NORM CONTESTATION ABOUT SUSTAINABLE DEVELOPMENT IN THE CONTEXT OF INTERNATIONAL PUBLIC INVESTMENT LAW DISPUTES

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This thesis analyses norm contestation about sustainable development in the context of international public investment law disputes in which environmental policies have been challenged as violation of an investor's rights. Existing conflicts between economic and environmental policy at the domestic and international level can pose problems to policy makers. To better understand the dynamics present when problems arise and their origins, I argue that institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes.

The thesis perceives institutional factors to include both procedural and substantive case characteristics. I examine what, in addition to facts provided in such cases, could matter in the determination of a case outcome, whereby my outcome of interest is an environmental policy permissible ruling in such investor-state disputes.

The study investigates procedural characteristics of transparency and of public participation, constituting intra-institutional factors, because they depend on the governing rules for dispute settlement of the organization administering the dispute, where applicable. Substantive case characteristics of horizontal integration between international economic and environmental law regimes are assessed as inter-institutional factor. I thus construct specific procedural and substantive case characteristics to capture both: power distribution among organizations, and, some of the outcomes of norm contestations resulting from national and international law-making processes.

I then explore whether –and find that indeed – transparency, public participation and horizontal integration as well as interpretation approach seem to show an influence on case outcomes, that is in the realm of an international law-application process. Suggesting that existing conflicts between environmental and economic policies could be understood as the outcome of norm contestation processes in different arenas engaging different actors, I then explain how my findings further inform the law-making process and thus can have policy implications. However, resulting policies in turn depend on outcomes of norm contestation among various actors in the law-making process and the decisions taken by states. This circular flow involving various processes at the domestic and international level is explicated with a model of interactions among actors in the context of norm contestation about sustainable development.

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ABBREVIATIONS

Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal
BIT	Bilateral Investment Agreement
Cartagena Protocol	Cartagena Protocol on Biosafety to the Convention on Biodiversity
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EED	Environmental Exception or Defense
EU	European Union
ECtHR	European Court of Human Rights
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FOI	Freedom Of Information
FTA	Free Trade Agreement
FTC	NAFTA Free Trade Commission
GAOR	General Assembly Official Records
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HI	Horizontal Integration
HI level 1	Treaty-specific reference (within the economic treaty invoked)
HI level 2	Non-treaty specific reference

ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IGO	International Governmental Organization
IIA	International Investment Agreement
IISD	International Institute for Sustainable Development
IPR	Intellectual Property Rights
ISDS	Investor-State Dispute Settlement
Mauritius Convention	UN Convention on Transparency in Treaty-based Investor-State Arbitration
MCO	Multi-Centric Organizational Model
MEA	Multilateral Environmental Agreement
MFN	Most-Favored Nation
NAAEC	North American Agreement on Environmental Cooperation
NAFTA	North American Free Trade Agreement
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biodiversity
NGO	Non-governmental organization
NT	National Treatment
PCA	Permanent Court of Arbitration
Plant Treaty	International Treaty on Plant Genetic Resources for Food and Agriculture
Ramsar Convention	Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat
Rotterdam Convention	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade
SD	Sustainable Development
Stockholm Convention	Stockholm Convention on Persistent Organic Pollutants
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCCD	United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa

UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNCITRAL	United Nations Commission on International Trade Law
UNWSSD	United Nations World Summit on Sustainable Development
VCLT	Vienna Convention on the Law of Treaties
World Heritage Convention	Convention concerning the Protection of the World Cultural and Natural Heritage
WTO	World Trade Organization
WTO AB	The World Trade Organization's Appellate Body

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1.0 NORM CONTESTATION IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT AND INTERNATIONAL PUBLIC INVESTMENT LAW DISPUTES – AN INTRODUCTION

1.1 RESEARCH PROBLEM

1.1.1 Introduction: What stands in the way of realizing the idea of sustainable development?

Over the last 70 years, international public law has evolved through simultaneous developments in trade, investment, and environment.[1] These developments play a crucial role for the realization of sustainable development. In fact, the International Law Association (ILA) recognizes a distinct sustainable development law with a body of principles and practices. However, much contestation around how to best realize sustainable development can be observed from negotiation history, including of the recent Rio+20 United Nations Conference on Sustainable Development, and the UN 2030 Sustainable Development Goals agreed upon in 2015. Yet, there remains a need to understand what stands in the way of realizing the idea of sustainable development. Prompted by this need, my investigation is guided by the research question "What explains variation in environmental policy permissibility[2] in international trade and investment law?"[3] The focus lies on identifying conditions that allow for the possibility of my outcome of

[1]International economic law has changed in trade law from the GATT 1947 to the WTO Agreement or GATT 1994, and has changed in international public investment law from Pre-World War II treaties of friendship, commerce and navigations to bilateral investment agreements. In addition, specific development interests have entered international economic law from the 1962 UN Resolution on Permanent Sovereignty over Natural Resources GA Res. 1803 (XVII) (Dec. 14, 1962) to the 2001 WTO Doha 'Development' Round. Also developed under advocacy of developing countries was the 1974 UN Center on Transnational Corporations that focused on foreign direct investment. Its office was closed in 1993 and its work transferred to UNCTAD. International environmental law has evolved from the 1962 Convention on civil liability for nuclear damage to many Multilateral Environmental Agreements, such as the Rio Conventions.

[2]The term "permissibility" has been used in the literature. Gus Van Harten, *Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration*, 1 SOCIO-LEGAL ASPECTS OF ADJUDICATION OF INTERNATIONAL ECONOMIC DISPUTES 27 (2011).

[3]The study focuses on disputes involving international public *investment* law which is a subset of international economic law, and is also contained in free *trade* agreements besides specific bilateral investment agreements, as also noted in the United Nations Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), GAOR Seventy-Second Session Supplement No. 10 (A/72/10). This choice to focus on

interest, i.e., international economic law dispute cases that result in rulings permissible of the environmental policy challenged in the case.

What matters in such cases – why and how? I suggest horizontal integration between international economic and environmental law plays a major role in such case outcomes. Growing environmental problems and their effects on livelihoods have led to the development of environmental policies and multilateral environmental agreements (MEAs), such as the United Nations Framework Convention on Climate Change with the objective to: " … prevent dangerous anthropogenic interference with the climate system, […] within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner".[4] Such and similar important objectives of other international environmental law regimes provide a normative answer to *why* horizontal integration between them and international economic law regimes matter. I find more scientific answers in my observations of *how* horizontal integration plays out in economic law disputes in which environmental policies are challenged. My study finds horizontal integration: can occur at different levels, within the economic treaty text invoked by a claimant or outside of it; can influence the interpretation of factual actions by the respondent, of legal provisions in the economic treaty text invoked and of the respondent's and claimant's obligations; and may be submitted as argument by various actors, including the disputing parties, *amicus curiae* or tribunal or dispute panel. This complex dynamic interplay further varies with observations of transparency and public participation in a dispute as well as the interpretation techniques employed by tribunals.

The results of my investigation include: observable inter-linkages between horizontal integration and dispute case outcomes; possible influence of institutional practices of transparency and public participation on the consideration of horizontal integration and interpretation; some unexpected tendencies; and recommendations for policy makers, NGOs and practitioners of international law.

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international investment arbitrations or disputes, enabled a richer analysis of norm contestation because many of the international trade law principles, standards or norms, such as most-favoured nations, national treatment or the concept of "like circumstances" still applied, while also in addition more specific investment-related norms such as "fair and equitable treatment" or "legitimate and reasonable expectations" could also be addressed.

[4]Article 2 of the United Nations Framework Convention on Climate Change.

1.1.2 Policy Problem: Existing conflicts between economic and environmental policy at the domestic and international level

My research question is driven by a problem that policy makers currently struggle with: the problem of existing conflicts between economic and environmental policy at the domestic and international level.[5] The reason for my directional research question is twofold: First, the study concerns horizontal integration at the international law level based on the assumption of a general hierarchy of international law mandating domestic implementation. Second, I suspect inequality in legal and institutional force among international regimes, with more advanced compliance and enforcement mechanisms found in economic regimes. Therefore, while one could ask: What explains differences in the integration of economic policy concerns in international environmental law?" I instead ask: "What explains variation in environmental policy permissibility in international trade and investment law?"

The policy problem is significant for at least three reasons: First, under international law, different regimes have equal status, each in their own issue area. They should not conflict. How could a country comply with conflicting obligations under different international law regimes? Second, despite their legal equal status, international economic regimes have been viewed in practice as more powerful than environmental legal regimes. A government may face the dilemma then to weigh the sustainable

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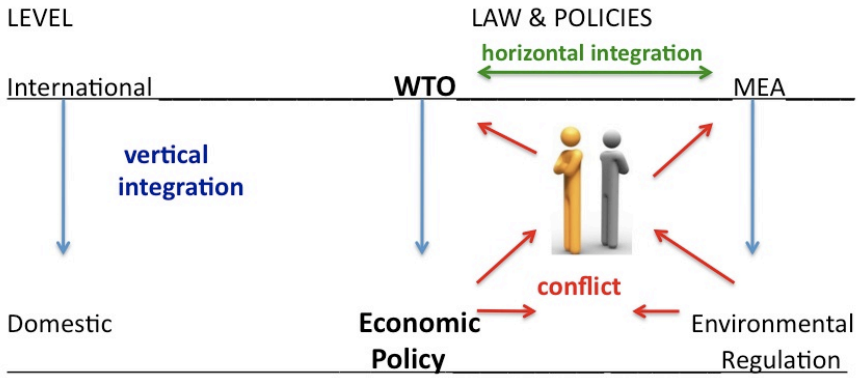

The illustration above shows (in green) the expected horizontal integration of international law across subject matters, such as between (in the multilateral context) the Multilateral Trade Law (WTO) and Multilateral Environmental Agreements (MEAs). It shows (in blue) the vertical integration of international law into domestic policies. Indicated (in red) are actual conflicts between domestic economic policies and environmental regulations, such as reducing costs for domestic industries to increase their international competitiveness versus imposing pollution fees or requiring emission permits to protect the environment. Also (in red) we see how domestic environmental regulations can conflict with international trade laws; And conversely (red) arrows indicate how domestic economic policies – such as exploiting natural resources such as tropical forests – can conflict with MEAs such as CITES, the Convention on International Trade in Endangered Species. The bolt part in the illustration— that is international and domestic economic policy— indicates my noted reason for my directional research question.

development benefits of implementing an environmental policy against the economic risks of facing trade sanctions or being sued for costly monetary compensation?

Third, some international economic regimes provide more power to specific actors than international environmental regimes.[6] This raises important questions about legitimacy, procedural integrity and possible systemic bias.[7]

1.1.3 Approach: Norm contestation at the stage when policies or their implementation are legally challenged

Following from the idea, (based on the theoretical framework used in this study and explained in Chapter 2), that international policy is the result of political power struggles among different multi-centric organizations engaged in strategic social construction and norm contestation, my theory suggests that *institutional* practices as asymmetric transparency and unequal participatory access or representation of stakeholders impinge on the power of organizations and in turn affect policy outcomes. Norm

[6] Differences among actors' powers and obligations in international public law relevant to sustainable development can be observed in several instances. Anthony VanDuzer et al. note "international human rights law imposes obligations on states to protect and fulfill the human rights of individuals subject to their jurisdiction and to provide remedies for violations, but few human rights treaties impose duties directly on non-state actors such as an investor. For the most part, international investment agreements (IIAs) also do not impose such duties. The absence of obligations on investors to respect human rights and promote sustainable development can make it difficult for a host state to meet its obligations to protect its citizens, which include the responsibility to regulate effectively the operations of foreign investors subject to their jurisdiction to ensure that they do not violate human rights". Moreover, the authors note "IIAs contain international legal rules that in many cases trump the application of domestic law of a host state to a foreign investor, for example requiring the state to compensate a foreign investor fully for the economic value of any property the government takes, even if this government act is in accordance with domestic constitutional laws and regardless of the public purpose, such as the creation of a national wildlife preserve". In addition, the authors note that only foreign but not domestic investors have access to the complaint mechanisms in IIAs and consequent claimed remedies for government acts, acts that might be part of the host country's' sustainable development policy, such as putting a price cap on drinking water. See: *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Counties* prepared by J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, for the Commonwealth Secretariat (August 2012) at 25 and 27 available at https://www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf . Different rights among actors can also be seen in terms of participatory rights. While IIAs provide for investment –state dispute settlement mechanism, participation, transparency and observer rights to disputes are not necessarily granted to members of the public or NGOs. To some it seems even contradictory that a state provides on the one hand for investors' protection and direct dispute settlement provisions in IIAs, including the possibility for investors to challenge government environmental policies, while that same state may also have supported the idea and signed the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. In such a case the public may have rights in government policy formulation but no information on why and how such policy could be challenged by an investor under IIAs.

[7] Susan Frank notes these issues in the context of investment treaty arbitration. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARVARD INTERNATIONAL LAW JOURNAL (2009). Kati Kulovesi assesses some of these issues in the context of the WTO dispute settlement system. Kati Kulovesi, The WTO dispute settlement system and the challenge of environment and legitimacy (2008) London School of Economics and Political Science.

contestations occur, among others, under different international regimes and within different institutional processes. Relevant to norm contestations around the concept of sustainable development are particularly international economic and environmental regimes. Horizontal integration between the outcomes of norm contestations among different international regimes is therefore important to avoid policy conflict.

The development and implementation of international law includes four broad processes: international negotiations; domestic ratification; policy development and implementation; and disputes and arbitrations as examples of compliance mechanisms in cases where disagreement about policy implementation exist. Thus, norm contestation may continue even after treaty and policy negotiations have concluded and take place in the interpretation process that occurs when policies or their implementation are legally challenged. My study focuses on the latter, dispute or arbitration cases. It allows me to investigate whether institutional practices of transparency and public participation also affect the norm contestation process in international legal disputes, by way of influencing the consideration of horizontal integration and legal interpretation in international economic law disputes. Naturally, policy development and implementation practices, such as good governance and following due process, are important factors in determining the permissibility of a challenged environmental policy.

Thus, institutional practices of transparency and public participation in the legal dispute process itself could also play a role in case outcomes, possibly influencing, through the submissions of arguments, the consideration of horizontal integration at various levels and in turn the interpretation of specific treaty provisions and of states' obligations. This approach to better understand but one of many challenges to the implementation of sustainable development, (i.e. potential rulings on the impermissibility of environmental policies) provides me with a specific population (cases), pre-identified by dispute parties to pose a policy conflict within a narrow context (legal analysis), and specific forums (dispute settlement mechanism).[8]

[8] I discuss the limitations of my study in chapter 9. As Gus Van Harten notes, there are also important limitations of an outcome-based approach: data on outcomes as a measure of actual performance is open to a range of alternative explanations such as variations in the strength of parties' claims, diversity of fact situations, possible inflation by claimants of amounts claimed, varying experience levels and incentives among arbitrators and varying political influences of states and private actors. They may also not capture interpretations of the law that may reflect bias independently of outcome. As to this latter point, I include in my study in part relevant interpretations of the law by examining through legal content analysis horizontal integration, such as the mentioning of or referencing to multilateral environmental agreements in international economic law dispute cases. Gus Van Harten, Contributions and Limitations of Empirical Research on Independence and Impartiality in International Investment Arbitration, 1 SOCIO-LEGAL ASPECTS OF ADJUDICATION OF INTERNATIONAL ECONOMIC DISPUTES 27 (2011).

1.1.4 Theoretical Research Argument

RESEARCH QUESTION: What explains variation in environmental policy permissibility in international economic law disputes?

THEORY: Institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes.

In search for a better understanding of what stands in the way of the implementation of sustainable development and guided by the research question "What explains variation in environmental policy permissibility in international trade and investment law?" my theory, that institutional factors impinge on the power of organizations and in turn affect policy outcomes, leads me to several testable hypotheses.

HYPOTHESIS 1: Horizontal integration increases the prospect of environmentally permissible dispute outcomes.

First, I hypothesize that horizontal integration increases the prospect of environmentally permissible dispute outcomes. A test may confirm that the presence of horizontal integration in existing disputes more frequently have environmentally permissible outcomes than those cases without horizontal integration. This constitutes an inter-institutional factor in my investigation because it looks at the integration between international economic and environmental institutions or regimes. Lack of horizontal integration in existing disputes illustrating a pattern of environmentally impermissible outcomes would also indicate some support of my hypothesis. In addition, finding a general trend of lack of horizontal integration in international economic law disputes cases may also imply unequal powers attributed to international environmental institutions compared to international economic regimes, an issue inviting further study.

HYPOTHESIS 2: Transparency in economic law disputes increases the prospect of environmentally permissible dispute outcomes.

My second hypothesis is that transparency in economic law disputes increases the prospect of environmentally permissible dispute outcomes. Support for the hypothesis will be confirmed if dispute outcomes that are environmentally impermissible are more frequently associated with cases with less transparent dispute and arbitration procedures (i.e. where no public information and access was provided

to: a notice of commencement of the dispute; dispute documents during the dispute; or the final decision of the dispute). This study is limited to data from publicly-disclosed disputes only. As there may exist undisclosed cases, it is possible that there might be differences between known and unknown disputes, so that this study's analysis and conclusion remain limited to publicly disclosed disputes.[9] Within this body of publicly disclosed dispute cases, however, one can test potential effects of differences in transparency practices on case outcomes.

HYPOTHESIS 3: Public representation and participation increases the prospect of environmentally permissible dispute outcomes.

