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Politics of the Minimum Standard of Treatment under the North American Free Trade Agreement

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JUDICIAL BEHAVIOUR IN INVESTMENT TREATY ARBITRATION

POLITICS OF THE MINIMUM STANDARD OF TREATMENT UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

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ABSTRACT

That subjective and political values form the sources and function of international law, is an often encountered claim and the literature produced by schools of international legal theory in response to this inquiry diverge. On the one hand, according to classical and positivist approaches to international law, a formalistic and ideal form of the law that is also detached from the world of politics is possible. On the other hand, the perception that attitudinal and institutional constraints might determine the content of the law is common in international legal scholarship ranging from international relations approaches and the New Stream to policy oriented perspectives.

Understanding the content of the law, however, would also necessitate questioning how adjudicators interpret legal texts and decide in causal-positive terms. In other words, in theorizing international law, one should explore the interpretation and application of international law in order to test whether adjudicators are influenced by background, training, personality, value preferences as well as normative and structural institutional constraints and, thus, if international law operates based on law and/or politics.

Based on the theories and methods of judicial behaviour that originate from the American legal realism movement of the early 20th century, this work undertakes a non-empirical socio-legal research that studies the behaviour of ITA tribunals. It considers that law is indeterminate and that the process of judicial-decision making is a mixture of law, politics and policy. This work constructs a framework based on the political regimes approach by Clayton and May (1999), supplemented by the political jurisprudence literature of Shapiro (1964) and the historical interpretive approach of Smith (1988). It argues that ITA Tribunals “may believe that individual legal institutions are themselves embedded within, and draw meaning from, the larger political regime”. In doing so, the ITA Tribunal may assume a principal political role in order to accommodate the interests of various stakeholders involved in the broader political regime of international investment, albeit limited to constitutive and non-constitutive institutions. This work investigates the role of institutions embedded in the broader political regime in judicial decision-making in ITA. How do institutions, with their political characteristics, affect the process of decision-making in ITA or do they affect at all? To that extent, this work is concerned with whether the ITA Tribunal oscillates between the normative character of the law and

the political contingency of the law. It examines the extent to which the ITA Tribunal accommodates politics in its decisions and, in this vein, whether there is a correlation between politics and decision-making in ITA.

As its case study, this work studies arbitral decision-making under NAFTA Chapter 11. It first explores the broader political regime in which NAFTA tribunals operate, revisiting the original bargain that underlies the NAFTA deal. It then identifies specific constitutive institutions that are influential in NAFTA ITA decision-making. It traces the specific vocabulary or 'grammar' (Koskenniemi 1989) that is used by Chapter 11 Tribunals in considering the place of these constitutive institutions in ITA decision-making. Subsequently, this work studies the normative political development of Article 1105 on the minimum standard of treatment within the broader political regime under NAFTA. It investigates shifts in the specific vocabulary vis-à-vis the distortions to the two pillars of the political regime of NAFTA, namely asymmetric obligations and the regulation of environment. This work demonstrates that the development of the minimum standard of treatment under Article 1105 reflects a brief history of intrusion by non-disputing parties from sovereign states and *amici.* This is enabled through the constitutive institutions and draws meaning from the political regime of international investment under NAFTA. It concludes that the ITA Tribunal is able to develop a vocabulary with which it could internalize the conundrums of the broader political regime in which it operates. This shows that the ITA Tribunal is not only competent in settling disputes but also in *judicial politics*.

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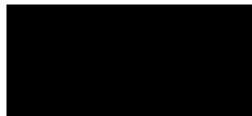
DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Dundee or any other institution.

I can confirm that this dissertation was copy edited for conventions of language, spelling and grammar by David Law.

Signed: 

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ABBREVIATIONS

ASIL	American Society of International Law
BIT	Bilateral Investment Treaty
BRICs	Brazil, Russia, India and China
CGPA	Canadian Generic Pharmaceutical Association
CIS	Commonwealth of Independent States
CIPP	Centre for Intellectual Property Policy
CIPPIC	Canadian Internet Policy and Public Interest Clinic
CUP	Cambridge University Press
EC	European Commission
ECtHR	European Court of Human Rights
ECT	Energy Charter Treaty
ECJ	European Court of Justice
EU	European Union
FAA	Federal Arbitration Act
FCC	Federal Commercial Code
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair & Equitable Treatment
FPS	Full Protection & Security
FTA	Free Trade Agreement
FTC	Free Trade Commission
GA	General Assembly
GATT	General Agreement on Trade and Tariffs
IBA	International Bar Association
ICAA	International Canadian Arbitration Act
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IIAs	International Investment Agreements
ILC	International Law Commission
IISD	International Institute for Sustainable Development
MFN	Most Favored Nation
MIGA	Multilateral Investment Guarantee Agency
MTEB	Methyl Tertiary Butyl Ether
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labour Cooperation
NAM	National Association of Manufacturers
NAFTA	North American Free Trade Organization
NGO	Nongovernmental Organization
NIEO	New International Economic Order

NT	National Treatment
OECD	Organization for Economic Cooperation & Development
OGEMID	Oil, Gas, Energy, Mining and Investment Disputes
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCC	Stockholm Chamber of Commerce
TDM	Transnational Dispute Management
TFEU	Treaty on the Functioning of the European Union
TPP	Trans Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

CHAPTER I

AN INTRODUCTION

"The language of judicial decision is mainly the language of logic. ... Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions"

Oliver Wendell Holmes Jr[1]

I. Introduction

" - You know, judge, if we lose this case we could lose NAFTA.
- Well, if you want to put pressure on me, then that does it"

This was a conversation that allegedly took place between the US Department of Justice Officials and Judge Mikva before he was appointed as arbitrator in *Loewen v the USA.*[2] The case entailed a claim that the US justice system failed to provide due process, a claim that – no matter how legitimate it perhaps was – had to be buried since[3], in the Tribunal's own words, the contrary would have damaged "both the integrity of the domestic judicial system and the viability of NAFTA itself".[4] Whilst one might argue that the US Officials' behind-the-doors intervention had no legal implications on the case, one must also weigh the practical reflections of this engagement on the behaviour of the Tribunal.

Was this the only instance, in which an investment treaty arbitration (ITA) tribunal was 'encouraged' to decide in a specific way? Although it would not be possible to establish causation between engagements, as such, and ITA decision-making, one could investigate

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[1] Oliver Wendell Holmes, 'The Path of the Law' (1997) 110 Harvard Law Review 991 at 9.
[2] J. Paulsson, The Idea of Arbitration (OUP Oxford 2013) at 161.
[3] Noah Rubins, 'Loewen v. United States: The Burial of an Investor-State Arbitration Claim' (2005) 21 Arbitration International 1.
[4] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, NAFTA, Award at para. 242.

publicly available information to illustrate correlation as to how politics[5] is internalized, eventually effecting arbitral behaviour.[6] In other words, one does not have to take a journalistic approach to uncover how arbitrators interact with State officials to determine what influences arbitral decision-making. One might as well construct an investigation on how normative[7] rules are applied, questioning why an ITA tribunal has decided the way it did and how it reached that particular outcome. Two presumptions would be key to such an approach. First, one should consider that, in ITA, politics does not have to take the form of an explicit intervention from the sovereign as experienced in *Loewen*. Second, even the simplest political impulses might be internalized and institutionalized in the normative framework that applies in ITA cases.

Critical approaches as such are not novel. Having emanated from the legal realism movement of the early 20th century, American political scientists have developed theories and methods with which they could examine judicial decision-making in the US Supreme Court. This body of scholarship is entitled *judicial behaviour* or *judicial politics* and analyses what adjudicators do and why they do it.[8] The attempt to explain behaviour of adjudicators has been mostly based on attitudinal and institutional theories, and has been subject of systematic, empirical and theoretical approaches. Traditionally, these methods

---

[5] Throughout this work the term 'politics' or 'political' will be utilized to refer to those activities of stakeholders who are concerned with furthering their subjective desires against constitutive limitations. This understanding of politics is constructed on Professor Martti Koskenniemi's description of the term in his often cited EJIL article on "The Politics of International Law": "…politics [is] understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules: '…the health of the political realm is maintained by conscientious objection to the political'". Martti Koskenniemi, 'The Politics of International Law', 4 EJIL 1 (1990) at 6.

[6] Catherine A Rogers, 'The Politics of International Investment Arbitrators', 12 Santa Clara Int'l. L. Rev. (2013); Penn State Law Research Paper No 52-2013 at 228-30. According to Professor Rogers "empirical data can only prove correlation". Whilst this work is not empirical, it nevertheless adopts a socio-legal approach in order to investigate the ITA Tribunal's engagement in politics. Similarly, the evidence gathered from a socio-legal investigation as such might only show correlation and not causation.

[7] Throughout this work the term 'normative' will be utilized to refer to existing rules and doctrines of the law that are based on norms. It will also be used in referring to normative legal research which implies a doctrinal way to study the law and which could be defined as "a process to find legal rules, legal principles, and doctrines of the law to address the legal issues at hand". Theresia Anita Christiani, 'Normative and Empirical Research Methods: Their Usefulness and Relevance in the Study of Law as an Object', Procedia – Social and Behavioural Sciences 219 (2016) 201-7 at 203.

[8] For a general overview *see* Nancy L Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' in Nancy L Maveety (ed), The Pioneers of Judicial Behavior (University of Michigan Press 2009).

and approaches do not question the normative content of the law.[9] Judicial behaviour rather puts forward hypotheses that explore motivations behind judicial decision-making, and aims to supply evidence that could show correlation.

Within this context, this work studies the role of politics in judicial behaviour in ITA. It studies how the political regime of international investment influences behaviour of ITA tribunals. Some might find this a futile exercise. After all, under a formalist mind-set, the ITA tribunal is outside of politics and that all it is doing is to apply the treaty, all the treaty and only the treaty.[10] On the other hand, a legal realist would challenge such a proposition. To them, ITA decision-making is not immune to politics and *Loewen* would be the tip of the iceberg.[11]

In this introduction to *Judicial Behaviour in ITA*, the reader is first presented to the fundamentals of international investment law, the body of rules that govern the flow of international investment. Hereunder, international investment law is perceived as an institutional framework that embodies a political regime for international investment (from which an ITA tribunal may draw meaning when interpreting substantive provisions of a treaty).[12] The reader is then introduced to what the term "institutions" conveys in the scope of this work. An introduction to new institutionalism is provided. This is followed by research questions and a brief overview of the methodological approach, i.e. socio-legal or 'Law in Context'.

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[9] Jeffrey A. Segal, 'Judicial Behaviour' in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds), The Oxford Handbook of Law and Politics (Oxford, OUP 2008).

[10] For proponents of this proposition *see* A. Broches, 'Settlement of Investment Disputes' in A. Broches (ed), Selected Essays World Bank, ICSID, and Other Subjects of Public and Private International Law (Martinus Nijhoff Publishers 1995); Jan Paulsson, Denial of Justice in International Law (Cambridge University Press 2005); Charles N Brower and Sadie Blanchard, 'What's in a Meme-the Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2013) 52 Colum J Transnat'l L 689.

[11] *See* e.g. Thomas Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics' (2015) 6 Journal of International Dispute Settlement 231. Also *see* Y. Dezalay and B.G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (University of Chicago Press 1998).

[12] See Cornell Clayton and David A May, 'A Political Regimes Approach to the Analysis of Legal Decisions' (1999) Polity 233.

II. International Investment Law and Investment Treaty Arbitration

International investment law is a discipline that embodies common rules that govern the flow of foreign investment.[13] It is a discipline that involves application of treaty standards of protection and customary international law for the treatment of alien investors to disputes. These more commonly, arise from controversies in high-stake infrastructure operations that involve public interest issues. Today, these operations include oil and gas explorations[14], regulatory measures in energy (e.g. electricity and gas)[15], water[16], transportation[17] and telecommunications.[18]

Modern international investment law operates within a network of international investment agreements (IIAs). Since the signing of the first bilateral investment treaty (BIT) between West Germany and Pakistan in 1959[19], this network has grown into include more than 3100 BITs, 339 other IIAs and regional free trade agreements (FTAs) such as the Investment Chapter of the Energy Charter Treaty (ECT) or Chapter 11 of the NAFTA. Contemporary IIAs codify standards for the protection and promotion of foreign investments such as most favoured nation (MFN), national treatment (NT), compensation for direct and indirect forms of expropriation, full protection and security, and fair and equitable treatment (FET). The majority of IIAs also include dispute settlement provisions which establish the basis for the comparably recent phenomenon of the ITA system. Currently there are more than 100 publicly-known pending ITA cases and the number of cases filed in the International Centre for Settlement of Investment Disputes (ICSID) – only – has increased to 597 by the end of 2016.[20]

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[13] Some scholars also referred to an emerging global investment regime in explaining the development of international investment law and investment treaty arbitration. *See* J.W. Salacuse, The Law of Investment Treaties (OUP Oxford 2010), whereby Salacuse adopted the "regime theory" of international relations. Also *see* Jeswald W Salacuse, 'The Emerging Global Regime for Investment' (2010) 51 Harv Int'l LJ 427; Jose E. Alvarez, The Public International Law Regime Governing International Investment (The Hague Academy of International Law 2011).

[14] *See* e.g. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.

[15] *See*. e.g. Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01.

[16] *See* e.g. Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/18.

[17] *See.* e.g. ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1.

[18] *See* e.g. France Telecom v. Lebanon, UNCITRAL, Award, 22 February 2005.

[19] Treaty for the Promotion and Protection of Investments between Pakistan and Federal Republic of Germany (25 November 1959).

[20] J. Zhan, World Investment Report 2013: Global Value Chains: Investment and Trade for Development (UNCTAD 2013); ICSID Case Load Statistics (Issue 2017 – 1) available at <

The ITA system is considered as unique[21] in that it enables individual claims of international law by foreign investors against sovereign states. It provides private parties the right to unilaterally initiate proceedings[22] and directly seek redress when the conduct of a host state allegedly harm their rights and interests.[23] In this, it puts the resolution of claims that arise from the treatment of foreign owned property into the hands of a tribunal[24] comprising of party appointed and presiding arbitrators, who interpret and apply substantive standards of treatment of international law under the jurisdiction granted to them in respective IIAs.

These substantive treaty standards have undergone some comprehensive development beginning with the emergence of international property rights in the 17th and 18th centuries. Throughout the course of history, the scope of the protection for foreign investors provided under the diplomatic protection of foreign property[25], *Calvo* doctrine[26] and customary international law have changed status and/or evolved into treaty standards of protection of foreign investments. While the *Calvo* doctrine restricted recourse of foreign investor claims only to domestic courts, first with the advent of the NT[27], investors were offered treatment "no less favourable than that which the host-state accords to its

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https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf> last accessed on 8 November 2017.

[21] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 European Journal of International Law 121. For a novel critique of this proposition *see* Martins Paparinskis, 'The Limits of Depoliticisation in Contemporary Investor-State Arbitration' (2010) 3 Select Proceedings of the European Society of International Law.

[22] Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Review 232.

[23] Todd Weiler, The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context (Martinus Nijhoff Publishers 2013) at 5.

[24] Or 'the ITA Tribunal' as explained later in this work. *See* e.g. Section VI in this Chapter on the "Methodological Approach".

[25] Charles Lipson, Standing Guard: Protecting Foreing Capital in the Nineteenth and Twentieth Centuries (University of California Press, 1985).

[26] The Calvo doctrine, asserted by the Argentine jurist Carlos Calvo, holds treatment of foreign nationals not more favourable than that is entitled to host state nationals. *See* Kenneth J Vandevelde, 'Sustainable Liberalism and the International Investment Regime' (1997) 19 Mich J Int'l L 373 at 379-80. *See* Donald Shea, The Calvo Clause (University of Minnesota Press 1955). For a more recent overview of the development of the Calvo doctrine *see* N. Maurer, *The Empire Trap: The Rise and Fall of U.S. Intervention to Protect American Property Overseas, 1893-2013* (Princeton University Press, 2013) at 18.

[27] "Advocates of this rule argued that it was an infringement of territorial sovereignty to cloak an alien with rights and privileges that placed them in a better position than citizens of the host state. In other words, aliens should be afforded no more than equal treatment with local citizens". "Those promoting the international minimum standard argued that national treatment did not provide sufficient protection for foreign investors…" Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital, vol 99 (Cambridge University Press, 2013) at 49-50.

own [i.e. national] investors".[28] Subsequently, the MFN standard extended the scope of the NT to treatment no "less favourable than investments of investors of any third state".[29] In addition, foreign investors increasingly invoked FET, full protection and security, and compensation for indirect expropriation standards, which, by way of interpretation, transcended the – rather narrow – protection provided under the minimum standard of treatment under customary international law.[30]

III. International Investment Regime, Politics and Fragmentation

The text-book definition of international investment law and ITA above is necessary to put this work on judicial behaviour in ITA in context. It is not sufficient however. In order to comprehend international investment law and ITA, one needs to revisit the political context in which this specialized regime of international law has come into being and has evolved.

Origins

Some scholars have traced this specialized regime of international law back to diplomatic protection and customary international law. In the introduction to the second edition of their commentary on *Principles of International Investment Law*, Christoph Schreuer and Rudolf Dolzer present a history of diplomatic protection and customary international law that takes the *Calvo* doctrine and the emergence of "the minimum standard of treatment" as the origins.[31] Likewise, Kenneth Vandevelde introduces the Friendship Commerce and Navigation (FCN) treaty programme of the US as the precursor of the modern BITs.[32] These provide the set of rules under international law, as contextualized by Elihu Root, which would protect an alien (a foreign national) from rules and procedures implemented in the domestic sphere if these rules and procedures fall below a minimum standard of

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[28] Christoph Schreuer and Rudolf Dolzer, Principles of International Investment Law: Rudolf Dolzer and Christoph Schreuer (Oxford University Press, 2008) at 178.

[29] *Ibid.*

[30] *Ibid*. Also see I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press, 2008) at 131.

[31] Schreuer and Dolzer, Principles of International Investment Law: Rudolf Dolzer and Christoph Schreuer at 44-8.

[32] Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation (Oxford University Press, 2010) at Chapter 2.

treatment.[33] Observance of a minimum standard of treatment was available in the cases filed at the International Court of Justice (ICJ) (and its predecessor Permanent Court of International Justice – PCIJ) and international claims commissions mostly in the first half of the 20th century, whereby home state of the alien would institute a claim against the host state in which the alien was injured.[34] Neither the customary international law on diplomatic protection nor the FCNs allowed direct recourse by aliens against host states as opposed to dispute settlement provisions in modern BITs.

Against a background of mainstream literature that considers historical origins as "anachronistic and obsolete"[35], some other scholars traced the institutions that underlie the international law principles and rules on the protection of aliens. In his often-cited commentary on *The International Law on Foreign Investment*, Professor Sornarajah traced the definition of 'foreign investment' to early European institutional writings, finding support from Vitoria and Vattel.[36] Andrew Guzman's starting point, on the other hand, was 'the Hull Rule' and its demise after World War II. [37] More recently, Kate Miles traced the origins to the evolution of 'aliens' property rights' drawing on the writings of Lipson and Anghie.[38] Whilst these scholars differed on their individual points of reference to the 'origins', their critical works share a common perception of international investment law – that international investment law emerged and evolved in response to the changing political landscape of inter-state relations. As opposed to normative analysis

[33] Elihu Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 16 American Journal of International Law Proceedings at 517.
[34] *See* e.g. LFH Neer & Pauline Neer (US) v. United Mexican States, 15 October 1926, 4 UNRIAA 60 (1926); Barcelona Traction, Light, & Power Case (Belgium v. Spain), Second Phase, ICJ Reports 4 (1970); Electronica Sicula (ELSI) Case (US v. Italy), ICJ Reports 15 (1989); Mavrommatis Palestine Concessions Case (Greece v. United Kingdom (UK)), PCIJ Series A, No. 2 (1924); Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland), PCIJ Series A, No. 10 (1926); Factory at Chorzów Case (Germany v. Poland) PCIJ Series A, No. 17 (1928).
[35] Schreuer and Dolzer, Principles of International Investment Law at 49.
[36] M. Sornarajah, The International Law on Foreign Investment (Cambridge University Press 2010) at 19-21.
[37] Hull Rule, as formulated in a diplomatic exchange between the American Secretary of State, Cordell Hull, and the Mexican Minister of Foreign Affairs in 1938, provides a full compensation standard: "[…] under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor". The "prompt, adequate, and effective" compensation formula has become known as the Hull Rule. A. T. Guzman, 'Why Least Developed Countries Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 Virginia Journal of International Law 639 at 645.
[38] Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital.

of the ‘origins’ of international investment law, they describe a regime of international investment based on law and economics[39], legal realism[40] and critical theory.[41] Throughout the course of its brief history, whilst an international investment regime, as we know today, evolved, attaining the political attributes of its era, i.e. the fall of the Soviet Union and globalization, and more recently, anti-globalization, scholars found support for a ‘systemic bias’ rooted in colonization.

The Germany-Pakistan BIT of 1959 is considered as the first BIT. Although this BIT is no longer in force (having been replaced in 2009[42]) (and did not provide for a binding dispute settlement mechanism), it nevertheless demonstrates the political environment in which the BITs were drafted. The Treaty is entitled “Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments” and amongst others, intends “to create favourable conditions for investments by nationals and companies of either State […]”, recognizing the promotion of investment and encouragement of private industrial and financial enterprise. This language is repetitive. Modern BITs include common references to ideals of market economy including “transfers of capital”, “private economic initiatives”[43], “flow of capital for economic activity”[44] and “stimulate private business ventures”.[45] These references mostly reflect political and economic developments after World War II. In the aftermath of World War II, in reconstructing a war-torn Europe, global institutions such as the World Bank and the International Monetary Fund assumed a role to foster stabilization and liberalization

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[39] A.F. Lowenfeld, International Economic Law (Oxford University Press, 2003).

[40] Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics'.

[41] D. Schneiderman, Resisting Economic Globalization: Critical Theory and International Investment Law (Palgrave Macmillan, 2013).

[42] Treaty for the Promotion and Protection of Investments between Pakistan and Federal Republic of Germany (1 December 2009).

[43] Treaty Between the Argentine Republic and The Republic of Chile for the Promotion and Reciprocal Protection of Investments (1991) Preamble

[44] Agreement Between Australia and the Czech Republic on the Reciprocal Promotion and Protection of Investments (1995) Preamble

[45] *See* e.g. Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion And Protection of Investments (1990) Preamble; Convention Between the Belgo-Luxembourg Economic Union and the Republic of Burundi Concerning the Reciprocal Promotion And Protection of Investments (1989) Preamble; Agreement between the Government of the Republic of Finland and the Government of the Republic of Estonia for the Promotion and Protection of Investments (1992) Preamble; Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments (2009) Preamble; Canada Model Foreign Investment Protection Agreement (FIPA) 2004 Preamble.

under the guidance of the Bretton Woods conference.[46] The early signs of a global order were, however, undermined with decolonization and the adoption of the New International Economic Order (NIEO), whereby newly independent states or former colonies, asserted their 'permanent sovereignty over natural resources' through the United Nations (UN) General Assembly by the mid-1970s.[47] Still, the International Centre for the Settlement of Investment Disputes (ICSID) Convention was drafted and was opened to signature in 1965.[48] ICSID was established by the World Bank to settle claims against states with binding and final awards, which would not require recourse to domestic judiciary for enforcement.[49] The Convention was drafted primarily with contractual arbitrations in mind.[50] As such, the first arbitrations brought under the convention (namely *Alcoa Minerals v Jamaica*[51], *Adriano Gardella v Cote d'Ivoire*[52]) reflected this initial purpose of the Convention.

Proliferation

Whilst the development of international investment law remained reserved until then, the situation changed with the fall of the Soviet Union, the collapse of the Berlin Wall and the increasing adoption of Washington consensus inspired reforms throughout the

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[46] Edward S Mason and Robert E Asher, The World Bank since Bretton Woods: The Origins, Policies, Operations, and Impact of the International Bank for Reconstruction and Development and the Other Members of the World Bank Group: The International Finance Corporation, the International Development Association [and] the International Centre for Settlement of Investment Disputes (Brookings Institution Press 2010).

[47] Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), 29 U.N. GAOR Supp (No. 1) at 3, U.N. Doc. A/9559 (1974); Programme of Action on the Establishment of a New International Economic Order G.A. Res. 3201 (S-VI), 29 U.N. GAOR Supp (No. 1) at 5, U.N. Doc. A/9559 (1974). See Karl P. Sauvant, 'Toward the New International Economic Order' in Karl P. Sauvant and Hajo Hasenpflug (eds), The New International Economic Order: Confrontation or Cooperation between North and South? (The New International Economic Order: Confrontation or Cooperation between North and South?, Westview Press 1977) at 3-19.

[48] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (18 March 1965)

[49] Aron Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' (1987) 2 ICSID review 287; Mark B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards' (1987) 2 ICSID Review 85.

[50] Andreas F Lowenfeld, 'The ICSID Convention: Origins and Transformation' (2009) 38 Ga J Int'l & Comp L 47 at 55-6; Christoph H Schreuer, The ICSID Convention: A Commentary (Cambridge University Press 2009) at Foreword by Sir Elihu Lauterpacht at x.

[51] Alcoa Minerals of Jamaica Inc. v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction, 6 July 1975. Consent to arbitration was based on a contractual clause. The case was discontinued by the order of the Tribunal of 27 February 1977.

[52] Adriano Gardella v. Côte d'Ivoire, ICSID Case No. ARB/74/1, Award, 29 August 1977. Consent to arbitration was based on a contractual clause.

1980s.[53] The liberalization/de-regulation objectives of the term encouraged developing states and former communist states to seek foreign capital in the form of direct investments from Northern capital exporting powers.[54] The 1984 US Model BIT reflected the ideals of this era. Ideologically, it was tailor made to defy governmental distortions to the 'market' grounded in the laissez-faire movement. The Model BIT was marketed as an essential component of liberal values such as free market economy and the rule of law.[55] Southern developing states increasingly entered into BITs not only with Northern capital exporting powers but also within the South-South context[56], multiplying the possibility of, what Jan Paulsson coined as "arbitration without privity".[57] The expectation of developing states was that bilateral relations as such would increase foreign investment inflows. To some, BITs were "considered as a diplomatic token of good will" and, as such, were representative of these bilateral negotiations. States did not anticipate any adverse consequences from the conclusion of BITs.[58] As a result, despite the NIEO ideals of the 1970s, BITs with binding dispute resolution clauses proliferated in number by the 1990s. The number increased from couple of dozen to more than two thousand by the 2000s.

Towards the mid-1990s, a number of multilateral agreements that included investment protection and promotion chapters were also negotiated and concluded. The North American Free Trade Agreement (NAFTA) entered into force in 1994 and provided

[53] Washington consensus is a set of economic policy prescriptions that were urged on the crisis-wrecked Latin American states by Washington, D.C. Amongst others, it opted for principles including liberelization, deregulation, liberalization of inward FDI, property rights etc. John Williamson, 'A Short History of the Washington Consensus' (2009) 15 Law & Bus Rev Am 7; also *see* Alvarez, The Public International Law Regime Governing International Investment at 89-90. The Multilateral Investment Guarantee Agency was also established in 1986 by the World Bank with the objective to encourage the flow of FDI in the Latin American countries to tackle the decrease in the amount of the FDI in the region, which allegedly was due to continued use of the Calvo doctrine. *See* Christopher K Dalrymple, 'Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause' (1996) 29 Cornell Int'l LJ 161.

[54] Karl P. Sauvant, 'World Investment Report 1994: Transnational Corporations, Employment and the Workplace' (UNCTAD 1994). Also *see* Farhad Noorbakhsh, Alberto Paloni and Ali Youssef, 'Human Capital and FDI Inflows to Developing Countries: New Empirical Evidence' (2001) 29 World Development 1593.

[55] *See* José E Alvarez, 'The Evolving BIT' (2010) 7 Transnational Dispute Management (TDM).

[56] UNCTAD, 'Bilateral Investment Treaties 1959-1999' (New York: United Nations Publications 2000) at 2.

[57] Paulsson, 'Arbitration without Privity'.

[58] Lauge N Skovgaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (Cambridge University Press 2015) at 1-5.

investment protection provisions under a binding dispute settlement mechanism under Chapter 11.[59] NAFTA was designed as a free trade agreement with the objective to liberalize and reduce barriers to trade between the USA, Canada and Mexico.[60] The same year the Energy Charter Treaty (ECT) was signed, entering into force in April 1998.[61] Similar to NAFTA, it provided a binding dispute settlement mechanism and substantive standards of protection under Part III on Investment Promotion and Protection and Part V on Dispute Settlement. Like NAFTA, ECT has a specific mandate. It was drafted with the objective to "increase cross border cooperation in the energy industry", giving due regard to commercial energy activities including trade, transit, investments and energy efficiency (which were the mottos of the restructured energy markets beginning in the 1980s).[62] With the increase in the number of IIAs, ITA cases also proliferated in number. According to Stephan Schill, the proliferation of BITs and the increase in the arbitral jurisprudence constituted a "*de facto* multilateralization of international investment law".[63] Whereas, a big majority of these cases were registered in the beginning at ICSID, the Stockholm Chamber of Commerce (SCC), the Permanent Court of Arbitration (*ad hoc*) and more recently International Chamber of Commerce (ICC) International Court of Arbitration have increasingly administered ITA cases. Today, more than 700 ITA cases are reported to have been registered.[64]

Backlash

However, it is not the number of such cases that caused the international community to take issue, but rather the scale and the subject matter of the claims these cases entailed. In *CME v Czech Republic*, a Tribunal constituted under the Netherlands-Czech Republic BIT, awarded CME, a Dutch Company owned by Ralph Lauder – an American cosmetics

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[59] The North American Free Trade Agreement (1994), full text available at <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> last accessed on 3 November 2017.
[60] *See* G.C. Hufbauer and J.J. Schott, NAFTA: An Assessment (Institute for International Economics 1993).
[61] The Energy Charter Treaty and Related Documents (1994), full text available at <http://www.energycharter.org> last accessed on 3 November 2017.
[62] See Andrei Konoplyanik and Thomas Walde, 'Energy Charter Treaty and Its Role in International Energy' (2006) 24 J Energy Nat Resources L 523.
[63] Mark Wu, 'The Scope and Limits of Trade's Influence in Shaping the Evolving International Investment Regime' in Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales (eds.), The Foundations of International Investment Law: Bringing Theory into Practice (OUP: Oxford, 2014) at 173 ft. 19. Stephan Schill, The Multilateralization of International Investment Law (Cambridge, CUP 2009).
[64] UNCTAD Investment Policy Hub Statistics, available at <http://investmentpolicyhub.unctad.org/ISDS> last accessed on 3 November 2017.

billionaire – 353 million USD in damages in 2003. This was equivalent to Czech Republic's entire healthcare budget at the time.[65] To some, not only the amount of the award was troubling. The fact that Mr. Lauder had initiated parallel proceedings against Czech Republic based on the same facts and claims but this time under the US-Czech Republic BIT[66] (which was dismissed two years before the *CME* Tribunal reached its final award) also incited criticism of the ITA system.[67]

Perhaps, however, the most controversial ITA cases involved disputes that arose from the emergency measures taken by Argentina in the wake of its currency crisis of December 2001. Argentina faced more than 40 ITA cases, mostly under the US-Argentina BIT and BITs with EU countries.[68] The awards and annulment decisions that came out between 2005 and 2011 prompted further criticism when the tribunals awarded significant sums to claimant investors [USD 133.2 million to *CMS*; USD 106.2 million to *Enron*; USD 128 million to *Sempra*; USD 57.4 million to *LG&E*].[69] They were condemned for

[65] CME Czech Republic B.V. v. The Czech Republic, UNCITRAL; G. Van Harten, Investment Treaty Arbitration and Public Law (Oxford University Press, 2007).
[66] Ronald S. Lauder v. The Czech Republic, UNCITRAL.
[67] Van Harten, Investment Treaty Arbitration and Public Law at 7-8; Osgoode Hall Law School, 'Public Statement on the International Investment Regime' <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> last accessed 1 January 2016; *see* also Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2012) 30 Nw J Int'l L & Bus 383.
[68] In chronological order, reference to "the Argentine decisions" or "the Argentine cases" includes CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005; LG&E Energy, Corp. LG&E Capital, and Inc. v. The Argentine Republic LG&E International, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006; Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007; CMS Gas Transmission Company v. The Argentine Republic, ICSID, 'Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Award, 28 September 2007; Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008; National Grid P.L.C. v. Argentine Republic, UNCITRAL, 'Award', 3 November 2008; Sempra Energy International v. The Argentine Republic, ICSID, Decision of the Ad Hoc Committee on the Application for Annulment, 29 June 2010; Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic, ICSID, Decision of the Ad Hoc Committee on the Application for Annulment, 30 July 2010; Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010; Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010; Impregilo S.p.A. v. The Argentine Republic, ICSID Case No. ARB/07/17, Award, 21 June 2011; El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011.
[69] Alvarez, The Public International Law Regime Governing International Investment at 250.

reaching inconsistent outcomes despite the same or similar wording of the applicable constitutive institutions (i.e. BITs). Particularly, the tribunals' reading of Argentina's defence of necessity under the US-Argentina BIT and customary international law were either criticised or overturned by Annulment Committees for *CMS, Sempra, Enron and Continental Casualty v Argentina*.[70] Many critics found support from the annulment decisions, arguing that these decisions exhibit the inadequacy of *ad hoc* tribunals, normally constituted to settle commercial disputes, in resolving disputes that involve important public interest issues.[71] In addition, critics alleged that ITA tribunals produce inconsistent decisions, undermining the stability and predictability of the regime, that the regime "unduly intrusive on national sovereignty" and that the regime is biased in favour of private interests of investors from capital exporting states.[72] Particularly, in relation to the latter, a growing body of literature produced arguments for and against and, more recently, by empirically and statistically testing whether there is pro-investor or pro-State bias in ITA decision-making.[73]

Against this backdrop, a backlash against the ITA regime raged at the beginning of the 2000s. In a 2001 New York Times article, reported by Anthony DePalma, the ITA Tribunal was condemned for lacking transparency:

"Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors

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[70] *Ibid*. at 247-56.

[71] *See* e.g. Sornarajah, The International Law on Foreign Investment at 463-8; Frank Spoorenberg and Jorge E Viñuales, 'Conflicting Decisions in International Arbitration' (2009) 8 The Law & Practice of International Courts and Tribunals 91. Also *see* Alvarez, The Public International Law Regime Governing International Investment at 257.

[72] Alvarez, The Public International Law Regime Governing International Investment at 257; Osgoode Hall Law School, 'Public Statement on the International Investment Regime'; *see* Van Harten, Investment Treaty Arbitration and Public Law; M. Sornarajah, 'A Law for Need or a Law for Greed?: Restoring the Lost Law in the International Law of Foreign Investment' (2006) 6 International Environmental Agreements 329.

[73] *See* e.g. Susan D Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 NCL Rev 1; Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals–an Empirical Analysis' (2008) 19 European Journal of International Law 301; G. Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall LJ 211; Thomas Schultz and Cédric G. Dupont, 'Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law; Jose E. Alvarez and G. Topalian, 'The Paradoxical Argentina Cases' World Arbitration and Mediation Review. This new wave of empirical and statistical literature will be further discussed in Chapter III below.

and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged”.[74]

The “legitimacy” outburst additionally prompted a wave of scholarship that argued how the ITA regime adversely effected human rights and the environment, preventing states from implementing laws and regulations in order to protect such matters of public interest. Early NAFTA cases (including *Metalclad, Pope & Talbot* and, in particular, those filed against the USA by *Loewen* and *Mondev*), the *CME/Lauder* cases and the Argentine cases, coupled with these “legitimacy” critiques, motivated states, including Northern capital exporting countries, to revisit their investment treaties. The USA, for instance, revised its investment protective Model BIT of 1984, introducing further sovereign protective provisions in its Model BITs of 2004 and 2012, particularly in the light of its experience with NAFTA Chapter 11.[75] Whilst these BITs still adhered to the capitalist conception of the day, they nevertheless narrowed substantive investment protection provisions – particularly curtailing the content of the FET standard to the minimum standard of treatment.[76]

In the meanwhile, the rise of the south or the so-called ‘shift of powers from the North to the South’ has triggered a shift in the investment policies of most notably the BRICs (Brazil, Russia, India and China).[77] China, now a major capital exporting state, possessed the power to negotiate BIT provisions that provided broader protection for its investors.[78]

[74] Anthony DePalma, 'NAFTA’s Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say' New York Times (11 March 2001), <http://www.nytimes.com/2001/03/11/business/nafta-s-powerful-little-secret-obscure-tribunals-settle-disputes-but-go-too-far.html> last accessed on 3 November 2017.

[75] Kenneth Vandevelde, 'A Comparison of the 2004 and 1994 US Model BITs: Rebalancing Investor and Host Country Interests', Karl P. Sauvant (ed.), Yearbook on International Investment Law and Policy 2008-2009, (New York: OUP, 2009); *see* K. J. Vandevelde, 'The Bilateral Investment Treaty Program of the United States' (1988) 21 Cornell International Law Journal.

[76] Alvarez, 'The Evolving BIT' at 8-15.

[77] Khalid Malik, 'The Rise of the South: Human Progress in a Diverse World', Human Development Report 2013, (UNDP-HDRO Human Development Reports 15 March 2013).

[78] Todd Allee and Clint Peinhardt, 'Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions' (2010) 54 International Studies Quarterly 1. *See* Axel Berger, China’s New Bilateral Investment Treaty Programme: Substance, Rational and Implications for International Investment Law Making (2008) at 15-6, observing that “[…] China has pro-actively initiated a remarkable change of its formerly restrictive BIT policy towards a liberal approach. Since 1998, Beijing is negotiating BITs that contain comprehensive investor-state dispute settlement provisions”. Available at <https://www.die-gdi.de/uploads/media/Berger_ChineseBITs.pdf> last accessed on 8 November 2017.

On the other hand, India revised its Model BIT, more recently, introducing a 5-year period for foreign investors to exhaust local remedies before invoking the dispute settlement provisions. India also curtailed the scope of the investment protection provisions in its Model BIT, most notably limiting the FET provision's scope to customary international law minimum standard of treatment.[79] Likewise, Canada limited the scope of the FET standard to the minimum standard of treatment in its Model Foreign Investment Protection Agreement (FIPA). This was extended to its most recent BITs with Benin (January 2013), United Republic of Tanzania (May 2013), Cameroon (March 2014), Nigeria (May 2014), Senegal (November 2014), Mali (November 2014), Cote d'Ivoire (November 2014), Burkina Faso (April 2015) and Guinea (May 2015). Canada also introduced, what has been coined as the "non-lowering of standards" provision in its African BITs, whereby both Contracting Parties are under an obligation not to derogate from domestic health, safety and environmental measures.[80]

In addition, the Investment Chapter of the Trans Pacific Partnership (TPP) Agreement (i.e. Chapter 9) among 12 countries including the USA, Canada and Australia also resembles characteristics of the 2004 and 2012 US Model BITs. At the same time, they give due regard to states' right to regulate in public interests on matters of environment as well as subsidies (particularly in relation to public health measures).[81] The Investment Chapter of the Transatlantic Trade and Investment Partnership (TTIP) proposed by the EU Commission similarly adopts provisions that would preserve states' right to regulate "through measures necessary to achieve legitimate policy objectives" (Article 2). Remarkably, the EU Commission proposes a standing Investment Tribunal that consists

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[79] Grant Hanessian and Kabir Duggal, 'The Final 2015 Indian Model BIT: Is This the Change the World Wishes to See?' (2017) 32 ICSID Review - Foreign Investment Law Journal 216.

[80] Mary E Footer, 'BITs and Pieces: Social and Environmental Protection in the Regulation of Foreign Investment' (2009) 18 Mich St U Coll LJ Int'l L 33 at 43-6; Rainbow Willard and Sarah Morreau, 'The Canadian Model BIT – A Step in the Right Direction for Canadian Investment in Africa?, Kluwer Arbitration Blog, 18 July 2015, available at <http://kluwerarbitrationblog.com/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/> last accessed on 3 November 2017.

[81] Trans Pacific Partnership (TPP) Agreement (Draft) Chapter 9 on Investment, available at < https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf> last accessed on 3 November 2017. The language in the Draft Investment Chapter of the TPP could as well be considered as Australia's protectionism for its right to regulate for public health. *See* Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12. Also *see* Kavaljit Singh, Philip Morris v Australia: A Big Win for Public Health, Third World Economics, Issue No. 606, 1-15 December 2015 at 5-6, available at < http://www.twn.my/title2/twe/2015/606/3.htm> last accessed on 3 November 2017.

of 15 judges appointed jointly by the EU and US governments, in response to systemic criticisms voiced by scholars and NGOs. [82]

As further explored in Chapter IV below, Latin American States, including Bolivia, Venezuela and Ecuador have also denounced the ICSID convention and some of their investment treaties.[83] More recently, in the wake of renewables subsidy claims, Italy withdrew from the ECT (although it publicly denied that its withdrawal was linked to these cases).[84] Russia, on the other hand, refused to comply with the controversial *Yukos* award, in which it was asked to pay USD 50 billion in damages to the Russian oil oligarch. The Yukos shareholders also paid a staggering USD 74 million in legal fees.[85] This, perhaps the most controversial and biggest, award (in the brief history of ITA) was recently set aside by The Hague District Court in the Netherlands, with the Court finding that the *Yukos* Tribunal lacked jurisdiction to hear the claim.[86]

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[82] Transatlantic Trade and Investment Partnership (TTIP) Agreement (Draft), Trade in Services, Investment and E-Commerce, CHAPTER II – Investment, available at < http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> last accessed on 3 November 2017. *See* Van Harten, Investment Treaty Arbitration and Public Law for Van Harten's proposal for a standing investment court. Also *see* the controversial report, Corporate Observatory Europe and the Transnational Institute, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (2012), demonizing the *ad hoc* character of the ITA Tribunals.

[83] Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy 571.

[84] Luke Peterson, Italy Follows Russia in Withdrawing from Energy Charter Treaty, but for Surprising Reason, 17 April 2015, Investment Arbitration Reporter, available at <https://www.iareporter.com/articles/italy-follows-russia-in-withdrawing-from-energy-charter-treaty-but-for-surprising-reason/> last accessed on 3 November 2017.

[85] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227; Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226; Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228 ('Yukos Shareholders v Russia')

[86] The Hague District Court, Judgement of 20 April 2016, Russian Federation v Veteran Petroleum Limited, Case Number C/09/477160 / HA ZA 15-1; Russian Federation v Yukos Universal Limited, Case Number C/09/477162 / HA ZA 15-2, Russian Federation v Hulley Enterprises Limited, Case Number C/09/481619 / HA ZA 15-112 unofficial translation available at <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230> last accessed on 3 November 2017; see Daniella Strik, Georgios Fasfalis and Marc Krestlin, Yukos Awards set Aside by The Hague District Court, Kluwer Arbitration Blog, 27 April 2016, available at <http://kluwerarbitrationblog.com/2016/04/27/yukos-awards-set-aside-by-the-hague-district-court/> last accessed on 3 November 2017. Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries at 3.

A Period of Uncertainties?

Whilst the regime of international investment is under-going a transformation, allegedly responding to the backlash and the legitimacy outburst voiced by critics[87], it, at the same time, continues to produce controversial decisions.[88] Nevertheless, the international investment regime no longer reflects the capitalist and neoliberal ideals that were once embedded in the US BIT programme of the 1980s. According to Professor Sornarajah, there are signals of "the retreat of neoliberalism", which might lead to Latin American states and, even, the USA going back to the *Calvo* Doctrine. Sornarajah even predicts the revival of the NIEO "with developed states also evincing a desire to assert control over foreign investment".[89] Yet, he suggests, the investment regime has entered into a "period of uncertainties", a period that has started with the global economic crisis of 2008. Economic and political developments that dominate this period, namely the rise of BRICs and the emergence of the "multipolar order", would make it unrealistic to pursue the "inflexible investment protection" that was once advocated by the Northern powers.[90] At the same time, one might witness a Southern driven re-empowerment of capitalism. The bottom line is that political and economic developments continue to be the most conspicuous drivers of the international investment regime.[91]

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[87] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator' (2017) Forthcoming European Journal of International Law.

[88] *See* e.g. Yukos Shareholders v Russia; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04; The Tribunal in Occidental v Ecuador awarded the investor USD 2.37 billion in compensation from Ecuador at the same time observing that "the investor had broken Ecuador's own laws as well as the contract with the Ecuadorian government". Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries at 3. See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012. The decision was partially annulled later on and was reduced to USD 1.6 billion by the Annulment Committee chaired by Prof. Juan Fernández-Armesto. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015.

[89] M. Sornarajah, Resistance and Change in the International Law on Foreign Investment (Cambridge University Press 2015) at 65-9.

[90] *Ibid*. at 405-7.

[91] *See* D. Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016) at Chapter 7. According to David Kennedy, emergence of international investment law would be consistent with the law's expansion into global political and economic life as "law became an ever more powerful strategic tool for people struggling for advantage on the global stage". *Ibid.* at p. 218.

Politics and Fragmentation

The brief introduction to the international investment regime above exhibits how deeply politics and international investment law are intertwined. There exists a political regime of international investment that informs the institutional development of international investment law. Whereas, colonialism once prompted the development of international property rights, the capitalist order embodied in the so-called Washington consensus has been the driving force behind the political regime for international investment until very recently. It is only within the past decade or so, the international investment regime has attained a new function, greater adherence to issue relating to the environment, human rights, transparency, sovereignty but most importantly, greater protection for the newly capital exporting states of the South as a result of the so-called "shift of powers". The broader political regime, the international investment regime continues to inform the development and transformation of international investment law.

Jacob Viner once observed that one of the "outstanding characteristics" of "the evolution of international law under modern capitalism" "was its attempt to build a legal protection for property and for private enterprise from the power activities of foreign states both in times of peace and in times of war".[92] This continues to be the case for international investment law. As Professor Sornarajah put it, the power struggle between the North and South prompts new uncertainties for its development. There is certainty, however, that international investment law is only one of many fragmented sub-disciplines of international law. Albeit negatively, this has been pointed at by the Study Group of the International Law Commission on Fragmentation of International Law, led by Professor Martti Koskenniemi. The emergence of a specialist and even "exotic" system of investment law, possessing its own principles and institutions, reported the International Law Commission, has stimulated "conflicts between rules and rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law".[93] The fragmentation of international law is for a reason, Koskenniemi further explains:

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[92] Jacob Viner, International Economics: Studies (Free Press 1951) at 218.

[93] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (2014) ("The Fragmentation Report") at para. 8. Particularly since the Treaty on the Functioning of the European Union (TFEU) extension of EU's common commercial policy to regulating FDI, a "conflict" has been voiced between the intra-EU BITs, the ECT and EU Law. In Micula v Romania, the Tribunal pointed at this "conflict". *See* Ioan Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20,

> "[…] the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. The point of creating such special institutions is precisely to affect the outcomes that are being produced in international world. […] For example, the rise of the bilateral investment treaty has certainly transformed the relationship between the private investor and host state from what it was 20 years ago".[94]

There is an underlying "structural bias", argues Martti Koskenniemi, in such specialized systems of international law. The brief review of the development of international investment regime above and its intertwined-ness with international investment law, indeed, exhibits that the creation of the ITA system aimed at catering for "special audiences", namely the foreign investors primarily originating from the developed North. Whilst this political motivation, as put forward above, has been recently transforming into a North-South balance, a systemic bias nevertheless exists. The ITA system has always and principally been about the 'protection and promotion of foreign investments'. The majority of the BITs are entitled 'Reciprocal Promotion and Protection of Investments' and their preambles embody the so-called Washington consensus ideals.[95] Inasmuch as there is an on-going transformation in international investment law that allegedly responds to the systemic criticisms made to the ITA system, whether the systemic bias originates from the North or the South is immaterial.[96] The ITA system continues to be an instrument of this 'broader political regime'.

The question is then, how this broader political regime informs the behaviour of an ITA tribunal. Does the ITA tribunal derive guidance from the broader political regime that

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Award, 11 December 2013 at para. 310, where the Tribunal observed "In this respect, the Respondent argues that where conflicts arise between competing rules of international law which cannot be resolved by systemic interpretation, the intention of the relevant States determines which of the competing rules takes precedence. According to the Respondent, in the present case the common intention of Romania and Sweden is clear: they intended the BIT to be subordinated to EU law. As EU law contains more specific rules on state aid, EU law should prevail by application of the principle lex specialis derogat generali". *See* the Fragmentation Report at paras. 37-43: Harmonization/systemic integration should therefore be encouraged, argued the International Law Commission since there is a "strong presumption against normative conflict" in international law. One should take note of the "systemic interpretation" approach recently taken by Respondent States in ITA. *See* e.g. South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Respondent Counter-Memorial, 31 March 2015 at paras. 193-209.

[94] Martti Koskenniemi, 'The Politics of International Law–20 Years Later' (2009) 20 European Journal of International Law at 65.

[95] *Supra Note* 45.

[96] As Professor Koskenniemi recently put it, "There will always be some already internationalised regime of governance that is ready to take over". Martti Koskenniemi, 'It's Not the Cases, It's the System' (2017) 18 The Journal of World Investment & Trade 343 at 350.

underlies international investment law? Does the ITA Tribunal deviate from the 'language of logic', and if it so, under what constraints does this deviation occur? Alternatively, does the ITA Tribunal simply apply the normative rules that are negotiated and concluded by state parties? The role of the ITA Tribunal in its broader political regime will be further explored in Chapter IV below.

IV. An Alternative Understanding of the International Investment Regime?

Critical inquires as such on the current standing of the international investment regime would necessitate an alternative understanding of the role of international investment law and the ITA Tribunal in the broader political regime. This work considers international investment regime as a broad framework that involves economic, social and political structures: These structures inform interactions amongst actors in the regime, shaping already existing rules. Eventually, the normative institutional framework, namely international investment law, evolves, responding to the newly emerging systems of governance. Thus the making of international investment law is an institutional process. Institutions such as international property rights develop and evolve over the course of history to respond to newly emerging economic, social and political institutions. To that end, it establishes the broader political regime for the regulation of international investment.

Before doing so, one should first define what the term "institutions" mean – a term that has so far been used in discussing the international investment regime. A description of new institutionalism and more specifically historical institutionalism, an approach that is considered key to the analysis of judicial behaviour in this work (further explored in Chapter II below), is necessary.

In general, institutions are considered as perpetual instruments of interaction in societies. According to one definition, they "are the humanly devised constrains that structure political, economic and social interaction".[97] They comprise informal constrains such as sanctions, taboos, customs, traditions and codes of conduct, and formal rules such as constitutions, laws and property rights. In each society, institutions are tailored to create

[97] Douglas Cecil North, 'Institutions', 5 Journal of Economic Perspectives 1 (Winter, 1991) 97-112 at 97. Also *see* Douglass Cecil North, Institutions, Institutional Change and Economic Performance (Cambridge University Press, 1990).

order and reduce uncertainty in transactions. They are key to the emergence and development of economies and politics that govern societies. Whether a society has thrived or experienced stagnation or decline is dependent on the structure and quality of its institutions.[98]

In *Institutions, Institutional Change and Economic Performance*, Douglas North described institutions as "any form of constraint that human beings devise to shape human interaction". According to North, these include "formal constraints" such as written rules and agreements that regulate "contractual relations and corporate governance" and "constitutions, laws and rules that govern politics, government, finance, and society" as well as "informal constraints" such as "unwritten codes of conduct, norms of behaviour, and beliefs".[99] North's work on the interplay between institutions and economic performance put forward the fundamentals of "rational choice institutionalism" which focuses on individuals and their "utility maximising" behaviour when creating institutions. According to scholars, contrary to conventional assumptions of neoclassical economics, individuals have incomplete information and do not possess unbounded rationality.[100] They create institutions in order to mitigate risks and reduce transactions costs and provide a degree of certainty and predictability in their interactions.[101]

According to some, however, rational choice institutionalism considered individual-institutions relation as a one-way relationship, and has failed to emphasize interactions among institutional structures. While historical institutionalists admitted that individuals make rational choices and calculate their interests, they also argued that individuals also interact with other groups, interests, ideas and institutional structures when taking decisions.[102] Furthermore, according to sociological institutionalists, individuals are embedded in a much larger framework, with their decisions are formed under the

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[98] Dani Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire Them', 35 Studies in International Comparative Development 3 (1999) 3-31.
[99] North, Institutions, Institutional Change and Economic Performance at Chapter 1. Daron Acemoglu and James Robinson convincingly explain that it is the "inclusive" or "extractive" institutions that underlie economic success. D. Acemoglu and J.A. Robinson, Why Nations Fail: The Origins of Power, Prosperity and Poverty (Profile Books 2012).
[100] Claude Menard and Mary M. Shirley (eds), Handbook of New Institutional Economics (Springer 2008) at Introduction.
[101] *Ibid.*
[102] Thomas A Koelble, 'The New Institutionalism in Political Science and Sociology' (1995) Comparative politics 231.

influence of culture, society, organizational identity, and industrial sectors. Thus, contrary to the contentions of rational choice theorists, the choices of individuals make emerge within a larger institutional framework, and "ought not to be treated as fixed".[103]

Prominent advocates of historical institutionalism, James G. March and Johan P. Olsen, argued that the choices of individuals make are "deeply embedded in cultural, socioeconomic, and political fields or structures". According to them, institutions are "rules of conduct in cultural, socioeconomic, and political fields", and such rules define the limits of appropriateness of individual choice. Institutions are not only outputs of individuals' attempts to maximise utility. They also constitute checks and balances upon individuals, and thus give their choices legitimacy.[104] In a similar vein, sociological institutionalists, Walter W. Powell and Paul J. DiMaggio, asserted that institutions determine the choices of "rational actors". Their definition of institutions, however, is one step broader than March and Olsen: According to Powell and DiMaggio, conventions and customs should be considered within the realm of institutions.[105]

In sum, institutionalism refers to a set of approaches that define institutions and analyse interactions between individuals, institutions and organizations in the course of decision making. Contrary to attitudinal theories, new institutionalism does not only focus on individuals but seriously considers institutions that establish the environment in which an individual takes decisions. This is an important distinction for this work. Focusing on the institutions that constrain arbitrators enables one to focus on "the structures that constrain and empower" the ITA Tribunal and not on the "behaviour or preferences of individual" arbitrators.[106] Adopting a new institutionalist approach is therefore essential in

[103] *Ibid.* at 232.

[104] James G. March and Johan P. Olsen, Rediscovering Institutions (Free Press, 1989) at 9-10.

[105] Powell Walter W. and DiMaggio Paul J. (eds), The New Institutionalism in Organizational Analysis (University of Chicago Press 1991) at (Introduction) 9-10.

[106] A practical and useful description of institutionalism is provided in T. Ginsburg and R.A. Kagan, Institutions & Public Law: Comparative Approaches (P. Lang 2005) at 1: "Institutionalism is a broad term that reflects a range of approaches rather than a single paradigm. In the economic and political traditions, institutionalism refers to that strain of rational-actor approaches that takes institutional structure seriously, rather than focusing on the particular individual agent alone. In the sociological tradition, on the other hand, institutions are sources of constraint that frame preferences, define roles, and constitute the structure within which individual agents operate. What these various approaches have in common is a focus not on the behaviour or preferences of individuals but rather on the structures that constrain and empower them. Institutions are more than the sum of the individuals that make them up".

developing the ‘alternative understanding of the international investment regime’ described above.

V. Research Questions

As a contribution to the judicial behaviour scholarship on international courts and tribunals, this work seeks answers to the following research questions: What is the role of institutions, with their unique characteristics, in the arbitral decision-making? More specifically, what is the role of institutions embodied in international investment law, with their political limitations and attributes, in ITA decision-making? More generally, this work is an attempt to explore the role of politics in ITA decision-making.

VI. Methodological Approach

This work takes a critical approach by adopting theories of judicial behaviour in exploring international investment law and ITA decision-making. As discussed in Chapter II in detail, theories and methods of judicial behaviour have mostly been developed in judicial contexts. The majority of cases and materials that have been on the subject of analyses of judicial behaviour, are those that were established by courts and justices and, in particular, by the American Supreme Court. However, arbitration, as an alternative dispute resolution method, could also provide the context in which theories and methods of judicial behaviour could be adopted. In doing so, one should note the distinction between the office of courts and arbitral tribunals and, in this sense, where contemporary international arbitration and, in particular, ITA structurally falls.

In *Courts: A Comparative and Political Analysis,* Martin Shapiro identified “consent” as a fundamental pillar for maintaining the triad for purposes of conflict resolution since the Praetor Edict in the early Roman law. “Triad” is the “logic of courts”, explained Shapiro, whereby a conflict between two disputing persons is resolved by a third. According to Shapiro, this is “the basic social logic of courts” – “a logic so compelling that courts have become a universal political phenomenon”.[107] Whilst, historically, dispute resolution is developed on the consent of the triad, it was also substituted with “the law and the office” over time which distinguished the judge in a court from the arbitrator. In other words,

[107] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986) at 1-5.

Shapiro explains that the 'arbitrator' "does not hold […] an office but is rather chosen by the parties, rather than imposed on them". The 'arbitrator' then "becomes a kind of a private judge".[108] Although contested, arbitration is considered as a "semi-judicial evaluative process, where the parties to a dispute surrender their responsibility for its resolution to a disinterested third party".[109] However, an arbitrator is not necessarily "the disinterested third party" in contemporary international arbitration. In particular, the structure of contemporary ITA resembles the office of courts more closely since it functions (not only based on consent but also) based on normative concerns of the law within the limits of the political regime of international investment. Similar to adjudicators in judicial contexts, ITA arbitrators may therefore be concerned with the policy and institutional implications of their decisions.[110] Such court-like features of contemporary international arbitration make judicial behaviour theories and methods relevant for the purposes of this work – i.e. whether ITA has become a "universal political phenomenon". As suggested by some scholars, such characteristics of ITA also "suggest opportunities for cross-fertilization between the studies of domestic and international judicial behavior".[111]

Yet, due to the critical nature of judicial behaviour studies and the *sui generis* characteristics of ITA tribunals, a study on judicial behaviour in ITA decision-making would necessitate one to adopt certain methodological approaches, in an attempt to respond to certain methodological challenges. However, first, one should explore why this work does not entirely fall within the realm of doctrinal or socio-legal studies. In doing so, it is necessary to first identify what a traditional doctrinal approach and a socio-legal approach entail and discuss the extent to which this work could be considered a socio-legal study.

The doctrinal approach, as embodied within the confines of positivism, is defined as "the research process used to identify, analyse and synthesise the content of the law". Primarily it derives its arguments from authoritative sources of the law, namely "existing

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[108] *Ibid.*

[109] Webb J., 'Arbitration: Semi-judicial process or negotiation?', 2 Current Psychological Reviews 3 (September 1982) 251-68 at 251-2.

[110] Erik Voeten, "International Judicial Behaviour", in Cesare Romano et al (eds), *The Oxford Hanbook of International Adjudication* (Oxford: OUP, 2014) at 560.

[111] *Ibid.*

rules, principles, precedents and scholarly publications".[112] Ideally, a doctrinal research undertakes a "rigorous analysis and creative synthesis" of the legal reasoning.[113] However, the traditional account of the doctrinal approach would take the legal system itself "as a theoretical framework that selects facts and highlights them as legally relevant ones". This would lead the researcher to remain "in a box called 'law' and not concerned with the effects of the law in the world external to the black letter box".[114] Yet the elements external to the "black letter box" generally remain outside the analysis of a legal doctrinal researcher. Albeit inaccurately, the doctrinal approach is therefore often equated to "formalist" or "black letter approaches" in emphasizing to refer to someone who is "uncritical".[115]

Inasmuch as the doctrinal method could involve critical and even empirical approaches, the use of such approaches is rather limited. Therefore, the doctrinal approach is often criticized for not adopting a "theoretical framework, which consist of concepts, categories and criteria that are not borrowed from the legal system itself".[116] To that end, William Twining identifies a typical weakness in relation to the doctrinal approach. He states "[…] it takes as its starting point and its main focus of attention rules of law, without systematic or regular reference to the context of problems they are supposed to resolve, the purpose they were intended to serve or the effects they in fact have".[117] A doctrinal researcher, thus, very often studies the legislation, rules, principles, precedent and doctrines in isolation from their fundamental goals and the broader context in which they were created "[F]rom information provided merely by legal texts and expositions of doctrine", one cannot know, Twining argues, "to what extent [doctrines] make any difference in practice, let alone transform, economic, social and other relations and behaviour".[118]

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[112] Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in D. Watkins and M. Burton (eds), Research Methods in Law (Taylor & Francis 2013) at 9-10.
[113] *Ibid*. at 11.
[114] *Ibid*. at 15-6.
[115] W. Twining, General Jurisprudence: Understanding Law from a Global Perspective (Cambridge University Press 2009) at 25-6.
[116] Hutchinson, 'Doctrinal Research: Researching the Jury' at 15-6.
[117] W.L. Twining, Taylor Lectures: Academic Law and Legal Development (Faculty of Law, University of Lagos 1976)
[118] William Twining, 'Globalisation and Legal Scholarship' (2009) Montesquieu Lecture - Tilburg University at 16.

Distinctly, as discussed earlier, this work on judicial behaviour puts external determinants such as institutions, the institutional framework and the broader political regime in which international investment law derives meaning from at the centre of its analysis. Thus far, it diverges from traditional approaches suggested by the doctrinal approach, and more accurately falls within the confines of "socio-legal research". It is difficult to define socio-legal studies. They involve a broad range of scholarship and include approaches as diverse as feminist work or critical legal studies. Whilst its meaning yet remains contentious[119], Twining uses "socio-legal studies", "law in context", "law in the real world", "law and society" and "sociology of law" interchangeably to refer to empirical legal studies (at the same time noting that 'empirical' is a contested concept) that broadly include "theoretical, interpretive, and factual enquiries into legal phenomena".[120] "Law in action", in this context, is coined as an umbrella term, according to Twining, which does not reflect the socio-legal studies not as broadly as the "law and society" scholarship in the US, which "covers the whole range of socially oriented legal scholarship and theorising". To Twining, law in action reflects a more dynamic and refined approach compared to "law in books" as it is in "contact with the 'real world'". It exhibits practicality as it is more directly concerned with "what actually happens as opposed to what is meant to happen and with actual consequences".[121]

As identified in Chapter II below, the body of literature on judicial behaviour may be considered as falling within the realm of socio-legal studies. American legal realists including Roscoe Pound and Karl Llewellyn are usually remembered for developing their ideas on dichotomies that contrast "appearance and reality. These include, law in books and law in action, paper rules and real rules, rules and results (outcomes in particular cases), rules and consequences ('impact'), rules and predictions" etc.[122] Likewise when confining his methodological approach on judicial behaviour, Llewellyn found support from the real rules-paper rules dichotomy:

[119] Fiona Cownie and Anthony Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' in D. Watkins and M. Burton (eds), Research Methods in Law (Research Methods in Law, Taylor & Francis 2013) at 35-6.

[120] Twining, General Jurisprudence: Understanding Law from a Global Perspective at 228.

[121] *Ibid.*

[122] *Ibid.* at 298.

"Real rules' then, if I had my way with words, would by legal scientists be called the practices of the courts and not 'rules' at all. … The concept of 'real rule' has been gaining favor since it was first put into clarity by Holmes. 'Paper rules' are what have been treated, traditionally, as rules of law: the accepted doctrine of the time and place – what the books say 'the law' is.…"[123]

Similar to socio-legal studies as such, this work studies the real rules and, more significantly, "how law works in the real world". However, as opposed to some of the socio-legal studies identified in Chapter II below, it does so without adopting an empirical or quantitative methodology. To that extent, this work could be labelled as a "non-empirical socio-legal study"[124] into judicial behaviour. Similar to a doctrinal research, its primary sources are the materials of international law, international investment law, ITA case materials and relevant secondary commentary. It adopts a "library-based research design".[125] However, as opposed to legal doctrinal research this study does not aim to reveal what is "good law".[126] Its objective is to explore the 'illogical' results[127], revealing the "real law" in ITA decision-making. In doing so, this work uses "judicial behaviour" theories (and in particular the political regimes approach) identified in Chapter II below as a lens to revisit the ITA Tribunal's role as constrained by the broader political regime in ITA decision-making.

However, identifying this work as a 'non-empirical socio-legal' study only serves in putting the methodological foundations of this work in context. As discussed earlier, ITA tribunals are *ad hoc* tribunals vested with the power to settle a particular dispute between a foreign investor and a host State under an IIA.[128] In other words, in theory, an ITA tribunal does not have an 'obligation' to have systemic concerns as to how international investment law develops. It is established to settle the specific dispute at hand and once the dispute is resolved the tribunal's specific mandate is complete.[129] This key theoretical

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[123] K.N. Llewellyn, Jurisprudence: Realism in Theory and Practice (University of Chicago Press, 1962) at 21-2 as quoted in Twining, General Jurisprudence: Understanding Law from a Global Perspective at 299.
[124] For an example *see* Cownie and Bradney, 'Socio-Legal Studies: A Challenge to the Doctrinal Approach' at 45-8.
[125] Hutchinson, 'Doctrinal Research: Researching the Jury' at 13.
[126] M. Van Hoecke, Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline? (Bloomsbury Publishing, 2011) at 92-4.
[127] As referred by Holmes, 'The Path of the Law' at 9.
[128] Schreuer and Dolzer, Principles of International Investment Law at 33.
[129] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arbitration International 357 at 368-9.

foundation of ITA tribunals therefore seriously limits a judicial behaviour researcher's inquiries into the behaviour of an ITA tribunal. It may be straightforward for an attitudinal or behavioural judicial behaviour scholar to focus on the individual policy predilections of arbitrators. By contrast, it would be a challenging exercise for a new institutionalist judicial behaviour scholar to assess the impact of institutions external to an ITA tribunal on the behaviour of the tribunal since arbitrators may diverge in their reactions to such external influences. A second methodological challenge is with respect to the IIA that applies in the dispute at hand. The IIA and therefore the substantive provisions therein may vary from one dispute to another. For instance, inasmuch as the factual background of the Argentine cases are similar, the BITs and therefore the substantive rules that applied in individual cases diverged. In *CMS, Sempra, Enron and Continental Casualty* the Tribunals applied the US-Argentina BIT and its substantive provisions. In *BG* and *National Grid*, and *Total* the Tribunals applied the UK-Argentina BIT and France-Argentina BITs respectively.[130] Dissimilar texts of IIAs thus make it difficult for the researcher to focus on the external institutional limitations since each IIA have particular characteristics inasmuch as similarities.

The question is then how one could overcome such a methodological limitation if one was to undertake a new institutionalist analysis of the behaviour of ITA tribunals. How could one consider the external institutional and political influences on ITA tribunals that are *ad hoc* in character; established under different IIAs whose members vary from one case to another? A methodological solution, in response, would be to consider "the ITA Tribunal" as a standing court-like structure. Although, as mentioned above, one must acknowledge that ITA tribunals are *ad hoc* in character as opposed to a standing court – similar to the American Supreme Court, such a methodological assumption provides a framework in which one could omit attitudinal and behavioural inquiries into the behaviour of "the ITA Tribunal" that are based on background, training, personality and value preferences. This methodological approach aids the researcher to exclusively focus on the institutional factors that influence ITA decision-making.

A second methodological choice made in this work is in relation to its case study. In order to assess the effects of the external institutional environment on the behaviour of the ITA

[130] Alvarez and Topalian, 'The Paradoxical Argentina Cases' at 34.

Tribunal, one should also limit its case study to ITA cases instituted under the same constitutive institution or, in other words, the IIA. Such a methodological approach would be key to overcome the second challenge associated with the *ad hoc* nature of the ITA Tribunal, i.e. the variations in the text of applicable constitutive institutions and the underlying political regime from which the ITA Tribunal draws meaning. In doing so, this work keeps its focus on ITA cases instituted under NAFTA's Chapter 11. As explored in Chapter V in more detail, NAFTA came into existence under controversial political terms, establishing a political regime from which the ITA Tribunal may draw meaning from in making sense of some controversial provisions under Chapter 11 including Article 1105 on the Minimum Standard of Treatment. Whilst much has been written on the doctrinal development of the Minimum Standard of Treatment (as a concept of customary international law) and the inconsistencies in the interpretation of Article 1105[131], scholars have omitted why NAFTA tribunals decide the way they do – and how the doctrinal development of this controversial provision mimics the controversial political environment in which NAFTA came into existence. This work on judicial behaviour on the NAFTA ITA Tribunal aims to address this gap in the literature. The new institutional analysis in this work complements the attitudinal and behavioural analyses on ITA arbitrators reviewed in Chapter III.

Nevertheless, as a result of its methodological choices, this work omits key attitudinal and behavioural approaches and, thus, the dynamics within an ITA tribunal associated with the personal policy choices and values of arbitrators. However, as explained in Chapter II, institutional and attitudinal theories are not mutually exclusive. Each theory and method of judicial behaviour has its shortcomings. These theories and methods rather complement each other in exploring how and why a judge, an adjudicator, an arbitrator or "the ITA Tribunal" decides the way it does. As identified in the Conclusion in Chapter VIII, the methodological approach adopted in this work, which is based exclusively on new institutionalism, could explain why this work cannot elaborate on some of the inconsistencies in NAFTA Chapter 11 cases. Such inconsistencies might as well be

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[131] *See* e.g. P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International 2013); Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP Oxford 2013).

explained under the auspices of an attitudinal work. However, this would be beyond the limited scope of this work.

VII. Overview

As such, this work on judicial behaviour in ITA first defines what "judicial behaviour" is in *Chapter II*. It revisits the basic tenets of the judicial behaviour literature in the American political science scholarship, exploring its development starting from the American legal realist movement to the institutionalist approaches in analysing judicial behaviour of the US Supreme Court. Thus far, it adopts 'judicial behaviour' as its theoretical framework.

