v. Canada*, UNCITRAL Arbitration, Award of 31 March 2010, paras. 189 *et seq.*; see, however, also the concerns voiced by the tribunal in *Pope & Talbot Inc. v. Canada*, NAFTA Arbitration, Award in Respect of Damages of 31 May 2002, paras. 43 *et seq.*

152 See thereto also, e.g., *van Aaken*, Journal of International Economic Law 12 (2009), 507 (536) (“a device to allow for learning processes through a kind of functional renegotiation with low transaction costs”); *Boor/Nowrot*, Kölner Schrift zum Wirtschaftsrecht 7 (2016), 91 (103). Generally on the idea of build-in learning processes in legal regimes see *Luhmann*, Jahrbuch für Rechtssoziologie und Rechtstheorie 1 (1970), 175 (191 *et seq.*).

other side,¹⁵³ it is in particular the dual role of states (and supranational organizations) as treaty parties and actual or at least potential respondents in investment arbitration proceedings that not infrequently gives rise to concerns with regard to issues of procedural fairness, especially if treaty parties attempt to influence the litigation of ongoing cases to their benefit on the basis of interpretative statements to which retroactive effect is attributed.¹⁵⁴ In the interest of procedural fairness and thus ultimately the rule of law, preference should consequently be given to proactive interpretatory statements unrelated to, and not applicable to, currently ongoing investor-state arbitration proceedings.

And indeed, the wording of at least some of the respective provisions indicate that the contracting parties have been aware of these challenges when negotiating and drafting their investment agreements. For example, Article 3.42 (5) of the EU-Vietnam investment agreement signed on 30 June 2019 states: “When serious concerns arise as regards issues of interpretation which may affect matters relating to this Section, the Committee may adopt interpretations of provisions of this Agreement. Any such interpretation shall be binding upon the Tribunal and the Appeal Tribunal. *The Committee may decide that an interpretation shall have binding effect from a specific date.*”¹⁵⁵ Similar provisions are for example stipulated in Article 8.31 (3) of CETA as well as in Article 3.13 (3) of the EU-Singapore investment agreement signed on 19 October 2018. These regulations indicate that the contracting parties at least consider the possibility of explicitly excluding any retroactive effects of their authoritative interpretations. Finally, even more far-reaching, and in the interest of procedural fairness indeed also preferable, is the regulatory approach chosen in the in many ways quite innovative 2015 Norwegian Draft Model BIT that foresees in its Article 23 (4) (ii) that the Joint Committee may “interpret this Agreement, bearing in mind that this competence shall not be used to undermine the amendment provisions of Article [Amendments]. The Joint Committee should refrain from adopting interpretations of provisions already submitted to a Tribunal in a dispute between a Party and an Investor of the other Party; [...]”.¹⁵⁶

153 See thereto for example the quite telling statement by the investment tribunal in *Pope & Talbot Inc. v. Canada*, NAFTA Arbitration, Award in Respect of Damages of 31 May 2002, para. 47 (“For these reasons, were the Tribunal required to make a determination whether the Commission’s [the NAFTA FTC] action is an interpretation or an amendment, it would choose the later.”). Specifically in the context of investment agreements see on this issue also *Ewing-Chow/Losari*, in: Kalicki/Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System*, 91 (109 *et seq.*); *Krajewski*, in: Donath/Heger/Malkmus/Bayrak (eds.), *Festschrift für Rainer Hofmann zum 70. Geburtstag*, Vol. 2, 653 (659 *et seq.*); *Methymaki/Tzanakopoulos*, in: Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime*, 155 (177 *et seq.*); *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (103). Generally on this challenge in connection with authoritative treaty interpretations by the contracting parties see also, e.g., *Chayes/Handler Chayes*, *The New Sovereignty*, 209; *Dahm/Delbrück/Wolfrum*, *Völkerrecht*, Vol. I/3, 674; *Karl*, in: Schreuer (ed.), *Autorität und internationale Ordnung*, 9 (23 *et seq.*); *Tietje*, *Zeitschrift für Rechtssoziologie* 2003, 27 (37); *Nowrot*, in: *Tietje/Nowrot* (eds.), *Internationales Wirtschaftsrecht*, 68 (108 *et seq.*).

154 On the respective concerns see for example *Schreuer*, in: Fitzmaurice/Elias/Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties*, 129 (148) (“It is obvious that a mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings, by issuing official interpretation to the detriment of the other party, is incompatible with principles of fair procedure and is hence undesirable.”); *Ishikawa*, in: Kalicki/Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System*, 115 (141 *et seq.*); *Boor/Nowrot*, *Kölner Schrift zum Wirtschaftsrecht* 7 (2016), 91 (103 *et seq.*); *Roberts*, *American Journal of International Law* 104 (2010), 179 *et seq.*; *Gazzini*, *Interpretation of International Investment Treaties*, 338. See thereto from the arbitral practice also, e.g., *Pope & Talbot Inc. v. Canada*, NAFTA Arbitration, Award in Respect of Damages of 31 May 2002, paras. 48 *et seq.*

155 Emphasis added by the author.

156 The text of the 2015 Norwegian Draft Model BIT is available on the internet under: <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>> (accessed 4 September 2025).

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