My third hypothesis proposes that public representation and participation[10] increases the prospect of environmentally permissible dispute outcomes.[11] Testing this I may find dispute cases that have resulted in environmental policy permissible rulings are more open to public participation, i.e. in which non-disputing parties and stakeholders are able to provide expertise on points of law, offer historical and cultural context to a dispute and reveal how a dispute has wider ramifications beyond the interest of the disputing parties.

These three hypotheses developed out of the ideas that:

- Institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes;
- International economic law disputes are examples – and the result of – ongoing strategic social construction and norm contestation between multi-centric organizations;
- International economic law dispute outcomes vary for different reasons, including the presence of horizontal integration, public representation and participation and transparency in the dispute case; and
- The presence of these indicators increases the prospect of environmentally permissible dispute outcomes.

[9] *Ibid*. p.19.
[10] For example, participatory access provided by the international institutional arrangement housing the economic law and disputes by allowing for public observance of hearings and submission and acceptance of *amicus curiae* submissions.
[11] Testing this we should find that dispute outcomes that are environmentally permissible occurred more in IIAs that are more open to the public than in IIAs with less access.

This study makes relevant observations testing these hypotheses and reveals to what extent these ideas can and cannot be confirmed by existing international economic law disputes in which environmental policies have been challenged.

2.0 UNDERSTANDING THE PROBLEM: THEORETICAL FRAMEWORK

There exists a wide range of literature on international regimes (S. Krasner, D. Drezner, R. Steinberg, S. Picciotto), on international trade and investment law (S. Charnovitz, P. M. Dupuy, R. Howse, E. Neumeyer, A. Guzman), and on sustainable development (W. Sachs, H. Daly, D. Meadows, P. Hawkin, A. Lovins). Few studies center at the intersection of these spheres (H. Mann, K. von Moltke, Aron Cosbey, N. Bernasconi-Osterwalder) with a specific focus on institutional practices relevant to the evolution of international economic and environmental law.

While studies on the lessons learned from multilateral negotiations point to the importance of institutional practices, research on systemic case outcomes in international investment disputes or arbitrations has focused primarily on the prospect of actual bias arising from selected individual factors as opposed to perceptions of bias arising from institutional factors.[12]

In the context of multilateral *environmental negotiations*, D. Davenport, L. M. Wagner and C. Spence (2012) have illustrated how "innovative processes and techniques […] have been used to help move coalitions toward a negotiated conclusion at points when the talks have stalemated".[13] In the context of multilateral *trade negotiations*, Martin Khor (2009) observed from the account of key meetings and conferences of the WTO that the non-transparent processes of decision-making in the negotiations gave rise to perceptions of manipulation and of bias of the system towards the major developed countries.[14]

This claim of bias is addressed by Franck (2009) in the context of international *investment arbitration*, exploring whether arbitration inappropriately favors either the developed or the developing world and investigating whether there is a relationship between 'development status' and arbitration outcome.[15] Like Franck, whose dependent variables include the development status of the nationality of

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[12]Gus Van Harten, *The Use Of Quantitative Methods To Examine Possible Bias In Investment Arbitration*, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010-2011 (Karl P. Sauvant ed. 2012) at 862.

[13]PAMELA S. CHASEK AND LYNN M. WAGNER (EDS.), THE ROADS FROM RIO –LESSONS LEARNED FROM TWENTY YEARS OF MULTILATERAL ENVIRONMENTAL NEGOTIATIONS (Routledge. 2012), at 39.

[14] Martin Khor, Analysis of the Doha Negotiations and the Functioning of the WTO (South Center 2009) at 34.

[15] Susan D. Franck, Development and Outcomes of Investment Treaty Arbitration, 50 HARVARD INTERNATIONAL LAW JOURNAL 435(2009). Gus Van Harten, The use of quantitative methods to examine

adjudicators and of the host country, McArthur and Ormachea (2009) examine primarily *individual factors* in relation to possible bias in dispute case outcomes, including: the economic status of the home and host country and the quality of the host countries' institutions.[16] In contrast to these two quantitative studies, Gus van Harten has advocated qualitative methods to the study of investment arbitration outcomes and has highlighted how *institutional aspects* of investment treaty arbitration give rise to the perception of bias. He identifies a lack of: accountability, openness, coherence and independence of arbitrators as major flaws in the current system.[17] Thus, empirical studies have focused on bias, and some have noted that such studies: "are subject to significant limitations"; seem unable to provide "conclusive proof of bias"[18] and "encourage examining empirical findings in light of research about other tribunals and other features of international adjudication".[19]

A specific focus on international economic law disputes and sustainable development has recently been pursued by Nathalie Bernasconi-Osterwalder and Lise Johnson (2011 and 2012). The authors highlight how the lack of transparency and opportunity for public participation in international investment arbitrations, which often challenge domestic environmental laws and regulations, has weakened the perceived legitimacy of the dispute settlement system and the decisions rendered under it. They also document the trend to enhance some aspects of transparency of international investment arbitration, but find still shortcomings with respect to the transparency of the proceedings.[20]

My study complements this literature in several ways: by concentrating on international economic law dispute cases rather than negotiations; by looking at institutional rather than individual factors that may influence case outcomes observable at the systemic level; by testing different institutional factors, i.e. transparency, participation and horizontal integration (as aspect of inter-institutional structure) – and recognizing the complex interactions between them – in contrast to institutional factors investigated by

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possible bias in investment arbitration, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2010-2011 (Karl P. Sauvant ed. 2012) at 866.

[16] Kathleen S McArthur and Pablo A. Ormachea, International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction 28 THE REVIEW OF LITIGATION 559(2009). Gus Van Harten (Ibid) notes that only one variable in McArthur and Ormachea (2009), namely the legal basis for the claim (contract versus treaty) engaged an aspect f the institutional context.

[17] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at153.

[18] Jonathan Ketcheson, Investment Arbitration: Learning from Experience, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW (Steffen Hindelang and Markus Krajewski ed. 2016) at 105.

[19] Catherine Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2014).

[20] Nathalie Bernasconi-Osterwalder and Lise Johnson, Investment Treaties & Why they matter to sustainable development (International Institute for Sustainable Development 2012). Bernasconi-Osterwalder Nathalie and Lise Johnson, Transparency in the Dispute Settlement Process: country best practices (International Institute for Sustainable Development 2011). Bernasconi-Osterwalder Nathalie and Lise Johnson, A Critical Opportunity for Transparency in Investor-State Disputes as Government Delegations and Arbitration Experts Meet in New York (International Institute for Sustainable Development February 2012).

others, such as independence of adjudicators; and by bringing into focus the sustainable development component of international economic law dispute cases aiming at case outcomes that result in either environmental policy permissible or impermissible rulings instead of previous focus on bias outcomes based on development status.

My research interest was prompted in response to the work of many different authors but three conceptual or theoretical frameworks stand out in influencing my theory: John Ruggie's ideas of embedded liberalism, norm-governed and norm-transforming change; Martha Finnemore and Kathryn Sikkink's theory of norm cascade; and Raymond C. Miller's Multi-Centric Organizational Model and World View.

In this chapter I will discuss how each of their contributions form the intellectual basis for my research. They inform my research approach to the issue of sustainable development, the dynamics involved in the institutionalization process of sustainable development and my assumptions about main actors and the arenas in which they interact.

2.1 JOHN RUGGIE'S EMBEDDED LIBERALISM, NORM-GOVERNED AND NORM-TRANSFORMING CHANGE

John Ruggie (1982)[21] described post-World War II international economic and political order as the compromise of embedded liberalism.[22] In the context of sustainable development, embedded liberalism calls for policy flexibility of nation states to ensure a balance between economic openness and environmental protection. Ruggie also made an important distinction between norm-governed and norm-transforming change.[23] Norm-governed change occurs at the level of rules and decision-making

[21] Ruggie explains: "unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism". He notes: "it was an achievement of historic proportions for the United States to win adherence to the principle of multilateralism, particularly in trade. […] Differences among the industrialized countries concerned the forms and depth of state intervention to secure domestic stability, not the legitimacy of the objective". G. Ruggie, International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, 36 INTERNATIONAL ORGANIZATION (1982) at 393-4.

[22] Embedded liberalism calls for policy flexibility of nation states to ensure a balance between economic openness and domestic welfare, in order to secure domestic stability. See: Encyclopedia of International Political Economy § 1 (Barry R. J. Jones ed., Routledge); The Princeton Encyclopedia of the World Economy (Princeton University); and BENJAMIN COHEN, INTERNATIONAL POLITICAL ECONOMY –AN INTELLECTUAL HISTORY (Princeton University Press. 2008).

[23] Ruggie explains: "As long as purpose is held constant, there is no reason to suppose that the normative framework of regimes must change as well. In other words, referring back to [the] analytical components of international regimes, rules and procedures (instruments) would change but principles and norms (normative frameworks) would not. […]. Insofar as they continued to reflect the same sense of purpose, they would represent a case of norm-

procedures, leaving the normative framework of existing regimes intact. In contrast, norm-transforming change occurs at the level of the normative framework itself, something truly transformative.[24]

The relevance of Ruggie's contribution on the subject of international regime change to my study is twofold: First, Ruggie's notion of norm-transforming change captures the important kind of change I am interested in explaining. It is relevant to the inquiry of what prevents the implementation of sustainable development, as both procedural and normative changes may be necessary to avoid that sustainable development remains an oxymoron.[25] Moreover, procedural changes may constitute important instruments to pave the way for a normative change or paradigm shift. Ruggie correctly identifies the post-WWII international economic and political order as norm-governed change: i.e., a change that remained within the normative framework of economic liberalism embracing free trade and economic growth. Ruggie suggested: "as long as purpose is held constant, there is no reason to suppose that the normative framework of regimes must change as well, […] rules and procedures would change but principles and norms would not".[26] However, many believe today that a norm-transforming change is necessary for sustainable development, in order to address the physical reality which confines economic growth within a finite ecological system or environmental limits (Herman Daly, 1989, 1992, 1996).[27]

This suggested contradiction between the norm of global economic growth and the potential for global sustainable development[28] lies at the heart of the policy problem of existing conflicts between economic and environmental policy at the domestic and international level. My study looks at what institutional factors facilitate particular resolutions in international economic law dispute cases ruling on the permissibility of an environmental policy. Could there be procedures at play preventing –or allowing for – the possibility of norm-transforming change?

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governed as opposed to norm-transforming change". G. Ruggie, International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, 36 INTERNATIONAL ORGANIZATION (1982) at 384. BENJAMIN COHEN, INTERNATIONAL POLITICAL ECONOMY –AN INTELLECTUAL HISTORY (Princeton University Press. 2008).

[24] *Ibid*.

[25] Sustainable development is considered an oxymoron as long as development is understood as economic growth. RAYOND C. MILLER, INTERNATIONAL POLITICAL ECONOMY: CONTRASTING WORLD VIEWS (Routledge. 2007) at 165.

[26] John Ruggie, International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order, 36 INTERNATIONAL ORGANIZATION (1982) at 384.

[27] HERMAN DALY AND JOHN B. COBB, FOR THE COMMON GOOD (Beacon Press, . 1989). Herman Daly, Operational principles for Sustainable Development, EARTH ETHICS (1991).; Herman Daly, Allocation, distribution, and scale: towards an economics that is efficient, just and sustainable, 6 ECOLOGICAL ECONOMICS (1992) at185-193; and HERMAN DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (Beacon Press. 1996).

[28] This could also be described as the conflict between the norms of international economic regimes and international environmental regimes of MEAs.

Secondly, Ruggie's description of embedded liberalism is no longer reflecting reality,[29] as both WTO rules and international investment rules have severely reduced policy flexibility or policy space for nation states to pursue domestic welfare spillovers from economic openness. In some instances,[30] this has already led to domestic instability.[31] The issue of policy flexibility is important to the implementation process of sustainable development and is addressed in my investigating characteristics of international economic law disputes that result in either environmental policy permissible rulings. Picciotto (2003) observes that WTO agreements have prioritized harmonization[32] but have greatly demoted reciprocity and interface in the management of regulatory interdependence. He finds this pressure towards global homogeneity tends to override local preferences as embodied in national laws, policies, and regulations.[33] My study focuses on conditions leading to environmental policy permissible dispute outcomes. Can we observe institutional factors that seem to be able to re-embed international economic law and balance it with national environmental policy preferences? And, should national environmental preferences be prone to change, as seen in the U.S. Trump administration communications suggesting a directional change

[29] Ruggie and Abdeleal (2009) find: "while the legal rights enabling [Transnational Corporations] TNCs to operate globally have expanded significantly over the past generation, their activities are not adequately encompassed by global regulatory frameworks. This results in growing governance gaps—between the scope and impact of their activities, and the capacity of societies to manage their adverse consequences. The more than 2,500 bilateral investment treaties are a case in point". The authors "propose that policymakers revisit the principles of embedded liberalism in the hopes of embedding, and thereby legitimating, the practices of transnational corporations, the governance of financial markets, and the rules of international organizations. The core principle of embedded liberalism is the need to legitimize international markets by reconciling them to social values and shared institutional practices. This principle implies the need to bridge gaps in the governance of firms that produce, buy, and sell around the world, firms whose rights have in the recent era of globalization outstripped the global frameworks that should regulate them". John Ruggie & Rawi Abdelal, The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism, in NEW PERSPECTIVES ON REGULATION. (David Moss, and John Cisternino, eds. ed. 2009) at 153-4.

[30] One example is the challenge of Argentina's emergency policy measures taken in response to the December 2001 economic collapse. Gus van Harten notes, the investment treaty tribunal in *CMS v Argentina* 2005 ordered Argentina to pay $133 million to CMS Energy, a US-based investor in the gas sector. The arbitrators concluded among other things that, regardless of whether the government acted in good faith in adopting policies that harmed CMS Energy's business, Argentina bore an 'objective' responsibility under international law to ensure stable and predictable business environment for foreign investors, even in the midst of financial meltdown. Further, the arbitrators decided that the investor's right to compensation was not extinguished or moderated by circumstances of public emergency. (IMF blocked the release of $2bn to Argentina blaming the government's failure to impose austerity measures. In response to the economic collapse Argentineans took to the streets, 30 people died; in just two weeks five presidents were forced from office GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at 1-4.

[31] *Ibid*. In a way, as predicted by Ruggie, as embedded liberalism was to secure domestic stability.

[32] I would argue that harmonization is not necessarily the problem; it is the underlying purpose of harmonization that matters. Harmonization towards green economies based on open technology transfer could be an effective way towards the implementation of sustainable development. (See draft negotiation text and conference themes of Rio + 20, which were: How to build a green economy to achieve sustainable development and lift people out of poverty, including support for developing countries that will allow them to find a green path for development; and How to improve international coordination for sustainable development by building an institutional framework).

[33] Sol Picciotto, Private Rights vs Public Standards in the WTO, 10 REVIEW OF INTERNATIONAL POLITICAL ECONOMY (2003) at 391.

towards further dis-embedding liberalism, can institutional factors support stabilizing progress in the evolution of international public law, that is, protect against a weakening of the institutions of embedded liberalism?[34]

My study complements and challenges Ruggie's contribution to regime change. I agree with Ruggie and Abdelal's observation that new liberalism succeeded in "disembedding national markets"[35] and my study of international economic law disputes observes both existing, as well as lack of, policy flexibility or policy space under international economic regimes. However, my study challenges Ruggie and Abdelal's optimistic view that "globalization is likely to be undone by national policy reactions driven by societies that have grown increasingly skeptical of newly disembedded global markets".[36] This view assumes public awareness. My study incorporates variables such as transparency and participation in institutional procedures that tests this assumption of public awareness and a possibility of reaction that underlines the authors' optimistic view. The study observed that in some dispute cases, the presence of transparency and participation characteristics may even have an effect in the opposite direction, prompting tribunals to carefully stick to their case specific mandates. While my interest in norm-transforming change is prompted by Ruggie's contributions, his work[37] does not provide an answer to my question: what permits or prevents norm-transforming change? A more useful theoretical framework for my interest in norm-transforming change is provided by Martha Finnemore and Kathryn Sikkink's theory of norm cascade.

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[34] Consider Karl Polanyi description of "the social history in the 19th century as the result of a double movement: While on the one hand markets spread all over the face of the globe, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market relative to labor, land, and money". In his view, society protected itself against the perils inherent in a self-regulating market system". KARL POLANYI, THE GREAT TRANSFORMATION (Beacon Press 2nd edition ed. 1944) at 79-80. Less optimistic of lasting directional progress, Mark Blyth proposes the possibility of counter-double movements. He suggests "the political struggle between disembedding and reembedding the market continues today". MARK BLYTH, GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY (Cambridge University Press. 2002) at 4.

[35] John Ruggie & Rawi Abdelal, The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism, in NEW PERSPECTIVES ON REGULATION. (David Moss, and John Cisternino, eds. ed. 2009) at 152.

[36] *Ibid.*, p.153.

[37] Specifically, giving the physical reality of ecological limits to economic growth, I am not satisfied with Ruggie's and Abdelal's holding on to the possibility of a return to embedded liberalism which Ruggie identified as norm-governed change controlled by the normative value of economic growth. The authors state: "The fundamental challenge for the social legitimacy of TNCs is rooted not in shifting perceptions, but in an underlying institutional reality" (p.154). Says Ruggie: "The disembedding of markets and the asymmetrical rules governing TNCs have, more recently, undermined the very global project neoliberalism was meant to enhance. Now this era of globalization must be saved, and not by the neoliberal ideology that led in significant part to globalization's current crisis of legitimacy. Rather, policymakers should return to the intellectual and normative framework that made the renaissance of global markets possible: embedded liberalism" (p.161). John Ruggie & Rawi Abdelal, The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism, in NEW PERSPECTIVES ON REGULATION. (David Moss, and John Cisternino, eds. ed. 2009).