In *Chapter III*, under the rubric of theories of judicial behaviour and approaches identified in *Chapter II*, this work undertakes a holistic review of the newly-emerging empirical and statistical judicial behaviour literature on ITA. Putting on the judicial behaviour lenses, it identifies the gaps and shortcomings in this newly emerging literature and argues how historical interpretive, political jurisprudence and political regimes approaches could be adopted to address these gaps and shortcomings.

In *Chapter IV*, based on historical interpretive, political jurisprudence and political regimes approaches, this work revisits the role of the ITA Tribunal in its broader political context. It theorizes how constitutive institutions, as characterized by the broader political regime, might inform the ITA Tribunal in interpreting the legal norms of international law in general and international investment law in particular. It argues that, at times, the ITA Tribunal may assume a principal political role in accommodating the interests of the stakeholders within the limits of constitutive and non-constitutive institutions. The Chapter concludes with two hypotheses that are tested in *Chapters V* and *VII*.[132]

What follows then is a case study on judicial decision-making under NAFTA. Given the broad framework of provisions embodied in Chapter 11 of NAFTA, this work first

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[132] This work is on judicial behavior in ITA. As such it initially introduces the reader to the underlying theories and methods, or in other words to the basic tenets, of judicial behavior that are relevant for this work. These theories and methods become relevant only after the work undertakes a review of their potential reach into ITA. These reviews are undertaken in Chapters III and IV. Only then it is viable to introduce the reader to the hypotheses since these derive meaning from the analyses undertaken at Chapters II, III and IV.

confines the context of this study to Article 1105 on the Minimum Standard of Treatment, a provision that has proved to be ambiguous and that has given NAFTA tribunals a broad space to oscillate between the ‘paper law’ and the ‘real law’.

In *Chapter V*, this work defines what the political regime of NAFTA is and how it operates within the realm of some of its constitutive institutions. In *Chapter VI*, it then briefly introduces the reader to the normative framework of the minimum standard of treatment in Article 1105 or, in other words, what ‘the minimum standard of treatment is’ ought to mean.

Subsequently in *Chapter VII*, this work explores the legal material associated with NAFTA cases in which the claimant investor has invoked Article 1105. In a chronological order, it traces whether the political regime for international investment under NAFTA has any bearing on the judicial behaviour of the Chapter 11 tribunals. In *Chapter VIII*, this work concludes, identifying areas for further research.

CHAPTER II

THE BASIC TENETS OF JUDICIAL BEHAVIOUR

I. Introduction

That subjective and political values form the sources and function of international law is an often encountered claim and the literature produced by schools of international legal theory in response to this inquiry diverge. On the one hand, according to classical and positivist approaches to international law, a formalistic and ideal form of the law that is also detached from the world of politics is possible.[1] On the other hand, the perception that attitudinal and institutional constraints might determine the content of the law is common in international legal scholarship ranging from international relations approaches (such as liberalism, institutionalism and constructivism[2]) and the New Stream (i.e. Critical Legal Studies[3]) to policy oriented perspectives (i.e. the New Haven School[4]).

Understanding the content of the law, however, would also necessitate questioning how adjudicators interpret legal texts and decide in causal-positive terms. In other words, inasmuch as theorizing international law, one should explore the interpretation and application of international law if one was to test whether adjudicators are influenced by background, training, personality, value preferences as well as normative and structural institutional constraints and, thus, if international law operates based on law and/or politics.

Theories and methods of judicial behaviour provide plausible frameworks for undertaking this task. These theories and methods have been developed in judicial contexts and, in

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[1] *See* Hans Kelsen, *Pure Theory of Law* (Univ of California Press, 1967).

[2] *See* Andrew Moravcsik, 'Liberal Theories of International Law'; Barbara Koremenos, 'Institutionalism and International Law'; J Brunnee and SJ Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack, 'International Law and International Relations: Introducing an Interdisciplinary Dialogue' (Cambridge University Press, 2013).

[3] *See* e.g. David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wis Int'l LJ 1.

[4] *See* e.g. Myres S McDougal, Harold D Lasswell and W Michael Reisman, 'Theories About International Law: Prologue to a Configurative Jurisprudence' (1967) 8 Va J Int'l L 188; Myres S. McDougal and W. Michael Reisman, 'International Law in Policy Oriented Perspective' in Ronald St John Macdonald and Douglas Millar Johnston (eds), *The Structure and Process of Internatiobnal Law: Essays in Legal Philosophy, Doctrine and Theory*, Vol 6 (Martinus Nijhoff Publishers, 1983).

particular, in the context of decision-making at the American Supreme Court. Originating from the American legal realism movement of the early 20th century, the literature on judicial behaviour in the American Supreme Court has introduced ways to analyse what adjudicators do and why they do it. The attempt to explain the behaviour of adjudicators has been mostly based on attitudinal and institutional theories and has been subject to systematic, empirical and theoretical approaches. These approaches do not question, 'what the law is' or 'what the law should be'. The study of judicial behaviour excludes descriptive doctrinal, prescriptive normative and purely deductive approaches.[5] It simply puts forward hypotheses that explore motivations behind judicial decision-making and aims to supply evidence that could show correlation.

II. Judicial Behaviour

Theories of judicial behaviour were initially adopted by public law scholars in the United States. American legal realists including Jerome Frank, Karl Llewellyn, Leon Green, Max Radin, and Felix Cohen[6] argued against the orthodox view of their day in that judicial decision-making is mechanical or formalistic[7], which viewed justices as "value free technicians who do no more than discover the law".[8] In other words, they argued against the perception that "judges decide cases on the basis of distinctively legal rules and reasons which justify a unique result in most cases". The realists asserted that "careful empirical consideration of how courts really decide cases reveals that they decide, not primarily because of law, but based (roughly speaking) on their sense of what would be fair on the facts of the case".[9] Realism transformed the then understanding of public law. In addition to their doctrinal understanding of judicial decisions, public lawyers recognised that judicial decision-making is "a mixture of law, politics, and policy and that

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[5] Segal, 'Judicial Behaviour'.

[6] Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 Tex L Rev 267 at 269.

[7] *See* Charles Grove Haines, 'General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges' (1922) 17 Ill LR 96.

[8] Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' at 2 quoting Walter F Murphy and Joseph Tanenhaus, *The Study of Public Law* (New York: Random House, 1972) at 13.

[9] M.P. Golding and W.A. Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Wiley, 2008) at 50. *See* V Nourse and G Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?', Cornell Law Review, Vol. 95, p. 61 (2009).

judges' decisions were influenced by background, training, personality, and value preferences".[10]

This call for empirical research[11] formed the basis of later theoretical approaches in the study of judicial behaviour in the American Supreme Court. The empirical work on judicial behaviour was primarily established as a sub-discipline of American political science scholarship.[12] In 1948, Herman Pritchett pioneered the "attitudinal model"[13] which was later developed in the writings of Glendon Schubert (1958, 1965)[14], Sidney Ulmer (1965)[15] and, relatively recently, by Jeffrey Segal and Harold Spaeth (1993, 2002).[16] In 1957, Robert Dahl introduced an early example of historical institutionalism in studying limitations on the American Supreme Court, resulting from the role and agendas of the Congress and the presidency during the New Deal regime.[17] In 1964, Martin Shapiro introduced "political jurisprudence", which, according to some, "anticipated" *New Institutional* approaches to judicial behaviour.[18] In 1988 Rogers

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[10] Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' at 3 quoting Murphy and Tanenhaus, *The Study of Public Law* at 16-7.

[11] Karl N Llewellyn, 'Some Realism About Realism: Responding to Dean Pound' (1931) 44 Harvard Law Review 1222.

[12] "Legal Realism suggests that law is indeterminate only at some levels, and the hierarchical structure of the court system means that only a small number of judges and lawyers regularly confront questions at those levels, the so-called "hard cases" in courts of last resort (which is why most Realist analysis focused on the Supreme Court)". Cornell W Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' in Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999) at 19-20.

[13] C Herman Pritchett, *The Roosevelt Court: A Study of Judicial Values and Votes, 1937-48* (New York: Macmillan, 1948).

[14] Glendon A Schubert, 'The Study of Judicial Decision-Making as an Aspect of Political Behavior' (1958) 52 American Political Science Review 1007; Glendon A Schubert, *The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices, 1946-1963* (Northwestern University Press, 1965).

[15] S Sidney Ulmer, 'Toward a Theory of Sub-Group Formation in the United States Supreme Court' (1965) 27 The Journal of Politics 133.

[16] J.A. Segal and H.J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993); J.A. Segal and H.J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press, 2002).

[17] Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 J Pub L 279.

[18] Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York: Free Press of Glencoe, 1964).

Smith[19] and in 1999 Howard Gillman and Cornell Clayton[20] more openly discussed the contribution of *New Institutionalism* in public law and studies of judicial behaviour.

In Europe meanwhile, studies of judicial behaviour were rare. Whilst philosophical foundations of legal realism were developed by Scandinavian Legal Realists including Axel Hägerström, Vilhelm Lundstedt, Karl Olivecrona, Alf Ross and Ingemar Hedenius as early as the 19th century[21], comprehensive studies on judicial behaviour of supreme courts in Scandinavia are comparably recent and have mostly been constructed on theories and methods introduced by American political science scholars.[22] Despite such a solid philosophical background, even amongst the 21st century European political scientists, judicial decision-making was admitted as a mechanical or formalistic enterprise. According to European scholars, courts and judges were outside politics.[23] In various instances, for example, the French constitutional law specialists noted that the Constitutional Council "was outside politics and that all it was doing was to 'apply the constitution, all the constitution and only the constitution'". The European law scholarship on the European Court of Justice (ECJ) opposed any criticism for being "unsupported or erroneous". According to Arthur Dyevre, "[i]n such a context, any attempt to explain the judges' decisions in terms of strategic decision-making and preference maximization appeared subversive. The judges' allies in academia would invariably discard it as an attempt to undermine the institution of judicial review".[24]

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[19] Rogers Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' (1988) 82 American Political Science Review 89.

[20] Cornell W Clayton and Howard Gillman, *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999); Howard Gillman and Cornell W Clayton, *The Supreme Court in American Politics: New Institutionalist Interpretations* (University Press of Kansas, 1999).

[21] *See* Strang, Johan, "Two Generations of Scandinavian Legal Realists" *Retfærd: nordisk juridisk tidsskrift* (2009). Also *see* Hart, H.L.A., "Scandinavian realism" *The Cambridge Law Journal* 17 (2) (1959), 233-240.

[22] *See* e.g. Skiple, Jon Kåre, et al. "Supreme Court Justices' Economic Behaviour: A Multilevel Model Analysis" *Scandinavian Political Studies* 39.1 (2016) 73-94.

[23] In the European continent only a handful of political scientist paid attention to judicial politics. For instance *see* Christine Landfried, 'Judicial Policy-Making in Germany: The Federal Constitutional Court' (1992) 15 West European Politics 50; Christine Landfried, 'The Judicialization of Politics in Germany' (1994) 15 International Political Science Review 113.

[24] Arthur Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour' (2010) 2 European Political Science Review 297 at 298.

Against a background of European scholars' dismissing involvement of politics in judicial decision-making, American political scientists – once again – took the lead in exploring "judicial politics" in Germany and France. In 1976, Donald Kommers published the first example of judicial behaviour studies in German social science scholarship with *Judicial Politics in West Germany: A Study of the Federal Constitutional Court*.[25] Similarly, Alec Stone Sweet published the first account of judicial behaviour in France in 1992, and applied methods of political science to French Constitutional Council in *The Birth of Judicial Politics in France*.[26] International courts also attracted considerable attention from American political scientists and public lawyers. A substantive body of literature on ECJ has flourished since the 1990s. In addition to his earlier works on judicial politics, Martin Shapiro explored judicial politics in the ECJ in a body of comparative literature.[27] Likewise, Walter Mattli and Anne-Marie Slaughter analysed behaviour in the ECJ considering the integration amongst "courts, regulatory agencies, executives, and legislatures" in the EU.[28] Karen Alter questioned the autonomy of the ECJ from European politics.[29] In their often cited empirical work on judicial behaviour in ECJ, Clifford Carrubba et al. also examined whether political preferences of EU member state governments "have a systematic and substantively important impact on ECJ decisions".[30]

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[25] Donald P Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Sage Publications, 1976). Also *see* Donald P Kommers, 'Judicial Review: Its Influence Abroad' , 428 The Annals of the American Academy of Political and Social Science 52 (1976).

[26] Alec Stone Sweet, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992). *See* also Martin M Shapiro, 'Judicial Review in France' (1989) 6 JL & Pol 531.

[27] *See* Martin Shapiro, 'The European Court of Justice' (1992) Sbragia 1992a 123; Martin Shapiro, 'The Problems of Independent Agencies in the United States and the European Union' (1997) 4 Journal of European Public Policy 276; Martin Shapiro, 'European Court of Justice: Of Institutions and Democracy, The' (1998) 32 Isr L Rev 3; Martin Shapiro, 'The European Court of Justice' in P.P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999)

[28] Walter Mattli and Anne-Marie Slaughter, 'Revisiting the European Court of Justice' (1998) 52 International Organization 177.

[29] Karen J Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52 International Organization 121.

[30] Clifford J Carrubba, Matthew Gabel and Charles Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 102 American Political Science Review 435. Yet, the literature on judicial behaviour in international courts and tribunals continue to diversify. Once again, chiefly American political scientists and lawyers scrutinise judicial independence in decision making in international courts including the International Criminal Court, International Court of Justice, the European Court of Human Rights, GATT and WTO Dispute Settlement Bodies and *ad hoc* Arbitral Tribunals. See Alec Stone Sweet and Giacinto Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2013) 46 NYUJ Int'l L & Pol 911; Joost Pauwelyn, 'The

In a nutshell, contrary to what has been referred to as the legal model[31] (or what we could call as mechanistic or formalistic jurisprudence), judicial behaviouralists argued that decision-makers do not apply the law independent from their individual subjective values and that their individual preferences and voting patterns could be empirically tested. One should note that judicial behaviour scholarship involves methods that are 'non-competing'. Some scholars approach the behaviour of courts from the viewpoint of values and ideological preferences of adjudicators (*the attitudinal approach*). Whereas others consider the institutional environment as the main determinant of judicial decision-making (*the institutional approach*). Scholars of judicial behaviour acknowledge the use of both attitudinal and institutional methods and, occasionally, consider whether the two approaches could be 'integrated'[32] or 'unified'[33] in an attempt to establish a general theory of judicial behaviour.

Below, this chapter will review theories of judicial behaviour including the attitudinal theory and old and new Institutionalisms. This review will benefit from the writings of scholars such as Herman Pritchett, Glendon Schubert, Harold Spaeth, Martin Shapiro, Howard Gillman and Cornell Clayton, who are considered amongst 'the pioneers of judicial behaviour'. It will sketch at the main arguments scholars have developed aiming to build a theoretical framework which will be useful for the study of judicial behaviour in ITA. As such, this review will not conduct an analysis of the substantive empirical data presented in these landmark studies. Such an endeavour would be beyond the scope of the review but it would also contrast the methodological framework of this work, since, as discussed in Chapter I, this study could be characterised as a non-empirical socio-legal work.

Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus' (2015) 109 American Journal of International Law 761.

[31] The legal model has been discussed in the Judicial Behaviour scholarship interchangeably with mechanistic or formalistic jurisprudence. Both assume that decision-makers "apply the law objectively, dispassionately, and impartially", and that "the legal has not, and perhaps cannot, be subject to systematic empirical falsification". Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 33.

[32] *See* Melinda Gann Hall and Paul Brace, 'Toward an Integrated Model of Judicial Voting Behavior' (1992) 20 American Politics Quarterly 147; Paul Brace and Melinda Gann Hall, 'Integrated Models of Judicial Dissent' (1993) 55 The Journal of Politics 914.

[33] Dyevre, 'Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour'.

III. Theories of Judicial Behaviour

III.1. The Attitudinal Theory and Behaviouralism

The attitudinal theory posits that adjudicators decide based on their individual policy preferences against the factual background of a particular case. The theory focuses on justices and "the influence of [their] individual predilections on the development of law".[34] In other words, in the attitudinal thinking "ideology matters": a justice may vote the way they do because they are conservative, whereas another may vote the way they do because they are liberal.

The attitudinal method originates from the US legal realism of the 1920s. The realist perceptions that "law-making inhered in judging" and that normative concepts of law "merely rationalize decisions, they are not causes of them"[35] were, perhaps for the first time[36], analysed based on an empirical methodology by Charles G. Haines in 1922.[37] In his landmark article, Haines argued against the mechanical theory that would postulate absolute legal principles and explored "the significance of human element in the administration of justice". He advocated a method that would consider remote and indirect factors (including general and legal educational background, family and personal associations as well as wealth and social position) and direct factors (such as legal and political experience, political affiliations and opinions, and intellectual and temperamental traits) in exploring judicial decision-making in American constitutional law. According to Haines:

> "A complex thing like a judicial decision involves factors, personal and legal, which carry us to the very roots of human nature and human conduct. Political prejudices, the influences of narrow and limited training with antiquated legal principles and traditions, or class bias having little or no relation to wealth or property interest, are more likely to affect the decisions of judges than so-called 'economic interests'".[38]

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[34] Pritchett, *The Roosevelt Court: A Study of Judicial Values and Votes, 1937-48* at i.

[35] *See* Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 87-8.

[36] One should note Jerome Frank's earlier attempts to test the legal realist conceptions based on theories of Sigmund Freud and Jean Piaget. *See* J. Frank, *Law and the Modern Mind* (Brentano's 1930); Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press 1973).

[37] Haines, 'General Observations on the Effects of Personal Political and Economic Influences in the Decisions of Judges' at 115-6.

[38] *Ibid.* at 49.

Thus, according to Haines, economic factors would have no or little influence on judicial-decision-making. Attitudinal scholars like Herman Pritchett and Glendon Schubert followed his footsteps.

III.1.1. Herman Pritchett

Whilst Haines presented one of the early models for the empirical study of decision-making in the American Supreme Court, Herman Pritchett further developed and pioneered behavioural analysis of judicial decision-making in his empirical work of 1948 entitled *The Roosevelt Court*. In his study, Herman Pritchett examined "dissents, concurrences, voting blocs, and ideological configurations from the Court's non-unanimous decisions between 1937 and 1947".[39] Whilst Pritchett made use of the early realist conceptions in shaping his empirical research on "social and psychological origins of judicial attitudes"[40], *The Roosevelt Court* diverged in its methods. Contrary to realist conceptions and Haines' earlier arguments, Pritchett retained "public law's traditional concern for appreciating the judge as a particular kind of political actor whose activity took place within the context of a legal, institutional framework".[41] Pritchett's benchmark study, thus, did not follow a strictly realist orientation, considering justices as following their own policy preferences under the constraints of legal reasoning.[42] Thus, Pritchett's work was not only a response to the call for empirical research on courts by the legal realists – but one which stressed "the linkage of judicial politics to the concept of law".[43]

Pritchett pursued a quantitative technique that aimed to spot determinants making judges behave as they do.[44] He considered the Supreme Court "as a small decision-making group, whose voting and behaviour could best be explained in terms of imputed differences in the attitudes of individual justices toward the recurrent issues of public policy that characterise cases that reach the Court for decision".[45] He was interested in

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[39] Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 89.
[40] Pritchett, *The Roosevelt Court: A Study of Judicial Values and Votes, 1937-48* at i.
[41] Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' at 8.
[42] Lawrence Baum, 'C. Herman Pritchett: Innovator with an Ambiguous Legacy' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (The Pioneers of Judicial Behavior, 2009) at 60.
[43] Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' at 8.
[44] Joel B Grossman, Edward N Muller and Joseph Tanenhaus, *Frontiers of Judicial Research* (J. Wiley 1969) at 4.
[45] Glendon Schubert, 'Behavioral Research in Public Law' (1963) 57 American Political Science Review 433 at 2.

the social and psychological origins of judicial behaviour and, henceforth, developed a methodology based on "socio-psychological theory of the formation of attitudes" that "stressed the importance of social background in shaping the attitudes/values expressed in observable behaviour and measurable in the same currency".[46]

In *Civil Liberties and the Vinson Court*, one could more clearly recognise Pritchett's moderate realist perception. According to some, his comparison of the Supreme Court and the Congress, based on their tasks and the type of issues they dealt with, resembles *an institutionalist* perspective.[47] According to Pritchett, similar to the Congress, the Supreme Court is constrained by its own rules and traditions. For instance;

"[…] when a civil liberties case comes to the Supreme Court, the justices are not asked whether they are more or less in favour of civil liberties. They are asked how the Court, consistently with its role as the highest judicial body in a federal system, should dispose of a proceeding, the basic facts in which have been found and the form of which has been given by lower judicial bodies."[48]

In addition, since the Supreme Court "operate[s] in times of crisis" as a result of its institutional structure, it must handle "[…] the difficult problems, the field where new legislation needs interpretation, the areas of the law where precedents conflict or are non-existent – on such a court decisions must inevitably reflect the values of the justices who make them".[49]

Thus, according to Pritchett, whilst institutional limitations arising from precedent, different traditions of the law, judicial deference to legislative authority, federalism and construction of statutes were important, what motivated the behaviour of justices was, at the end, their own policy preferences.[50]

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[46] Maveety, 'The Study of Judicial Behaviour and the Discipline of Political Science' at 11.

[47] *See* Clayton's review of The Roosevelt Court in Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 23: "Although Pritchett thought judges were primarily "motivated by their own (policy) preferences", like the old institutionalists he also recognized the judicial "preferences" were influenced by conceptions of what it was appropriate for judges to do. Thus, he developed an intervening variable between a justice's policy preferences and justice's votes in cases which he called "judicial role conception".

[48] Charles Herman Pritchett, *Civil Liberties and the Vinson Court* (University of Chicago Press 1969) at 187-8.

[49] Charles Herman Pritchett, *The Roosevelt Court* (Quadrangle Books 1969) at 239.

[50] C Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947*, vol 21 (Quid Pro Books 2014) at xiii; Baum, 'C. Herman Pritchett: Innovator with an Ambiguous Legacy' at 62.

III.1.2. Glendon Schubert

Although Herman Pritchett (in Glendon Schubert's own words) "blazed a trail" in putting forward a comprehensive quantitative work on the behaviour of the Supreme Court justices[51], Schubert is, very often, hailed as the founder of the attitudinal theory. This is due to his ground-breaking approach in theorising the attitudinal method in *Quantitative Analysis of Judicial Behaviour* (1959), *The Judicial Mind* (1965), and *The Judicial Mind Revisited* (1974).

Schubert was the first behaviouralist[52] to use game theory[53] and bloc and scalogram analysis (which builds on psychological research on measuring attitudes). In his *Quantitative Analysis*, he maintained that "bloc analysis […] can be used to trace shifts in the balance of power on the [Supreme] Court and to examine relationships between formal and informal leadership". He further undertook game analysis which, in his view, led "to a better understanding than would otherwise be possible of the effects of 'rational' and 'non-rational' factors in the [Supreme] Court's decision-making".[54] In his scalogram analysis, based on cumulative scaling (or Guttman scaling), Schubert also argued that, if judges vote based on their personal attitudes, it would be possible to find out an ordinal relationship in their preferences. A basic method, in this vein, would be to count votes. If a justice regularly upheld, for instance, non-counsel convictions, he/she might be labelled as conservative.

This non-cumulative scaling method, however, had its flaws. Even if one labelled a justice as conservative based on the amount of his/her conservative votes in non-counsel convictions, such a labelling might be insufficient to prove that this justice is more

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[51] Glendon A Schubert and Vilhelm Aubert, *Judicial Decision-Making* (free Press of Glencoe London 1963) at "dedication".

[52] Behavioralists could be described as those scholars that responded to the call for scientific study of law by legal realists. Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 67.

[53] Although Schubert is frequently associated with social-psychological theories of judicial decision making, he also was one of the first political scientist to apply game theoretic models. In his 1958 review, Schubert wrote that the "judicial process is tailor-made for investigation by the theory of games. Whatever may be their obligations as officers of courts, attorneys frequently play the role of competing gamesmen, and the model of the two-person, zero-sum game certainly can be applied to many trials… and the behaviour of Supreme Court justices": Schubert, 'The Study of Judicial Decision-Making as an Aspect of Political Behavior' at 1022.

[54] Victor G. Rosenblum, 'Quantitative Analysis of Judicial Behavior by Glendon A. Schubert; Constitutional Politics by Glendon A. Schubert' (1961) 5 Midwest Journal of Political Science 81 at 81-3.

conservative on the right to counsel since different cases might present facts that are of different importance to public policy. In other words, a justice's vote might change based on the importance of the facts involved. Schubert's cumulative scaling theory, on the other hand, focused on unidimensional attributes in which one could analyse attitudes of justices toward one subject only.[55]

Perhaps, his most important innovation, however, was elaborated in *The Judicial Mind*. Dissatisfied with the cumulative scaling and its unidimensional restrictions and drawing on the work of psychologist Clyde Coombs[56], Schubert argued that justices' values could be ideologically scaled along with case stimuli. For instance, the way Supreme Court Justices approach two distinct cases on the constitutionality of search and warrant might suggest whether a justice is liberal, moderate or conservative. Whereas a justice, who would uphold a search without a warrant would be deemed as liberal, another justice who would challenge the constitutionality of a search as such, might be considered as conservative. In Schubert's account, by counting votes of justices and, based on case stimuli, determining which ideological space they fall into might help one in anticipating outcomes of reviews of constitutionality by the Supreme Court.[57]

As one might expect, Glendon Schubert's attitudinal method received some criticism from classical legal theorists. Mendelson, for instance, complained about how – so little – normative concerns of the law matter to judicial behaviouralists. To him, Schubert's categorisation of complex cases and complex votes were artificial, making the substantive conclusions drawn from such analyses meaningless.[58] Likewise Theodore Becker criticized the lack of "the peculiar systemic factors" in Schubert's analyses including "the existence of a large body of authoritative precedent; the deeply embedded notion of judicial restraint and stare decisis".[59]

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[55] Jeffrey Segal, 'Glendon Schubert: The Judicial Mind' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (The Pioneers of Judicial Behavior, University of Michigan Press 2009) at 81-4.

[56] *See* Clyde H Coombs, 'A Theory of Data' (New York: John Wiley and Sons, Inc., 1964)

[57] Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 67-8; Segal, 'Glendon Schubert: The Judicial Mind' at 81-4.

[58] Wallace Mendelson, 'The Neo-Behavioral Approach to the Judicial Process: A Critique' (1963) 57 American Political Science Review 593 as quoted in Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 24.

[59] Theodore L Becker, 'Inquiry into a School of Thought in the Judicial Behavior Movement' (1963) 7 Midwest Journal of Political Science 254 at 265 as quoted in Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 24.

The attitudinal method Schubert adopted in *The Judicial Mind* was constructed on cognitive and empirical psychology which, according to Clayton, allowed him to "model how particular justices would vote in particular types of cases based on their previously held ideological preferences".[60] Rohde and Spaeth would thereafter endorse Schubert's concept of judicial attitude, arguing that:

> "[…] each member of the Court has preferences concerning the policy questions faced by the Court, and when the justices make decisions they want the outcomes to approximate as nearly as possible those policy preferences."[61]

Inasmuch as Schubert could be considered as the pioneer of strategic thinking on judicial behaviour, he was not the scholar who openly discussed whether justices acted *strategically* so as to pursue their policy preferences. Walter Murphy would coin the term strategic in studies of judicial behaviour.

III.1.3. Strategic Behaviour: Walter F. Murphy

The strategic account posits that justices act strategically to achieve their policy goals. Scholars based this proposition on certain assumptions:

> "(1) [S]ocial actors make their choices to achieve certain goals, (2) social actors act strategically in the sense that their choices depend on their expectations about the choices of other actors, and (3) these choices are structured by the institutional setting in which they are made."[62]

Whilst game theoretic approaches were first used by Glendon Schubert at the end of the 1950s, this definition of the strategic account was initially pursued by Walter F. Murphy in *Congress and the Court* in 1962.[63] Based on interview data, cases, manuscript collections, and congressional hearings, Murphy asserted that, ultimately, the Supreme Court justices might choose to fine-tune their opinions in order to avoid an adverse reaction from institutions like Congress and the President. In other words, according to

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[60] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 24.
[61] *Ibid.*
[62] Lee Epstein and Jack Knight, *The Choices Justices Make* (Congressional Quarterly Press 1998) at xi.
[63] Walter F Murphy, *Congress and the Court* (Chicago: University of Chicago Press, 1962)

Murphy, “justices […] anticipate the reactions of other institutions and take those reactions into account in making decisions”.[64]

Murphy furthered his thesis in *The Elements of Judicial Strategy* (1964), relying on intuitions based on the rational choice paradigm, he argued that strategic interaction does not only take place between the Supreme Court and other institutions but also amongst the justices.[65] Thus, in *Congress and the Court* and *Elements of Judicial Strategy*, Murphy aimed to demonstrate how one of nine justices in the Supreme Court, operating within a space of institutional and ideological constraints, could maximise their influence on public policy.[66]

Murphy’s contributions to analysis of judicial behaviour in the Supreme Court stand out since they are not based on social-psychological methods pursued by attitudinal theorists. The economic approach, offered by Murphy, particularly in the *Elements of Judicial Strategy,* assumes that “justices are preference maximisers who make decisions to further their goals with regard to the preferences and likely actions of other relevant actors and the institutional context” as opposed to the attitudinal modellers, who asserted that “justices are policy seekers who further their policy goals with reference to their normative and policy based preferences”. In other words, a point of distinction between the attitudinal and the strategic model is that social-psychological approaches “do not acknowledge a strategic component to decision-making”.[67]

As opposed to attitudinal theorists, Murphy emphasized the role of larger political structures and social power which “conditioned the ability of individual judges to affect social policy”. According to Murphy, when making decisions, justices are constrained by the views of other colleagues on the bench, legislators, administrators, future litigants, interest groups and other political factors.

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[64] Lee Epstein and Jack Knight, 'Walter F. Murphy: The Interactive Nature of Judicial Decision-Making' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press, 2009) at 204.
[65] Walter F Murphy, *Elements of Judicial Strategy*, vol 17 (Quid Pro Books 1964)
[66] Murphy and Tanenhaus, *The Study of Public Law* at 24.
[67] Epstein and Knight, 'Walter F. Murphy: The Interactive Nature of Judicial Decision-Making' at 206-7.

Whilst Murphy considered personal policy preferences as the ultimate goal of judicial leniency of justices, at the same time, he revolutionised the strategic behaviour in the institutional context that "[…] forced judges to behave or vote in ways they otherwise would not if left unconstrained by their institutional environments".[68] Murphy should therefore, be considered as a behaviouralist with a twist of institutionalism who pioneered the rationale choice approach chiefly developed by Lee Epstein and Jack Knight in the 1990s.

III.1.4. Harold J. Spaeth and Jeffrey A. Segal

As one of the strongest proponents of the attitudinal theory, Harold Spaeth, is the scholar who put forward an "attitudinal model" for the Supreme Court which, in his words, aimed at explaining the behaviour in question in a simple and parsimonious way.[69]

In their, perhaps, most influential work, *The Supreme Court and The Attitudinal Method*, Spaeth and Segal studied models of decision-making in, and political history and structure of, the Supreme Court. This rather theoretical monograph, thus, marks the genesis of attitudinal thinking as a model. Based on the earlier studies of behaviouralists such as Pritchett and Schubert, Spaeth and Segal argued that:

> "The Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."[70]

The Supreme Court and the Attitudinal Method remains to be one of the most controversial works on the Supreme Court since, according to its authors, the attitudinal model is "the only" approach that could reveal how decisions are made by the Supreme Court justices. Their critique of the legal model (or in other words mechanical or formalistic jurisprudence) points at the insufficiency of purely legalistic explanations behind decision-making in the Supreme Court. In the legal model, according to Segal and Spaeth, the four variants used by justices (i.e. plain meaning, intent of the framers (or legislators), precedent and balancing) serve "only to rationalize the Court's decisions and

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[68] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 23-4.
[69] Segal and Spaeth, *The Supreme Court and the Attitudinal Model* at 32.
[70] *Ibid.* at 64-5.

to cloak the reality of the Court's decision-making process […]". In other words, these variants serve to provide an apology for the subjective attitudes of decision-makers.[71]

Segal and Spaeth argue that, by using the attitudinal model, one could measure what the legal model deems immeasurable, i.e. attitudes of the Supreme Court justices. Whilst the legal model cannot "be subject to systematic and empirical falsification", the attitudinal model "operationalizes its constructs in an intersubjectively transmissible fashion and provides empirical support for its conclusions".[72] Based on Spaeth's earlier work and theories of social psychology[73], the authors defined attitude as "nothing more than a set of interrelated beliefs about at least one object and the situation in which it is encountered".[74] In focusing on "attitudes", they built their approach on Rohde and Spaeth's microanalytical model which gathers "the Court's decisions into discrete sets of cases, each of which is organized on the basis of the 'attitude situation' within which the 'attitude object' is encountered". According to Segal and Spaeth:

> "The theory […] assumes that sets of these cases that form around similar objects and situations will correlate with one another to form issue areas (e.g., criminal procedure, First Amendment freedoms, judicial power, federalism) in which an interrelated set of attitudes – that is, a value – will explain the justices' behaviour (e.g., freedom, equality, national supremacy, libertarianism). […] These attitudes […] should cause a behaviourally predisposed justice to support certain legal claims and to oppose others, while other justices behave in an opposite fashion."[75]

In support of their assertions, Segal and Spaeth provided a diverse set of evidence that links justices' attitudes to their votes. Their sources included newspaper editorials, assessment of the Supreme Court justices' records as lower court judges as well as justices' off-the-bench speeches and writings. According to the authors, these provided adequate data in anticipating whether, for instance, Justice Marshall would take a liberal approach, whereas Justice Rehnquist would take a conservative approach in a death penalty case. Segal and Spaeth criticised earlier attitudinal work (i.e. by Pritchett and Schubert) for overlooking the potential of the attitudinal method to "anticipate". According to the authors, "the early attitudinal modellers should have formally reversed

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[71] *Ibid.* at 33-53.
[72] *Ibid.* at 34.
[73] David W Rohde and Harold J Spaeth, *Supreme Court Decision Making* (WH Freeman, 1976) at 75-6.
[74] *Ibid.* at 72.
[75] Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited* at 91-2.

matters by using the patterns of past voting to predict how justices would vote in future cases".[76]

In support of their theoretical position, Segal and Spaeth analysed Supreme Court decisions over a period of thirty-years and concluded that "justices' votes within particular issue or policy domains approximate a "unidimensional structure" (that is justices' voting patterns remained stable over time); and that justices' voting patterns correspond closely to their a priori policy preferences […]".[77]

Whilst *in The Supreme Court and the Attitudinal Method* Segal and Spaeth focus chiefly on the attitudinal factors that affect decision-making, this work is also important that it undertakes an institutional analysis of the Supreme Court. Segal and Spaeth did not only look at voting attitudes of justices. In order to solidify their case, they also paid considerable attention to institutional features of the Supreme Court in order to understand whether the design of the Court enhances the ability of the justices to make their preferences.[78] This indeed recalls what Pritchett pursued in *Civil Liberties and the Vinson Court.*[79] However, as further elaborated below, the attitudinal model considered such institutional features as exogenous elements of judicial decision-making. In other words, in the attitudinal approach institutions were considered as secondary determinants in judicial decision-making.

III.2. Institutionalism

As described in the Introduction chapter, institutionalism refers to a set of approaches that take institutions seriously. This part will not reiterate these definitions. It will rather focus on institutionalist methods developed by political scientists in their study of public law in

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[76] Segal and Spaeth, *The Supreme Court and the Attitudinal Model* at 222.
[77] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 24.
[78] Melinda Gann Hall, 'Review: The Supreme Court and the Attitudinal Model' (1995) 57 J POL 254.
[79] The Supreme Court and the Attitudinal Model was subsequently revised with The Supreme Court and the Attitudinal Model Revisited (2002). This more recent version included attitudinal examination of more recent cases in the Supreme Court as well as author's response to challenges raised by the rational choice approach to Supreme Court decision making. In order to keep to focus on the basics of Judicial Behaviour theories, this section will not provide more details on Spaeth's extensive work on the Supreme Court decisions. For further reading, see Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*; See also book review by Craig F. Emmert, 'The Supreme Court and the Attitudinal Model Revisited by Jeffrey A. Segal and Harold J. Spaeth. Cambridge: Cambridge University Press, 2002 (April 2003) 13 Law and Politics Book Review.

the US. As noted earlier, there exist two forms of institutionalism, i.e. old and new and at least, three broad approaches to new institutionalism, i.e. rational choice, historical and social. Thus, to some, new institutionalism stands as "highly fractured". It is a theory of many methods and conclusions.[80] Irrespective of the methods and conclusions they reached, however, this part will review works of scholars who have presented theoretical innovations to the study of judicial behaviour in the US Supreme Court using institutionalist approaches. These methodological innovations hypothesise that judicial decision-making is not only constructed on subjective values and beliefs of adjudicators (as pursued by behavioural or attitudinal scholars)[81], but also on institutional factors that might be motivated by, for instance, "a sense of duty or obligation about [the adjudicator's] responsibility to the law".[82]

One might trace the use of institutional methods in the US public law scholarship to Edward S. Corwin. Corwin, in an age of legal realism, was amongst the first to argue against the classic US legal realist conception – that justices read their own ideological and political values into the law.[83] According to Corwin, judicial bias did not result from the personal values of justices. It was deeply and historically embedded into "changing ideological structures, or institutions, that framed judicial thought and constituted the nature of individual judicial preferences". To Corwin, such institutional ideological structures could best be identified through historical analysis (by contrast to quantitative methods followed by advocates of behaviouralism, and attitudinal and rational choice decision-making).[84] In *The Twilight of the Supreme Court (1934)*, Corwin undertook a historical overview the inter-relationship between the political attitudes and interests, and

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[80] Tracey E. George, 'Supreme Court Decision-Making: New Institutionalist Approaches by Cornell W. Clayton, Howard Gillman' (1999) 59 The Journal of Economic History 849 at 850.

[81] According to Clayton, behaviouralism was the opposite of the old institutionalism. Where the old institutionalists used informal historical and interpretative methods to study relatively formal or tangible subjects like statutes and judicial doctrines, behaviouralism used formal, positive or "scientific" methods in order to study intangible subjects like attitudes and process. *See* Philip Ethington and Eileen McDonagh, 'The Eclectic Center of the New Institutionalism' (1995) 19 Social Science History 467. *See* also Philip J Ethington and Eileen L McDonagh, 'The Common Space of Social Science Inquiry' (1995) 28 Polity 85 at 88.

[82] Clayton and Gillman, *Supreme Court Decision-Making: New Institutionalist Approaches* at 5.

[83] Edward Samuel Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory* (Yale University Press, 1934).

[84] Cornell W Clayton, 'Edward S. Corwin as Public Scholar' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press, 2009) at 307-8.

the development of the most important doctrines of the American constitutional law by going into the legal reasoning of the American Supreme Court.[85]

Alpheus T. Mason, a student of Corwin, followed suit. In his biographical works on Supreme Court justices, he considered the Supreme Court "as a human and political institution" and explored the Supreme Court's relations with other institutions of the federal government as well as connections amongst the Justices.[86] These political scientists used both doctrinal and historical methods. Their central objective was to explore "how law and individual judicial decisions were related to the broader political contexts that gave them meaning".[87]

Whilst scholars like Corwin and Mason together with Charles G. Haines, departed from the legal realist thinking in subtle ways, according to some, they were still legal realists.[88] After all, their primary objective was to understand "how law and individual judicial decisions were related to the broader political contexts that gave them meaning".[89] However, at the same time, for these "old institutionalists":

"[…] judicial decisions were political acts, not because judges were like elected policy makers who consciously advanced policy preferences or constituent interests, but because law itself was a process for constructing political values, and legal interpretation was always influenced by deep political forces that shaped judicial attitudes at the effective and cognitive level."[90]

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[85] Corwin, *The Twilight of the Supreme Court: A History of Our Constitutional Theory*. See Douglas B Maggs, 'Review of the Twilight of the Supreme Court: A History of Our Constitutional Theory by Edward S. Corwin' (1935) 2 University of Chicago Law Review 18.
[86] Sue Davis, 'Alpheus Thomas Mason: Piercing the Judicial Veil' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press, 2003) at 316. For an overview on Mason's work on judicial biography *see* Brandeis Mason and A Brandeis, *A Free Man's Life* (New York: Viking, 1956); Alpheus T Mason and Harlan Fiske Stone, 'Pillar of the Law' (Hamden: Archon Books, 1956); Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (New York: Simon and Schuster, 1965).
[87] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 20. *See* also Robert Eugene Cushman, 'Leading Constitutional Decisions' (1925) as quoted by Clayton: "The Supreme Court does not do its work in a vacuum. Its decisions on important constitutional questions can be understood in their full significance only when viewed against the background history, politics, economics, and personality surrounding them and out of which they grew".
[88] Murphy and Tanenhaus, *The Study of Public Law* at 13.
[89] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 20.
[90] *Ibid.* at 21.

One could also see those strategic influences in the old institutionalist thinking. As Murphy and Tanenhaus pointed out, scholars did consider strategic actions by judges in an attempt to avoid adverse "reactions ranging from widespread popular abuse of the Court and even defiance of its rulings to attempts to diminish the Court's authority or tamper with its membership".[91]

A second departure from the modern institutionalist thinking is perhaps how old institutional scholars conceptualised "institutions". Their conception was rather realistic and, thus, they focused on formal or tangible institutions including courts, judicial doctrines, written opinions, statutes and constitutions. These formal institutions were considered as the sources of "historically stable patterns of ideas and behaviour […] that could ultimately compel individuals to behave in prescribed ways".[92] The old institutionalist approaches, as explained by Clayton, provide that:

> "[…] judicial attitudes and behaviour were structured by historically evolving legal institutions, which were themselves embedded within broader social and political (state) ones. Reflective judgments, as opposed to simple attitudes and behaviour, however, always retained partial autonomy from these institutional forces, hence the role of normative analysis. Historical and interpretive analysis was thus used to explain both the actual functions of real institutions as well as their goals and purposes, and it could inform reasoned judgements about reform if the one failed to match the other."[93]

This wave of "old institutionalist" analyses of Supreme Court decision-making paved the way for later analysis of the institutional features of judicial decision-making. Corwin's historical approach established the theoretical grounds for historical institutionalism which was subsequently developed in the works of Robert G. McCloskey, Martin Shapiro and rational choice institutionalism as furthered by strategic pioneers Walter F. Murphy, Lee Epstein and Jack Knight. Such approaches have also been scrutinised under the New Institutionalist framework by scholars such as Howard Gillman and Cornell Clayton. However, as is reviewed below, the New Institutionalist terrain is chiefly based on the influential work by Rogers Smith (1988).

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[91] *Ibid* at 20.
[92] *Ibid.*
[93] *Ibid* at 22.

III.2.1. Old Institutionalism: Historical Institutionalism in Context

III.2.1.1. Robert G. McCloskey

Robert G. McCloskey was interested in the political history of the Supreme Court. He wrote on how certain “areas of American life” impacted “currents of American political development”. However, his interest in the history of the Supreme Court was not limited to its “intellectual history”. It also covered the “institutional history”. Though, behavioural scholars had at times referred to institutional features of judicial decision-making in the Supreme Court, their analyses were predominantly based on the assumption that it was the justices’ personal policy preferences that influenced their decision-making. Unlike behaviouralists, McCloskey – following the footsteps of earlier historical political analyses – argued that the Court could not be deemed as a “freewheeling super-legislature”, which functions based solely on personal policy preferences.[94] He had a simple starting point: According to McCloskey, the Supreme Court was an institution and was cast in a role in the political system.[95] This role “[was] to make policy with respect to specific set of issues – most notably relating to powers of various institutions in the political system”.[96]

To McCloskey, the Court’s role was broad enough to advocate its policy choice in contentious public policy issues. Similar to Corwin and Mason, McCloskey aimed at linking the Supreme Court decision-making to political interests in various historical periods. In *The American Supreme Court*[97], McCloskey reviewed three periods of constitutional development. At the verge of the Civil War in 1789, he identified that the Supreme Court justices were greatly concerned about the “value of preserving the American Union”. Between 1865 and 1937, the Court was concerned about the role of government in implementing economic regulation. From 1937 to mid-1950s, the Supreme Court was more concerned about questions relating to civil rights and liberties.

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[94] Robert Green McCloskey, *The Modern Supreme Court*, vol 46 (Harvard University Press, 1972) at 129-30.

[95] Robert G McCloskey, 'The Supreme Court Finds a Role: Civil Liberties in the 1955 Term' (1956) Virginia Law Review 735.

[96] Howard Gillman, 'Robert G. Mccloskey, Historical Institutionalism, and the Arts of Judicial Governance' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press, 2003) at 340.

[97] Robert G McCloskey and Sanford Levinson, *The American Supreme Court* (University of Chicago Press, Third Edition 2000) at 15-6.

McCloskey also identified historical turns – i.e. the transformation from the "New Deal mentality" to a greater scale of support for labour and "humane democracy" – that motivated Warren Court's rather activist approach to civil liberties.[98] According to McCloskey, such transformations proved that:

"the interests and values, and hence the role, of the Court have shifted fundamentally and often in the presence of shifting national conditions… It is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand".[99]

In contrast to behaviouralists, McCloskey did not undertake quantitative analysis. His methods were historical and interpretative, which, according to Howard Gillman, paved the way for McCloskey to move beyond the influence of attitudes on decision-making and to explore the circumstances under which the Court would "impose limits on national power rather than just legitimate it by upholding legislation".[100] In other words, such methods gave McCloskey a competitive advantage compared to his predecessors. Unlike behaviouralists, McCloskey was able to dig deep into the origins of judicial attitudes: To him, the *source* of justices' attitudes was of central importance.[101]

Howard Gillman describes McCloskey's brand of historical institutionalism based on the following implications:

"(1) institutions should be understood in terms of the distinctive "roles" they place within a larger structure of governance and authority; (2) these roles are normative (and must be engaged as such) but also reflect constellations of power and interest within changing historical contexts; (3) the Supreme Court's institutional characteristics shape the distinctive way in which justices attempt to exercise power and maintain their authority and legitimacy; and (4) the Court's capacity to exercise power depends on its ability to generate sufficient support for its role from powerful interests and constituencies".[102]

These implications distinguish McCloskey from doctrinal historians. He developed a historical institutional approach and explored "political challenges facing the justices as

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[98] McCloskey, *The Modern Supreme Court* at 160. Gillman, 'Robert G. Mccloskey, Historical Institutionalism, and the Arts of Judicial Governance' at 342.
[99] McCloskey and Levinson, *The American Supreme Court* at 230.
[100] Gillman, 'Robert G. Mccloskey, Historical Institutionalism, and the Arts of Judicial Governance' at 342.
[101] *Ibid.* at 343.
[102] *Ibid.* at 338.

they attempted to secure their place in the political system".[103] His final contributions on *Stone* and *Vinson Courts* showed the importance of the method that is sensitive to "the situation of the decision makers at the time they had to make their decision".[104] According to McCloskey, in their pursuit to behave like a political institution, the justices also had to maintain a pattern of Court behaviour that emphasizes judicial separation in order to retain their legitimacy and, hence, their power. He argued that the Supreme Court had to "be a court, as well as seem one".[105]

III.2.2. From Old Institutionalism to New Institutionalism in Public Law: Rogers Smith

Old institutionalist methods were the initial steps towards a more constructive agenda in the analysis of judicial decision-making in public law. Such methods did indeed provide a leeway to avoid clashes between "behaviouralists" and "normative" approaches. However, according to Martin Shapiro, many young scholars were moving toward value based empirical work in public law scholarship, which could renew such clashes.[106] In his often cited article on New Institutionalism in public law, Rogers Smith argued in favour of a theoretical setting that could unify many of public law scholarship's "longstanding descriptive and normative concerns" under the rubric of New Institutionalism.[107]

Rogers Smith based his work on the seminal article by James March and Johan Olsen (1984),[108] in which the authors criticised earlier analyses of political values based on individualistic and utilitarian methodologies for failing to integrate "fundamental normative premises" and collective actions or activities formed through institutions and organisations.[109] According to Smith, March and Olsen's emphasis on normative values,

[103] *Ibid.* at 344.
[104] McCloskey, *The Modern Supreme Court* at viii. Gillman, 'Robert G. McCloskey, Historical Institutionalism, and the Arts of Judicial Governance' at 354.
[105] McCloskey and Levinson, *The American Supreme Court* at 12-3.
[106] Martin Shapiro, 'Recent Developments in Political Jurisprudence' (1983) 36 Western Political Quarterly 541 at 543-4.
[107] Rogers M Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' (1988) 82 American Political Science Review 89 at 90.
[108] James G March and Johan P Olsen, 'The New Institutionalism: Organizational Factors in Political Life' (1983) 78 American political science review 734.
[109] B Guy Peters, *Institutional Theory in Political Science: The New Institutionalism* (Bloomsbury Publishing USA 2011) at 25.

and institutions and organisations, would aid the contemporary public law scholarship in overcoming "the treatment of legal and political institutions simply as epiphenomena of self-interested individual and group behaviour".[110] Despite the attempts to integrate normative ideas in law with studies of historical evolution of political institutions and judicial behaviour, to Smith, a deeper scrutiny of the influence of human institutions or structures on the decision and actions of political actors (such as judges) and *vice versa* could respond to real weaknesses in behaviouralist and rational choice perspectives.[111]

In comprehending the shift from old to new institutional method, one should consider the difference between the two. According to Clayton this difference lies on "the new acceptance of a more dynamic and porous conception of institutions and a reduced emphasis on the importance of the state in political analysis".[112] New institutionalism does not view political institutions only as real or tangible structures of power, authority and resources but also as including informal norms, myths, habits of thought or background structures and patterns of meaning. As Smith argues, in the new institutionalist thinking institutions are:

"[…] not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as patterns of rhetorical legitimation characteristic of certain traditions of political discourse or the sorts of associated values found in popular belief systems."[113]

In integrating the "New Institutionalist" approach of March and Olsen, Smith first pointed at the shortcomings in the mainstream public law methods, i.e. attitudinal and rational choice approaches, in which, the behaviour of justices "is normally portrayed as the result of rational calculations designed to advance the individual's or group's self-interest", and that "the preferences and powers of political actors are often treated as exogenous givens

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[110] Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' at 91.
[111] *Ibid.* at 92.
[112] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 32; Howard Gillman, 'The New Institutionalism, Part I: More and Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics' (1997) 7 Law and Courts 6; Rogers Smith, 'Ideas, Institutions, and Strategic Choice' (1995) 28 Polity 135.
[113] Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' at 91

in political analysis".[114] According to Smith, the root problem in attitudinal and rational choice methods is that judicial behaviour scholars have treated:

"the resources, the institutional environment, and especially the very values and interests of political actors as exogenous, as determinants of political choice situations that shape events while remaining more or less impervious to conscious human direction themselves".[115]

Whilst Smith admitted the value of knowing voting patterns of the Supreme Court justices based on specific case stimuli, (for instance search and seizure cases as exemplified by Glendon Schubert – see at III.1.2 above) or civil liberties and economic issues (which, could, to a large extent, be linked to attributes such as age, educational, professional background and partisanship), he argued that scholars could learn more about judicial policy making by questioning if:

"[…] there are established police practices, or inherited values, that lead justices to think searches in certain places are more problematic; or if we identify the content and sources of the typical experiences influencing judicial attitudes that attributes like educational and professional background signal; or if we study the institutional constraints on the sorts of justices that are likely to be sitting on the bench at a given time. We might also wish to consider whether judicial voting patterns affect the types of searches police conduct; whether prevailing popular notions about the privacy of certain locations do so; whether judicial decisions on various economic and civil liberties issues assist or alter the institutions that shape and select justices with certain attitudes; and other questions of this order."[116]

At the same time, he acknowledged that the New Institutionalist method has its weakness as well as its strengths. According to Smith, a core weakness is that the new institutionalist method downgrades "the significance of human political actors". Whilst background institutions and structures, (such as the position of the actor in question in state agencies or political parties, by economic relations, by ideological outlooks, by enduring ethnic alliances, etc.), are of paramount importance, one should note that, judicial actors might

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[114] *Ibid.* at 91. On the description of institutions see Smith, 'Ideas, Institutions, and Strategic Choice' at 138: "The Lord Baltimore Hotel is a kind of institution; the Social Science History Association is a kind of institution; the State Department is a kind of institution. But none of these institutions will function for a second if there aren't a whole lot of human beings with ideas in their heads defining their roles in relation to those institutions. It is their purposes, their projects that make those institutions go and work. [To say] that in some sense ideas are secondary to institutions or organizations seems incoherent to me…. And if ideas are necessary to an institution's existence and functioning, why treat them as separate and secondary".
[115] Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' at 95.
[116] *Ibid.*

be influenced by many other variables in which case the decision-maker might choose to retain some room for their subjective values.[117]

Smith suggested, for those public law students who are willing to give greater adherence to "interplay of meaningful acts and structural contexts", to analyse the influence of political choices in the origins of the institutions they examine. This would require all analysts to (i) provide some indication as to the origins of the institutions they examine; (ii) identify their dependent variables, i.e. the set of judicial decisions, they claim to explain, and (iii) question how legal choices affect institutions inasmuch as how institutions affect legal choices.[118]

In applying the New Institutionalist perception of March and Olsen to the study of law and courts in political science, according to Clayton, Smith aimed at "unifying the behaviouralist quest for empirical rigour with the more inclusive conception of politics and law that was part of the normative jurisprudence […]".[119] In this vein, one could identify two major currents that attempt to analyse both empirical data and normative jurisprudence: First, the rational choice method (or as suggested elsewhere "the positive theory of institutions") which draws heavily on the works of Murphy on strategic behaviour. Second, the historical-interpretative method that is built on the works of Corwin, Mason and Robert G. McCloskey, and that has further been developed by scholars, including Martin Shapiro, Howard Gillman and Cornell Clayton.

III.2.3. Rational Choice Institutionalism: Lee Epstein and Jack Knight

Drawing on the implications Murphy furthered in his landmark study, *Elements of Judicial Strategy*, Lee Epstein and Jack Knight, introduced the modern day account of the strategic thinking on the Supreme Court in 1998. Their contribution, *The Choices Justices Make*, starts with the basic assumption – that the Supreme Court justices are sophisticated characters, and are strategically inclined to maximise their individual policy preferences by taking into account consideration of the preferences of others within the institutional context in which they operate.[120]

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[117] *Ibid.* at 99-101.
[118] *Ibid.* at 101-5.
[119] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 31.
[120] Epstein and Knight, *The Choices Justices Make* at preface xiii.

According to the authors, components of the strategic account include goals of actors, strategic interaction and institutions. The first component of behaviour, i.e. "the goal", requires one to assume that actors make their decisions consistent with their goals and interests. In other words, an actor (and in this case the Supreme Court justice) acts "intentionally and optimally toward a specific objective". On Epstein and Knight's account:

"[A] major goal of all justices is to see the law reflect their preferred policy positions, and they will take actions to advance this objective."[121]

However, they acknowledge that policy is not "the only judicial motivation". Throughout their contribution, the authors pay particular attention to "institutional legitimacy":

"The idea is that before the Court can make authoritative policy that other institutions, the states, and the public will view as binding on them, it must have some level of respect. *Craig* makes this point nicely. If the governor of Oklahoma regarded the Court as an illegitimate institution that lacked the authority and capacity to make policy, why would he feel obliged to follow the *Craig* ruling?"[122]

The second component is strategic interaction. This "goal" reliant component posits *interdependency:* According to the authors, when a justice acts strategically, they are aware "that her success of failure depends on the preferences of other actors and the actions she expects them to take, not just on her preferences and actions".[123] Thus, a justice would be motivated to act strategically in order to ensure that the law reflects their preferred policy position.[124]

Under the strategic account, the third and last component of judicial decision-making is "institutions". The authors adopt a – rather – narrow understanding of institutions, one that resembles the old institutionalists' conception of institutions. According to Epstein and Knight, "institutions can be formal, such as laws, or informal, such as norms and conventions". The authors exemplify Article III of the US Constitution, which establishes the basis for the institution of "life tenure":

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[121] *Ibid.* at 11.
[122] *Ibid.* at 12.
[123] *Ibid.*
[124] *Ibid.* at 11.

"[U]nlike members of legislatures and even judges in many states, [Supreme Court justices] do not have to face the voters to retain their jobs. The institution of life tenure […] influences justices' goals. Instead of acting to maximise their chances for re-election, justices act to maximise policy."[125]

One could turn to Maltzman et al.'s example on "the separation of powers" in the American tradition in understanding strategies justices may develop. According to some, under the strategic thinking:

"Because the Supreme Court is embedded in a political system in which the legislative and executive branches of government have the capacity to overturn, circumvent, or even ignore its decisions, the separation of powers view suggests that the Supreme Court will anticipate the reaction of Congress and craft its statutory interpretation decisions so that they will not be overturned."[126]

As opposed to the attitudinal approach's description of the unconstrained nature of judicial decision-making, the strategic approach would suggest that justices consider external constraints such as congressional censure and internal constraints including procedures and rules that are internal to the functioning of the court in making their decisions. According to strategic thinking, internal politics or, in other words, the collegial character of the court might also determine outcomes. The behaviour of each justice might be dependent on the actions and preferences of the others. Scholars pay particular attention to the opinion writing process, in which justices bargain, negotiate and compromise about the content of the legal rules in order to form a legal doctrine. Thus, to some, judges are not "free agents". They are "constrained by the actions and choices of other justices".[127]

III.2.5. Historical-Interpretive Institutionalism

As Rogers Smith puts it, historical-interpretive institutionalism attempts to "integrate the study of ideas in law with descriptive studies of the historical evolution of political institutions and behaviour".[128] Similar to rational choice theory, historical-interpretivism puts institutions at the centre. However, contrary, rational choice approach, historical-

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[125] *Ibid.* at 17.
[126] Forrest Maltzman, JFII Spriggs and Paul Wahlbeck, 'Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making' in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, 1999) at 48.
[127] *Ibid.* at 49-54.
[128] Smith, 'Political Jurisprudence, the "New Institutionalism," and the Future of Public Law' at 90.

interpretivism takes a descriptive approach and focuses on the content of judicial opinions and normative concerns, which were treated as secondary by behavioural scholars. Historical-interpretivism "is best known for examining the source and evolution of institutional norms on the Supreme Court, norms of processes as well as substance".[129]

III.2.5.1. Martin Shapiro

Martin Shapiro, a student of McCloskey, introduced one of the early examples of *new institutional* analysis in the judicial branch and a rather controversial understanding of courts in public law.[130] Based on McCloskey's theoretical underpinnings in understanding courts in the larger political system, Shapiro also discussed institutional functions of judicial norms in a comparative as well as historical approach.[131]

Shapiro's work on the public law subfield of American political science scholarship is immense. Since the beginning of the 1960s, his publications include topics as diverse as

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[129] George, 'Supreme Court Decision-Making: New Institutionalist Approaches. By Cornell W. Clayton, Howard Gillman' at 850.

[130] According to some, his works form "the *key* bridge between traditional institutional analysis […] and the work of the new institutionalists". Herbert M. Kritzer, 'Martin Shapiro: Anticipating the New Institutionalism' in N.L. Maveety (ed), *The Pioneers of Judicial Behavior* (University of Michigan Press 2009) at 387. According to Gillman and Clayton, on the other hand, his brand of institutionalism lays "the groundwork for the claim that he was a progenitor of what later emerged as the so-called 'new institutionalism' in public law scholarship. [However] newer institutionalist scholarship has moved beyond Shapiro's agenda in useful ways, but that future progress is still best ensured by keeping in mind the most important lessons to be derived from Shapiro's body of work". Gillman, Howard, "Martin Shapiro and the movement from "old" to "new" institutionalist studies in public law scholarship", *Annu. Rev. Polit. Sci.* 7 (2004): 363-382 at 365.

[131] *See* in general Martin Shapiro, 'Political Jurisprudence' (1963) 52 Kentucky LJ 294; Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (Free Press of Glencoe 1964); Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press 2002); Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press 1986). Martin Shapiro's works should be distinguished from Cornell Clayton, Howard Gillman and David May's analyses of US courts. Whilst Shapiro presented an earlier account of New Institutionalism in the analysis of courts and court procedures, Cornell Clayton and Howard Gillman, perhaps, introduced one of the first examples of New Institutional analysis of courts in social science. Shapiro's works, however, are relevant in that he did not only focus on the American context. In *Courts: A Comparative and Political Analysis*, he moved beyond the American context by conducting a comparative analysis of (what he coined as) "political jurisprudence" in England, Continental Europe, Imperial China and the courts of Islam. His work extends to theoretical analysis of *stare decisis* as well as institutional analysis of the European Court of Justice. His writings affected latter New Institutionalist assertions by Cornell Clayton, Howard Gillman and David May, who criticized the concept of "political jurisprudence", but, at the same time, agreed in that justices make decisions considering "the appropriate mission or role of the Court" in its institutional framework. In this context *see* Clayton and Gillman, *Supreme Court Decision-Making: New Institutionalist Approaches*; Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions'; Kritzer, 'Martin Shapiro: Anticipating the New Institutionalism'.

the Supreme Court doctrines on the freedom of speech, the evolution of common law courts in England, the problem of appeals in the courts of Islam, economic regulation in the EU and torts in civil law countries.[132] He is praised for his controversial approach in scrutinising courts as political agencies and in using historical-interpretive case study methods as opposed to his predecessors' behavioural approaches.

Shapiro argued that the institution of courts fall within the larger political system and that judicial norms have institutional functions. In his landmark study, *Law and Politics in the Supreme Court (1964*), Shapiro coined the term "political jurisprudence", which he claimed to be "a vision of courts as political agencies and judges as political actors".[133] According to Shapiro, courts were no different from political institutions and thus should be studied within the realm of mainstream political science analyses applied to other governmental institutions and their respective actors. This presented a fundamental departure from the institutionalist viewpoint of Corwin, Mason and McCloskey since these institutionalists wrote about the unique institutional features of courts that made them different from political institutions in American governance.[134] For political scientists, Shapiro, therefore, remains a new institutionalist, since he did not employ a traditional method under the principal agent theory in examining the relationship between the American Supreme Court and other governmental institutions.[135] Instead, he treated the Court as "the principal political institution" that provides guidance to its agencies, such as lower courts, executive agencies or the legislative organ of the government.

Similar to other socio-legal scholars reviewed above, Shapiro's "political jurisprudence" theory traces back to legal realism.[136] However, in addition to the legal realist perceptions,

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[132] R. Shep Melnick, "One Government Agency among Many: The Political Jurisprudence (sic) of Martin Shapiro", in Ginsburg T. and Kagan T. A. (eds) *Institutions and Public Law: Comparative Approaches,* vol 40 (Peter Lang, 2005) at 19.

[133] Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* at 196.

[134] Kritzer, 'Martin Shapiro: Anticipating the New Institutionalism' at 388.

[135] *Ibid.* at 391.

[136] His legal realist conception presents itself more robustly in *Courts: A Comparative and Political Analysis (1981)*, where Shapiro challenged what he defined as the ideal prototype of courts involving "(1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong". He analysed courts and court processes in England, Continental Europe, Imperial China, and also the problem of appeal in the courts of Islam within the institutional environment in which they were established. Shapiro came to some provocative conclusions: Throughout the history, courts have been subject to influence by political institutions, and thus they are highly compliant to political sovereign.

Shapiro searched for "socio-logical jurisprudence" which he defined as the view that "law must be understood not as an independent organism but as an integral part of the social system".[137] His novel approach to legal jurisprudence enabled him to look beyond the direction of what the Court is doing and to consider why the Court is deciding what it is deciding.[138] To Shapiro, the Court is obliged to provide "carefully reasoned and consistent opinions" in order to "(i) guide future actors in predicting the likely outcome of future cases and (ii) present an image consistent with popular and professional expectations of neutrality".[139] This theoretical innovation – in essence – emphasized arguments developed by behavioural scholars that the opinions of the Courts are rationalizations. However, it additionally aimed to explain what the Courts sought in terms of shaping policy.

Whilst Shapiro used behavioural and game-theoretical arguments in shaping his institutional theory, he omitted methods used by attitudinal and strategic behaviour scholars. According to Shapiro, in the end, "it is the doctrinal realm that the Justices shape the political role of the Supreme Court".[140] The attitudinal and strategic methods played an important role in shaping the new form of analysis. Moreover, they are important to support and interpret the findings of historical-interpretive analysis. However, these methods are dependent on traditional analysis and therefore remain secondary.[141]
His account also influenced later comparative works on courts in public law.[142] A series of essays, compiled by Tom Ginsburg and Robert A. Kagan, furthered comparative analysis of judicial behaviour based on four common implications.[143] First, scholars

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According to Shapiro this ideal prototype of courts is erroneous. *See* Shapiro, *Courts: A Comparative and Political Analysis*.

[137] Kritzer, 'Martin Shapiro: Anticipating the New Institutionalism' at 390.

[138] As is elaborated in the following section, this approach also requires one to explore the obiter dictum behind a court's or tribunal's final decision. See ibid. at 391

[139] *Ibid.* at 390-1

[140] Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* at 40.

[141] Howard Gillman, 'Martin Shapiro and the Movement from "Old" to "New" Institutionalist Studies in Public Law Scholarship' (2004) 7 Annu Rev Polit Sci 363 369.

[142] Tom Ginsburg and Robert A Kagan, *Institutions & Public Law: Comparative Approaches*, vol 40 (Peter Lang 2005).

[143] These implications are instructive in shaping our arguments as well, since they also put forward a plausible framework for the study of judicial behaviour in ITA decision-making. See Erik Voeten: According to Voeten, a cross-fertilization between fields would be relevant to scrutinise International Judicial Behaviour: "Aside from the influence of home-state bias, which is fairly particular to international courts, there are important similarities between domestic and international judges. Like international judges, domestic judicial appointments are often affected by partisan politics. Like international judges,

considered courts as government agencies that make policies which aim to "affect the behaviour of governmental officials, business corporations, and large groups of citizens".[144] The consent of parties is key to the legitimacy of decisions. Judges might need to bolster their legitimacy in order to ensure that "their decisions will evoke consent and compliance rather than opposition and resistance". Thus, the pursuit of legitimacy might constrain the judicial behaviour of judges.[145]

Second, if courts interact with other governmental institutions they might be subject to "external pressures of ideas, ideology and politics". Therefore, in order to understand courts:

"[S]cholars must attend not only to the ideologies and votes of individual judges but to the institutional interactions between courts and the ideas that flow from the legal academy and political journalists, as well as, judicial interactions with other actors in the political system. […] [I]nstitutionalist scholars have observed that judges, like other politicians, often do not do what is dictated by principle but that which is politically possible."[146]

Third, scholars must understand the way in which courts operate, how they seek legitimacy, how they are organized and, in this vein, how they influence the policy process. In common law systems, for example, lengthy verdicts and opinions could be considered as indicators of legitimacy. Furthermore, the vision of legitimacy could be created by the pre-existing laws by which "their rulings purport to be dictated".[147]

Fourth, since courts are institutions contained in the larger political framework, the reach of law and courts is not presumed but is a target of inquiry. Contrary to conventional legal analysis, the institutional theory does not take the legitimacy of courts as given and does not directly pursue consideration of the normative content of the law. Rather, institutional

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domestic judges are concerned with the policy and institutitonal implications of their judgments. Moreover, domestic judges vary considerably in their institutional protections. This suggest opportunities for cross-fertilization between the studies of domestic and international judicial behaviour where the study of domestic judicial behaviour includes countries other than the US". Voeten, "International Judicial Behaviour" at 560.

[144] Ginsburg and Kagan, *Institutions & Public Law: Comparative Approaches* at 3.

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.*

analysis questions “the conditions under which law and courts are potent as a mechanism of social ordering”.[148]

III.2.5.2. Howard Gillman and Cornell Clayton on Attitudinal and Rational Choice Methods

Influenced by the historical institutionalist methods followed by McCloskey and Shapiro and the New Institutionalist approach, which was furthered in public law by Smith, Howard Gillman and Cornell Clayton joined the debate with two edited volumes that provide New Institutionalist perspectives in the study of the Supreme Court decision-making. Both published in 1999, *Supreme Court Decision-making: New Institutionalist Approaches* and *The Supreme Court in American Politics: New Institutionalist Interpretations* offer an introduction to the use of institutionalist perspectives in American public law literature.

In *Supreme Court Decision-making*, Gillman and Clayton introduce the readers to a critique of the attitudinal model. According to scholars, the attitudinal model is not “enough” for two main reasons:

> “First, […] [i]t is not possible to imagine political behaviour – or, for that matter, any purposeful human behaviour – proceeding without some overt or tacit reference to the institutional arrangements and cultural contexts that give it shape, direction, and meaning. Even if political actors come to think that they are free to promote a preferred agenda, it is necessarily the case that this experience is a by-product of a set of favourable institutional conditions […] [And second] [i]ndividuals who are associated with particular institutions often come to believe that their position imposes upon them an obligation to act in accordance with particular expectations and responsibilities.”[149]

In the sections that follow, authors point to the fundamental differences between lawyers and political scientists. According to Clayton, whereas precedent, stare decisis, formalism and, in this vein, how judges conceptualize their opinions, are at the epi-centre of what lawyers study. Political scientists however, “were not interested in law as such, but only in understanding how law was part of politics”.[150]

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[148] *Ibid at 3-4.*

[149] Gillman and Clayton, *The Supreme Court in American Politics: New Institutionalist Interpretations* at 3.

[150] Clayton, 'The Supreme Court and Political Jurisprudence: New and Old Institutionalisms' at 17-20.