2.2 MARTHA FINNEMORE AND KATHRYN SIKKINK'S THEORY OF NORM CASCADE

Martha Finnemore and Kathryn Sikkink's theory of norm cascade[38] connects with Ruggie's idea of 'norm-transforming change,' because the authors are interested in the role norms play in political change—both the ways in which norms themselves change and the ways in which they change other features of the political landscape.[39] While Ruggie's embedded liberalism does not necessitate a change in the normative framework of international economic regimes, my research looks at the conflict between the established norm of economic growth and the emerging norms of sustainable development. I suspect that the dominant or established norm of the development focus on economic growth may limit environmental policy choices. Finnemore and Sikkink find the following explanations for the way norms produce social order and stability: norms channel and regularize behavior, and they often limit the range of choice and constrain action.[40] The problem is explaining change. The authors suggest that in an ideational international structure, idea shifts, and norm shifts are the main vehicles for system transformation. "Norm shifts are to the ideational theorists what changes in balance of power are to the realists".[41] Ruggie also notes "having identified the possibility of system transformation at the macro level, corresponding micro practices that may have transformative effects must be identified".[42] My study investigates the possibility of transformative effects of such "micro practices" such as institutional transparency and participation in international economic law disputes.

2.2.1 Institutions, norms and concepts

To avoid conceptual confusion, which Finnemore and Sikkink[43] believe arise from the different language of *norms*[44] versus the language of *institutions*,[45] I refer to the New Oxford American Dictionary, which

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[38] Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 887-917.
[39] *Ibid*., at 888.
[40] *Ibid*., at 894.
[41] *Ibid*., at 894.
[42] John Ruggie, What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge, 52 INTERNATIONAL ORGANIZATION (1998) at 876.
[43] Finnemore and Sikkink explain: one difference between "norm" and "institution" is aggregation. The norm definition isolates single standards of behavior, whereas institutions emphasize the way in which behavioral rules are structured together and interrelate (a collection of practices and rules). The authors contend that "used carefully, norm language can help to steer scholars toward looking inside social institutions and considering the components of social institutions as well as the way these elements are renegotiated into new arrangements over time to create new patterns of politics" Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 891.

defines norm as "a standard or pattern, especially of social behavior, that is typical or expected of a group". Institution is defined as "an established law, practice, or custom". In my research, for example, social institutions include the market. And one norm within the market as institution is the norm of private property right protection. Another social institution addressed in my research is development, and an example of a norm within development as institution would be the norm of focusing on economic growth. Sustainable development is not yet a proper social institution, because while evolving it has not yet been fully institutionalized: it is not yet 'established law, practice or custom.' We may therefore speak instead of "the concept" of sustainable development.[46] Sustainable development, however, does include various norms, such as public participation and access to information. In my study, I understand sustainable development to be an intellectual and potentially legal concept that might evolve into a social institution, just as the market evolved into today's dominant social institution.

2.2.2 Strategic social construction

In my research, I look at "the mechanism by which norms exercise influence," that is for example: how norms of public participation and transparency vis-à-vis the established norm of confidentiality influence dispute outcomes. Finnemore and Sikkink identify "one of the most politically salient processes" is "strategic social construction," in which actors "strategize rationally to reconfigure preferences, identities, or social context".[47] My research focuses on the arena of international public investment disputes or

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[44] Regarding different types or categories of norms, according to Finnemore and Sikkink, we can differentiate between regulative norms, constitutive norms, and prescriptive norms. Regulative norms order and constrain behavior. For example, private property rights are norms of the market understood as institution (i.e. an aggregation of practices and rules or different norms). Private property right protections constrain behavior. The WTO Agreement on Trade Related Intellectual Property Rights (TRIPS) orders behavior. For instance, TRIPS Article 27 mandates all WTO members to make patents available and prohibits members from excluding patents from any specific sectors. (Before the TRIPS agreement, countries like India could refuse to patent pharmaceuticals). Constitutive norms create new actors, interests, or categories of actions. Examples here are the norms of public participation and access to information, which I focus on in my study. Prescriptive norms carry a quality of "oughtness" and an evaluative dimension. The authors explain: "we only know what is appropriate by reference to the judgments of a community or a society". Norm-breaking behavior generates disapproval and norm conforming behavior is either praised or is so taken for granted that it provokes no reaction whatsoever. Yet, "there are no bad norms from the vantage point of those who promote the norm". *Ibid*., at 891-2.

[45] The different language of norms used by political scientists versus the language of institutions used by sociologists.

[46] The invention of new legal concepts is normally a rare occurrence and always challenging. Where some such concepts, for instance those of the "most favored nation treatment" and of "self-determination" have evolved, maturing from idea to legal standards or norms, others, such as that of the "common heritage of human kind or of a "New International Economic Order" (NIEO), have faded away, having lost their initial evocative appeal. NICO AND FRIEDL WEISS (EDS.) SCHRIJVER, INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Martinus Nijhoff Publishers. 2004) at xi.

[47] *Ibid*., p.888.

arbitrations where such "strategic social construction" can take place.[48] Norms, both existing and evolving, are being interpreted in disputes. One could also say that ideas receive emphasis during disputes and influence outcomes. "Ideational causation" as norm-based reason for action,[49] can be identified from dispute content and outcome, because specific ideas[50] provide the reason for action, such as a government having to pay compensation claims to the winning corporation; or they provide reasons for governments not to take actions, (the regulatory chill effect), such as governments hesitating to implement a policy.[51] The concept of ideational causation is therefore relevant to my study, but not its main subject.[52] I don't attempt to investigate the policy outcomes or policy changes prompted[53] by a dispute outcome. Instead, I

[48] I am of the view that "strategic social construction" can be observed in both the negotiation process of international law and in the interpretation of the negotiated treaties during arbitrations and disputes. But in this study I only focus on the latter arena.

[49] Finnemore and Sikkink look at "conditions under which norms will be influential in world politics" and advise researchers to "specify ideational causal claims and mechanisms clearly". The authors use ideational "causation" in a way that recognizes that ideas and norms are often reasons for actions, not causes in the physical sense of the world. In my research, norm-based "reasons for action" can be identified from a dispute outcome. Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998)
at 888 and 890.

[50] For example, an arbitration ruling requiring a government to compensate a company may be based on the idea of "regulatory takings" or the idea that a government policy is "tantamount to" an expropriation or an "indirect" expropriation. "This 'tantamount to' clause has been used under NAFTA's Chapter 11 to file cases claiming that government regulatory policies, including those that treat domestic and foreign investors the same, are equivalent to takings because they restrict investors' actions". NAFTA Chapter 11 Investor-State Cases Lessons for the Central America Free Trade Agreement. (2005) at 2. "Ideational causation" is here exemplified by the content and outcome of the dispute based on the idea of "regulatory takings" which itself is based on an established norm (in this case the Hull Rule). The requirement of "prompt, adequate, and effective" compensation has become known as the 'Hull Rule'" in reference to Secretary of State Cordell Hull who at the time stated "no government is entitled to expropriate private property, for whatever purpose, without the provision for prompt, adequate, and effective payment therefore". Andrew T. Guzman, Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 639(1998) at 645.

[51] Tienhaara's (2006) study of an Indonesian case involving a dispute over mining contracts in protected forests, which the author finds to provide evidence supporting the regulatory chill hypothesis. In this case, even though NGOs got actively involved to advocate for environmental protection, the Indonesian government retreated in part from its forest law that prohibited open-cast mining in protection forests. "According to several observers, the government had been 'burned' in previous arbitrations and was not eager to try their luck again". Kyla Tienhaara, What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries, 6 GLOBAL ENVIRONMENTAL POLITICS (2006) at 94.

[52] My study does not investigate ideational causation, but rather accepts this concept as a reason for action by the relevant actors, i.e., governments, corporations and third parties in a dispute. This perception matters for the dynamics in strategic social construction or norm shaping that actors engage in during negotiations and disputes, which is the focus of my study. The perception of "ideational causation" among actors in a dispute is what causes them to engage eagerly in strategic social construction, that is to defend a status quo norm or fight for norm cascade in the battle of norm contestation.

[53] Finnemore and Sikkink advise researchers to evaluate those claims (of ideational causation) "in the context of carefully designed historical and empirical research". Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 890.

focus on factors or case characteristics that may influence the dynamic of norm contestation that centers on strategic social construction during a dispute.[54]

"Because norms embody a quality of 'oughtness' and shared moral assessment," Finnemore and Sikkink state, "norms prompt justification for action and leave an extensive trail of communication among actors that we can study".[55] In my research, this 'trail' of communication can be found in the legal reasoning in cases leading to a specific dispute outcome 'destination.'[56] However, my focus is not to show that sustainable development as a concept or normative framework exists;[57] rather, I want to investigate what prevents behavioral change in the direction of norm internalization.[58] Sustainable development is not

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[54] In other words, my focus lies on norm change or transformation based on treaty law rather than norm change or transformation based on customary law. Nevertheless, I recognize that the division between the two is not that simple. Sometimes treaty law may influence or lead to new customary law; conversely, it may hinder the development of new customary international law. Richard B. Bilder and Oscar Schachter Jonathan I. Charney and Maurice Mendelson, Disentangling Treaty and Customary International Law § 81 ((APRIL 8-11, 1987) at 157-164.

[55] Martha Finnemore and Kathryn Sikkink (1998) *Ibid.*, at 892.

[56] Finnemore and Sikkink explain this means "we can only have indirect evidence of norms just as we can only have indirect evidence of most other motivations for political action" (*Ibid*., p. 892). While others have investigated direct evidence for sustainable development (See for example S. Gamper-Rabindran, NAFTA and the Environment: What Can the Data Tell Us, 54 ECONOMIC DEVELOPMENT AND CULTURAL CHANGE 605(2006). Such as changes in air pollution or other environmental measures, my approach focuses on these indirect measures of norms of sustainable development. One reason I focus on sustainable development as a concept with evolving norms is the growing recognition of ecological limits to economic growth, which warrants logically a Kuhnsian shift away from the dominant economic growth norm in the current development paradigm (although Kuhn did not apply his concept to social sciences or legal studies). As Finnemore and Sikkink suggest, "idea shifts and norm shifts are the main vehicles for system transformation" (*Ibid*., at 894).

[57] Significantly, Finnemore and Sikkink "separate norm existence or strength from actual behavioral change in their operationalization" (*Ibid*., p. 892).

[58] Regarding the "life cycle" of norms theory, Finnemore and Sikkink explain the dynamics of norm evolution with their "life cycle" of norms theory. This three-stage process involves: First, norm emergence during which norm entrepreneurs seek to persuade a critical mass of states to embrace new norms, leading to a threshold or tipping point. The second stage, norm cascade, is characterized by a dynamic of norm leaders motivating other states to become norm followers. It is based on pressure for conformity, the desire to enhance international legitimization, and/or the desire of state leaders to enhance their self-esteem. The third and final stage in the "life cycle" of norms occurs with norm socialization to achieve norm internalization. At this stage, "norms become so widely accepted that they are internalized by actors and achieve a "'taken-for-granted' quality that makes conformation with the norm almost automatic". The authors recognize that "internalized norms can be both extremely powerful (because behavior according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to conform)" (*Ibid*., p. 904). Applied to the context of my study, a simplified outline of the emergence of the concept of sustainable development, for example, could include the following: The UN General Assembly Resolution on Development and Environment of 1972, which recognized that "no environmental policy should adversely affect the present or future development possibilities of the developing countries". (See: UN General Assembly Resolution on Development and Environment A/RES/2849 (XXVI), 17 January 1972). The Stockholm Declaration legitimized the human environment as an area of international concern, recognizing that the protection of the environment "is the urgent desire of the peoples of the whole world and the duty of all governments". (See: Stockholm Declaration of the United Nations Conference on the Human Environment 11 1.L.M. 1416, June 16, 1972).This aspiration was expressed in the general principles of the 1982 World Charter For Nature, of which the first principle states: "Nature shall be respected and its essential processes shall not be impaired". (See: World Charter for Nature U.N.G.A. RES. 37/7; 22 I.L.M.455, October 28, 1982.) All these aspirations and earlier recognitions then were formulated by the 1987 Brundtland Report into the popular description and definition of sustainable development as "development which meets the needs of the present without

yet achieved since state and non-state actors behave not in conformity with sustainable development principles. However, the evolution of the concept of sustainable development has led to a reaction by those wanting to protect the dominant development norm that focuses predominantly on global economic growth. While participation and transparency are norms of the concept of sustainable development, one reaction to this evolution is to prevent these norms from challenging the norms of confidentiality that have been established in international investment law.[59]

2.2.3 Dynamics of strategic social construction and norm contestation

Influenced by Ruggie's idea of norm-transforming change, I am interested in the dynamics of norm contestation. In this study, I look at institutional factors, (including institutional transparency and third party representation and participation), as mechanisms that may facilitate or prevent norm cascade and norm internalization. Finnemore and Sikkink's theory of norm cascade identifies three important aspects in the dynamics of strategic social construction and norm contestation: First, norm entrepreneurs face firmly embedded alternative norms,[60] and conceptions of appropriateness. In international investment arbitration, for example, the norm of institutional transparency has long been seen as inappropriate because of the embedded norm of confidentiality that dominates in commercial arbitrations. Second, the authors point to organizational platforms or arenas in which norm contestation takes place and acknowledge that the structure of international organizations can influence norms they promote,[61] as can the epistemic communities residing within them.[62] While the focus on institutional structure and on

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compromising the ability of future generations to meet their own needs". (Our Common Future. (1987). The 1992 Rio Declaration adopted this definition in Principle 3, that "the right to development must be fulfilled so as to equitably meet the development and environmental needs of present and future generations". (See: Rio Declaration on Environment and Development U.N. Doc. A/CONF.151/26; 31 I.L.M.874, June 13, 1992). One decade later we find the title of an international conference entailing the concept, namely the World Summit on Sustainable Development. The 2012 Rio plus 20 Conference initiated the path to the UN Sustainable Development Goals adopted in 2015.

[59] We can recognize here a dynamic that is characterized by the power struggle among different actors, which lies at the heart of Raymond Miller's multi-centric organizational framework or model, discussed below.

[60] Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 896.

[61] The authors note: "Often, entrepreneurs work from standing international organizations that have purposes and agendas other than simply promoting one specific norm. Those other agendas may shape the content of norms promoted by the organization" (*Ibid*., p. 899, FN 49).

[62] For example, professional training and expertise of bureaucrats in these organizations can aid or block the promotion of new norms within standing organizations (Ibid., p. 899). Economists, ecologists, and lawyers all carry different normative biases, systematically instilled in their professional training (*Ibid*. p. 905). See also Peter Haas's study on epistemic communities. Dezalay and Garth (1996) observed that arbitrators tend to come from a discrete professional community, nested in networks of cross-connected players who affiliate around prominent centers of arbitration, such as the International Chamber of Commerce. See: Y. Dezalay and B. Garth, 1996, Dealing in virtue.

professional bias contribute in important ways to our understanding of norm change,[63] I focus on procedural mechanisms within institutional arrangements, such as institutional transparency and participatory access, hypothesizing that they may matter for the possibility of norm cascade. Third, Finnemore and Sikkink illustrate the different stages in a norm life cycle in which "change at each stage is characterized by different actors, motives and mechanisms".[64] However, these actors (norm entrepreneurs with organizational platforms, states, international organizations networks, law professions, bureaucracy) are not well defined and in my view better describe the agents through which actors achieve their strategic social construction. Raymond C. Miller provides a better-developed framework to understand central actors engaged in norm contestation, one that takes into account the different worldviews or paradigms from which these actors come from and their respective motives or objectives.[65]

2.3 RAYMOND C. MILLER'S MULTI-CENTRIC ORGANIZATIONAL MODEL AND WORLD VIEW

As Finnemore and Sikkink note, a norm is a standard of appropriate behavior for actors with a given identity, so that norm advocacy depends on the worldview or paradigm the actors come from.[66] And existing paradigms, as identified by Raymond C. Miller, are conflicting. He contrasts three dominant paradigms or worldviews in the field of international political economy, relevant to the policy issue of

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University of Chicago Press, referenced in: Gus Van Harten: "Contributions and limitations of empirical research on independence and impartiality in international investment arbitration," Oñati Socio-Legal Series, Vol.1, No 4, 2011. Moreover, Gus Van Harten has alerted us to the way in which "longstanding safeguards of judicial independence in domestic systems of justice have been abandoned in the unique context where foreign investors bring international claims against states". According to Van Harten, "without secure tenure for the judges who decide public law, one must ask, where does the judges' career interest lay? Where one can credibly show that the judges may be financially or economically beholden to public or private interests that have a stake in the case or in the interpretation of the law, then the appearance of independence—and appearances are key in this respect given the difficulties of proving or disproving actual bias—is seriously undermined. "See: Gus Van Harten, Five Justifications For Investment Treaties: A Critical Discussion, 2 TRADE, LAW AND DEVELOPMENT (2010).

[63] Finnemore and Sikkink recognize that "routes to normative change may be indirect and evolutionary: procedural changes that create new political processes can lead to gradual and inadvertent normative, ideational and political convergence. "I investigate whether a procedural change in international economic law disputes that would adopt transparency and third party participation could lead to a new political process or change in the power dynamics of norm contestation that could allow for the possibility of a gradual ideational or norm-transforming change. Finnemore, M. and K. Sikkink (1998) at 905.

[64] *Ibid*., at 895 and 898.