Supreme Court Decision-making consists of thirteen chapters and three parts. Part II includes five chapters written with a historical-interpretivist approach. Part III, and the five chapters hereunder, on the other hand, build on the rational choice rubric of new institutionalism. As highlighted above, the two approaches have fundamental differences, chief among them being their treatment of normative concerns of the law that is part of the jurisprudence. Hereunder, one should consider how Howard Gillman and Cornell Clayton built their understanding of judicial behaviour based on these normative concerns in Part I, "Conceptualising the Supreme Court as an Institution".

Both Cornell Clayton and Howard Gillman pursue the historical interpretive institutionalism in their analysis of judicial decision-making. In his introduction, and based on Smith's perspective on new historical institutionalism, Clayton contextualizes how historical interpretivists seek to explain judicial decision-making as a process in which "[…] judicial values and attitudes are shaped by judges' distinct professional roles, their sense of obligation, and salient institutional perspectives". Historical interpretivists adopted methodologies that would explore "perspectives or patterns of meaningful action",[151] which, over time, would be institutionalized within the normative framework of the law.

The new historical institutional theory thus requires closer attention to be paid to the same legal institutions the old institutionalist considered in their analyses (namely judicial doctrines, precedents, statutes, etc.). Such attention however, also needs to be given to relationships at the political level, (such as "the views held by interest groups and electoral conditions, found in such things as party platforms, public speeches and debates around judicial appointments, and *amicus briefs* […]").[152] Clayton noted that, in this context, normative analysis "would turn on identifying the underlying purposes of particular legal institutions in contrast to the specific group institutional-power contexts within which they arose".[153]

Whilst new historical institutionalism is identified as the ultimate model in studying judicial politics, it is also criticised for rejecting "the [positive theory of institutions – or

[151] *Ibid* at 32.
[152] *Ibid* at 37-8.
[153] *Ibid.*

rational choice approach] and behaviouralists view that legal institutions lack constitutive or formative influence over judicial attitudes”.[154]

III.2.5.3. Cornell Clayton and David May: Political Regimes Approach

Inasmuch as Clayton and Gillman favoured the historical interpretative approach over the positive theory of institutions in their earlier works, Clayton with David May later introduced a hybrid theory that aimed at bridging:

> “[…] two disparate strands of scholarship about the role of the Court and judicial decision-making: the so-called political jurisprudence strand of political science scholarship that links the Court’s role to the views and attitudes of the dominant governing coalition; and the normative jurisprudence of most scholarship in the legal academy, which explains and critiques the Court’s decisions on the basis of normative legal criteria.”[155]

Along the lines of their previous work on new institutionalism, the theory Clayton and May introduced in 1999 adopted an institutionalism that “holds a constitutive conception of politics but retains a more traditional conception of political institutions”. This approach, what they referred to as the “political regimes”, was based on Rogers Smith’s brand of interpretive institutionalism as well as Martin Shapiro’s “political jurisprudence” scholarship.[156]

In a nut shell, according to Clayton and May, the Supreme Court is not entirely bound by its relationship “to other political and social institutions and the groups that control their power”.[157] It is not always accurate that certain institutionalized constraints motivate judicial decisions reflect “the instrumental politics of self-interest or preference maximization”.[158] In other words, they argued that, inasmuch as the Supreme Court might be sensitive to the positions and values of groups dominating Congress and the presidency, the reasons behind such sensitivities might not be “a strategic calculation about achieving one’s policy preferences, a fear of override by the political branches or

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[154] *Ibid.* at 38-9.
[155] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions' at 234.
[156] *Ibid.* at 242.
[157] Cornell Clayton, 'Supreme Court and Political Jurisprudence' in Cornell Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, 1999) at 36.
[158] *Ibid.*

even an unself-conscious acceptance of the policy views of the dominant political coalition".[159] Clayton and May asserted:

"[…] a justice may believe that individual legal institutions are themselves embedded within, and draw meaning from, the larger political regime."[160]

In supporting their position, Clayton and May relied on a body of jurisprudence of the Supreme Court, in which the Court emphasized the law's relativity or sensitivity to "historically contingent political relationships". For instance, in *Garcia v San Antonio*, as opposed to the fixed and abstract legal principle, the Court relied on "a political safeguards doctrine or the view that the constitutional boundaries between states and the federal government is defined by the evolving political process and values in the national government".[161] Furthermore, they found that, in cases that involved individual rights, the Supreme Court often relied on "conceptions of law that require judicial sensitivity to 'contemporary community standards' (*Miller v California*), the 'habits and manners of civility' (*Bethel School District v Fraser*), society's 'evolving standards of decency' (*Trop v Dulles*), or even the values found in the 'conscience and traditions of our people' (*Palko v Connecticut*)". These legal doctrines and standards, thus, recognize the "political contingency of law and require any authentic commitment to law to be responsive to the views held by important political actors such as Congress, the president, states and interest groups". According to Clayton and May, one should consider that "a justice could be truly committed to law and yet sensitive to the dominant values of the political regime".[162]

Based on a review of such precedence, Clayton and May hypothesized that "the values and attitudes found within the judiciary are shaped by (but in turn can also shape) the existing configuration of political institutions and power across the regime".

Clayton and May opined that reflections of such configurations could best be captured through analysing legal decisions and doctrines. In order to build "a more complete

[159] *Ibid.* at 37.
[160] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions' at 234-5.
[161] *Ibid.* at 243-4.
[162] *Ibid.* at 244-5.

understanding of the relationship between the Supreme Court and the broader political regime of which it is part", scholars proposed a model that would consider the political views of Congress, the executive branch, interest groups and other state governments voiced through their submissions as litigants or amici before the Court.[163]

IV. Conclusion

The review of the judicial behaviour scholarship above is in no way exhaustive. It is only representative of the vast literature on judicial behaviour insofar as to provide the theoretical basis and guidance for this work. As highlighted in the introduction, whilst this work adopts a socio-legal approach, it is not empirical. As opposed to attitudinal and behaviouralist studies, it does not follow a method with which it explores empirical data to reach its conclusions. It does not count votes of ITA arbitrators. It does not focus on the individual attitude and behaviour of arbitrators. As I shall further elaborate in Chapter IV, this work rather focuses on the institutional environment, or the broader political regime, which shapes arbitral decision-making in ITA. It adopts the political regimes approach of Clayton and May as complemented by Rogers Smith's historical interpretivist inquiries and Martin Shapiro's "political jurisprudence" literature. In doing so, the work pays attention to normative aspects of the law. In other words, as opposed to early judicial behaviour scholars, it does not explore the ideologies behind certain arbitral decisions vis-à-vis case stimuli. As I shall detail in Chapter III, this has already been explored in the ITA literature.

To that end, the subject matter of this work is closely connected to the role of the ITA Tribunal in its external institutional environment that is embedded in, and draws meaning from, the larger political regime in which it operates (Clayton and May, 1999). This work explores how this unorthodox understanding of the ITA Tribunal determines how law works in real life. As detailed in Chapter IV, this political regime does not only entail extra-legal factors but also politics that are internalized through normative institutions (Smith, 1988). Throughout its analysis, it examines normative sources such as "obiter dictum" and attempts to reveal whether extra-legal as well as normative forms of political intervention (such as "amicus curiae submissions") affect the behaviour of the ITA tribunal in choosing one interpretive method over the other.

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[163] *Ibid.* at 249-52.

PART A

Suppose that we are "the ITA Tribunal" and we are instructed to resolve a dispute between Company A, a foreign investor and the host State X. What factors should we base our judgement on? What factors influences how we conduct our judgement? Do we apply the law as it is? Alternatively, do we consider those values that are external to the normative framework? Do we internalize these external values in the long term? In other words, how do we position ourselves against the normative values and standards of international investment law and those values that are imposed on us by States and investors as parties to investment arbitrations as well as non-disputing third parties?

We would not hear these sorts of questions from an international adjudicator. An ITA Tribunal would not discuss that its role is not limited to settling a dispute. For the ITA Tribunal, its function is straightforward. It applies the IIA, relevant procedural rules and, at times, domestic laws on the facts of the dispute, on the basis of which it reaches a definitive answer. An ITA Tribunal would not define its role as establishing a balance between normative rules and standards of the law and the concrete behaviour of actors who are formally and informally involved in ITA decision-making. To the ITA Tribunal, law is determinate and so are its answers to inquiries on international investment law.

Since the early ITA cases filed under Chapter 11 of NAFTA, these assumptions have been widely discussed, challenged and treated as problematic. Particularly within the last decade, there has been a surge in the number of empirical studies testing these critical inquiries into the role of the ITA Tribunal. These studies have been primarily based on judicial behaviour methods and approaches and, amongst others, have explored whether political leniencies, career motivations, as well as the social and educational backgrounds of arbitrators, affect arbitral decision-making.

In Part A of Chapter III, I will review this growing literature on judicial behaviour in ITA decision-making. I will undertake this review with a holistic approach. To that end, I will critically scrutinise theoretical and methodological approaches offered by scholars in showing correlation that there is pro-investor or pro-State bias in the ITA system. Subsequently in Chapter IV, I will put forward a theory of the ITA Tribunal based on the

historical interpretive, political jurisprudence and the political regimes approaches elaborated in Chapter II. Herein, I will scrutinise the role of the ITA Tribunal in its institutional space and will challenge the fundamental assumption that the role of the ITA Tribunal is limited to settling disputes between investors and host States. Consequently, I will put forward variables in testing the hypothesis in the remainder of this work.

CHAPTER III

JUDICIAL BEHAVIOUR SCHOLARSHIP ON INVESTMENT TREATY ARBITRATION

I. Introduction

"Why do adjudicators decide the way they do?" is a question of key significance in studies of judicial behaviour. Within the last decade, it has also become a key inquiry in a recently emerging - new wave of - scholarship on ITA. Drawing on socio-legal theories and methods (empirical or not), scholars explored the effects of inner-ITA tribunal dynamics on ITA decision-making (including political leniencies, career motivations, and the social and educational backgrounds of arbitrators[1]) as well as extra-ITA tribunal features (such as institutional constraints[2] and processes[3]). They questioned whether ITA is tilted toward the Northern capital exporting interests; whether there is a pro-investor bias in the ITA system; or, sometimes disruptively, whether arbitrators are political.[4][5][6][7]

Similar to the theoretical framework elaborated in Chapter II, the review hereunder is structured according to the approaches to judicial behaviour in ITA adopted in various contributions. Whilst they might not have been aware that their contributions would fall under the rubric of either the attitudinal/behavioural, strategic or new institutional approaches, scholars seem to have adopted one or a mixture of the three in an attempt to respond to systemic and substantive criticisms of ITA. The emergence of this new stream

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[1] Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration'Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 Harv Int'l LJ 435; Daphna Kapeliuk, 'Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators, The' (2010) 96 Cornell L Rev 47.

[2] Tom Ginsburg, 'International Judicial Lawmaking' (2005) University of Illinois Legal Working Paper Series 26; Tom Ginsburg, 'Political Constraints on International Courts' in Cesare Romano, Karen Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford, OUP, 2014)

[3] Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) Journal of International Dispute Settlement 553.

[4] Michael Waibel and Yanhui Wu, *Are Arbitrator's Political?* (November 5, 2011), available at <http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf> last accessed on 3 November 2017.

[5] Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration'.

[6] Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes'.

[7] Brekoulakis, 'Systemic Bias and the Institution of International Arbitration' at 557.

of scholarship, I shall argue, is a turn to critical understanding of the process of ITA decision-making. In an attempt to put these approaches to judicial behaviour in context, I will first elaborate on some of the systemic and substantive criticisms of ITA. I will then outline this emerging literature and will conclude that ITA scholars have, so far, neglected how one could benefit from the historical interpretive and the political regimes approaches to judicial behaviour.

II. Perceived Issues of Legitimacy in ITA

As identified in the introduction, a backlash has been raging against the ITA system since the early 2000s. Critics of the legitimacy of the system have become more apparent with the conclusion of the first set of Argentine cases. In addition to the foundational legitimacy of the ITA system, an emerging judicial behaviour scholarship on ITA questions the effect of "bias" and the "perceived issues of legitimacy" on decision-making in ITA.[8]

As discussed earlier, international investment law embodies institutions that structurally represent both private and public law elements. Though the concept of custom has been characterised as a "generalization of the practice of States"[9] and the general view is that IIAs are agents of the public international law regime[10], debates on whether international investment law is public or private law are at odds. On the one hand, international investment law applies to complex investor-state issues resulting from global economic transactions which, as a result, may involve the use of commercial arbitration procedures.[11] On the other hand, international investment law implements public international law principles which traditionally govern public interest issues such as human rights and the environment. According to some, the endeavour to characterize

[8] The review on the "perceived issues of legitimacy" is based on an earlier published work by the author. Özgür, U.E., 'In Search of Fairness and Consistency in Investor-State Arbitration: An 'Institutional' Approach to Interpreting the Doctrine of Legitimate Expectations', *Transnational Dispute Management (TDM) Journal – Special Issue on Investor-State Dispute Settlement System, ed. Jean Kalicki & Anna Joubin-Bret, (Vol:1, January 2014)*, available at: <http://www.transnational-dispute-management.com/article.asp?key=2049> last accessed on 3 November 2017.

[9] J. Crawford, *Brownlie's Principles of Public International Law* (Oxford: Oxford University Press, 2012)

[10] Alvarez, *The Public International Law Regime Governing International Investment*; Prosper Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a Ménage Ą Trois' (2000) 15 ICSID Review 401 at 406.

[11] T. W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) at 724.

international investment law in the public or private sphere and to balance public and private interests prompts uncertainties,[12] and constitutes the very heart of the, so-called, legitimacy concerns in investor-state arbitration.[13]

The concerns emphasized by 37 international investment law scholars in the "Public Statement on the International Investment Regime" issued at Osgoode Hall School of Law (Osgoode Hall Public Statement) conclude that States should withdraw from IIAs and, furthermore, should not comply with arbitral awards. According to the critics, the international investment regime harms public welfare since (i) it produces inconsistent arbitral decisions contrary to one of its main goals; (ii) it by-passes domestic laws and regulations and the sovereigns' right to regulate in the public interest, including those actions necessary in emergency situations; therefore it threatens national sovereignty and self-determination; (iii) it incorporates expansive interpretations of protection treatments (expropriation, most-favoured nation – MFN, non-discrimination and fair and equitable treatment – FET), reflecting a strong bias towards transnational corporations[14]; and (iv) it illegitimately privatizes disputes that must be adjudicated in the public sphere, and therefore fails to incorporate rule of law values such as transparency and participation.[15]

According to others, these problems are not legitimacy problems but problems resulting from the emerging nature of the system (or as Brigitte Stern recalled, a "*crise de croissance* – a teenager's crisis"), and will be fixed once it completes its development.[16] Some others challenged the word "crisis" and asserted that the so-called problems of

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[12] A. Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration' (2011) 14 Journal of International Economic Law 469.

[13] G. Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' (2007) 56 International and Comparative Law Quarterly 371; Stephan W. Schill, 'Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach' (2011) 52 Va J Int'l L 57.

[14] It should, however, be noted that this criticism cannot be substantiated with only the outcome of cases. As UNCTAD recently reported "By the end of 2015, a total of 444 ISDS proceedings have been concluded, with 36 per cent of cases decided in favour of the State, 26 per cent in favour of the investor and 26 per cent of cases settled". UNCTAD, 'Investor-State Dispute Settlement: Review of Developments in 2015' (2016) 2 IIA Issues Note, available at <http://investmentpolicyhub.unctad.org/Publications/Details/144> last accessed on 3 November 2017.

[15] Osgoode Hall Law School, 'Public Statement on the International Investment Regime'; Alvarez and Topalian, 'The Paradoxical Argentina Cases'.

[16] B. Stern, 'The Future of International Investment Law: A Balance between the Protection of Investors and the States' Capacity to Regulate' in Sauvant K. Alvarez J. E. (ed), *The Evolving International Investment Regime: Expectations, Realities, Options* (Oxford:Oxford University Press, 2011) at 175.

legitimacy are an 'illusion'.[17] Likewise, Jose Alvarez argued that contrary to Osgoode Hall Law Scholars' contentions as to the deficits in the system, the Argentine decisions do not generate 'inconsistent arbitral case law, undue sovereign intrusion, blanket disregard for 'emergency' action, or pro-investor bias'. According to him, the Argentine decisions also do not back up the assertions that investment arbitration privatize public law disputes and therefore fall in the wrong side of the public-private law distinction.[18] Alvarez admitted that divergences occurred among the arbitral Tribunals and the annulment Committees in operating the doctrine of necessity under customary international law and Article XI – the non-precluded clause – of the US-Argentina BIT.[19] However, he concluded that legal problems that were considered in the Argentine cases have changed the international investment regime and made it more responsive to the needs of states.[20]

To date, in order to resolve these issues, scholars have generated a variety of proposals. Some radical views included the dismantling of international arbitration as a dispute resolution method in claims grounded on public international law and/or supported the reviving of the *Calvo Doctrine* which would enable the use of international arbitration solely through "choice of law and forum clauses in contracts with foreign investors over international commitments".[21] At the same time, some focused on improving the investor-state arbitration mechanism with organizational reforms, such as, limiting access to the mechanism, introducing an appeals facility and creating a standing international investment court.[22] Some others considered codification options including enhancing the existing mechanism through the drafting of individual IIAs.[23]

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[17] D. Krishan, 'Thinking About Bits and Bit Arbitration: The Legitimacy Crisis That Never Was' in Baetens F. Weiler T. (ed), *New Directions in International Economic Law in Memoriam Thomas Wälde* (Brill Online Collection 2011).

[18] Alvarez and Topalian, 'The Paradoxical Argentina Cases'.

[19] Alvarez, *The Public International Law Regime Governing International Investment*

[20] Ibid.; Jose E. Alvarez and K. Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in Sauvant K. P. (ed), *The Yearbook of International Law and Policy 2008-2009* (Oxford: Oxford University Press, 2009)

[21] W. Michael Reisman, 'The Evolving International Standard and Sovereignty' (2007) 101 Proceedings of the Annual Meeting (American Society of International Law) 462 at 464.

[22] Van Harten, *Investment Treaty Arbitration and Public Law.*

[23] *See* UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (IIA Issues Note, June 2013), available at <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> last accessed on 3 November 2017.

This rather doctrinal discussion in academia (as to whether problems of "legitimacy" do exist or whether they are minor systemic shortcomings and will diminish once the system autocorrects) has shifted and has assumed a socio-legal and, at times, an empirical agenda. The remainder of this chapter reviews this shift in the ITA scholarship. As one might observe from the review below, there are a limited number of scholarly works on judicial behaviour in ITA given its recent growth. As discussed earlier in Chapter II, judicial behaviour mostly emanated from the American political science tradition. Whilst there are comparably more established studies of judicial behaviour in international commercial arbitration,[24] judicial behaviour studies in ITA have improved in context and have increased in number only recently.

III. Attitudinal or Behavioural Scholarship on ITA

III.1. Outcome based Statistical Analysis

Susan Franck stands out as the pro-genitor of outcome based empirical scholarship on ITA. In her contributions between 2005 and 2015, Franck considered variables including parties to, and the subject of, an arbitration dispute, the increase in the number of awards, win/loss rates, amounts claimed and awarded and costs of an arbitration.[25] At the same time, Franck acknowledged the effect of arbitrator profiles and, in response to some critiques, empirically analysed whether the arbitration community is a "pale, stale, male" "mafia". In this, Franck did consider "who is involved in arbitration" and "nationality and gender of arbitrators". [26]

Her analysis occasionally touched upon whether any of these variables had an effect on arbitrator behaviour. For instance, in a 2009 contribution, Franck considered the effect of highly contested variables such as, "the development status of a respondent state" and "the development status of the presiding arbitrator", on the outcome of arbitration cases and, thus, - rather indirectly - on the behaviour of the ITA Tribunal. Methodologically,

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[24] Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order.*

[25] Susan Franck, 'Role of International Arbitrators, The' (2005) 12 ILSA J Int'l & Comp L 499; Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration'; Franck, 'Development and Outcomes of Investment Treaty Arbitration'; Susan D Franck, 'Icsid Effect-Considering Potential Variations in Arbitration Awards, The' (2010) 51 Va J Int'l L 825; Susan D Franck, 'Conflating Politics and Development: Examining Investment Treaty Arbitration Outcomes' (2014) 55 Va J Int'l L 13; Susan D Franck and Lindsey E Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 Duke Law Journal.

[26] Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' at 75.

Franck suggested both quantitative and qualitative assessment of dependent variables on (i) whether the investor or the State ultimately won the arbitration and (ii) whether the amounts awarded had any correlation with the development status.[27] Franck statistically reviewed the publicly available data based on the indexes by the World Bank, the Organisation for Economic Cooperation and Development (OECD) and the UN Development Programme (UNDP) (the Human Development Index – HDI). She concluded that the outcomes of ITA are not correlated to the development status of the respondent state and the presiding arbitrator, or some interaction between these two variables. Thus, according to Franck, the behaviour of an arbitrator would not be dependent on the development divide of the presiding arbitrator or the respondent State.[28]

In her follow-up article of 2014, Franck furthered this outcome based research on the development statistics derived from the World Bank, OECD and the UNDP. She was concerned that none of her prior analysis checked the contribution of the level of internal state democracy to ITA outcomes. Franck considered variables including "politics and democracy" (ranking the respondent State pursuant to the Polity IV index), in addition to the development status and the amounts claimed/awarded. Compared to her earlier work, she pursued a discreet definition of "outcomes", suggesting that the win/loss ratio would provide unreliable data.[29] According to Franck, in defining "outcome" one should consider whether the ITA Tribunal "both identified a comparable breach of international law and provided any derivative damage assessment". Her methodology and hypotheses were the same as in her previous analysis. Franck aimed to provide additional evidence that ITA decision-making is not dependent on variables related to development and political institutions.[30] Similar to her previous argument, Franck found no consistent correlation between the level of democracy, the development status of respondents and outcomes of ITA. Furthermore, when democracy levels were constant, according to Franck, it was impossible to evidence that there is a link between the development status of the respondent State and the outcome. Franck, therefore, suggested future research in examining "pro-investor" claims in ITA, shifting the focus to other variables "such as identity of investors, the level of experience of parties' lawyers, the impact of host country

[27] Franck, 'Development and Outcomes of Investment Treaty Arbitration'.
[28] *Ibid.*
[29] Franck, 'Conflating Politics and Development: Examining Investment Treaty Arbitration Outcomes'.
[30] *Ibid.* at 39-40.

corruption, the level of good governance practices, or the scope of regulations related to Corporate Social Responsibility for investors".[31]

In her latest empirical contribution (co-authored with Lindsey Wylie), Franck scrutinised the effect of some of these variables on ITA outcomes. Using statistics from 159 final cases derived from 272 publicly available ITA awards, Franck and Wylie explored whether there was a correlation between ITA outcomes and independent variables associated with investors, states, lawyers, arbitrators and venue. In this, the authors identified (i) case related and (ii) arbitrator-venue related factors that might influence the outcomes. Amongst others, Franck and Wylie considered "panels' gender composition, panel's compositive development status, whether the chair was a repeat player with multiple appointments and venue" as arbitrator-venue related factors. Once again, Franck concluded that the results did not support a conclusion that ITA was biased and was unpredictable.[32]

Susan Franck's methodological contributions in the empirical divide of the ITA literature could be labelled as "statistical". Whilst Franck did consider the background of adjudicators (arbitrators), she tested these variables against the outcome of ITA cases. In other words, although her contributions scrutinised the effect of such variables in ITA decision-making and, in that sense, her statistical empirical socio-legal work carries some attitudional/behavioural characteristics, Franck was little concerned about the process of decision-making, i.e. interpretation.

III.2. Inter-Panel Dynamics and Empiricism in ITA

Against a background of statistical analysis in ITA, in 2009, Daphna Kapeliuk focused on inter-panel dynamics in an attempt to put forward an "analysis of judicial behaviour of elite investment arbitrators" or, as she puts it, "repeatedly appointed private judges". Focusing on cases administered at ICSID, Kapeliuk explored the judicial behaviour of arbitrators on three levels: "the tribunal as a whole, the appointment status of the arbitrators on the tribunal and the individual level".[33] As a practitioner, her study was

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[31] *Ibid.* at 64.
[32] Franck and Wylie, 'Predicting Outcomes in Investment Treaty Arbitration'.
[33] Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' at 48-9.

also aimed at informing parties to an ITA dispute, i.e. investors and host States. She argued that the findings of an empirical endeavour as such could guide parties in assessing "the desirability of selecting [elite arbitrators] to the tribunal".[34]

To that end, her hypothesis differed from earlier studies which contended that arbitrators are "utility maximizers" who would increase their chances of re-appointment in future disputes by rendering compromise awards. According to Kapeliuk, a hypothesis as such would neglect the fundamental difference between the interests of a first-time appointed arbitrator and of arbitrators who are repeatedly appointed as chairpersons. She proposed a methodology that would consider the "unique role of presiding arbitrators". Kapeliuk suggested testing variables that define the "elite arbitrator" against dependent variables such as the manner of conclusion of the arbitration case (award on the merits or jurisdiction, settled or discontinued) and the outcome of the case (determined based on the percentage recovered out of what was originally claimed).[35]

In her analysis, Kapeliuk scrutinised contentions by some critiques of ITA as to whether arbitrators display some behavioural patterns (such as rendering compromise awards or showing pro-investor bias) in order to receive a greater number of appointments. As for the Tribunals that involved at least one elite arbitrator, Kapeliuk found no tendency to render compromise awards and to rule in favour of investors. Regarding the decision patterns of elite arbitrators, Kapeliuk found (i) some evidence but no correlation between the number of appointments of elite arbitrators as chairpersons and the number/rate of settlements the parties reached, and (ii) no indication of favouritism toward foreign investors based on the records of the monetary awards granted.[36]

As a follow up, in 2012, Kapeliuk furthered her claims on inter-panel dynamics by scrutinising whether the presence of an experienced party-appointed arbitrator would have any effect on the outcome of an ITA case. She suggested focusing on the collegial phase of ITA adjudication where arbitrators bargain on their individual opinion of the dispute in order to reach an outcome. It is this "collegial phase", Kapeliuk argues, in

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[34] *Ibid.* at 50-4.
[35] *Ibid.* at 71-5.
[36] *Ibid.* at 79-90.

which an experienced arbitrator might have more weight.[37] In testing whether an arbitral panel tends to vote in favour of the party who appointed the experienced arbitrator, Kapeliuk explored the outcome of ICSID ITA cases that involved "suspicious panels" (i.e. panels that consisted of one experienced and one inexperienced party appointed arbitrator). She also questioned if experienced party-appointed arbitrators tend to dissent more compared to inexperienced arbitrators.[38]

Similar to her previous empirical study, Kapeliuk found no statistically significant correlation between the level of experience of a party-appointed arbitrator and the tendency to decide in favour of the party who appointed the experienced arbitrator. She also found no relationship between the level of experience of an arbitrator and the leniency towards dissenting opinions.[39]

Whilst Kapeliuk, like Susan Franck, scrutinised the outcome of ITA cases, she distinctively adopted a mixture of judicial behaviour approaches in exploring the behaviour of arbitrators. In her 2009 article, she took note of some of the theories articulated in Chapter II (above), including the attitudinal and the strategic models. Although her take on the attitudinal model would appear to be on point, Kapeliuk's analysis of the legal model and the strategic model are problematic. For starters, the legal model cannot be considered as a model of judicial behaviour since the legal model considers law as determinate, a position legal realism and the theories of judicial behaviour is essentially against. On a further note, with the strategic model, Kapeliuk referred to Epstein and Knight's seminal work on rational choice institutionalism (or the positive theory of institutions)[40] which fundamentally diverges from the strategic model suggested by Walter F. Murphy in 1962.[41] Although Kapeliuk noted that she adopted the economic model (as discussed by Richard Posner[42]), the hypotheses she tested also resemble those of behavioural strategic thinking elaborated by Murphy: With their decisions, arbitrators might aim to maximize particular policies such as promoting their

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[37] Daphna Kapeliuk, 'Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration' (2012) 31 Rev Litig 267 at 292-3.
[38] *Ibid.* at 298.
[39] *Ibid.* at 304-11.
[40] Epstein and Knight, *The Choices Justices Make*.
[41] Murphy, *Congress and the Court*.
[42] Richard A Posner, *How Judges Think* (Harvard University Press, 2010)

reputation and increasing their chances of future appointment by way of increasing accuracy and countering criticisms. As opposed to rational choice institutionalists, Kapeliuk's analysis does not consider institutional, organisational or legitimacy concerns.

A second query that one might raise, is with respect to the data Kapeliuk took as reference. As she rightfully pointed out, "outcome of cases" is only one determinant in studies of judicial behaviour. However, one should also consider patterns of interpretation.[43]

III.3. Behaviouralist Inquiries into Judicial Behaviour of Arbitrators

Thomas Schultz might be described as one of the protagonists of this emerging scholarship on judicial behaviour in international arbitration in general and in ITA in particular. Schultz et al. have written on the potential reflections of legal realism on judicial decision-making in international arbitration. In various contributions throughout 2014 to 2016, they have taken a rather attitudinal approach to judicial behaviour in ITA, based mostly on the law and economics approach introduced by Justice Brian Leiter and Richard Posner.

In 2014, Schultz and Robert Kovacs discussed what judicial behaviour is, referring to a metaphor commonly used by those who meant to ridicule the US legal realists in the early 20th century: 'what the judge says depends on what he had for breakfast'. Rightfully so, what Schultz and Kovacs pointed at was not what an arbitrator literally had for their breakfast.[44] As discussed in Chapter II already, this metaphor is in fact an over-simplification of the legal realism in judicial behaviour which argues that what motivates the behaviour of adjudicators is not legal rules but "a sense of what would be fair on the facts of the case at hand".[45]

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[43] *See* Kapeliuk, 'The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators' at 89: "Future research should explore whether some elite arbitrators tend to adhere to specific legal positions or reasoning, thereby displaying a decision pattern that might affect the outcome".

[44] Thomas Schultz and Robert Kovacs, 'The Law Is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' (2014) Selected Topics in International Arbitration–Liber Amicorum for the 100th Anniversary of the Chartered Institute of Arbitrators (Oxford University Press, 2014), King's College London Law School Research Paper No 2014-36.

[45] Golding and Edmundson, *The Blackwell Guide to the Philosophy of Law and Legal Theory* at 50.

A reason why one might label Schultz and Kovacs as attitudinalists or behaviouralists emanates from the type of theories of judicial behaviour they adopted. In consideration of the variables described above, they endorsed Posner's position whereby he describes adjudicators as "utility maximizers". Adjudicators, Posner maintained, consider what "best satisfy their own needs, wants, desires and aspirations".[46] In return, Schultz and Kovacs identified incentives and constraints including "income", "reputation, fame and prestige", "doing justice" and legitimacy of respective arbitrators' positions as determinants of judicial behaviour in ITA. They asserted that arbitrators might respond to market forces which could motivate them to decide in a way that would have little or no effect on their income.[47]

The second determinant (i.e. reputation, fame and prestige), Schultz and Kovacs argued, "might be becoming less appealing, rather than more" in increasing an arbitrator's competitiveness in the ITA market. Authors asserted that this is partially due to the legitimacy concerns voiced toward the ITA system and the "backlash" ultimately experienced.[48] The third determinant, "doing justice", could be achieved in at least three broad ways. The authors argued that arbitrators might aim (i) to achieve cumulated satisfaction between parties, (ii) to further the rule of law or (iii) to further certain societal values. The three broad ways, however, involve each arbitrator's subjective understanding of justice, which may depend on "one's home legal culture, and its attendant representations of the right ways to do justice".[49] To Schultz and Kovacs, the last (but not least, considering the breadth of the article) determinant, "avoiding reprimand", motivates arbitrators towards deciding in a way so as to avoid annulment or setting aside of their decisions.[50]

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[46] Schultz and Kovacs, 'The Law Is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' at 2. *See* Richard A Posner, 'The Role of the Judge in the Twenty-First Century' (2006) 86 BUL rev 1049; Posner, *How Judges Think*; Richard A Posner, 'The Law and Economics of Contract Interpretation' (2004) U Chicago Law & Economics, Olin Working Paper.

[47] Although, in the end, they also noted that "this incentive seems significantly less strong than popular lore has it". According to the authors arbitrators seek to be "picked and picked again" but this has little or nothing to do with "income" since most arbitrators have other and lucrative sources. Schultz and Kovacs, 'The Law Is What the Arbitrator Had for Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour' at 6-8.

[48] *Ibid.* at 9-12.

[49] *Ibid.* at 13-15.

[50] *Ibid* at 16.

In an updated version of the paper above, Schultz argued against both the legal model (which would only consider that arbitrators apply the law only and without any influence of personal preference or bias) and legal realism (which would concede that law plays no role in arbitral decision-making).[51] Taking one side or the other, Schultz argued, is an "argumentative fallacy" – a "false dilemma" – which "creates the illusion that [these] options are mutually exclusive and collectively exhaustive". To him, one should not take one position exclusively in exploring judicial behaviour in ITA. Schultz argued that "a combination of legal realism and law and economics" might respond to such theoretical shortcomings in the literature.[52] In the remainder of his article, Schultz identified extra-legal factors in arbitral decision-making, noting that these do "not eliminate the role of law". The determinants he identified under the auspices of the "law and economics" framework were far short of those that were identified in his previous contribution with Robert Kovacs. These were once again related to arbitrators' financial and non-financial interests in decision-making such as the market value of their decisions on merits and jurisdiction, reputation and avoiding annulment or setting aside of their decisions.[53]

Schultz's theoretical and methodological assertions on the law and economics framework, however, has not – so far – led to an empirical study. According to Schultz, one would "not expect the actual effects of the legal factors on decision-making to be empirically proven".[54] His position, perhaps, also emanates from the difficulty in putting together an empirical method that may measure how determinants, as such, could motivate arbitrator behaviour. It would appear that Schultz did not have the same difficulty in putting together an outcome based empirical study (similar to those of Susan Franck) in testing the discontents of ITA, i.e. whether ITA promotes the rule of law or over-empowers the investors. In a comparably comprehensive outcome based empirical analysis that covered 541 ITA claims filed between 1972 and 2010, Schultz and Cedric Dupont concluded that, since the mid-1990s, ITA has strengthened the international rule of law. However, they noted, it has served this function to a limited extent since the

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[51] Schultz, 'Arbitral Decision-Making: Legal Realism and Law & Economics'.
[52] *Ibid.* at 231-5.
[53] *Ibid.* at 241-50.
[54] *Ibid.*

international investment regime seems “to be harder on poorer countries than on richer countries”.[55]

Although Thomas Schultz has shown some decent efforts in theorising judicial behaviour in ITA, his socio-legal contributions reiterated assertions of early legal realists and strategic accounts in the judicial behaviour scholarship. However, as discussed in Chapter II, this scholarship has progressed substantially.[56] Schultz, having focused on personal values and the strategic agendas of investment arbitrators, seems to have stuck in the attitudinalist or behaviouralist realm of judicial behaviour. At the same time, one should note that Schultz (together with Cédric Dupont) did further the judicial behaviour scholarship on ITA by way of introducing a general political framework that responds to the critical theoretical perception of the ITA Tribunal.[57] As a result, contrary to what Schultz asserts, his behaviouralist work does not respond to his own criticism that the ITA literature is stuck in an argumentative fallacy between normativism and behaviouralism.

IV. Institutionalist Approaches to ITA decision-making

IV.1. New Institutionalism and Judicial Behaviour in International Arbitration

Stavros Brekoulakis, in his often-cited 2013 contribution, argued against some of the above reviewed studies for following attitudinalist or behaviouralist accounts in their theoretical, methodological and empirical endeavours. The scholarship on judicial behaviour in international arbitration, asserted Brekoulakis, is problematic on two levels. First, the empirical studies that attempt to measure bias in ITA suffer from a methodological hardship because bias is, almost always, an unmeasurable phenomenon. Second, behavioural or attitudinal theories adopted by scholar’s exhibit theoretical limitations. Brekoulakis submitted that “the correlation between award outcomes, voting patterns and judicial attitudes is simplistically linear”, which “reduces arbitral decision-making to a policy or financially driven exercise”.[58] By only considering extra-legal

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[55] Schultz and Dupont, 'Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study'.

[56] *See* at Chapter II above “historical interpretive institutionalism”.

[57] Cédric Dupont and Thomas Schultz, 'Towards a New Heuristic Model: Investment Arbitration as a Political System' (2016) 7 Journal of International Dispute Settlement 3.

[58] Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' at 556-7.

influences such as political tendencies, career motivations, education, etc., Brekoulakis noted, scholars “fail to take into account the influence of the broader institutional context in which decisions are taken”. According to him, therefore, endeavours to empirically prove bias in arbitral decision- making remain as “descriptive inferences based on correlation”.[59]

According to Brekoulakis, one should also consider the influence of “the broader institutional context within which decisions are taken”. The institutional context would include “institutional processes such as selection and appointment of [arbitrators], their legal and professional training, their distinct professional role and tenure status, their financial and professional dependence on the institution and the existence of *stare decisis*” as determinants of behaviour.[60] Brekoulakis based his assertions on Cornell Clayton and David May’s 1999 article in *Polity*, in which authors aimed at reconciling core insights of the two new institutionalist approaches, i.e. rational choice and historical/interpretive institutionalisms, under the rubric of the “political regimes” approach.[61]

One should take note of Brekoulakis’ convincing conceptualisation of bias. As reviewed above, to date, scholars have tended to scrutinise bias in arbitral decision-making through various behavioural theories and methods. In the end they were unable to put forward meaningful evidence that would prove bias toward foreign investors or States. According to Brekoulakis, whilst apparent or implicit bias is almost impossible if not methodologically challenging to prove, systemic bias, i.e. bias that is embedded in the procedural design of certain types of adjudication, might be observable. This, according to Brekoulakis, is due to the fact that examination of “systemic bias” would “not focus on whether a certain decision-maker has financial or personal interest in a dispute”, or in other words, would not be determined through behavioural or attitudinal approaches.[62]

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[59] *Ibid.* at 569-70.
[60] *Ibid.* at 557-8.
[61] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions'.
[62] Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' at 561-3.

Despite his on-point conceptualisation of "bias" in international arbitration, one might argue that Brekoulakis' adaptation of the new institutional narrative is problematic. Brekoulakis made use of the works of new institutionalists, including Cornell Clayton and David May (who determined limitations in both rational choice and historical/interpretive theories at the end of the 1990s – see Chapter II). However, he (i) omitted the fundamental difference between old and new institutionalism in his description of institutions and (ii) dismissed essential differences between rational choice and historical/interpretive institutionalisms. Whilst Brekoulakis did consider *stare decisis* as a determinant that is associated to the adjudicator's obligation toward the law, similar to behavioural or attitudinal scholars, he identified variables such as arbitrators' "legal and professional training, their distinct professional role and tenure status [and] their financial and professional dependence on the institution".[63] His contribution, therefore, fails to reflect a deeper understanding of new institutionalism and the "political regimes" approach suggested by Clayton and May.[64] To that end, one could as well argue that his work falls in the confines of attitudinal/behavioural scholarship of judicial behaviour.

IV.2. Rational Choice Institutionalism and Strategic Behaviour in ITA

On this emerging literature on judicial behaviour in ITA, one should also discuss recent efforts and contributions by scholars at the University of Oslo's PluriCourts. Whilst Ole Kristian Fauchald, Malcolm Langford and Daniel Behn have contributed greatly on the empirical and statistical agenda of the ITA scholarship, Langford and Behn's 2016 contribution published in the EJIL, deserves particular attention for its innovative theoretical approach to judicial behaviour in ITA.[65]

As reviewed above, a great majority of the empirical work on ITA questioned if ITA is biased toward investors or host States. In their 2016 contribution, Langford and Behn rather discussed whether the legitimacy debate in ITA affects behaviour of arbitrators, or in other words, if there is a reflexive shift in the behaviour of arbitrators in response to the legitimacy debate.[66]

[63] *Ibid.* at 557.
[64] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions'.
[65] Langford and Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator'.
[66] *Ibid*. at 1-5.

In doing this, the authors constructed a theoretical framework on the rational choice institutionalism (or the positive theory of institutions) strand of judicial behaviour. Amongst others, Langford and Behn hypothesized that arbitrators are concerned with (i) "various collective and individual costs" including the risk of non-compliance of an award by a state, (ii) their individual or collective reputation which might be at risk if their decision is annulled and (iii) the survival of the ITA system.[67] By getting involved in a process of "discursive institutionalism", according to the authors, arbitrators induce a social change of norms and values by way of "shifting] their background individual opinions as they become acquainted or engaged in the legitimacy debate".[68]

However, Langford and Behn did not leave their theoretical framework at this. The "reflexivity" they described was conditional upon various constraints specific to the institution of investment arbitration, one of them being "the fragmentation constraint". They argued that since the ITA Tribunal is *ad hoc* in its nature and only deals with the case at hand, an arbitrator might be precluded from acting in a "systemic manner". This fragmentation constraint, however, is subject to certain conditions. According to Langford and Behn, repeat arbitrators may behave against such a constraint since they, "are likely to be more sensitive to systemic threats" and may feel that they should guard the regime by way of getting involved in broader discussions on the legitimacy of the ITA system.[69]

A description of the "legitimacy discourse" is made in the subsequent sections. Langford and Behn identified the evolution of signals from (i) states (in the form of "exit" or "voice"), (ii) academics and the civil society and (iii) prototypical cases that received the major share of legitimacy criticism in "four periods or waves: pre-crisis (1990-2004), early crisis (2005-2009), mid-crisis (2010-2014), and late crisis (2015-)".[70] These, according to authors, set the context toward which arbitrators are reflexive.

Against a background of the evolving pro-investor/pro-Western critiques on ITA, Langford and Behn identified three methodologies that could be followed in testing their

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[67] *Ibid.* at 6.
[68] *Ibid.* at 7.
[69] *Ibid.* at 8-9.
[70] *Ibid.* at 10-1.

hypothesis. The first is “doctrinal”, which involves tracing particular doctrinal shifts in ITA awards. The second is “sociological”, which involves interviews with the objects of reflexivity, i.e. arbitrators. The third approach is “outcome” based and involves quantification of win-loss and compensation levels and ratios in the case. According to the authors, whilst the doctrinal approach provides “a fine-grained perspective on the legal mechanics of change”, it might also cause a futile tracking of “foregrounded discourse” which might not provide any hint as to the actual shifts in arbitral decision-making.[71] Langford and Behn also noted some methodological limitations in the sociological and outcome based approaches, i.e. subjectivity for the sociological method and confounding variables/disharmony in the character of cases (i.e. some cases showing dubious characteristics).[72] Nonetheless, the authors adopted a quantitative and outcome based approach in an attempt to obtain “a sense of general trends”. Based on their database, Langford and Behn found that, at the merits stages, there is some evidence of strategic behaviour with which arbitrator’s exhibit “greater deference on average to states”.[73]

Langford and Behn’s timely contribution shed light on the intricacies of judicial behaviour in ITA. Their theoretical framework elaborated a deeper understanding of new institutionalism, and more specifically, rational choice institutionalism in judicial behaviour in ITA compared to Brekoulakis’ 2013 contribution. However, the authors do not refer to the second strand of new institutional analysis, namely historical/interpretive institutionalism, nor did they address some essential shortcomings in rational choice institutionalism.

As discussed in Chapter II, rational choice institutionalism posits certain limitations, chief of them being normative concerns of adjudicators toward the law. In other words, the historical interpretive theory posits that adjudicators do not always act strategically as a reflex to certain institutional shortcomings. In addition to certain constraints (such as “the fragmentation constraint”), adjudicators might also be constrained by normative rules that have developed in a certain period of time and which might not be associated to strategic thinking but could emanate from, e.g. ‘structural biases’.

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[71] *Ibid.* at 15-6.
[72] *Ibid.* at 16-21.
[73] *Ibid.* at 22-33.

IV.3. Quantifying Interpretive Approaches to Judicial Behaviour in ITA

The University of Oslo's Ole Kristian Fauchald undertook an early account of interpretive analysis of ITA decision-making. In his 2008 EJIL article, Fauchald, perhaps unwittingly, explored the "judicial behaviour" of ICSID Tribunals with, what he referred to as, an empirical method. Amongst other things, he questioned the extent to which "ICSID Tribunals contribute to creating a predictable legal framework in which the interests of investors, states, and third parties are taken properly into account".[74]

In assessing the behaviour of ICSID Tribunals', Fauchald first identified the kind of issues that a tribunal might face in interpreting and applying international law. In this vein, seven sets of rules (or "sources of law", as Fauchald termed them) are determinative: the ICSID Convention, multilateral investment treaties, BITs, customary international law, general principles of law, specific agreements or decisions and national legislation.[75]

A key hypothesis furthered by Fauchald relates to how one may envisage certain roles in tribunals based on their interpretive arguments. On the one side, according to Fauchald, a tribunal might only be interested in "the relationship between the parties to the dispute (a 'dispute oriented' tribunal)". On the other side, a tribunal might consider, and might rule, based on factors that are not strictly related to the relationship between the parties to the dispute "(a 'legislator oriented' tribunal)".[76]

By confining himself to Article 38 of the ICJ Statute and Articles 31-33 of the VCLT, Fauchald tested this hypothesis (on these two independent roles a tribunal might assume in interpreting international law). He scrutinised interpretive arguments developed by ICSID Tribunals on (i) the wording of the provision, (ii) the context, (iii) the object and purpose, (iv) customary international law, (v) general principles of law, (vi) analogies and *a contrario* arguments, (vii) agreements between the parties, (viii) case law, (ix) state practice, (x) preparatory work, (xi) legal doctrine and (xii) reasonable results.[77] His

[74] Fauchald, 'The Legal Reasoning of ICSID Tribunals–an Empirical Analysis' at 302.
[75] *Ibid*. at 303.
[76] This fundamental differentiation mimics a legal realism oriented argument of this work, i.e. the ITA Tribunal's role is not limited to settling a dispute. This argument will further be elaborated in Chapter V.
[77] Fauchald, 'The Legal Reasoning of Icsid Tribunals–an Empirical Analysis' at 308.

methodology quantified references to sources of international law in interpretive arguments developed by ICSID Tribunals in 98 awards.

In developing their interpretive arguments, ICSID Tribunals, concluded Fauchald, cited case law the most (90 times) followed by legal doctrine (73 times) and state practice (52 times). On the other hand, according to Fauchald, the infrequent use of object and purpose, the unsystematic use of state practice and the tendency to be "dispute oriented", indicated that ICSID tribunals rarely take into account the interests of third parties involved in an ITA case.[78]

Whilst Fauchald's analysis seem to be fundamentally constructed on the institutionalist perception – one that considers decision-making in ITA subject to various institutional constraints – the author did not elaborate where his contribution stands theoretically. The study is mostly doctrinal and quantitative in its method and does not critically analyse how and why ICSID Tribunals create the context in which the interests of third parties to a dispute might be taken into account. Fauchald omitted such issues that are essential in studies of judicial behaviour. Although he took note of variables that might prove that there is some strategy-making in accommodating interests of third parties to a dispute, Fauchald's review of ICSID jurisprudence remains to be informative rather than critical.

IV.4. Content Analysis in ITA Decision-Making

Gus Van Harten presented a recent set of contributions that discussed an approach against the outcome based statistical research in ITA by. Van Harten began with a critical review of Susan Franck's outcome based work (2009),[79] elaborating on the methodological shortcomings in this statistical endeavour. According to Van Harten, Franck's study, most importantly, suffered from a lack of data which led to 40 to 80% of errors throughout the majority of Franck's results. On a second note, Van Harten argued that Franck erred in taking the OECD development status as a proxy and, thus, in admitting Mexico and Eastern European countries as developed states. To Van Harten, in the light of these

[78] *Ibid.* at 356-9.

[79] Gus Van Harten, 'Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's Development and Outcomes of Investment Treaty Arbitration' (2011), available at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1740031> last accessed on 3 November 2017.

shortcomings, it was "inappropriate" to conclude that the ITA system "functions fairly and that the eradication or radical overhaul of the arbitration process is unnecessary".[80]

In the articles that followed, Van Harten did not only point at these shortcomings of outcome based statistical research but also discussed the potential contribution of theories and methods of judicial behaviour in the analysis of ITA decision-making. In *Contributions and Limitations* (2011), Van Harten introduced his methodological approach, namely "content analysis", which, he argued, would capture the bias embedded in interpretations of the law independently of the outcome.[81] The overall aim of such an empirical endeavour, Van Harten explained, would be to combine "interdisciplinary research tools in order to avoid the methodological weaknesses of each tool operating in isolation".[82] To that end, Van Harten aimed at applying a method that would gather content analysis with statistical empiricism in responding to the following hypotheses he identified:

"(a) arbitrators would tend to adopt expansive approaches to legal issues more frequently than restrictive approaches, (b) the tendency toward expansive approaches would be accentuated for claims by investors of the US, UK, Germany and France as major capital-exporters, powers within the appointing authorities, and historical treaty-makers in the system; and (c) the tendency would shift toward restrictive approaches for claims against the US, UK, Germany and France."[83]

In theorising "rationales for arbitrator behaviour", although Van Harten did not review theories and methods of judicial behaviour in depth, he took note of those doctrinal, attitudinal, economic, strategic and institutional factors that might affect judicial behaviour in ITA. In *Asymmetrical Adjudication* (2012), however, Van Harten mostly based his theoretical inquiries on, considering them as "unique", institutional characteristics of the ITA system, including non-reciprocity (that a host State cannot initiate an ITA against an investor under an IIA); non-existence of the customary duty of private parties to exhaust domestic remedies and systemic bias. The systemic bias argument Van Harten followed also encompassed an institutional inquiry. Based on the

[80] *Ibid*. at 1-2.
[81] Gus Van Harten, "Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration", *Oñati Socio-Legal Series* 1(4) (2011).
[82] *Ibid.* at 14-5.
[83] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall LJ 211 at 224-5.

structure of the ITA system and the arbitration industry, he asserted that arbitrators tend to behave strategically to retain their competitiveness in the arbitration market and are therefore dependent on:

"(1) those who are able to initiate claims in an asymmetrical claims structure; (2) those who exercise power in the arbitration centres that opeate as appointing authorities under investment treaties; (3) those who have the power to include investment arbitration clauses in legal instruments such as investment treaties and investment contracts; and (4) those who act as 'gatekeepers' or otherwise wield influence in the arbitration industry."[84]

In testing his hypothesis on the existence of pro-investor bias in judicial decision-making in ITA, Van Harten adopted the content analysis method which, he explained, is "a systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding".[85] Accordingly, Van Harten identified and coded seven different issues of ITA relating to jurisdiction and admissibility. He classified each arbitrator's resolution of these issues as expansive, restrictive or non-classifiable. For instance, if an arbitrator found a claim permissible where ownership of the investment extends through a chain of companies, he/she was coded as taking an expansive approach. Likewise, if an arbitrator allowed a claim by minority shareholders where the treaty does not include a reference to "shares" in the definition of investment, that arbitrator was also coded as taking an expansive approach.[86]

Based on his content analysis of 140 ITA decisions (which comprised the total English-language awards on jurisdiction and admissibility rendered before May 2010), Van Harten concluded that arbitrators "favour the class of parties" (i.e. investors) or are "influenced by, a need to appease actors who have power or influence over specific appointment decisions or over the wider position of the relevant arbitration industry".[87]

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[84] *Ibid.* at 220. This "strategic behavior" thinking could be associated to Dezalay and Garth's study on commercial arbitration. Van Harten, in various occasions, cited this as a "key work" in developing his arguments. On the other hand, Van Harten also noted that Dealing in Virtue is "dated and may not capture experiences in investment arbitration since the recent explosion of investment treaty claims". *Ibid.* at 222.
[85] *Ibid.* at 223.
[86] *Ibid.* A full account of these examples is available at 227-8.
[87] *Ibid.* at 251-2.

In his follow up study, *Asymmetrical Adjudication (Part II)* (2016), Van Harten improved the methodology and data set. Most importantly, he increased the number of issues to fourteen, this time including matters related to substantive provisions such as national treatment, FET, FPS, indirect expropriation, umbrella clause and national security exception. For instance, Van Harten coded an approach admitting the FET standard autonomous of customary international law as expansive, whereas approaches limiting the content of the FET standard to the *Neer* and *ELSI* terminology (of outrage, bad faith, wilful disregard of due process of law, wilful neglect of duty, etc.) were considered as restrictive. With respect to the umbrella clause, an approach that contemplates private or commercial acts as determinants of treaty violation was coded as expansive.

Out of the 1001 issue resolutions coded in 123 ITA cases, Van Harten concluded that in 73.5% of these resolutions, tribunals took an expansive approach. According to Van Harten, these findings reinforced the conclusions of his previous content analysis that arbitrators tend to rule in favour of claimant investors. On a second note, he also found that, in 1001 issue resolutions in 123 cases, "there was evidence of a strong tendency in favour of an accentuated expansive approach if the claimant was [from] a major Western capital-exporting state".[88] Even amongst these "major Western capital-exporting states", Van Harten considered (namely the USA, France, Germany and the UK), resolutions reached in the 14 coded issues proved to illustrate bias toward the USA (particularly in NAFTA cases where the USA was the respondent state).[89]

Comparably, Van Harten's content analyses on ITA decisions provide a comprehensive analysis on judicial behaviour in ITA decision-making. His work is mostly constructed on method. Yet, his theoretical assumptions hardly reflect a deeper understanding of the theories of judicial behaviour elaborated in Chapter II. As discussed earlier, he mentions attitudinal, strategic, economic and institutional factors, however, (as opposed to e.g. Langford and Behn's work above) his hypotheses do not reflect those theoretical

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[88] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) No. 31/2016 Osgoode Legal Studies Research Paper at 29.

[89] *Ibid.* at 42-3. According to Van Harten "the pro-US variation in the case of NAFTA claims by Canadian investors against the US, and in favour of US investors that brought NAFTA or BIT against other states, suggests tentatively that there is a degree of hierarchy among Western capital-exporters themselves". *Ibid.* at 47-8.

questions raised by any of these approaches. This caveat is partially due to Van Harten's objective in these studies. He aimed at empirically showing evidence that the claims he furthered in his controversial study of 2007[90] were plausible assumptions and that his outcome based statistical work, in which he claimed that there is no evidence of pro-investor bias in ITA (e.g. Susan Franck's empirical work) were erroneous. Whilst Van Harten, with this body of research, alleges to have shown correlation suggesting a bias toward Western capital–exporting interests in ITA decision-making, his work does not illustrate why tribunals behave in a biased manner in individual cases. In other words, his "content analysis" focuses on the "resolution" or "outcome" of each coded variable and does not answer if, for example, tribunals act strategically or reflexively to respond to particular institutional variables in the ITA system. These variables, according to historical interpretevist approaches, do not only emanate from the systemic biases that that are embedded in the political foundations of the particular regime in question. They also emanate from the interactions between stakeholders and susceptibility of the ITA Tribunal to assume a principal political role to accommodate different interests.[91] As such, Van Harten does not substantiate why the "expansive" outcome is wrong. His work suffers from a dilemma: if the bias is pro-investor, it is 'bad' bias. If the bias is pro-state, it is 'good' bias.

V. Mixed Approaches to Judicial Behaviour in ITA

In reviewing the scholarship on why the ITA Tribunal behaves the way it does, one might come across studies that do not fit in any, or that could be included in more than one, of the sub-categories of judicial behaviour theories elaborated in Chapter II. It would be a challenging exercise to categorise David Schneiderman's socio-legal works on *Legitimacy and Reflexivity (2011)*[92] and *Judicial Politics (2012)*[93] in ITA since they adopt either none, or one or more, of the theories of judicial behaviour in exploring arbitrators' behaviour.

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[90] Van Harten, *Investment Treaty Arbitration and Public Law*.

[91] According to Professor Rogers, Van Harten's content analyses fail to explain why "'expansive' jurisdictional findings are somehow an improper deviation from the 'correct' legal outcome". Rogers, 'The Politics of International Investment Arbitrators' at 227-8.

[92] David Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' (2011) *Journal of International Dispute Settlement* 2.2 (2011), 471-495.

[93] Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes'.

In *Legitimacy and Reflexivity*, Schneiderman addressed judicial behaviour in ITA based on the "systems theory" (Teubner 1986; Luhmann 1994, 2004). He questioned whether actors, including the arbitrators, act "reflexively when confronted with systemic conflict" that is prompted by the on-going concerns of legitimacy on the ITA system.[94] Schneiderman undertook a doctrinal review of some key ITA awards. He concluded that ITA Tribunals (i) have shifted their emphasis from the takings rule (in expropriation disputes) to the FET standard (which might perform similar functions); (ii) have attempted to merge global standards by endorsing WTO Appellate Body decision-making and (iii) have adopted a proportionality doctrine more often in responding to public interest in the ITA decision-making.[95] This, according to Schneiderman, provided evidence that the ITA system is a "normatively closed but a cognitively open system". In other words, there is an openness within the regime's international structures toward adapting itself to change. Arbitrators, Schneiderman argued, "are acting reflexively to the extent that they are responding to external critiques by shifting grounds".[96]

Nonetheless, the systemic theoretic approach adopted by Schneiderman did not consider whether arbitrators had economic, strategic or attitudinal rationales in behaving reflexively. This would be a matter more appropriately explored through judicial behaviour theories and Schneiderman, ultimately, undertook an analysis of judicial politics in order to explain inconsistencies in three Argentine cases – i.e. *CMS, LG&E, and Enron.*[97]

In *Judicial Politics (2012)*, he explored non-legal variables in the ITA decision-making that emanate from theories of judicial behaviour including social background, attitudinal behaviour, strategic behaviour and institutional concerns. In light of Rogers Smith's assertions, Schneiderman considered each of these approaches as "interacting" or "interconnecting" approaches instead of competing ones. This finding, according to

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[94] Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' at 475-83.

[95] *Ibid.* at 484-94.

[96] *Ibid.* at 495.

[97] CMS Gas Transmission Company v. Republic of Argentina, *Award*, ICSID Case No. ARB/01/8 (12 May 2005), LG&E International Corp., LG&E Energy, Corp. and LG&E Capital Inc. v. Argentine Republic, *Decision on Liability*, ICSID Case No. ARB/02/1 (3 October 2006), Sempra Energy International v. Argentine Republic, *Award*, ICSID Case No. ARB/02/16 (28 September 2007)

Schneiderman, would necessitate one to consider each approach separately on a given set of variables if one was to find correlation that there is judicial politics in ITA.

Accordingly, Schneiderman first reviewed, what he referred to as, the agency centred models, i.e. educational and professional backgrounds and individual attitudes and, second, the more structural models, i.e. strategic behaviour and new institutionalism. Having identified issues specific to the three Argentine cases, including inconsistencies in the application of the FET standard and necessity defense, Schneiderman initially conducted a personal background check of arbitrators Vicuña, Lalonde, Rezek, Maekelt, Van den Berg and Tschanz, considering their professional background and nationality.[98] Thereafter, based on Segal and Spaeth's attitudinal model and on a database on the outcome of 81 awards in which these individuals sat as chairpersons or party-appointed arbitrators, he questioned whether they are attitudinally biased toward investors. Schneiderman concluded that, whilst the cases in which Vicuna and Lalonde appeared showed some pro-investor bias, the opposite was true in relation to Rezek. Accordingly, behaviouralist models are inadequate in explaining the inconsistencies within *CMS, LG&E* and *Enron*.[99]

Schneiderman constructed a further analysis on the strategic behaviour model. In reviewing this approach, he cited some key old-institutionalist strategic scholarship including Murphy's *Elements of Judicial Strategy (1964)* as well as new institutionalist strategic assertions (or, in other words, the rational choice theory based arguments) by Epstein and Knight (1996, 2003). Focusing on some early NAFTA cases such as *SD Myers*[100]*, Loewen*[101] and *Methanex*[102], Schneiderman suggested that arbitrators do act strategically in an attempt to respond to outside forces including US Congressional and public opinions. According to Schneiderman, strategic behaviour might explain the conflicting views of Van den Berg and Rezek on state of necessity defense.[103]

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[98] Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' at 392-400.
[99] *Ibid.* at 401-3.
[100] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, NAFTA
[101] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, NAFTA
[102] Methanex Corporation v. United States of America, UNCITRAL, NAFTA
[103] Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' at 403-7.

A third, and last, approach to explain the behaviour of arbitrators in *CMS, LG&E* and *Enron* was built on the new institutionalist account of Howard Gillman and Cornell Clayton. Schneiderman, by adopting Gillman and Clayton's historical/interpretive approach as well as Clayton and David May's "political regimes" account, considered the three Argentine cases "within parameters that are larger than the decision makers themselves or other actors having power over them".[104] In other words, one should consider, Schneiderman argued, the effect of the wider picture "of personnel, practices, norms and politics" on ITA decision-making. In doing so, he turned to the out of tribunal views of individual arbitrators, e.g. Judge Mikva - co-arbitrator in the *Loewen* Tribunal. Showing there is a small but affective "audience of international investment lawyers – operating within the legal academy and legal practice – who serve as commentators, arbitrators, and counsel and giving rise to apparent, if not real, conflicts of interest".[105] By supporting his institutional assertions with Bourdieu's social theory[106], Schneiderman contended that arbitrators attempt to "make between differing or antagonistic interests, values and world views" and, at the same time, remain receptive to dominant forces. He concluded that this was also the case with arbitrators Van den Berg and Rezek. The locus in which they made their decisions allowed a certain degree of inconsistency and, subsequently, of self-correction in their conclusions on the necessity defense in *CMS* and *LG&E*. However, this does not change the fact that ITA decision-making, Schneiderman asserted, "continues to spin on [an] investor-friendly axis".[107]

One could argue that Schneiderman's take on judicial behaviour in ITA is problematic on three levels. First, although Schneiderman was right to consider Smith's characterization of the theories of judicial behaviour as "interacting" or "interconnecting", he erred in suggesting that this was a methodological call for applying each theory at the same time. Whilst each theory of judicial behaviour delivers valuable results in judicial decision-making, each would also require individual and more comprehensive attention. Any endeavour that tests each of these complex theories and methods at the same time would

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[104] *Ibid.* at 408.
[105] *Ibid.* at 409.
[106] Along the lines of the theoretical subsmissions by Dezalay and Garth in Dezalay and Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*.
[107] Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' at 411.

remain superficial and would not do justice to the far-reaching content of the American judicial behaviour scholarship.

Second, even then, his understanding of the US judicial behaviour scholarship is erroneous. Most importantly, his review of "strategic behaviour" scholarship cites contributions that are key to attitudinal and new institutional scholarship. Whilst Schneiderman rightfully referred to Murphy's *Elements of Judicial Strategy (1964)* in substantiating the old institutionalist strategic behaviour, his characterization of Herman Pritchett's *The Roosevelt Court (1948)* (a key attitudinal study) and Lee Epstein and Jack Knight's contributions throughout 2000 and 2003 (which fall in the rational choice institutionalism – or positive theory of institutions) is inaccurate.

Third, in his take on new institutionalism, Schneiderman does not elaborate essential differences between old and new institutionalisms that are a fundamental pillar of the US judicial behaviour scholarship in its move from behavioural and strategic behaviour theories to rational choice and historical/interpretive institutionalism. Despite his important consideration of Howard Gillman, Cornell Clayton and Rogers Smith's key contributions in the field (and in particular on historical/interpretive institutionalism), Schneiderman does not take into account the essential theoretical proposition of this stream of scholarship which suggests taking normative values that develop in a certain period of time at the centre of judicial behaviour analysis. This causes Schneiderman to, mistakenly, focus on the structural constraints of the ITA system (which would rather indicate an old institutionalist approach) rather than normative concerns that would require one to explore the historical interpretive development of, in context, the necessity defense doctrine.

VI. Conclusion

Whilst some scholars claim to have proven that ITA functions on a pro-investor or pro-developed State axis, it is, however, difficult to acknowledge that any of the empirical data reviewed above provides consistent evidence. Although I presented a critique of the studies above based on their erroneous use of the theories and methods of judicial behaviour, these empirical works have also been criticised for their erroneous assumptions and methods they depend on. According to Professor Catherine Rogers, how,

in the absence of the alleged bias (or any other extra-legal factor) would the ITA Tribunal reach the 'correct' outcome would be a mere speculation. In addition, measuring personal policy or ideological values of adjudicators would be difficult, if not "impossible".[108] Moreover, "over simplification of outcomes" could lead the researcher to erroneous results.[109] Inasmuch as the content of arbitral awards should be an important variable for a judicial behaviour researcher, analysis of the content should not be based on the "over-simplified"[110] and, even, 'out-dated' dichotomy of pro-investor – pro-state bias.

At the same time, it might be useful to identify the literature on judicial behaviour in ITA based on the ongoing clash between legal positivism and legal realism; formalism and attitudinalism or normativism and behaviouralism. One either takes a normativist approach, accepting that arbitrators decide based on the law only or one follows behaviouralist assumptions and acknowledges that arbitrators are subjective and political, and therefore, so are their decisions. Identifying the literature based on this dichotomy could also facilitate the researcher in responding the historical interpretivists concerns on the normative contents of the law. It would also be consistent with the ultimate objective of this work: to develop a theoretical approach that could advance socio-legal knowledge in analysing judicial behaviour.

The critique of the judicial behaviour literature on ITA above is constructed on this understanding. It illustrates that scholars do not possess a sufficiently deep understanding of the American judicial behaviour scholarship – a scholarship that they seek guidance from in constructing their respective studies on judicial behaviour. As discussed, Kapeliuk's work on inter-panel dynamics does not reflect inquiries put forward by rational choice institutionalism, as she argued to have explored, but more squarely falls in the realm of behavioural strategic thinking elaborated by Murphy (1962). Brekoulakis although alleged to have undertaken an institutionalist approach under the rubric of the political regimes theory (1999), his identification of the so-called political regime is

[108] For a novel methodological view on measuring values in ITA, *see* Daniel Behn's PhD thesis on Q Methodology and ITA. Daniel Behn, A Theory of Configurative Fairness for Evolving International Legal Orders: Linking the Scientific Study of Value Subjectivity to Jurisprudential Thought, *University of Dundee PhD Thesis (2013)*, available at <http://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.578957> last accessed on 3 November 2017.
[109] Rogers, 'The Politics of International Investment Arbitrators' at 228-34.
[110] *Ibid.* at 231.

problematic. Some of the determinants Brekoulakis identify, such as "legal and professional training" and the "distinct role and tenure status" of arbitrators, resemble those determinants that would be considered in a typical behavioural/attitudinal study. Likewise, the works of Schneiderman, although point at some important aspects of the judicial behaviour scholarship, fail to reflect a deeper understanding of this scholarship, inaccurately citing institutional theories in his review of attitudinal approaches. He also does not elaborate the key differences between old and new institutionalisms which makes him focus on the structural constraints of the ITA system, leading him to take an old institutionalist approach. In some other contributions on the other hand, scholars including Langford, Behn and Fauchald exclusively focus on rational choice or behavioural theories and methods. As a result, they take overly empirical approaches, ignoring the development of some normative doctrines of international investment law. As identified, none of the studies in this recently emerging scholarship on judicial behaviour in ITA (except for Van Harten's content analysis), accurately considers the normative concerns of the law from the perspective of judicial behaviour theories, failing to do justice to historical-interpretive scholarship of Rogers Smith, Martin Shapiro, Cornell Clayton, Howard Gillman and David May.

This work is an attempt to address issues left untouched in this new stream of scholarship. It investigates normative development of selected doctrines of international investment law under the political regimes approach. The next Chapter, elaborates new institutionalist inquiries into the role of the ITA tribunal. In doing so, it describes the institutional space of ITA and identifies institutional constraints on judicial behaviour as well as its role as a principal political institution.

CHAPTER IV

THE INVESTMENT TREATY ARBITRATION TRIBUNAL AND ITS ROLE

I. Introduction

Previous chapters elaborated theories and methods of judicial behaviour and their current reflections on ITA scholarship. Section A commenced by making some critical inquiries into the role of the ITA Tribunal. In this chapter, I shall argue that the role of the ITA Tribunal is shaped in the institutional space in which institutions interact with, and alter, each other. Similar to the political regimes approach put forward by Cornell Clayton and David May, this Chapter considers the centrality of legal institutions. These include IIAs, procedural rules, multilateral treaties of enforcement, general principles and rules of international law as well as domestic laws and regulations. These are constitutive institutions in the decision-making process of the ITA Tribunal, which gain meaning through exercises of interpretation and application and which are themselves embedded within, and draw meaning from, the larger political regime of international investment law. It is also theorised that the ITA Tribunal assumes a principal political role to capture the political contingency of the law responding to the views of the stakeholders that has an interest in the system, at the same time presenting an image of law that is consistent with popular and professional expectations of neutrality (Shapiro 1964).

This theoretical understanding of the ITA Tribunal complements those rational choice inquiries furthered by Langford and Behn. It is an investigative endeavour that takes normative institutions, which shape and constrain ITA decision-making, at the centre of its analysis. This analysis is developed on the basis that each normative institution is discretionary and is created to respond to certain policies and political agendas of its era and that these normative institutions are, to some extent, altered by the concrete political behaviour of actors. I shall argue that, in addition to resolving a dispute between the parties, the ITA Tribunal serves to accommodate and further such political alterations through ITA decision-making.

This chapter starts with describing the role of the ITA Tribunal in its institutional space and how it might – theoretically – further politics in its decisions. It then investigates

judicial behaviour in four arbitral awards, *Loewen,*[1] *Methanex,*[2] *AES*[3] and *Electrabel,*[4] in an attempt to hypothesize such theoretical assertions have a standing and to illustrate that there is ample room to further investigate the reach of politics in ITA decision-making. Based on these theoretical and practical assertions, the chapter puts forward two hypotheses on the role of ITA Tribunal, which will be investigated in the remainder of the work.

II. The Role of the Tribunal in ITA Decision-Making

As opposed to the judicial behaviour analysis of ITA reviewed in Chapter III, this work does not aim to predict or second-guess what tribunals would decide subject to certain institutional perspectives, attitudes, concepts, rules and internal or external politics. It is rather an investigation as to the role of these institutions in judicial decision-making in ITA. How do institutions, with their political characteristics, affect the process of decision-making in ITA or do they affect at all? To that extent, this work is concerned with whether the ITA Tribunal oscillates in-between the normative character of the law and the political contingency of the law. It examines the extent to which the ITA Tribunal accommodates politics in its decisions and, in this vein, whether there is a correlation between politics and decision-making in ITA.

In undertaking such an investigation, it is necessary to first contextualize "the ITA Tribunal's" duty in resolving investor-State disputes. Is its task limited to resolving a dispute based on treaties, procedural rules, international law and domestic laws and regulations? Alternatively, does the ITA Tribunal also have a duty to accommodate and balance the political interests of actors and institutions involved in the ITA decision-making? According to some, the ITA Tribunal's task would be strictly limited to settling a dispute within the limits of the applicable treaty and international law. After all, in an ideal world, "arbitral tribunals are instruments of the rule of law"[5] and one might therefore

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[1] Loewen Group, Inc. and Raymond L. Loewen v United States of America, Award, 23 June 2003, ICSID Case No. ARB(AF)/98/3.

[2] Methanex Corporation v United States of America, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, UNCITRAL.

[3] AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary, Award, 23 September 2010, ICSID Case No. ARB/07/22

[4] Electrabel S.A. v Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19

[5] Paulsson, *Denial of Justice in International Law*

assume that decision makers must hold right process above any subjective and/or political value.[6] They should seek legitimacy with their decisions by instituting determinacy, consistency and coherence.[7] Under a legal realists thinking, however, one could argue that the ITA Tribunal has a role beyond settling a dispute at hand – a role that could be determined by the political regime in which it undertakes decision-making.

Based on the *new institutionalist* approaches to judicial behaviour, one could as well argue that, as an institution, the ITA Tribunal consists of two clusters of behaviour. First, the internal behavioural framework, concerned with personal values, inner politics and strategic behaviour amongst the members of the ITA Tribunal. Second, the external behavioural framework that concerns the institutional framework (or the political regime) in which the ITA Tribunal functions. As explained earlier, this work is not an attitudinal or behavioural empirical study. It does not count votes or aim to measure the values of members of the ITA Tribunal. At the same time, it does not adopt a rational choice approach. To that extent, the work does not study the "internal politics" of the ITA Tribunal.

This work – rather – studies the place and function of the ITA Tribunal in its external cluster. In other words, it investigates how the external institutional framework, with its political characteristics, affects the behaviour of the ITA Tribunal. However, contrary to early institutional assertions, it takes normative concerns of the law at the centre of its analysis. In doing so, it first considers international investment law as the external institutional framework that is the sum of cognitive structures of authority, such as norms and rules of conduct, as well as habits of thought or background structures and patterns of meaning, which entail politics.

Herein it is considered that international investment law is constructed on *formal* and *informal institutions* that present *constitutive constraints* on its function and practice. At the same time, it has its political origins which present *non-constitutive* and *systemic*

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[6] "When it is asserted that a rule of its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and therefore that it ought to promote voluntary compliance by those whom it is addressed. It is deserving of validation". Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990) at 26.

[7] *Ibid*. at 30-46.

constraints on ITA tribunals. These systemic constraints distinguish international investment law from its domestic counterpart. Whereas the American public law scholarship is concerned with how domestic politics might affect the behaviour of justices, judicial behaviour studies in international investment law should additionally be concerned with how systemic constraints or biases influence how tribunals decide.[8]

International investment law forms an institutional space in which ITA tribunals function. The institutional space of the ITA consists of formal institutions such as IIAs,[9] procedural rules,[10] multilateral treaties of enforcement,[11] general principles and rules of international law,[12] and domestic laws and regulations.[13] These together form "a constitutive

[8] Koskenniemi, 'The Politics of International Law–20 Years Later'; Erik Voeten, 'International Judicial Behaviour' in Cesare P. R. Romano, Karen J. Alter and Chrisanthi Avgerou (eds), *The Oxford Handbook of International Adjudication* (Oxford, OUP 2014) at 551.

[9] Including bilateral investment treaties (BITs), multilateral treaties such the Energy Charter Treaty (ECT), and investment chapters of free trade agreements such as the North American Free Trade Agreement (NAFTA) Chapter 11.

[10] Such as International Convention for the Settlement of Investment Disputes (ICSID) Rules, International Chamber of Commerce (ICC) Rules of Arbitration, Stockholm Chamber of Commerce (SCC) Rules of Arbitration, United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, etc.

[11] Such as the ICSID Convention or the New York Convention on the Recognition or Enforcement of Foreign Arbitral Awards.

[12] Article 38 of the Statute of the International Court of Justice (ICJ) reads: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59 judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (emphasis added).

[13] Domestic laws and regulations is not always treated as "facts" of a dispute. Article 42(1) of the ICSID Convention provides: "In the absence of [an] agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". *See* e.g. *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Proceeding (5 February 2002) at para. 40. "[D]omestic law has been applied as 'law' also beyond the ICSID Convention and in the absence of explicit treaty language to the same effect. By way of illustration, in *EnCana v. Ecuador*, the tribunal reasoned that: 'The second preliminary question concerns the applicable law. The relevant clause, Article XIII(7) of the BIT, provides only a tribunal exercising jurisdiction under the BIT "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Unlike many BITs there is no express reference to the law of the host State. However for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical as sets) the rights affected must exist under the law which creates them, in this case, the law of Ecuador". J. E. Viñuales, 'The Sources of International Investment Law' in S. Besson and J. d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford: Oxford University Press, 2016) at 1074-5.

instrument"[14] or a *constitutive institution* for adjudicators. The institutional space also includes *informal institutions* such as *stare decisis,*[15] academic scholarship[16] and soft law[17] which are not mandatory elements for interpretation but essential sources in giving meaning to the constitutive institution. Actors possess a central role in the creation of the constitutive and non-constitutive institutions: as a reflection of international politics, home and host States conclude international treaties, legislate domestic laws and regulations for the treatment of foreign property and establish state practice or custom. Arbitral bodies conduct judgments based on treaties, international custom and principles, domestic laws and regulations and academic writings in the field, they establish patterns of interpretation, thought and meanings.

Figure I below illustrates the broader political 'box' in which the ITA Tribunal operates. Whilst the ITA Tribunal is limited to operate using the vocabulary embedded in the constitutive and non-constitutive institutions described above, as a principal political institution it may also assume a duty to capture the political contingency of international investment law that emanates from the international investment regime. In other words, the ITA Tribunal might draw meaning from the broader political regime of international investment when applying and interpreting the constitutive institutions in order to be

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[14] David D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2007) 24 Berkeley Journal of International Law 401-23 at 411.

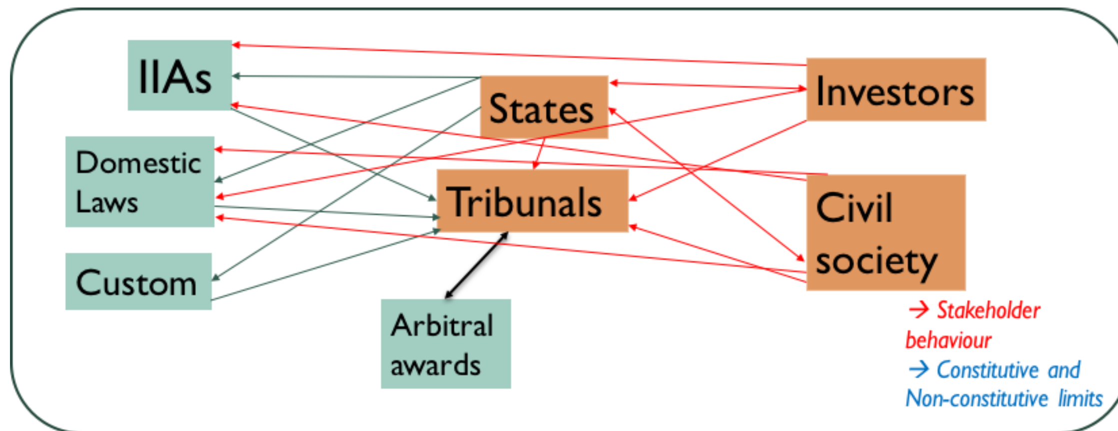
[15] Article 38(d) of the Statute of the ICJ recognizes judicial decisions as a subsidiary means for the determination of rules of law. At the same time, it is commonly recognized that ITA bodies have "a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law": *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) at Para. 117. Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 Arbitration International 357. In his empirical study, Fauchald found that in 92 cases (out of 98 concluded between 1998 and 2006) ITA tribunals referred to earlier decisions. Fauchald, 'The Legal Reasoning of Icsid Tribunals–an Empirical Analysis'. Also see for a statistical analysis on the use of previous ITA awards as authority, Jeffery P. Commission, 'Precedent in Investment Treaty Arbitration a Citation Analysis of Developing Juroisprudence' (2007) 24 Journal of International Arbitration 129.

[16] Salacuse, *The Law of Investment Treaties* at 156-7: "The writings of scholars and practitioners are another source of assistance in interpreting investment treaties. As noted above, Article 38 of the Statute of the ICJ specifies the use of 'teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law'. Both counsel and tribunals in investor-state arbitrations routinely refer to such works in analysing the meaning of treaty terms in specific cases". Schreuer, *The ICSID Convention: A Commentary* at 617 para. 118: "As would be expected, ICSID Tribunals and ad hoc committees have also relied frequently on academic writings on various points of law".

[17] *See* e.g. IBA Rules on the Taking of Evidence in International Arbitration, IBA Guidelines on Conflicts of Interest in International Arbitration.

responsive to the views of different stakeholders that have an interest in the regime. Yet, the ITA Tribunal should remain within the confines of the normative doctrine of treaty interpretation (for instance) to show its commitment to law.

FIGURE I: Broader Political Regime of International Investment



III. Interpretative Choices for the ITA Tribunal

Such theoretical underpinnings would necessitate one to explore the logic behind the interpretation of the constitutive and non-constitutive institutions. After all, it is the exercise of interpretation that an ITA tribunal establishes patterns and gives meanings to institutions. As such, the exercise, one could argue, is not a mechanical one. The ITA Tribunal has a certain degree of discretion subject to the political regime of international investment law.

In this vein, one may consider the general rules for interpreting treaties, i.e. Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), as interpretive limitations in an ITA case. These provisions are the ground-work of the UN International Law Commission (ILC) in the interpretation of international treaties. Although they have been much criticized for lacking concreteness,[18] they remain the embodiment of the international community's consensus on treaty interpretation and are considered as a reflection of customary international law.[19]

[18] Jan Klabbers, 'Virtuous Interpretation' in M. Fitzmaurice, O.A. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff Publishers, 2010)

[19] C. Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in M. Fitzmaurice, O.A. Elias and P. Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the*

Article 31, the general rule of interpretation, requires international courts and tribunals to adhere, in good faith, to the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". When interpretation under Article 31 "leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable", Article 32 provides that "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". Article 33, on the other hand, incorporates rules that would apply "when a treaty has been authenticated in two or more languages".

Villiger identifies five methods in the theory of interpretation of the VCLT rules. First, the subjective or historical method, which takes into account the "real" intentions of the drafters of the treaty and encourages recourse to the treaty's preparatory work. Second, the textual method, which takes the text of the treaty as the reflection of the real intention of the parties. Third, the contextual or systematic method, which considers the meaning of the terms in their nearer and wider context. Fourth, the teleological (or functional) method, which allows for the object and purpose of the treaty to be taken into account in interpretation and fifth, the logical method, which encourages the use of concepts such as *per analogiam, e contrario, contra proferentem*, etc.[20]

In contrast to such positivist approaches to treaty interpretation, Joost Pauwelyn and Manfred Elsig argue that treaty interpretation might entail political behaviour. To them, there are five major interpretive choices available to international courts and tribunals which also adhere to the role of politics in treaty interpretation.[21] Three dominant hermeneutics, scholars argue, remain to be the most commonly preferred choices in modern treaty interpretation. These are the textual method (Fachiri, 1929), the subjective/historical method (Lauterpacht, 1950; McDougal, Lasswell and Miller, 1967) and the teleological method (Letsas, 2010). These, however, provide divergent meanings depending on the interpretive choices international courts and tribunals adopt.

Law of Treaties: 30 Years On (Martinus Nijhoff Publishers, 2010) at 130. *See* e.g. *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, ICJ Reports 1999 at 1060 at para. 20.

[20] M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) at 421-6.

[21] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).

First, a tribunal, for instance, may consider that the meaning of a term has changed since the treaty was concluded, thus adopting the "evolutionary" method. The same tribunal may take the "original" meaning of the term when the treaty was concluded (e.g. the term "commerce" in the 1858 treaty between Costa Rica and Nicaragua), substantially affecting the outcome of the case.[22] Second, the tribunal may choose to adopt the "work-to-rule" method whereby it rules in favour of the defendant state if there is a gap or doubt as to the violation of the treaty at hand. By contrast, the tribunal may also prefer a "gap-filing" or "activist" approach in which case the tribunal uses the text-intent-purpose hermeneutics to construe an applicable rule.[23] Third, the tribunal may choose to decide a case based on its own merits using the "case-by-case" method. On the other hand, it might also choose to rely on precedent in which case it adopts the "rule of precedent" method.[24] The final interpretive method or choice relates to how the tribunal positions itself in relation to other treaties and tribunals. The tribunal might choose to limit itself to its own constitutive instrument (in the ITA the constitutive instrument would be the IIA and the surrounding legal rules) adopting a "self-contained" interpretive method. The tribunal might also choose to interpret its constitutive instrument with reference to general international law and other treaties.[25]

In the ITA practice, the textual (or the literal) method has been taken as the principal method of interpretation. According to Thomas Wälde, giving up this approach would signal great weakness in the text of the treaty, and thus, one may consider recourse to the teleological method or in other words, the object and purpose of the treaty, as an exception rather than the rule. To Wälde:

"Object and purpose are more open to the subjective views of the interpreter. Preambles and authoritative views on the main purposes of a treaty tend to refer to all the politically correct and appealing purposes possible; as the pressure of special interest groups and activists in the international arena grows, treaties are likely to ever more resemble UN General Assembly resolutions, where every possible issue pushed by an activist group is included. For this reason, reference to objectives cannot avoid a selection of objectives by relevance and relative weight or the impossible task of trying to seek an optimal compromise between conflicting objectives. But relying on the text both is, and as

[22] *Ibid.* at 452-3.
[23] *Ibid.* at 454-5.
[24] *Ibid.* at 456.
[25] *Ibid.* at 457-9.

importantly, appears much less subjective than struggling through the possible impact of a particular interpretation forecast for an uncertain future by a tribunal or counsel with no expertise in or mandate for economic planning and social engineering (emphasis added)."[26]

Therefore, the interpreter should resort to object and purpose and, where useful, to the preparatory works (i.e. *travaux preparatoires* or *travaux*) under Article 32 VCLT insofar as to "exercise maximum fidelity to the objective design and architecture of the treaty as created by its drafting process". However, Wälde further asserts, the interpreter might also find him/herself in a position where he/she has to "modulate, specify and develop [the treaty] when flaws appear". Subjectivity in interpretation would then come to the surface.[27]

On the other hand, some would take the position that recourse to, for instance, the teleological method (and thus subjectivity) is a conscious, voluntary choice. Sir Hersch Lauterpacht, a proponent of real intentions of parties in treaty interpretation, observed that the interpretive method international courts and tribunals adopt might also be an ex-post justification or "façade" for an outcome already reached on other grounds.[28] This might particularly be valid for ITA practice. As Weiniger observed, and McLachlan and Shore concurred, "[i]n practice the principles contained in the [VCLT] are not wholly useful in resolving difficult questions of BIT interpretation as the guidance they provide is insufficiently concrete".[29] This, according to Weiniger, has led *CMS*[30], *SGS v Pakistan*[31], *SGS v Philippines*[32] and *Tokios Tokeles*[33] Tribunals, in their decisions on

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[26] T. W. Wälde, 'Intepreting Investment Treaties: Experiences and Examples' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: OUP, 2009) at 755.
[27] *Ibid.* at 756-7.
[28] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 Brit YB Int'l L 48.
[29] C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: OUP, 2014) at para. 3.72.
[30] CMS Gas Transmission Company v. The Republic of Argentina, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ICSID Case No. ARB/01/8.
[31] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 ICSID Case No. ARB/01/13.
[32] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6.
[33] Tokios Tokelés v. Ukraine, Decision on Jurisdiction, 29 April 2004, ICSID Case No. ARB/02/18.

jurisdiction, to mould the BIT provisions so as to justify the outcomes they wished.[34] To Wälde, this would come as no surprise. "[E]very player in the field of investment disputes – governments, counsel, tribunals, academics and NGO activists", Wälde asserted, "generally adopts an interpretation in line with their ideological and political preferences and subconscious biases".[35] Scholars highlight that such methods in treaty interpretation might emanate from a political and, thus, a conscious choice.[36]

Whether the general rules of interpretation, i.e. VCLT Articles 31 to 33, withstand these claims or not is beyond the reach of the scope of this work. However, rather indirectly, the work will address whether involvement of institutions in the decision-making process, defined hereunder, would alter the use of the general rules of interpretation (for instance if they would increase recourse to the teleological or textual method). As argued earlier the ITA Tribunal might assume a principal political role in responding to the political regime in which it operates, at the same time seeking an authentic commitment to constitutive and non-constitutive institutions. It is therefore essential to discuss these institutional limitations within which the ITA tribunal operates before moving forward.

So far an attempt has been made to explain how the rules of treaty interpretation might provide the space for politics in the judicial behaviour of ITA tribunals. Below, I shall further elaborate on how constitutive and non-constitutive institutions may allow politics and may eventually influence ITA decision-making. In doing this, I shall first identify politics that is asserted through institutions in the process of ITA decision-making. Secondly, I will investigate concrete examples from practice to show that there is ample room for further research and to identify the roadmap and the hypotheses that will be tested in the remainder of this work.

IV. Institutional Limitations on ITA Decision-Making

IV.1. Constitutive and Non-Constitutive Limitations

In ITA decision-making, the participation of stakeholders in the ITA (including those who are not directly involved as parties or bodies responsible for settling disputes) might

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[34] J. Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford: Oxford University Press, 2012) at para. 2.18.

[35] Wälde, 'Intepreting Investment Treaties: Experiences and Examples' at 724-5.

[36] Pauwelyn and Elsig, 'The Politics of Treaty Interpretation'.

be enabled through the constitutive and non-constitutive institutions allowing some political influence on ITA decision-making. In order to influence judicial decision-making, actors might utilize instruments including "the definition of jurisdiction; formal appointment mechanisms that shape the court; and discursive techniques to get judges to internalize state values".[37] Actors such as non-governmental organizations (NGOs) might pursue their interests in ITA decision-making through normative rules such as Article 38 of the Statute of the International Court of Justice (ICJ) and/or relevant provisions of applicable IIAs.

The primary constitutive institution, the applicable IIA, may allow host and home State involvement in the interpretation of treaty standards through the allocation of interpretative authority to contracting States and/or State bodies and by providing for non-disputing party interventions. Article 1131 of NAFTA is one such constitutive institution.[38] Vested on its authority to issue interpretations on certain provisions of NAFTA, the Free Trade Commission (FTC), is comprised of cabinet level ministers of NAFTA Parties, issued a Note on the interpretation of NAFTA Chapter 11 on 31 July 2001. As further elaborated in Chapter V, VI and VII, the FTC's interpretative limitation on the FET and protection and security standards to customary international law have been widely applied and have also been challenged by NAFTA Tribunals.[39] Article 30(3) of the US Model BIT and Article 15.21(2) of the Singapore-USA FTA are other examples

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[37] Ginsburg, 'Political Constraints on International Courts' at 487. For noncompliance *see* Tanja Börzel, Tobias Hofmann and Diana Panke, 'Opinions, Referrals, and Judgments: Analyzing Longitudinal Patterns of Non-Compliance' (2008) Free University of Berlin Unpublished manuscript.

[38] Article 1131(2) of NAFTA provides that "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section".

[39] Anthea Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' *Harv. Int'l LJ* 55 (2014) 1. *See* e.g. *Loewen*: "The effect of the Commission's interpretation is that [FET] and [FPS] are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in Metalclad Corp v United Mexican States (Aug 30, 2000), S.D. Myers, Inc. v Government of Canada (Nov 13, 2000) and Pope & Talbot, Inc. v Canada, Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded". *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, 26 June 2003, ICSID Case No. ARB(AF)/98/3 at Para. 128. Gabrielle Kaufmann-Kohler, 'Interpretive Powers of the Free Trade Commission and the Rule of Law' (2011) Fifteen years of NAFTA 175. For other decisions that followed FTC's interpretation: *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), at Para. 100; *United Parcel Service of America, Inc. v. Canada*, UNCITRAL, Award (22 November 2002), at Para. 97; *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award (9 January 2003), at Paras. 175–178; *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004), at Paras. 90–91.

to constitutive institutions opting for binding interpretation by treaty parties.[40] Likewise, Article 9 of the Netherlands-Czech Republic BIT provides that "[e]ither [party] may propose the other Party to consult on any matter concerning the interpretation or application of the [BIT]" in the form of a "consultation".[41] After the issuance of the Partial Award in *CME v Czech Republic*, Czech Republic called for such consultations with the Netherlands based on this provision (before the Tribunal rendered its final award), when it disagreed with the tribunal's interpretation. Furthermore, Article 31(3) of the VCLT may guide Tribunals to take into account subsequent agreements of state parties in interpreting treaties.[42]

Politically oriented organizations might also have an impact on decision-making through *amicus curiae* briefs based on public policy, human rights[43] and environmental concerns. Such *amicus curiae* submissions were submitted by the International Institute for Sustainable Development (IISD) and Earth Justice in March 2004 in *Methanex* after a legal and political struggle for involvement that was first formulated in the IISD submission of August 2000.[44] Ever since, *amicus* submissions have become an integral part of the NAFTA Chapter 11 practice. The FTC Statement on Non-Disputing Party Participation dated 7 October 2003 reinforced tribunals' authority to accept *amicus curiae* submissions, albeit subject to certain procedures.[45] Yet, a non-disputing party would not

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[40] 2004 US Model BIT, Article 30(3): *"A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a Tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision".* Singapore-USA Free Trade Agreement (2004), Article 15.21(2): *"A decision of the Joint Committee [of State parties] declaring its interpretation of a provision of this agreement ... shall be binding on a tribunal established under this section, and any award must be consistent with that decision".*

[41] CME Czech Republic B.V. v. The Czech Republic, Partial Award, 13 September 2001, UNCITRAL. *See* Loretta Malintoppi and Hussein Haeri, 'The Non-Disputing State Party in Investment Arbitration: An Interested Player or the Third Man Out?', *Practising Virtue* (Oxford: Oxford University Press, 2015)

[42] Article 31(3) of the VCLT: "3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties".

[43] *See* e.g. Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic, Order in Response to Amicus Petition, 12 February 2007, ICSID Case No. ARB/03/19 at paras. 16-8.

[44] *See* Howard Mann, 'Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex v. United States' (2001) 2 RECIEL. Also *see* Jorge E Viñuales, 'Amicus Intervention in Investor-State Arbitration' (2006) 61 Dispute Resolution Journal 72.

[45] NAFTA FTC Statement on non-disputing party participation (amicus curiae) (7 October 2003).

possess the “substantive status, powers or privileges of a disputing party”,[46] however, as detailed in Chapters VI and VII, non-disputing party submissions under NAFTA Article 1128 have both increased in frequency and in impact.[47]

In addition, states might use their rights to denounce treaties as a strategy by utilizing termination provisions in respective IIAs. For instance, the discontent in Latin America with ITA judgments rendered under the auspices of ICSID, has motivated states including Bolivia, Nicaragua, Venezuela and Ecuador to take steps towards dismantling the ITA system. Bolivia withdrew from the ICSID Convention in 2007. Ecuador and Venezuela denounced the Convention in 2009 and 2012 respectively. All three countries have terminated some of their BITs: Bolivia gave notice to terminate its BIT with the US in 2011. Venezuela gave notice to terminate its BIT with the Netherlands in 2008. Indonesia expressed its intention to terminate more than 60 BITs it had entered into, claiming that ITA “allow[s] disgruntled foreign investors to bypass local courts and seek compensation in international tribunals”. South Africa has given notice to terminate its BITs with Germany, the Netherlands, Switzerland and Spain as part of its “planned review of investment treaties”.[48]

IV.2. Extra-Constitutive Limitations

Above I reviewed some, if not the most important, institutional constraints with which non-disputing parties may exercise some political influence on the behaviour of the ITA tribunal. On the other hand, political influences, as such, might go well beyond these

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[46] United Parcel Service of America Inc. v. Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001, UNCITRAL at para. 39.

[47] *See* e.g. Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016.

[48] Ben Bland and Shawn Donnan, Indonesia to terminate more than 60 bilateral investment treaties, Financial Times (26 March 2014), available at <http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html#axzz31PShRjnT> last accessed on 14 September 2015; Nicholas Peacock and Hannah Ambrose, South Africa terminates its bilateral investment treaty with Spain: second BIT terminated, as part of South Africa’s planned review of its investment treaties, Herbert Smith Freehills (21 August 2013), available at <http://www.lexology.com/library/detail.aspx?g=daf93855-71f9-425e-92d3-5368d104f8ff> last accessed on 14 September 2015; Robert Hunter, South Africa terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland, available at <http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/> last accessed on 14 September 2015. See Marco E Schnabl and Julie Bédard, 'The Wrong Kind of ‘Interesting'' (2007) The National Law Journal. Also see Charles N. Brower and Stephan Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law' (2009) 9 Chi J Int'l L 471 at 475.

formal limits set by the constitutive and non-constitutive institutions. Actors might lobby in order to influence decisions by States and awards by ITA tribunals and might publish to "gain advantage in a particular contest",[49] where issues of public interest are at stake.[50] Academic scholars might take positions (that are at times political) in discussing problems surrounding the ITA.[51] States, on the other hand, might take extra-legal actions such as non-compliance[52] by ignoring, over-ruling or rejecting decisions.[53] Political interactions

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[49] David D Caron, 'Towards a Political Theory of International Courts and Tribunals' at 412.

[50] T. W. Waelde, 'Investment Arbitration and Sustainable Development: Good Intentions - or Effective Results?' (December 2006) 3 Transnational Dispute Management ft. 3 "[…] is [a] deeply flawed system [that] currently operates to the benefit of corrupt companies and individuals providing them with almost complete security for their ill-gotten assets. So the dispossessed citizens of countries like the Democratic Republic of the Congo, whose interests are not served by their political leaders, should be 'realistic' and not expect assistance from the World Bank and the OECD governments that have supported the 'transition to peace' to revoke or revise mining contracts that have been improperly obtained and which are profoundly unbalanced. The companies should be free to pocket the proceeds of these corrupt deals while home governments can save their consciences by putting money into aid projects to promote good governance". *See* also Corporate Europe Observatory and the Transnational Institute, 'Profiting from Injustice', available at <www.tni.org/profitingfrominjustice.pdf> last accessed on 14 September 2015 in which it was claimed that ITA tribunals "tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias".

[51] Osgoode Hall Law School, 'Public Statement on the International Investment Regime', available at: <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/> last accessed on 14 September 2015. The Statement openly calls states to oppose and not comply with their commitments under international law noting that: "There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose".

[52] Argentina had not complied with judgements including *CMS, Azurix, Enron, Sempra* and *Vivendi*. It recently settled *CMS, Azurix, Vivendi, Continental Casualty*, and *National Grid*. *See* Charles B Rosenberg, 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2013) 44 Geo J Int'l L 503; 'Argentina settles five investment treaty awards', Allen & Overy, 7 November 2013 available at <http://www.allenovery.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx> last accessed on 14 September 2017. Bolivia has not paid any judgment before January 2014. Alison Ross, Bolivia pays highest ever settlement to foreign investor, Global Arbitration Review (GAR), 8 January 2015: "Bolivia has paid Pan American Energy US$357 million in compensation for the 2009 expropriation of its natural gas unit Chaco, following a settlement agreement signed in the presidential palace in La Paz". In Venezuela, late Hugo Chavez stated that Venezuela would not honour the judgments of ITA tribunals, available at <http://www.cbsnews.com/news/chavez-venezuela-wont-honor-arbitration-body/> last accessed on 14 September 2017. Venezuela further followed an aggressive political agenda against the ITA system, even inaccurately claiming that ITA tribunals "ruled 232 times in favour of transnational interests out of the 234 cases filed throughout the history". Sergey Ripinsky, 'Venezuela's Withdrawal from ICSID: What It Does and Does Not Achieve' (2012) 13 Investment Treaty News. Non-compliance has also been raised by investors in the enforcement of awards against Congo, Kazakhstan, Liberia, Senegal and Zimbabwe, and according to Rosenberg, Bolivia and Ecuador might follow suit in their remaining cases in ICSID. Rosenberg, 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards'.

[53] Ginsburg, 'Political Constraints on International Courts' at 487.

among stakeholders including States, investors, civil society and academics may influence the process of arbitral decision-making. It has long been argued that ITA is formally established upon constitutive and non-constitutive institutions that ideally "remove investment disputes from the intergovernmental political sphere".[54] However, the alternative understanding of ITA in a broader regime described above would require one to question whether stakeholders interact in isolation from domestic and international politics.[55]

In the light of the political regimes theory, one could argue that tribunals have a sense of duty towards constitutive and non-constitutive institutions of international investment law and, at the same time, they might adjudicate in an attempt to fulfil a particular political mission or role in accordance with the historical context and purpose and the institutional logic of their position. This institutional logic might stem from the institutional dynamics within the tribunal as well as the institutional space of the tribunal.

As discussed earlier, it is the institutional space the ITA Tribunal is in that is at the centre of this work. In looking at the institutional logic of international investment law or the political regime its foundations are constructed on, one should revisit the "structural bias" or "systemic implications" of international investment law introduced in Chapter I above. Through fragmentation of international law special regimes have been created, argued Martti Koskenniemi:

> "[…] the world of legal practice is being sliced up in institutional projects that cater for special audiences with special interests and special ethos. The point of creating such special institutions is precisely to affect the outcomes that are being produced in international world. […] For example, the rise of the bilateral investment treaty has certainly transformed the relationship between the private investor and host state from what it was 20 years ago".[56]

As highlighted, in Chapter I, protection of institutions including private property rights of aliens underlies the political foundations of international investment law. In other

[54] Broches, 'Settlement of Investment Disputes' at 163.
[55] As Martin Shapiro put it: "No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints": Shapiro, *Courts: A Comparative and Political Analysis* at 34.
[56] Koskenniemi, 'The Politics of International Law–20 Years Later' at 65.

words, principally, the specialized regime of international investment law is about the protection and promotion of foreign investments. However, this structural condition could be distorted by various other socio-political factors voiced by, for example, NGOs in relation to the protection of the environment and human rights.[57] In addition to constitutive and non-constitutive institutions highlighted above, such distortions may also emanate from extra-legal interventions by actors involved in the political regime of international investment. It would however be a difficult task to spot such interventions, let alone reveal evidence that could establish causation (such as the "behind the doors" intervention of the US Department of Justice Officials in *Loewen v the USA* – highlighted in Chapter I). As stated in the Introduction, this work rather focuses on the politically motivated interventions on ITA decision-making through constitutive and non-constitutive institutions. Nonetheless, the work will also consider the weight given by the ITA tribunal to the structural bias/"systemic implications" of the particular constitutive institution applicable in the subject dispute.[58]

V. Four Examples: Deciding the Politically Possible?

In order to test the level of politics in play in ITA decision-making, one should consider the political regime of international investment in relation to the applicable IIA and question how ITA decision-making would shape the institutional development of doctrines and rules in international investment law inasmuch as how constitutive/non-constitutive and political institutions would limit or influence decision-making in the ITA.

By undertaking a rigorous task as such, first, one should determine the political regime of the specific constitutive instrument (e.g. NAFTA or the ECT) and explore its peculiar constitutive rules, which allow the ITA Tribunal to assume a role beyond its task to settle

[57] Thomas Walde and Abba Kolo, 'Environmental Regulation, Investment Protection and 'Regulatory Taking'in International Law' (2001) 50 International and Comparative Law Quarterly 811; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 573.

[58] *See* e.g. Ecuador v. United States, Permanent Court of Arbitration, Case No 2012-05, 4 April 2012, Expert Opinion with Respect to Jurisdiction of Professor W. Michael Reisman at para. 26. Professor Reisman points at the systemic implications the ITA tribunal might have to consider: "In treaties made to provide benefits to third parties and, especially, to induce them to adjust their actions in reliance on the effective provision of those benefits, the stability of those expectations is also critical to the fulfilment of the objects and purposes of the treaties concerned. BITs share this object and purpose with human rights treaties".

the dispute at hand. This would be essential to obtain a meaningful outcome from an investigative endeavour as such. In this context, one could consider the involvement of politics and its effects on outcomes in disputes, (i) that take place between parties that are in similar economic positions (for instance the systematic review could be grouped under North-South, North-North, South-South dimensions); (ii) that arise from the violation of same or similar constitutive institutions, and (iii) that have similar factual inquiries into international law. Such groups of cases may include NAFTA Chapter 11 cases; awards related to the 2001 economic crisis in Argentina; or disputes concerning potential conflicts between legal regimes represented by same actors or institutions (for instance EU Law, intra-EU BITs, the TFEU and the ECT).

In the chapters that follow, this work studies NAFTA Chapter 11 decision-making in general and judicial behaviour in interpreting Article 1105 of NAFTA on Minimum Standard of Treatment in particular. Before moving onto the case study, however, I shall first illustrate whether the arguments above have any standing in arbitral practice. Below, I will provide some examples that have received criticism from scholars, aiming to illustrate the politics involved in the ITA decision-making. I will then put forward a hypothesis that will be tested in the remainder of this work. In doing so, this chapter initially explores four arbitral cases, which may, to some extent, show ITA tribunals' susceptibility to decide 'what is politically possible' within their respective broader political regimes. The first two cases are examples from the NAFTA jurisprudence, i.e. *Loewen v the USA* and *Methanex v the USA*, whereas the last two cases were filed under the ECT, i.e. *AES* and *Electrabel* in which the tribunals accepted non-disputing party submissions from the EU on the controversial issue of 'ECT and EU law incompatibility'.

V.1. Loewen v USA

An example of an ITA case in which the ITA tribunal assumed a principal political role might be*Loewen*. The case involved a Canadian funeral services company who had a commercial dispute with its competitor in the US State Court of Mississippi. Loewen claimed that the Court allowed the plaintiff, O'Keefe, to make various discriminatory references to Loewen's foreign nationality and make race and class-based distinctions between the parties. The Court, having refused Loewen's application with regard to the jury to deem O'Keefe's references to nationality, race and class impermissible, awarded

the plaintiff USD 500 million in damages. Loewen was required to secure USD 625 million to appeal the judgement and thus to postpone the enforcement. Under the pressure that its Mississippi assets were to be sold for enforcement, Loewen settled with O'Keefe and agreed to pay USD 175 million.

Subsequently, Loewen initiated arbitration proceedings against the US under the ICSID Convention and Chapter 11 of NAFTA. Loewen claimed that the Mississippi Court, "by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments". Loewen further claimed that "by permitting extensive nationality-based, racial and class-based testimony and counsel comments", the Court violated Article 1105 of NAFTA, which includes a duty of FPS and a right to FET. It submitted that "the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA which bars the uncompensated appropriation of investment of foreign investors" and that the US is "liable for Mississippi's NAFTA breaches under Article 1105".[59]

In June 2003, the Tribunal issued its award and dismissed Loewen's claims. Although the Tribunal determined that the conduct of the Mississippi Court violated the US's obligation under Article 1105 of NAFTA to provide FET[60], it concluded that since Loewen was subject to bankruptcy and reorganization it had lost the right to rely on its Canadian nationality before the award was rendered.[61] Furthermore, according to the Tribunal, Loewen failed to exhaust local remedies, (by not appealing the judgement of the Mississippi Court), and therefore its claim failed to meet requirements of the "principle of finality".[62]

The Tribunal's judgement in *Loewen* has been widely criticized. For one reason, the Tribunal held that the claim lacked jurisdiction after it had decided that it could hear the

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[59] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award, 26 June 2003, ICSID Case No. ARB(AF)/98/3 at paras. 39-40.
[60] *Ibid.* at para. 142.
[61] *Ibid.* at para. 239.
[62] *Ibid.* at para 145.

merits.[63] Secondly, the Tribunal failed to consider commercial peculiarities in the dispute having concluded that Loewen must have exhausted the appeal mechanism despite the USD 625 million bond.[64] A third and serious flaw in the judgement was asserted to be the *obiter dictum*[65], which explained why the Tribunal could not award Loewen damages despite "a manifest injustice as that expression is understood in international law".[66] According to the Tribunal:

> "Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself" (emphasis added)."[67]

According to Jacques Werner, the *obiter* in Loewen proved that "arbitrators [were] playing politics rather than applying the very treaty provisions they are meant to apply".[68] In an OGEMID discussion, Thomas Wälde also criticized the decision asserting, "the tribunal excelled with great efforts at legal imagination in denying the claim".[69] Similarly, Todd Weiler noted: "The arbitrators really put their foot in it – They basically said, 'We'd like to do the right thing but we can't'".[70] One might argue that what stopped the arbitrators from doing 'the right thing' was, in reality, their bounded discretion to protect the political regime of NAFTA.

V.2. Methanex v USA

Another case in which formal and informal political influences by NGOs and states were evident is *Methanex*. The case involved Methanex, a Canadian producer of methanol – a substance that had been used as a component of methyl tertiary butyl ether (MTEB) that

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[63] Todd Weiler comment on OGEMID 6 October 2003, Loewen - "Have you read it?": *"it is quite arguable that a tribunal has no business entertaining a challenge to its jurisdiction as of any other date than the day upon which the arbitration was commenced. It may enter into such considerations later in time, but it must restrict itself to the question of whether it had jurisdiction in the first place on the day that the arbitration commenced"*.

[64] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award at para. 195.

[65] Todd Weiler comment on OGEMID 6 October 2003, Loewen - "Have you read it?"

[66] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award at para. 54.

[67] *Ibid.* at para. 242.

[68] Jacques Werner, 'Does the Loewen Award Endanger the Credibility of the NAFTA Dispute Settlement Mechanism?' (2005) 6 J World Investment & Trade 79 at 81.

[69] Thomas Wälde comment on OGEMID 27 September 2004: CDC v Seychelles award.

[70] Todd Weiler comment on OGEMID 1 March 2004: Loewen v. US (and OGEMID Poll) in US National Law Journal.

increases oxygen in unleaded gasoline. In March 1999, the State of California issued an order to ban the use of MTBE by the end of 2002 because of the contamination in drinking water supplies and therefore health and safety and environmental concerns. Subsequently, Methanex initiated a NAFTA claim against the US arguing that the MTBE ban would be unnecessary had the California State agencies taken the necessary steps to implement and enforce existing underground gasoline storage tank regulations.[71] Methanex claimed that, failing to enforce its domestic environmental laws and regulations, and by implementing plans that would ban the use of MTBE, the US was in breach of its national treatment obligation under Article 1102; treatment of international minimum standard under Article 1105 and its obligation to provide compensation against expropriation under Article 1110 of NAFTA. In total, Methanex claimed USD 970 million from the US including interests and costs.[72]

In August 2005, the Tribunal issued its final award. It dismissed Methanex's national treatment claim under Article 1102, and concluded that "the California MTBE ban did not differentiate between foreign and domestic MTBE producers nor, if it is relevant, did it differentiate between foreign and domestic methanol producers".[73] The Tribunal further overruled the international minimum standard of treatment claim under Article 1105 noting that "Methanex failed […] to establish that the California ban on MTBE was discriminatory or in any way exposed it to sectional or racial prejudice".[74] A novel and, rather, controversial approach was adopted in its interpretation of the compensation for expropriation standard. The Tribunal rejected Methanex's claim with regard to the regulation on the MTBE ban being a measure tantamount to expropriation. The Tribunal held that:

"[…] Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless

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[71] Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Award at para. 83.
[72] *Ibid.* at Preface paras. 1-11.
[73] *Ibid.* at Part IV, Chapter B, para 38.
[74] *Ibid.* at Part IV, Chapter C, para 26.

specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."[75]

While this statement was welcomed by NGO scholars as heroic for providing a novel approach in the consideration of public interest issues such as health and environment,[76] it was also widely criticized for being an erroneous interpretation of the compensation for expropriation standard and international law. According to Markus Perkams, the *obiter* by the Tribunal implied that "as long as no specific commitment has been given to an investor, a bona fide regulation can never be an expropriation. Or in other words, regulations and expropriations are, without any special commitment of the government, mutually exclusive". Perkams argued the Tribunal's position is misleading, given the definition of indirect expropriation in the US Model BIT of 2004, in both NAFTA (*Metalclad, Pope & Talbot, GAMI, Feldman*) and BIT (*Tecmed, CME, CMS*) jurisprudence on the compensation for expropriation standard, in the jurisprudence of the European Court of Human Rights (ECtHR) on regulatory takings and the jurisprudence established by the German federal courts, the US Supreme Court and the European Court of Justice (ECJ) on indirect expropriations. All of which contrast with the interpretation articulated by the *Methanex* Tribunal.[77] Likewise, Professor Christoph Schreuer criticized the award for "quite bluntly" arguing that "a measure, that is taken for a public purpose, is non-discriminatory and is accomplished with due process is not an expropriation but a lawful regulation and hence does not require compensation". His view was that such reasoning could spell the end of protection against regulatory takings since a broad reading of "legitimate public purpose" might subjugate investors to heavy economic consequences arising from radical regulatory measures.[78]

Methanex was adjudicated and concluded in a period of growing discontent over ITA cases under Chapter 11 of NAFTA. Since its inception, investors had brought claims against states challenging regulatory measures implemented on public interest grounds. However, there was particular growth in the number of claims filed against environmental

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[75] *Ibid.* at Part IV, Chapter D, para. 7.

[76] Howard Mann 'Opening the Doors, at least a little: Comment on the Amicus decision in Methanex v. United States' RECIEL 10 (2, 2001) at 241-245.

[77] Methanex - Erroneus on Expropriation? (an OGEMID discussion).

[78] Comment by Christoph Schreuer on OGEMID 28 November 2005, Methanex - erroneous on expropriation? From Prof Schreuer.

and health and safety measures. By March 2001, the number of cases opposing environment and health and safety regulations – only – had reached to 10 (out of a total of 17). Both the civil society and NAFTA parties were particularly critical of tribunals' broad interpretations of the FET and compensation against expropriation standards in *Metalclad* and *S.D. Myers* and anxious that NAFTA tribunals were disregarding environmental and sustainability related objectives put forward in the preamble to the Treaty.[79] Furthermore, Methanex's claim was amongst the highest they had considered until then. Despite the environmental concerns and high value of the compensation requested, the early stages of the ITA proceedings were held in privacy, reinforcing political opposition by civil society and states.[80] Activists from NGOs and political journalists expressed concern that the way the NAFTA investment chapter had worked was "seriously wrong"[81] for it enabled foreign investors bringing claims against public interest measures. NGOs and non-disputing state parties, on the other hand, were involved in the proceedings through constitutive institutions. The International Institute for Sustainable Development (IISD) and Earth Justice submitted *amicus curiae* briefs in March 2004 after a legal and political struggle of involvement that was first formulated in the IISD submission of August 2000. Among others, NGOs took the position that the MTBE ban in California was a public health measure and therefore was protected under 'police powers' – a concept, which provides that *legitimate* and *bona fide* regulation in the public interest would not amount to a measure tantamount to expropriation.[82] NGOs' position was formally supported by both the US government in its submissions and the Canadian government in its participation under Article 1128 of NAFTA.[83]

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[79] International Institute for Sustainable Development and World Wildlife Fund, *Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights* (International Institute for Sustainable Development= Institut International du Développement Durable 2001) at 15.
[80] Sanford E Gaines, 'Methanex Corp. v. United States' (2006) 100 The American Journal of International Law 683 at 683-9.
[81] Cat Lazaroff, 'Billion Dollar NAFTA Challenge to California MTBE Ban', 11 September 2000, available at <http://www.ens-newswire.com/ens/sep2000/2000-09-11-07.asp> last accessed on 17 May 2017; Mary Bottari, 'NAFTA's Investor "Rights" A Corporate Dream, A Citizen Nightmare, The Multinational Monitor, April 2001, Vol 22, No 4, available at <http://multinationalmonitor.org/mm2001/01april/corp1.html> last accessed on 17 May 2017.
[82] Andrew Newcombe, 'The Boundaries of Regulatory Expropriation in International Law' (2005) 20 ICSID Review.
[83] Howard Mann, 'Opening the Doors, at Least a Little: Comment on the Amicus Decision in Methanex V. United States' (2001) 10 Review of European, Comparative & International Environmental Law 241 at 241-5.

Some scholars argued that the MTBE regulation fell within the limits of police power measures,[84] whereas, according to others, the *Methanex* judgement pushed the limits of legal discourse in its interpretation of compensation of the expropriation standard.[85] In either case, be it the "police powers" principle or not, the tribunal refrained from interpreting Article 1110 in a way that would cover non-discriminatory and *bona fide* regulatory actions, diverging from earlier NAFTA precedent. One could question whether, amidst rising discontent towards NAFTA Chapter 11 disputes, the tribunal acted in a way that would re-establish the integrity and credibility of Chapter 11 in the eyes of civil society and NAFTA parties and thus protect the political regime of Chapter 11.

V.3. AES & Electrabel v Hungary

Comparably recent cases that involved the politically sensitive issue of 'conflict' between ECT and EU Law are *AES (2010)* and *Electrabel (2012)*. Both *AES* and *Electrabel* were pursued in the ICSID under the ECT and both claims concerned regulatory measures taken by the Hungarian government in its energy power sector. In *AES*, the investors, AES Summit Generation Limited and AES-Tisza Eromu Kft., challenged Hungary's re-introduction of administrative (and thus regulated) pricing in electricity generation. This was the result of both the administrative pricing and fixed tariffs under Power Purchase Agreements (PPAs) being abolished under the EU Third Energy Package and EU State Aid regulations after Hungary acceded to the EU in 2004. Investors argued that the re-introduction of administrative pricing through the issuing of the Price Decrees was inconsistent with its prior legislative regime established under the 2001 Electricity Act and thus violated the ECT's FET, national treatment, FPS and compensation for expropriation standards. In *Electrabel*, on the other hand, Electrabel S.A. did not only challenge the re-introduction of administrative pricing but, among others, Hungary's alleged failure to protect the investor's rights under the PPA after its accession to the EU. According to the investor, re-regulation of tariffs in electricity generation in 2006, the termination of the PPA in 2008 and the Hungarian government's failure to justly

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[84] Howard Mann, *The Final Decision in Methanex v. United States: Some New Wine in Some New Bottles* (International Institute for Sustainable Development – Institut international du développement durable 2005) available at <www.iisd.org/pdf/2005/commentary_methanex.pdf> last accessed on 14 September 2015.

[85] *See* also Thomas Wälde comment on OGEMID 2 May 2006: Human rights and investment disputes, water and police.

compensate Electrabel or allow recovery for its stranded costs, constituted breaches of the ECT under standards including the FET and compensation for expropriation.

The *Electrabel* Tribunal held that "[The EU] is a Contracting Party to the ECT in which it played from the outset a leading role; and, moreover, that the European Commission's perspective on this case is not the same as the Respondent's and still less that of the Claimant". Therefore, in both cases, the EU was allowed *amicus curiae* submissions as a non-disputing party since it had "much more than a significant interest" in the proceedings.[86] The *amicus* articulated both the jurisdictional and substantive positions of the EU. According to the EU, investors' claims with regard to termination of the PPAs should have been brought against the European Community, not against Hungary, since this is an "intra-EU dispute" falling within the exclusive competence of the EU courts.[87] In its substantive submissions, the EU further argued that the Tribunals should apply EU law as international law in the context of the PPA termination claims and, in the contrary, should adopt harmonious interpretation of the ECT and EU law and determine that there is no conflict between the two.[88]

In *AES*, the Tribunal acknowledged, "the points developed in [EU's] *amicus curiae* brief in its deliberations". However, according to the Tribunal, this was exclusively an ECT claim[89] and therefore it was not subject to the jurisdictional requirements of EU law. Having found that it had jurisdiction in the dispute, the Tribunal dismissed investors' claims on the merits concluding that Hungary's regulatory actions did not violate the ECT. In reaching its conclusion, the Tribunal interpreted substantive principals of investment treaty law and did not include EU law in its analysis. According to Professor Bermann, the Tribunal was "plainly conscious of the dissonance between the EU law and investor protection law", however by not including EU law in its analysis, and furthermore by not addressing to the issues surrounding the EU law-investment treaty law

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[86] Electrabel S.A. v. Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ICSID Case No. ARB/07/19 at Part IV at 28, para. 4.92.
[87] *Ibid.* at Part V at 3, para. 5.10.
[88] *Ibid.* at Part IV at 27-35, Paras. 4.89-4.110.
[89] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, Award, 23 September 2010, ICSID Case No. ARB/07/22 at para. 8.2.

interaction raised in the EU *amicus*, it “avoided having to favour one legal order over the other”.[90]

In *Electrabel*, similar to *AES*, the Tribunal concluded that it has jurisdiction and rejected the EU’s submission noting that (i) “there exist no relevant inconsistency between EU law, the ECT and the ICSID Convention”,[91] (ii) the investor is not a “Community investor, bringing a case against the Community before an international arbitration tribunal against a Community measure”[92] and (iii) the Tribunal is established under the ECT and ICSID Convention which “exclude any other remedy”.[93] Whilst the Tribunal did not substantially diverge from prior awards with similar facts or issues, compared to its predecessors, it provided a lengthy *obiter* in discussing the issue of incompatibility between EU law and investment treaty law. It also analysed the question of hierarchy between the two legal systems. In its conclusions, the Tribunal suggested that in the event of an incompatibility between EU law and investment treaty law, “the ECT would apply in relations between EU Members and Non-EU Members but that EU law would prevail over the ECT in relations between EU Members themselves (including Belgium and [Hungary])”.[94] Thus, “EU law would prevail over the ECT’s substantive protections and that the ECT could not apply inconsistently with EU law to such a national’s claim against an EU Member State”.[95]

AES and *Electrabel* are two examples of cases that brought the issue of incompatibility claims between EU law and ITA system to the surface. Particularly after the 2004 enlargement of the EU, pre-EU commitments of newly acceding states, including the Czech Republic and Hungary, have become problematic. Pricing and tariff commitments available to investors under PPAs were abolished, and post-EU regulations have been increasingly challenged before ITA tribunals. Furthermore, with the inclusion of foreign direct investment in the EU common commercial policy under Article 207 of the TFEU

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[90] George A Bermann, 'Navigating EU Law and the Law of International Arbitration' (2012) 28 Arbitration International 397 at 424.

[91] Electrabel S.A. v. Republic of Hungary, Decision on Jurisdiction, Applicable Law and Liability, at Part V, page 15, para. 5.32

[92] *Ibid.* at Part V Page 15, para. 5.33

[93] *Ibid.* at Part V Page 16, para. 5.37

[94] *Ibid.* at Part IV, Pages 60-1, para. 4.187

[95] *Ibid.* at Part IV, Page 62, para. 4.189.

in 2007, the competence of ITA tribunals in handling such intra-EU disputes (as the EU recalls) have become controversial. The potential threat of conflict between EU law and international investment law has subjected tribunals dealing with intra-EU disputes to increasing pressure by the EC, NGOs, states as well as scholars and international lawyers. One could argue that, as such, political influences on tribunals affected the outcome of cases. Professor George Bermann argued that the Tribunal developed an "accommodation technique". In order to resolve tensions between two legal systems, tribunals "interpret[ed] one or both of two potentially conflicting norms in such a way as to dispel an apparent contradiction between them".[96]

In *AES*, the Tribunal avoided further conflict between two legal systems by not addressing the alleged incompatibility issues. In *Electrabel*, whilst the Tribunal held that there was no material inconsistency between the two, it further suggested that had there been an inconsistency, EU law would prevail in intra-EU disputes. According to Professor Bermann, this was a "remarkable concession on the part of the Tribunal and one that none of the other Tribunals hearing these cases has been prepared to make".[97] By addressing the issue of hierarchy, the Tribunal established an analysis that could guide other tribunals in resolving the EU law-investment treaty law tension. It also "reinforce[d] the inclination that Member State courts probably already have to favour EU law even if that means not giving effect to an investment arbitral award".[98]

In light of these, one could also question whether both Tribunals acted in a bounded space of institutional framework in deciding that there is no inconsistency between the two legal systems and that EU law prevails in intra-EU disputes. It is indeed possible that the political regime established by the TFEU, the EU Internal Market, the ECT and intra EU BITs had political implications on these cases.

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[96] Bermann, 'Navigating EU Law and the Law of International Arbitration' at 428.

[97] George Berrman comment on OGEMID discussion 23 April 2013: EU Law and Investment Treaty Arbitration: Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19 - Applicable law and jurisdictional issues.

[98] *Ibid.*

VI. Hypotheses

In the *Epilogue* to the re-printed *From Apology to Utopia*, Professor Koskenniemi discusses how structural conditions determine how international law is practiced. The international lawyer, argues Koskenniemi, is bound to follow the "grammar" of international legal argumentation. In other words, in order to be heard, an international lawyer should follow certain normative and argumentative patterns. At the same time, the international lawyer should practice within the confines of economic, socio-political and professional structures. She does not only need to be competent in formal legal reasoning, but should also be able to operate in a social environment that determines how the argument can be normatively framed. Only then, the international lawyer could be competent in *the politics of international law* or, according to this work, in *judicial politics*.[99]

Albeit from a different theoretical perspective, this work also considers the influence of the structures external to the normative grammar of international investment law. Above, I introduced an alternative understanding of the ITA Tribunal, whereby it may assume a principal political role in accommodating different political interests between stakeholders involved in the political regime of international investment. In doing so, the ITA Tribunal would be limited to constitutive, non-constitutive and extra-constitutive institutional limitations described above. Particularly, the constitutive and non-constitutive institutional limitations would shape and influence the vocabulary the ITA Tribunal chooses, since the ITA Tribunal would, at the same time, be bound to provide carefully reasoned opinions in order to present an image consistent with popular and professional expectations of neutrality.

The above examples provide some examples in which the ITA Tribunal is subject to constitutive, non-constitutive and extra-constitutive limitations. How the tribunals in these cases behaved provide fertile ground for further research that the constitutive and non-constitutive constraints provide a framework within which a tribunal may oscillate

[99] Werner, Wouter and de Hoon, Marieke and Galan, Alexis, "Introduction", in Wouter Werner, Marieke de Hoon and Alexis Galán (eds) *The Law of International Lawyers: Reading Martti Koskenniemi,* (Cambridge University Press, 2017) at 5. M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press, 2006) at 572-6.

between law and politics, drawing meaning from the larger political regime in which they are embedded.

In looking into whether there is further correlation between the behaviour of ITA Tribunals and politics, the following hypotheses will be put into test in Chapters V and VII:

1. Politics is not only present in the making of treaties and the concrete behaviour of actors (states) but also in ITA decision-making.
2. The ITA Tribunal may assume a principal political role in accommodating the requirements of the constitutive and non-constitutive institutions and the requirements of the broader political regime in which it operates. Whilst the requirements of the broader political regime maybe imposed by the stakeholders involved in the regime, politics might also emanate from the political foundations on which the international investment regime is established. Politics might be internalized through particular constitutive and non-constitutive institutions embedded in the political regime of international investment by the ITA Tribunal.

It is believed that an investigation that focuses on the normative 'grammar' used in the arbitral awards could provide evidence that there is correlation between politics and the ITA decision-making and that protection of foreign investments under international law is *not only a normative exercise but also a political one*. It could show that, at times, the ITA Tribunal does assume a principal political role, illustrating its *competency in judicial politics*.

PART B

So far, I have reviewed methods and theories of judicial behaviour in the American political science scholarship and discussed how the political jurisprudence and political regimes approaches could be employed in analysing judicial behaviour in ITA. I characterized international investment law as an institution embedded in a larger political regime and that its practice carries both legal and political features. I argued that the ITA Tribunal may assume a principal political role in capturing the political contingency of international investment law under influence by the stakeholders, at the same time establishing a 'grammar' that responds to popular and professional expectations of neutrality. (CHAPTERS II and IV).

Within this framework, decision-making under Chapter 11 of the North American Free Trade Agreement (NAFTA) is studied in the chapters that follow. Chapter VII, in particular, investigates the interpretation of the Fair and Equitable Treatment (FET) standard embedded in Article 1105 of NAFTA on the Minimum Standard of Treatment. Contrary to the behaviouralist (Franck 2007, 2009), attitudinalist (Waibel and Wu 2011) and rational choice (Langford and Behn 2015) assertions, this study constructs its investigation on decision-making on the political jurisprudence (Shapiro 1964) and political regimes (Clayton and May 1999) approaches that fall within the confines of historical interpretivist institutionalism (Smith 1988). Based on these scholars' perception of new institutionalism and normative jurisprudence, this study examines institutions that are embedded in the constitution of NAFTA (constitutive institutions) and the larger political regime from which these legal institutions draw meaning via interpretation and application by Chapter 11 tribunals.

CHAPTER V

THE POLITICAL REGIME OF DECISION-MAKING UNDER NAFTA CHAPTER 11

I. Introduction to the North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA)[1] is one of the few multinational free trade agreements (FTAs) concluded amongst developed and developing countries, i.e. the USA, Canada and Mexico.[2] It originated from the Canada-USA FTA of 1988[3] and was negotiated simultaneously with the Agreement Establishing the Word Trade Organization (WTO) of 1994[4] which similarly aimed to further liberalize and reduce barriers to trade. To the USA, the inclusion of Mexico in the free trade negotiations was essential to construct a global "liberalized American identity on trade".[5] Respectively, NAFTA was characterized as a free trade pact that established "a common market" for intellectual property rights, energy policy, foreign investments and transportation in the Northern American hemisphere.[6] It maintained the American liberal ideals that dominated the 19th century, putting strong emphasis on trade liberalization and the market throughout the text of the agreement.

Inasmuch as it is subject of criticism in the current political environment, NAFTA was concluded and came into force under fierce opposition by labour unions, globalization critiques and environmental groups. In the USA, during its negotiation, even the Democratic legislators were critical of the labour and environmental provisions of the agreement, cautioning the Democratic Presidency "not to submit to Congress any trade

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[1] The North American Free Trade Agreement (1994), full text available at <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> last accessed on 3 November 2017.

[2] Another recent example is the Comprehensive Economic and Trade Agreement (CETA) adopted by the Council and signed at the EU-Canada Summit on 30 October 2016, full text available at < http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> last accessed on 3 November 2017.

[3] The Canada – USA Free Trade Agreement (1988) superseded by NAFTA, full text available at < http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf> last accessed on 3 November 2017.

[4] Agreement Establishing the World Trade Organization (1994), full text available at < https://www.wto.org/english/docs_e/legal_e/04-wto.pdf> last accessed on 3 November 2017.

[5] J.S. Lantis, The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective (Oxford: OUP, 2008) at 40.

[6] Hufbauer and Schott, NAFTA: An Assessment at 1.

agreement that does not preserve existing [national] environmental, health and labour laws". Against a background of political controversy, the Clinton administration took an active role to gain support for the ratification of the treaty in Congress, pushing Canada and Mexico to conclude side agreements in an attempt to address the sensitivities of the domestic opposition on environmental policies, labour protections and import surges.[7] A similar, but somewhat milder, opposition was experienced in Canada under the Conservative Mulroney administration. Labour, and environmental organizations and corporations argued that, as experienced with the Canada-USA FTA, NAFTA would cause significant economic problems. Some strong provincial governments, i.e. Ontario and Quebec, voiced their concerns that the treaty would cause Canadians to loose manufacturing jobs.[8]

On the other hand, for Mexico, NAFTA would be an instrument that could "facilitate Mexico's socioeconomic development".[9] The-then President Carlos Salinas believed that NAFTA would institute investment liberalization in Mexico, increase its potential to attract foreign investments in the Northern American hemisphere, eventually aiding it to tackle the economic hardships it faced (which eventually led to the 1994-95 financial crisis causing 52% inflation and -6.49% economic growth in 1995).[10] Also with the free trade arrangements, Mexico would benefit from preferential access to the US markets which, until then, only allowed limited access – an outcome of the resurgent US protectionism.[11] Despite Salinas's efforts to market NAFTA to the Mexican community, however, NAFTA was not entirely popular. The Ejercito Zapatista de Liberacion Nacional (EZLN) or Zapatistas of Chiapas even staged an uprising against the Partido Revolucionario Institucional (PRI) on 1 January 1994, claiming that NAFTA is "the death certificate for the Indian people of Mexico, who are dispensable for the government of

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[7] Lantis, The Life and Death of International Treaties: Double-Edged Diplomacy and the Politics of Ratification in Comparative Perspective at 36. The side agreements, the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labour Cooperation (NAALC), were concluded on 14 September 1993, right before NAFTA entered into force on 1 January 1994.

[8] *Ibid.* at 40-7.

[9] Howard Mann, 'Private Rights, Public Problems: A Guide to NAFTA's Controversial Chapter on Investor Rights' (2001) International Institute for Sustainable Development and World Wildlife Fund at 7.

[10] Strom C Thacker, 'NAFTA Coalitions and the Political Viability of Neoliberalism in Mexico' (1999) 41 Journal of Interamerican Studies and World Affairs 57 at 78-9.

[11] Francisco Nogales, 'The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment' (2010) 8 Annual Survey of International & Comparative Law 6 at 100.

Carlos Salinas de Gortari".[12] Economists would warn against the uneven distributive effects of economic regionalism in North America as there was a significant asymmetry of development between the technologically advanced US agriculture sector and relatively underdeveloped Chiapas farmers. All in all, despite its political risks at the time, Salinas was committed to the economic benefits that NAFTA could have brought.[13]

Whereas NAFTA received intense resistance for its potential effects on environment, health, labour and free trade regulations, Chapter 11 of NAFTA on Investments and the binding dispute resolution procedure hereunder received little or no individual criticism during the course of its negotiation. Chapter 11 negotiations were primarily led by the USA. Concerned about the investment environment in Mexico (constraints on investment access and unlawful expropriation of business assets), the US negotiators put particular importance on Chapter 11. In order to promote foreign investment, Mexican officials supported Chapter 11 provisions, albeit historical inconsistent with Mexico's policies to protect its right to regulate.[14]

One should also note that Chapter 11 was drafted at a time the international community had little knowledge as to the broad protections the ITA regime had to offer foreign investments.[15] Although, as early as 1999, some did argue that Chapter 11 was the "Bill of Rights for transnational corporations", enabling them to challenge "*bona fide*, non-discriminatory public health and environmental regulations",[16] at the time of its conclusion, it was premature to expect public opposition on a topic that was still obscure. According to Todd Weiler, one had to wait for a "tough case" to arise in order to comprehend what the substantive provisions of Chapter 11 actually meant – "a case where protection of health and/or the environment appears to directly conflict with economic

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[12] Neil Harvey, 'Rebellion in Chiapas: Rural Reforms and Popular Struggle' (1995) 16 Third World Quarterly 39 at 39.

[13] *Ibid.* at 44-7.

[14] Nogales, 'The NAFTA Environmental Framework, Chapter 11 Investment Provisions, and the Environment' at 100-1.

[15] For instance, the-then Senator John Kerry stated: "When we debated NAFTA, not a single word was uttered in discussing Chapter 11. Why? Because we didn't know how this provision would play out. No one really knew just how high the stakes would get". *See* Adam Liptak, 'Review of US Rulings by NAFTA Tribunals Stirs Worries' (18 April 2004) NY TIMES at A20.

[16] Chris Tollefson, 'Games without Frontiers: Investor Claims and Citizen Submissions under the NAFTA Regime' (2002) 27 Yale J Int'l L 141 at 159.

efficiency and the protection of investment rights".[17] However, a discontent surfaced even before the submission of the first such "tough" Chapter 11 case.

As will further be investigated in Chapter VII, the growing number of disputes in the USA-Canada context, amongst the most contentious being *Loewen*[18] and *Metalclad,*[19] the Tribunal's interpretation of Chapter 11 provisions instigated a political backlash against the ITA regime under NAFTA. Considering that the USA-Canada FTA, the predecessor of NAFTA, did not include an ITA procedure (in its Chapter 16 on dispute resolution),[20] it is beyond doubt that Chapter 11 was aimed at Mexico – a country, according to Jeffery Atik, that "had demonstrated an oscillating ambivalence towards US investment".[21] Despite its original intention that Chapter 11 was imposed as an "asymmetric obligation" on Mexico,[22] the increase in the number of challenges to the US and Canadian measures by investors was considered a betrayal to the original bargain, "whereby [the USA and Canada], notwithstanding the formal mutuality of obligations, were entitled to immunity".[23]

The political regime of international investment under NAFTA thus suggests that Chapter 11 (i) was negotiated as an asymmetrical obligation against Mexico, whereby Canada and the USA would be entitled to immunity. Whilst not directly related to Chapter 11, NAFTA negotiations also hinted at the discontent on (ii) NAFTA's impact on the Parties' sovereign rights to regulate on issues of environment and free trade. These two pillars of the political regime of international investment under NAFTA would later cause significant shifts in the investment protection agreement programmes of the USA and Canada. However, the political regimes approach also suggests that these two pillars have

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[17] T. Weiler, 'Interpreting Substantive Obligations in Relation to Health and Safety Issues' in T. Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Brill Nijhoff, 2004) at 107.
[18] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Decision on Jurisdiction, 5 January 2001, ICSID Case No. ARB(AF)/98/3; Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award, 23 June 2003, ICSID Case No. ARB(AF)/98/3.
[19] Metalclad Corp v United Mexican States, Award, 30 August 2000, ICSID Case No. ARB(AF)/97/1.
[20] USA-Canada FTA (1988) Chapter 16 *supra* note 3.
[21] Jeffery Atik, 'Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process' in T. Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Brill Nijhoff, 2004) at 130.
[22] Jose E Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1996) 28 U Miami Inter-Am L Rev 303.
[23] Atik, 'Legitimacy, Transparency and Ngo Participation in the NAFTA Chapter 11 Process' at 140.

had impacts on the behaviour of Chapter 11 tribunals and it is the latter that this work questions, what the role of the two pillars of the NAFTA's investment regime have been in judicial decision-making under Chapter 11.

I shall address this question in Chapter 11 by investigating the interpretation and application of the normative 'grammar' of the Minimum Standard of Treatment provision under Article 1105. Before moving to this study in Chapter VII, however, one should discuss the fundamentals of institutional constraints on ITA decision-making under NAFTA Chapter 11. Drawing on the theoretical assertions of Clayton and May[24] as well as Martin Shapiro[25], one could hypothesize that these two pillars of the political regime of NAFTA could be accommodated through normative provisions or, in other words, constitutive institutions of NAFTA.

In setting the scene, this chapter first elaborates some of its findings in the Introduction, briefly discussing the political regime of international investment in light of global political economics. Subsequently, it explores the political regime of NAFTA and its potential relation to judicial behaviour in Chapter 11 tribunals. Last, but not least, the Chapter describes the scope of Chapter 11 and the constitutive institutions of NAFTA that might be utilized to accommodate the two pillars of the political regime of international investment, namely asymmetric obligations and concerns relating to regulation of the environment and free trade.

II. The Political Regime of International Investment: NAFTA in Context

II.1. Global Political Economics and the Changing Scope of the Constitutive Institutions

As discussed in the Introduction, since the global political economic order has shifted from economic nationalism to economic liberalism, the international investment regime has adapted itself towards instruments that embody less sovereign intrusion in the regulation of cross-border investment flows. Whilst the number of IIAs had steadily increased after World War II, it was not until the collapse of the Soviet Union and the transformation of the CIS countries from socialism to free market economies that IIAs

[24] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions'.
[25] Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence.*

with ITA provisions proliferated in number. The substance of these IIAs, or in other words, substantive provisions of protection, reflected the liberal ideals of the era: "investment neutrality, investment security and market facilitation".[26]

These liberal principles, however, have gradually transformed to respond to the increasing control of the state through regulation in markets. With the rise of globalization, what started as the 'minimum intrusion of the sovereign state' has left its place to the "market state"[27] or the 'regulatory state'.[28] On the other hand, economic crises, namely the Argentine crisis of 2001 and the 2008-2009 credit recession as well as environmental and human rights concerns led to the rise of the "return of the state" by the 2010s.[29] These shifts have been the inevitable consequence of the struggle of power between the state and the market.