[65] RAYOND C. MILLER, INTERNATIONAL POLITICAL ECONOMY: CONTRASTING WORLD VIEWS (Routledge. 2008) at 105 and 217. Finnemore and Sikkink (1998) do recognize this in part in their definition of a norm as "a standard of appropriate behavior for actors with a given identity" [emphasis added], (*Ibid*., at 891).

[66] Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 891.

sustainable development by juxtaposing economic liberalism, institutionalism for which he developed the Multi-Centric Organizational (MCO) model, and Marxism. He thereby highlights their different beliefs about central actors, about decision-making, and about value creation that determine their different perspectives on preferred policies, including development policy. Contrasting worldviews thus is important to an understanding of norm contestation, and to Finnemore and Sikkink's notion that "there are no bad norms from the vantage point of those who promote the norm".[67] The dominant norms associated with the market understood as institution have been so widely accepted that they reach norm internalization in Finnemore and Sikkink's life cycle of norms.

Of these different worldviews or paradigms, I have adopted the MCO perspective[68] as an analytical framework for my study. My reasons for this choice are fourfold: I choose the MCO model because of its diversity of the central actors, because of its interaction model of power negotiations, because of its political and economic decision making arenas, and because of its criticism of the dominant paradigm of economic liberalism.[69]

In this view, the market as institution with specific norms and views stands in opposition to the institutionalization of sustainable development norms. For example, the market model's emphasis on individuals seeking to maximize material gain stands in opposition to the sustainable development norm of equitable sharing of limited resources; private property stands in contrast to the concept of the commons; competition as the accepted mode of behavior stands in contrast to the need for cooperation on transboundary issues such as such as in climate change; the focus on efficiency stands in contrast to

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[67] *Ibid*., at 892.

[68] Adherents to the MCO school of thought argue that the central actors are not individuals, as assumed by economic liberals, nor are the central actors classes, as proposed by Marxists. Instead, the MCO school argues that central actors are multi-centric organizations, including corporations, government agencies, labor unions and non-profit associations or NGOs. The decision-making process also differs. In the MCO model decisions are derived though power negotiations, rather than by the supply and demand dynamic in the market suggested by economic liberals, or by the capitalist mode of production proposed by Marxists. Actors engage in different decision-making arenas: political arenas include legislatures, regulators, and courts, and economic arenas include oligopolistic business structures. The outcomes in the MCO model are determined by power rather than market efficiency as assumed by economic liberals. RAYOND C. MILLER, INTERNATIONAL POLITICAL ECONOMY: CONTRASTING WORLD VIEWS (Routledge. 2008) at 105. Authors of the MCO school of thought critically view the market itself, understood as institution or aggregate of norms, to be the result of norm creation or construction. Karl Polanyi's Great Transformation notes important norm elements of the market as institution, such as the commodification of nature (which is relevant in my study). He argues that the market actually turns real things into "fictional commodities" that have harmful consequences. Raymond C. Miller (2008) at 90.

[69] This critique leads adherents to the MCO school of thought (depending on their location on the MCO school of thought spectrum) to propose either reform, as in Ruggie's call for a return to embedded liberalism, or to propose radical system transformation. Among the latter belongs Herman Daly who emphasizes the environmental limits of our global ecological system within which the global economy must function and beyond which development policy or economic growth cannot be realistically pursued.

sufficiency;[70] the focus on economic growth stands in contrast to the recognition of ecological limits; the normative prescription of laissez-faire government stands in contrast to the need for government regulations; supply and demand as the value determining mechanism stands in contrast to an understanding of the inherent value in natural capital.

The MCO model, therefore, fits well the situation of the evolution of the concept of sustainable development, currently undergoing norm contestation through strategic social construction by various actors engaging in power negotiations over the gain or loss of norm institutionalization. I apply this framework in my study of what institutional factors or norms in international economic disputes prevent the possibility of norm-transforming change. The central actors in the MCO model match with those in my study, i.e., governments, corporations, and third party public representatives. And the MCO model's decision-making dynamic of power negotiations fits the strategic social construction dynamic that I assume to be at play in norm contestation: actors engage in power negotiations over – or in strategic social construction of –norms in a battle of norm contestation. The MCO model's political decision-making arena includes legislatures, regulators, and courts, which matches with my study of international economic law disputes integrating law-making and law-applying processes. And the model's criticism of the dominant economic liberal paradigm fits well with the idea of prescriptive qualities of norms and my interest in norm-transforming change towards sustainable development.

2.4 LEGAL THEORETICAL APPROACHES

The above explicated theoretical frameworks, based on theories from the fields of international political economy and global governance, inform my assumptions about main actors, dynamics involved in the institutionalization process of sustainable development and the arenas in which thy interact. In addition this study, focusing on the specific 'arena' and context of international economic law disputes in which an environmental policy was challenged, required knowledge of legal studies, such as on: historic development and relevant principles and rules of international law, including evolving standards; existing legal and institutional frameworks including established constitutional and administrative arrangements; and established legal and institutional practices and techniques. Legal theory therefore contributed to my understanding of existing legal and institutional frameworks, principles and rules as well as techniques

[70] For Wolfgang Sachs focusing exclusively on "doing things right" (i.e., efficiency) without first figuring out how "to do the right things" (i.e., sufficiency) is like putting the cart before the horse. WOLFGANG SACHS, PLANET DIALECTICS (Zed Books. 1999).

and thereby enabled me to develop the indicators and measurements of this study. Specifically, these inputs informed the boundaries within which central actors engage and thereby allowed me to organize and categorize complex elements of this study for a meaningful analysis, taking into account: dispute rules as well as practices and criteria for public participation and transparency; legal arguments, their relevance and applicability; and a variety of approaches to – or methods of –treaty interpretation. The author therefore took an interdisciplinary approach, combining the scholarly fields of International Relations or International Affairs and of International Legal Studies. Relevant legal theories or ideas informing this study, include *inter alia*: the concept of fragmentation[71] in international law; the theory of 'self-contained' or 'special regimes' in international law;[72] the idea of a systematic or unifying role of general international law; as well as public law approaches[73] vis a vis the notion of "a constitutional function of international economic law".[74]

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[71] For an application of the concept to international environmental law, see: BODANSKY DANIEL AND JUTTA BRUNNEE AND ELLEN HAY (EDS.), THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Oxford University Press. 2007). With regards to international economic law, see Alan Boyle, dispute resolution and applicable law, chapter 7 in the above-cited Oxford Handbook of International Environmental law. Applied specifically to international investment law, see S. Di Benedetto who explains two notions of fragmentation applied to international investment law: one focusing on its "fragmentation into a multiplicity of autonomous legal instruments [and] the settlement of investment disputes by independent investment tribunals"; and the other focusing on cases in which rules or principles belonging to different regimes may apply to the same matter in a potentially conflicting way". SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar) at 22-23. He also quotes the International Law Commission's observations of "'fragmentation does create the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices', as well as noting 'the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice' such as trade law and environmental law" referring in footnote 1 to the International Law Commission, 58th Session, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemie, A/CN.4/L.682, 13 April 2006.

[72] Saverio Di Benedetto discusses this theory in detail and refers to the International Law Commission's report on fragmentation to "delineate three possible meanings to the concept of self-contained regimes". He suggests: One meaning applies to cases 'where a special set of secondary rules claims priority over the secondary rules in the general law of State responsibility[;] self-contained regimes may consist of 'interrelated wholes of primary and secondary rules' having primacy over general rules on the matter[;] and this legal notion may concern entire fields of international law (such as human rights law, trade law etc.) and imply 'rules of general international law are assumed to be modified or even 'excluded' in the 'administration' (interpretation and application of rules) of these fields". SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar) at 25-31. The author also notes on page 33 in footnote 34 the ILC Reports conclusion that "the notion of a 'self-contained regime' is simply misleading and accordingly it is suggested that the term 'self-contained regime' be replaced by 'special regime'".

[73] See here: Gus Van Harten, who argues for the adaptation of 'a public law framework' in investment treaty arbitrations, calling for "the application of principles developed domestically and, to a lesser extent, in the international sphere, in cases where courts and tribunals directly resolve regulatory disputes between individuals and the state". He suggests "tribunals should be cognizant of a wider regulatory concerns overs, including the countervailing interest that are represented by public opposition to particular business activity; the implications of a particular investment for the host economy; the impact on the host state's ability to prioritize social stability, public health and morals, and environmental concerns over the objectives of economic efficiency and investor confidence;

The study leans on theories from legal studies that focus on the methods of treaty interpretations,[75] such as whether a textual or objective, intentionalist or subjective, teleological,[76] an integrated approach[77] or meta-teleological[78] approach, or a combination thereof. These ideas are reflected in my selection of the study's horizontal integration indicator and related measurements.

Legal studies' general ideas of fragmentation in international law, a unifying role of general international law as well as public law approaches are noticeably linked to the study's focus on horizontal integration between two distinct branches of international public law, i.e. economic versus environmental law. For example, this study treats each of them in a "quasi-unified" manner. With regards to international economic law, S. Di Benedetto, for example: speaks of a "quasi-unified regime" when referring to international investment law; treats it as a unified concept, notwithstanding its lack of comprehensive multilateral rules;[79] and at the same time recognizes "the formal patchwork origins of the rules applied [and] ongoing differences in treaty clauses and arbitral decisions".[80]

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and the overall coherence and legitimacy of the integration project". GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at 143-144.

[74] ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW: INTERNATIONAL AND DOMESTIC FOREIGN TRADE LAW AND FOREIGN TRADE POLICY IN THE US, THE EU AND SWITZERLAND (Higher Education Press. 2004).

[75] See for example: M.O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920–1942. A TREATISE (1943) at 640–661; H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (1958); E. MCWHINNEY, JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES. JURISDICTION, JUSTICIABILITY AND JUDICIAL LAW-MAKING ON THE CONTEMPORARY INTERNATIONAL COURT (1991).; O. SPIERMANN, INTERNATIONAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE. THE RISE OF THE INTERNATIONAL JUDICIARY (2005).; Christoph Schreuer, Diversity and Harmonization of Treaty Interpretation in Investment Arbitration, 3 TRANSNATIONAL DISPUTE SETTLEMENT (2006).; and Ole Kristian Fauchald, The legal Reasoning of ICSID Tribunals – An empirical Analysis, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008).

[76] "The objective approach [ ] focuses on the analysis of the words that are actually used in the text itself; the subjective approach, [ ] focuses on determining the intention of the parties to the treaty; and the teleological approach, [ ] focuses on the object and purpose of the treaty". : KJETIL MUJEZINOVIć LARSEN, THE HUMAN RIGHTS TREATY OBLIGATIONS OF PEACEKEEPERS (Cambridge University Press. 2012) at 23. Gerald Fitzmaurice, Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law, in BRITISH YEAR BOOK OF INTERNATIONAL LAW (1953) at 1-70.

[77] Referring in the context of this study to treaty interpretation that, for example "take[s] account of environmental considerations and norms from international environmental law". KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL (Cambridge University Press. 2013) at 313.

[78] Referring to "the scheme of treaties" [and] "in support of a systematic approach to treaty interpretation". See: Cambridge Yearbook of European Legal Studies 2011-2012 at 93.

[79] SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar.) at 9-10.

[80] *Ibid*., at 12.

International investment law provisions can be frequently found in Free Trade Agreements (FTAs), besides their location in bilateral investment agreements. International trade law exists both within the multilateral WTO context as well as in bi- and multi-lateral "WTO+" and FTA law. In this study international economic law encompasses both investment and trade law. They share some similarities in terms of coverage and provisions. The WTO, for example contains the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS) that covers establishment (investment) under service sector. FTAs also contain investment provisions including under their service sector chapters. They also share similar legal provisions, such as the principles of national treatment and most-favoured nations.

Similarly international environmental law covers different subject matters as well as areas with synergies, and exists in multilateral and sometimes bilateral form of treaties. S. Di Benedetto notes here as well that authors have used the term "patchwork" to describe the picture of both international rules on foreign investment, "and to qualify another branch of public international law, i.e. international environmental law".[81]

The public law approach among legal scholars and approaches to treaty interpretation are related to the study's focus on the horizontal integration in the application of principles and norms between international economic law on the one hand and multilateral environmental agreements on the other.

Legal studies focus less on the actors engaged in the process, though some legal scholars have implied the "potential of tribunals," in their interpretive arguments, to "take into account interests other than those represented to them by investors and host countries [through] instruments that ensure transparency and participation".[82] This 'potential' is explored in this study by including three indicators hypothesized as relevant to dispute outcomes, comprising: horizontal integration; public representation or participation; and transparency. The study takes into account various actors engaged in power 'negotiations' over – or in strategic social construction of –norms in a battle of norm contestation in the context of embedded liberalism, which explains the theoretical framework choice.

[81] *Ibid*., at 9. C. MCLACHLAN, L. SHORE AND M. WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES (Oxford. 2007) at 5; PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press) at 4.
[82] Ole Kristian Fauchald, The legal Reasoning of ICSID Tribunals – An empirical Analysis, 19 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008) at 359.

2.5 LINKAGE BETWEEN THE THEORETICAL FRAMEWORKS AND THE STUDY

My theory proposes that institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes. The theory is informed by the three theoretical frameworks introduced above and was developed because the literature's focus on bias did not fully answer my questions around existing conflicts between environmental and economic policies, their origins and the outlook for overcoming such conflicts. Neither did the literature's concentration on bias, although helpful, fully satisfy my need to gain a better understanding when I focused on only one arena where such conflict can be observed, namely international investment arbitration, and when I centered my attention on only one narrow research question: What explains variation in environmental policy permissibility in international economic law disputes? In this section I explain how my research question and my specific approach allows me to apply my theory with the aim to gain a deeper understanding to my questions about existing conflicts in international environmental and economic law.

2.5.1 Overview of arenas, actors and norm contestation in the context of this study

Figure 2.1 below illustrates the main three arenas in which norm contestation takes place, captured in the first column to the left. First, norm contestation takes place in the arena of domestic government or politics, shown at the bottom of this figure and second in the arena of international governance, illustrated above the domestic level. This positioning has two reasons: it illustrates the vertical link describing that outcomes of international governance in form of international law informs policy implementation at the domestic level, in some instances this can be understood as a top-down approach. The positioning is also well suited when we think of bottom-up approaches in international governance, such as seen in the recently adopted Paris Agreement in which parties determined their own nationally determined contributions. The third arena in which norm contestation takes place and is observed in this study is the arena of international disputes, illustrated at the top of Figure 2.1. This arena is placed at the top of this illustration to describe that: domestic policies and their implementation may be challenged in international investment arbitration; arbitrations are informed by the outcomes of international governance or international treaties; and arbitration outcomes again inform domestic policy makers in a vertical manner as to whether the policy challenged was determined by the tribunal as permissible or impermissible under international public law.

Figure 2.1 also illustrates the actors engaged in norm contestation, (second column) as well as the direction of norm contestation in the context of this study, namely toward embedded liberalism in the context of sustainable development (third column on the right). An important distinction in the norm contestation activities listed in the third column as 'advocating' and 'defending' public interest is that states, in contrast to non-government actors, have an "obligation to regulate economic activities in a public interest".[83] The number 1 in this illustration suggests one starting point in the arena of domestic government, where domestic government representatives from various policy areas and administrative levels engage in norm contestation to design, legislate and implement policies. Other indirect actors engaged in this norm contestation process are businesses and civil society representatives that advocate various public interest policies, depending on their respective background. Number 2 in this illustration takes us to the arena of international governance, as noted it is situated above domestic government because it informs, through vertical integration what policy objectives at the international level have been agreed on to be implemented at the domestic level. In the international governance arena, the main actors are government representative of various nations. However, each nation may select their government representatives for this arena from different ministries such as from the Ministry of Economy for economic regime negotiations and from the Ministry of Environment for environmental regime negotiations, indicated in two separate arrows in Figure 2.1. Also at the international governance arena we find other indirect actors engaged in this norm contestation process. These are again businesses and civil society representatives that advocate various public interest policies, depending on their background. Once international regime negotiations have resulted in formulated commitments or obligations of parties, may they be called their specific tariff or service sector schedules in economic regimes or "nationally determined contributions" as in the recent Paris Agreement, policy implementation takes place at the national level, indicated in this Figure 2.1 with the number 3. When a government's domestic policy implementation is challenged by a foreign investor as violation of the investors' economic rights, a dispute can be brought to an international investment arbitration indicated with a number 4. In this arena investors are notably no longer "other indirect actors" but as disputing party qualify as direct actors at equal footing with governments, while civil society organizations remain indirect actors. This unequal power situation can be adjusted through some procedural case characteristics, moving along a spectrum from no information about a case at all to permission to participate through an *amicus curiae* submission

[83] "A recognition of the 'right to regulate' in international investment law indicates a similar if not the same paradigm shift as with regards to sustainable development: It should not be seen (or misused) as embracing unfettered or unchecked public powers, but it can be understood as relating to a *more balanced* approach which not only focuses on the rights of the investor but also on the obligation of the State to regulate economic activities in a public interest". Steffen Hindelang and Markus Krajewski, Conclusion and Outlook Wither International Investment Law?, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski ed. 2016) at 381-382.

for example. The arrow on the left side of Figure 2.1 connecting the first arena with the third points in both ways because not only can a policy implemented be challenged in an international investment arbitration, but the outcome or ruling of such dispute informs in turn domestic government action, for example to pay compensation and or revise or change the initial policy.