One might argue that the consequences of such developments in global political economics on the international investment regime have been two-fold. First, sovereign protective IIA provisions have gradually replaced those provisions that were expansive towards private interests. A good example is the FET standard, which has been criticized for its elusiveness and for giving effect to greater protection for foreign investments. Particularly, in the US Model BIT programme, the 2004 Model BIT introduced more regulatory discretion for the parties of the BIT compared to its predecessor in 1994, providing guidance for interpreting substantive provisions including the FET standard.[30] Subsequently, the 2012 US Model BIT curtailed the scope of the FET, limiting it to the customary international law minimum standard of treatment of aliens. Whilst the "return of the state" in the US BIT programme was certainly a reaction to the NAFTA ITA

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[26] Kenneth J Vandevelde, 'The Political Economy of a Bilateral Investment Treaty' (1998) American Journal of International Law 621 at 629.
[27] P. Bobbitt, *The Shield of Achilles: War, Peace, and the Course of History* (Knopf Doubleday Publishing Group, 2007)
[28] G. Majone, 'The Rise of the Regulatory State in Europe' (1994) West European Politics 77; G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) Journal of Public Policy 139.
[29] A. Musacchio and F. Flores-Macias, 'The Return of State-Owned Enterprises' (2009), available at <http://hir.harvard.edu/the-return-of-state-owned-enterprises?page=0,0> last accessed on 15 June 2016.
[30] Kenneth J. Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 UC Davis J Int'l L & Pol'y 157; Vandevelde, 'The Bilateral Investment Treaty Program of the United States'.

practice, as well as an effort to pursue a consistent policy with the US FTAs,[31] it was also an act of counterbalancing against deregulation and liberalisation.[32]

II.2. The Political Regime of NAFTA and Judicial Behaviour

Inasmuch as global political economics influenced the drafting of sovereign protective IIA provisions, it has also motivated a change in the 'structural bias'[33] embedded in the international investment regime from 'expansiveness towards private interests' to 'greater adherence towards sovereign regulatory powers'. This shift might not only have an impact on the codification of substantive provisions of protection in IIAs but also influenced the behaviour of ITA tribunals. Whilst stakeholders involved in the political regime of international investment have taken constitutive ways via normative provisions in pursuing their interests in Chapter 11 decision-making, they have also made an impact on the political regime of NAFTA, which, in turn, may inform judicial behaviour in Chapter 11 tribunals.

The political regime in which the investment agreement is embedded may impact the judicial behaviour of the ITA Tribunal when interpreting and applying a particular substantive provision of investment protection on the facts of the case. According to the political regimes approach, the ITA Tribunal "may believe that individual legal institutions are themselves embedded within, and draw meaning from, the larger political regime".[34] This larger political regime for international investment could also be drawn from the structural bias of international investment law which, as argued above, has shifted from 'greater protection for private investments' to 'greater adherence towards sovereign regulatory powers' within the last two decades.

The question is then whether Chapter 11 tribunals have been giving greater resort to conceptions of international law that require judicial sensitivity to environment, human rights, sovereignty, democracy etc. in line with the shifting grounds of global political economics. For instance, do tribunals take into account the larger contextual framework,

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[31] Vandevelde, 'A Comparison of the 2004 and 1994 Us Model BITs: Rebalancing Investor and Host Country Interests'.

[32] Jose E. Alvarez, 'The Return of the State' (2011) 20 Minnesota Journal of International Law 223.

[33] Koskenniemi, 'The Politics of International Law–20 Years Later'.

[34] Clayton and May, 'A Political Regimes Approach to the Analysis of Legal Decisions' at 234-5.

namely the political regime of international investment, when giving meaning to a particular substantive provision of Chapter 11, even if that provision of NAFTA does not explicitly refer to conceptions such as sovereignty or democracy?

The existence of such a larger contextual framework was discussed by the *Glamis Gold*[35] Tribunal in length. In its award dated 8 June 2009, the Tribunal, having noted its case-specific mandate, characterized Chapter 11 of the NAFTA as "a significant public system of private investment protection". Therefore, in the view of the Tribunal, its "case-specific mandate is not a license to ignore systemic implications" which would require the Tribunal to render "its case specific decision with sensitivity to the position of future tribunals […] and the ultimate integrity of Chapter 11, the Tribunal continued, "lies upon this contextual framework and "a modicum of awareness of [each NAFTA tribunal] for each other and the system as a whole".[36]

One might (and some did) criticize *Glamis Gold* Tribunal's deliberation regarding the Chapter 11 Tribunal's task since it detached itself from its case-specific mandate.[37] However, one might also argue that the Tribunal's observations were in effect stating the obvious. Whilst the Chapter 11 Tribunal's mandate is indeed limited to settling a particular dispute as per Article 1136 of NAFTA, according to Professor Michael Reisman, it would not be difficult to find justifications to empower the Chapter 11 Tribunal in exercising "a concomitant role and, perforce, to doing it with full consideration of systemic implications". Where formal international law-making, Reisman continues, is "notoriously slow and difficult" and perhaps "dysfunctional", judicial law-making, despite its lack of democratic legitimacy, might be the "only alternative".[38] In *Glamis Gold*, the Tribunal, albeit inconsistently, seems to have assumed this political function by endorsing the place of the contextual framework, namely the political regime of international investment, in judicial decision-making. Perhaps, in an attempt to strengthen democratic legitimacy of its position, the Tribunal also pointed at

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[35] Glamis Gold, Ltd. v. The United States of America, Award, 8 June 2009, UNCITRAL.
[36] *Ibid.* at paras. 5-7.
[37] W Michael Reisman, ''Case Specific Mandates' Versus 'Systemic Implications': How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture' (2013) 29 Arbitration International 131.
[38] *Ibid*. at 135.

the significance of participation by non-disputing parties through constitutive means, namely *amicus curiae* submissions.[39]

Inasmuch as Chapter 11 tribunals might establish the grounds to draw meaning from the larger political regime in interpreting certain provisions of NAFTA, the same political regime might also motivate a tribunal to ignore obvious violations of Chapter 11. As discussed in Chapter V, this might be the case in *Loewen,* in which the Tribunal refused to award damages since this would "damage […] viability of NAFTA itself".[40] Although the tribunal concluded that there was "a manifest injustice"[41] rendering a favourable damages award would be against the fundamental principles of the political regime of Chapter 11 at the time, which imposed an 'asymmetric obligation' in favour of the USA. In other words, a damages award against the USA would be contrary to the founding principles of the political regime of international investment that established the foundations of NAFTA. As Jose Alvarez put it, NAFTA tribunals might be "too aware that what they say or fail to say in their decisions can create powerful political ripples, some of which may ultimately engulf the NAFTA itself".[42] *Glamis Gold* and *Loewen* have illustrated that this in turn may impact on the judicial behaviour of tribunals under Chapter 11.

Glamis Gold and *Loewen* are two of the most significant examples that show correlation between the political regime of international investment and judicial behaviour. Nonetheless, Chapter 11 tribunals do not always provide explicit answers as to why they behave the way they do when they are subject to certain institutional limitations. However, this, according to Alvarez, would not change the fact that Chapter 11 decisions "evince political and not purely legal concerns irrespective of matters addressed".[43]

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[39] Glamis Gold, Ltd. v. The United States of America, Award at para. 8.
[40] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, Award at paras. 241-2.
[41] *Ibid.* at para. 54.
[42] José Alvarez, 'Forward: The Ripples of NAFTA' (2004) NAFTA Investment Arbitration: The First Ten Years (Todd Weiler ed, 2004) at xxxv.
[43] Alvarez further noted: "Decisions issued by NAFTA arbitrators on virtually any topic may demonstrate the operation of the 'passive' virtues of judicial restraint that many see as a necessary element of sustaining the credibility and legitimacy of judicial review, even for established judicial bodies like the US Supreme Court or the ICJ. Some arbitrators may reserve their most innovative suggestions to dicta, for fear of the consequences. Others may, on occasion, fail to do full justice to the parties actually before them, whether in terms of findings of fact or law or in terms of the award of damages for the same reasons". *Ibid.*

Whether, Chapter 11 decisions evince politics is an inquiry I shall address within Chapter VII. Prior to proceeding to the Chapter on Article 1105, however, one should explore the content of Chapter 11 and each constitutive institution that will be the subject of this investigation.

III. NAFTA and its Institutions: Chapter 11 in Context

NAFTA comprises twenty-two chapters and, as highlighted above, covers topics as diverse as intellectual property, investments, technical barriers to trade and trade in services. Chapter 11 is dedicated to "Investment, Services and Related Matters". Its provisions, as David Gantz asserts, "are evolutionary rather than revolutionary".[44] This is because Chapter 11 is constructed on the US BIT programme which goes back to the early 1980s.[45] It includes substantive provisions for the protection of foreign investments in the territory of one Member State (Article 1139) against violations of national treatment (Article 1102), most favoured nation (Article 1103), minimum standard of treatment (Article 1105) as well as prohibitions against unlawful expropriation (Article 1110) and the imposition of performance requirements (Article 1116). In Part B, it regulates recourse to a binding ITA procedure subject to the rules of ICSID, ICSID Additional Facility and UNCITRAL (Article 1120).

Chapter 11 of NAFTA is not the first IIA to provide investors with direct recourse to a binding dispute settlement procedure. As discussed earlier, it is only one part of a network comprising of more than 3000 investment treaties providing direct recourse to an ITA procedure. Its significance, however, lies in its practice – one which caused a fundamental shift in the development of international investment law. Whilst it would not be unusual to come across ITA cases between investors and governments from developed countries nowadays,[46] NAFTA contributed to an unexpected body of jurisprudence in the US-Canada – Canada-US direction at the end of the 1990s. Alarmed that substantive

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[44] David A. Gantz, 'Contrasting Key Investment Provisions of the NAFTA with the United States-Chile Fta' in T. Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Brill Nijhoff, 2004) at 400.

[45] Vandevelde, 'The Bilateral Investment Treaty Program of the United States'.

[46] *See* e.g. Charanne (the Netherlands) and Construction Investments (Luxembourg) v. Spain, SCC, Award 21 July 2016; Vattenfall & Others (Sweden) v. Federal Republic of Germany, ICSID Case No. ARB/12/12; PV Investors v. Spain, UNCITRAL; Philip Morris Asia Ltd. v. The Commonwealth of Australia, PCA Case No. 2012-12, UNCITRAL.

provisions could be invoked against developed states in the same way as developing countries, the USA and Canada have since amended their policies in their investment treaty programmes introducing sovereign protective provisions in their model investment agreements.[47]

One may argue that such shifts in the political regime of international investment, however, do not only affect negotiation and codification of new obligations on investment protection. As will further be discussed in Chapter VII, these have also had an impact on the judicial behaviour of ITA Tribunals constituted under Chapter 11. Such policy shifts have been accommodated by the tribunals through *constitutive institutions* available under NAFTA.

As discussed in the previous chapter, judicial behaviour in ITA is subject to a number of institutional limitations. I described those limits that are embedded in the constitutive instrument of ITA decision-making as *constitutive institutions*. In addition to the investment agreement and specific provisions therein, these include procedural rules, multilateral treaties of enforcement, general principles and rules of international law as well as domestic laws and regulations. The constitutive institution may also give resort to *non-constitutive (or informal) institutions* such as stare decisis, academic scholarship and soft law in treaty interpretation.

Within this framework, I will further elaborate, below, the constitutive institutions under the auspices of NAFTA, with which stakeholders may influence the ITA decision-making under Chapter 11. In this, I will first explore the use of key NAFTA provisions that have had influence on the tribunals or have given them the space to manoeuvre and to accommodate certain political issues in their decisions.

The constitutive institutions discussed below are in no way exhaustive. As the *ADF* Tribunal put it, NAFTA, as a trade agreement, is a complex document.[48] The number of

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[47] *See* e.g. the 2004 and 2012 Model US BITs, and the 2004 Canada Model FIPA. *See* Charles N Brower and Lee A Steven, 'Who Then Should Judge: Developing the International Rule of Law under NAFTA Chapter 11' (2001) 2 Chi J Int'l L 193.

[48] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award at para 148. The Tribunal noted: "Clearly, NAFTA is a complex document, arguably the most complex free trade agreement currently in existence. Virtually every Chapter contains its own articles on definitions. Annexes, beginning

NAFTA provisions which could fall within our definition of constitutive institutions, would supersede the number of provisions discussed below. However, hereunder, I shall limit the scope of this chapter to those constitutive institutions that have been more frequently discussed in the jurisprudence when interpreting Article 1105 and, have thus affected, the judicial behaviour of Chapter 11 tribunals.

III.1. Article 1131: Interplay with the Rules of Treaty Interpretation

A constitutive institution as such, is embedded in Article 1131 of Chapter 11. It regulates the interplay between NAFTA and the customary international rules of treaty interpretation and instructs an ITA Tribunal to "decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law". NAFTA tribunals have so far responded to this constitutive institution (i) by taking the customary international rules of treaty interpretation (as codified in Article 31 of the VCLT) as "the applicable rules of

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with Annex 201.1 attached to Chapter 2, are used to create further definitions, or may contain their own definitions applicable to those annexes alone. Some Chapters, such as Chapter 15 on Competition, stand virtually alone, while others, such as Chapter 3 on Goods, contain general rules and principles which run through much of the treaty text. There is a separate Chapter 21 dealing in a general way with exceptions, such as in Article 2101 which relates to the incorporation, to a cer- tain extent, of provisions of Article XX of the GATT, in respect of most of NAFTA, and Article 2106 excepting cultural industries for Canada alone. Additional exceptions are to be found throughout the NAFTA. Five major Schedules list different types of non-conforming measures maintained by each of the Parties. State, provincial and local government measures, in several important areas, have not as yet actually been subjected to the disciplines of NAFTA, due to failure to agree within two years from entry into force of NAFTA as originally contemplated".

international law”[49] and (ii) by considering Article 102(2) of NAFTA[50] as well as the Preamble in giving meaning to the “object and purpose” of the agreement. [51]

As highlighted in Chapter V, there exists three dominant hermeneutics of treaty interpretation under the customary international rules of treaty interpretation. These are

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[49] *See* e.g. Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 at para 43; Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/01, Award, 17 July 2006 at para 171; Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007 at paras. 119 and 195; Corn Products International Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/1, Decision on Responsibility, 15 January 2008 at para. 76; Methanex Corporation v. United States of America, UNCITRAL, Final Award, 3 August 2005 at part IV, Chapter B, Para. 29; United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Award on the Merits, 24 May 2007 at Para. 43.

[50] Article 102 (Objectives) of NAFTA reads: 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-national treatment and transparency, are to: (a) eliminate barriers to trade in, and facilitate the cross-border movement of goods and services between the territories of the Parties; (b) promote conditions of fair competition in the free trade area; (c) increase substantially investment opportunities in the territories of the Parties; (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party‘s territory; (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement. 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

[51] The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
STRENGTHEN the special bonds of friendship and cooperation among their nations;
CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
CREATE an expanded and secure market for the goods and services produced in their territories;
REDUCE distortions to trade;
ESTABLISH clear and mutually advantageous rules governing their trade;
ENSURE a predictable commercial framework for business planning and investment;
BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;
ENHANCE the competitiveness of their firms in global markets;
FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights;
CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
PRESERVE their flexibility to safeguard the public welfare;
PROMOTE sustainable development;
STRENGTHEN the development and enforcement of environmental laws and regulations; and
PROTECT, enhance and enforce basic workers' rights;
[…]

the (i) textual, (ii) subjective/historical and (iii) teleological methods. As far as the jurisprudence of NAFTA is concerned, teleological and textual methods have been chiefly employed by ITA tribunals. In an early Chapter 11 case between Ethyl Corporation and Canada, the Tribunal considered Article 102(2) as a reference when exploring the "object and purpose" of the agreement, and, in particular, took note of Articles 102(1)(c) and (e).[52] Likewise, in *SD Myers v Canada*, the Tribunal considered Article 102(1) in deriving parties' obligations therefrom.[53]

Article 102 of NAFTA constitutes only one aspect of the underlying principles of the Agreement. While Article 102, as reviewed below, is frequently cited when interpreting the substantive provisions of Chapter 11, the Preamble and various other provisions of the Agreement (e.g. Chapter I: Objectives) have proved to be equally important under Chapter 11 practice.

The "object and purpose" method has been an essential component of teleological approaches to Chapter 11 provisions. In *Metalclad v Mexico*, for instance, the Tribunal took note of NAFTA's objective "to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives" (Article 102(1)), in interpreting the FET standard under Article 1105.[54] In *Fireman's Fund v Mexico*, the Tribunal took Article 102(1) as the guiding principle in considering Article 1401 on financial regulations.[55] Professor Thomas Wälde, as well, in his separate opinion in *Thunderbird v Mexico,* highlighted the significance of the objectives of NAFTA (embedded in Article 102) in giving meaning to the doctrine of legitimate expectations under Article 1105.[56] In *Mobil and Murphy v Canada*, the Tribunal considered the object and purpose of NAFTA as "a far ranging free trade agreement, designed to permit the

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[52] Ethyl Corporation v. The Government of Canada, UNCITRAL, Award on Jurisdiction 24 June 1998 at paras. 50-6.
[53] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 at paras. 197-8 and 229.
[54] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 at para. 75.
[55] Fireman's Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/01, Award on Jurisdiction, 17 July 2003 at paras. 69 and 75.
[56] Thomas Wälde, International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion, 01 December 2005 at para. 36.

free flow of goods, services and investment amongst the NAFTA Parties" in interpreting and giving effect to unilateral reservations of NAFTA parties.[57]

Nonetheless, Article 102 is not the only guiding principle in the interpretation of Chapter 11 provisions. In *SD Myers v Canada*, for example, the Tribunal discussed the weight of provisions relating to environmental protection and distortions to trade embodied in the Preamble and the NAAEC[58] as well as other Agreements[59] in interpreting the provisions of Chapter 11. *In obiter*, it noted that:

- "Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states;
- Parties should avoid creating distortions to trade;
- Environmental protection and economic development can and should be mutually supportive."[60]

Based on these principles, the Tribunal observed that the host State shall adopt a measure that is consistent with open trade in exercising its environmental protection rights, if a variety of equally effective and reasonable means of environmental protection is available.[61] Reference to open trade and environmental protection was also made by Arbitrator Bryan Schwartz in his dissent. Schwartz opined that the same principles should be taken into account in conducting an analysis of "like circumstances" under Article 1102 (National Treatment) and in assessing whether Canada had legitimate environmental and public welfare reasons for treating S.D. Myers in a less favourable manner than its Canadian competitors.[62]

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[57] Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012 at para. 340.
[58] *Supra* note 7.
[59] In particular, the Tribunal considered CANADA-USA Transboundary Agreement on Hazardous Waste United Nations Commission on International Trade Law and Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (1992). S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 at paras. 205-16.
[60] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000 at paras. 220-1.
[61] *Ibid.* at 222.
[62] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, Concurring Except with Respect to Performance Requirements, in the Partial Award of the Tribunal, 12 November 2000 at para. 131.

Against a background of teleological interpretation of Chapter 11 provisions, some tribunals adopted a textual approach, focusing on the language and text of the substantive provisions. According to the Tribunal in *ADF v USA*, NAFTA's general objectives "may frequently cast light on a specific interpretive issue", however, it shall not supersede detailed provisions set in a particular context under NAFTA that function as *lex specialis*.[63] Quoting the *ADF* Tribunal, the Tribunal in *Canfor v USA* also held that general objectives of NAFTA cannot overrule a particular provision.[64]

Even then, however, the Tribunal in *ADF* emphasized the importance of the political regime of NAFTA in treaty interpretation. By reference to Articles 31 and 32 of the VCLT, the Tribunal observed that:

"[…] the specific provisions of a particular Chapter need to be read, not just in relation to each other, but also in the context of the entire structure of NAFTA if a treaty interpreter is to ascertain and understand the real shape and content of the bargain actually struck by the three sovereign Parties (emphasis added)."[65]

As the above review illustrates, the constitutive institution of Article 1131 of NAFTA has facilitated the interplay of NAFTA with the customary rules of treaty interpretation, thus far providing tribunals a degree of flexibility to give weight to the policy objectives of NAFTA Parties inasmuch as the object and purpose of the Agreement.

III.2. Article 2001: Allocation of Interpretative Authority

Another constitutive institution is Article 2001, which may allow the NAFTA parties to instruct Chapter 11 tribunals in interpreting certain provisions of NAFTA. Article 2001 established the Free Trade Commission (FTC), "comprising cabinet-level representatives of the Parties and their designees" (Article 2001(1)). Amongst others, the FTC has been allocated with the authority to supervise the implementation of NAFTA (Article 2001(1)(a)) and to "resolve disputes that may arise regarding its interpretation and

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[63] ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at paras. 147-8.
[64] Canfor Corporation v. United States of America, Tembec Inc. et. al. v. United States of America and Terminal Forest Products Ltd. v. United States of America, UNCITRAL, Decision of Preliminary Question, 6 June 2006 at para. 179.
[65] ADF Group Inc. v. United States of America, Award at para. 149.

application” (Article 2001(1)(c)). As per Article 2001, thus, the FTC may adopt interpretations of the Agreement that are binding on Chapter 11 tribunals.

The FTC issued a Note as such, on 21 July 2001 relating to the interpretation of certain Chapter 11 provisions. The Note (i) provided that Chapter 11 tribunals are not subject of a general duty of confidentiality and (ii) instructed tribunals to equate the standards of FET and full protection and security under Article 1105 to the minimum standard of treatment under customary international law.[66] The latter assertion of the FTC with respect to interpretation of Article 1105 has received serious criticism. In *Pope & Talbot v Canada*, the Tribunal, though held that the FTC Note amounted to an “amendment”, in the end, it deemed the decision as an “interpretation” and ruled accordingly.[67] In his opinion in *Methanex*, Sir Robert Jennings criticized the FTC Note for constituting a “demarche intended to apply pressure on the Tribunal to find in a certain direction by amending [NAFTA] to curtail investor protection”, which, he continued, was “surely against the most elementary rules of the due process of justice”.[68]

As will further be investigated in Chapter VII, NAFTA tribunals have had mixed reactions towards the FTC Note after it was issued in 2001. As mentioned above, some tribunals criticized but, at the same time, concluded that it was lawful and binding. Some others did not even get into whether the FTC Note is a legitimate “interpretation” or an illegitimate “amendment” to the Agreement. Nonetheless, Article 2001, as a constitutive institution, formed the legal basis for the interpretation and application of substantive provisions – at times – in the shadow of politics.[69]

III.3. Article 1128: *Non-Disputing Party Submissions*

A third constitutive institution is Article 1128. It provides that “a Party may make submissions to a Tribunal on a question of interpretation of this Agreement”. The

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[66] Notes of Interpretation of Certain Chapter Eleven Provisions (Free Trade Commission, July 31, 2001), available at < http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp> last accessed on 24 November 2016.

[67] Pope & Talbot Inc. v. Government of Canada, UNCITRAL, Award in Respect of Damages, 31 May 2002 at para. 47.

[68] Methanex Corporation v. United States of America, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C., 6 September 2001 at 4-5.

[69] In order to avoid repetition, the role of this constitutive institution on judicial behavior of Chapter 11 tribunals will be investigated in Chapter VII in depth.

provision has long been used by third parties, including non-governmental organizations and non-disputing State parties, as the basis for involvement in Chapter 11 proceedings in the form of written submissions.

As discussed earlier in Chapter IV, the first such *amicus curiae* submissions admitted under Chapter 11 of NAFTA were filed by the IISD and Earth Justice between 2001 and 2004 after a legal and political struggle for involvement that was first formulated in the IISD submission of August 2000.[70] Against a background of such efforts by non-disputing third parties to participate in Chapter 11 proceedings, the Tribunals in *Methanex* and *UPS v Canada*[71] discussed the limits of admitting *amicus curiae* submissions. In the absence of clear guidance under NAFTA, the Tribunal in *Methanex* considered Article 15 of the applicable rules of arbitration, i.e. UNCITRAL Rules which, according to the Tribunal provided "the broadest procedural flexibility within fundamental safeguards". However, in the Tribunal's view, this mere procedural provision, could not "grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party".[72] Likewise, the Tribunal in *UPS* held that there are limits to the powers conferred by Article 15(1) of the UNCITRAL Rules, endorsing the views expressed by the *Methanex* Tribunal.[73]

At the same time, both Tribunals concurred that "allowing a third person to make an *amicus curiae* submission could fall within [their] procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules". This conclusion, according to the *Methanex* and *UPS* Tribunals, found support in the body of jurisprudence established by the Iran-US Claims Tribunal and the WTO Appellate Body.[74] In sum, both Tribunals found *amicus curiae* submissions by the

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[70] *See infra* Chapter V, Part V.2.

[71] United Parcel Service of America Inc. v. Government of Canada, UNCITRAL *(hereinafter "UPS")*

[72] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 at paras. 27-9.

[73] United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 at para. 39.

[74] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 at paras. 31-3; United Parcel Service of America Inc. v. Government of Canada, UNCITRAL, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001 at para. 64.

Communities for a Better Environment (*Methanex*), the Earth Island Institute (*Methanex*), the Canadian Union of Postal Workers (*UPS*) and the Council of Canadians (*UPS*) admissible.[75]

Reflecting on the decisions discussed above in *Methanex* and *UPS* Tribunals, the FTC commission issued another statement (this time not on interpreting certain provisions of NAFTA but) on setting procedural recommendations to guide Chapter 11 tribunals in accepting written *amicus curiae* submissions. The FTC statement, dated 7 October 2003, provided that "(i) no provision of [NAFTA] limits a Tribunal's discretion to accept written submissions from a person or entity that is not a disputing party (a "non-disputing party") and (ii) nothing in this statement by [the FTC] prejudices the rights of NAFTA Parties under Article 1128 of the NAFTA". According to the FTC, in this vein, key issues in allowing an amicus submission would be related to whether (i) the submission would bring a perspective, particular knowledge or insight from the parties, thus assisting tribunals in determining a factual or substantive issue; (ii) the submission would address matters within the scope of the dispute; (iii) the third party filing the submission has particular interest in the arbitration and (iv) there is a public interest in the subject-matter of the dispute. In the remainder of the statement, the FTC further recommended certain procedures to be adopted by Chapter 11 tribunals when admitting non-disputing party submissions, suggesting that this would be "in the interest of fairness and the orderly conduct of arbitrations […]".[76]

The FTC statement came in the midst of the proceedings in *Methanex*. In its Final Award, the Tribunal considered the statement in a separate sub-heading and adopted it conditional upon two key understandings by the Disputing Parties: (i) the third party filing an *amicus curiae* submission shall identify any entity with which it collaborated in preparing submissions and (ii) parties to dispute shall have a right to respond to any NAFTA Article 1128 submissions from Canada or Mexico. The Tribunal then admitted a third *amicus curiae* submission by the IISD dated 9 March 2004, in addition to those already submitted by the Communities for a Better Environment and the Earth Island Institute in 2001.[77]

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[75] Methanex *ibid*. at para. 53; UPS *ibid*. at para. 73.

[76] *See* Free Trade Commission's Statement on Non-Disputing Party Participation, October 7, 2003, available at: < http://www.state.gov/documents/organization/38791.pdf>, date of access 24 November 2016.

[77] Methanex Corporation v. United States of America, UNCITRAL, Final Award, 3 August 2005 at Part II,

Since its publication in 2003, the FTC Note has been considered as an important pillar of *amicus curiae* submissions under Chapter 11. In *Apotex v the USA*, for instance, the Tribunal found that the FTC Note is further compatible with Article 41(3) of the ICSID Additional Facility rules and therefore should be given weight in determining whether an *amicus curiae* submission is acceptable. In consideration of the submission filed by the Study Center for Sustainable Finance of the Business Neatness Magnanimity BNM srl ('BNM') on 7 February 2013, the Tribunal dismissed the application since BNM, the Tribunal noted, failed to satisfy the criteria set forth at Sections B(6) and (7) of the FTC statement.[78] Likewise, Mr. Barry Appleton's *amicus curiae* submission was dismissed on the same grounds (non-compliance with Sections B(6) and (7) of the FTC statement). The Tribunal treated the FTC statement as an essential instrument in consideration of *amicus curiae* submissions. It noted that, "[Mr. Appleton] should have relied directly on the FTC statement" rather than "various sources of international law to establish the applicable criteria" which seemingly address similar prerequisites.[79] Furthermore, in *Eli Lilly v Canada*, the Tribunal granted involvement to some third party applicants[80] once again considering whether their applications satisfy the criteria enlisted in Section B(6) of the FTC Statement.[81]

However, the involvement of third parties and non-disputing State Parties in Chapter 11 proceedings started even before the FTC Statement was published.[82] As illustrated in Chapter VII, in *Pope & Talbot v Canada* only, the Tribunal received 15 non-disputing party submissions. According to some, giving too much evidentiary weight to Article 1128 submissions is unjust to claimant investors, since almost always, third parties to the dispute have an interest in the narrow interpretation and application of NAFTA Chapter

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Chapter C, paras. 27-9.

[78] Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Procedural Order on the Participation of the Applicant, BNM, as a Non-Disputing Party, 4 March 2013

[79] *Ibid.* at para. 29.

[80] Eli Lilly and Company v. Government of Canada, ICSID Case No. UNCT/14/2, Procedural Order No. 4, 23 February 2016. The applications admitted were by the Canadian Chamber of Commerce; the Canadian Generic Pharmaceutical Association ("CGPA"); the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") and the Centre for Intellectual Property Policy ("CIPP"); intellectual property law professors from universities in the United States ("The Seven IP Professors"); and the National Association of Manufacturers ("NAM")

[81] *Ibid.*

[82] Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley J Int'l L 200.

11 provisions.[83] In a 2012 contribution, Professor Gabrielle Kaufmann-Kohler also voiced some concern that the use of non-disputing State party submissions under Article 1128 was becoming “the rule rather than the exception”. However, she noted, records of non-disputing State party submissions under NAFTA indicate the opposite of what one might call as “resurgence of diplomatic protection”. To her, the purpose of these submissions would appear to be promotion of “a balanced and long-term interpretation of the treaty”.[84] Whilst some might also argue that this increase is a consequence of overwhelming calls for transparency and democratic legitimacy in ITA[85], the record of Article 1128 submissions show that non-disputing parties are more actively involved in cases that distort the pillars of the political regime of international investment under NAFTA.[86] Thus one could argue that third party involvement in Chapter 11 proceedings is not only about increasing transparency, democratic legitimacy or the long-term and balanced interpretation of the treaty. As Meg Kinnear suggested:

> “The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and sovereign states with a clear interest in the proper operation of the Agreement, transcends the merits of specific cases (emphasis added)”.[87]

It is possible that Meg Kinnear states the obvious. In a NAFTA ITA proceeding, it is not only the disputing parties that have an interest in the resolution of the dispute. Non-

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[83] Margaret Clare Ryan, 'Glamis Gold, Ltd. V. The United States and the Fair and Equitable Treatment Standard' (2011) 56 McGill Law Journal/Revue de droit de McGill 919 at 950-1.

[84] Gabrielle Kaufmann-Kohler, 'Arbitral Precedent Dream, Necessity or Excuse?' (2007) 23 Arbitration International 305 at 312-3.

[85] Barnali Choudhury, 'Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?' (2008) Vanderbilt Journal of Transnational Law; Andrew Newcombe and Axelle Lemaire, 'Should Amici Curiae Participate in Investment Treaty Arbitrations?’(2001)' 5 Vindobona Journal of International Commercial Law and Arbitration 22.

[86] See e.g. Pope & Talbot v Canada, Award on Merits Phase II, Third Submission of the US pursuant to Article 1128 of NAFTA, 24 July 2000; Fourth Submission of the US pursuant to Article 1128 of NAFTA, 1 November 2000; Fifth Submission of the US pursuant to Article 1128 of NAFTA, 1 December 2000. Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", 15 January 2001.

[87] Pope & Talbot v Canada, NAFTA UNCITRAL, Letter from Meg Kinnear to the Tribunal, 1 October 2001 at para. 4 (emphasis added). *See* also Meg Kinnear, ‘Article 1128 - Participation by a Party’ in M.N. Kinnear, A.K. Bjorklund and J.F.G. Hannaford, *Investment Disputes under Nafta: An Annotated Guide to Nafta* (Kluwer Law International 2006), Supplement No. 1 at 1128-1 – 1128-5, where Kinnear noted: “Article 1128 gives the non-disputing NAFTA Parties a right to make submissions in a Chapter 11 arbitration. It is an innovative provision which recognizes the systemic interest of each NAFTA Party in the interpretation of the Agreement”.

disputing parties' interests, in the *proper* resolution of the dispute, could be greater than the disputing parties' interests. From this point of view, one could argue that the ITA Tribunal has a duty to adopt politically correct interpretations and applications of Treaty provisions, which supports the hypothesis that the ITA Tribunal might assume a principal political role if necessary. Article 1128's effect in NAFTA decision-making will be more closely investigated in Chapter VII.

III.4. Article 1136: *Stare Decisis*

An informal constitutive institution that may influence ITA decision-making under Chapter 11 is "*stare decisis*", or in other words, the doctrine of precedent. This constitutive institution is characterized as "informal" since there is no doctrine of binding precedents in international investment law. While as per Article 38 of the Statute of the ICJ, it is clear that decisions by international courts and tribunals are a source of international law, albeit a subsidiary one, ITA tribunals are constituted on *ad-hoc* bases, tasked with the purpose of settling the dispute at hand. This admonition is rooted in Article 59 of the Statute of the ICJ[88] and is further reinforced in Article 1136 of NAFTA, which reads: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of a particular case".

Nonetheless, applications, interpretations and decisions of prior tribunals have been routinely cited and relied on in ITA practice.[89] Whereas, some scholars treated this as the emergence of consistent case law and even precedence,[90] some others approached this development with caution, encouraging tribunals to confine their function to settle a particular case between certain disputing parties or, in other words, to a case specific methodology.[91]

In sum, previous decisions are considered relevant by everyone involved in an ITA case, including counsel and non-disputing third parties. Some tribunals explain this trend with

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[88] Article 59 of the Statute of the ICJ reads: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

[89] *See* Commission, 'Precedent in Investment Treaty Arbitration a Citation Analysis of Developing Juroisprudence'.

[90] Kaufmann-Kohler, 'Arbitral Precedent Dream, Necessity or Excuse?'.

[91] Reisman, ''Case Specific Mandates' Versus 'Systemic Implications': How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture'

the ITA Tribunal's "duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law".[92] Likewise, in *Suez v Argentina*, the Tribunal emphasized the "goal of international investment law to establish a predictable, stable legal framework for investments", which it considered as a justification for tribunals to give "due regard to previous decisions on similar issues".[93]

On the other hand, the ITA practice under Chapter 11, according to Gantz, has additional motivations in giving due regard to previous decisions. Chapter 11 tribunals are likely to include members from common law countries, who, "from the first day at school, are trained to look first at the cases".[94] Whether this claim would have any standing in Chapter 11 practice would be subject of an attitudinal study. Herein one should focus on whether normative discussions on *stare decisis* in ITA, elaborated above, affect the behaviour of Chapter 11 tribunals.

The decisions by Chapter 11 tribunals illustrate that, *stare decisis*, as an informal constitutive institution, may constrain decision-making in NAFTA arbitration. Whilst some tribunals refrained from considering previous decisions as precedent, others discussed whether the ITA Tribunal has a duty in setting systemic implications in the interpretation of Chapter 11's substantive standards. In *Methanex*, for instance, the Tribunal, in interpreting Article 15 of the UNCITRAL Rules and reviewing whether *amicus curiae* submissions are admissible, observed that it "can set no legal precedent, in general or at all". According to the Tribunal, "[f]or each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only".[95] In its Partial Award, the same tribunal further determined that although the Claimant, Methanex, may rely on previous NAFTA Chapter 11 decisions to support its arguments, nonetheless,

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[92] Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award at para. 90; Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 at para. 50.

[93] Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic), Decision on Liability, 30 July 2010 at para. 189.

[94] Gantz, 'Contrasting Key Investment Provisions of the Nafta with the United States-Chile Fta' at 406.

[95] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", 15 January 2001 at para. 51.

"[t]hese are not sources of law; and neither can be regarded as authority legally binding upon this Tribunal".[96]

On the other hand, in his dissenting opinion in *Thunderbird v Mexico*[97], the late Professor Thomas Wälde argued that precedent plays an important role in ITA decision-making, at the same time, admitting that there is no formal *stare decisis* rule as in common law countries. According to Wälde, although tribunals have the full liberty to deviate from previous awards, it would nonetheless be challenging to confront a well-established jurisprudence. "The role of precedent has been recognized *de facto*", Wälde continued, however, the function of previous decisions in ITA "can also be formally inferred from Art. 1131 (1) of the NAFTA – which calls for application of the 'applicable rules of international law'".[98]

Echoing Professor Wälde's opinion in *Thunderbird*, in *Glamis Gold*, the Tribunal held that although "there is no precedential effect given to previous decisions", nevertheless a NAFTA Tribunal "should communicate its reasons for departing from major trends present in previous decisions, if it chooses to do so". As discussed above already, to the Tribunal, international investment law is a "significant public system of private investment protection" and, as such,"[a] case-specific mandate is not license to ignore [such] systemic implications".[99]

Professor Reisman asserted that this observation of the *Glamis Gold* Tribunal reflects a "meditative overture". To him, the Tribunal in *Glamis Gold* was in a dilemma: It would rather choose to stick with its case-specific mandate or respond to the "siren" of systemic

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[96] Methanex Corporation v. United States of America, UNCITRAL, Partial Award, 7 August 2002 at para. 141.

[97] International Thunderbird Gaming Corp. v. United Mexican States ('Thunderbird'), UNCITRAL, Arbitral Award, 26 January 2006.

[98] Thunderbird, Separate Opinion, 26 January 2006 at para. 129. See also Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, 18 August 2008 at paras. 116-7; Saipem S.p.A. v. The People's Republic of Bangladesh, ICSID Case No. ARB/05/07, Award, 30 June 2009 at paras. 66-7; Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008 at paras. 49-50.

[99] Glamis Gold, Ltd. v. The United States of America, Award at paras. 5-8.

implications.[100] In the end, the Tribunal adopted a strategy whereby it came up with an "intermediate" approach which, according to the Tribunal, showed a "modicum of awareness" of the system as a whole along with a "greater contextual awareness".[101]

In some of the subsequent NAFTA Chapter 11 cases, tribunals continued this meditative overture in dealing with the question of *stare decisis*. In a 2010 award, the Tribunal in *Chemtura v Canada*, for instance, ruled that, it "is not bound by previous decisions of NAFTA or other international tribunals". Nevertheless, the Tribunal continued, "it ought to follow solutions established in a series of consistent cases comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case".[102] Similarly, in *Cargill v Mexico*, while the Tribunal did not discuss whether it was bound by previous decisions or whether it has a case specific mandate, there was a perceived sense of obligation on the Tribunal to elaborate those reasons that would distinguish its findings as to what constitutes investment from those of the Tribunal in *ADM v Mexico*.[103]

This meditative overture in the treatment of arbitral jurisprudence in Chapter 11 disputes is an illustration as to how tribunals may act flexibly in an attempt to respond to the political regime of international investment. Previous awards may be given weight or ignored insofar as to preserve the larger context or "the real shape and content of the [NAFTA] bargain". How the institution of *stare decisis*, with its political attributes, shapes judicial behaviour of tribunals in interpreting Article 1105 of NAFTA will be a subject of Chapter VII.

III.5. Article 1136(3): Standards of Judicial Review

A final constitutive institution that is commonly utilized in challenging the behaviour of Chapter 11 Tribunals is the "judicial review" procedure which embodies standards of review to be applied by domestic courts at the seat of the arbitration. The so-called

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[100] Reisman, ''Case Specific Mandates' Versus 'Systemic Implications': How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture' at 150.

[101] Glamis Gold, Ltd. v. The United States of America, Award at para. 5.

[102] Crompton (Chemtura) Corp. v. Government of Canada, UNCITRAL, Award, 2 August 2010 at para. 109.

[103] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 at para. 524.

standards of judicial review are characterized as "constitutive" since they are made available through the reference in Article 1120 of NAFTA to ICSID Additional Facility[104] and UNCITRAL Rules.[105] Article 1120 also makes resort to ICSID Convention possible and, in this regard, to the annulment and *ad hoc* Committee process for the parties of a dispute as per Article 53 of the Convention.[106] However, Mexico has not signed and Canada only recently ratified the ICSID Convention.[107] The practical inapplicability of the ICSID Convention has so far made the judicial review processes within the Chapter 11 sphere limited to setting aside or annulment procedures according to Article 1136(3) of NAFTA for those Chapter 11 decisions rendered under the ICSID Additional Facility or the UNCITRAL Rules.

Although the ICSID Additional Facility and UNCITRAL Rules provide some guidance regarding the set-aside or enforcement procedures, the applicable standards of review are made available to domestic courts under the domestic arbitration rules applicable at the seat of the arbitration. In Canada, for instance, these standards are encapsulated in federal as well as provincial statutes which implement the UNCITRAL Model Law on International Commercial Arbitration. Canada (except for Quebec) has adopted Article

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[104] ICSID Additional Facility Rules (2006), available at <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/AFR_English-final.pdf> last accessed on 7 November 2016. At this stage one could also take note that scholars also discussed whether the ITA arbitrators should adopt a formal and informal standard of review. *See* e.g. Stephan Schill, Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review, Journal of International Dispute Settlement, Vol. 3 (2012) at 577.

[105] UNCITRAL Arbitration Rules (2010) (with new article 1, paragraph 4, as adopted in 2013) available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf> last accessed on 7 November 2016.

[106] ICSID Convention (1966) available at < https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf> last accessed on 7 November 2016.

[107] Canada's ratification of the ICSID Convention has entered into force on 1 December 2013. An important consequence is that since the US and Canada have both ratified the Convention, Chapter 11 disputes between Canadian investors and the US or US investors and Canada may be brought under the ICSID Convention and Rules, which do not allow post award challenges as an ICSID award is final and binding on the parties according to Article 53. Since its ratification, only one NAFTA Chapter 11 case has been administered under the ICSID Rules between a US investor and Canada, i.e. Mobil Investments Canada Inc. v. Canada, ICSID Case No. ARB/15/6, NAFTA, Request for Arbitration submitted on 16 January 2015.

34 of the Model Law unaltered, thus, making recourse to Canadian courts available to the parties of a Chapter 11 dispute.[108]

Canadian *foras*, as the seat of many NAFTA Chapter 11 proceedings, have also received the majority of applications for review of Chapter 11 awards by unsatisfied disputing parties. Such applications have been, so far, brought before the Federal Court of Canada and the provincial courts of British Columbia and Ontario. Against the *Metalclad* award,[109] for instance, Mexico, the respondent State, brought the first Chapter 11 set-aside suit before the British Columbia Supreme Court under the ICAA.[110]

At the Supreme Court, Justice Tysoe first characterized the dispute as "commercial" in nature for the purposes of the ICAA, permitting the Court to rule on the appeal on a question of law.[111] He then considered Sections 5 and 34 of the ICAA in determining the grounds for the standard of review and ruled out Mexico's argument to import the domestic standard of application of the "pragmatic and functional approach" as well as

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[108] Such an application would be subject to the following standards embodied in Article 34 (2) and (3) of the Model Law (as well as the Canadian International Arbitrations Act – ICAA):
(2) An arbitral award may be set aside by the courts specified in Article 6 only if:
(a) the party making the application furnishes proof that:
(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submission to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
(b) the court finds that:
(i) the subject-matter of this dispute is not capable of settlement by arbitration under the law of this State; or
(ii) the award is in conflict with the public policy of this State.

[109] Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

[110] 2001 BCSC 664, available at <http://www.italaw.com/documents/Metaclad-BCSCReview.pdf> last accessed on 8 November 2016; Supplementary Reasons 2001 BCSC 1529.

[111] Application of the ICAA was made available through the reference in the ICSID Additional Facility rules, which defaulted to the domestic arbitration legislation at the seat of the arbitration, i.e. Vancouver, British Columbia, Canada.

"excess of jurisdiction" and "jurisdictional error".[112] According to Justice Tysoe, standards of review should be limited to those provisions provided in the ICAA, and these standards, to him, were sufficient to partially set aside the award on the basis that the *Metalclad* Tribunal mispresented the applicable law by reading "transparency" as an element of Article 1105 of NAFTA.[113]

Another set aside suit was brought before the Ontario Superior Court and Court of Appeal under the Ontario ICAA[114] by Mexico against the award in *Feldman v Mexico*.[115] In its decision, the Ontario Superior Court dismissed Mexico's application, relying on the availability of a "privative clause", a standard developed for the review of domestic administrative decisions by the Supreme Court of Canada, which, according to the Court, was embodied in Article 53(4) of the ICSID Additional Facility Rules and Article 34 of the Model Law. Accordingly, the Court considered that the degree of deference was high and determined that its jurisdiction for review was strictly limited to Article 34 of the Model Law, "which allows for a very limited opportunity for the courts to provide any recourse against an award".[116] Upon Mexico's appeal, the Ontario Court of Appeal upheld the Superior Court's reading of Article 34 of the Model Law and dismissed Mexico' application in its entirety.[117]

A third set aside request was brought by Canada's Attorney General against the award in *SD Myers v Canada* at the Federal Court of Canada. The application was dismissed on grounds that were similar to those in *Mexico v Feldman*. *SD Myers* was a case conducted

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[112] 2001 BCSC 664 at paras. 50-6.

[113] 2001 BCSC 664 at paras. 57-76. The grounds for the set-aside decision by the British Columbia Supreme Court have been much criticized by practitioners and scholars for "substituting the arbitral tribunal's decision with its own". *See* e.g. Giorgio Sacerdoti, 'Investment Arbitration under Icsid and Uncitral Rules: Prerequisites, Applicable Law, Review of Awards' (2004) 19 ICSID Review 1; Todd Weiler, 'Metalclad v. Mexico: A Play in Three Parts' (2001) 2 The Journal of World Investment & Trade 685; Jack J Coe Jr, 'Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel within NAFTA and the Proposed FTAA?' (2002) 19 Journal of International Arbitration 185; William S Dodge, 'Case Report: Metalclad Corporation V. Mexico' (2001) 95 AJIL 910. Henri Alvarez, on the other hand, opined that "the standard of review articulated in this case as opposed to its application, was correct". Henri Alvarez 'Judicial Review of Nafta Chapter 11 Arbitral Awards' in E. Gaillard and F. Bachand (eds), *Fifteen Years of Nafta Chapter 11 Arbitration* (Fifteen Years of Nafta Chapter 11 Arbitration, Juris 2011) at 109.

[114] Which also adopted the UNCITRAL Model Law.

[115] 2003 CanLII 34011 (Ontario Supreme Court); 2005 CanLII 249 (Ontario Court of Appeal).

[116] 2003 CanLII 34011 (Ontario Supreme Court) at para. 53.

[117] 2005 CanLII 249 (Ontario Court of Appeal).

under the UNCITRAL Rules and the Court dismissed Canada's application based on its failure to raise the jurisdictional objections (it so relied in its set-aside application) under Article 21(3) of the UNCITRAL Rules before the Tribunal.[118] Nonetheless, the Court discussed Canada's substantive arguments and noted that, along the lines of Ontario Superior Court's reading in *Mexico v Feldman*, Article 34 of the Model Law could not be interpreted to include domestic standards such as "pragmatic" and "functional" approaches. Nor does Article 34, continued the Court, enable judicial review of decisions suffering from errors of law or fact as long as they are made within the tribunal's jurisdiction. Despite this limitation on its jurisdiction, the Court proceeded to review Canada's substantive arguments, exercising domestic standards of review that applied to matters of "public policy".[119] According to the Court, 'public policy' referred to "fundamental notions and principles of justice", which included "jurisdictional error". A decision rendered in such capacity would be "patently unreasonable", "clearly irrational", "totally lacking in reality" or a "flagrant denial of justice". Based on these standards, the Court first upheld the Tribunal's interpretation of "investor" and "investment of an investor of a Party" under the NAFTA. With respect to Canada's arguments against the Tribunal's application of Article 1102 and 1105, the Court ruled that it did not have jurisdiction to review these under Article 34 of CAC since they included questions of mixed fact and law. Nonetheless, the Court observed that the Tribunal did not misinterpret Article 1102, referring to the flexibility of the notion of "like circumstances" under the provision. On the other hand, the Court did not get into an analysis of Article 1105, since the violation of Article 1102 sufficiently supported the damages award. Thus, according to the Court, *SD Myers* Tribunal's award did not violate any of the domestic standards of review.[120]

Such applications of domestic standards of review were also furthered in set aside proceedings against *Bayview v Mexico*[121] and *Cargill v Mexico*[122], in which the Superior Court of Ontario dismissed the applicants', namely Bayview Irrigation District and Mexico respectively, requests to set aside the awards. In both cases, the Court, once again,

[118] 2004 FC 38 (Canada (Attorney General) v SD Myers, Inc.)
[119] *Ibid.*
[120] *Ibid.* at paras. 55-9.
[121] 2008 CanLII 22120 (Ontario Superior Court).
[122] 2010 ONSC 4656 (Ontario Superior Court).

adopted the deferential approach, noting that its jurisdiction to review awards under Article 34 of the Model Law is limited to exceptional circumstances.[123] However, the Superior Court further commented on the applicable standards in both cases and held that only "correctness" or "reasonableness" would apply in exploring whether decisions of the Chapter 11 tribunals should stand. According to the Court, these standards point at standards narrower than those applied at the domestic administrative courts in Canada and observed that only a breach of the "principles of fundamental justice" would disqualify an arbitral award.[124]

Whilst the Model Law has provided a common ground for the review of Chapter 11 awards seated in Canada, in the US, the standards of review encapsulated in the Federal Arbitration Act (FAA),[125] have culminated in narrower grounds to set aside an arbitral award under NAFTA. For instance, an application by the claimant investor to vacate the award in *Thunderbird* was dismissed by the US District Court in the District of Columbia, imposing a "heavy burden" of proof on the investor that the *Thunderbird* Tribunal acted in "manifest disregard of duty".[126] According to the Court, the standard of review under the FAA limited its jurisdiction to determine whether the Tribunal's actions amounted to

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[123] 2008 CanLII 22120 (Ontario Superior Court) at para. 15.

[124] 2008 CanLII 22120 (Ontario Superior Court) at paras. 45 and 74-7; 2008 CanLII 22120 (Ontario Superior Court).

[125] *See* Article 10 of the FAA, which reads:
Section 10. Same; vacation; grounds; rehearing
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration
(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators, or either of them.
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.
(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5.

[126] *International Thunderbird Gaming Corporation v United Mexican States*, Judgment of the US District Court for the District of Columbia on petition to set aside award dated 14 February 2007 at 3-5, available at < http://opil.ouplaw.com/view/10.1093/law:iic/135-2007.case.1/IIC135(2007)D.pdf> last accessed on 11 November 2016.

"more than an error or misunderstanding with respect to the law". Otherwise, it would be improper, noted the Court, for it to "assess the factual question of whether that *prima facie* burden had been met in the first instance".[127] A second application to vacate and remand the award was filed at the US District Court under Section 10 of the FAA by the claimant investor in *Loewen*. The Claimant argued that the *Loewen* Tribunal engaged in "disturbing misconduct" and illustrated a "manifest disregard for the law" since it "never fairly and impartially heard and considered the relevant evidence."[128] Upon reviewing US's objections, the District Court ruled that Loewen's application was time barred since it failed to meet the 3-month time limit in the FAA. The District Court, thus, did not discuss any of the substantive arguments elaborated in Loewen's application.[129]

The Federal Commercial Code (FCC) of Mexico also provides a forum to set aside an arbitral award. Albeit with a few changes, the FCC adopted the Model Law.[130] So far, the Mexican courts have not received a set-aside application against a Chapter 11 award. Nonetheless, based on the deferential approach Mexican courts have adopted in the review of international commercial arbitration awards, it is speculated that the Mexican courts may as well follow suit as opposed to judicially review for errors of law. However, noted Henri Alvarez, the procedure and standards to be applied by the Mexican courts are likely to be different as Mexico is a civil law jurisdiction.[131]

The set aside procedures allowed at the seat of Chapter 11 proceedings, provided open access to domestic courts to adopt standards of review that, at times, originated from various concepts of domestic judicial review. Scholars voiced their concerns against inconsistent applications of domestic standards of review to NAFTA awards.[132] Not only are there uncertainties with respect to limits and application of domestic standards of review, they might also elevate domestic administrative law standards into substantive standards of protection under Chapter 11. Whether these risks would have any bearing on

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[127] *Ibid.* at 6.
[128] *Raymond L. Loewen v USA*, Judgment of the US District Court for the District of Columbia on petition to set aside award dated 31 October 2005 at 4, available at < http://www.italaw.com/sites/default/files/case-documents/ita0476.pdf> last accessed on 10 November 2016.
[129] *Ibid.* at 8-9.
[130] Codigo de Comercio de Mexico, Title IV, Book V, 1993 Articles 1415-63.
[131] Alvarez 'Judicial Review of NAFTA Chapter 11 Arbitral Awards' at 150-1.
[132] *Ibid.*

ITA decision-making under Chapter 11 by influencing the ITA Tribunal to assume its principal political role is another inquiry that could be investigated.

IV. Conclusion

The above investigation on some of the constitutional institutions of NAFTA illustrates how Chapter 11 tribunals may oscillate between law and politics in their flexible institutional space, at times, assuming a principal political role. It shows the ways with which a tribunal might accommodate political interests in the NAFTA constituency into the substantive provisions of NAFTA by drawing meaning from the larger political regime of international investment.

In Chapter VII, by investigating the interpretation and application of the constitutive institutions reviewed above, I shall identify interpretative choices made by Chapter 11 tribunals in giving meaning to Article 1105 of NAFTA. Within this, I shall attempt to answer whether the two pillars of the political regime of international investment under NAFTA (asymmetric obligation and concerns relating to regulation of environment and free trade), have had an impact on the judicial behaviour of Chapter 11 tribunals, thus modifying the content and scope of the Minimum Standard of Treatment in the brief history of NAFTA investment disputes. Before investigating what the "real law" is, however, one should describe what the 'paper law' is. Accordingly, Chapter VI reviews the background to Article 1105 and the FET standard, and their relation to the minimum standard of treatment under customary international law.

PART C

JUDICIAL POLITICS UNDER NAFTA ARTICLE 1105?

Conclusion of the first NAFTA Chapter 11 case almost five years after the NAFTA entered into force seems to have not resulted in anything inconsistent with the structural implications of the Agreement. *US national claimants* including Robert Azinian, Kenneth Davitian and Ellen Bacha requested from a Chapter 11 Tribunal (composed of Paulsson, von Wobeser and Civiletti) monetary damages against *Mexico's alleged violations* of Articles 1101 and 1105 of the NAFTA, arising from the City of Naucalpan's annulment of DESONA's concession contract.[1] In its rather brief Award dated 1 November 1999, the Tribunal considered standards embodied in Article 1105 insofar as to resolve whether the decision by the Mexican court, upholding the annulment of the concession contract, constituted a denial of justice.[2]

However, the content and scope of Chapter 11 claims have since changed dramatically. Perhaps due to an increase in the sophistication of claims and of the claimant counsel strategy, a much wider use of the FET standard under Article 1105 has emerged. The Award in *Metalclad v Mexico*[3] illustrated a shift towards greater deference to private interests in the interpretation and application of the FET standard under Article 1105. In August 2000, the Tribunal, having adopted a teleological approach, interpreted the provision as requiring a "transparent and predictable framework" for foreign investments.[4] This shift, however, came with its costs. Concerned about potential issues such interpretation could cause, NAFTA parties issued an 'interpretive' Note in July 2001, limiting the scope of Article 1105 on the Minimum Standard of Treatment to that applied by the customary international law minimum standard of treatment.[5] The FTC Note directly affected the-then pending cases. The ITA Tribunal in *Pope & Talbot*[6], for

[1] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999 at para. 28.
[2] *Ibid.* at para. 92.
[3] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
[4] *Ibid.* at paras. 70 and 76.
[5] Notes of Interpretation of Certain Chapter Eleven Provisions (Free Trade Commission, July 31, 2001).
[6] Pope & Talbot Inc. v. Government of Canada, UNCITRAL, Award on the Merits Phase II, 10 April 2001.

instance, was forced to re-adjust its interpretation of Article 1105 in its Award on Damages.[7] In subsequent disputes, although the Chapter 11 tribunals at times criticized the interpretative Note by the FTC for constituting an "amendment" to the Agreement, nonetheless, they produced strategies allowing them a 'politically correct interpretation' of Article 1105.

The case study in Chapter VII aims to identify such strategies developed by Chapter 11 tribunals in interpreting and applying the FET standard under Article 1105. To that end, it undertakes an investigation of ITA awards on jurisdiction and merits, dissenting opinions and third party submissions associated about 20 cases, in which claimant investors invoked FET under Chapter 11. From the conclusion of *Azinian v Mexico* in November 1999, to the publication of the latest award in *Windstream v Canada* in September 2016, the Chapter explores whether ITA tribunals have accommodated the three pillars of the political regime of international investment under NAFTA[8] in their rulings. In this vein, the study identifies the normative evolution and transformation of the "Minimum Standard of Treatment" under Article 1105 over a time span of two decades.

Chapter VI below first identifies the content and scope of the FET standard under Article 1105 on the Minimum Standard of Treatment, giving weight to its drafting and its relation to the customary international law minimum standard of treatment. In relation to the latter, i.e. Article 1105's correlation to custom, this Chapter will only offer an overview rather than a detailed analysis of the complex ramifications of the customary international law minimum standard of treatment. The international standard has already been discussed in a wide variety of articles and commentaries,[9] and more recently, scholars

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[7] Pope & Talbot Inc. v. Government of Canada, UNCITRAL, Award in Respect of Damages, 31 May 2002 at para. 47.

[8] As identified in Chapter VI, the three pillars of the political regime of international investment under NAFTA are asymmetric obligation, political immunity of the USA and Canada, and concerns relating to regulation of environment, human rights and free trade.

[9] *See* for example Root, 'The Basis of Protection to Citizens Residing Abroad'; Edwin Borchard, 'The" Minimum Standard" of the Treatment of Aliens' (1939) 33 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 51; Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens*, vol 69 (AW Sijthoff, 1949).

have substantially contributed to a deeper understanding of this controversial concept of international law.[10]

Chapter VII, on the other hand, will deal with the international standard (and in particular the FET standard hereunder) as it is interpreted and applied by Chapter 11 tribunals through constitutive institutions. This includes Articles 1131, 2001, 1128, and 1136, exploring whether there is correlation between the interpretive strategies the tribunals have adopted and the pillars of the political regime of international investment under NAFTA identified in Chapter V. The ultimate objective of these reviews will be to trace oscillations between interpretive methods and strategies that could illustrate how the ITA Tribunal assumes a principal political role by drawing meaning from the larger political regime of NAFTA.

[10] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP Oxford 2013); Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context*.

CHAPTER VI

INTRODUCTION TO THE MINIMUM STANDARD OF TREATMENT AND ARTICLE 1105: SETTING THE SCENE

I. Introduction

In its much contested sub-paragraph (1), Article 1105 of the NAFTA, entitled "the Minimum Standard of Treatment", provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security". It is argued that a purpose of this provision has been to provide foreign investors a minimum standard of treatment that is not contingent on how other investment and/or entities (whether domestic or not) are treated as opposed to the NT and MFN standards.[1]

Inasmuch as it is clear that Article 1105 is not contingent on domestic law, what it obligates NAFTA Parties to has been an issue of utmost controversy. Contentious inquiries into the minimum standard of treatment included whether the international minimum standard of treatment of aliens is a part of customary international law,[2] whether the customary international law minimum standard of treatment encapsulate the FET standard,[3] or, whether the FET is a standard autonomous from the minimum standard of treatment as evolved under customary international law.[4] Prior to exploring the international standard's reflections on the Chapter 11 practice, it is useful to review the development of the international minimum standard.

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[1] UNCTAD, *Fair and Equitable Treatment* (UNCTAD Series on issues in international investment agreements, 1999) at 15.

[2] Sornarajah, *The International Law on Foreign Investment* at 213.

[3] UNCTAD, *International Investment Agreements: Key Issues* (Issues in International Investment Agreements, 2004) at 212-4; more recently *see* Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* at 65-8 and A. Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International, 2012)

[4] A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer Law & Business, 2009) at 264.

I.1. Customary International Law Minimum Standard of Treatment and its Content

The minimum standard of treatment under customary international law (or the international standard) is no recent phenomenon. As an idea, it was shaped well over a century ago due to an increase in the need for the greater protection of alien rights and property originating from capital exporting States in the early twentieth century.[5] Initially, the international standard emerged as an embodiment of principles that aimed at preventing the discriminatory treatment of aliens and a denial of justice. The US Secretary of State, Elihu Root was amongst the first to acknowledge the international minimum standard, a threshold that no sovereign State must fall below in the treatment of aliens. In his opening address at the American Society of International Law's Annual Meeting in 1909, Root observed:

> "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization."[6]

Citing Lord Palmerston, in the *Don Pacifico* case in the House of Commons, Root argued:

> "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not inform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."[7]

The international standard was thereafter much discussed in academic circles as well as in the international law practice. Root's characterization, albeit guiding in principle, was insufficient to define exactly what the international standard was. According to Paparinskis, for Root, the international minimum standard did certainly entail "a standard

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[5] Due to mass scale expropriations that took place during the 1917 Soviet Revolution in Russia and in Mexico during the turmoil in the 1930s. Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* at pp. 146-7. Also see P. Dumberry, *The Fair and Equitable Treatment Standard: A Guide to Nafta Case Law on Article 1105* (Kluwer Law International 2013) at 14.

[6] Root, 'The Basis of Protection to Citizens Residing Abroad' at 20-1.

[7] *Ibid.*

of justice that measured justice due" and, thus, protection for aliens against denial of justice.[8] On the other hand, as for the treatment of alien property, the perception of the international standard was yet "vague, confusing, undefined and indefinable" to US and European scholarship.[9]

As further identified by Paparinskis[10], and convincingly so, a second influence in the discourse of the international minimum standard, was the 1926 Award of the US-Mexico General Claims Commission (the Commission) in the *LFH Neer and Pauline Neer* case (*Neer*).[11] The description of the international standard by the Commission continues to be invoked as an authority in the ITA practice even today, including claims brought under Chapter 11 of the NAFTA. Established in the 1920s to settle claims of US nationals arising out of the unrest after Mexican Revolution of 1910-1920, the Commission considered a claim for compensation for the death of a US national, Pauline Neer. Amongst others, it was alleged that "the Mexican authorities showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits".[12] In its decision, the Commission dismissed the claim, albeit making important observations on the international minimum standard. First, the Commission acknowledged "[…] the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty".[13] Nonetheless, it asserted a description of the international standard, by means of analogy[14], which remains influential in international legal practice:

"The propriety of governmental acts should be put to the test of international standards, and that the treatment of an alien, or order to constitute an international delinquency, should amount to an outrage, to

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[8] Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* at p. 48. As noted by Brownlie "[l]eading proponents include Anzilotti, Verdross, Borchard, Oppenheim, Guggenheim, de Visscher, Scelle, and Jessup". J. Crawford, *Brownlie's Principles of Public International Law* (OUP Oxford 2012) at p. 613.
[9] Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* at 44.
[10] *Ibid.* at 49-54.
[11] L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (15 October 1926) 4 R.I.A.A.
[12] *Ibid.* at p. 61.
[13] *Ibid.*
[14] Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* at p. 51.

bad faith, to wilful neglect of duty, or to an insufficiency so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[15]

The views on the Commission's description of the international minimum standard are divided. The Tribunal in *Railroad Development Corporation v Guatemala*, for instance, observed *in obiter* that, "the *Neer* case did not formulate the minimum standard of treatment after an analysis of State practice". The Tribunal found it "[…] ironic that the decision considered reflecting the expression of the minimum standard of treatment in customary international law is based on the opinions of commentators and, on its own admission, went further than their views without an analysis of State practice followed because of a sense of obligation".[16]

On the other hand, for some other tribunals, *Neer*'s formulation of the international standard was a fundamental point of reference in elaborating the "traditional" meaning of the international standard.[17] Furthermore, in *TECMED v Mexico*, the Tribunal cited *Neer*'s formulation of the international standard, and rather ambitiously asserted that:

"The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor […] The foreign investor also expects the host state to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities."[18]

In *Glamis Gold v the USA*, the Tribunal adopted the *Neer* formulation of the international minimum standard, ruling that, only if "the act in question is sufficiently egregious and shocking", and thus features "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons", would the international standard be violated.[19]

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[15] L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (15 October 1926) 4 R.I.A.A at 65.
[16] Railroad Development Corporation v. Republic of Guatemala, CAFTA, ICSID Case No. ARB/07/23, Award, 29 June 2012 at para. 216.
[17] See Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006 at para. 295; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 at para. 123.
[18] Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003 at para. 154.
[19] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009 at para. 22.

While some challenge Elihu Root's assessment of the international minimum standard[20] and some others consider that the *Neer*'s reasoning has little value in determining the content of the international standard,[21] as illustrated above, these formulations, albeit partially, are still considered in the legal discourse. Yet, the international standard lacks a universally accepted articulation. According to some, the international standard is an umbrella concept, which embodies "[…] a set of rules, correlated to each other and deriving from one particular norm of general international law of customary international law, namely that the treatment of an alien is regulated by the law of nations".[22] In 1949, Roth identified eight rules that, according to him, would fall under this umbrella concept. Considering the emerging state practice on expropriation, Roth, in addition to principles relating to protection against arbitrary and discriminatory conduct for aliens, identified "adequate compensation for expropriation" as another pillar that is encompassed by the international standard.[23]

These illustrate that the umbrella concept of the international standard is not static. In response to the large scale expropriations that took place in Eastern Europe after World War II, for instance, states' growing reference to "prompt, adequate and effective"

[20] Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*.
[21] Robert Yewdall Jennings, *General Course on Principles of International Law* (1967) at 487; Jan Paulsson and Georgios Petrochilos, 'Neer-Ly Misled?' (2007) 22 Foreign Investment Law Journal 242.
[22] Roth, *The Minimum Standard of International Law Applied to Aliens* at p. 127.
[23] According to Roth, these eight rules are: "(1) An alien, whether a natural person or a corporation, is entitled by international law to have his juridical personality and legal capacity recognized by the receiving state. (2) The alien can demand respect for his life and protection for his body. (3) International law protects the alien's personal and spiritual liberty within socially bearable limits. (4) According to general international law, aliens enjoy no political rights in their State of residence, but have to fulfil such public duties as are not incompatible with allegiance to their home state. (5) General international law gives aliens no right to be economically active in foreign States. In cases where national economic policies of foreign States allows aliens to undertake economic activities, however, general international law assures aliens equality of commercial treatment among themselves. (6) According to general international law, the alien's privilege of participation does not go so far as to allow him to acquire private property. The State of residence is free to bar him from ownership of all certain property, whether movables or realty. (7) Where an alien enjoys the privilege of ownership of property, international law protects his rights in so far as his property may not be expropriated under any pretext, except for moral or penal reasons, without adequate compensation. Property rights are to be understood as rights to tangible property which have come into concrete existence according to the municipal law of the alien's State of residence. (8) International law grants the alien procedural rights in his State of residence as primary protection against violation of his substantive rights. These procedural rights amount to freedom of access to court, the right to a fair, non-discriminatory and unbiased hearing, the right to full participation in any form in the procedure, the right to a just decision rendered in full compliance with the laws of the State within a reasonable time". *Ibid.* at 185-6.

compensation in the event of expropriation resulted in the codification of the Hull Formula in the UN General Assembly *Resolution on Permanent Sovereignty over Natural Resources* in 1962.[24] Nonetheless, the rise of the "New International Economic Order" with the UN General Assembly's Charter of Economic Rights and Duties of States marked a return to sovereign protectionism in the regulation of property rights for aliens.[25] Some would argue that this has limited the compensation for expropriation rules to provide "adequate compensation" and to empower domestic judiciary in the settlement of disputes.[26]

More recently, OECD and UNCTAD have attempted to determine customary rules that the international standard encapsulate. In a 2005 report, OECD, in addition to administration of due process for aliens, identified 'full protection and security' as another pillar of the international standard which the OECD asserted, "is usually understood as the obligation for the host State to adopt all reasonable measures to physically protect assets and property from threats or attacks" that may target aliens.[27] Endorsing the findings of the OECD report, in its 2012 study on the FET standard, UNCTAD also limited the content of the international standard to administration of justice, treatment of aliens under detention and full protection and security.[28]

On the other hand, according to some scholars, the proliferation of BITs in the 1990s and the emergence of standards such as the FET, represented the 'new' custom and, thus, could be considered as constituting another pillar of this umbrella concept.[29] A handful

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[24] G.A.Res.1803(XVII), 14 December 1962.
[25] G.A.Res.3281(XXIX), 12 December 1974.
[26] Dumberry, *The Fair and Equitable Treatment Standard: A Guide to Nafta Case Law on Article 1105* at 20-1.
[27] Catherine Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* (International Investment Law: A Changing Landscape A Companion Volume to International Investment Perspectives, OECD 2005) at 82. *See* also Giorgio Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection' (1998) 269 RECUEIL DES COURS-ACADEMIE DE DROIT INTERNATIONAL 251 at 347.
[28] In his treatise on international investment law, Sornarajah followed suit: "Yet, the international minimum standard, the existence of which is denied collectively by the developing states, has not been fleshed out. Outside the standards applicable to expropriation and to state responsibility for denying protection and security to aliens which are separately provided for in investment treaties, international minimum standard captures the category which involves a denial of justice". Sornarajah, *The International Law on Foreign Investment* at 172.
[29] Stephen M Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) Proceedings of the Annual Meeting (American Society of International Law) 27.

of ITA Tribunals endorsed this view, observing that "[…] the vast number of bilateral and regional investment treaties (more than 2000) almost uniformly provide fair and equitable treatment of foreign investments […] [which] have influenced the content of rules governing the treatment of foreign investment in current international law".[30]

Yet, it is difficult to point at the exact coverage of the international standard as a result of its non-static content. The confusion in the development of a rule on expropriation demonstrated in the ICJ in the *Barcelona Traction* case, in which the Court observed that "the evolution of the law has not gone further and that no generally accepted rules in the matter have crystallized on the international plane" despite:

> "[…] the important developments of the last half-century, the growth of foreign investments and the expansion of international activities of corporations, in particular of holding companies, which are often multinational, and considering the way in which the economic interests of states have proliferated […]"[31]

Nevertheless, according to some, in the current conundrum, one could summarize the rules commonly encapsulated in the international standard as the host States' obligations, (i) to prevent discriminatory and arbitrary conduct in the treatment of aliens; (ii) to prevent denial of due process in the administration of justice for aliens; (iii) not to expropriate alien property unless it is accompanied with adequate compensation and provided that it is in public interest; and (iv) to provide aliens protection and security.[32]

I.2. The International Standard: FET and Article 1105

I.2.1. The FET Standard

As mentioned above, similar to the international minimum standard, the fair and equitable (FET) is predominantly considered as a standard that is autonomous or, in other words, non-contingent in comparison to NT or MFN standards. In contrast to these relative standards, the FET provides "a basic general standard which is detached from the host

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[30] Mondev International Ltd. v The United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 at paras. 117 and 125 (emphasis added); *see* also CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003 at paras. 498-9.