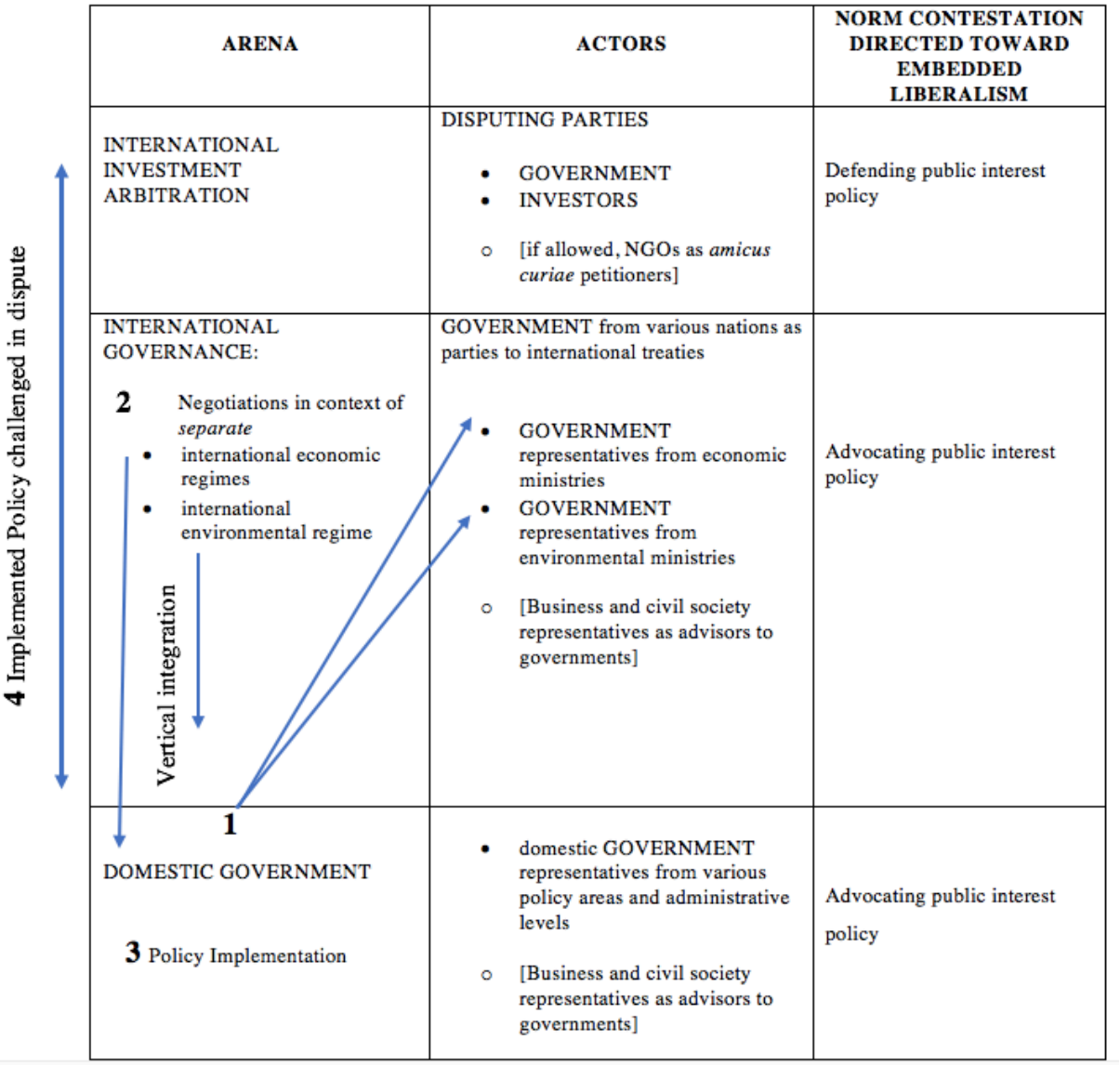

Figure 2.1:Overview of arenas, actors and norm contestation

2.5.2 Application of my theory in the context of norm contestation in the arena of international investment arbitration

How then does my research question, on what explains variation in environmental policy permissibility in international economic law disputes, and my specific approach allow me to apply my theory with the aim to gain a deeper understanding to my questions about existing conflicts in international environmental and economic law?

There are several benefits to focusing on norm contestation in the arena of international investment arbitration. Besides narrowing the research focus to a specific forum (dispute settlement mechanism), and as noted before providing me with a specific population (cases) pre-identified by dispute parties to pose a policy conflict within a narrow context (legal analysis) there is also another important benefit to this choice of arena. Focusing on norm contestation in the arena of international investment arbitration is not disconnected from the outcomes of norm contestation in the arenas of domestic politics (the policy design and implementation being at issue in the dispute) and of international governance (the consideration of public international law in the determination of the dispute). And another interconnection between the outcomes of norm contestation in different arenas observable in international investment arbitrations lies in that the decision taken by a tribunal informs again policy design and implementation at the domestic governance level, as well as norm contestation at the international governance level. This is further discussed in the following sections of this chapter, specifically where I present my model of interactions in the context of norm contestation about sustainable development in international investment arbitration illustrated in Figure 2.3 below.

Having noted the benefits for my choice to focus on norm contestation in the arena of international investment arbitration, an explanation is in order on what I did to offer new insights to what existing literature has explored so far. Specifically, the research question aimed at explaining norm contestation in the context of international investment law disputes in which environmental policies have been challenged as violation of an investors' rights. I examined what, in addition to facts provided in such cases, could matter in the determination of a case outcome. My outcome of interest is an environmental policy permissible ruling. By looking at institutional factors observable at the systemic level that may influence case outcomes the study attempts to explain influences on case outcomes in a different light or perspective than some of the literature that has focused on individual factors or bias. To me and in the context of this study institutional factors include both *procedural* and *substantive* case characteristics. I tested the hypotheses that cases in which *procedural* characteristics of transparency and public participation are present should result in environmental policy permissible outcomes. These procedural case characteristics are linked to the power of actors, with transparency and public

participation present reducing the power inequality among actors. The transparency and public participation characteristics constitute intra-institutional factors, because they depend on the governing rules for dispute settlement of the organization administering the dispute. In contrast categorized as inter-institutional factor that can have an influence on case outcomes is horizontal integration between international economic and environmental law. It is understood as inter-institutional factor because it concerns the horizontal integration between two distinct international regimes. I tested the hypothesis that cases in which the *substantive* case characteristic of horizontal integration is observed should result in environmental permissible outcomes. Horizontal integration is categorized as a substantive rather than procedural case characteristic because it refers to the substantive legal arguments. And, notably, horizontal integration is based on the outcomes of norm contestation between various actors in the arena of international governance. Finally, building on the literature's focus on bias, the study developed as more specific alternative explanation –and examined— the possible influence of an interpretation approach taken by a tribunal on case outcome.

2.5.3 Observing embedded liberalism in the context of sustainable development as continuous compromise and result of an ongoing norm contestation process

If the compromise of embedded liberalism was truly reached after World War II the issue of governments' policy flexibility in achieving economic openness while serving domestic welfare should be settled and we should not see cases in which environmental policies are being challenged. Yet, such cases exist and they point to an understanding of embedded liberalism as continuous compromise, resulting from an ongoing norm contestation process at various levels.

Recognizing that each such case is different, the question "what determines dispute outcomes in such cases" is difficult to answer. However, one may dare to ask, "What factors matter in the determination of dispute outcomes?" Findings of this inquiry: provide answers to the status of embedded liberalism; illuminate an uncompleted and ongoing norm contestation on the promotion of sustainable development in general and more specifically between economic and environmental policies' design and implementation; and clarify inequalities in the power struggle among actors.

So, if the idea of embedded liberalism would be fully and *ideally* realized in the context of economic and environmental policies, we would find harmony and mutual supportiveness between these two policy areas as the norm. One would expect disputes to only occur in cases where environmental policies have been developed in gravely unjust, corrupt, protectionist or arguably unacceptable unilateral manners. However, the variance in the challenges and defenses of environmental policies and subsequent

determination of disputes outcomes provide insights into the *actual* status of embedded liberalism and its associated norm contestation process.

A tribunal may find the disputed environmental measure impermissible because it violates the responding state's obligations under the international economic law treaty under which the dispute was brought, or international law in general. The case outcome can also depend on what interpretation technique the tribunal applies and how it considers, *inter alia*: presented[84] legal and factual arguments of a case; including purpose and objective of –as well as rights and obligations provided for in –the invoked economic treaty; and integration or hierarchy of the economic treaty in relation to other international environmental law instruments and agreements.

In analyzing how a tribunal considers these elements specifically, this study observed indicators of horizontal integration, transparency and public participation with the aim of answering the question what factors matter in the determination of dispute outcomes. For example, the study observed that transparency and public representation and participation indicators have affected how a tribunal considers presented and /or possible legal and factual arguments of a case. However, as noted above not necessarily following the expectations of an *amici curiae*. In the *Glamis v. United States* case the tribunal stated its awareness of wide public anticipation of the case outcome and expressed its reluctance to decide on controversial issues presented in some of the *amicus curiae* submissions. Specific case characteristics indicating horizontal integration were in turn observed in the *amicus curiae* submissions. In its submission to this case the Quechan Indian Nation cited several international legal instruments, including a multilateral environmental agreement[85] and submitted that the United States "was obliged under international law to safeguard the rights and interests of the Quechan people".[86]

To illustrate how the study can clarify the status of embedded liberalism in the context of economic and environmental policies and its associated ongoing norm contestation, let's consider two case scenarios.

In the first case scenario, a tribunal finds an environmental policy impermissible. Reasons for the decision may include findings that:

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[84] A tribunal may also initiate legal considerations not presented by parties.

[85]The International Environmental Agreement data base project of the University of Oregon *at* https://iea.uoregon.edu/ provides more information on MEAs, such as the: Convention on Biological Diversity, with its instruments, including *inter alia* the Cartagena Protocol and Nagoya Protocol; CMS; CITES; Plant Treaty, Ramsar Convention, World Heritage Convention, Basel Convention, Rotterdam Convention, Stockholm Convention; Minamata Convention on Mercury; Vienna Convention; Montreal Protocol; UNCCD; UNFCCC with its Kyoto Protocol and Paris Agreement. Another good source is see for example United Nations Information Portal on Multilateral Environmental Agreements *at* https://www.informea.org .

[86] See supplemental *amicus curiae* submission of the Quechan Indian Nation in *Glamis v. United States*, 16 October 2006, at 9.

- the challenged environmental policy has been developed in gravely unjust, corrupt, protectionist or unacceptable unilateral manners;
- a violation of obligations under the invoked economic treaty occurred, including in consideration of the treaty's purpose and objective; or
- the challenged environmental measure has been developed or implemented in a manner that lacks due process, cost-benefit analysis or based on scientific reasoning.

In the second case scenario, a tribunal finds an environmental policy permissible. Reasons for the decision may include findings that:

- none of the above claims (of corruption or protectionism) have been shown in this case;
- instead, the environmental policy is clearly linked to environmental objectives or to obligations under MEAs, which could also be specified in the economic treaty invoked; and/or
- the policy has been implemented in a coordinated multilateral manner in line with international standards.

As the study will show, in both of these scenarios, the latter two considerations: reveal the current status of embedded liberalism; depend on the norm contestation observable in the claim and defense arguments presented; and vary based on the interpretation technique employed. The status of embedded liberalism can be found in the requirements or qualifying considerations for a policy to be found permissible or not. The norm contestation can involve legal arguments that: widen the environmental policy space of treaty provisions; lead to broader understanding of concepts such as like circumstances or juxtapose legitimate versus reasonable expectations of investors; and call for considerations of respondent's environmental objectives, including obligations under international legal instruments and agreements external to the economic treaty invoked. A sketch of possible juxtaposition of views in this context and examples of the study's observations of the status of embedded liberalism and norm contestation are captured in Figure 2.2 below.

RULING IMPERMISSIBLE BECAUSE:	**RULING PERMISSIBLE BECAUSE:**
Policy found to be protectionist, including "green protectionism" MEA obligation not applicable because not ratified by all parties	Policy found to be specifically linked to an MEA objective MEA found applicable even if not ratified because of universal nature of the MEA
Environmental protection intention too vague for application and only in preambular language vis a vis economic objective and purpose provision	Treaty includes sustainable development concept as overriding objective including in preambular or operational paragraphs noted by tribunal as significant
Policy found to be arbitrary	Policy found to be linked specifically to an environmental purpose
Policy found to be unilateral	Policy implemented in coordinated multilateral manner or front-runner sovereignty upheld
Policy found to be gravely unjust or implemented in a corrupt manner	Policy found to be enacted in good faith
Policy found to be not implemented in accordance with due process (timely, transparent, participatory manner) And without initial consultations	Policy found to be implemented in accordance with due process (timely, transparent, participatory manner) And with initial consultations
Policy found to lack of cost-benefit analysis, with no reference to scientific assessment and not in accordance with international standards	Policy found to be based on an independent cost-benefit analysis, and an independent scientific assessment and in accordance with international standards established by international bodies
Exceptions or defenses seen as not applicable, because of threshold, specific qualifier in relevant provisions or doctrines	Non–treaty or treaty-specific environmental exception or defense accepted as relevant and applicable
ABSENCE OF HORIZONTAL INTEGRATION REFERENCE COULD KEEP LIMITED ENVIRONMENTAL SPACE IN ECONOMIC LAW CONTEXT:	**HORIZONTAL INTEGRATION REFERENCES COULD BROADEN ENVIRONMENTAL SPACE IN ECONOMIC LAW CONTEXT:**
Narrow understanding of concepts as "like circumstances"	Broader understanding of concepts as "like circumstances"
Narrow understanding of "legitimate expectations" of investor	Higher threshold for "reasonable expectations" of investors, especially in highly regulated sector
Environmental impact assessment not seen as necessary or determining	Environmental impact assessment accepted as established norm

Figure 2.2: Sample observations of the status of embedded liberalism and norm contestation

An additional example is found in the Quechan Indian Nation *amicus curiae* submission to *Glamis v. United States*, which directly points to a specific ongoing norm contestation by: noting that "in the past decade, an emerging corporate social responsibility (CSR) movement has articulated new values and defined new norms for corporate good practice in relation to environmental and social performance on issues ranging from toxic emissions to human rights"; emphasizing CRS[87] "is an evolving concept" with a "template [that] is emerging at the global level that entails seven norms of good practice"; and listing these and "the goals of these emerging norms".[88] Here, the interpretation technique employed by a tribunal plays an important role as this may alter whether it: permits a norm contestation that involves presentations by an *amicus curiae*; accepts legal arguments as relevant and recognizes such as applicable to the case; and considers two levels of horizontal integration. For example, in contrast to a tribunal employing systemic-integration interpretation technique, a tribunal employing a treaty-based interpretation technique may, in practice, reject consideration of MEA obligations by the responding state that are not mentioned the economic treaty under which the claim was brought.

Finally, the third theoretical framework suggests decision-making processes are based on power struggles among actors. Power inequalities among actors in an institutional context can be related to: access to the negotiation or dispute processes to present a wide range of considerations; inter-institutional factors such as strong enforcement powers developed under international economic law regimes versus weaker compliance mechanisms that are still evolving under international environmental law regimes; or institutional bias.

Recalling the first case scenario above, another underlying reason for an environmental policy impermissible outcome could be that a tribunal's considerations may be related to an institutional biased based on the epistemic community to which arbitrators belong. For example, a tribunal that assumes a hierarchy of economic over environmental norms, may interpret the purpose and objective of the invoked treaty strictly thereby upholding economic norms and dismissing more vague preambular language calling for mutual supportiveness of sustainable development policy goals. This may not so much be an intended biased, but the result of arbitrators being versed in international economic law and less familiar with simultaneously evolving international environmental law instruments.

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[87] Some have noted described Corporate social responsibility as internationally recognized standards, referring to OECD, Guidelines for Multinational Enterprise (OECD 2011) and European Commission, A Renewed EU Strategy 2011-14 for Corporate Social Responsibility (2011). Frank Hoffmeister, The Contribution of EU Trade Agreement s to the Development of International Investment Law, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski eds. 2016) at 363.

[88] See supplemental *amicus curiae* submission of the Quechan Indian Nation in *Glamis v. United States*, 16 October 2006, at 12-3.