[31] Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), ICJ Reports 1970, 3, at 46-7.

[32] Dumberry, *The Fair and Equitable Treatment Standard: A Guide to Nafta Case Law on Article 1105* at 26-7.

State's domestic law".[33] Against this rather broad definition of the FET standard, still, there is no general agreement on the precise meaning of the 'fair and equitable treatment'. As Schill noted "arbitral tribunals often do not display a conceptually clear vision of what limitations [fair and equitable treatment] entail for state measures affecting foreign investors".[34] According to the critics of ITA, therefore, the FET standard provides a broad discretionary power to tribunals.[35] Nevertheless, some scholars argued that tribunals have established a set of principles such as "due process", "reasonableness", "non-discrimination", "consistency" and "transparency", which could be embodied in the doctrine of the Rule of Law. According to Vandevelde, these principles might together provide a unified theory of interpretation of the FET standard.[36]

Historically, the FET standard may be traced back to the Covenant of the League of Nations, in which Article 23(e) obliged its Member States "to secure and maintain […] equitable treatment for the commerce of all Members of the League".[37] A more explicit reference was however, adopted in the 1948 Havana Charter for an International Trade Organization which authorized the Organization to "recommend for and promote bilateral or multilateral agreements on measure designed […] to assure *just and equitable treatment* for the enterprise […]".[38] Nonetheless, since the League of Nations demise before World War II and as the Havana Charter never entered into force, the standard did not stand out in the international plane.[39]

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[33] R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (Springer Netherlands 1995) at 58-9.

[34] Stephan Schill, 'Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) at 151

[35] Osgoode Hall Law School, 'Public Statement on the International Investment Regime'.

[36] K.J. Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 NYUJ Int'l L & Pol 43.

[37] Some scholars treated the reference on the Covenant as a possible origin of the FET Standard. *See* e.g. Theodore Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' (2008) Michigan Law Review 853 at 870; Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* at 88-9; Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* at 201.

[38] *See* Article 11(2) of the Havana Charter for an International Trade Organization, 24 March 1948, UN Conference on Trade and Employment, UN Doc. E/CONF.2/78, Sales No. 1948.II.D.4. J Christopher Thomas, 'Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators' (2002) 17 ICSID review 21 at 40; Kill, 'Don't Cross the Streams: Past and Present Overstatement of Customary International Law in Connection with Conventional Fair and Equitable Treatment Obligations' at 871-3.

[39] The term fair and equitable treatment "was not a term of art in public international law before WWII". However, this has changed in the 1990s. In 1996, Judge Rosalyn Higgins in her separate opinion in the *Oil*

Yet, in 1959 in the Abs-Shawcross Draft Convention on Investments Abroad[40] and in 1967 in the OECD Draft Convention on the Protection of Foreign Property,[41] direct references to the FET standard were offered for the protection of alien property. Whilst these conventions remained as drafts only because of the difficulties in concluding multilateral investment agreements, they coincided with the emergence of the FET standard in BITs throughout the 1960s and 1970s.[42]

With respect to its content, there are arguments that hold the FET standard tantamount to the international standard. Some scholars base these arguments on the reference in the Notes and Comments to Article 1 of the 1967 OECD Draft Convention, in which the Drafting Committee explained that FET refers to "the standard required conforms in effect to the minimum standard which forms part of customary international law".[43] This view was also endorsed by the Swiss Foreign office in a statement issued in 1979, which articulated that:

> "[…] the fair and equitable treatment refers to a classic principle of international law according to which the states have to provide to foreigners who are in their territory, and their property, the benefit of an international minimum standard, that is a minimum of personal, procedural and economic rights."[44]

Platforms Case stated that "fair and equitable treatment to national and companies and unreasonable and discriminatory measures are leger terms of art well known in the field of overseas investment protection, which is what is there addressed" [Oil Platforms (Iran v United States) 1996 ICJ Reports at 858, Separate opinion of Judge Higgins at para. 39] as quoted in Newcombe and Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* at 255-6.

[40] Hermann Abs and Hartley Shawcross, 'The Proposed Convention to Protect Private Foreign Investment: A Round Table: Comment on the Draft Convention by Its Authors' (1960) 9 Journal of public law 115.

[41] Article 1 of the OECD Draft Convention on the Protection of Foreign Property of the OECD adopted 12 October 1967, 7 ILM 117 (1967).

[42] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) 70 The British Year Book of International Law 99 at 113-4.

[43] 1967 Draft Convention on the Protection of Foreign Property of the OECD, Commentary on Article 1 of the Draft Convention. See ibid at p. 112-3; UNCTAD, *International Investment Agreements: Key Issues* at 8; Yannaca-Small, *Fair and Equitable Treatment Standard in International Investment Law* at 4.

[44] Annuaire Suisse de droit international, 178 (1980), translated and quoted by Adriana Sánchez Mussi, 'International Minimum Standard of Treatment' (2008) ASADIP Wordpress Web Site at 11, available at < https://asadip.files.wordpress.com/2008/09/mst.pdf> last accessed on 7 November 2017.

Likewise, considering the specific treaty language, the Tribunal in *Biwater Gauff v Tanzania* concluded that the scope of the FET standard "is not materially different from the content of the minimum standard of treatment in customary international law".[45]

By contrast, according to F. A. Mann 'fair and equitable treatment' "envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words".[46] Likewise, to Stephen Vasciannie, the development of the international standard vis-à-vis the FET standard exhibits that "both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness, but the presence of a provision assuring fair and equitable treatment in an investment instrument does not automatically incorporate the international minimum standard for foreign investors".[47] Iona Tudor more recently argued that FET does not only ensure a minimum standard but is meant to ensure that the most adequate standard is applied to the particular facts of the case.[48] In the majority of ITA cases, tribunals endorsed this approach, considering the FET as an independent and autonomous treaty standard. The Tribunal in *Vivendi v Argentina*, for instance, considered FET as a separate standard – one that provides a more expansive protection than that of customary international law.[49]

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[45] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008 at para. 586.
[46] Francis A Mann, 'British Treaties for the Promotion and Protection of Investments' (1982) 52 British Yearbook of International Law 241 at 244.
[47] Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' at 144.
[48] Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* p. 67-8.
[49] Compañía de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi), ICSID Case No. ARB/97/3, Award, 20 August 2007. *See* further See e.g. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004 at paras 110-2; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Final Award, 1 Jul. 2004 at paras 188-90; CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005 at paras 282- 4; Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, 17 March 2006 at paras 286-95; LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, Decision on Liability, 3 Oct. 2006 at paras 125-31; PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007 at para. 239; Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 17 January 2007 at paras 291-99.

Nevertheless, the content and scope of the FET standard adopted in more than 3000 BITs today diverge widely based on their drafting typologies.[50] Whereas in a number of IIAs, contracting Parties made references to 'international law',[51] 'customary international law' and/or 'minimum standard of treatment',[52] in some other treaties, FET has been drafted as a stand-alone standard of protection.[53] One should therefore consider each treaty on its

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[50] Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* at 15-52; Dolzer and Stevens, *Bilateral Investment Treaties* at 60.

[51] *See* e.g. Article II(3)(a) of the Ecuador – United States BIT (1993), Article 3 of the Trinidad and Tobago – United States BIT (1994), Article 3 of the Jordan – United States BIT, which provide: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by *international law*". In their commentary of the articles, the parties agreed that "This paragraph also sets out a *minimum standard of treatment based on customary international law*" (emphasis added).

[52] *See* e.g. Mexico - Spain BIT (2006), Article IV entitled Minimum Standard of Treatment provides: "Each Contracting Party will accord investments of investors of the other Contracting Party, treatment in accordance with *customary international law*, including fair and equitable treatment, as well as full protection and security" (emphasis added); Czech Republic – Canada FIPA (2009) and Slovak Republic – Canada FIPA (2010), Article III(1)(a) provide: "Investments or returns of investors of either Contracting Party shall at all times be accorded treatment in accordance with *the customary international law minimum standard of treatment of aliens*, including fair and equitable treatment and full protection and security"(emphasis added); Canada – Peru FTA (2008), Article 805(1) provides "Each Party shall accord to covered investments treatment in accordance with *the customary international law minimum standard of treatment of aliens*, including fair and equitable treatment and full protection and security" (emphasis added); Chile – United States FTA (2003), Article 10.4, Oman – United States FTA (2006), Article 10.5, Peru – United States FTA (2006), Article 10.5, Colombia – United States FTA (2006), Article 10.5 and Panama – United States FTA (2007) provide: "Each Party shall accord to covered investments treatment in accordance with *customary international law*, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the *customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world* […]" (emphasis added); United States – Turkey BIT (1990), Article II(3): "Investments shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in a manner *consistent with international law*. Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments" (emphasis added).

[53] See e.g. Estonia – Netherlands BIT (1992), Article 3 provides: "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures. the operation, management, maintenance. use. enjoyment or disposal thereof by those nationals"; Sweden – Latvia BIT (1992), Article 2(2) provides: "Each Contracting Party shah at all times ensure fair and equitable treatment of the investments by investors of the other Contracting Party and shah not impair the management, maintenance, use, enjoyment or disposal thereof as well as the acquisition of goods and services and the sale of their production, through unreasonable or discriminatory measures"; Netherlands – Paraguay BIT (1992), Article 3(1) provides: "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party

own merits. This Chapter is on the application and interpretation of Article 1105, which presents a *sui generis* formulation by giving explicit reference to 'minimum standard of treatment', 'international law' and 'fair and equitable treatment' at the same time.

I.2.2. Article 1105

Article 1105 of NAFTA is entitled "the Minimum Standard of Treatment". As mentioned above, it obliges each NAFTA Party to provide aliens "treatment in accordance with international law, including fair and equitable treatment and full protection and security". To some, references to the minimum standard and international law are indications that the content of Article 1105 and the FET standard hereunder, are limited to customary international law minimum standard of treatment of aliens. Professor Schreuer, for instance, considering the FTC Note, asserted that "[…] in the context of Article 1105 (1), the concept of fair and equitable treatment is equivalent to the minimum standard of treatment under customary international law".[54] Likewise, in the treatise on BITs, Dolzer and Stevens argued that the "primary obligation in Article 1105 is to accord treatment in accordance with international law", in which fair and equitable treatment is "expressly subsumed".[55] According to Dumberry, explicit references to the minimum standard and international law and the existence of a "binding interpretation by an authorized treaty body" also suggest that the FET standard under Article 1105 "must be considered as one of the elements included in the umbrella concept of the minimum standard of treatment".[56]

On the other hand, according to some others, the negotiation texts of Article 1105 suggest that the provision imposed a higher standard of international responsibility on host States compared to customary international law. In none of these texts on Article 1105, is there

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and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals"; Belgium-Luxembourg – Malaysia BIT (1979), Article 3(2) provides: "All investments, made by nationals or companies of one of the Contracting Parties shall enjoy fair and equitable treatment, in the territory of the other Contracting Party"; Kyrgyz Republic – Latvia BIT (2008), Article 2(2) provides: "Each Contracting Party shall in its territory accord to investments and returns on investments of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security".

[54] Christoph Schreurer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 J World Investment & Trade 357 at 363.

[55] Dolzer and Stevens, *Bilateral Investment Treaties* at 60.

[56] Dumberry, *The Fair and Equitable Treatment Standard: A Guide to Nafta Case Law on Article 1105* at 44.

an indication that "customary international law" was the intention behind the reference to the minimum standard or international law.[57] To the contrary, as highlighted by Todd Weiler, a former Mexican NAFTA Chapter 11 negotiator, Mr. Luis Miguel Diaz, openly admitted that "Mexico's Chapter 11 negotiators were dead set against Article 1105 being constrained by reference to any subset of 'international law' (such as 'general principles of international law' or 'customary international law')".[58] The witness statement by Mexico's lead negotiator of NAFTA, Mr. Guillermo Aguillar Alvarez, in *Methanex v USA*, also confirmed this position. As reported by Dumberry, reflecting on Mr. Alvarez's statements, the investor – Methanex, argued that:

> "[…] the concept of customary international law had been discussed at length by the Parties during negotiation and it was ultimately decided not to include such reference with full knowledge that this would result in expanding coverage of Article 1105."[59]

It should come as no surprise that these unsettled claims on the content of Article 1105 have caused interpretive controversy amongst claimant investors and State Parties as well as ITA tribunals. As further investigated below, in the early NAFTA Chapter 11 cases, NAFTA States have commonly taken the position that the reference to "minimum standard of treatment" and "international law" in the text of Article 1105 was a clear indication of the customary international law minimum standard of treatment of aliens. Therefore, the substance and content of FET under Article 1105 was restricted to custom. By contrast, claimant investors took the position that Article 1105 refers to "international

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[57] Kinnear, Bjorklund and Hannaford, *Investment Disputes under Nafta: An Annotated Guide to Nafta* at 1105-15-7.

[58] Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* at 245 ft. 685.

[59] Methanex Corporation v. United States of America, UNCITRAL, Claimant Submission on FTC Note of Interpretation, 18 September 2001 at 6, in which Methanex asserted that "In fact, the word "customary" was actually deleted from one of the negotiating texts of NAFTA. Mr. Guillermo Aguilar Alvarez, one of the principal Chapter 11 negotiators for Mexico, recalls that one of the proposed versions of what became Article 1105 or its equivalent used the phrase "customary international law." (The United States almost certainly has a copy of this text; however, it has chosen to withhold it from this Tribunal). When Mexico resisted the use of the term "customary," the United States negotiators pointed out that deleting the word would expand the coverage of Article 1105 by bringing in other legal obligations, including independent treaty obligations between or among the NAFTA Parties. Mexico had no objection to incorporating such obligations into Article 1105, and the three countries eventually agreed to the present text of NAFTA Article 1105".

law" not to "customary international law" and, as pointed out above, furthered that it was not the intention of NAFTA parties to restrain the content and scope of FET to custom.

A second controversy arose from the limits of protection the minimum standard of treatment under customary international law offers. According to NAFTA State Parties, the minimum standard under Article 1105 carries the narrow meaning as established in *Neer*. To the contrary, claimant investors argued that the minimum standard of treatment of aliens has evolved since *Neer* and, therefore, the protection it offers cannot be limited to that provided in 1926.

The USA based its position on its previous treaty practice. It had a long negotiating history starting with its FCN programme, in which no reference was made to the limiting effects of customary international law on the (then) International Law Standard. FET would therefore appear to be a self-standing standard.[60] Although some commentators argued that, as a Member of the OECD, the US's position with respect to FET standard was – and has been – one that held "minimum standard" as forming a "part of customary international law",[61] such a reading of the FET standard was not clearly articulated during NAFTA negotiations. As mentioned above, in upholding the political positions of NAFTA parties (and, in particular the Mexican position[62]), the US – rather purposefully – chose not to draft Article 1105 (and particularly the proviso that referred to "international law") so as to limit its scope to "general principles of international law" or "customary international law".[63] Likewise, Vandevelde noted the instability in the US position with respect to FET and its relation to customary international law:

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[60] K.J. Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer Law and Taxation 1992) at 76.

[61] Thomas, 'Reflections on Article 1105 of Nafta: History, State Practice and the Influence of Commentators' at 48-9.

[62] *See* Weiler, *The Interpretation of International Investment Law: Equality, Discrimination, and Minimum Standards of Treatment in Historical Context* at footnote 685: "… Referring to Article 38 of the Statute of the Court of International Justice, Miguel Diaz [the former Mexican NAFTA Chapter 11 negotiator] told me that he and his colleagues were well aware of the significance of leaving the term "international law" unadorned by adjectives… Miguel Diaz stated that Mexico's Chapter 11 negotiators were dead set against Article 1105 being constrained by reference to any subset of "international law" (such as "general principles of international law" or "customary international law"). It is ironic, then, that US negotiators apparently patted themselves on the back for having obtained Mexico's acceptance of the "international law" language found in Article 1105…"

[63] *Ibid.* at 245.

"Recall how, up until 2000, the policy of the U.S.A. and other major capital exporting States had been to read-up the [customary international law minimum standard of treatment] by advocating the adoption of higher substantive standards in treaty practice – which they would aspirationally label as "customary international law". After 2000, the U.S. officials attempted to rely upon the very same rhetoric to ratchet-down those higher substantive standards instead."[64]

One could argue that the Tribunals' reading of the FET provision in the *Metalclad* award and submission of similar claims triggered a change in the policies of NAFTA Parties. The argument presented by Mark Clodfelter and Barton Legum from the US Department of State in *Methanex v. the USA (Methanex)* on 13 November 2000 illustrates the change in the position of the US towards the scope of Article 1105 and its relation to customary international law:

""[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and not as obligations to be applied without reference to international custom."

"[F]rom its first use in investment agreements, "fair and equitable treatment" was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United States incorporated "fair and equitable treatment" into its various bilateral investment treaties ("BITs")."

These arguments were made in a majority of NAFTA defences by respondent host States, albeit unsuccessfully. This would, in the end, trigger a backlash against the expansive reading of Article 1105 by Chapter 11 tribunals. In Chapter VII, I shall further elaborate these controversies vis-à-vis the pillars of the political regime of foreign investment under NAFTA. The above review illustrates a constitutive institution that is vague and ambiguous – one that provides a broad space to the ITA Tribunal and other stakeholders for their respective political roles in the broader political regime of international investment under NAFTA. Yet, this broad space is limited by other constitutional and non-constitutional institutions reviewed in Chapter V. In the next Chapter, I will trace

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[64] Vandevelde, *United States Investment Treaties: Policy and Practice* at 76. Canada's experience with its Foreign Investment Promotion and Protection (FIP) programme resembles a similar uncertainty. *See* C. Brown, *Commentaries on Selected Model Investment Treaties* (OUP Oxford 2013) at 78-80.

how the ITA Tribunal assumes a principal political role in accommodating interests of different stakeholders within its institutional space.

CHAPTER VII

FROM *AZINIAN* TO *WINDSTREAM*: JUDICIAL POLITICS UNDER NAFTA ARTICLE 1105?

Given the controversial place of the FET within the international standard and as a result of its elusive content, it could be argued that the ITA tribunals have been able to oscillate between the two ends of the spectrum. The *Neer* formulation of the 1920s and the allegedly broader articulation of the international standard that encapsulates the FET together with its much contested doctrines, namely "additive elements of fairness", "transparency" and "legitimate expectations". The critical inquiry is why a tribunal would choose one over the other. Below, I shall explore chronologically, whether the political regime for international investment under NAFTA has any bearing on the judicial behaviour of the Chapter 11 tribunals. Through institutions identified in Chapter V above, namely Articles 1131, 2001, 1128 and 1136, I will scrutinize whether NAFTA tribunals give weight to the pillars of the political regime of NAFTA's investment chapter identified earlier. In particular, I will assess how the above mentioned institutions have been utilized in interpreting Article 1105, whether there have been anomalies in the use of these institutions and whether such anomalies exhibit correlation with these pillars of the political regime, namely asymmetric obligation and regulation of environment and free trade.

As already explained, this work is not an empirical study. As such, it does not follow an empirical methodology. This work is rather an investigation and, to that end, involves close reading of arbitral cases from the angle of judicial behaviour theories – particularly from the perspective of political regimes theory. To that end, it will review each case, in which Article 1105 was interpreted, providing short summaries of their factual background. This is necessary in order to comprehend whether factually these cases threaten the asymmetrical obligation and regulation of environment and free trade pillars of NAFTA. Factual background to these cases are also important to explore how each tribunal exercise the interpretive choices available to them against the facts of each dispute. These reviews focus on the methodologies adopted and choices made by

tribunals in interpreting Article 1105, investigating the obiter dictum of tribunals in order to find traces of judicial politics.

I. Restrictive Invocation of an Expansive Provision: *Azinian*

The brief history of judicial politics under Article 1105 shall commence with *Azinian v Mexico* (*Azinian*).[1] Whereas, *Ethyl Corporation v. Canada (Ethyl)* is the first Chapter 11 case that was concluded,[2] *Azinian* is the first Chapter 11 case that was instituted against a NAFTA party,[3] and is the first case in which a final award on merits was rendered.

It would be fair to state that *Azinian* did not entice anything inconsistent with the structural implications of NAFTA. *US national claimants* including Robert Azinian, Kenneth Davitian and Ellen Bacha requested from a Chapter 11 Tribunal (composed of Jan Paulsson (Chair), Claus von Wobeser and Benjamin R. Civiletti) monetary damages against *Mexico's alleged violations* of Articles 1110 and 1105 of the NAFTA, arising from the City of Naucalpan's annulment of DESONA's concession contract.[4]

In its rather brief Award dated 1 November 1999, the Tribunal considered standards embodied in Article 1105 insofar as to resolve whether the decision by the Mexican court, upholding the annulment of the concession contract, constituted a denial of justice.[5] Claimant investors claimed violation of Article 1105, affirming that the breach of the Concession Contract violated international law because it was "motivated by non-commercial considerations and compensatory damages were not paid." However, as the Tribunal observed, this was not an invocation but a paraphrasing "of a complaint more specifically covered by Article 1110".[6]

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[1] Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States, ICSID Case No. ARB (AF)/97/2 Award, 1 November 1999.

[2] Ethyl Corporation v. The Government of Canada, UNCITRAL – the case was settled in 1998 after the Tribunal rendered its Award on Jurisdiction on 24 June 1998.

[3] The arbitration was initiated with the submission of the Notice of Arbitration on 17 March 1997 pursuant to NAFTA Article 1137(1)(b). In both cases, claimants invoked Article 1110 on Expropriation and Compensation: In Ethyl, claimant investors challenged the new legislation by the Canadian government on MMT that would allegedly curtail the value of its MMT production plant. In Azinian, investors challenged host States' annulment of a waste disposal concession awarded to a Mexican enterprise, Desechos Solidos de Naucalpan S.A. de C.V., or DESONA, in which claimants were shareholders.

[4] Azinian v. Mexico, Award, at para. 28.

[5] *Ibid.* at para. 92.

[6] *Ibid.*

Yet, in its *dictum*, the Tribunal went on to consider the scope of "denial of justice" under international law. Noting that violation of due process lacked basis, primarily because the Claimants did not raise complaints against the Mexican courts,[7] the Tribunal observed that:

"[…] A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way. There is no evidence, or even argument, that any such defects can be ascribed to the Mexican proceedings in this case. […] There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretence of form" to mask a violation of international law. In the present case, not only has no such wrong-doing been pleaded, but the Arbitral Tribunal wishes to record that it views the evidence as sufficient to dispel any shadow over the bona fides of the Mexican judgments. Their findings cannot possibly be said to have been arbitrary, let alone malicious".[8]

One could argue that there is correlation between the interpretive choices made in *Azinian* and the state of the political regime on the international investment of the era in which the decision was rendered. The late 1990s show greater adherence toward the proliferation of investment protection provisions and IIAs. A remarkable portion of IIAs concluded in the era exhibit an on-going asymmetry of investor rights between Northern capital exporting states and Southern capital importing developing countries. As discussed in Chapter V, this asymmetry is an underlying pillar of the investment regime under NAFTA, and *Azinian* is not inconsistent with the political conundrums of the political regime at this stage. It was instituted by US claimants against Mexico and the *dictum* discussed above only considers denial of justice in the scope of and within the allegedly traditional limits of Article 1105.[9]

Thus far, one may argue that the Tribunal had no difficulty in reaching its conclusion and reflecting the conundrums of the political regime of international investment in the era. As the Claimants failed to invoke Article 1105 amply, the Tribunal had no reason to explore the rules of treaty interpretation (as per Article 1131) and to consult non-disputing

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[7] *Ibid.* at para. 100.

[8] *Ibid.* at paras. 102-3.

[9] *See* L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States (15 October 1926) 4 R.I.A.A. Also see Section I.1. of Chapter VI.

parties to comprehend the reach of Article 1105 (as per Articles 2001 and 1128). This however changed in the cases that followed.[10]

II. An Unexpected Expansion of Investor Rights

Against this background of a restrictive use of Article 1105, *Metalclad v. Mexico*[11] *(Metalclad)* marks the start of an unexpected expansion in the interpretation and application of investor. It illustrated that claimant investors could more directly benefit from the teleological interpretations of NAFTA provisions and, in particular, from the protections offered by Article 1105. This unexpectedly broad reading of provisions of Chapter 11, together with the other cases (*SD Myers* and *Pope & Talbot*) that distorted the asymmetrical obligation pillar of the political regime of NAFTA, have caused a political backlash from both NAFTA Parties and third parties including civil society.

As mentioned earlier, until *Metalclad*, claimant investors were neither aware nor were they informed as to the broad scope of protection Article 1105 could offer. The Award that came out in August 2000 has changed this flow. In subsequent awards on Article 1105, namely *SD Myers v Canada*[12] and *Pope & Talbot v Canada,*[13] tribunals also made broad observations as to the content and scope of this provision. Since then, whereas, NAFTA Parties gradually asserted their political powers in a judicial process by constitutive means in order to protect the asymmetry in investment protection, civil society has publicly criticized the expansion of private rights for investments to the detriment of public interest.

II.1. Metalclad v Mexico

Metalclad, an American corporation, invoked the FET standard under Article 1105, and challenged the decision by the Mexican Municipality of Guadalcazar in rejecting its application for a municipal construction permit to construct a hazardous waste landfill after a permit of construction was granted at the federal level and after the construction

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[10] *See* e.g. Mondev International Ltd. v. United States of America, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2 at para. 96, whereby the Tribunal controversially held that "under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule 'are interlocking and inseparable'".
[11] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1.
[12] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000.
[13] Pope & Talbot Inc. v. The Government of Canada, UNCITRAL, Award on Merits Phase II, 10 April 2001.

was completed. The municipality's decision, along with the Ecological Degree enacted by the Governor, thus, barred Metalclad from operating the already-completed landfill. The Claimant alleged that:

"[It] has suffered damages directly caused by Respondent's [f]ailure to accord […] treatment in accordance with international law, including fair and equitable treatment and full protection and security as required by Article 1105 of the NAFTA. Respondent's actions of failing to protect Claimant's rights, leaving claimant victim to prejudice, governmental capriciousness, scandal and corruption, failed to rise to the minimum standard of treatment required by Article 1105 and principles of international law".[14]

Metalclad's contentions, however, were not limited to simple reiteration of what was already drafted in the text of Article 1105. As opposed to the Claimants in *Azinian*, the Claimant investor introduced teleological interpretation by asserting that:

"<u>The quid pro quo between Mexico and the United States in the NAFTA negotiations was a greater ability to attract foreign investors (for Mexico) in exchange for strong investor protections (for the U.S.)</u>. Patterned after the U.S. Model BIT, the NAFTA grants the highest standard of investor protections of any multilateral international agreement" (emphasis added).[15]

Indeed, as discussed in Chapter V, a systemic implication embedded in NAFTA is with respect to "the promotion and protection of investments". As also noted by the Tribunal by reference to Article 102(1), a central objective of NAFTA (and free trade agreements of a similar nature) "is to promote and increase cross-border investment opportunities and ensure successful implementation of investment initiatives".[16] Based on such a teleological understanding, the Tribunal adopted "transparency" and "certainty" in interpreting the FET provision:

"Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has

[14] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Claimant Memorial, 8 September 1997, at 108 para. 148.
[15] *Ibid.*
[16] *Ibid.* at para. 70.

been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws”.[17]

This method led the Tribunal in finding that the denial of the permit by the Municipality “was improper, as was the municipality’s denial of the permit for any reason other than those related to the physical construction or defects in the site”.[18] Noting that Mexico failed to ensure a *transparent and predictable framework* for Metalclad’s business planning and investment, the Tribunal concluded that “Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105”.[19]

As some commentators noted, the Tribunal was not aware whether such a reading of Article 1105 would back fire. Whilst it did not discuss if FET in Article 1105 recalls no more than customary international law of minimum standard of treatment, the Tribunal did consider “treatment in accordance with international law” so as to include FET.[20] In other words, according to the Tribunal customary international law did not constitute a threshold for violations of FET under Article 1105. According to Charles Brower II, one should not be surprised that the Tribunal did not discuss what fair and inequitable is under the Agreement. “International law” under Article 1105 has a clearly established meaning, argued Brower and “current disagreements about the scope of that phrase reflect an attempt to create ambiguity where none exists”.[21]

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[17] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at para. 76.

[18] *Ibid.* at para. 86.

[19] *Ibid.* at paras. 97-101. Some argued that findings of the Tribunal would also establish basis for treaty violations resulting from conducts including “the denial of a right to a fair hearing” and “breach of legitimate expectations” in addition to “absence of clear rules and transparency”. One should however observe that neither denial of justice nor legitimate expectations (in their conventional scopes) were invoked by Metalclad. See Ian A Laird, 'Betrayal, Shock and Outrage-Recent Developments in Nafta Article 1105' (2003) 3 Asper Rev Int'l Bus & Trade L 185 at 195.

[20] Weiler, 'Metalclad V. Mexico: A Play in Three Parts' at pages 690-2: “As we shall see this simple conclusion would ultimately come back to haunt the Tribunal and Metalclad. Nonetheless, at the time, it must have appeared only logical to the Tribunal that, in interpreting what “international law” and “fair and equitable treatment” meant within the context of NAFTA Article 1105, the principle of transparency might well come into play-particularly given the appropriate fact pattern and the NAFTA’s predominantly liberalising objectives”.

[21] Charles H Brower, 'Investor-State Disputes under Nafta: The Empire Strikes Back' (2001) 40 Colum J Transnat'l L 43 at 54-6.

Metalclad was the first case in which a NAFTA tribunal awarded damages to a claimant investor under Article 1105. Similar to its predecessor (i.e. *Azinian*), it involved claims against governmental actions that were labelled as “social and environmental regulations”. To critics of globalization, the award in *Metalclad* proved that NAFTA posed a growing threat to democratic decision-making and to States’ sovereign powers to regulate in the public interest. NGOs considered it as an “assault on the original local struggle that brought [the Ecologic Decree] into being”.[22] Likewise, some scholars referred to the award as an assault to “popular sovereignty” or in their words “democracy”.[23]

The unwelcome expansiveness of private interests in the NAFTA constituency was treated as a threat not only to democratic decision-making but also as an unexpected challenge to the asymmetric obligations that underlie the Agreement. As discussed further below, this resulted in NAFTA Parties pursuing strategies that would limit the effects of the decision.

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[22] *See* Gerard Greenfield, Metalclad Vs. Mexico, Toxic Waste and Nafta (SOLIDARITY 2001) available at <https://solidarity-us.org/node/977> last accessed on 3 November 2017: “In most reports on the Metalclad vs. Mexico case the "problem" was that state legislation caused Metalclad to lose the value of its investment. The debate is then carried out in terms of the validity of the legislation in protecting the environment and public health. But we should remind ourselves that this kind of legislation does not appear out of thin air. As with most social and environmental regulation protecting the rights and interests of working people, it was the result of sustained local struggle: "Metalclad wants to reopen and expand a toxic dump site in Guadalcazar County in the northern part of the north-central state of San Luis Potos. That the company might succeed in doing so—despite the opposition of many local officials and citizens—has kept Guadalcazar residents on edge. Residents do not trust the federal government to enforce environmental laws. When the Mexican company that Metalclad bought its toxic dump from refused to obey federal orders to close down in 1991, local residents—-brandishing machetes—enforced the order themselves."—Multinational Monitor, (October 1995) "When local authorities ignored the complaints of outraged community members, citizens brandishing machetes mobilized in September 1991, preventing tractor trailers from unloading more toxic wastes."—Multinational Monitor (October 1995). From this perspective it is clear that the "problem" began not with the environmental regulations but with a well-organized protest by the local community. This struggle from below forced the municipal government of Guadalcazar to impose the ban, which in turn forced the state governor to respond. Thus the NAFTA ruling in favor of Metalclad is not just an assault on environmental regulation. It is an assault on the original local struggle that brought this legislation into being. […] Where federal governments do not have the legal or political power to reverse such legislation, it can allow the "external" intervention of NAFTA to act on its behalf” (emphasis added).

[23] Noam Chomsky and Jean Drèze, Democracy and Power: The Delhi Lectures (Open Book Publishers 2014) at pp. 123-4. Kavaljit Singh, Questioning Globalization (Zed Books 2005) at pp. 72-5.

II.2. SD Myers v Canada

Chronologically, *SD Myers v Canada (SD Myers)* was the second case in which the Tribunal dealt with the content and scope of minimum standard provision under Article 1105. The first Partial Award in *SD Myers* was published on 13 November 2000 about two months after the *Metalclad* Award.[24] Like *Metalclad*, *SD Myers* involved regulatory actions by a NAFTA Party, Canada, against an environmentally hazardous chemical compound, i.e. polychlorinated biphenyl (PCB). SD Myers, Inc., an American corporation, with an interest in treating PCB through its investment in Canada (Myers), was precluded from carrying out its business when Canada enacted an Order prohibiting the export of PCB waste to the U.S. This resulted from a lobbying campaign by the Canadian disposal industry who eventually persuaded the Canadian minister to ban the export of PCB from 1995 to 1997.[25] Although the export ban was labelled as an emergency measure based on the health and environmental concerns of the Canadian government, the Tribunal found that, by closing the border, the Canadian government took protectionist measures, aiming at promoting the Canadian market share of domestic competitors.[26]

Amongst others, SD Myers, Inc. invoked Article 1105 claiming that "the promulgation of the export ban by Canada was done in a discriminatory and unfair manner that constituted a denial of justice and a violation of good faith under international law". Whilst the *SD Myers* Tribunal found violation of Article 1105 in the end, its assessment of minimum standard and its relation to the FET standard was fundamentally different. First, the Tribunal in *SD Myers* established violation of Article 1105 on the same grounds as its determinations under Article 1102 – National Treatment: "(i) the export ban was the result of protectionist and discriminatory intent, (ii) the export ban favoured nationals over non-nationals and (iii) S.D. Myers was directly prevented from carrying out the business they planned to undertake…"[27]

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[24] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000.
[25] R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (Cambridge University Press 2011) at 65.
[26] S.D. Myers, Inc. v. Government of Canada, Partial Award, at para 162.
[27] *Ibid.* at para 193.

Second, unlike *Metalclad*, the *SD Myers* Tribunal held that the FET standard "…cannot be read in isolation. [It] must be read in conjunction with the introductory phrase …treatment in accordance with international law".[28] The Tribunal continued:

"[…] a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders. The determination must also take into account any specific rules of international law that are applicable to the case".[29]

In discussing the content of Article 1105, the Tribunal adopted the classical reading of the minimum standard as formulated in the *Hopkins* case of the US-Mexican Claims Commission, according to which, "…under the rules of international law applied to controversies of an international aspect, a nation is required to accord to aliens, broader and more liberal accords to its own citizens under its municipal laws…".[30] Furthermore, the Tribunal referred to F.A. Mann's description of the minimum standard as being an "over-generalization", nonetheless citing that the reach of the minimum standard:

"[…] goes much further than the right to most-favored-nation and to national treatment....so general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that provisions of the Agreements affording substantive protection are not more than examples of specific instances of this overriding duty".[31]

Although the Tribunal's reading of Article 1105 would appear as one that equates Article 1105 with the customary international law minimum standard of treatment, the Tribunal deviated from this approach when it further ruled that a breach of Article 1102 could also amount to a violation of the FET standard under Article 1105.[32] While the Tribunal

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[28] *Ibid.* at para 262.
[29] *Ibid.* at para 263.
[30] George W. Hopkins (USA v. Mexico), General Claims Commission United States and Mexico Docket No. 39 (Award of 31 March 1926). *Ibid.* at para. 260.
[31] *Ibid.* at paras. 265-6. F.A. Mann, "British Treaties for the Promotion and Protection of Investments", (1981) 52 Brit. Y.B. Int'l L. On the other hand, one should note that the SD Myers Tribunal neglected Dr Mann's views that the FET standard is autonomous and "envisage[s] conduct which goes far beyond the minimum standard and afford[s] protection to a greater extent…"
[32] Kläger, 'Fair and Equitable Treatment' in International Investment Law at 66.

dismissed SD Myers's claim that the FET provides protection beyond the minimum standard, it nonetheless adopted an interpretation that established basis for an Article 1105 violation despite Arbitrator Chiasson's opinion that "a finding of a violation of Article 1105 must be based on a demonstrated failure to meet the fair and equitable requirement of international law". According to Chiasson, however, this was absent in the conduct of the Government of Canada.[33] By contrast, according to the majority of the Tribunal, Canada also violated Article 1105 when it issued the "Interim and Final Orders" on the export ban.[34]

In addition to being one of the first cases instituted under Chapter 11, *SD Myers* is also a case that involved issues, which may be perceived as issues relating to protection of the environment.[35] The Claimant was discriminated against and was prevented from competing in the Canadian market for destroying PCB wastes. Yet, the dispute did not create a conflict between environmental measures, a matter of public policy, and investment protection under Chapter 11.[36]

One could find correlation in that the damages award favoured by the Tribunal in *SD Myers* exhibits a distortion to the asymmetrical obligation pillar of the political regime of international investment under NAFTA. As opposed to the Tribunal in *Metalclad*, the *SD Myers* Tribunal quoted F.A. Mann only to the extent that it supplements its previous finding that equates the FET in Article 1105 to the international minimum standard. This led the Tribunal to deviate from the *Metalclad* Tribunal's broader understanding of the FET under Article 1105, nevertheless, it also held that a violation of Article 1102 could amount to a violation of the obligation to FET. Accordingly, the evaluation of the value of investment in these two cases was different. Whereas the *Metalclad* Tribunal adopted the "actual expenses" approach in evaluating the fair market value (FMV) of Metalclad's

[33] SD Myers v Canada, Partial Award, at para. 267.
[34] *Ibid.* at para. 268.
[35] Joseph de Pencier, 'Investment, Environment and Dispute Settlement: Arbitration under Nafta Chapter Eleven' (1999) 23 Hastings Int'l & Comp L Rev 409 at 410.
[36] According to some however, there were reasons to believe that there was a "serious risk that investors in other cases may attempt to use the provisions of NAFTA Chapter 11 to seek damages for the imposition of legitimate environmental measures that harm their businesses". Todd Weiler, 'A First Look at the Interim Merits Award in SD Myers, Inc. v. Canada: It Is Possible to Balance Legitimate Environmental Concerns with Investment Protection' (2000) 24 Hastings Int'l & Comp L Rev 173 at 175.

investment by also giving weight to the FET violation[37], the *SD Myers* Tribunal rejected the application of the FMV method and considered violation of Article 1102 only.[38] According to the Tribunal in *SD Myers* "the damages to which [SD Myers] was entitled arising out of Canada's breach of Article 1102 were neither increased not diminished by its breach of Article 1105".[39] In other words, inasmuch as the *SD Myers* Tribunal ruled that Canada violated Article 1105 when it violated Article 1102, its finding did not have practical consequences for the Parties. The outcome was – once again – in favour of the asymmetrical reality of NAFTA. Whilst Mexico, in *Metalclad*, was ordered to pay compensation for its breach of Article 1105 Canada did not compensate SD Myers as a result of its Article 1105 breach.

II.3. Pope & Talbot v Canada (Merits Phase II)

The findings of the Tribunal in *Pope & Talbot v Canada (Pope & Talbot)* on Article 1105 was published shortly after the Award in *SD Myers* on 10 April 2001.[40] This second award by the Tribunal (entitled the "Award on the Merits Phase II") came out amidst intense debate as to whether NAFTA's 'minimum standard' provision in NAFTA has a meaning beyond customary international law. The two awards released prior to *Pope & Talbot* interpreted Article 1105 so as to require "transparency" in the treatment of investors (i.e. *Metalclad*) and so able to be breached through a violation of Article 1102 (i.e. *SD Myers*). The Tribunal in *Pope & Talbot*, comprising of Lord Dervaird, Benjamin J. Greenberg Q.C. and Mr. Murray J. Belman, furthered this unexpected expansion of investor rights in the US-Canada context. It determined that Canada violated Article 1105 when implementing the "verification review" process of the Canada-US Softwood Lumber Agreement of 1996, making allegedly broad observations on the content of the FET standard hereunder.

Pope & Talbot, Inc., an American enterprise with a Canadian subsidiary in British Columbia, filed a claim under the UNCITRAL Arbitration Rules against the Government of Canada on 25 March 1999 on the bases that Canada violated certain Chapter 11 provisions, including Article 1105, by restraining the export of softwood lumber from

[37] Metalclad v Mexico, Award, at para. 122.
[38] SD Myers v Canada, Partial Award, at paras. 307-8.
[39] *Ibid.* at para. 319.
[40] Pope & Talbot v Canada, Award on Merits Phase II.

four Canadian Provinces as per the Softwood Lumber Agreement.[41] The Tribunal thereafter rendered four different awards. The Interim Award released on 26 June 2000 dealt specifically with Article 1106 on performance requirement and Article 1110 on expropriation. The Award on Merits Phase II of 10 April 2001, on the other hand, elaborated the Tribunal's findings regarding the investor's claims on Article 1102 on national treatment and Article 1105 on the minimum standard of treatment.[42]

The Tribunal's reading of the FET standard under Article 1105 was the broadest in terms of the rights provided to a claimant investor until then. The Tribunal first analysed Article 1105 insofar as to include "fairness elements" "applied in the [domestic legal systems of the] NAFTA countries".[43] These elements, however, would be additive to the reference to "international law" in the provision. In other words, according to the Tribunal, Article 1105 does not only entitle investors the right to a minimum standard of treatment under international law but also provides investors protection as per the fairness elements encapsulated in the FET standard.[44] According to the Tribunal, this "additive character" of the FET standard was rooted in the 1987 Model BIT, which was also adopted by the USA and Canada at the time. The Tribunal opined that the "language and the evident intention" of the US and Canada BITs reinforced that the "fairness elements" are distinct from and additive to the customary international law minimum standard of treatment.[45]

USA's contention, as a non-disputing party as per Article 1128, that "it was not the intention of the NAFTA parties to diverge from the customary international law concept of FET" was dismissed by the Tribunal. In this vein, the Tribunal noted that NAFTA Parties failed to provide convincing evidence. It also observed that, to the contrary, there were "very strong reasons for interpreting the language of Article 1105 consistently with the language in the BITs", chief of them being the "basic unlikelihood" that NAFTA Parties intended to provide a narrower protection than the FET standard granted under their BITs.[46] Having determined that the content of the FET standard provides elements

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[41] *Ibid.* at paras. 18-29.
[42] Pope & Talbot v Canada, UNCITRAL, Interim Award, 26 June 2000; Award on Merits Phase II, 10 April 2001; Award in Respect of Damages, 31 May 2002; Award in Respect of Costs, 26 November 2002.
[43] Pope & Talbot v Canada, Award on Merits Phase II at paras. 110-3 and 118.
[44] *Ibid.* at paras. 109-18.
[45] *Ibid.* at paras. 111-3.
[46] *Ibid.* at paras. 111-6.

additive to customary international law, the Tribunal also dismissed Canada's contention that "before a violation of international law can properly be found, the conduct in question must be 'egregious'".[47]

In reaching these conclusions, the Tribunal relied on the "context, object and purpose" of NAFTA.[48] As already reviewed in Chapter V, the object and purpose method has been an essential component of interpretation by Chapter 11 tribunals. The *Pope & Talbot* Tribunal adopted a teleological interpretation when describing the content of Article 1105, exploring the "ordinary meaning" of the provision by reference to Article 102 which sets out one of NAFTA's objectives as "increas[ing] substantially investment opportunities". Although no direct recourse was made to Article 1131 of NAFTA, VCLT's provisions on interpretation provided guidance to the Tribunal.[49] However, the Tribunal went beyond the "object and purpose" method (and the textual method it so argued that it principally gave weight to) when it drew meaning from the treaty practice of Canada and the USA, in which, the Tribunal argued, the FET standard presented "additive elements" to the content of the minimum standard of treatment.[50] By doing this, the *Pope & Talbot* Tribunal diverged from the *SD Myers* Tribunal's reading of Article 1105.

As mentioned, Article 1128 was amply utilized by the non-disputing NAFTA parties. In relation to the Award on Merits, the US made three submissions, the first one on 24 July 2000, the second one on 1 November 2000 and the third one on 1 December 2000.[51] The US's submission of 1 November 2000 stipulated the US position relating to interpretation of Article 1105 – one that held the FET standard equal to customary international law minimum standard of treatment. Likewise, Mexico also made submissions on the

[47] *Ibid.* at paras. 108-9. *See* Pope & Talbot v Canada, UNCITRAL, Fourth Submission of the United States, 1 November 2000. It is striking how amply non-disputing NAFTA parties utilized Article 1128 in establishing a joint position in the interpretation of Articles 1102, 1105 and 1110 as well as NAFTA Parties "sovereign right to regulate" (*see* Pope & Talbot v Canada, UNCITRAL, Submission of the United Mexican States, 3 April 2000 at paras. 47-53).

[48] *Ibid.* at para. 115.

[49] *Ibid.* at para. 75 ft. 68.

[50] *Ibid.* at para. 117.

[51] Pope & Talbot v Canada, Award on Merits Phase II, Third Submission of the US pursuant to Article 1128 of NAFTA, 24 July 2000; Fourth Submission of the US pursuant to Article 1128 of NAFTA, 1 November 2000; Fifth Submission of the US pursuant to Article 1128 of NAFTA, 1 December 2000. *Ibid.* at para. 79 ft. 76.

interpretation of Article 1105 on 5 November 2000 and on 3 December 2001, additionally criticizing Metalclad's reading of Article 1105 and arguing that it would be inappropriate to consider the Metalclad Tribunal's interpretation until the set aside application at the Canadian courts has been concluded.[52] The amount of Article 1128 submission in *Pope & Talbot* is striking. Whilst in *Metalclad* and *SD Myers* the Tribunals received 1 (*SD Myers* – from the USA) or 2 (*Metalclad* – one each from the USA and Canada) Article 1128 submissions, in *Pope & Talbot* the Tribunal received 8 submissions from the USA and 7 submissions from Mexico. The use of non-disputing party submission was not only unprecedented but also reflected how hard NAFTA Parties opposed the expansion of private investment rights. As far as Article 1105 concerned, all three NAFTA Parties were in agreement that minimum standard of treatment should have been equated to customary international law minimum standard of treatment. Canada, in its comment on the post hearing Article 1128 submissions of the USA and Mexico contended that "the Tribunal should place 'great wright on the shared views of the three States party to the agreement'".[53]

Inasmuch as these submissions were allowed, drawing on the text of the award, one could argue that these submissions had little or no impact on the behaviour of the Tribunal. Neither did the Tribunal equate the FET standard under Article 1105 to the international minimum standard, nor did it consider the set aside proceedings pending at the Supreme Court of British Columbia at the time. The award rendered by the Tribunal on 10 April 2001 presented the ultimate degree of expansion of investors' rights under Article 1105. This unanticipated expansion of private interests and investor rights against the NAFTA Parties in contrast to the asymmetrical obligations that underlie the treaty triggered reaction by the Parties through constitutive means: First, the set aside decision by the Supreme Court of British Columbia, rendered as per the application by Mexico made through Article 1136(3), put forward one of the most controversial set aside reasoning against the interpretation of Article 1105 in the NAFTA dispute settlement history. Second, the FTC issued its Note on the interpretation of certain NAFTA Chapter 11 provisions on 31 July 2001 based on the authority vested under Article 1131(2),

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[52] Pope & Talbot v Canada, UNCITRAL, Submission of the Government of Mexico pursuant to Article 1128 of NAFTA, 5 November 2000.

[53] Pope & Talbot v Canada, UNCITRAL, Submission Respecting Post-Heairing Article 1128 Submission Filed by the United Mexican States and the United States of America, 1 June 2000 at para. 5.

controversially equating the the content of Article 1105 to the customary international law minimum standard of treatment.

III. Backlash Against the Expansion of Investor Rights under NAFTA

III.1. Setting Aside Metalclad Tribunal's Reading of Article 1105

Before the Tribunal in *Pope & Talbot* issued its Award in Respect of Damages on 31 May 2002, the Supreme Court of British Columbia set aside *Metalclad* Tribunal's reading of Article 1105 before it became final and enforceable as per NAFTA Article 1136(3)(b) under the Standard of Review provisions of the International CAA by Mexico.[54] In his much criticized decision, in May 2001, Justice David Tysoe held that the *Metalclad* Tribunal fundamentally erred in interpreting Article 1105. According to Justice Tysoe, the Tribunal's determination as to what was unfair and inequitable went "beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11".[55] Justice Tysoe further held that reference to "international law" in Article 1105 clearly meant "customary international law" and any attempt to expand its scope to include a self-standing FET standard would be an error in law. By importing a transparency obligation into Chapter 11 from Chapter 18, opined Justice Tysoe, the Tribunal adopted an improper application of Article 1105 to the facts of the case.[56]

In doing this, Justice Tysoe first determined that the International CAA was applicable in the set-aside proceedings.[57] Despite the narrow scope of judicial review under Article 34 of the International CAA, he set aside the transparency aspects of the award on Article 1105, holding that the Tribunal failed to show "authority […] to establish that transparency has become part of customary international law".[58] When setting aside the Tribunal's reading of Article 1105, Justice Tysoe also made observations on the findings of the two other Tribunals, namely the *Pope & Talbot* and *SD Myers* Tribunals. Whereas Tysoe criticized *Pope & Talbot* Tribunal's reading of Article 1105, he upheld the position of *SD Myers* Tribunal that the FET standard is not a self-standing standard.[59] According

[54] Mexico v. Metalclad Corp., 2001 B.C.S.C. 644 (B.C. Sup. Ct. May 2, 2001).
[55] *Ibid.* at para. 67.
[56] *Ibid.* at para. 72.
[57] *Ibid.* at paras. 44-6.
[58] *Ibid.* at para. 68.
[59] *Ibid.* at paras. 60-5.

to Justice Tysoe, "[…] treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment which is not in accordance with international law […]".[60] To some, this was his substitution for the *Metalclad* Tribunal's interpretation of Article 1105 under the mandate of NAFTA Article 102(1) – the key provision in interpreting NAFTA itself – where the Tribunal held that the transparency principle should also be used to inform NAFTA's standards of protection.[61] Henri Alvarez also opined that Justice Tysoe's articulation of the standard of review in this case was correct, although, in the end, its application was erroneous.[62]

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One could argue that there are two elements in the Supreme Court's decision that shows correlation between Justice Tysoe's judicial behavior and the political regime of international investment under NAFTA: First, Justice Tysoe engineered its decision so as to set aside one aspect of the award only which had made NAFTA Parties most discontent, namely Article 1105. After setting aside the *Metalclad* Tribunal's reading of Article 1105, Justice Tysoe also observed that the Tribunal erred in finding that the pre-Ecological Decree measures by Mexico constituted a measure tantamount to expropriation in violation of Article 1110, basing this conclusion on its view that:

"[…] Mexico permitted or tolerated the conduct of the Municipality, which amounted to unfair and inequitable treatment breaching Article 1105, and that Mexico therefore participated or acquiesced in the denial to Metalclad of the right to operate the landfill".[63]

Justice Tysoe agreed with Mexico that "the Tribunal's analysis of Article 1105 infected its analysis of Article 1110" in relation to pre-Ecological Decree. However, he thereafter ruled that, since the Tribunal did not base its decision on the lack of "transparency" in its conclusion with respect to the post-Ecological Decree, its award on the violation of expropriation (Article 1110) was within the scope of the submission to arbitration.[64] One could argue that the ambivalence in Justice Tysoe's dismissal of the "transparency" obligation aided him in fashioning "compromises to satisfy the parties". As observed by William Dodge:

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[60] *Ibid.* at para. 62.
[61] Weiler, 'Metalclad V. Mexico: A Play in Three Parts' at 700-2.
[62] Alvarez 'Judicial Review of Nafta Chapter 11 Arbitral Awards' at 109.
[63] Mexico v. Metalclad Corp., 2001 B.C.S.C. 644, at paras. 77-9.
[64] *Ibid.* at paras. 92-5.

"It was Justice Tysoe who gave each party what it wanted most-setting aside for Mexico the transparency aspects of the award, while giving Metalclad most of its money-but at the cost of consistency in the application of British Columbia's ICAA".[65]

According to Dodge, the Supreme Court was erroneous in its finding that the *Metalclad* Tribunal cited "no authority […] to establish that transparency has become part of customary international law". ITA Tribunals did find international responsibility on the lack of transparency in a number of decisions which, if cited, could have caused trouble to Justice Tysoe in setting aside the award.[66] However, considering the integrity of the political regime of international investment, compromises had to be made. Justice Tysoe succeeded in upholding the asymmetrical characteristics of NAFTA, (i) by not setting aside the reasoning on expropriation thus letting Metalclad keep a majority of the damages award and (ii) by setting aside the Tribunal's adoption of the "transparency" obligation, thus serving to benefit the asymmetric obligations in the NAFTA constituency, albeit "at the cost of consistency in the application of British Columbia's ICAA".[67]

Moreover, as mentioned above, when doing this, Justice Tysoe disagreed with *Pope & Talbot* Tribunal's award on Article 1105, criticizing the decision for incorporating fairness elements into the minimum standard of treatment. Once again, one could have interpreted this as an indication that future awards, which expand the content and scope of Article 1105 beyond the international minimum standard to the detriment of the asymmetry of NAFTA, might be set aside.

III.2. The FTC Note

As discussed in Chapter V, a constitutive institution through which the NAFTA Parties may influence ITA decision-making is Article 1131(2). One could argue that, having noticed the ineffectiveness of non-disputing state party submissions through Article 1128 (particularly in *Pope & Talbot*) the NAFTA Parties utilized this alternative constitutive

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[65] William S Dodge, 'Metalclad Corporation V. Mexico. Icsid Case No. Arb (Af)/97/1.40 Ilm 36 (2001), and Mexico V. Metalclad Corporation. 2001 Bcsc 664' (2001) American Journal of International Law 910 at 916.

[66] *Ibid.* at 917-8. *See* e.g. Amco v. Indonesia (Resubmitted Case) (1990), 1 ICSID REP. 569, 604-05 (1993); Biloune v. Ghana Investments Centre, 95 ILR 183, 207-10 (1989/90); Owners of the Tattler (United States) v. Great Britain, 6 R.I.A.A. 48, 49-51 (1920).

[67] Mexico v. Metalclad Corp., 2001 B.C.S.C. 644 at para. 54.

institution to assert their authority on Chapter 11 tribunals. The Free Trade Commission (FTC) exercised its "interpretative authority" to clarify "the proper interpretation of Article 1105" on 31 July 2001, providing the following in its Note:

- "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

- The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

- A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)".[68]

Certainly, the FTC Note was a reaction to the expansion of private rights for international investment beyond the limits that were originally anticipated by NAFTA Parties. Inasmuch as this was a reaction against the broad interpretation adopted in *Metalclad*, *SD Myers* and *Pope & Talbot*, there was also a growing concern amongst the US State Department lawyers, that there would be at least three more cases in which the USA might be held liable for breaching Article 1105. Thus, in 2001, three years after voicing an intervention in relation to the interpretation of certain NAFTA provisions by Canadian officials in 1998, the US Government was convinced that Chapter 11 was the Pandora's box of NAFTA and, in particular, Article 1105, posed a significant litigation risk against the interests of both the USA and Canada.[69]

Whilst an option to "fix" this "problem" would be to amend the Agreement, limiting the reach of Chapter 11, as Todd Weiler argued, such an option would not be advocated since to do so would "contradict decades of trade policy-making". It would threaten the ideology behind ITA that "global economic welfare can best be maximized through the creation of a binding web of international trade and investment rules". This would

[68] Notes of Interpretation of Certain Chapter Eleven Provisions (Free Trade Commission, July 31, 2001), available at < http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>, date of access: 24 November 2016.
[69] Todd Weiler, 'NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious' (2001) 29 Int'l Bus Law 491 at 493.

eventually trigger a retreat of the global economic rules of investment protection which would also constitute "a political nightmare" for the "political masters" of NAFTA.[70]

Thus, a second option, or as some put it, "a safety valve",[71] available to NAFTA Parties was to address issues that might contradict the political regime of international investment one by one.[72] The first such interpretive Note targeted the most controversial provision of Chapter 11 at the time, namely Article 1105. In 'fixing' the problem, the FTC particularly took note of the *Metalclad* and *Pope & Talbot* Tribunals' reading of Article 1105. In line with what government lawyers pursued in these cases, the FTC decided that the NAFTA Parties originally aimed at equating the content of Article 1105 to the international minimum standard which would prevent the Parties from treating investments in an egregious, shocking or outrageous manner. In addition, as opposed to the findings of the *Pope & Talbot* Tribunal, according to the FTC, the FET standard in Article 1105 was not additive to the international minimum standard but was subsumed in it. Furthermore, in a direct response to the *SD Myers* Tribunal's findings, the FTC "interpretation" provided that it was not the intention of the NAFTA Parties that a violation of another provision of NAFTA or another international treaty amounts to a violation of Article 1105(1).[73]

Scholars anticipated no immediate reaction to the FTC Notes of interpretation. According to Weiler, there was little possibility that the FTC Notes would apply retroactively, given the prohibition against retroactivity in Article 28 of the VCLT as well as in customary international law as recognized by the International Law Commission.[74] To Brower, international law would also require one to abide by the principle that "no one may be the judge of his own cause". Brower's view was that, it appeared "highly unlikely that a Chapter 11 tribunal would construe Article 1131(1) as authorizing the use of interpretive

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[70] *Ibid.* at 494.

[71] Guillermo Aguilar Alvarez and William W Park, 'The New Face of Investment Arbitration: NAFTA Chapter 11' (2003) 28 Yale J Int'l L 365 at 397.

[72] Weiler, 'NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious' at 494. According to Weiler: "If the process works, other changes are likely to follow, basically whenever a NAFTA government loses what its officials consider to be an important case".

[73] *See* T. Weiler, 'Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico' in T. Weiler (ed), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May, 2005).

[74] Weiler, 'NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious' at 495.

statements by NAFTA Parties to resolve substantive issues in pending cases".[75] Whilst no retroactive effect was imposed on the *Metalclad* and *SD Myers* Awards, when the FTC published its Note, the *Pope & Talbot* Tribunal was yet to make a decision on damages. As discussed below, the FTC Note had an immediate impact in this case.

Scholars further questioned whether the FTC Notes on interpretation constituted an amendment to the provisions of Chapter 11. A first group argued that the FTC Note was a "*de facto* amendment" to NAFTA and could "imperil the stability and predictability of the investor protection regime so laboriously negotiated in 1994".[76] Sir Robert Jennings, in his separate opinon in *Methanex*, severely criticized the Note, observing that:

> "In present case, without even asking for leave, one of the actual Parties to the arbitration has quite evidently organized a demarche intended to apply pressure on the Tribunal to find in a certain direction by amending the Treaty to curtail investor protection. This is surely against the most elementary rules of the due process of justice. The phrase due process is itself of United States origin and has become international (see NAFTA Article 1110) because the United States has for so long been regarded as the guardian of due process. It is very sad to see this present betrayal of principles of which the United States has long been the revered author and practitioner".[77]

Brower also criticized the Note for failing to resolve any debates about the meaning of Article 1105.[78] He further argued that the Note constituted an amendment to the Agreement, asserting that it should only be binding upon the Tribunals if and when the conditions of the "modification of and addition to" NAFTA as per Article 2202 are met.[79] On the other hand, according to Stefan Matiation, the FTC Note was neither an amendment to the Agreement nor an interpretation of Article 1105 "that is unsustainable under rules of international legal interpretation".[80] Matiation, however, agreed with Brower that the Note did not clarify much about the content and scope of the minimum

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[75] Brower, 'Investor-State Disputes under Nafta: The Empire Strikes Back' at 56 ft. 71.
[76] Alvarez and Park, 'The New Face of Investment Arbitration: Nafta Chapter 11' at 398.
[77] Methanex Corporation v United States of America, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C., 6 September 2001 at 4-5.
[78] Charles H Brower, 'Why the Ftc Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005) 46 Va J Int'l L 347.
[79] Brower, 'Investor-State Disputes under NAFTA: The Empire Strikes Back' at 56 ft. 71. Similar observations were made by Todd Weiler. *See* Todd Weiler, 'NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back' (2002) The International Lawyer 345 at 346-7.
[80] Stefan Matiation, 'Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes' (2003) 24 U Pa J Int'l Econ L 451 at 495.

standard of treatment.[81] Likewise, J.C. Thomas opposed Brower's argument that the FTC Note constituted a partial amendment to NAFTA. The Note, according to Thomas, reflected a consensus amongst the three Trade Ministers and one would be "ill advised to second-guess" the presumption of good faith in the Commission's measure.[82]

III.3. Preliminary Remarks

In light of such critical arguments, one should re-explore the motivation behind the Standard of Review application for *Metalclad* initiated by Mexico and the Note of 31 July 2001 by the FTC. Did these interventions simply reinforce the "purpose and object" of the Agreement and aim to promote the international rule of law or were they litigation tactics to enforce the political conundrum of NAFTA at the time, namely the asymmetric obligations pillar of the political regime?

First, it could be argued, that Justice Tysoe's decision paved the way for the NAFTA Parties to more effectively use the Standard of Review procedure as a litigation tactic against those decisions by tribunals that adopted an expansive reading of Chapter 11 provisions in favour of private investments.[83] Todd Weiler argued that this was the case in *SD Myers*. According to him, the set aside proceedings initiated by Canada in *SD Myers* against the Partial Award of 13 November 2000, before the Tribunal issued its final award on damages (and yet the dispute was pending), could be considered as a "conceivable litigation stalling tactic and a never-ending attempt to obtain judicial review of interlocutory Tribunal orders and awards".[84]

Second, inasmuch as scholars argued that the FTC note was a legitimate measure by the Trade Ministers of NAFTA Parties (and that it was not an amendment to, nor was it an interpretation of, Article 1105), there was consensus that the FTC note did not clarify the content of the international minimum standard. As evidenced in defences by host States

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[81] *Ibid.* at 495-502.

[82] J Christopher Thomas, 'A Reply to Professor Brower' (2001) 40 Colum J Transnat'l L 433 at 453-5.

[83] After *Metalclad* however the Standard of Review process proved to be mostly unsuccessful for NAFTA Parties. *See* Chapter V Section III.5 for further discussion on this point.

[84] Weiler, 'NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back' at 346. In relation to the set aside procedure in UPS v Canada, Weiler further noted at ft. 5: "More surprisingly, in the opening weeks of 2002, the government of Canada launched an unprecedented judicial review of a procedural order issued by the Tribunal in United Parcel Serv. v. Canada apparently because it did not approve of the Tribunals choice of Washington D.C. as the sims of that arbitration".

in some Chapter 11 cases, NAFTA Parties have been of the view that the international minimum standard is set forth in the 1926 *Neer* decision by the US-Mexican Claims Commission,[85] albeit acknowledging that the standard may have evolved since then.[86] Whilst since the FTC Note, Chapter 11 Tribunals have found little or no guidance in *Neer*'s articulation of the international minimum standard,[87] to some, the FTC's limiting of the reference to "international law" in Article 1105 to what the minimum standard was in 1926 was an attempt to amend to the original intentions of the NAFTA Parties.[88] The FTC is established as an independent institution under Article 2001 of NAFTA, nevertheless its members are also members of the executive organs of the NAFTA Parties.[89] One could therefore argue that NAFTA does not prohibit the FTC from taking decisions that ensure the political regime that empowers the Agreement.

The normative argument on the content and scope of Article 1105 above, thus shows correlation that both the set aside procedures within a Chapter 11 claim and the FTC's 'interpretative' powers, were utilized as litigation tactics and/or as safety valves against those tribunals that deviated from the asymmetrical obligation pillar of the political regime of international investment of NAFTA.

IV. Resistance Against the Backlash: Pope & Talbot v Canada (Damages)

The backlash against the expansion of private investment rights has received mixed reactions from Chapter 11 tribunals in subsequent cases. The Tribunal in *Pope & Talbot* was the most resilient. When the FTC published its Note in 2001, the Tribunal was yet to decide on the damages aspects of its decision on merits.

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[85] "Canada considers that the principles of customary international law were frozen in amber at the time of the Neer decision". Pope & Talbot, Award in Respect of Damages at para. 57.

[86] *See* e.g. Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009 at para. 272.

[87] ADF Group Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 at paras. 180-1; Mondev International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002 at paras. 114-6; Waste Management Inc. v. United Mexican States [II], ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004 at para. 93.

[88] Weiler, 'NAFTA Investment Law in 2001: As the Legal Order Starts to Settle, the Bureaucrats Strike Back' at 347.

[89] Matiation, 'Arbitration with Two Twists: Loewen v. United States and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes' at 478-9.

The Tribunal in *Pope & Talbot* issued its Award in Respect of Damages on 31 May 2002 and, thus, had the opportunity to examine the FTC Note based on the factual record of the case and the disputing parties' arguments.[90] According to the Tribunal, the negotiating drafts presented to it provided no evidence that the intention of the parties was to limit the content and scope of Article 1105 to "customary" international law. Nowhere in the negotiating texts was there reference to "customary". Considering that custom is only one of the many components of "international law", as per Article 38 of the ICJ Statute, the Tribunal reached the conclusion that the FTC Note should be characterized as an amendment to the Agreement. However, noted the Tribunal, whether the FTC Note was an interpretation or an amendment would not affect its decision on damages. The Tribunal therefore considered the FTC Note as an interpretation and furthered its arguments accordingly.[91]

The next question was whether the FTC's interpretation of Article 1105 would apply retroactively. According to some commentators, the Note should not affect previous made by the Tribunal.[92] This was also the position taken by the Claimant investor. *Pope & Talbot* argued against a potential revisit of the Tribunal's findings on Article 1105 that had already been decided since the contrary would violate the basic presumption of retroactivity in international law.[93] Inasmuch as the Tribunal acknowledged the Claimant's position, and noted that "the position adopted by Canada was not wholly clear", it concluded that:

"[…] the phrase "shall be binding" in Article 1131(2) is better regarded as mandatory than prospective. Viewed in that light, it is incumbent on the Tribunal to assess the impact of the Interpretation upon its prior findings with respect to Article 1105".[94]

These preliminary findings did not require the Tribunal to overturn its previous Award on Article 1105. The Tribunal observed that its previous interpretation of Article 1105 could remain since either (i) its interpretation could be compatible with the FTC's or (ii),

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[90] Pope & Talbot, Award in Respect of Damages, 31 May 2002.
[91] *Ibid.* at paras. 48-51.
[92] Weiler, 'NAFTA Article 1105 and the Free Trade Commission: Just Sour Grapes, or Something More Serious' at 495.
[93] Pope & Talbot, Award in Respect of Damages at para. 50-51.
[94] *Ibid.* at para. 51.

if it is not, its interpretation could lead to the same conclusions to that of the FTC when applied to the facts of the dispute.[95]

Subsequently, the Tribunal noted that the FTC Note prescribes the international minimum standard as the protection afforded to investments of other NAFTA Parties under Article 1105. According to the Tribunal, the FTC, thus, required that "the fairness elements" determined in its previous award are "subsumed in, rather than additive to, customary international law".[96] Whilst, at first sight, its award on Article 1105 and the FTC Note would appear to be incompatible, the Tribunal viewed that such incompatibility would depend on "whether the concept behind the fairness elements under customary international law is different from those elements under ordinary standard applied in NAFTA countries".[97]

In determining the content of the fairness elements under customary international law, the Tribunal dismissed Canada's argument that "the principles of customary international law were frozen in amber at the time of the *Neer* decision". The Tribunal rejected this static understanding of customary international law.[98] To the Tribunal, the concepts of customary international law have evolved since the 1920s as a result of the concluding of new international agreements, which constitute state practice. The "international delinquencies" have also broadened since *Neer* was rendered in 1926 to include "fair and equitable treatment".[99] In support of these observations, the Tribunal relied on the FET provision of the OECD Draft Convention on the Protection of Foreign Property as well as the proliferating BIT practice that more often afford FET to foreign investments. According to the Tribunal, modern BITs "are not limited to protection against international delinquencies".[100] It found support in the *ELSI* case, in which the ICJ prescribed arbitrariness as "a wilful disregard of due process of law, an act which shocks, or at least surprise a sense of judicial propriety".[101] Along these lines, the Tribunal noted

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[95] *Ibid.* at para. 52.
[96] *Ibid.* at para. 53.
[97] *Ibid.* at paras. 55-6.
[98] *Ibid.* at paras. 57-9.
[99] *Ibid.* at paras. 57-9.
[100] *Ibid.* at paras. 60-2.
[101] *Ibid.* at paras. 63-4.

that, it would propose a formulation of the minimum standard that reflects the current practice of states. However, continued the Tribunal, this would be unnecessary since:

"[…] even applying Canada's proposed standard, damages would be owing to the Investor as a result of the Verification Review Episode […]".[102]

The Award in Respect of Damages by the Tribunal in *Pope & Talbot* illustrates the indeterminacy of Article 1105. The provision is vague, asserted Klager, and therefore provided the broad space of manoeuvre to the Tribunal insofar as to circumvent the FTC Decision by relying on the doctrine of 'evolutionary character of the minimum standard of treatment'.[103] Whilst the reference to evolutionary character indeed represents a weak argumentative basis, it provided the *Pope & Talbot* Tribunal a leeway to reach a pragmatic solution whereby it endorsed the outcome of its earlier decision on Merits and, at the same time, reacted (in legal terms) to the political backlash against the expansion of investor rights under NAFTA. The divergence between the two award that the Pope & Talbot Tribunal is an example to how the ITA Tribunal may use the 'grammar' of international law, at the same time, assuming a principal political role.