Here, variation in the interpretation technique plays again an important role and can be observed in various cases, and the study considers as alternative explanation the interpretation approach taken by a tribunal. Viñuales juxtaposes the following two examples: In "*Parkerings v. Lithuania*, the tribunal interpreted the most-favored nation (MFN) clause of the applicable investment treaty in light of different considerations, including the fact that the projects of the two investors did not have the same consequences for a UNESCO protected side," and thereby "carved out some space for the incorporation of environmental consideration in assessing the scope of the MFN clause".[89] In contrast, he notes in *Grand River v. United States*, the tribunal regarded "'relevant rules' under the VCLT cannot override agreed treaty text and the Parties' agreements regarding its interpretation," a "conception" which Viñuales suggests, "would deprive Article 31(3)(c) of the VCLT of its main purpose, which is to introduce flexibility in the interpretation of international norms".[90] This issue of systemic integration was arguably also noted by the International Law Commission in its recent 2017 Report, stating:

> "*The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including inter alia the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law*".[91]

Considering interpretation approach as alternative explanation, the study investigated and confirmed the potential influence of treaty-specific versus systemic-integration interpretation approaches[92] taken by a tribunal on case outcomes and in combination with other hypothesized case features and characteristics. Importantly, the study investigated and focused on interpretation *practice* not

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[89] E. JORGE VIñUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) at 152-3.
[90] *Ibid*., at 154-5.
[91] United Nations Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), GAOR Seventy-Second Session Supplement No. 10 (A/72/10).
[92] These are defined below in the paragraph. In addition, the raw data collection included also observations of interpretation approaches: of mutual supportiveness; applying the principle of contemporaneity; and suggesting potential institutional biased. This latter politically sensitive category was observed for example based on jurisdictional assertion.

the legal correctness thereof, which others have elaborated on.[93] The study thus refrains from clarifying what a tribunal should have done to correctly apply for example VCLT Article 31, such as in a "single combined operation" but rather observes what interpretation approached a tribunal took. For this reason, I specified interpretation approaches that are unique and for this study's purpose alone, though recognizing that VCLT Article 31 "neither stipulates a hierarchy of various distinct means of interpretation nor offers a tentative catalogue of various means of interpretation among which the interpreter may choose," but "on the contrary obliges interpreters to consider all potentially relevant means of interpretation before eventually adopting one of them".[94] I specified as treaty-specific interpretation technique as focusing on VCLT Article 31 (1), (2) and (3) (a) and (b). In the context of this study, an observed treaty-specific interpretation approach means that the tribunal focused mainly on the text of the economic law treaty under which the claim was brought, and agreements, instruments, and state practice related specifically to that economic law treaty.[95] In addition to an interpretation approach that is treaty text-based, an observed systemic-integration interpretation approach displays a tribunal taking also into account sources that are external to economic law treaty text under which the claim was brought as provided for in VCLT Article 31(3)(c) to take into account any relevant rules of international law applicable in the relations between the parties. The rationale behind identifying these observations[96] is that references to such sources of

[93] Katharina Berner examines the applicability of the 1969 Vienna Convention on the Law of Treaties in international investment disputes and highlights their potential to reconcile investment protection and sustainable development concerns. She notes: "unless parties to an IIA choose to deviate from the Vienna rules, these rules govern the agreement's interpretation either as treaty law or as a reflection of customary international law"; "in most instances, the complex interaction of various sources in the light of the principle of party autonomy will result in authorizing arbitral tribunals to apply the Vienna rules"; and applying them –if they form part of the applicable law –is not subject to a tribunal's discretion but mandatory" so that "failure to apply or to correctly apply [them] can entail serious consequences and may justify an annulment decision". Katharina Berner, Reconciling Investment Protection and Sustainable Development, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski ed. 2016) at 180-181.

[94] *Ibid.*, at 189.

[95] This approach applies this study's observations of horizontal integration indicators at level 1 (treaty-specific) but not at level 2 (non-treaty specific) explicated in Chapter 3 below.

[96] The idea for identifying observations of interpretation techniques follows from the practice that parties to a dispute or *amicus curiae* submissions may make reference to any of the sources of international law, as listed in Article 38(1) of the Statue of the ICJ, in their presentations to the tribunal or panel, which in turn may also make independent reference to any of these sources. The two different interpretation techniques applied by the tribunals and observed in this study are differentiated by way of what kind of references to international law the tribunal considers in its interpretation, taking into account VCLT Article 31 on general rules of interpretation.

Sources of international law are listed in **Article 38(1) of the Statute of the International Court of Justice**, which 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;

international law that are external to the treaty text under which the claim was brought may in turn affect the understanding or interpretation of specific economic treaty provisions.

The *Santa Elena v. Costa Rica* case is also illustrative of the link to the study's theoretical frameworks, including the third or multi-centric organizational model by Raymond C. Miller addressing power struggles. The tribunal in this case did not see the need to consider references made by the responding state to its MEA obligations (one measure of horizontal integration in this study). The tribunal held that "the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid [and] [t]he international source of the obligation to protect the environment makes no difference".[97] The tribunal's conclusion points both to the status of embedded liberalism to the extent that expropriation requires compensation and to existing ongoing norm contestation, such as the responding state calling on the tribunal to consider its environmental protection obligations under MEAs. The case illustrates power dynamics by reference to pre-arbitration events,[98] which included: First, legal proceedings between the parties before Courts of Costa Rica that took place in the approximately twenty-year period from the date of Respondents 1978 Decree until the commencement of the arbitration. Second, that the 1994 US enactment or Helms Amendment (which prohibits U.S. foreign aid to a country that has expropriated the property of a U.S. citizen or corporation where the country has not returned the property, provided adequate and effective compensation, offered a domestic procedure providing prompt, adequate and effective compensation or

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d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] 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".

Article 31 of the Vienna Convention on the Law of Treaties (on general rules of interpretation) addresses the interpretation of treaties. Its subparagraphs read:
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
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.
4. A special meaning shall be given to a term if it is established that the parties so intended".

[97] *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case ARB/96/1, at paragraph 71.
[98] *Ibid*., at paragraphs 20 and 25.

submitted the dispute to arbitration under the ICSID rules) was invoked against Costa Rica. Consequently a US $175 million Inter-American Development Bank loan to Costa Rica was delayed at the behest of the U.S. until Costa Rica consented to refer the *Santa Elena* case to international arbitration. Costa Rica consented to arbitration before an ICSID tribunal on 21 March 1995.

M. Sornarajah emphasizes that "disputes like *Santa Elena* may be regarded as having been decided when the effect of neoliberal thinking was at its highest," noting this case as "an attempt at insulating investment protection from other values, such as the protection of the environment" while tribunals and courts, "outside the context of investment treaties" have held that "interference with foreign investment for an environmental purpose" can be justified.[99] The pre-arbitration events in this case raise several questions, including: whether horizontal integration of international economic and environmental law may be better facilitated outside the investment treaty context, including through initial local legal review in domestic courts;[100] whether local legal reviews are necessary and/or practical;[101] and to what extent corporate political power promoting economic interest can prevent horizontal integration.[102]

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[99] M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press. 2015) at 334 and 332.

[100] As noted elsewhere, "the existence of a dispute settlement mechanism separate from domestic judicial and administrative procedures is thought to contribute to a 'friendly investment climate' necessary to attract FDI to the host state" (See: Freya (ed.) Baetens, International investment dispute settlement in the twenty-first century: Does the preservation of the public interest require an alternative to the arbitral model? , in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (2013) at 418). However, the usefulness of attracting FDI for sustainable development depends on whether the investment does indeed promote not only economic but also environmental and social benefits. UNCTAD recommends the UN Sustainable Development Goals need "a step-change in investment" and suggests: private sector commitment to sustainable development; transparency and accountability in honoring sustainable development practices; partnership with government on maximizing co-benefits of investment; and [even] private sector's responsibility to avoid harm, even if it is not prohibited. (See: UNCTAD: Investing in Sustainable Development Goals –Action Plan for Private Investments in SDGs, Special Edition for the Third International Conference on Financing for development –July 2015, UNCATD/OSG/2015/3, at 6, available at http://unctad.org/en/PublicationsLibrary/osg2015d3_en.pdf).

[101] Opinions on the necessity and practicality of exhausting local remedies differ. Christoph Schreuer opines "that in investment arbitration there is no need to exhaust local remedies. The only accepted exception from this principle is a claim for denial of justice" (Christoph Schreuer, Interaction of International Tribunals and Domestic Courts in Investment Law., in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (Brill Arthur W. Rovine ed. 2010) at 76). Others note: "in forming national coherence of environmental standards and assuring rule of law in environmental decisions, legal reviews play a vital role"; "if national legal remedies must be exhausted first, the international tribunals will to a greater extent be required to address national views as stated in national judgments"; and, particular in cases of developing countries, local legal institutions may develop or be strengthened. (ASA ROMSON, ENVIRONMENTAL POLICY SPACE AND INTERNATIONAL INVESTMENT LAW (Stockholm University. 2012) at 87-89).

[102] For example by: promoting insulated regimes with more specific and stronger compliance mechanism in international economic law vis a vis MEAs; employing regulatory chill through the threat of arbitration; or using other legislative avenues as in this case the enactment and invocation of the Helms Amendment. In this context Asa Romson has noted: "the perception of voluntarism in concluding international treaties, and thus constraining national policy space, is strictly formal and makes no account of the reality of world politics. It is rather evident that less powerful states sometimes make agreements forced by other, more powerful states. […] The fact that many BITs are more or less copies of the capital-exporting-state model treaty indicates that the capital-importing state in many negotiations has had a subordinated role in setting the rules". (*Ibid.*, at 40.)

2.5.4 Model of interactions in the context of norm contestation about sustainable development in international investment arbitration

To visualize the application of my theory in the context of norm contestation about sustainable development in international investment arbitration consider Figure 2.3 below, in which I present a model of interactions identified during this research and show how its findings inform the three theoretical frameworks and real world interactions.

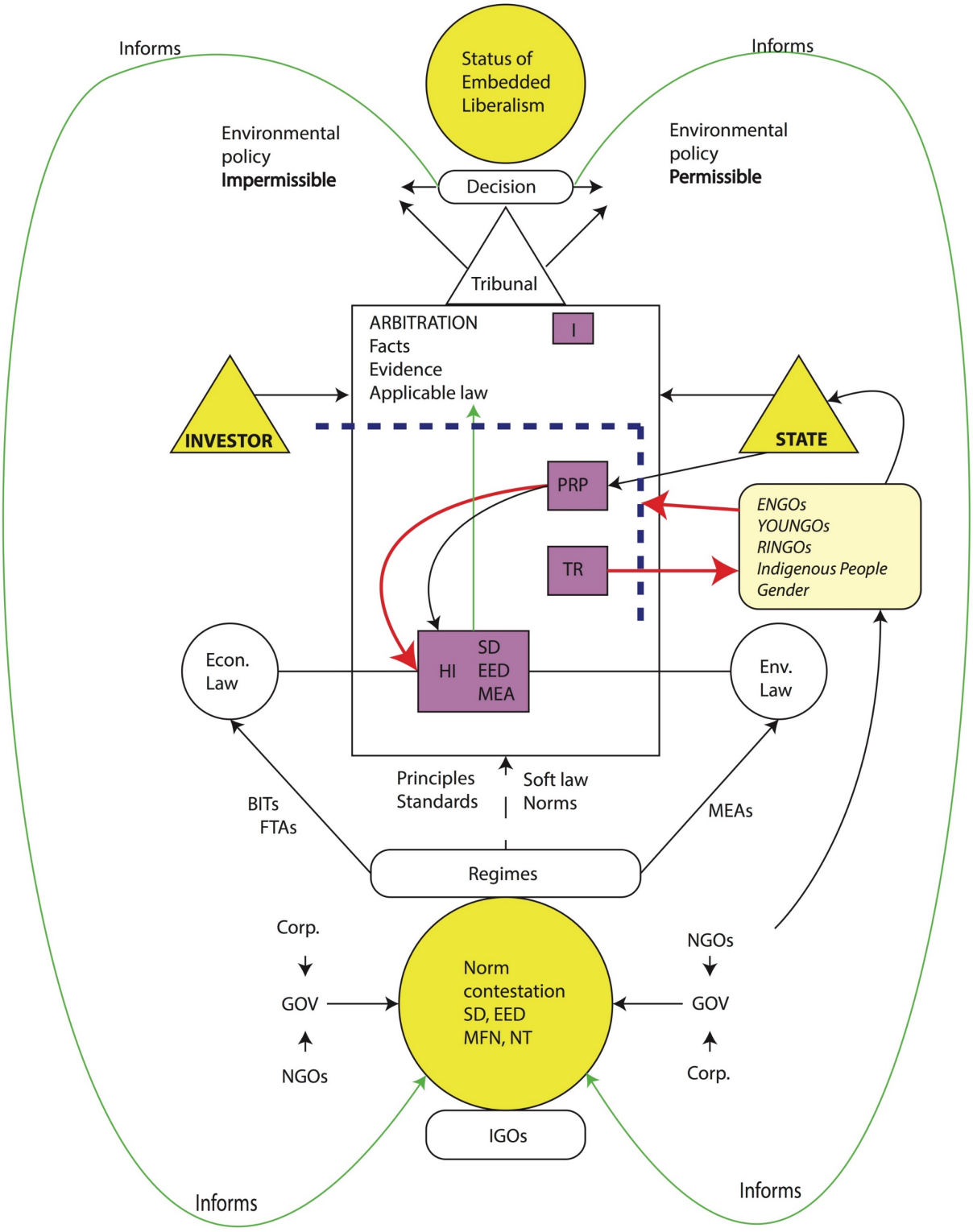

Figure 2.3: Model of interactions in the context of norm contestation about sustainable development in international investment arbitration

If the imagination allows one to picture a butterfly in Figure 2.3, the center of this illustration captures the policy problem caused by simultaneously developed but potentially conflicting international economic and environmental laws. This is illustrated with two separate small circles, one on each side of the butterfly's wings. Following down to the tail of the butterfly we get at the origin of the potential conflict between these two separate areas of international public law. As shown in Figure 2.1 above government representative from different ministries often engage in the respective negotiations of international economic and environmental regimes. In Figure 2.3 here, the encircled elements describe that international economic and environmental laws are often referred to as international regimes, including for example BITs and FTAs on the left side and MEAs on the right side. Regimes also include several principles, standards, and soft law elements or norms captured in the center above regimes. The upward arrows indicate that the content of international regimes feeds into the arbitration arena captured in a box above. Following the illustration further down shows that these regimes can be administered by or "housed" in IGOs.

The illustration also captures the three theoretical frameworks, starting from the bottom with the theory of norm cascade. Norm contestation takes place between state actors but is also influenced by non-state actors, including NGOs and corporations. This interaction of norm contestation in the context of different regimes can take place under the administration of IGOs. For example, several MEAs are drafted during meetings, such as COPs with administrative help of the respective Secretariats of the Conventions, such as in case of the three Rio Conventions the UNFCCC, the UNCBD or the UNCCD Secretariats.

The second theoretical framework, the Multicentric-Organizational Model, is already captured in the depiction of various actors involved directly or indirectly in norm contestation. At the center of the butterfly, these actors are even more clearly illustrated as: corporations or an ***Investor*** party to a dispute case on the left; government or the ***State*** party to a dispute to the right; and various other NGOs, including Environmental NGOs (ENGOs), Youth representatives (YOUNGOs), Research and Independent NGOs (RINGOs), Indigenous Peoples Constituencies, Woman end Gender Constituencies; Trade Unions NGOs (TUNGOs) or Business and Industry NGOs (BINGOs) to give a taste of the acronym soup used by practitioners in the field. An important element of this theoretical framework is the decision-making conception based on power negotiations and the recognition of power inequalities among actors. The triangles illustrate with sharp angles the superior level of power of corporations and governments as parties to a dispute compared to other non-disputing parties such as NGOs captured in a curved box. Notably, the two disputing parties also have the power to restrict NGOs' access to some characteristics of the transparency and public representation and participation indicators in this study. This restrictive power is indicated by a dotted line in the illustration. This power is

administrated by the tribunal, also shown in a triangle as important actor in a dispute, though not engaging in power negotiations. The tribunal does, however have the power to make decisions and rulings in a dispute case. This power is particularly great in the international investment arbitration context with limited possibilities for appeals to a decision.

The third theoretical framework of embedded liberalism is captured at the top of Figure 2.3 above the decision taken by a tribunal concluding either with an environmental policy permissible or impermissible ruling. Embedded liberalism is located and can be observed here because tribunals' decisions are not always based on a clear finding, for example that the challenged environmental policy was clearly illegitimate because the measure was gravely unjust or based on corruption. Instead, a variety of reasons behind a tribunal's decision for finding a measure either illegitimate or legitimate was observed. By providing its reasoning, the tribunal presents the status of embedded liberalism. Broadly speaking, reasons provided based on applicable laws and norms established under economic regimes supporting the finding of illegitimacy of a measure capture the "liberalism" and reasons provided based on applicable laws and norms founded under environmental regimes capture its "embeddedness". Since these legal arguments are juxtaposed in a dispute case one can observe the contours of a given status of embedded liberalism (Please see Figure 2.2 above). Tribunal's reasoning provided in their decisions thus inform the status of embedded liberalism (indicated with green arrows) which also feeds back to the norm contestation process below in this illustration. This feedback can show the applicability and value of provisions, norms, standards or principles resulting from the norm contestation process and/or provide information regarding what further updates may be necessary to improve their applicability in the context of international investment arbitrations.

International investment disputes –the focus of this study –appear in the very center box of this illustration. As emphasized throughout the study and confirmed by the data, tribunals base their decisions foremost on facts, evidence and the applicable law presented in a dispute case. Besides these important elements captured in the illustrated arena, the study tested my ideas, highlighted in purple, that horizontal integration (HI), transparency (TR) and public representation and participation (PRP) could also have an influence on dispute outcomes.

In addition, an alternative explanation was taken into account and tested, namely that the interpretation approach taken by a tribunal could have an influence on dispute outcomes. This alternative explanation of interpretation approach (I), also in purple is positioned closest to the tribunal in this illustration and next to facts, evidence and applicable law. This is because a tribunal taking a treaty-specific interpretation approach may be less inclined to consider legal arguments as applicable law such as references to sustainable development (SD), to environmental exceptions or defenses (EED) and to MEAs when they are only presented at the horizontal-integration level 2, (not treaty-specific) compared

to a tribunal taking a systemic-integration interpretation approach. For example, such references may not be recognized as applicable law due to: their vagueness compared to more specific objectives provisions in the treaty invoked in the dispute; or lack of ratification of an MEA by the parties to the treaty invoked in a dispute; or lack of general universal applicability of the MEA. In addition, but not specifically considered in the final analysis of my results, institutional bias could also be at play, for example based on an epistemic community of arbitrators that is foremost trained in economic law or assumes a hierarchy between economic versus environmental regimes.

My first idea, that horizontal integration (HI) could have an influence on dispute outcomes is captured by way of a green arrow, indicating the assumption that references to sustainable development (SD), to environmental exceptions or defenses (EED) and to MEAs made in legal arguments could be accepted as applicable law by the tribunal and taken into account to arrive at its decision. This idea captured in the first purple box (HI) is also linked to the developments in international economic and environmental law, because these specific horizontal integration characteristics can occur within the specific treaty invoked in a dispute, such as in a BIT's preambular or operational paragraphs. They can also occur outside the specific treaty invoked in a dispute, established for example under various MEAs. The study confirms that these specific references can be made by a disputing party, the tribunal itself or non-disputing parties, such as NGOs in an *amici curiae* submission.

Related to this last point is my second idea, that transparency (TR) could have an influence on dispute outcomes. This is because the presence of specific transparency characteristics of publication of a notice of intent and document access during proceedings are assumed to empower non-disputing parties such as NGOs to engage directly or indirectly in a case. This is indicated by a red arrow in the illustration. However, transparency can potentially be restricted by disputing parties, illustrated by a dotted line. The data confirmed furthermore the interconnection between these two specific transparency characteristics, that is, only when the public is informed of a case taken place, can a request from the public to document access during proceedings be made. Document access during proceedings further enables NGOs to review whether horizontal integration references are being made in a case.

Transparency is also related to my third idea, that public representation and participation (PRP) could have an influence on dispute outcomes. When the transparency characteristic of publication of a notice of intent is given and awareness of a dispute possible, non-disputing parties such as NGOs can submit petitions to the tribunals for *amicus curiae* and/or observer status. This is illustrated by a red arrow. The two relevant public representation and participation characteristics in this study can also be potentially restricted by disputing parties, again illustrated by a dotted line. When *amicus curiae* and/or observer status is granted, petitioners can submit legal arguments including with references to sustainable development (SD), to environmental exceptions or defenses (EED) and to MEAs. This is illustrated by

red arrows. Even when this public participation status is not granted in a dispute, NGOs can still enhance their public representation by way of advising the government acting as state party in the dispute. This is illustrated by black arrows.

All of my case characteristics related to horizontal integration, transparency and public representation and participation can be absent in a case resulting still in an environmental policy permissible outcome. The dotted line also illustrates this possibility, showing that ultimately only parties to a dispute must present to the tribunal facts, evidence and applicable law, including their positions regarding the case characteristics identified in my ideas on potential influential factors for case outcome.

With this explanation, I present Figure 2.3 as model of the interactions at play in the context of international investment arbitration in which environmental policies are challenged. The model reintegrates the three theoretical frameworks on which this study was based.

This chapter introduced how, based on the evaluation of existing literature and selected theoretical frameworks, this study ventured into gaining a better understanding of the problem of existing conflicts between environmental and economic law at the international and domestic level. In search of the factors that matter in the determination of environmental policy permissibility in international economic law disputes, this study observed indicators of horizontal integration, transparency and public participation in international investment arbitration cases in which an environmental policy was challenged. The following chapters explain in more detail the reasons for these indicators, how they are measured and how they assist in finding answers to the posed question. The above provided an indication of how these indicators may influence the scope of consideration of various legal elements in a given case. It further noted that a tribunal's reasoning and consideration of presented and possible arguments is related to the interpretation technique it employs. Detecting an interpretation technique is assisted in the presence of the indicators, because a tribunal may provide in its reasoning why it accepts or rejects considerations presented as relevant or applicable to the case.

The results of this study are thus useful in providing guidance to: policy makers to ensure more challenge-proof environmental policy design and implementation, for example by stating direct links to environmental objectives, international standards or obligations; *amicus curiae* applicants, to make their calls for horizontal integration considerations most effective; and potential claimants to for example take into account reasonable and legitimate expectations into account before filing for arbitration.

Observing the indicators, explicated in more detail in the next chapters, aims at answering the posed question and in addition, reflects in an *en passant* fashion, the actual status of embedded liberalism, its associated norm contestation process and potential power struggles therein as suggested by the theoretical frameworks informing this study.

3.0 HORIZONTAL INTEGRATION

This chapter explicates horizontal integration as indicator as well as its measurements in this study. It follows from:

Hypothesis 1: Horizontal integration increases the prospect of environmentally permissible dispute outcomes.

Independent Variable 1: Horizontal Integration between international economic and environmental law

3.1 DEFINITION AND RATIONALE FOR HORIZONTAL INTEGRATION AS INDEPENDENT VARIABLE

What do I mean by horizontal integration? M.-C. Cordonier Segger differentiates between "horizontal linkages" and "vertical linkages". The former relates to different fields of law, within international public law; the latter refers to different levels of law, such as between internationallaw and law at the regional, national or sub-national level.[103] Besides *linkages*, a diversity of terms has been used in the literature to describe interinstitutional influence, including *interplay*, *interlinkage*, *overlap interconnection* and *interaction*.[104] I am of the view that the aim of horizontal *integration* between different fields of international public law is to: avoid conflicts between them; allow for mutual supportiveness of seemingly conflicting norms; and, where conflicts exist, point to new understandings of

[103] MARIE-CLAIRE CORDONIER SEGGER AND JUDGE C.G. WEERAMANTRY, SUSTAINABLE JUSTICE –RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW (Martinus Nijhoff Publishers. 2005) at 94.

[104] THOMAS GEHRING AND SEBASTIAN OBERTHÜR (EDS.), INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL GOVERNANCE: SYNERGY AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES (MIT Press. 2006) at 4. Oberthür and Gehring employ the term *interaction*, because "it emphasizes that interinstitutional influence is rooted in decisions taken by the members of one of the institutions involved. It is thus action that triggers interaction". I explain below, in the context of jurisdictional delimitation, how my study differs in part from Oberthür and Gehring's study by focusing instead on horizontal *integration*.

provisions contained in public international law as evolved up to that moment. More specifically, I adopt as my definition of horizontal integration Broude Tomer's "'principles of normative integration' in international law," which he defines as "methods deliberately aimed at the reconciliation of formally disparate elements of international law through normative hierarchy, inter-institutional comity, margins of appreciation, *lex posterior*, *lex specialis*, subsidiarity, interpretation and other such doctrines and conceivable tools".[105] The specific methods defining horizontal integration in this study are contained the research's measurements of horizontal integration, which are explicated below and include reference to: the normative policy goal of sustainable development; state obligations concluded under MEAs; and environmental exception or defenses, such as contained in treaty provisions or doctrines articulating states' regulatory powers. The data collection in the study – that is the means of observing the presence of these measures or whether and how horizontal integration methods are used in the cases under study – involved in part a jurisprudence analysis based on case documents. The specific context of horizontal integration in this study is the horizontal integration between international economic and environmental law. Horizontal integration itself can be understood as an evolving "prescriptive norm"[106] of balancing rights and obligations under public international economic[107] law vis-à-vis rights and obligations embodied in MEAs.[108]

These rights and obligations are the result of various international negotiations that took place over the last 70 years and through which international public law evolved through simultaneous developments in trade, investment, and environment. These developments play a crucial role for the realization of sustainable development, which former UN Secretary General Ban Ki-moon expressed as "the challenge of our time". Indeed, the UN Sustainable Development Summit in September 2015 in New

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[105]See: B. Tomer, Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration, 6 LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW REVIEW (2008-2009) at 173.

[106] Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 891.

[107] Overlaps between investment treaties and trade agreements can be observed in many Free Trade Agreements (FTAs). As seen in several NAFTA cases discussed in this study the jurisdictional question arose as to whether NAFTAs investment chapter also apply to state measures affecting trade in goods or services in other chapters, since only the former are subject to compulsory arbitration and remedy of damages against the state. (GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at 79). The complex inter-relationship between international trade and investment law is further illustrated in the relevant link of most-favoured nation (MFN) provisions in the relationship between a countries' commitments made in an international investment agreement and its obligations under the WTO's GATS, which applies among others to investments in form of establishment of service providers in the host state. (See: J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Counties prepared for the Commonwealth Secretariat (2012) at 40-42.

[108] In taking on international obligations in the areas of environmental protection and sustainability but also often interlinked human rights, labor rights, and the rights of indigenous peoples in MEAs and other international treaties, a state accepts the responsibility for regulating the negative effects of trade related economic activities and foreign investment (See: *Ibid*. J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, at 29-30.

York City 2015,[109] which adopted the 2030 Agenda for Sustainable Development, was compared by attending speakers "to what happened 70 years ago when leaders came together to meet the challenges of the post-war world and created the UN".[110]

3.2 SUSTAINABLE DEVELOPMENT AND LAW

Though the International Law Association has recognized a distinct sustainable development law with a body of principles and practices, views on sustainable development differ. Some have noted developments in international public law as moving in diverging directions, others as displaying a double movement, as termed by Karl Polanyi.[111] Anthony VanDuzer et al. notes:

> *"In international environmental law, [sustainable development] relates to the protection of the natural environment in order that future generations can continue to enjoy it as present generations do. In development and human rights circles, its meaning is broader, encompassing environmental sustainability, but also equitable development to reduce poverty, improve the health of people throughout the world, promote peace, protect human rights and pursue gender equality. From an economic point of view, achieving sustainable development entails liberalizing trade and investment policy in order to facilitate the access of goods to foreign markets and to stimulate foreign investment flows".*[112]

Though currently discussions continue on how to ensure implementation of the Post-2015 Development Agenda and the UN Sustainable Development Goals, some scholars have looked at what might have prevented progress on sustainable development until now. To some of them, balancing the obligations contained in the different regimes, and in particular achieving the balance between private investors' rights and governments' rights to regulate economic activities in the public interest, has been a

[109] With the adoption and universal acceptance of the 2030 Agenda for Sustainable Development in September 2015, heads of states committed themselves "to working tirelessly for the full implementation of this Agenda by 2030". See: UN General Assembly resolution "Transforming our world: the 2030 Agenda for Sustainable Development," paragraph 2, (A/RES/70/1).
[110] Rishikesh Bhandary, Faye Leone, Leila Mead, Delia Paul, Nathalie Risse, Lynn Wagner and Pamela Chasek (ed.), Summary of the UN Sustainable Development Summit,, 32 EARTH NEGOTIATION BULLETIN, (2015) at 15.
[111] See footnote 34.
[112] J. Anthony VanDuzer, Penelope Simons and Mayeda, Graham, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Counties prepared for the Commonwealth Secretariat (2012) at 24-25.

theme of concern since the mid-1990.[113] As some authors have noted, "conflicting commitments may lead to ambiguity because actors cannot sincerely implement both of them simultaneously".[114]

Studying international economic law disputes in which an environmental policy measure was challenged provides one entry point to assess governments' rights to regulate economic activities in the public interest. My first hypothesis suggests that horizontal integration increases the possibility of environmentally permissible dispute outcomes. The basis for this hypothesis is threefold: First, determining an environmental policy, as permissible, should be more likely when environmental consideration that states have articulated within or external to that treaty are taking into account. Second, such environmental considerations articulated by the international community are captured in the measurements of horizontal integration and include references to sustainable development, to MEAs and to environmental exceptions or defenses. They can be understood as evolving norms. Third, in considering applicable laws, "arbitral tribunals and other international jurisdictions have wide discretion in determining whether and to what extent a given norm is relevant,"[115] which in turn informs the interpretation techniques they apply in deciding a case. In practice, tribunal or dispute panel may recognize norms presented in the arguments made by disputing parties, or even non-disputing parties, as relevant or alternatively dismiss them. A Tribunal or dispute panel itself may also introduce norms it views as relevant to a case. Furthermore, the extent to which it uses norms in deciding a case may vary.

3.3 MEASUREMENTS OF HORIZONTAL INTEGRATION

A. Reference made to the concept of sustainable development

B. Reference to an MEA is made in the case

C. Reference made to an environmental exception or defense

The study operationalizes horizontal integration and recognizes its presence in a given case by observing whether any or all of the above listed references have been made in a case. In addition the study observes by whom such a reference was made and whether the references have been accepted by the tribunal as relevant and applicable to a given case. Each of these references can occur at two levels: level

[113] Howard Mann, Reconceptualizing International Investment Law: Its Role in Sustainable Development, 17 LEWIS & CLARK LAW REVIEW (2013) at 533.
[114] THOMAS GEHRING AND SEBASTIAN OBERTHÜR (EDS.), INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL GOVERNANCE: SYNERGY AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES (MIT Press. 2006) at 336.
[115] E. JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) at 108.

1 horizontal integration refers to a reference in the text of economic law treaty under which the claim was brought; and level 2 horizontal integration refers to a reference external to the economic law treaty under which the claim was brought.[116] These are explained below. The goal of this scientific inquiry is to test, by observing any patterns in the universe of dispute cases, whether horizontal integration – as a whole, in a specific combination, and to what extent in relation to other factors –may correlate to dispute outcomes.

3.3.1 Reference made to the concept of sustainable development

The concept of sustainable development, articulated in the 1987 Brundtland Report as "development that meets the need of the present without compromising the ability of future generations to meet their own needs," has gained general acceptance as international policy goal by governments since the 1992 UN Earth Summit. The implementation of sustainable development requires harmonization of "three core elements: economic growth, social inclusion and environmental protection".[117] "Despite the general agreement, there are hundreds of formulations of sustainable development, each reflecting particular values and priorities," write M.-C. Cordonier Segger and A. Khalfan, noting the concept "can be considered part of the object and purpose of many international treaties".[118]

A reference to the concept of sustainable development submitted in an international economic law dispute in which an environmental policy is challenged constitutes one measure of horizontal integration, because it calls for normative integration, i.e. for the tribunal/panel, in determining the case, to take this accepted international policy goal into account. The variety of possible references appears along a long spectrum starting on one end with treaty specific language, including in preambular or operational paragraphs, in the invoked international economic treaty under which the case was brought. One the other end, references to sustainable development occur as contextual arguments and as more general formulations. In an *amicus curiae* brief in the *Glamis v. United States* case, for example, the Quechan Indian Nation submitted the concept implicitly stating its intent to use the land area concerned in this dispute "into the future with future generations" as well as that "for indigenous populations, land does

[116] Correspondingly, a tribunal/panel following a treaty-specific interpretation technique may dismiss level 2 horizontal integration references while a tribunal following a systemic-integration interpretation technique may take all of these references into account.
[117] See: United Nations Sustainable Development the Sustainable Development Goals (available at http://www.un.org/sustainabledevelopment/development-agenda/ last accessed June 2016).
[118] CORDONIER SEGGER M.C. AND A. KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICE AND PROSPECTS (Oxford University Press. 2004).

not represent simply a possession or means of production … it is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth …"[119]

The study refrains from attributing more relevance to one reference to sustainable development over another, but differentiates such as level 1 horizontal integration measures when they are textual references to the economic law treaty under which the claim was brought, and to agreements, instruments, and state practice related specifically to that economic law treaty. Level 2 horizontal integration measures are references external to that economic law treaty and its instruments. Why this reluctance to attribute level of relevance to different references to sustainable development? Because even the relevance of level 1 horizontal integration measures, such as preambular treaty language, is debatable. And this is suitable, because the study *observes* the references made and to the extent possible whether a tribunal took the references to be relevant or into account.[120]

Measure of the Horizontal Integration (HI) Indicator	**Level 1 HI Within economic treaty text**	**Level 2 HI External to economic treaty text**
Reference made to Sustainable development	**For example:** **Referenced to sustainable development as aspirational goal in preamble**	**For example:** **Reference to sustainable development concept as international policy objective**

Figure 3.1: Differentiation of a level 1 and level 2 horizontal integration measure related to sustainable development

Let's consider a level 1 horizontal integration measure of a reference to sustainable development in the preamble to the economic treaty text as an example. As noted elsewhere, "a preamble of an international agreement provides an introduction to the goals and thinking of the drafters of the agreement, including for those who may interpret and apply the treaty at a later date".[121] Nevertheless, the

[119] See: Submission by the Quechan Indian Nation to Glamis v. United States, August 19, 2005, page 10, available at http://www.state.gov/s/l/c10986.htm last accessed December 15, 2015.
[120] A reference noted by the tribunal itself as relevant in its reasoning indicates clearly a taking into account of the references. Lack thereof however cannot clearly exclude the possibility that a tribunal took such references into account, a situation that instead is observable only when a tribunal/panel clearly dismisses such references in its reasoning.
[121] South African Development Community, SADC Model Bilateral Investment Treaty Template with Commentary (2012) at 5.

subject of a hierarchy in the sources of international law and rules of interpretation of treaties, as set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT) 1961, has been subject of debate.

Letsas notes:

> *"[VCLT] Article 31 refers to the preamble to the treaty and what counts as relevant context for interpreting its terms (such as subsequent practice or agreement by states parties), but it is not at all clear how much weight these elements should be given in determining the object and purpose of a treaty. Nor does the VCLT make clear how far, if at all, the object and purpose of a treaty may diverge from the intentions and practices of states parties".*[122]

He suggests: "the task of individuating the object and purpose of a treaty and of interpreting the treaty in the light of them, is – from beginning to end – a thoroughly evaluative, not empirical, exercise".[123]

Observing the reference *being made* in a case as indicator of horizontal integration is likewise more useful than observing merely that the concept of sustainable development is contained in the preamble or as an objective or purpose of the treaty, yet not mentioned in the case at all. Surely textual inclusion of the concept in the preamble of the treaty could also be seen as an indicator of horizontal integration between international economic and environmental law, namely as the outcome of normative processes by which the concept of sustainable development has entered not only international environmental but also economic law—processes which affect the horizontal relationship between the two areas of law. However, observing the use of or reference to the concept looks at the active notion of integration and thereby seeks to prevent a misappreciation of a fallow *de jure* norm.