V. Playing Along with the Asymmetry of the Political Regime of NAFTA?

V.1. Mondev v USA

The award in *Mondev v the USA* (*Mondev*) was published, shortly after the *Pope & Talbot* Tribunal's Award in Respect of Damages, on 11 October 2002. A Chapter 11 Tribunal consisting of Sir Ninian Stephen, Professor James Crawford and Judge Stephen M. Schwebel dismissed Mondev's Article 1105 claim in its entirety.[104]

The claim arose out of a real estate development contract concluded in December 1978 between the City of Boston, the Boston Redevelopment Authority (BRA) and Lafayette Place Associates (LPA). LPA was a limited liability partnership based in Massachusetts and owned by Mondev International Ltd., a company incorporated in accordance with the Laws of Canada. The contract entitled LPA the option to purchase the Hayward Parcel, a

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[102] *Ibid.* at para. 65.
[103] Kläger, 'Fair and Equitable Treatment' in International Investment Law at 75-6.
[104] Mondev International Ltd. v. United States of America, Award, 11 October 2002, ICSID Case No. ARB(AF)/99/2.

piece of land owned by the City of Boston by 1 January 1989 at a price ascertained by a formula in the Contract.[105] Discontent with the pricing of its land, the City of Boston allegedly attempted to frustrate LPA's right to purchase the land.[106] LPA brought suit in Massachusetts in March 1992 against the City of Boston for the breach of contract and the BRA for "intentional interference with contractual relations".[107]

In 1994, the trial culminated in a jury verdict in favour of LPA in both claims. However, the trial judge set aside the claim against the BRA, holding the BRA immune from liability for intentional torts under a Massachusetts statute. Whereas the City of Boston appealed the verdict against it for the breach of contract, LPA appealed the trial judge's decision that held BRA immune from intentional torts. The Massachusetts Supreme Judicial Court (SJC) approved the the trial judge's decision in relation to BRA and, further, upheld the City of Boston's appeal with respect to LPA's contractual claim. LPA applied to the SJC for a hearing and also sought judicial review at the US Supreme Court. Both LPA's both petitions were denied, and LPA lost both its claims.[108]

Mondev thereafter brought a claim against the USA under Chapter 11 and the ICSID Additional Facility Rules for the loss and damage caused to its interests in LPA as an investor. Amongst others (namely national treatment and expropriation and compensation claims under Articles 1102 and 1110), Mondev invoked Article 1105, claiming that the USA breached its obligations due to SJC's decision and the acts of the City of Boston and BRA.[109] The Tribunal first determined that only the Article 1105 claim was within its jurisdiction since the alleged violations of Articles 1102 and 1110 had both occurred before the NAFTA entered into force on 1 January 1994 and NAFTA does not apply retrospectively.[110]

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[105] *Ibid.* at para. 37.
[106] *Ibid.* at paras. 38-9.
[107] *Ibid.* at para. 139.
[108] *Ibid.* at para. 40. *See* William S Dodge, 'International Decisions: Loewen Group, Inc. v. United States and Mondev International Ltd. v. United States' (2004) 98 AJIL 155 at 159-63; Pieter HF Bekker, 'The Use of Non-Domestic Courts for Obtaining Domestic Relief: Jurisdictional Conflicts between NAFTA Tribunals and US Courts' (2004) 11 ILSA J Int'l & Comp L 331.
[109] Mondev International Ltd. v. United States of America, Award, 11 October 2002 at paras. 1-3.
[110] *Ibid.* at paras. 57-75.

As one would expect, against a background of such facts, the basis of Mondev's claim under Article 1105 was that the USA failed to provide LPA due process when the SJC overturned the trial jury's verdict and denied LPA's subsequent petitions. To that extent, the Tribunal's interpretation and application of Article 1105 concerned denial of justice which, according to the Tribunal, is "the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals".[111]

In doing this, the Tribunal first undertook an analysis of the "meaning and effect of Article 1105". The extensive discussion by the parties and non-disputing state parties on the FTC Note and the damages award by the Tribunal in *Pope & Talbot* were taken into account. According to Mondev the FTC Note was "more a matter of amendment" and therefore one could question the Respondent's good faith for changing "the meaning of a NAFTA provision in the middle of the case in which that provision plays a major part".[112] By contrast, to the Respondent USA, the measure by the NAFTA Parties was an act of interpretation that had been adopted "in view of what they saw as "the misinterpretations" of Article 1105 by earlier NAFTA tribunals". In any event, continued the USA, Article 1131 is "one of the rules of the game, a rule designed just so that the Parties could assure that what they meant by NAFTA's terms could be made known whenever there were misinterpretations".[113]

The USA further submitted a post-hearing submission on 8 July 2002, in which it reviewed the *Pope & Talbot* Tribunal's consideration of the FTC Note. According to the Respondent, the Award in Respect of Damages in *Pope & Talbot* merited little consideration since "nothing in the text of NAFTA supports the view that FTC interpretations would be subject to… review by an *ad hoc* tribunal constituted under Chapter Eleven". Nevertheless, argued the USA, the *Pope & Talbot* Tribunal's equation of customary international law with the content of the BITs without regard to any question of *opinio juris* was erroneous. The USA also criticized the *Pope & Talbot* Tribunal's reliance on the ELSI case, which concerned a particular FCN treaty and, therefore, "cannot reflect an evolution in customary international law […]". The USA continued:

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[111] *Ibid.* at para. 96.
[112] *Ibid.* at para. 102.
[113] *Ibid.* at para. 103.

"ELSI did not even purport to address customary international law standards requiring treatment of an alien amounting to an 'outrage' for a finding of a violation. In any event, ELSI clearly does not establish that any relevant standard under customary international [law] requires mere 'surprise'".[114]

In its Article 1128 submission of 23 July 2002, Mexico likewise criticized the *obiter dictum* of the *Pope & Talbot* Tribunal's interpretation of Article 1105, whereby the *Pope & Talbot* Tribunal, opined Mexico, "created the interpretative problem that it complained of, in particular in adopting an additive approach to Article 1105(1)". Mexico acknowledged that the customary international law standard may have evolved since the 1920s. However, it diverged from the USA's position in its post hearing submission, noting that the Chamber's finding in the ELSI case was nevertheless "instructive as to the standard of review that the international tribunal must employ when examining whether a State has violated the international minimum standard". According to Mexico, whereas the international minimum standard would provide protection against arbitrary action being substituted for the rule of law, mere domestic illegality would not be considered arbitrary under international law.[115] Similarly, Canada, in its Article 1128 submission of 19 July 2002, noted that its "position has always been that customary international law can evolve over time, but that the threshold for finding violation of the minimum standard of treatment is still high".[116]

The Tribunal further considered the post hearing submissions of all three NAFTA Parties on the question of whether "contemporary international law reflects the concordant provisions of many hundreds of [BITs]". According to the USA, when adopting provisions for fair and equitable treatment in NAFTA and other BITs, its intention was to incorporate principles of customary international law. In upholding this argument, the Tribunal found guidance in statements of implementation of NAFTA and other BITs submitted to the legislatures of signatory governments. Irrespective of whether these statements could be considered as *travaux preparatoires*, furthered the Tribunal, "they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence opinion juris".[117]

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[114] *Ibid.* at para. 106.
[115] *Ibid.* at para. 108.
[116] *Ibid.* at para. 109.
[117] *Ibid.* at para. 111.

Having determined that FET is *subsumed* in customary international law,[118] the Tribunal then discussed the content of FET for the purposes of the dispute. It opposed Canada's view that the content of the international minimum standard is laid down by the Mexican Claims Commission in the *Neer* case on three grounds. First, the *Neer* case concerned the physical security of an alien and not the treatment of foreign investments. Second, the *Neer* award was decided in the 1920s and since then rules governing the protection of foreign investment have developed dramatically. Third, a vast number of international investment treaties uniformly accord FET to foreign investments, which have influenced the content of the rules governing the treatment of foreign investment in contemporary international law.[119]

Having determined that the content of the international minimum standard is one that evolves, the Tribunal felt no need to resolve issues concerning the FTC Note. Rather, the Tribunal made lengthy observations on the content of the FTC Note[120], whereby, the Tribunal concluded, NAFTA Parties have all agreed that fair and equitable is subsumed in customary international law and:

"[…] that the standard adopted in Article 1105 was that as it existed in 1994 […] as it had developed to that time […]".[121]

The question then was whether the FET, as subsumed under customary international law, provided protection against "unremedied acts of the local constabulary" or whether one could also challenge "reasoned decisions of the highest courts of a State". Quoting the Tribunal in *Azinian*, the Tribunal ruled that an investor has the option to seek local remedies, however, if it does so, "it is not the function of NAFTA tribunals to act as courts of appeal".[122]

In reaching its conclusion, the Tribunal in *Mondev* maintained the 'pragmatic approach' of the *Pope & Talbot* Tribunal that the content of the minimum standard of treatment is one that evolves. In doing so, however, it adopted a narrow understanding of what the

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[118] *Ibid.* at paras. 111-3.
[119] *Ibid.* at paras. 114-7.
[120] *Ibid.* at paras. 119-123.
[121] *Ibid.* at paras. 124-5.
[122] *Ibid.* at para. 126. Quoting Azinian at para. 99.

FET standard meant, diverging from the *Pope & Talbot* Tribunal's previous reading of the provision. In its decision, the Tribunal in *Mondev* chose not to challenge the content of the FTC Note. To the contrary, the Tribunal discussed non-disputing NAFTA parties' positions submitted under Article 1128 throughout its award that deemed the FTC Note as an interpretation and not an amendment.[123] It could be argued that, against a background of a backlash against private investment rights, the Tribunal's choices in reading Article 1105 also reflected the interests of the broader political regime that underlie the foundations of NAFTA. Yet, it is also important to note the Tribunal made some observations *in obiter* that could have distorted the political regime. In relation to denial of justice, for instance, the Tribunal held that "under NAFTA it is not true that the denial of justice rule and the exhaustion of local remedies rule 'are interlocking and inseparable'".[124] Inasmuch as this obiter constituted a divergence from the established *Azinian* rule, it was also criticized by scholars for reaching the "wrong" conclusion.[125] Yet, such distortions to the political regime of NAFTA did not affect the outcome of the case.

V.2. Feldman v Mexico

The Tribunal in *Feldman v Mexico*, composed of Prof. Konstantinos Kerameus (Chair), Jorge Covarrubias Bravo and Prof. David A. Gantz, issued its Award on 16 December 2002, two months after the *Mondev* Award was published.[126] The dispute arose from the tax measures applied to cigarette resellers to bar rebates in Mexico. The US investor, Mark Feldman, challenged these measures applied to the Mexican company it owned and controlled, namely Corporacion de Exportaciones Mexicanas (CEMSA), which engaged in the export of Mexican cigarettes. According to Feldman, the tax measures denied CEMSA certain tax refunds provided to Mexican national exporters, violating Articles

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[123] Not only did the Tribunal consider Article 1128 submission throughout the proceedings, it also allowed non-disputing State Parties to be present and represented at the hearings, noting that "Article 1128 entitles a NAFTA Party to make submissions to a Chapter 11 Tribunal on any question of interpretation of NAFTA. Canada by letters of 19 April and 12 June 2000 and Mexico by letter of 7 June 2000 expressed their wish to make such submissions. They also expressed their wish to attend hearings held in the course of the proceedings". Mondev International Ltd. v. United States of America, Award, 11 October 2002 at para. 7.
[124] Mondev International Ltd. v. United States of America, Award at para. 96.
[125] Paulsson, *Denial of Justice in International Law* at 111.
[126] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

1102 on national treatment, Article 1110 on expropriation and Article 1105 on the Minimum Standard of Treatment.[127]

After determining that Feldman had standing to bring the claim in December 2000[128], the Tribunal (i) declined that Mexico's actions amounted to unlawful expropriation under Article 1110[129] but, at the same time, (ii) found that Mexico violated its national treatment obligations under Article 1102 by treating CEMSA differentially and less favourably compared to other Mexican exporters in like circumstances.[130]

In relation to Feldman's Article 1105 claim, the Tribunal ruled that the provision was not applicable to the measures in question since Article 2103 specifically carves out tax measures from the coverage of NAFTA. Nonetheless, the Tribunal still made observations as to whether the tax measures met the requirements of due process as per Article 1105 via application of Article 1110(1)(c). In doing so, the Feldman Tribunal found Justice Tysoe's reading of the provision "instructive". It held:

> "While the transparency in some of the actions of SHCP may be questioned, it is doubtful that lack of transparency alone rises to the level of violation of NAFTA and international law, particularly given the complexities not only of Mexican but most other tax laws. The British Columbia Supreme Court held in its review of the Metalclad decision that Section A of Chapter 11, which establishes the obligations of host governments to foreign investors, nowhere mentions an obligation of transparency to such investors, and that a denial of transparency alone thus does not constitute a violation of Chapter 11 (United Mexican States v. Metalclad, Supreme Court of British Columbia, Reasons for Judgment of the Honorable Mr. Justice Tysoe, May 2, 2001, paras. 70-74, http://www.naftalaw.org.; transparency is a general NAFTA obligation of the NAFTA Parties under Chapter 18). While this Tribunal is not required to reach the same result as the British Columbia Supreme Court, it finds this aspect of their decision instructive (emphasis added)."[131]

In other words, the Tribunal in *Feldman* upheld the controversial interpretation of Justice Tysoe of Article 1105 that the provision does not obligate NAFTA Parties to "transparency" in their conduct. As noted elsewhere, *Feldman* was the first NAFTA case

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[127] *Ibid.* at paras. 6-23.

[128] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000.

[129] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 at para. 111.

[130] *Ibid.* at para. 187.

[131] *Ibid.* at paras. 125, and 133-4.

in which the interpretation of Article 1105 by the Supreme Court of British Columbia's was openly adopted.[132]

V.3. ADF v USA

ADF v USA is another case that was concluded after the FTC Note was issued in July 2001 (after *Feldman*), in which an Arbitral Tribunal, composed of Judge P. Florentino Feliciano (Chair), Professor Armand de Mestral and Ms. Carolyn Lamm, made substantive findings on Article 1105 on the Minimum Standard of Treatment in its award of 9 January 2003.[133] The dispute arose out of the construction of the Springfield Interchange Project (SIP) by the Virginia Department of Transportation (VDOT). Shirley Contracting Corporation (Shirley) was awarded the main contract, they then sub-contracted with ADF International for the supply and delivery of the structural steel components for nine bridges. In doing so, ADF International, like Shirley, was asked to adhere to US 'Buy America' laws, requiring that steel and other products be purchased and manufactured in the United States. ADF International's claim related to its loss of profit resulting from the manufacture of the steel girders (used in the project) in the United States as opposed to ADF Group's facilities in Canada.[134]

In its memorial, ADF invoked Article 1105 on grounds that included (i) Buy America provisions were "per se unfair and inequitable within the context of NAFTA", (ii) Buy America provisions failed to "adequately control the discretionary authority" of the public office that implemented the law, as a result of which the USA did not accord "full protection and security" and (iii) Buy America provisions dissolved the "legitimate expectations created by previous decisions of US courts and administrative agencies with respect to 'buy national policies'".[135]

In its decision, the Tribunal, citing the *Mondev* Tribunal's reading of the Minimum Standard of Treatment, adopted the pragmatic approach, whereby it accommodated the

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[132] Shotaro Hamamoto, 'Domestic Review of Treaty-Based International Investment Awards: Effects of the Metalclad Judgment of the British Columbia Supreme Court' in M. Kanetake and A. Nollkaemper (eds), The Rule of Law at the National and International Levels: Contestations and Deference (Bloomsbury Publishing, 2016) at 105-6.
[133] ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003.
[134] *Ibid.* at paras. 44-60.
[135] *Ibid.* at para 72.

NAFTA Parties' positions voiced in the FTC Note. Whilst it considered that the FTC Note is a binding and legitimate act of interpretation by NAFTA Parties as per Article 1131(2) of NAFTA, it also held that the Minimum Standard of Treatment under Article 1105:

"[…] is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development".[136]

According to the Tribunal, both the USA and the non-disputing Parties supported this position in their submissions – the USA submitted, and Mexico and Canada agreed that the FTC Note refers to customary international law "as it exists today" subject to the caveat that "the threshold [for violation of that standard] remains high". [137] The Respondent, USA, accordingly contended that, in order to succeed in its Article 1105 claim, ADF "must show a violation of a specific rule of customary international law relating to foreign investors and their investments". Whilst the Tribunal noted that positions of the disputing Parties were unsatisfactory and unconvincing,[138] it felt no need to further discuss the content and scope of the customary international law minimum standard since, considering the facts of the case, the US measures, held the Tribunal, were not inconsistent with the requirements of Article 1105(1).[139]

The Tribunal's deliberation, in *obiter*, on the FTC Note's place in interpreting Article 1105 is an interesting one. Although, as noted already, the Tribunal considered the FTC Note as a legitimate act of interpretation, it also took note of the Claimant's request from the Tribunal to address whether the FTC Note is a "true interpretation" or an

[136] *Ibid.* at para. 179.

[137] *Ibid.* Non-disputing party submissions through Article 1128 did not only concern this finding of the Tribunal, but also Canada's and Mexico's positions and comments with respect to (i) the FTC Note and (ii) Pope & Talbot Tribunal's reading of Article 1105. Mexico, for instance, contended that "the NAFTA Parties in fact gave the Pope & Talbot Tribunal considerable assistance in Phase 2 of the proceeding" in opposition to ADF's argument that the "Pope Tribunal was overwhelmed by assistance from representatives of the NAFTA Parties". See ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, 22 April 2002, Second Article 1128 Submission of the United Mexican States at 1-2. Also see ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1, 19 July 2002, Canada's Second Article 1128 Submission.

[138] *Ibid.* at para. 182.

[139] *Ibid.* at paras. 187-98.

"amendment".[140] However, the Tribunal did not find "persuasive the Investor's submission that a tribunal is impliedly authorized to do that as part of its duty to determine the governing law of a dispute". It continued:

"A principal difficulty with the Investor's submission is that such a theory of implied or incidental authority, fairly promptly, will tend to degrade and set at naught the binding and overriding character of FTC interpretations. Such a theory also overlooks the systemic need not only for a mechanism for correcting what the Parties themselves become convinced are interpretative errors but also for consistency and continuity of interpretation, which multiple ad hoc arbitral tribunals are not well suited to achieve and maintain (emphasis added)".[141]

In other words, the motivation behind the Tribunal's understanding of the FTC Note lies on the Tribunal's concerns over the systemic operation of NAFTA as well as its interpretation. Although the Tribunal was invited to determine whether the FTC Note was meant as an interpretation of or an amendment to Article 1105, it refrained from doing so, not only because of the lack of authentic and authoritative source that might have proved the contrary,[142] but also due to systemic problems such determination could have caused.

V.4. Loewen v USA

In *Loewen v USA*, the Arbitral Tribunal, comprising of Sir Anthony Mason (Chair), Judge Abner Mikva and Lord Mustill, dismissed the Claimant's, Loewen's, Article 1105 claim based on the US State Court of Mississippi's failure to provide due process "by permitting extensive nationality-based, racial and class-based testimony and counsel comments". Since the factual background of this case has already been reviewed in Chapter IV. Section V.1., I will not revisit the facts but, hereunder, will rather focus on the Tribunal's approach to the FTC Note and the content and scope of Article 1105.

An observation made by the Tribunal was that the FTC Note is an "interpretation" and is "binding on the Tribunal by virtue of Article 1131(2)". Whilst the Claimant initially argued that the FTC Note "went beyond interpretation and amounted to an unauthorized

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[140] *Ibid.* at para. 177
[141] *Ibid.*
[142] *Ibid.*

amendment to NAFTA", in its oral arguments the Claimant dropped this position. Accordingly, the Tribunal felt no need to further address this issue.[143]

In determining the scope and content of the Minimum Standard of Treatment, the Tribunal followed an approach comparably narrow to those of the *Metalclad, SD Myers* and *Pope & Talbot* Tribunals. According to the Tribunal, the FTC Note establishes that FET and FPS are not free standing obligations but are obligations "only to the extent that they are recognized by customary international law".[144] Inasmuch as the Tribunal in *Loewen* made observations on the content of Article 1105, its subsequent findings were limited to denial of justice and its applicability. In doing this, the Tribunal relied on the *Mondev* Tribunal's view on the administration of justice that it is the facts which might prove that "the impugned decision was clearly improper and discreditable", resulting the investment to be subjected to "unfair and inequitable treatment".[145] In the light of the facts, the Tribunal concluded that the "whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with the minimum standard of international law and fair and equitable treatment". According to the Tribunal, however, a FET violation only at the trial court proceedings was not enough to establish the alleged Article 1105 violation in relation to the whole judicial process.[146]

Drawing on the observations of Sir Robert Jennings and Professor James Crawford, the Tribunal took the view that "a breach of international law constituted by a lower court decision" does not amount to an international wrongdoing if and when there is "available an effective and adequate appeal within the State's legal system".[147] In other words, the Tribunal held that no State is "responsible for a breach of international law constituted by a lower court decisions when there was available an effective and adequate appeal within the State's legal system".[148] Accordingly, concluded the Tribunal, Loewen failed to exhaust all "reasonably available remedies" when it most notably did not pursue the

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[143] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 at para. 126-7.
[144] *Ibid.* at para. 128.
[145] *Ibid.* at paras. 129-33.
[146] *Ibid.* at para. 137.
[147] *Ibid.* at paras. 150-3.
[148] *Ibid.* at para. 154.

Supreme Court option and, "in consequence, […] has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible".[149]

One needs not repeat the criticisms voiced towards the decision of the Tribunal in *Loewen*. These were discussed at Chapter IV. However, one could take note of the political regime in which the *Loewen* Tribunal operated. The claim was perhaps the strongest in the brief history of NAFTA Chapter 11 disputes instituted against the USA. Before then, there had been widespread criticisms by third parties against the expansion of private investment rights as well as against the potential use of Chapter 11 provisions to the detriment of the systemic asymmetry of NAFTA. As discussed above, the FTC Note published as per Article 1131 and the set-aside procedures triggered as per Article 1136, served for the protection of the asymmetric obligation pillar of the investment regime under Article 1105. The Tribunal in *Loewen* felt no need to depart from the so-called interpretation of the Minimum Standard of Treatment. However, it went one step further by first determining that the trial process and the verdict was in violation of the FET standard but, at the same time, openly admitting that it chose not to "put it right" and "give some teeth" to the "NAFTA ideals" since:

> "Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands"(emphasis added).[150]

With "the integrity of the domestic judicial system and the viability of NAFTA itself", one could argue that, the Tribunal openly admitted its principal political role in protecting and furthering the asymmetric obligation pillar of the political regime of NAFTA.

V.5. Waste Management v Mexico

The Tribunal in *Waste Management v Mexico (II)*, comprising of James Crawford (Chair), Benjamin R. Civiletti and Eduardo Magallon Gomez, rendered its Award on 30 April

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[149] *Ibid.* at paras. 207-17.
[150] *Ibid.* at 241-2.

2004 almost one year after the Award in *Loewen* was published and three years after the FTC issued its Note.[151] The *Waste Management II* Award provided an oft-cited formulation of Article 1105. It is important therefore, to note that Article 1105, in the words of the Tribunal, “emerg[ed]” as a “general standard” under international law.[152]

The *Waste Management II* claim was filed by the US company, Waste Management, Inc., in 2000. This followed the previous case it brought against Mexico in 1998 which was dismissed by the Tribunal in *Waste Management v Mexico (I)* on the basis that Waste Management had not waived its right to initiate or to continue the claim before national courts or tribunals, a prerequisite embedded in Article 1121(1) of NAFTA.[153]

The dispute in *Waste Management* arose from the concessional rights granted to Acaverde, a Mexican company indirectly owned by Waste Management, for the provision of waste disposal services within the City of Acapulco in the State of Guerrero for a period of fifteen years. Under the Concession Agreement, Acaverde undertook (i) to provide on an exclusive basis certain municipal waste disposal and street cleaning services in a specified area of Acapulco and (ii) to build and operate a permanent solid waste landfill for the City as a whole.[154] As per the Concession Agreement, Acaverde was provided “an irrevocable, contingent and revolving line” of guarantee for “all payment obligations” of the City of Acapulco by Banco Nacional de Obras y Servicios Publicos, S.N.C. (‘Banobras’).[155]

On 15 August 1995, Acaverde began providing services under the Agreement but soon started to experience difficulties. Waste Management alleged that these difficulties arose from the City’s failure to provide the landfill it promised to make available for the use of Acaverde and to make regular payments as per the Concession Agreement. Waste Management further claimed that it experienced substantial difficulties in developing a

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[151] Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.
[152] *Ibid.* at para. 98.
[153] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, Arbitral Award, 2 June 2000.
[154] *Ibid.* at paras. 41-5.
[155] *Ibid.* at para. 48.

commercially viable client base.[156] Mutual allegations by Waste Management and the City government culminated in Waste Management's decision to end its operations in the City of Acapulco in November 1997.[157]

Subsequently, Acaverde pursued two sets of proceedings before the Mexican federal courts against Banobras for non-performance of the Line of Credit Agreement which was eventually dismissed together with Acaverde's appeals. Acaverde also pursued arbitration under the Concession Agreement against the City of Acapulco which was subsequently discontinued.[158]

In its claim under Chapter 11 of NAFTA, Waste Management invoked Articles 1110 and 1105. Whilst the Claimant characterized its Article 1105 claim as an "alternative and overlapping basis for recovery", the Tribunal considered it as an "autonomous basis of claim", assessing its requirements in depth. The Claimant argued its investment was subjected to arbitrary and capricious acts by the City of Acapulco and Banobras and lacked due process of law as a result of which the Claimant's (i) investment became valueless and (ii) its right to access to justice was obstructed when the litigation was unreasonably delayed and when Acaverde was denied "the opportunity to obtain timely payment from Banobras".[159]

Similar to its predecessors, the Tribunal in *Waste Management (II)* commenced its analysis with an overview of the FTC Note's content and an understanding of the points made therein by referencing the *Mondev* and *ADF* Tribunals' formulations on the content and scope of Article 1105. The Tribunal accepted that the customary international law embedded in Article 1105 is not static and, therefore, is not confined to the kind of outrageous treatment referred to in the *Neer* case.[160]

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[156] *Ibid.* at paras. 57-8.
[157] *Ibid.* at paras. 59-72.
[158] *Ibid.* at para. 70.
[159] *Ibid.* at paras. 86-7. It is interesting that the Tribunal received only one Article 1128 submission by contrast to earlier NAFTA cases. The Submission was filed by Canada and only made some general observations, also arguing that the minimum standard of treatment under Article 1105 is equivalent to customary international law. See Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Submission of Canada pursuant to Article 1128 of the NAFTA, 19 March 2003.
[160] *Ibid.* at paras. 86-93.

Thus Article 1105 was not only invoked based on the alleged arbitrary and capricious acts of Mexico but also based on denial of justice. The Tribunal, in setting the limits of the scope of Article 1105, put together a survey of previous NAFTA awards till then, pointing at certain differences but also concluding that "a general standard for Article 1105 [was] emerging". The Tribunal held:

"[…] Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant".[161]

The task the Tribunal faced thereafter was the application of this "general standard" to the facts of the case. The Tribunal held that the financial guarantees provided by Banobras were limited. The State of Guerrero was not a party to the Concession Agreement and was also not a financial guarantor. On the other hand, although the City of Acapulco failed in various ways to fulfil its obligations under the Agreement, observed the Tribunal, it also took steps to fulfil its commitments. According to the Tribunal, the weakness in Waste Management's claim arose from its failure to anticipate a resistance by the local people to pay for waste removal services and the Mexican financial crisis. In other words, the City's actions did not reach a level that would have amounted to a breach of the Minimum Standard of Treatment. In addition, after reviewing the Mexican judicial proceedings by Acaverde, the Tribunal concluded that "the Mexican court decisions were not either *ex facie* or on closer examination, evidently arbitrary, unjust or idiosyncratic". In sum, the Tribunal dismissed Waste Management's Article 1105 claim.[162]

In doing so, it is curious why the Tribunal refrained from discussing the extensive *obiter dictum* in *Metalclad* on Article 1105, limiting itself to *SD Myers, Mondev, ADF* and – despite the substantive criticism directed to it – *Loewen*. Although the Tribunal cited *Metalclad* and discussed its controversial set aside proceedings under the CIAA in its

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[161] *Ibid.* at para. 98.
[162] *Ibid.* at paras. 128-40.

deliberations on Article 1110, it made no mention of the *Metalclad* Tribunal's reading of the provision when observing that a general standard for Article 1105 was emerging. As a result, albeit implicitly, the Tribunal took distance from the "transparency" requirement voiced by the Tribunal in *Metalclad*. In addition, by avoiding discussion of such controversies, the Tribunal excluded the *Metalclad* formulation from the "general standard" it argued was emerging. As illustrated in the cases that followed, this behaviour proved to be crucial in limiting what would otherwise expand the private investment rights vis-à-vis sovereign powers of NAFTA Parties.

V.6. GAMI v Mexico

In *GAMI v Mexico*, the Tribunal comprising of Jan Paulsson, Prof. W. Michael Reisman and Julio Lacarte Muro, dismissed GAMI's Article 1105 claim arising from the regulation of sweeteners in Mexico on 15 November 2004[163], in a dispute that finds its foundations in the sweeteners conflict between Mexico and the USA. According to some, this conflict goes back to 3 November 1993, when the Mexican and US chief negotiators of NAFTA exchanged letters with regard to a side-agreement on sweeteners. However, disagreement, resulting from domestic politics and Mexico's failure to administer its sugar programme, followed which eventually led the Mexican Government to start adopting measures that were allegedly "aimed at protecting the Mexican sugar industry". First, the Mexican Government issued a Decree on expropriation in September 2001 that covered 27 of Mexico's 61 sugar mills. Further measures followed when the Mexican Congress adopted a tax on the use of high fructose corn syrup (HFCS) that applied almost exclusively to US investors. Sugar mill owners, including GAM (Grupo Azucero Mexicano, S.A. de C.V.), instituted *amparo* proceedings in Mexican courts.[164] GAMI Investments Inc., a US incorporation and the minority shareholder of GAM, also initiated proceedings under Chapter 11 of NAFTA, invoking – amongst others – Article 1105 and arguing that Mexico breached FET when it arbitrarily implemented and applied its sugar market measures.[165]

[163] Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Final Award, 15 November 2004.
[164] Sergio Puig, 'Investor-State Tribunals and Constitutional Courts: The Mexican Sweeters Saga' (2013) 5 Mexican Law Review
[165] Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Final Award at paras. 23-5.

The Tribunal considered at Section 6(B), the content and scope of Article 1105 against a background of facts as presented by GAMI.[166] The Tribunal first presented some of its observations as to whether GAMI had satisfied the requirement that its "complaint of alleged unfair and inequitable treatment" is connected "with a demonstration of specific and quantifiable prejudice".[167] The Tribunal found that GAMI failed in this respect and an award of damages "even if it had found a violation of Article 1105" was therefore not possible. Nevertheless, it continued to explain why "GAMI also failed to establish its claim in principle under Article 1105".[168]

According to the Tribunal, GAMI "comprehensively demonstrated that the regulations which it refers to as 'the Mexican Sugar Program' were not carried out in accordance with their terms".[169] Was this however enough to meet the threshold of the minimum standard of treatment embedded in Article 1105? Before assessing this threshold, the Tribunal first made an observation as to the systemic role of the ITA tribunal:

> The duty of NAFTA tribunals is rather to appraise whether and how pre-existing laws and regulations are applied to the foreign investor. It is no excuse that regulation is costly. Nor does a dearth of able administrators or a deficient culture of compliance provide a defence. Such is the challenge of governance that confronts every country. Breaches of NAFTA are assuredly not to be excused on the grounds that a government's compliance with its own law may be difficult. Each NAFTA Party must to the contrary accept liability if its officials fail to implement or implement regulations in a discriminatory or arbitrary fashion (emphasis added).[170]

Thereafter, the Tribunal noted that "[t]he relevant international obligation is expressed in Article 1105(1)", citing the FTC Note. In the absence of any contention as to whether the FTC Note is an amendment or an interpretation by GAMI, the Tribunal found "it unnecessary to question whether the Notes constitute 'a proper exercise of the interpretive power in Article 1131'".[171]

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[166] *Ibid.* at Section 6(B).
[167] *Ibid.* at para. 83.
[168] *Ibid.* at para. 85.
[169] *Ibid.* at para. 86.
[170] *Ibid.* at para. 94.
[171] *Ibid.* at para. 92 and ft. 14.

In its comparably short reasoning, the Tribunal turned to prior NAFTA awards in seeking guidance as to what Article 1105 obligates NAFTA parties to. The Tribunal first made observations on what is known as the doctrine of 'legitimate expectations'. It held that, although it is not "the role of international law in the context of the protection of foreign investment [to] appraise the content of a regulatory programme extant before and investor decides to commit". A government's failure to implement or abide by its own law may not necessarily amount to a violation of Article 1105. A violation may materialize, however, when a "pre-existing licensing regime upon which a foreign investor has demonstrably relied" arbitrarily repudiated.[172]

In its subsequent analysis, the *Waste Management II* formulation was instructive to the Tribunal. It quoted the formulation in length, taking note of "the emergence of a general standard for Article 1105". It further observed that "*Neer* was decided more than half a century before NAFTA saw the light of day".[173] Citing the *ADF* award, the Tribunal agreed that the customary international law as reflected in Article 1105 is "constantly in a process of development". To that extent, the Tribunal upheld GAMI's reproduction of the *Waste Management II* formulation.[174] However, this threshold, albeit lower than that of *Neer*, was still not met by GAMI in the Tribunal's opinion since, as noted above, GAMI failed to justify any quantifiable damage to its investment. As opposed to the investor in *Waste Management II*, the claim did not involve a contractual obligation but, more importantly, it did not "amount to an outright and unjustified repudiation of the transaction" for which "some remedy is open to the creditor to address the problem".[175] In reaching its conclusion, the Tribunal did not receive Article 1128 submissions by the non-disputing Parties, except for the USA's submission on jurisdictional aspects of the arbitration.[176] The case did not constitute a distortion to the two pillars of the political regime of NAFTA. One could argue that the Tribunal had no reason to assume a principal political role to respond to interests of stakeholders involved in the political regime of NAFTA.

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[172] *Ibid.* at para. 91.
[173] *Ibid.* at para. 95.
[174] *Ibid.*
[175] *Ibid.* at paras. 96-102. *See* T Weiler, 'Gami Comment' (2005) 2 Transnational Dispute Management (TDM).
[176] *Ibid.* at para. 11. *See* Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL, Submission of the United States of America, 30 June 2003.

V.7. Methanex v USA

In *Methanex v the USA (Methanex)*, the Tribunal, comprising of V. V. Veeder (Chair), Prof. W. Michael Reisman and J. William F. Fowley, dismissed Methanex's Article 1105 claims in its Final Award dated 3 August 2005.[177] As discussed in more detail in Chapter IV above, Methanex brought its Chapter 11 claim against the USA on the basis that the regulatory measures taken by the State of California, banning the use of MTBE, were in violation of Chapter 11 provisions including Article 1105. Briefly, Methanex's Article 1105 claim was based on the argument that the US measures were intentionally discriminatory and were therefore unfair and inequitable by definition.[178] Hereunder, I shall focus only on the interpretation of Article 1105 by the Tribunal.

The Tribunal in *Methanex* undertook a lengthy analysis of the Minimum Standard of Treatment obligation together with the FTC Note. It first considered the FTC Note as "rules of interpretation". The Tribunal voiced "certain sympathy" with Methanex's position that the FTC Note is not an interpretation but an amendment to the Agreement which falls outside the scope of Article 1131(2). According to the Tribunal, whilst it was reasonable that Methanex assumed that the FTC Note was directed at its own argument (above), it nonetheless dismissed Methanex's position by not taking any argument relating to "the motive or the timing" of the FTC Note as relevant. To the Tribunal "the historical fact remains that the FTC has made what it characterizes as an 'interpretation' of Article 1105(1) of NAFTA".[179]

Similar to earlier cases in which Article 1105 was invoked, the Tribunal in Methanex first determined the FTC Note as an "interpretation" as per Article 1131(2) of NAFTA. However, continued the Tribunal, "leaving one side the impact of Article 1131(2) NAFTA", the FTC Note:

"[…] must also be considered in the light of Article 31(3)(a) of the Vienna Convention as it constitutes a subsequent agreement between the NAFTA Parties on the interpretation of Article 1105 NAFTA (without

[177] Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 5 August 2005.
[178] *Ibid.* at Part II – Chapter D, para. 27.
[179] *Ibid.* at Part II – Chapter B, paras. 12-4.

here deciding Methanex's claim that the interpretation of 31st July 2001 is in truth an amendment, not an interpretation".[180]

According to the Tribunal, Respondent USA's position and Article 1128 submissions by Canada and Mexico exhibited such an agreement.[181] Also having found support in the writings of Oppenheim, the Tribunal concluded that "an authentic interpretation by treaty parties overrides the ordinary principles of interpretation". This alternative justification seemed to have been adopted to refute Methanex's application for the production of the *travaux preparatoires* in relation to Article 1105. The Tribunal held that the *travaux* would only become relevant had Methanex established that the meaning of Article 1105 was still "demonstrably ambiguous or obscure, or the result of interpretation pursuant to Article 31 to be manifestly absurd or unreasonable […]". However, there was an agreement by the treaty parties and a series of decisions had already been taken in relation to interpretation of Article 1105, one of which (namely *Waste Management*) was also relied on by Methanex.[182]
Adopting VCLT and the FTC Note as the primary sources in interpreting Article 1105, the Tribunal then discussed whether "the minimum standard of treatment precludes governmental differentiations as between nationals and aliens" or, in other words, discrimination.[183] The Tribunal did not find support for Methanex's argument that Article 1105 embodies prohibition of discrimination between national and aliens, even if one ignores the FTC Note and even if Methanex had established discrimination under Article 1102. It further noted that if it was the intention of NAFTA Parties to incorporate a norm of non-discrimination, they would have done so as they did in Article 1110(1) which requires that a lawful expropriation must, among other requirements be effected 'on a non-discriminatory basis'.[184]

To this end, the Tribunal in *Methanex* diverged from the formulation of the *Waste Management II* Tribunal, in which a standard of non-discrimination was embedded in the customary international law standard of minimum standard of treatment under Article 1105. Why the Tribunal in *Methanex* diverged from the *Waste Management II*

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[180] *Ibid.* at Part II – Chapter H, para. 24.
[181] *Ibid.* at Part II – Chapter B, para. 21.
[182] *Ibid.* at Part II – Chapter H, para. 25.
[183] *Ibid.* at Part IV – Chapter C, para. 14.
[184] *Ibid.* at Part IV – Chapter C, para. 15.

formulation is curious. Read under the rubric of political regimes theory, however, one should take note of the Tribunals behaviour in choosing the interpretive approaches that would accommodate the two systemic implications that we have identified – namely asymmetric obligation and regulation of environment. As discussed earlier in Chapter V Section III.4 above, the *Methanex* Tribunal held that previous decisions:

> " […] are not sources of law; and neither can be regarded as authority legally binding upon this Tribunal".[185]

This interpretive choice the Tribunal made meant it did not have to apply the discrimination standard embedded in the *Waste Management II* formulation that reinforces that there is correlation between the choice made by the Tribunal and the systemic implication of NAFTA. In this context, one should revisit the Tribunal's decision in admitting *amicus curiae* submissions under Article 1128.[186] The Tribunal took note of the petitioners' argument that it was under an obligation to "consider environmental and sustainable development goals" of NAFTA.[187] It also took note of respective positions of the the non-disputing NAFTA Parties. Whilst Canada took the view that involvement of *amici* submissions would institute greater openness and transparency, Mexico objected admission of Article 1128 submissions other than those filed by NAFTA Parties. Mexico contended that if such submissions were allowed, "the *amici* would have greater rights than the NAFTA Parties themselves because of the limited scope of Article 1128".[188] In the end, the Tribunal admitted *amicus curiae* submissions, observing that the case at hand involved important "public interest" issues.[189] Similar to *Pope & Talbot*, the Tribunal in *Methanex* received 4 Article 1128 submissions from Canada and one from Mexico. But, perhaps, the most remarkable third party involvement came from the *amici.* The decision of the Tribunal on third parties to intervene was unprecedented.

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[185] Methanex Corporation v. United States of America, UNCITRAL, Partial Award, 7 August 2002 at para. 141.
[186] Methanex Corporation v. United States of America, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", 15 January 2001.
[187] *Ibid.* at para. 6.
[188] *Ibid.* at paras. 9-10.
[189] *Ibid.* at paras. 49-52.

On a further note, one should also revisit the timing of the FTC Note. Although the Final Award in *Methanex* came out in August 2005, the arbitration was filed on 3 December 1999. The Tribunal took note of the timing. It observed that it was reasonable for Methanex to assume that the FTC note "was directed specifically at its own argument on Article 1105 NAFTA advanced against the USA in these arbitration proceedings".[190] As mentioned, Sir Robert Jennings also severely criticized the USA for changing the rules of the game it created during the arbitration against the most elementary fundamentals of due process.[191] Yet, none of these observations stopped the Tribunal from choosing the interpretation that was most beneficial to the pillars of the political regime of NAFTA.[192]

V.8. Thunderbird v Mexico

The Award in *Thunderbird v Mexico* was published almost six months after the decision in *Methanex* on 26 January 2006 by the Tribunal consisting of Professor Albert Jan van den Berg (Chair), Professor Thomas Wälde and Augistin Portal Ariosa. The claim was filed by International Thunderbird Gaming Corporation, a Canadian corporation, whose principle offices are situated in the US against Mexico, based on the alleged breaches of Articles 1102 (non-discrimination), 1110 (expropriation) and 1105 of NAFTA.

Thunderbird was in the business of operating gaming facilities. Having decided on exploiting business opportunities in the Mexican market, it submitted a written request (Solicitud) through its legal representative in Mexico to Secretaria de Gobernacion (SEGOB) on 3 August 2000.[193] Hereunder, Thunderbird's planned investment was described as concerning "the commercial exploitation of video game machines for games of skills and ability". Thunderbird further explained that "[i]n these games, chance and wagering or betting is not involved…".[194] SEGOB responded two weeks after, on 15 August 2000. By reference to Mexican Federal Law of Games and Sweepstakes, prohibiting "gambling and luck related games", it observed in its Oficio that "[…] it is

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[190] Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, at para. 14.

[191] Methanex Corporation v United States of America, UNCITRAL, Second Opinion of Professor Sir Robert Jennings, Q.C., 6 September 2001 at 4-5.

[192] One might also revisit the interpretation of the Tribunal of Article 1110 on expropriation as identified in Chapter IV Section V.2.

[193] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Arbitral Award, 26 January 2006 at paras. 41-50.

[194] *Ibid.* at para. 50.

important to clarify that, if the machines that your representative exploits operate in the form and conditions stated by you, this governmental entity is not able to prohibit its use".[195] Based on the Officio, the Counsel for Thunderbird stated that the investment "can operate the video games skill machines as long as they do not become, in any manner whatsoever, as gaming or betting machines".[196] Following the opening of Thunderbird's investment, however, in December 2000 there was a change of government in Mexico. SEGOB issued the Resolucion Administrativa in October 2001 and closed down Thunderbird's facilities, declaring that Thunderbird's investments were prohibited gambling machines under the Federal Law of Games and Sweepstakes.[197]

When domestic proceedings failed[198], Thunderbird turned to Chapter 11, claiming that amongst others, Mexico violated Article 1105 when it first created a "legitimate expectation" upon which Thunderbird relied to make investments which was then revoked with the regulation by SEGOB. The legitimate expectation claim under Article 1105 was an important part of the award and the dissent by the late Professor Thomas Wälde has shaped the "legitimate expectations" doctrine as it stands today.[199] Notwithstanding legitimate expectations, Thunderbird also invoked "denial of justice" and "arbitrariness/abuse of rights" in the proceedings before SEGOB, also in breach of Article 1105. The Claimant's reliance on the *Waste Management II* formulation concerning the content and scope of Article 1105 is also noteworthy.[200]

Before moving onto Thunderbird's Article 1105 claims, the Tribunal made some general observations as to what is meant by "legitimate expectations" is in the NAFTA context, in the light of "the good faith principle of international customary law". According to the Tribunal, it relates:

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[195] *Ibid.* at para. 55.
[196] *Ibid.* at para. 59.
[197] *Ibid.* at paras. 73-6.
[198] *Ibid.* at paras. 76-9.
[199] International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Separate Opinion of Thomas Walde, 1 December 2005. For a recent review of the doctrine *see* Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review 88.
[200] Thunderbird, Arbitral Award, para. 185.

"[…] to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages".[201]

Thunderbird's principle claim was that the Oficio generated a legitimate expectation upon which Thunderbird relied to make its investment. The Tribunal first determined that Thunderbird failed to support its legitimate expectations claim with sufficient evidence.[202] It then proceeded to make observations on the content and scope of Article 1105. Similar to other NAFTA Tribunals constituted post-FTC Note, the Tribunal first formulated the minimum standard of treatment by reference to customary international law. It noted, at the same time, the minimum standard of treatment "should not be rigidly interpreted and it should reflect evolving customary international law".[203] Whilst the Tribunal held that "customary international law has evolved since decisions such as the *Neer Claim* in 1926", it also concluded that the threshold for finding a violation of the minimum standard of treatment still remains high.[204] In doing this, it referenced *SD Myers, Mondev, ADF, Azinian* and *Loewen* as well as non-NAFTA awards such as *Alex Genin v Estonia* and, also, the *ELSI Case*.[205] Although *Waste Management II* award is referred to by the Tribunal, the formulation adopted thereunder was not considered as relevant for the purposes of the dispute between Thunderbird and Mexico.[206] In sum, drawing on these awards and, in its own words "weigh[ing] against the given factual context", the Tribunal found that for a breach of Article 1105 to materialize the governmental measure in question "should amount to a gross denial of justice of manifest arbitrariness falling below acceptable international standards".[207] According to the Tribunal, there was insufficient evidence to establish that the SEGOB decisions and the domestic proceedings were arbitrary or unfair so as to violate this high threshold of minimum standard of treatment.[208]

[201] *Ibid.* at para. 147.
[202] *Ibid.* at para. 148-67.
[203] *Ibid.* at para. 192-4.
[204] *Ibid.* at para. 194.
[205] *Ibid.* at fts. 13-4.
[206] *Ibid.* at ft. 11.
[207] *Ibid.* at para 194.
[208] *Ibid.* at paras. 197-201. During the course of the proceedings, the Tribunal received only one Article 1128 submission. Canada, in its submission dated 21 May 2004, made observations limited to the content and scope of Article 1102 on non-discrimination. No comment was received from NAFTA Parties on Article 1105 or the FTC Note. International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Submission of the Government of Canada pursuant to Article 1128, 21 May 2004.

In his lengthy Separate Opinion, Professor Wälde expressed his disagreement with the finding that the "legitimate expectations" doctrine did not apply to the facts of the case. Wälde's opinion was far broader, owing to the fact that, in his opinion, "main principles underlying the application of the 'Investment Disciplines" in Chapter XI of the NAFTA" included the Preamble, Article 102 and Article 1115 of NAFTA as per Article 1131 (Applicable Law) and Article 31 of VCLT (applicable rules of international law). Read together, these principles, opined Wälde, held NAFTA Parties accountable to "clear rules", "predictable commercial framework for business planning and investment", "promotion of trade […]", "creation of new employment opportunities", "transparency", "increasing substantially investment opportunities" and "equal treatment among investors of the parties". To Wälde, the systemic implication of the investment treaty regime under NAFTA is to provide investment promotion and investment protection, such principles of interpretation had not been properly applied by the Tribunal in *Metalclad*.[209]

In other words, Wälde pointed at the systemic conditions under which the investment treaty regime was created namely "to compensate for the foreign investors' structural handicap when entering a foreign society and to help governments enhance the quality of their governance systems".[210] This position, according to Wälde, is endorsed by other eminent scholars and tribunals. In particular, he relied on non-NAFTA awards including *Maffezini v Spain, CME v Czech Republic, TECMED v Mexico* and *Occidental v Mexico* as well as NAFTA awards, *Metalclad* and *Waste Management II* in arguing that the fair and equitable treatment obligation is linked with transparency. According to Wälde, it is this transparency obligation that requires host governments to provide clarity and consistency in their interactions with foreign investors.[211]

Curiously, Wälde made no mention of the FTC Note when elaborating the content and scope of Article 1105 and the "legitimate expectations" doctrine hereunder. By relying on the non-NAFTA awards in finding support for the link between the transparency obligation and Article 1105, Wälde also appears to have ruled out the systemic bias established under the political regime for investment under NAFTA. He seems to have assumed a role in reminding the international community that investment arbitration is

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[209] Thunderbird, Separate Opinion of Thomas Walde at paras. 9-14 and ft. 14.

[210] *Ibid.* at para. 33.

[211] *Ibid.* at paras. 36-46.

about investment promotion and protection and that the political position of NAFTA parties has no standing in an ideal and objective adjudication even if they are presented through constitutive institutions such as Article 1131.

V.9. Glamis Gold v USA

The Award in *Glamis Gold v USA* was handed down by the Tribunal consisting of Michael K. Young (Chair), Professor David D. Caron and Kenneth D. Hubbard on 8 June 2009. The claim concerned the open-pit gold-mining project of Glamis Gold (the Imperial Project), a publicly held Canadian corporation engaged in the business of mining of precious metals in southeastern California. The mining site allocated to Glamis Gold was located within the California Desert Conservation Area (CDCA) close by the Native American lands where the Quechan Indian Nation's tribe had special cultural concerns.[212]

The use of land was subject to three principle of governance as per the Federal Land Policy and Management Act of 1976 (FLPMA), namely "multiple use, sustainable yield and the maintenance of environmental quality". A balance was to be achieved between the private interests of the investor and "the need to protect federal resources" including cultural resources in applying these principles.[213]

The original drilling plan for the Imperial Project was submitted by Glamis Gold and received approval by the Bureau of Land Management (BLM) in the early 1990s. At the time, BLM concluded that the proposed project would "not have any significant impacts on the human environment".[214] However, in the following years, additional environmental impact studies found that some of Glamis Gold's sites would have potential impacts on significant cultural and paleontological resources.[215] Quechan and other Native American tribes also challenged the impact studies and mitigation measures.[216] The environmental impact study was revised in 1997, including further mitigation measures suggested by Glamis Gold. Still, however, the study pointed out that the Imperial Project would have a "significant unavoidable" impact restricting the "ability

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[212] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award, 8 June 2009 at para. 10.
[213] *Ibid.* at paras. 46-50.
[214] *Ibid.* at para. 87.
[215] *Ibid.* at para. 99.
[216] *Ibid.* at para. 103.

of the Quechan to travel physically and spiritually along the Trail of Dreams […]" and also "[…] conduct traditional religious activities […]".[217] The conclusions of the study prompted the Secretary of Interior to decline the Project's operations plan in January 2001. Whilst the decision was later re-submitted to BLM for reconsideration[218], by 2003, the California State Mining and Geology Board (SMGB) adopted emergency measures, prohibiting the backfilling of mines in California. Further legislation was drafted to protect Native American sacred lands from backfilling of mines.[219] In its Chapter 11 claim against the USA, Glamis Gold challenged these measures, arguing that its investments were adversely affected as a result of USA's violation of Article 1110 (expropriation) and Article 1105.

The Tribunal commenced its assessment of Glamis Gold's Article 1105 claim by first identifying the parties' positions. Whereas, the parties agreed FET is a "recognized standard under customary international law and that it is firmly within the minimum standard of treatment […]", they disagreed as to the content and scope of FET.[220] Whilst Glamis Gold, under the guidance of BIT and NAFTA practice, contended that FET includes "protection against arbitrariness and discrimination, protection of legitimate investment-backed expectations and a requirement of a transparent and predictable legal and business framework", Respondent USA argued that Article 1105's duty to provide FET is limited to "the minimum standard of treatment demanded by customary international law".[221] In identifying the scope of FET, the Tribunal addressed the "authoritative sources to which it may look for guidance".[222] Such authoritative sources included the FTC Note. Since parties were in agreement that FET in Article 1105 was to be understood by reference to customary international law minimum standard of treatment of aliens,[223] the Tribunal felt no need to address whether the FTC Note was an amendment or an interpretation. The question was therefore, noted the Tribunal, what "customary international law minimum standard of treatment require[s] of a State Party

[217] *Ibid.* at paras. 110, 149 and 153.
[218] *Ibid.* at para 157.
[219] *Ibid.* at para. 181.
[220] *Ibid.* at para. 539.
[221] *Ibid.* at paras. 542-3.
[222] *Ibid.* at para. 540.
[223] *Ibid.* at para. 599.

vis-à-vis investors of another State Party". "Is it the same as that established in 1926 in *Neer v Mexico*? Or has the Claimant proven the Standard has 'evolved'?".[224]

It was the Claimant's burden, held the Tribunal, to provide sufficient evidence that the customary international law minimum standard of treatment has evolved and has "moved to require something less than the "egregious", "outrageous", or "shocking" standards as elucidated in *Neer*". According to the Tribunal, the Claimant had a difficult task since establishment of a rule of customary international law would require "(1) a concordant practice of a number of States acquiesced in by others and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*)".[225] In evaluating the jurisprudence presented by Glamis Gold, the Tribunal distinguished two sets of awards based on the two sets of language adopted in respective FET standards that underlie the disputes:

> "Those treaties and free trade agreements, like the NAFTA, that are to be understood by reference to the customary international law minimum standard of treatment necessarily lead their tribunals to analyze custom; while those treaties with [FET] clauses that expand upon, or move beyond customary international law, lead their reviewing tribunals into an analysis of the treaty language and its meaning, as guided by Article 31(1) of the [VCLT]".[226]

In light of the above distinction, the Tribunal was not convinced that the formulation in Article 4(1) of the Spain-Mexico BIT as interpreted by the Tribunal in *TECMED v Mexico* was relevant. On the other hand, further held the Tribunal, the formulation in *Neer*, at a minimum, was agreed upon by the NAFTA State Parties as illustrated in their Article 1128 submissions in *ADF* and *Pope & Talbot*.[227] Whether this standard has evolved was the next question the Tribunal dealt with. According to the Tribunal, there are two possible forms of evolution: "(1) that what the international community views as "outrageous" may change over time; and (2) that the minimum standard of treatment moved beyond what it was in 1926".[228] Whilst NAFTA Tribunals that evaluated the same question did not choose to differentiate the two forms of evolution, the *Glamis Gold*

[224] *Ibid.* at para. 600.
[225] *Ibid.* at paras. 600-2.
[226] *Ibid.* at para. 606.
[227] *Ibid.* at para. 612, ft. 1257.
[228] *Ibid.*

Tribunal nevertheless found support from the *Mondev* tribunal in concluding that its task is to find out whether the meaning of the specific language in *Neer*, i.e. "outrageous" has changed over time. Inasmuch the Tribunal concluded that what one "may find shocking and egregious" has changed over time, it held that Glamis Gold failed to provide evidence that the second form of evolution has materialized. In doing so, the Tribunal relied on *Thunderbird* Tribunal's use of "gross denial of justice" and "manifest arbitrariness", *SD Myers* Tribunal's use of "unjust and arbitrary" and the *Mondev* Tribunal's use of "shock or surprise", in determining the limits of the minimum standard of treatment.[229] According to the Tribunal, the use of such adjectives manifested that "although situations may be more varied and complicated today than in the 1920s, the level of scrutiny is the same":

"The fundamentals of the *Neer* standard thus still apply today: to violate the customary international law minimum standard of treatment codified in Article 1105 of the NAFTA, an act must be sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons […]".[230]

Not surprisingly, this rather narrow reading of Article 1105 guided the Tribunal to dismissing Glamis Gold's FET claims. Having assessed the Claimant's take on the Californian and federal regulatory measures both individually and collectively, the Tribunal concluded that Glamis Gold failed to establish that "the acts complained of fall short of the customary international law minimum standard of treatment".[231] Strictly, following the *Neer* formulation, the Tribunal observed that:

"There is simply not the egregiousness necessary to breach the fair and equitable treatment standard of Article 1105 as it currently stands. The State Parties to the NAFTA can always choose to negotiate a higher standard against which their behaviour will be judged. It is very clear, however, that they have not yet done so and therefore a breach of Article 1105 still requires acts that exhibit a high level of shock, arbitrariness, unfairness or discrimination".[232]

Throughout the Award, there appears to be little reference to the FTC Note. Compared to prior NAFTA awards, in which Article 1105 was invoked by investors, the *Glamis Gold*

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[229] *Ibid.* at para. 614.
[230] *Ibid.* at para. 616.
[231] *Ibid.* at para. 818.
[232] *Ibid.* at para. 829.

Tribunal appears to have refrained from getting into a discussion as to whether the FTC Note is an "interpretation" or an "amendment". The fact that both parties agreed that Article 1105 reflects the minimum standard of treatment of customary international law eased the Tribunal's duty in determining the content of Article 1105 – without a doubt Article 1105 provided for the minimum standard of treatment as embedded in customary international law. Whether, this standard has evolved since the 1920s and whether precedent has any value in the formation and development of custom were yet to be identified by the Tribunal. Whilst some could find the Tribunal's discussion on the above "exceptional and instructive",[233] the Tribunal, in its own words, nevertheless ruled in the shadow of "systemic implications":

"5. The reality is that Chapter 11 of the NAFTA contains a significant public system of private investment protection. The ultimate integrity of the protections given to the many individual investments made under Chapter 11 is ensured by reference to a multitude of arbitral panels occupied by persons who are only occasionally reappointed. The ultimate integrity of the Chapter 11 system as a whole requires a modicum of awareness of each of these tribunals for each other and the system as a whole.[234]

6. The fact that any particular tribunal need not live with the challenge of applying its reasoning in the case before it to a host of different future disputes (the challenge faced by standing adjudicative bodies) does not mean such a tribunal can ignore that challenge. A case-specific mandate is not license to ignore systemic implications. To the contrary, it arguably makes it all the more important that each tribunal renders its case specific decision with sensitivity to the position of future tribunals and an awareness of other systemic implications".[235]

The Tribunal did not describe what these "systemic implications" are in the remainder of its Award. One could however note that the Tribunal assumed a duty to protect the integrity of NAFTA Chapter 11 as a "significant public system of private investment protection" and considering "the larger context in which it operates".[236] Read in the light of the political regimes theory, one could simultaneously observe how the Tribunal served in protecting the "asymmetric obligations" pillar. Also considering the non-disputing party and *amici* submissions made by the Quechan Tribe and Friends of the Earth (even

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[233] J.K. Sharpe, 'The Minimum Standard of Treatment, Glamis Gold, and Neer's Enduring Influence' in Meg Kinnear et al. (ed), Building International Investment Law: The First 50 Years of ICSID (Kluwer Law International, 2015) at 269.
[234] Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award at para. 5.
[235] *Ibid.* at para. 6.
[236] *Ibid.* at para. 4.

if they were not officially “material” for the lengthy analysis of the Tribunal)[237], one should take note that the final decision of the Tribunal was at the same time favourable to the Quechan Tribe. Viewed under the rubric of the second pillar of the political regime of investment under NAFTA, i.e. regulation of environment, the Tribunal’s behaviour in the end also served in the protection of the “systemic implications” of Chapter 11 and the political regime of NAFTA also from this perspective.[238]

V.10. Cargill v Mexico

In *Cargill v Mexico*, the Tribunal comprising of Dr. Michael Pryles (Chair), Professor David D. Caron and Professor Donald D. McRae, handed down its Award on 18 September 2009 in a dispute registered by Cargill Inc., a US corporation, against Mexico, on behalf of itself and its Mexican subsidiary, Cargill de Mexico S.A. de C.V.[239] Similar to *GAMI* (as well as other NAFTA disputes that involved disputes on the regulation of certain corn products, i.e. *ADM* and *Corn Products v Mexico*), the dispute in Cargill arose from the regulatory measures instituted by Mexico in imposing additional excise tax on HFCS and new tariff rates and new permits on the importation HFCS producers and suppliers. Cargill, whose production primarily relied on HFCS imports in Mexico, argued that it sustained damages of more than USD 100 million when Mexico arbitrarily imposed

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[237] In sum, the Tribunal admitted 4 amici submissions from the Quechan Indian Nation on 19 August 2005, from Friends of the Earth (of Canada and United States) on 30 September 2005, from Sierra Club and Earthworks on 16 September 2006 and from National Mining Association on 13 October 2006. Odly enough, the Tribunal did not receive any Article 1128 submissions from the NAFTA Parties. In accepting these amici submissions, the Tribunal followed the procedure established under the FTC Statement (on Non-Disputing Party Participation dated 7 October 2003 – see Chapter V Section III.2 for an introduction), inviting the disputing parties to comment on the amicus curiae submissions and also observing that “transparency of Chapter Eleven tribunals is of particular importance to the member states of the … (NAFTA)” in response to Quechan’s request for confidentiality. Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Award at paras. 267-86. Glamis Gold, Ltd. v. The United States of America, UNCITRAL, Quechan Indian Nation Application for Leave to File a Non-Party Submission, 19 August 2015; Amicus Curiae Appllication of Friends of the Earth, 30 September 2015; Submission of Non-Disputing Parties Sierra Club and Earthworks, 16 September 2006; National Mining Association Application for Leave to File a Non-Party Submission, 13 October 2006.

[238] As discussed earlier in Chapter V, this behavior of the Tribunal was criticized by Professor Reisman for reflecting a “meditative overture”. Reisman, ''Case Specific Mandates’ Versus ‘Systemic Implications’: How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture'; Christina Binder and Jane Alice Hofbauer, 'Case Study: Glamis Gold Ltd. (Claimant) V United States of America (Respondent), Nafta/Uncitral Award, 8 June 2009 (July 15, 2016)' (2016), available at <https://ssrncom/abstract=2810078> last accessed on 3 November 2017.

[239] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009.

additional tax and new tariff rates and regulations.[240] Amongst others, Cargill invoked Article 1105, alleging that "Mexico's broad-based anti-HFCS campaign, of which the IEPS Tax was only one component" violated the minimum standard of treatment.[241]

Against a background of opposing views of the Parties on the scope and content of Article 1105, the Tribunal first summarized the Parties' contentions, particularly pointing at the requirements in relation to the FTC Note[242]; legitimate expectations[243]; arbitrariness, ambiguity and inconsistency[244]; transparency[245]; discrimination.[246] The Tribunal then made its observations and discussed its conclusions on the content and scope of Article 1105. According to the Tribunal, the FTC Note is "an interpretation" and is binding on the Tribunal by virtue of Article 1131(2). It held that it "joins all previous NAFTA tribunals in the view that Article 1105 requires no more, no less, than the minimum standard of treatment demanded by customary international law". In finding support, the Tribunal cited the *Mondev* Tribunal and the Article 1128 submission by Mexico in *ADF*.[247] As to the content of customary international law standard of FET, the Tribunal noted that there was agreement between the parties to the dispute and the two non-disputing NAFTA State Parties that "the customary international law standard is at least that set forth in 1926 *Neer* arbitration".[248] However, the Tribunal also took note of the disagreement as to "how that customary standard has in fact, if at all, evolved since that time".[249] Whilst the burden to prove that customary international law minimum standard of treatment has evolved since the 1920s was on the Claimant[250], the Tribunal also undertook a lengthy analysis on State practice. In the absence of a viable survey on State practice, the primary source of the Tribunal became the submissions of the three NAFTA Parties had made in previous NAFTA cases as non-disputing parties under Article 1128. The Tribunal turned to Mexico's Article 1128 submission in *ADF*[251], to BITs that

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[240] *Ibid.* at paras. 62-84.
[241] *Ibid.* at para. 235.
[242] *Ibid.* at para. 240.
[243] *Ibid.* at para. 249-54.
[244] *Ibid.* at para. 255-61.
[245] *Ibid.* at para. 262-4.
[246] *Ibid.* at para. 265.
[247] *Ibid.* at paras. 266-8.
[248] *Ibid.* at paras. 269-72.
[249] *Ibid.* at para. 272.
[250] *Ibid.* at paras. 273-4.
[251] *Ibid.* at para. 274.

included FET standards with reference to customary international law[252], writings of scholars and decisions of tribunals in seeking guidance as to whether customary international law has evolved.[253] It observed that Claimant relied heavily on the TECMED formulation and has not offered a survey of relevant arbitral decisions in which tribunals interpreted customary international law of FET.[254] Nonetheless, the Tribunal undertook a survey of its own of the past NAFTA arbitrations.

By reference to the *ADF* award, the Tribunal noted that minimum standard of treatment is "constantly in a process of development". In addition, relying on the *Mondev* Tribunal's reading of the minimum standard of treatment, the Tribunal held that "the customary international law minimum standard of treatment may evolve in accordance with changing State practice manifesting to some degree expectations within the international community".[255] The Tribunal continued:

> "As the world and, in particular, the international business community become ever more intertwined and interdependent with global trade, foreign investment, BITs and free trade agreements, the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner (emphasis added)".[256]

The Tribunal thereafter considered the *Waste Management II* Tribunal's conclusion that "a general interpretation was emerging from NAFTA awards". It partially agreed with the oft-cited *Waste Management II* formulation of Article 1105, noting that even today "the required severity of the conduct as held in *Neer* is maintained".[257] The Tribunal admitted Article 1128 submissions of Mexico and Canada in *ADF* as instructive, eventually holding that for a violation of Article 1105 to materialize "the lack or denial must be gross, manifest, complete or such as to offend judicial propriety". According to the Tribunal, the customary international law minimum standard of treatment is "significantly narrower than that present in the TECMED award where the same requirement of severity is not present". In articulating the contents of the standard, the

[252] *Ibid.* at para. 275.
[253] *Ibid.* at paras. 276-7.
[254] *Ibid.* at paras. 278-80.
[255] *Ibid.* at paras. 281-2.
[256] *Ibid.* at para. 282.
[257] *Ibid.* at para. 283.

Tribunal draw guidance from the *GAMI* award.[258] It then turned to discussing the Claimant's assertion that the minimum standard of treatment under Article 1105 required "stable and predictable environment that does not frustrate reasonable expectations", protection against "arbitrariness, ambiguity and inconsistency", transparency, and protection against "discrimination".[259] The Tribunal first rejected that Article 1105 provides protection for "reasonable expectations".[260] In relation to "arbitrariness", citing the *ELSI* case, the Tribunal concluded that "arbitrariness may lead to a violation of a State's duties under Article 1105 only when "the action constitutes an unexpected and shocking repudiation of a [State] policy's very purpose and goals".[261] As for the alleged "transparency" requirement of Article 1105, the Tribunal, without giving any reference to Article 102 of NAFTA, held that the Claimant failed to establish "a general duty of transparency" under the minimum standard of treatment.[262] In addition, the discrimination component, found the Tribunal, was not available under Article 1105. Giving reference to the FTC Note, the Tribunal noted that "[a] determination that there has been a breach of another provision of the NAFTA … does not establish that there has been a breach of Article 1105(1)".[263]

Despite its rather narrow reading of the minimum standard, the Tribunal reached the conclusion that Mexico breached Article 1105 when it instituted the import permit requirement. The Tribunal held:

"Reviewing closely the record of this case, the Tribunal finds ample support for the conclusion that the import permit was one of a series of measures expressly intended to injure United States HFCS producers and suppliers in Mexico in an effort to persuade the United States government to change its policy on sugar imports from Mexico. The Tribunal finds that the sole purpose of the import permit requirement was to change the trade policy of the United States; while the sole effect was to virtually remove Claimant from the Mexican HFCS market. There is no other relationship between the means and the end of this requirement. The Tribunal finds the institution of a permit requirement for a few foreign producers in an attempt to persuade another nation to alter its trade practices to be manifestly unjust".[264]

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[258] *Ibid.* at paras. 283-7.
[259] *Ibid.* at para. 288.
[260] *Ibid.* at paras. 289-90.
[261] *Ibid.* at paras. 291-3.
[262] *Ibid.* at para. 294.
[263] *Ibid.* at para. 295.
[264] *Ibid.* at para. 299.

From the obiter, one could reach the conclusion that the Tribunal incorporated a "discrimination" component within Article 1105 by deeming the targeting of suppliers that originated in the United States a violation.[265] It would appear that the Tribunal circumvented the use of "discrimination" expressly by reading "the standard of gross misconduct" into Article 1105. This conclusion diverged from earlier NAFTA Tribunals' readings of the minimum standard of treatment under customary international law. One could observe that the Tribunal took into account NAFTA Parties' respective positions as to the content and scope of Article 1105 (under Article 1128[266]). Whilst it did not receive any Article 1128 submissions from NAFTA Parties, it *ex officio* found guidance in Mexico's and Canada's Article 1128 submissions in *ADF*. One could also argue that the Tribunal considered the asymmetric obligation pillar of the political regime of NAFTA by circumventing the rather narrow formulation of the minimum standard it established in favour of the US HFCS market.

V.11. Merrill & Ring v Canada

The Award in *Merrill & Ring v Canada* was handed down by the Tribunal consisting of Professor Francisco Orrego Vicuna (Chair), Professor Kenneth W. Dam and J. William Rowley on 31 March 2010. The case concerned the application of Canada's Log Export Regime to Claimant's, a US investor's, timber operations in British Columbia, Canada.[267] The British Columbia Forest Act and the Canadian federal regulations under the Export and Import Permits Act governed the removal of logs from British Columbia. Under both regulations, a log surplus test would apply prior to authorization of log removal. According to the regime, parties interested in removing logs from British Columbia had to first allow local log processors to make offers to purchase the logs. Only after these offers or if the offers made are below the fair market value, would parties be allowed to remove or export logs.[268] Whilst, to this end, the two regulations applied similar log surplus tests, they diverged in their goals, the exemptions they provided within which they were applicable. Such differences, argued the Claimant, ultimately caused financial losses to Merrill & Ring when it was forced to sell its products in Canada for less than they could have sold if exported to the US. The Claimant also contested the log export

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[265] *Ibid.* at para. 300.
[266] *Ibid.* at para. 275 and 284.
[267] Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, 31 March 2010 at 26.
[268] *Ibid.* at para. 28-32.

regime for exerting unfair, un-transparent and discriminatory effects in violation of Articles Article 1102 (non-discrimination), Article 1110 (expropriation) and Article 1105.[269]

In its decision concerning Article 1105, the Tribunal first pointed at the "intricacies" of the law that applied in interpreting the fair and equitable treatment standard. According to the Tribunal, this was "[t]he most complex and difficult question brought to the Tribunal" since "a broad and unsettled discussion about the proper law applicable to this standard […]" still exists.[270] The Tribunal then, having diverged from earlier decisions on Article 1105, started its analysis with Article 31 of the VCLT and Article 1131(1) of NAFTA which direct NAFTA tribunals to apply "this Agreement and applicable rules of international law". The reference to "international law" hereunder, noted the Tribunal, could only be understood with reference to Article 38(1) of the Statute of the ICJ. The Tribunal further observed that nothing in the Agreement illustrates that it was the intention of the drafters to give "a more limited meaning" to the standard.[271]

After discussing the reach of international law as the applicable law, the Tribunal turned to the "subsidiary sources", namely judicial decisions, noting that "while not a source of the law in themselves, are a fundamental tool for the interpretation of the law and have contributed to its clarification and development". Subsequently, the Tribunal, similar to the *Waste Management II* Tribunal, conducted a survey of the extensive jurisprudence presented by both parties. It noted that the approaches adopted by the *Metalclad* and *SD Myers* tribunals and determining that these decisions "prompted the [FTC Note] … to the effect of linking [FET] with customary law only and to the effect of de-linking it from breaches of other NAFTA articles of separate treaties".[272]

Only after these determinations, the Tribunal turned to the FTC Note's role in the interpretation of Article 1105. NAFTA tribunals have followed the FTC Note "in the light of its binding character, as provided for in Article 1131(2)" noted the Tribunal. However, a major question remained: "[…] whether the customary international law minimum

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[269] *Ibid.* at para. 52-9.
[270] *Ibid.* at para. 182.
[271] *Ibid.* at paras. 183-5.
[272] *Ibid.* at paras. 188-9.

standard of treatment of aliens has been frozen in time since the 1920s or has evolved accordingly with current international law".[273] The Tribunal endorsed the evolutionary approach adopted by the *Mondev, ADF, Waste Management II* and *GAMI* Tribunals. The Tribunal was "mindful" of the FTC Note, however, it did not agree that it "necessarily reflects the present state of customary and international law". The Tribunal continued:

"[…] As the Investor has argued, the FTC [Note] seems in some respect to be closer to an amendment of the treaty, than a strict interpretation. In any event, the Tribunal is mindful of the evolutionary nature of customary international law … which provides scope for the interpretation of Article 1105(1), even in the light of the Free Trade Commission's [Note] (emphasis added)".[274]

Having made these observations, the Tribunal then undertook a lengthy analysis of the evolution of the minimum standard of treatment, starting with the oft-cited *Neer* and *ELSI* cases. According to the Tribunal, "customary international law is not frozen in time" and "it continues to evolve in accordance with the realities of the international community". State practice and *opinio juris* endorse this position.[275] In the NAFTA context, whilst a number of Tribunals have adopted the demanding *Neer* formulation and NAFTA jurisprudence "has stiffened since the FTC [Note]":

"[a] requirement that aliens be treated fairly and equitably in relation to business trade and investment […] has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris"*.[276]

Although, in the light of the FTC Note, the Tribunal admitted that the FET standard cannot be considered as "a free-standing obligation under international law", it concluded that FET "has become a part of customary law".[277] On this point, the Tribunal voiced a second criticism toward the FTC Note:

"[…] if the FTC Interpretation was construed so as to narrow the protection against unfair and inequitable treatment to an international minimum standard requiring outrageous conduct of some kind, then consistency would demand that the same standard be followed in respect of such claims made by the NAFTA States in respect of the conduct of other countries affecting business, trade or investments interests

[273] *Ibid.* at paras. 189-90.
[274] *Ibid.* at paras. 190-2.
[275] *Ibid.* at para. 193.
[276] *Ibid.* at paras. 194-204.
[277] *Ibid.* at para. 211.

of their citizens abroad. Yet, this is not the case under current international practice. Customary international law cannot be tailor made to fit different claimants in different ways. To do so would be to countenance an unacceptable double standard".[278]

Moving on, the Tribunal then considered the facts of the case in light of FET as embedded in customary international law. It assessed a possible breach of the protections offered by Article 1105(1) under two different scenarios. The first scenario was based on Merrill & Ring's position that "the protection provided by Article 1105(1) is significant and that the threshold to be applied to establish breach is a comparatively low one". This scenario would require the Tribunal to consider the "transparency" requirement as formulated by the Tribunal in *Metalclad*. According to the Tribunal, although "transparency" is not a part of the customary law standard, "as the judicial review of *Metalclad* rightly concluded, it is nonetheless approaching to that stage".[279] This scenario would also necessitate the Tribunal to examine "stability" and "legitimate expectations doctrine".[280] The second scenario, on the other hand, would require a higher threshold (while not relying on the *Neer* formulation), according to which "a state's wrongful conduct or behaviour must be sufficiently serious as to be readily distinguishable from an ordinary effect of otherwise acceptable regulatory measures".[281] Whilst, under each scenario, the Tribunal made findings as to the alleged breaches of Article 1105 by Canada, in the end, it chose not to determine which of the two scenarios should have guided its conclusions. According to the Tribunal, since Claimant failed to prove that it was damaged by Canada's alleged breaches to its satisfaction, "Canada has not been shown to have breached Article 1105(1) […]". "[A]n international wrongful act" noted the Tribunal, "will only be committed in international investment law if there is an act in breach of an international legal obligation, attributable to the Respondent that also results in damages".[282]

Although, in the end, the Tribunal dismissed Merrill & Ring's Article 1105 claim, in *obiter*, it made lengthy observations with respect to the scope and content of Article 1105 and the FTC Note. First, as opposed to previous NAFTA Tribunals (established after

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[278] *Ibid.* at para. 212.
[279] *Ibid.* at para. 231.
[280] *Ibid.* at paras. 232-3.
[281] *Ibid.* at para. 219.
[282] *Ibid.* at para. 266.

Pope & Talbot), the Tribunal in *Merrill & Ring* voiced the most serious critique of the FTC Note in years. The Tribunal noted that the Note was "closer to an amendment of the treaty, than a strict interpretation". Second the Tribunal considered NAFTA as another Agreement within the network of IIAs that regulate "business, trade or investments interests of citizens abroad". By doing so, the Tribunal reached the conclusion that it would be an "unacceptable double standard" if only under NAFTA foreign investments are subject to the narrower treatment provided under the FTC Note. In this context, inasmuch as the Tribunal seems to have challenged the asymmetric obligations pillar of the political regime under NAFTA, its *obiter* also signalled an expansion towards broader rights for foreign investors. To that end, the award was also inconsistent with the strict application of the *Neer* doctrine in *Glamis Gold* in interpreting Article 1105.[283]

V.12. Preliminary Remarks

Above I reviewed some important (but not all) post-FTC Note Chapter 11 cases, tracing the normative development of Article 1105. Before moving on, it is also worth taking note of *Chemtura v Canada*[284], *Grand River v USA*[285] and *Mobil v Canada*[286], in which Tribunals embarked into lengthy discussions as to the content and scope of Article 1105. However, none of these Tribunals diverged from previous NAFTA awards. All three Tribunals considered the FTC Note as a binding interpretation as per Article 1131. On the other hand, whereas the Tribunals in *Chemtura* and *Mobil* found guidance in

[283] One should also take note that the Tribunal received two Article 1128 submissions from the USA and from Mexico. The Tribunal also received an amicus curiae submission from the United Steelworkers, Communications, Energy and Paperworkers Union of Canada and the British Columbia Federeation of Labour. None of these submission entailed any substantive argument with respect to the content and scope of Article 1105 or the FTC Note. See Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, US Submission Made Pursuant to Article 1128 of the NAFTA, 14 July 2008; Submission of the United Steelworkers, Communications, Energy and Paperworkers Union of Canada and the British Columbia Federeation of Labour, 26 September 2008; Submission by the Government of Mexico made pursuant to Article 1128 of the NAFTA, 2 April 2009.

[284] Chemtura Corporation v. Government of Canada, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award, 2 August 2010.

[285] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award, 12 January 2011.

[286] Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012.

Mondev[287]*, Metalclad, Waste Management II, Thunderbird, Glamis Gold and Cargill*[288] in interpreting customary international law minimum standard of treatment, the Tribunal in Grand River relied exclusively on *Methanex* and *Glamis Gold*[289] – the two cases that perhaps have taken the narrowest approaches in reading Article 1105 after the FTC Note was issued. It is also worth noting that *Chemtura* and *Grand River* both entailed factual issues relating to environmental regulation. From this perspective as well, the two cases distorted this pillar of the political regime under NAFTA. In sum, in all three cases, the Tribunals dismissed Article 1105 claims of investors.

The cases post-FTC Note above exhibit that tribunals hardly adopted a broad notion of minimum standard of treatment under Article 1105. In order to accommodate the interests of NAFTA Parties and civil society, tribunals seem to have produced a 'grammar' with which they could interpret Article 1105 and apply it to individual facts of the disputes without distorting the 'asymmetric obligations' and 'environmental regulation' pillars of the political regime of NAFTA. At the same time, one could observe that two tribunals, namely the Tribunals in *GAMI* and *Merrill & Ring*, diverged from earlier interpretive choices by applying lower thresholds in determining the content of the minimum standard of treatment. Yet, considering the factual background of both disputes, the Tribunals dismissed investors' Article 1105 claims. As such, the post-FTC Note Chapter 11 Awards seem to complied with the requirements of the political regime of NAFTA, at times assuming a principal political role. However, as discussed below, recent NAFTA practice signal a second wave of expansion of private investment rights since *Metalclad, SD Myers and Pope & Talbot*.

VI. Re-expansion of Investor Rights?: Clayton & Bilcon v Canada

In *Clayton & Bilcon v Canada*, the Tribunal comprising of Judge Bruno Simma (chair), Professor Donald McRae and Professor Bryan Schwartz handed down its Award on Jurisdiction and Liability on 17 March 2015 in a dispute between Clayton et al., Bilcon

[287] Chemtura Corporation v. Government of Canada, UNCITRAL (formerly Crompton Corporation v. Government of Canada), Award at paras. 110-124.
[288] Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum at paras. 138-153
[289] Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL, Award at paras. 208 and 214.

Delaware Inc. and Canada.[290] In a majority decision, Canada was held liable for breaches of Articles 1102 (national treatment) and 1105.

The dispute arose from disagreements between parties in relation to an environmental assessment of a mining quarry project planned to be developed in Nova Scotia.[291] The Claimant, Bilcon, a US corporation run by the Clayton family, entered into a partnership with Nova Stone, a Nova Scotia company, in 2002 in order to develop and operate a quarry at Whites Point in Nova Scotia.[292] At the time, Nova Stone held a preliminary approval for a 3.9-hectare quarry approved by the Nova Scotia Department of Environment and Labour. The Canadian Department of Fisheries and Oceans, however, required an environmental assessment for the entire project before Nova Stone started test blasting.[293] An environmental assessment was required if and when an industrial project risked danger or damage to marine life under the *Canadian Environmental Assessment Act* (CEAA). Canadian provincial authorities, based on their constitutional powers, could also conclude that there is a need for an environmental assessment to regulate land-based industrial activity.[294]

Between 2002 and 2007, the Whites Point project was subjected to a lengthy environmental assessment. As per the CEAA, a joint review panel (JRP) conducted a first assessment in 2003. Its task was to assess the Project against any “likely significant adverse effects after mitigation” as well as “any effect on socio-economic conditions, on environmental health, [and] physical and cultural heritage”. In doing so, the JRP was to apply to the guidelines prepared by the CEA Agency. In assessing the White Points project, however, the JRP additionally supplemented the CEA Agency’s guidelines with its own, putting the threshold higher by requiring, among others, an assessment of “social and cultural patterns”, namely potential “effects on traditional lifestyles, values […] and culture”. In that sense, JRP’s guidelines were unprecedented and unexpected by Bilcon. Based on the JRP’s conclusions in relation to community core values, Nova Scotia and

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[290] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Decision on Jurisdiction and Liability, 17 March 2015.
[291] *Ibid.* at para. 111.
[292] *Ibid.* at paras. 112-3.
[293] *Ibid.* at paras. 123-5.
[294] *Ibid.* at para. 152.

the federal Government rejected the implementation of the Project toward the end of 2007. The investor contested the environmental assessment process followed by the CEA Agency and the JRP.[295] For Bilcon, by introducing an unprecedented guideline in the assessment of environmental impact of the Whites Project, the JRP exceeded its jurisdiction. Further, the ministerial decisions adopted the "JRP's legal flaws as their own without giving the Investors an opportunity to make submissions". Canada's acts, according to the Claimants, demonstrated "a lack of due process, natural justice, fairness and reasonableness, falling short of the international standard for treatment of foreign investors", which were in breach of Article 1105.[296]

Following a lengthy summary of parties' respective positions, the Tribunal started its analysis of the "international minimum standard" by giving reference to earlier NAFTA cases and in particular to the formulation adopted by the *Waste Management II* tribunal.[297] The Tribunal first set out the constitutive institutions that are key to its assessment, the FTC Note in the light of Article 31(3)(a), which calls on treaty interpreters to take into account "any subsequent agreement between the parties" as well as Article 1131(2) of NAFTA, as the *lex specialis* rule. There was no disagreement between the Parties that the FTC Note is a binding interpretation. There was, however, disagreement on the interpretation of the FTC Note. Whereas, Claimants argued that the FTC Note is "only one element that the Tribunal should use", Canada argued that the Tribunal "was limited to the authentic interpretation of the [FET] standard provided by the FTC".[298] Having agreed with Canada on this point, the Tribunal was to determine "what is the content of the contemporary international minimum standard that the tribunal is bound to apply".[299]

Similar to earlier NAFTA Tribunals that addressed the same problem, the Tribunal considered *Neer* formulation as a starting point. However, relying on *ADF* and, in particular, *Merrill & Ring*, the Tribunal distanced itself from the narrow reading of Article 1105 in *Glamis Gold*.[300] According to the Tribunal:

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[295] *Ibid.* at paras. 503-5.
[296] *Ibid.* at paras. 361-2.
[297] *Ibid.* at para 427.
[298] *Ibid.* at para. 432.
[299] *Ibid.* at para. 433.
[300] *Ibid.* at paras. 434-6.

"[…] the international minimum standard exists and has evolved in the direction of increased investor protection precisely because sovereign states – the same ones constrained by the standard have chosen to accept it. States have concluded that the standard protects their own nationals in other countries and encourages the inflow of visitors and investment".[301]

The Tribunal further observed that "[m]any NAFTA tribunals have shared the merging consensus that the *Neer* standard of indisputably outrages misconduct is no longer applicable". Although tribunals "have attempted to identify a "threshold of seriousness", held the Tribunal, "there is no consensus yet on a formulation that best suits the modern evolution of the standard".[302] However, the Tribunal found the *Waste Management II* Tribunal's formulation of Article 1105 "a particularly apt one". Whilst the formulation conveys a high threshold, noted the Tribunal, it still does not require "that the challenged conduct reaches the level of shocking or outrageous behaviour".[303] Turning to reasonable expectations, the Tribunal also found the *Waste Management II* formulation convincing in that a "breach of reasonably relied-on expectations could be a relevant factor". However, referring to the *ADF* Tribunal, "only representations made by authorized officials qualify for consideration in this context".[304] At the same time, the Tribunal observed that "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach"[305] except for some special circumstances. These would include "changes in a legal or policy framework that have retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor".[306]

In the case at hand, held the Tribunal, the Claimants were "encouraged to engage in regulatory approval process […] that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case".[307] The Tribunal reached this conclusion based primarily on the

[301] *Ibid.* at para. 438.
[302] *Ibid.* at para. 440.
[303] *Ibid.* at paras. 442-3.
[304] *Ibid.* at paras. 445-6.
[305] *Ibid.* at para. 437.
[306] *Ibid.* at para. 572.
[307] *Ibid.* at para. 453.

unprecedented introduction of "community core values" by the JRP.[308] Having applied the *Waste Management II* formulation, the Tribunal was convinced that Canada breached the "procedural as well as substantive fairness components" when it denied Bilcon a "fair opportunity to know the case it had to meet". The Tribunal also found that Canada failed the "arbitrariness" test of the *Waste Management II* formulation when it allowed an arbitrary review by the JRP.[309] The Tribunal repeated that there was a high threshold for an Article 1105 breach to materialize. However, the Tribunal considered that threshold was met in light of "the Investors' reasonable expectations […]".[310]

A final disposition by the Tribunal related to the environmental concerns voiced by the public and state authorities. The Tribunal quoted the Preamble to the Agreement, which required observance of "a predictable commercial framework for business planning and investments" as well as "the development and enforcement of environmental law". To the Tribunal, however, "[t]he mere fact that environmental regulation is involved does not make investor protection inapplicable". It further observed that the Laws of Canada and the NAFTA itself "expressly acknowledge that economic development and environmental integrity can not only be reconciled, but can be mutually reinforcing".[311]

The Tribunal's conclusion was that "the approach to the environmental assessment taken by the JRP and adopted by Canada resulted in breach of Article 1105".[312] Arbitrator McRae, however, disagreed. In his dissent, McRae first voiced his disagreement in relation to the majority's understanding of "community core values". According to McRae this was not a new concept. At the same time, Arbitrator McRae, although agreeing that the applicable legal standard is the *Waste Management II* formulation, contested the majority's application of the standard against the facts of the case. In his view, the Tribunal found that – and accurately so – the said formulation requires a "high threshold". However, a simple allegation of a breach of Canadian law was should not

[308] *Ibid.* at para. 590.
[309] *Ibid.* at para. 591.
[310] *Ibid.* at paras. 592-4.
[311] *Ibid.* at paras. 595-7 (emphasis added).
[312] *Ibid.* at para. 742.

have been sufficient to meet that threshold. Rather the formulation should have been applied "rigidly".[313]

Most importantly, Arbitrator McRae made observations in relation to the systemic implications of NAFTA and what it protects. For McRae, the majority's finding that "a novel language used by the [JRP]" could constitute a violation of Article 1105 "will change the character of environmental review under a [JRP] and perhaps other forms of environmental review as well".[314] He noted:

> "This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to "offend judicial propriety". Once again, a chill will be imposed on environmental review panels which will be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection (emphasis added)".[315]

The *Bilcon* decision illustrates some serious departures from the earlier NAFTA Chapter 11 practice. Whilst the majority of the Tribunal cited the *Waste Management II* formulation as the guiding principle, it nevertheless adopted a lower threshold in applying the standard also citing the *Merrill & Ring* formulation in deciding that the arbitrariness threshold was met. However, the arbitrariness test as interpreted by the majority of the *Bilcon* Tribunal does not reflect the *Waste Management II* formulation as the majority diverged from the *ELSI* and *Neer* tests of judicial shock and outrage. To some, this outcome may "represent a new and unwelcome direction" in Chapter 11 jurisprudence.[316] Whilst one could argue that such an outcome would not represent a 'brand new direction' (considering the earlier backlash in Chapter 11 decision-making), the *Bilcon* decision

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[313] William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, 10 March 2015 at paras. 32-40

[314] *Ibid.* at para. 48.

[315] *Ibid.* at para. 51.

[316] Michael Carfagnini, 'Too Low a Threshold: Bilcon v Canada and the International Minimum Standard of Treatment' (2016) 53 Canadian Yearbook of International Law/Annuaire canadien de droit international 244 at 275.

could as well renew the backlash by NAFTA Parties and the civil society. The increase in the sovereign intrusion in the subsequent *Mesa Power v Canada* case (below) indicates that this could be the case.

The political regimes approach is not able to explain the divergence of the Bilcon decision from the earlier NAFTA jurisprudence on Article 1105. Nevertheless, one should take note of Arbitrator McRae's observations on the 'regulation of environment' pillar of the political regime of NAFTA – and his criticism that the majority decision could signal a "remarkable step backwards in environmental protection".

VII. Sovereign Intrusion by Non-Disputing Parties?: Mesa Power v Canada

On 24 March 2016, another NAFTA Tribunal comprising of Professor Gabrielle Kaufmann-Kohler, Charles N. Brower and Toby Landau, handed down its Award in a dispute initiated by Mesa Power, LLC, a US corporation – part of the Mesa group of companies involved in the business of renewable energy projects, more specifically in the wind sector. The case concerns the application of government measures relating to regulation and production of renewable energy in the State of Ontario under a feed-in-tariff (FIT) Programme that offers long-term FIT Contracts to successful applicants. Essentially, Mesa's, a US-registered investor's, claims loomed from (i) the implementation of the FIT Programme and (ii) the granting of priority access to the Ontario transmission grid for two Korean companies.

The background to the FIT Programme illustrates characteristics of a common regulatory reform. As early as 1998, the Government restructured the vertically integrated monopoly (i.e. Ontario Hydro) creating an Independent Electricity System Operator (IESO). The IESO was responsible for the administration of the electricity market and the operation of the transmission system whilst Hydro One, Inc. (Hydro One) was responsible for the transmission and rural distribution. In order to regulate this scheme, it established and authorised the Ontario Power Authority (OPA).[317] Subsequent changes to the regulatory framework were introduced in an attempt to promote generation from renewable sources of energy with the 2009 Green Energy and Economy Act (GEGEA). The GEGEA was

[317] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 at paras. 7-9.

later amended to implement the FIT Programme under the supervision of the Minister of Energy. The OPA launched the FIT Programme together with the FIT Rules in 2009.[318]In addition, the Government took steps towards increasing the share of renewable energy in the production of electricity in Ontario. Concurrent to adoption and implementation of the FIT Programme, it entered into negotiations with Samsung C&T Corporation and Korea Electric Power Corporation (together "the Korean Consortium") under the auspices of the GEGEA, which resulted in the signing of the Green Energy Investment Agreement (GEIA). Under the GEIA, in return for its investments, the Korean Consortium was guaranteed 500 MW of transmission capacity by the Minister of Energy in the Bruce Region of Ontario.[319]

Mesa's claims arose from the treatment of six applications it made through its subsidiaries, TTD, Arran, North Bruce and Summerhill between 25 November 2009 and 29 May 2010 in the Bruce Region. According to Mesa, the design and implementation of the FIT Programme, which included the assessment of the FIT Contract applications and not-running an Economic Connection Test (ECT) to determine the transmission capacity in Ontario[320], was "unjust and arbitrary". It also argued that, by entering into the GEIA, the Government provided "significantly" better access to the Korean Consortium. Mesa contended that Ontario, and thereby Canada, discriminated against Mesa and its investments in violation of Articles 1102, 1103 and 1104, imposed minimum domestic content requirements in violation of Article 1106 and failed to treat Mesa and its investments in accordance with the international law standard of treatment of Article 1105.[321]

On Article 1105, the Tribunal first determined that NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter Eleven Provisions Note of July 2001 (the FTC Note) is binding on the Tribunal in interpreting the provision. In doing so, the Tribunal, dismissed the contrary arguments of Mesa Power with which it requested from the Tribunal not to limit its interpretation to the FTC Note but to consider sources of law other than customary international law. According to the Tribunal:

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[318] *Ibid.* at paras. 9-13.
[319] *Ibid.* at paras. 38-41.
[320] *Ibid.* at paras. 19-25.
[321] *Ibid.* at paras. 207-8.

"If one were to follow the Claimant's argument, the FTC Note would be inutile, which cannot be correct".[322]

The Tribunal did not elaborate on why in-utility of the FTC Note "cannot be correct". It refused to get into a discussion as to whether the FTC Note is an "interpretation" or an "amendment". The Tribunal was limited by Article 1131(2), it held. An interpretation issued by the FTC is binding and no Tribunal can deviate from this normative rule. In support of this proposition, the Tribunal found guidance from *ADF* and *Clayton & Bilcon*.[323]

Thereafter, in sketching the content and scope of Article 1105, the Tribunal adopted the *Waste Management II* formulation and held that components including "arbitrariness, gross unfairness, discrimination, complete lack of transparency and candor", and "lack of due process" formed the customary international law minimum standard of treatment.[324] According to the Tribunal, Article 1105 does not impose additional requirements "beyond those deriving from the minimum standard", which was also the conclusion of the *Bilcon* Tribunal.[325] The Tribunal further held that a failure to honour an investor's legitimate expectations does not per se constitute a breach of Article 1105. It is an element, however, subsumed in other components of the minimum standard of treatment, and, thus, should only be taken into account when these components are analysed for a breach. For this last finding, the Tribunal concurred with *Waste Management II* (para. 96) and *Cargill* (para. 296) Awards.

Having determined the content and scope of the FET, the Tribunal then applied Article 1105 on the facts of the dispute. With respect to the claims based on measures taken by the OPA, the Tribunal found that Mesa failed to present sufficient evidence that these acts amounted to treaty violations.[326] Regarding the GEIA, the Tribunal found that the GEIA and the FIT Programme were not "comparable", "competing" or "interchangeable" tracks. Unlike the FIT Programme, the GEIA was "concerned with local economic development, at a time of economic difficulty".[327] According to the Tribunal, this

[322] *Ibid.* at para. 477.
[323] *Ibid.* at paras. 478-80.
[324] *Ibid.* at para. 502.
[325] *Ibid.* at para. 503.
[326] *Ibid.* at paras. 508-41.
[327] *Ibid.* at paras. 556-7.

rationale was well explained by the Government and that there was nothing "arbitrary", "grossly unfair" or "unreasonable" in its conduct.[328]

In relation to Mesa's complaint based on Ontario's failure to run a full ECT in determining the transmission capacity, the Tribunal noted that Article 1105 does not provide a guarantee against regulatory change.[329] According to the Tribunal, not running a full ECT process was a result of changing circumstances of the market conditions and therefore did not amount to a breach of Article 1105.[330]

Looking at the *Mesa Power* Award, one could reveal traces of judicial politics whereby the Tribunal attempted to establish a balance amongst the constitutive (or normative) rules of NAFTA and views of actors involved in the dispute. First, the Tribunal received Article 1128 submissions from the USA and Mexico upon its invitation of 1 June 2014.[331] In their submissions, NAFTA Parties commented on the six month waiting period in Article 1120, the meaning of the term "procurement" in Article 1108, the meaning of "state enterprise", the status of Chapter 15 as *lex specialis* and the use of the most favoured nation (MFN) treatment under Article 1103. In both submissions by Mexico and the USA, NAFTA Parties endorsed Canada's positions in the dispute.[332] A second invitation came from the Tribunal with respect to the *Bilcon* Award on 4 May 2015.[333] Whilst the previous Article 1128 submissions were not unprecedented, the second invitation, for the first time in the brief history of NAFTA Chapter 11 disputes, invited NAFTA Parties to comment on the findings of the another Chapter 11 Tribunal, namely *Bilcon*. The parties submitted their criticisms – or so to say their observations – on the *Bilcon* Tribunal's reading of Article 1102 on National Treatment and of Article 1105 on the Minimum Standard of Treatment. In both submissions, NAFTA Parties once again supported the Respondent Canada, arguing that the *Bilcon* Tribunal failed to adequately apply customary

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[328] *Ibid.* at para. 566.
[329] *Ibid.* at para. 619.
[330] *Ibid.* at para. 630.
[331] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Notification to Non-disputing Parties and Potential Amicus Curiae, 1 June 2014.
[332] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Submission of Mexico Pursuant to NAFTA Article 1128, 25 July 2014, and Submission of the United States Pursuant to NAFTA Article 1128, 25 July 2014.
[333] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Tribunal Letter Inviting Submissions on the Bilcon Award, 4 May 2015.

international law minimum standard of treatment on the facts of the case.[334] But more importantly, the USA expressed its discontent with the *Bilcon* Tribunal's understanding of the content of Article 1105. According to the USA, the *Bilcon* Tribunal adopted an erroneous formulation of Article 1105 by the *Waste Management II* Tribunal, which failed to reflect customary international law demonstrated by State practice and *opinio juris*.[335]

In various parts of the *Mesa* Award, one might also observe that the Tribunal made discreet clarifications in relation to issues that were contested and criticised in the *Bilcon* Award by NAFTA Parties. These included "relevance of previous decisions or awards", "applicable legal framework" and "burden of proof". In this vein, the Tribunal made some preliminary determinations. It noted that it has a duty to contribute to the harmonious development of international investment law and stated that, to that extent, it would adopt approaches established in previous decisions and awards.[336] It also preliminarily clarified that it would treat the FTC Note as a "law governing the merits" and Article 102 of NAFTA as a "principle of interpretation" whereby the Tribunal may adopt a teleological reading of NAFTA Chapter 11 provisions.[337] As for the burden of proof, the Tribunal held each party responsible to "establish the facts on which it relies in support of its claims and defences".[338]

These preliminary findings subsequently facilitated the Tribunal to (i) uphold the *Bilcon* Tribunal's findings with respect to application of the FTC Note[339], (ii) clarify which party has the burden of proof (an issue that was criticised by NAFTA Parties in the *Bilcon* Award) and (iii) adopt the *Waste Management II* Tribunal's formulation of Article 1105 (again contrary to the criticisms by non-disputing State parties).[340] However, in the end, the *Mesa* Tribunal adopted a restrictive application of *Waste Management II* formulation

[334] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Mexico Submission on the Bilcon Award, 12 June 2015, and the United States Submission on the Bilcon Award, 12 June 2015.
[335] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, The United States Submission on the Bilcon Award, 12 June 2015 at paras. 14-6.
[336] *Ibid.* at para. 222.
[337] *Ibid.* at paras. 228-233.
[338] *Ibid.* at paras. 234-7.
[339] *Ibid.* at para. 480.
[340] *Ibid.* at para. 501.

compared to that of the *Bilcon* Tribunal. Having reviewed the facts of the dispute, the Tribunal concluded that the GEIA, with the Korean Consortium, was "pursuant to a bona fide policy decision by the Ontario Government".[341] The majority of the Tribunal (Professor Kaufmann-Kohler and Toby Landau) were of the opinion that, although running two renewable energy programmes at the same time and not clearly articulating their relationship could be criticised, nonetheless measures by Ontario did not amount to a violation of Article 1105.[342]

By contrast, in his dissent, Charles N. Brower noted that Ontario "torpedoed" the FIT Programme when it implemented the GEIA and allowed the Korean Consortium "to acquire low-ranked FIT applicants in order to fill its allotted 500 MW". To Brower, this was an arbitrary, grossly unfair, unjust and idiosyncratic treatment of the FIT applicants and, therefore, amounted to a violation of Article 1105.[343]

On a further note, after reproducing the disputing parties' positions, the Tribunal separately took into account and discussed the positions of the non-disputing parties on (i) the Article 1120 objection[344], (ii) procurement exception[345] and (iii) interpretation, and the scope and content of Article 1105.[346] Thus, the way the *Mesa Power* Award is structured suggests that the positions of the non-disputing NAFTA parties were given greater weight in the proceedings compared to prior NAFTA cases. Evidence of this strategy by the Tribunal is well illustrated at para. 404 et al. where the Tribunal discusses the meaning of the term "procurement" referred to in Article 1108. After analysing and upholding the *ADF* and *UPS* Tribunals' broad understanding of the term "procurement", the Tribunal noted:

"All three NAFTA Parties appear to support the broad notion of procurement as advanced by the tribunals in ADF and UPS".[347]

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[341] *Ibid.* at para. 573.
[342] *Ibid.* at para. 682.
[343] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Concurring and Dissenting Opinion of Judge Charles N. Brower at para. 4.
[344] Mesa Power Group, LLC v. Government of Canada, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016 at paras. 289-92.
[345] *Ibid* at para. 392-4.
[346] *Ibid.* at para. 473-4.
[347] *Ibid.* at para. 410.

Likewise, after assessing whether Article 1001(5) of NAFTA should be read into Article 1108 in determining the scope of "procurement", the Tribunal endorsed the non-disputing State parties' views:

"[…] the Tribunal cannot support the Claimant's arguments on Article 1001(5). The Non-Disputing Parties appear to concur with the Tribunal's conclusions".[348]

In his dissent, Brower criticised the majority decision for interpreting the term "procurement" only[349] and for also giving too much weight to non-disputing State parties' positions. According to Brower, there is not "a case in which … Parties … appearing in a non-disputing capacity have ever differed from the interpretation being advanced by the respondent State. Inevitably, they club together".[350] However, the USA's submissions in *Feldman* and *Metalclad* suggest the opposite. In both instances, the USA, as the non-disputing State party, endorsed claimants' positions on the questions of nationality of the investor under Article 1117(1)[351] and of responsibility of municipalities under NAFTA.[352] The issue – then – is not whether a non-disputing State party clubs with a Respondent State. Based on the facts of the dispute and its policies with respect to applicable standards of NAFTA, a NAFTA Party could as well pursue a strategy under Article 1128 that might be favourable to a claimant investor. The issue is to what extent NAFTA allows non-disputing State parties to advance such policies and whether the ITA Tribunal makes use of these submissions to settle a dispute and/or to pursue policies embodied in NAFTA. In sum, the majority in *Mesa Power* seems to have responded to the political regime of NAFTA. In the wake of the *Bilcon* Tribunal's much criticised reading of Articles 1102 and 1105, the Mesa Tribunal did not only settle the dispute but also addressed some of the criticisms directed to the *Bilcon* Award, assuming a principal political role.

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[348] *Ibid.* at para. 430.

[349] *Ibid.* at paras. 27-8. According to Brower Article 1108 immunizes "procurement by a Party or a state enterprise".

[350] *Ibid.* at para. 30.

[351] Marvin Roy Feldman Karpa v United Mexican States, Submission of the United States of America on Preliminary Issues, ICSID Case No. ARB(AF)/99/1 (Feldman), (6 October 2000) at paras. 2-12.

[352] Metalclad Corporation v United Mexican States, Submission of the Government of the United States, ICSID Case No. ARB(AF)/97/1 (Metalclad), 9 November 1999 at paras. 3-8.

VIII. A Return to Fairness Elements?: Windstream v Canada

Windstream v Canada is the latest Chapter 11 dispute settled under NAFTA, in which Article 1105 was substantively assessed.[353] The Award was handed down on 27 September 2016 by a Tribunal comprising of Dr.Veijo Heiskanen (Chair), Mr. R. Doak Bishop and Dr. Bernardo Cremades.[354] Similar to *Mesa Power, Windstream* involved a US corporation, namely Windstream Energy LLC, challenging regulatory measures in relation of Ontario's FIT programme. This time, the FIT moratorium applied by Canada on 11 February 2011 on the development of offshore wind, claimed Windstream, frustrated its attempt to develop its Wolfe Islands Shoals ('WWIS') Project in Ontario.[355] The same regulatory/factual background that applied in *Mesa Power* was also applicable in *Windstream*, i.e. the regulatory background that was established in Ontario after the restructuring that dates back to 1998. Whilst the same liberalization principles therefore applied as in the regulatory framework, Windstream's claim additionally concerned offshore wind regulation which was subject to Wind Power Development on Crown Land, i.e. Wind Policy 4.10.04 as administered by the Ministry of Natural Resources ('MNR'). Windstream made an application to the MNR in relation to the Crown land in order to develop an offshore facility.[356] Further negotiations culminated in the conclusion of a FIT Contract for the WWIS on 4 May 2010 with the Ontario Power Authority ('OPA').[357] In doing so, WWIS was asked to provide a CAD 6 million letter of credit in order to secure its application.[358] Whilst representations were made by OPA and Windstream between 2010 and February 2011 to undertake the WWIS,[359] on 11 February 2011 Government of Ontario announced a moratorium, deciding not to move forward with the development of offshore wind "until further science regulatory work […] is

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[353] Eli Lilly v Canada is the most recent case concluded under NAFTA as of the day of the submission of this work. However, the case entails somewhat limited grounds of invocation of Article 1105 and, thus, a brief assessment of the provision by the Tribunal. As a result, the case has not been included in this Chapter. Yet, one should take not of the number of non-disputing party submissions received. The USA filed 2, Mexico filed one and *amici* filed 6 Article 1128 submissions. The case was dismissed by a Tribunal comprising of Professor Albert Jan van den Berg (Chair), Sir Daniel Bethlelem and Gary Born. Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017.

[354] Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Award, 27 September 2016.

[355] *Ibid.* at para. 5.

[356] *Ibid.* at para. 118.

[357] *Ibid.* at paras. 119-25.

[358] *Ibid.* at para. 126.

[359] *Ibid.* at paras. 127-45.

complete".[360] Windstream thereafter made repeated requests to the OPA to settle and to release its letter of credit. All these request went unattended.[361] Windstream filed its Notice of Arbitration under Chapter 11 against Canada on 5 November 2013, claiming that the Government of Ontario's and the OPA's conduct violated, amongst others, Article 1105 on Minimum Standard of Treatment. It argued that "the moratorium was arbitrary, grossly unfair and contrary to the Respondent's commitments and representations and the Claimant's legitimate expectations"[362] and that Canada discriminated against Windstream by treating other investors more favourably.[363]

The Tribunal started its analysis of this aspect of Windstream's claim by considering the disputing parties[364] as well as non-disputing NAFTA Parties', namely the USA's[365] and Mexico's[366], positions in length. It then described the scope and content of Article 1105. The Tribunal, by reference to Article 1131(2) of NAFTA, considered the FTC Note as an interpretation and as the "Governing Law".[367] In interpreting the customary international law standard embodied in Article 1105 and in the FTC Note, the Tribunal, in the absence of evidence of *opinio juris*, relied on the "indirect evidence". According to the Tribunal, such indirect evidence included previous decisions of NAFTA tribunals which specifically address the application and interpretation of Article 1105(1) and the "relevant legal scholarship".[368] In doing so, the Tribunal distinguished the *Neer* formulation, for a number of reasons. First, *Neer* is "a decision of an international claims commission" and therefore does not provide direct evidence of state practice. Second, *Neer* did not deal with the treatment of foreign investors.[369]

In reading Article 1105 under the guidance of the FTC Note, the Tribunal also observed that there is nothing in the FTC Note "which would suggest that NAFTA Tribunals should

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[360] *Ibid.* at para. 146.
[361] *Ibid.* at paras. 147-59.
[362] *Ibid.* at para. 298.
[363] *Ibid.* at para. 307.
[364] *Ibid.* at paras. 292-328.
[365] *Ibid.* at para. 329.
[366] *Ibid.* at para. 333.
[367] *Ibid.* at paras. 347-8.
[368] *Ibid.* at para. 351.
[369] *Ibid.* at para. 352.

entirely disregard the relevant rules of treaty interpretation", i.e. Article 31 of the VCLT.[370]

Oddly enough, the Tribunal found guidance in the *Pope & Talbot* – one of the NAFTA awards that triggered the FTC Note. It considered that the FET and FPS standards as reflecting the "fairness elements" that are subsumed in customary international law. The Tribunal also cited the *Mondev* Award, whereby the Tribunal, in obiter, observed that FET and FPS standards "references to existing elements of the customary international law standard are not intended to add novel elements to that standard".[371] The Tribunal then turned to considering the application of the "fairness elements" or the FET and FPS as "existing" under the customary international law minimum standard of treatment to the facts of the case. In doing so, the Tribunal once again found guidance in *Mondev,* in which the Tribunal also observed that "[a] judgement of what is fair and equitable cannot be reached in abstract; it must depend on the facts of the particular case".[372]

In light of the particular facts of the case between Windstream and Canada, the Tribunal observed "the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind".[373] In reaching this conclusion, the Tribunal reviewed the engagements between Windstream, the OPA and the Government of Ontario based on the factual information provided, between the signing of the FTI Contract in 2010 - the announcement of the Moratorium in February 2011 and the post-Moratorium communications and meetings.[374] The Tribunal first noted that it is:

"[…] unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful. The Tribunal notes that, while the conduct of the Ontario Government during the period leading up to the moratorium could have been more transparent, and although Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project, the Government's evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects".[375]

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[370] *Ibid.* at para. 355.
[371] *Ibid.* at paras. 360-1.
[372] *Ibid.* at para. 361.
[373] *Ibid.* at para. 366.
[374] *Ibid.* at paras. 367-75.
[375] *Ibid.* at para. 376.

On the other hand, the Tribunal further observed that the Government of Ontario did "relatively little to address the scientific uncertainty" it so based the 2011 Moratorium on. More importantly, continued the Tribunal, "the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium". Ontario failed, according to the Tribunal, to "clarify the situation" by promptly completing the scientific research and/or establishing a regulatory framework that would terminate Windstream's FIT Contract, excluding offshore wind from electricity generation. The Tribunal concluded that, by failing to take these measures the Government of Ontario, breached Article 1105(1).[376]

The Tribunal diverged from the *Waste Management II* formulation and the higher threshold applied by some of previous NAFTA tribunals. Once again, this was a serious departure from the established NAFTA practice. As evidenced above, since the FTC Note curtailed the content and scope of Article 1105 to the customary international law minimum standard of treatment, Tribunals have been cautious in not relying on the contested formulations produced by *Metalclad* and *Pope & Talbot*. In this latest case against Canada, this obviously has not been the case. Remarkably, the Tribunal turned to the *Pope & Talbot*'s "fairness elements" and *Mondev*'s "existing" formulations in finding guidance what Article 1105 meant. This led the Tribunal to conclude that Canada breached Article 1105 although being "unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful". The Tribunal gave a broad interpretation to Article 1105 despite the sovereign intrusion by the non-disputing NAFTA Parties under Article 1128, whereby both the USA[377] and Mexico[378] took a narrow view of the minimum standard of treatment. It is also curious that the Tribunal avoided from determining the components of the minimum standard under Article 1105. It is not clear, from the *obiter* above, which component of FET invoked by Windstream was determined to be violated – legitimate expectations or discrimination. It is also not clear whether the Tribunal applied the "fairness elements" determined in *Pope & Talbot* or whether it determined

[376] *Ibid.* at paras. 379-80.
[377] Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, United States Article 1128 Submission, 13 January 2016.
[378] Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22, Mexico's Article 1128 Submission, 13 January 2016.

"uncertainty" as an applicable component of the FET standard under Article 1105. Once again, the political regimes is not able to explain the interpretative choices followed by the Tribunal in this ITA case.

IX. Conclusion

I reviewed, above, the normative development of Article 1105 throughout the brief history of arbitral decision-making under NAFTA. I started the review with *Azinian (USA) v Mexico (1999)* – the first NAFTA case, in which an ITA tribunal interpreted Article 1105. I argued that the interpretation of the Tribunal resulted from the "restrictive invocation" of what later proved to be a vague and elusive provision. Essentially, the Tribunal clarified when a denial of justice could be pleaded under Article 1105. As such the first normative reading made into the minimum standard of treatment required a claimant investor to evince a host State's failure to "entertain a suit" by way of subjecting it to "undue delay" or "administer[ing] justice in a seriously inadequate way". As discussed, *Azinian v Mexico* did not entice anything inconsistent with the asymmetrical obligation pillar of the political regime of NAFTA, it was filed by US investors against Mexico. The above formulation has been often-cited by other NAFTA tribunals and, thus, has had an important place in the normative development of 'denial of justice' under Article 1105.

However, this 'traditional account' of Article 1105 was distorted in the cases that followed. First, in *Metalclad (USA) v Mexico* (2000), the NAFTA constituency witnessed how broadly Article 1105 could be interpreted. In this case, the Tribunal, having adopted a 'teleological approach', read "transparency" and "certainty" requirements embodied in Article 102 of NAFTA into Article 1105. This interpretive choice made by the Tribunal led it to conclude that Metalclad was not treated fairly and equitably by Mexico. Whilst the case, similar to its predecessor, did not 'directly' entice anything inconsistent with the asymmetrical obligations pillar, it was treated as problematic since such a broad reading of the provision could as well be used in Chapter 11 cases filed in Canada-US or US-Canada directions. Yet, during the proceedings, and perhaps unwittingly, this broad reading the Tribunal adopted was not challenged by the two non-disputing NAFTA Parties, namely, the USA and Canada, in their respective Article 1128 submissions. Only the USA, noted that the Tribunal should not deal with a question of "denial of justice"

since this was not raised in Metalclad's submissions. However, the "transparency" and "certainty" requirements adopted by the Tribunal were later on criticized and the Award was partially set aside by J Tysoe in his controversial decision of 2001. Not only J Tysoe did set aside the *Metalclad* Tribunal's interpretation of Article 1105, he also made lengthy observations on a pending case between Pope & Talbot and Canada, criticizing the Tribunal's approach to Article 1105.

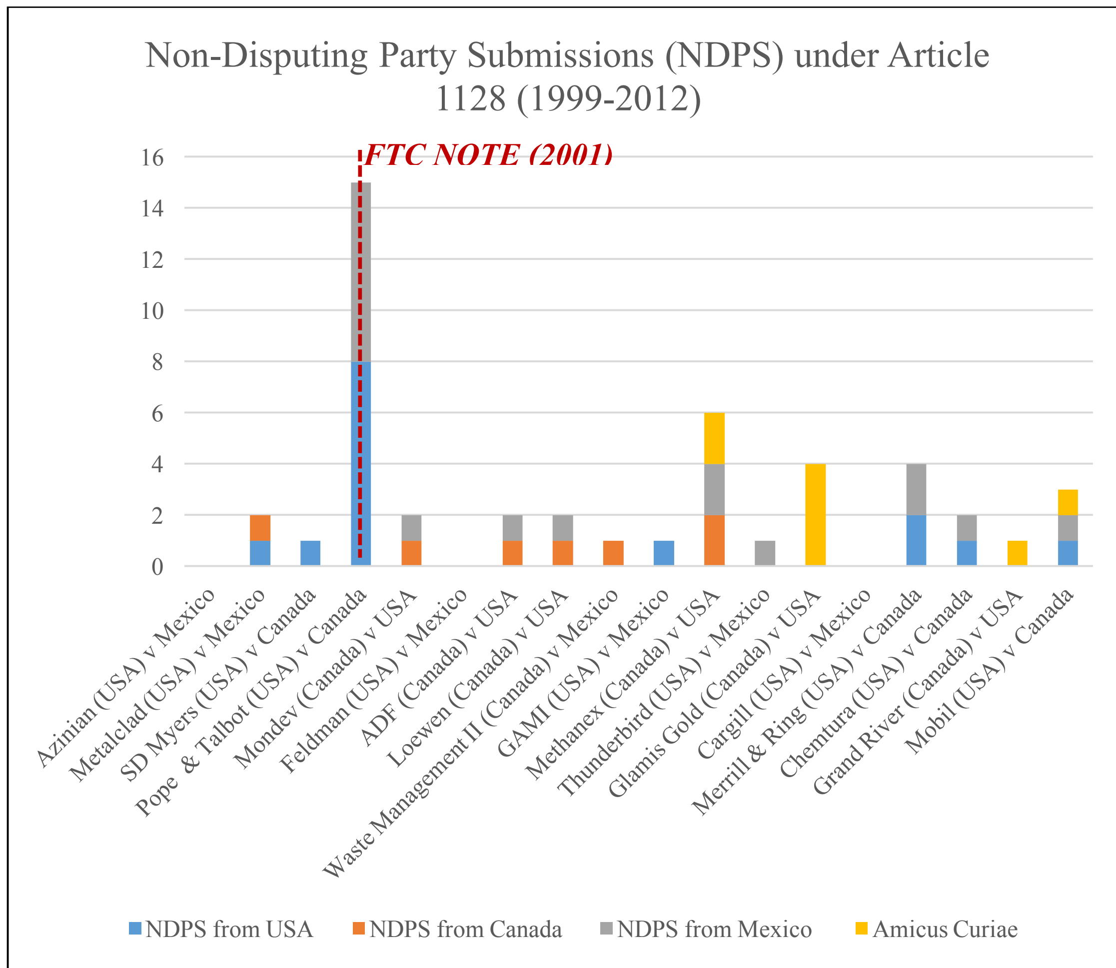
In the two cases that followed, namely *SD Myers (USA) v Canada (2000)* and *Pope & Talbot (USA) v Canada (2001-2002)*, Tribunals made their decisions under increasing influence by NAFTA Parties. The *SD Myers* Tribunal took an 'overarching approach' by considering "any specific rules of international law that are applicable to the case". This approach enabled the Tribunal to seek guidance from the *Hopkins* case and F.A. Mann's views on the minimum standard of treatment under customary international law. Nevertheless, the Tribunal found violation of Article 1105 not because there was a breach of customary international law but because there was a breach of Article 1102 on non-discrimination. On the other hand, the Tribunal in *Pope & Talbot* found support from the domestic legal systems of NAFTA Parties that Article 1105 included "fairness elements" and are "additive to" "international law" as referenced in the provision. However, after being criticized in a judicial review proceeding by J Tysoe, receiving 15 Article 1128 submissions by non-disputing NAFTA Parties (although not all of them provided observations of NAFTA Parties on Article 1105) and, lastly, limited by the FTC Note of 2001, the Tribunal deviated from its "additive to" approach in its Award in Respect of Damages (2002). It held that "the fairness elements" were "inclusive to" customary international law. This was due to the "evolution" of customary international law. According to the Tribunal, the *Neer* formulation did not reflect the state practice at the time.

This 'evolutionary approach', taken by the Tribunal in *Pope & Talbot,* was continued in some of the subsequent NAFTA Chapter 11 cases. In *Mondev (Canada) v USA (2002)*, the Tribunal distinguished the '*Neer* formulation' and, although it adopted a narrow meaning, noted that "the standard adopted in Article 1105 was that as it existed in 1994". *In ADF (Canada) v USA (2003)*, likewise, the Tribunal observed that Article 1105 is a not a static photograph of the minimum standard of treatment as it stood in 1927. In *Cargill (USA) v Mexico (2010)*, the Tribunal also adopted the evolutionary approach,

observing that the Neer formulation is not representative of the characteristics of today's "international business community". In *Waste Management (USA) v Mexico (II) (2004)*, the Tribunal formulated an 'emerging' general standard for Article 1105 based on previous decisions. In *Thunderbird (USA) v Mexico (2006)*, the Tribunal held that the customary international law has evolved since the *Neer* formulation. Inasmuch as these tribunals considered the FTC Note as a binding "interpretation", they also sent a systemic message that NAFTA Parties cannot equate customary international law minimum standard of treatment to the *Neer f*ormulation. On the other hand, the Tribunal in *Glamis Gold (Canada) v USA (2009)* diverged from the "evolutionary approach" by strictly applying the Neer formulation. In addition, the Tribunal in *Methanex (Canada) v USA (2005)*, diverged from earlier practice by not considering previous Chapter 11 decisions as sources of law. It is important to note that these two cases constituted distortions against the asymmetric obligations pillar of the political regime of NAFTA. The two cases also involved factual issues that were closely intertwined with environmental and public interest issues. As illustrated in Figure II below, *Methanex* and *Glamis Gold* received the highest number of non-disputing party submissions under Article 1128, both from non-disputing NAFTA Parties and from *amici* after *Pope & Talbot*. They also deviated from the earlier NAFTA practice on issues of interpretation affecting their conclusions in relation to alleged violations of Article 1105.

One should also note, from Figure II, the disproportionate involvement of non-disputing parties in cases that distort the asymmetric obligations pillar as opposed to cases that were filed against Mexico. In the cases against Mexico, NAFTA tribunals received one or two submissions from non-disputing NAFTA Parties and none *amicus curiae* submission. Especially in cases that distort both asymmetric obligations and regulation of environment, namely *Methanex* and *Glamis Gold*, the number of non-disputing party submissions doubled or tripled.

FIGURE II

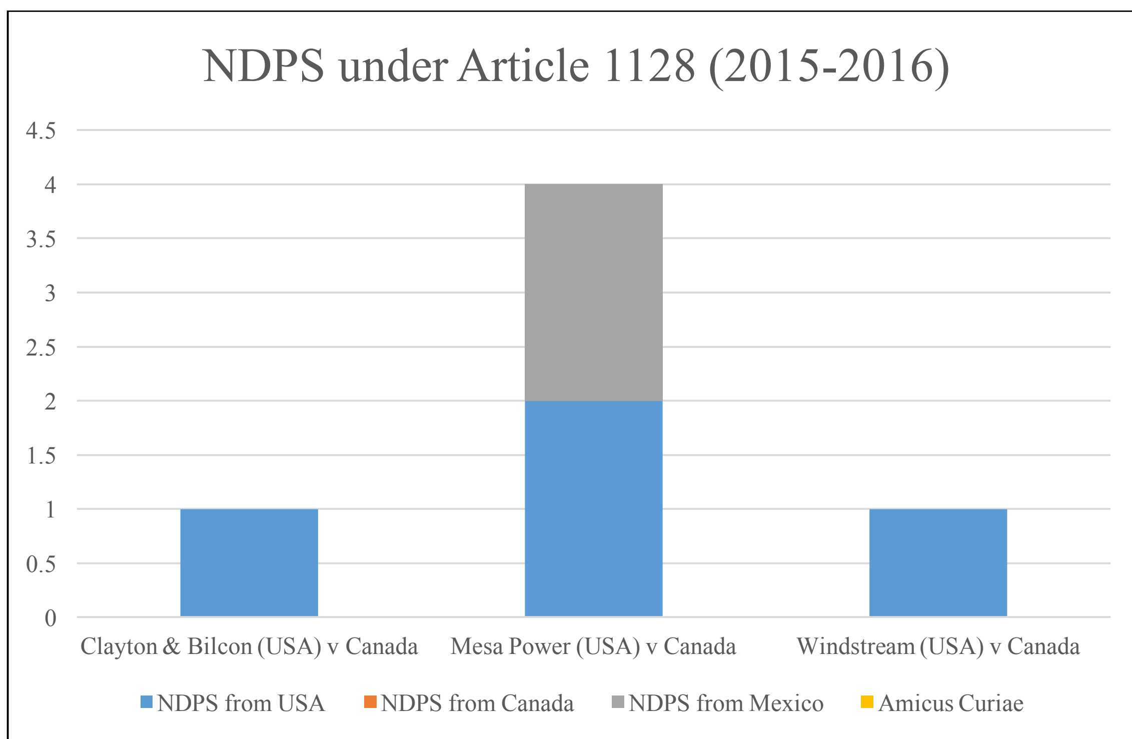


The normative development of Article 1105 between 1999 and 2009, thus, is a reflection of Chapter 11 Tribunals' oscillation between the 'traditional account/teleological approach', 'additive to/inclusive to' approaches and the 'evolutionary approach/emerging general standard and the *Neer* formulation'. Particularly, after the FTC Note was issued in 2001, Chapter 11 tribunals refrained from choosing interpretive approaches that would distort the political regime of NAFTA. At times, Tribunals openly referred to their systemic role in protecting the viability and integrity of NAFTA. As quoted in relevant sections above, in its *obiter dictum*, the Tribunal in *ADF*, for instance, openly avoided the use of any language that would "degrade and set naught the binding and overriding character of FTC interpretations". Likewise, the Tribunal *Loewen* assumed a role in protecting the integrity of the US judicial system and the viability of NAFTA. Similarly, the Tribunal in *Glamis Gold* considered that it had a duty protect the larger context in which it operates. Hence, the behavior of Chapter 11 Tribunals in interpreting Article

1105 between 2001 and 2012 exhibit correlation with the broader political regime of international investment under NAFTA. The interpretive doctrines introduced by NAFTA tribunals within the confines of Article 1105 resemble similarities with the approaches to treaty interpretation discussed by Pauwelyn and Elsig (2013). As the scholars identified, oscillations between such interpretive methods do entail political behaviour. In sum, one could conclude that the development of the minimum standard of treatment under Article 1105 reflects a brief history of sovereign intrusion by non-disputing parties, both from states and *amici*, that is enabled through the constitutive institutions and draw meaning from the political regime of international investment under NAFTA.

Against this background, very recently, NAFTA Chapter 11 practice has experienced an expansion in private investment rights in the interpretation of Article 1105. The Tribunal in *Clayton & Bilcon (USA) v Canada (2015)*, applying the evolutionary approach, found violation of Article 1105. However, its understanding of 'evolution' was broader than previous NAFTA Tribunals. According to the Tribunal, the international minimum standard has evolved in the direction of "increased investor protection". The Tribunal found guidance in the rather broad reading of the provision by the *Merrill & Ring* Tribunal. As a reaction, the Tribunal in *Mesa Power (USA) v Canada (2016)* received Article 1128 submissions from both the USA and Mexico that included substantive observations not only on the content and scope of Article 1105 but also on the *Bilcon & Clayton* Tribunal's interpretation of the provision. In dismissing the case, the Tribunal, although adopting the evolutionary approach and the *Waste Management II* formulation, concluded that legitimate expectations doctrine is not independent from the international minimum standard. On the other hand, the Tribunal in *Windstream (USA) v Canada (2016)* did not even feel the need to determine the components of the minimum standard of treatment. Controversially, it primarily relied on the fairness elements approach introduced by the *Pope & Talbot* Tribunal, offering an even broader interpretation of the provision. In this last case, the Tribunal only received one Article 1128 submission from the USA.

FIGURE III



This recent expansion of private investor rights in the interpretation of Article 1105 is a curious development. Not only do these cases distort the asymmetric obligation pillar, they are also closely associated with environmental regulation in Canada (in particular *Clayton & Bilcon*). Whilst there appears to be correlation between the greater involvement of non-disputing NAFTA Parties and the outcome of the *Mesa Power* case, the political regimes approach is unable to explain why, unexpectedly, *Clayton & Bilcon* and *Windstream* have re-broadened the content and scope of Article 1105. An attitudinal or behavioural empirical work on the background of the members of these Tribunals might help to explain these latest distortions to the two pillars of NAFTA's political regime of international investment, namely asymmetric obligation and environmental regulation.

However, the above review exhibits correlation between the behaviour of the Chapter 11 Tribunals in oscillating between the interpretive choices available to them thus far accommodating the political regime of NAFTA. Whereas there is greater adherence to a narrower reading of the minimum standard of treatment in cases instituted against the USA, tribunals behave more flexibly in cases instituted by US investors against Canada.

In the majority of cases, however, there is evidence that tribunals also consider the systemic implications of NAFTA on the practice of Chapter 11. As illustrated above, NAFTA tribunals so 'competently' developed a 'grammar' with which they could provide carefully reasoned opinions in order to present an image consistent with the popular and professional expectations of neutrality. At the same time, they 'competently' responded to systemic needs of the political regime of NAFTA, particularly between 2001 and 2012. The above review thus shows that NAFTA Chapter 11 tribunals might assume a principal political role based on the facts and the specific pillar of the political regime of NAFTA involved in the case. To that end, the above review shows that Chapter 11 tribunals are competent in *judicial politics*.

CHAPTER VIII

CONCLUSION

This work on judicial behaviour in ITA under NAFTA provides important socio-legal knowledge as to how international investment law works and how the ITA Tribunal operates in real life. Amongst the theoretical approaches available under the judicial behaviour scholarship, this work has chosen to follow the "political regimes" approach of Cornell Clayton and David May (1999), complemented by the "political jurisprudence" literature of Martin Shapiro (1964) and the "historical interpretivist" approach of Rogers Smith (1988). Whilst this scholarship is constructed on new institutionalism putting normative concerns of adjudicators at the heart of its understanding of judicial behaviour, it has also been criticized for treating rational choice and other behaviouralist concerns as secondary. As noted in the Conclusion to *Chapter VII*, this shortcoming of the historical interpretivist scholarship might explain why the political regimes approach does not show any correlation between the recent expansion of private investment rights under *Clayton & Bilcon* and *Windstream* and the pillars of the political regime of NAFTA. A rational choice or behavioural study, focusing on inter-panel dynamics and the professional/personal background of arbitrators in these cases might be necessary to explain the behaviour of these two tribunals and whether they were engaged in judicial politics. As Rogers Smith once explained, judicial actors might be influenced by variables other than institutional structures and may therefore choose to retain some room for their subjective values (Smith 1988).

This work has argued that international investment law does not operate in a closed 'box' constructed purely on normative concerns. It has argued that there is a 'real law' that emanates from the interactions of different constitutive and non-constitutive institutions as well as different stakeholders embedded in the broader political regime of international investment. This work adopted an 'alternative' understanding of the ITA Tribunal. The hypotheses put forward at the end of *Chapter IV* reflects this 'alternative' understanding. The role of the ITA Tribunal is not limited to settling a dispute between a foreign investor and a host State, it should also consider the peculiar attributes of constitutive and non-constitutive institutions within which it operates. These institutions may reflect the broader underlying political foundations the ITA Tribunal may adhere to. In that sense,

the role of the constitutive and non-constitutive institutions, with their political limitations and attributes, in ITA decision-making is integral to this work.

In studying "the ITA Tribunal", this work constructed its analyses on certain methodological assumptions. As already highlighted in the Introduction Chapter, one such assumption is in relation to the ad-hoc character of the ITA tribunal. As mentioned earlier, it would have been a challenging exercise for a new institutionalist judicial behaviour scholar to assess the impact of institutions, external to an ITA tribunal, in relation to the behaviour of the tribunal, since arbitrators may diverge in their reactions to such external influences. A second methodological assumption is in relation to the IIA that applies in the dispute at hand. The IIA and therefore the substantive provisions therein may vary from one dispute to another. In response, this work considered "the ITA Tribunal" as a standing court-like structure. This provided the methodological leeway to omit attitudinal and behavioural inquiries and to focus explicitly on the institutional factors that influence ITA decision-making. As for the second methodological challenge in relation to the variations of the applicable IIA, this work limited its case study to ITA cases instituted under the same constitutive institution or the IIA. In doing so, this work kept its focus on ITA cases under NAFTA's Chapter 11. Nevertheless, as a result of its methodological choices, this work omitted key attitudinal and behavioural approaches and, thus, the dynamics within an ITA tribunal associated with the personal policy choices and values of arbitrators.

Whilst this theoretical and methodological understanding of the ITA Tribunal mimics the analysis of 'courts' in their 'broader political regime', this work also found guidance in the historical interpretive approach in substantiating its focus on the normative development of the law under the shadow of politics. It was also guided by political jurisprudence literature. This literature is key in distinguishing its theoretical approach from old institutionalist (Corwin and Mason 1934) and rational choice institutionalist (Epstein and Knight 1998) analyses of 'courts' that are interested in how the court is 'constrained' in its broader institutional framework. As opposed to old institutionalist or rational choice approaches, this work instead used the terms 'influenced' or 'informed' when discussing how the ITA Tribunal operates in its broader political regime and whether the role of politics has bearing in judicial decision-making. It considered the ITA

Tribunal as an institution that may assume a 'principal political' role in interpreting substantive provisions embedded in the constitutive and non-constitutive institutions. Thus, the ITA Tribunal is 'limited to' (not 'constrained by') these institutions when it performs the activity of treaty interpretation.

In *Chapter V*, I discussed the limited options available to the ITA Tribunal when interpreting a treaty. Inasmuch as there are general principles and rules and evolving doctrines of treaty interpretation that may 'limit' the ITA Tribunal's behaviour, the Tribunal is also bound by the constitutive institution under which it operates. Be it NAFTA or the ECT, the constitutive institution under which the ITA Tribunal is 'constituted' may include provisions that might require the Tribunal to accommodate certain interests of the stakeholders involved in the broader political regime of international investment. By reviewing the original bargain that underlies NAFTA, I first identified what the broader political regime of international investment entails: namely asymmetrical obligations and regulation of environment (or as I named them 'the two pillars of NAFTA's political regime'). In the second half of *Chapter V*, I identified some of these provisions that limit the ITA Tribunal's discretion to choose one interpretive approach over the other within the NAFTA context. Articles 1128, 1131, 1136 and 2001 all provide constitutive ways through which stakeholders may further their respective interests, reflecting the specific institutional-power context of the pillars of the political regime of NAFTA. In the words of Meg Kinnear, the interests of stakeholders in the proper operation of NAFTA might "transcend[…] the merits of specific cases".

It is this theoretical understanding of the ITA Tribunal that guided the case studies in *Chapter VII*. By chronologically reviewing a number of cases in which Article 1105 on the minimum standard of treatment was interpreted, I aimed to trace the 'vocabulary' or, in the words of Professor Koskenniemi the 'grammar', that demonstrates how the ITA Tribunal assumes a political principal role in the broader political regime of NAFTA. Some of the quotations in *Chapter VII*, obtained from the legal material associated with these NAFTA Chapter 11 cases, illustrate that one need not explore the vocabulary used in the normative analysis as some of these tribunals (in particular see the *obiter dictum* in *ADF, Loewen* and *Glamis Gold*) explicitly mention their principal political role. However, the principal political role of the ITA Tribunal in some other cases could only

be revealed through an investigation of the vocabulary used in substantiating the Tribunal's interpretive choice. The normative transformation of Article 1105 was scrutinised recognising the historical interpretive assumption that the ITA Tribunal has 'a duty to provide carefully reasoned opinions in order to present an image consistent with popular and professional expectations of neutrality' (Shapiro 1964). I concluded in *Chapter VII* that the normative development of the minimum standard of treatment reflects a brief history of sovereign intrusion by non-disputing parties, both from states and *amici*, that is enabled through the constitutive institutions and draw meaning from the political regime of international investment under NAFTA.

This work attempted to contribute to the judicial behaviour scholarship on ITA identified and reviewed in *Chapter III*. A key criticism I directed to this scholarship relates to scholars' erroneous use of some of the judicial behaviour literature reviewed in Chapter II. For instance, Kapeliuk's, Brekoulakis' and Schneiderman's contributions suffered from this caveat. I also argued why so few normative concerns were relevant in Langford and Behn's rational choice analysis. On the other hand, Gus Van Harten's content analysis tested an assumption that is independent from the constitutive and non-constitutive institutions. In other words, Van Harten focused on a 'structural bias' embedded in international investment law. However, as identified in this work, each IIA may have provisions that reflect on the "structural bias" that is peculiar to the particular IIA applicable in a dispute (such as Articles 1128, 1131, 1136 and 2001 of NAFTA). In other words, there might be different structural biases that are embedded in different political regimes of international investment.

This work aimed to address these gaps in the judicial behaviour research on ITA decision-making. However, as mentioned at the beginning of this Chapter, it suffers from certain shortcomings. *First*, as identified, it treats attitudinal and behavioural concerns as secondary and therefore cannot explain the reasoning behind the recent expansion of investor rights in *Clayton & Bilcon* and *Windstream*. *Second*, it does not put forward an empirical method through which more evidence could be revealed and, thus, a more convincing correlation between politics and ITA decision-making might be presented. Methodologically, the analysis undertaken in this work may appear descriptive to some. However, it is logical in a historical interpretivist study to "integrate the study of ideas in law with descriptive studies of the historical evolution of political institutions and

behaviour" (Smith 1988). This descriptive approach to the content of judicial opinions and normative concerns through historical interpretivist theory, distinguishes the work from rational choice or behavioural works.

One could conclude that the historical interpretivist analysis of ITA decision-making could also be improved through an empirical and behavioural approach. However, one should take note that an empirical or behavioural study would hardly be able to measure personal and policy preferences of arbitrators. The judicial behaviour scholarship on the American Supreme Court illustrates this difficulty. On the other hand, areas of research could be diversified. As identified in *Chapter IV*, one such political regime in international investment that might provide valuable evidence could be ITA decision-making within the limits of the constitutive instruments of ECT, TFEU and EC (State Aid) regulations.

This work questioned the role of institutions engaged in international investment law, with their political limitations and attributes, in ITA decision-making. With this in mind, this work identified institutions under NAFTA Chapter 11 that are key to ITA decision-making, and in particular, in interpreting the minimum standard of treatment under Article 1105. It identified fundamental political characteristics of these institutions and the ways with which they may derive meaning from the broader political regime in which they are embedded. The alternative theoretical understanding of the ITA Tribunal and the case study on NAFTA have illustrated that politics is not only present in the making of treaties and the concrete behaviour of actors (states) but is also available in ITA decision-making. This socio-legal work has also shown that ITA tribunals may assume a principal political role in capturing the political contingency of international investment law under influence by the stakeholders, at the same time establishing a 'grammar' that responds to popular and professional expectations of neutrality. These findings support and validate the hypotheses identified at the end Chapter IV.

In sum, this work has illustrated that the development of the minimum standard of treatment under Article 1105 reflects a brief history of intrusion by non-disputing parties from sovereign states and *amici.* This is enabled through the constitutive institutions and draws meaning from the political regime of international investment under NAFTA. One could therefore conclude that the ITA Tribunal is able to develop a vocabulary with which

it could internalize the conundrums of the broader political regime in which it operates. This shows that the ITA Tribunal is not only competent in settling disputes but also in *judicial politics*.

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