Observing that a reference to sustainable development and a call for its consideration has been made in a case not only goes beyond mere observance of the concept's inclusion in the governing treaty but complements the observation by gaining insights as to who made the reference and, as far as possible whether the tribunal considered the reference in determining a case outcome. Mere inclusion of the concept of sustainable development in the treaty text as indicator of horizontal integration would not provide these useful insights. More important is that a reference to the concept was made in the case. In addition, even though sustainable development may be referred to in the preamble of a treaty, "the significance of preambles for interpreting an agreement may be affected by other provisions in the

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[122] Letsas George, Strasbourg's Interpretive Ethic- Lessons for the International Lawyer, 21 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW (2010) at 533.
[123] *Ibid*., at 535.

agreement" VanDuzer, Simons and Mayeda suggest. The authors explain that if an objectives provision does not "reflect the same priorities as the preamble, the objectives provision may be given priority over more general wording in the preamble". [124]

The following examples from the study's observations illustrate the insights gained from observing reference made to sustainable development in a case, including inquiries as to: Who? How? and Why? As to the 'who', the sustainable development concept can be referenced in a case by the respondent, the claimant, a non-disputing party, an *amicus curiae* submission, an expert opinion or the tribunal itself. As to the 'how', the reference is observed as external to the treaty text or treaty-specific, as in a preambular, and is observed in the context of the arguments presented. The 'why' inquiry looks at whether the referenced sustainable development concept was accepted by the judicial body as relevant and also applicable to the case.

In the *Ethyl Corporation v. Canada* case for example, though the promotion of sustainable development by parties is stated in the preamble of the governing treaty NAFTA, this notion and its environmental perspective lacked interpretive strength *vis a vis* the economic perspective. First, only the economic perspective is specified in the NAFTA Article[125] on objectives and was acknowledged by the tribunal even though responding Canada noted under the application of NAFTA that "the preamble to the NAFTA states that the parties resolved to *carry out stated objectives* 'in a manner consistent with environmental protection and conservation' and to 'strengthen the development and enforcement of environmental laws and regulations'" [emphasis added].[126] Second, the tribunal did not specifically address the responding state's reference to both the environmental notions in the preamble as well as the Annexed Side Agreement.[127] And third, no interested third party (neither state nor NGO) challenged the presumption of an economic focus and investor-friendly interpretation limiting government regulatory

[124] J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Counties prepared for the Commonwealth Secretariat (2012) at 48.

[125] On the other hand NAFTA's chapter 1 (on objectives) includes also articles on relation to environmental and conservation agreements.

[126] *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Defense, 27 November 1997, Notice of Intent to Submit a Claim to Arbitration, 10 September 1997, paragraph 71, available at: http://www.naftalaw.org.

[127] As stated above, the issue of a hierarchy in the sources of international law and rules of interpretation of treaties as set out in VCLT Articles 31–33 has been subject of debate. In the *Ethyl* case the tribunal focuses on guidance provided in VCLT Article 31(1) "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", while Canada's references included elements provided for in VCLT Article 31(2), "the context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty".

rights, or, supported more weight be given to the preambular language with its notion of promoting sustainable development and environmental view component.[128]

In contrast, in the *Methanex Corporation v. United States of America* case, besides the U.S.,[129] two *amicus curiae* submissions[130] also referred to the sustainable development objective in NAFTA's preamble. The Canadian NGO International Institute for Sustainable Development (IISD), stressed *inter alia*: "that the clear absence of an [environmental] exception provision and approach for Chapter 11 imposes upon the tribunal the need to understand differently how the right to regulate ought to be addressed in the context of Chapter 11; noted in this context "the clear recognition of environmental protection and sustainable development in the preamble to NAFTA;" referenced the reconfirmation of environmental goals of NAFTA in the North American Agreement on Environmental Cooperation (NAAEC); and submitted these objectives as important context for the purpose of interpretation of the treaty as set out in the VCLT Article 31(2)(a).[131] IISD explained "the protection of the environment and the promotion of sustainable development are two closely related aspects of state regulation that do not fall within the forms of regulation that a host state may not take in relation to foreign investors and investment"; and found this to not only to be "consistent with the preamble and objectives of NAFTA, "but also to have been recognized in the few international investment law arbitrations that have ruled on this issue".[132]

In addition, already in its Petition for *Amicus Curiae* Status[133] IISD explained that: consistent with NAFTA's objectives as set out in the preamble, there are limits placed by NAFTA on governments' authority to ensure economic and sustainable development are integrated rather than hierarchical legal

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[128] Mexico, as interested third state party to the case, exercised its right as NAFTA party in line with NAFTA Article 1128 by making a written submission on other points of the dispute. No *amicus curiae* was submitted.
[129] The U.S. recites NAFTA's preamble as relevant to environmental protection and conservation though without specifically using listing the term sustainable development, as well as referencing relevant provisions under the NAAEC "recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations . . . ". See: Amended Statement of Defense of Respondent U.S., December, 5 2003, paragraph 412.
[130] See: Methanex v. United States of America, Submission Of Non-Disputing Parties Bluewater Network, Communities For A Better Environment And Center For International Environmental Law, March 9, 2004, paragraphs 6-9; as well as Methanex v. United States of America, Amicus Curiae submission by IISD, March 9, 2004, paragraph 23.
[131] See: *Methanex v. United States of America*, *Amicus Curiae* submission by IISD, March 9, 2004, paragraph 23, 27-8.
[132] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Final Award, (November 13, 2000), at para. 67: "The Tribunal has carefully examined these contentions, since the environmental impact assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also increasingly so under international law".
[133] *Methanex v. United States of America*, Petition for *Amicus Curiae* submission by IISD, March 9, 2004, paragraphs 10, 14, 27.

policy objectives; a sustainable investment strategy requires governments' ability to maintain an optimal environmental protection process; interpretation of provisions must reflect NAFTA parties' commitments in the preamble to maintain their flexibility to safeguard public welfare, including environmental protection; and the public interest in this case regarding the ability of host states to meet their responsibilities towards their citizenry lies also within the context of states' international legal obligations. However, the *Methanex* tribunal also refrained from addressing references to NAFTA's preambular language.

Finally, in *S.D. Myers v. Canada*, where no *amicus curiae* submission was made, it was the tribunal itself that referenced indirectly the concept of sustainable development. It did so indirectly because it did not mention the words 'sustainable development,' as neither did Canada in *Ethyl Corporation v. Canada*. There are four preambular paragraphs set out by the parties in NAFTA related to sustainable development: "undertake each of the preceding in a manner consistent with environmental protection and conservation" (Paragraph 11); "preserve their flexibility to safeguard the public welfare" (Paragraph 12); "promote sustainable development" (Paragraph 13); and "strengthen the development and enforcement of environmental laws and regulations" (Paragraph 14). The tribunal in *S.D. Myers v. Canada* referenced preambular paragraph 11, Canada in the *Ethyl Corporation v. Canada* referenced preambular paragraphs 11 and 14, neither specifically referenced preambular paragraph 13 on promoting sustainable development. References to sustainable development can be made literally, by using the terms seen in the *amicus curiae* submission in the *Methanex Corporation v. United States of America*, or more indirectly.

Besides referring indirectly to the concept of sustainable development in NAFTA's preamble, noted as level 1 horizontal integration, the *S.D. Myers v. Canada* tribunal referred to the concept in several other places, including at level 2 horizontal integration. It did so for example: in the context of the Basel Convention's "insistence on environmentally sound management of waste;[134] in the context of "the international agreements affirmed in the NAAEC" which are the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development;[135] and by recognizing as "indirect environmental objective" to keep domestic industry strong to ensure capability for continued waste disposal.[136] This last reference to an 'indirect environmental objective' to keep domestic industry strong and ensure capability for the service, which the tribunal found to be a "legitimate goal,"[137] is particular relevant to the view and understanding of sustainable development by

[134] See: *S.D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paragraphs 211-3.
[135] See NAAEC preambular paragraph 8, referenced in *S.D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paragraphs 220-1.
[136] See: *S.D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paragraph 195.
[137] See: *S.D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paragraph 255.

developing countries, seeking to protect their, in part green, infant industries. The tribunal accepted all these references to sustainable development as relevant yet still rejected them as defense because Canada did not choose an available alternative (i.e. Canada did not stay within the scope for such legitimate objective as specified in the treaty text).

The above shows that the first measure of my indicator of horizontal integration, introduced in Table 3.1 above, can occur in various ways, similar to different shapes of puzzle pieces. This observation approach to the study's puzzle is applied in the same manner to the other measures of horizontal indication aiming at gaining a deeper understanding of the indicator's possible impact on the interpretation technique of the judicial body, for example either broadening the understanding of certain treaty provisions or interpreting treaty objectives more restrictively. To solve the puzzle, the study seeks to reveal in the picture at large, any patterns in the universe of dispute cases indicating whether horizontal integration – as a whole, in a specific combination of its measures, and to what extent in relation to my other indicators or appearing factors –may correlate to dispute outcomes.

3.3.2 Reference to an MEA is made in the case

The second measure of horizontal integration in the study is the observance of a reference to an MEA made in the case, which follows the same observational approach described above. Here, the level 1 horizontal integration measure constitutes a textual reference to an MEA in the economic law treaty under which the claim was brought, and agreements, instruments, and state practice related specifically to that economic law treaty. The level 2 horizontal integration measure is an MEA references external to that economic law treaty and its instruments. The study observes MEA references made, by whom and to the extent possible whether the MEA reference was accepted by the law-applying agent as communicative assumptions in the interpretation of parties' intent for prevailing environmental matters.

Measure of the Horizontal Integration (HI) Indicator	Level 1 HI Within economic treaty text	Level 2 HI External to economic treaty text
Reference made to an MEA	For example: - NAFTA Article 104 on Relation to Environmental and Conservation Agreements; and its - NAFTA Annex 104.1 on Bilateral and Other Environmental and Conservation Agreements	For example: Reference to an MEA obligation in existing or evolving MEA

Figure 3.2: Differentiation of a level 1 and level 2 horizontal integration measure related to an MEA

A reference to an MEA submitted in an international economic law dispute in which an environmental policy is challenged constitutes the second measure of horizontal integration, because it calls on the tribunal, in determining the case, to take developments in another international public law regime concerned with the environment into account.

There is no generally accepted definition of MEAs, which broadly defined include agreements among sovereign states that at least partly aim to protect the environment.[138] Daniel Bodansky points their origins back at early conservation movements with international focus. He notes as early as in 1868, "a German ornithological meeting proposed the development of an international treaty on bird protection" resulting in the 1902 "Convention to Protect Birds Useful to Agriculture," which "is widely considered the first multilateral environmental treaty".[139] Today, the United Nations Environment Programme (UNEP) is the main UN organ responsible for the environment. It has initiated negotiations of core MEAs and provides them with support for their implementation. Many MEAs have been concluded since 1972, the year of the Stockholm Conference and the establishment of UNEP.[140] In 2017, the International

[138] See: http://www.oxfordbibliographies.com
[139] BODANSKY, DANIEL, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW. (Harvard University Press. 2009) at 23.
[140] UNEP, Measuring Progress: Environmental Goals & Gaps (2012) at ii and United Nations Information Portal on Multilateral Environmental Agreements at http://leo.informea.org

Environmental Agreements Database Project observes 1290 MEAs and 2166 Bilateral Environmental Agreements.[141]

A reference to relevant existing MEAs made in the dispute cases indicates the recognition, at least by the referencing party, of horizontal interrelation between different areas of international public law, thereby appealing for reconciliation of potentially competing economic and environmental interests "in the context of an integrated, holistic international legal order".[142] Observations in this study show variation, in that level 1 and level 2 horizontal integration measures have been made, and in the acceptance or rejection of references as relevant and applicable to the case.

Using an illustration from WTO trade and environment disputes, not specifically investigated in this study, we find in the *WTO United States – Restrictions on Imports of Tuna (II)* case, the WTO panel regarded MEA references external to the governing economic law treaty (level 2 measure of horizontal integration) and not concluded among all GATT parties as "not relevant as a primary means of interpretation" and not applicable. In this case, the WTO Panel, *inter alia:*

> *"observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and that they did not apply to the interpretation of the General Agreement or the application of its provisions;" "found that under the general rule contained in Article 31 of the Vienna Convention, these treaties were not relevant as a primary means of interpretation of the text of the General Agreement;" and "considered that those cited treaties that were concluded prior to the conclusion of the General Agreement were of little assistance in interpreting the text of Article XX(g), since no direct references were made to these treaties in the text of the General Agreement, the Havana Charter, or in the preparatory work to these instruments".*[143]

However, as Palmer, Chaytor, and Werksman[144] note, the WTO Appellate Body has also taken into account existing international agreements and state practice when clarifying relevant provisions of

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See: Philippe Sands, Litigating Environmental Disputes: Courts, tribunals and the progressive development of international environmental law (2008).

[141] See: The International Environmental Agreements Database Project, University of Oregon, U.S., at https://iea.uoregon.edu/iea-project-contents

[142] Philippe Sands, Litigating Environmental Disputes: Courts, tribunals and the progressive development of international environmental law (2008) at 9-10. The author concludes inter alia, that "it will take time to fully integrate environmental concerns into the better established norms of foreign investment protection".

[143] See: UNITED STATES – RESTRICTIONS ON IMPORTS OF TUNA, Report of the Panel, 16 June 1994, (DS29/R), paragraphs 5.18 - 5.20.

[144] Beatrice Chaytor Alice Palmer, and Jacob Werksman Interactions between the WTO and International Environmental Regimes, in INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL

the GATT. For example, in the WTO *United States—Import Prohibition of Certain Shrimp and Shrimp Products* case, the Appellate Body made reference to a number of MEAs when clarifying the meaning of "exhaustible natural resources" under one of the "environmental" exceptions in GATT Article XX.[145] Analyzing this exception, the Appellate Body looked to MEAs as one source of evidence of the "contemporary concerns of the community of nations about the protection and conservation of the environment".[146]

Observing the reasoning behind a tribunal's decision as to whether to consider references to MEAs informs the interpretation technique applied, such as either a treaty-specific or a systemic-integration interpretation approach as illustrated in the examples above. In addition, such observations provide valuable insights, such as to what extent such reference may matter or not. In other words, the study gains understandings into what other possible factors may matter more than or in combination with references to MEA obligations in the determination of a case outcome, such as that states ought to choose available least trade-restrictive alternative measures or that cases of expropriation require compensation.

For example, in the ICSID *Santa Elena* case, even though the tribunal held that "the arbitration is governed by international law,"[147] the tribunal nevertheless concluded "the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking for which adequate compensation must be paid [and] [t]he international source of the obligation to protect the environment makes no difference".[148] For this reason, the tribunal explained, it did "not analyse the detailed evidence submitted regarding what respondent refers to as its international legal obligation to preserve the unique ecological site that is the Santa Elena Property,"[149] which included references to obligations to protect the environment set out in several MEAs.[150] In this regard, Nicolas Hachez and Jan Wouters note: "host states may have to choose between abiding by one or the other of their international

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GOVERNANCE: SYNERGY AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES, (Sebastian Oberthür and Thomas Gehring (eds.) ed. 2006) at 187.

[145] *Ibid.*

[146] *Ibid*., and specifically *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, 1998 Report of the Appellate Body, paragraph 129, WTO Doc WT/CTE. W/152.

[147] See: *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, ICSID Case ARB/96/1, paragraph 65.

[148] *Ibid*., at paragraph 71.

[149] *Ibid*., at paragraph 71 Footnote 32.

[150] These MEA references included: the Central American Regional Convention for the Management and Conservation of the Natural Forest Ecosystems; the Convention on Biodiversity; the Convention on Wetlands of International Importance Especially as Waterfowl Habitat; the UNESCO Convention on the Protection of the World Cultural and Natural Heritage; and the Western Hemisphere Convention. See *Ibid.*, Costa Rica's Counter-Memorial of 15 June 1998, paragraphs 62-67, as also reported by C. N. Brower and J. Wong, General Valuation Principles: The Case of Santa Elena, in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (T. Weiler (ed.) ed. 2005) at 747-775.

obligations […] [and may not be able to] implement international agendas to which they may be deeply committed".[151]

The *S.D. Myers v. Canada* case is also illustrative. Canada made reference to its MEA obligations under the Basel Convention. The reference is a HI level 1 measure because it is specifically listed in NAFTA text as to prevail over NAFTA provisions in case of conflict. The tribunal accepted its relevance to this case, however rejected Canada's defense based on the MEA obligation by: noting NAFTA Annex 104 provides the Basel Convention would have priority if and when it was ratified by the NAFTA parties, and the US had not yet ratified; emphasizing that even if it was ratified by the US, the MEA obligation required Canada to choose among alternatives the option least inconsistent with NAFTA to meet its obligation; and noting that the Basel Convention did permit "the continuation of the Transboundary Agreement with its emphasis on including cross-border movements as a means to be considered in achieving the most cost-effective and environmentally sound solution to hazardous waste management".[152] Noting Canada's alternative policy options, the tribunal found the measure not implemented within the requirements of the obligation to choose an available least-trade restrictive alternative.

The above shows why and how reference to MEAs in a dispute serves as the second measure of horizontal integration. This measure differs from a reference to sustainable development, which calls for consideration for a more general internationally policy objective[153] than the more specific objectives and obligations undertaken by states in MEAs. A reference to a MEA (i.e. to another yet specific international public law regime) is also distinguished in this study from references made to an environmental exception or defense, which can also occur at horizontal integration level 1 and 2 and which can be articulated both in a specific or general manner. This is explained below.

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[151] International investment dispute settlement in the twenty-first century: Does the preservation of the public interest require an alternative to the arbitral model?, in INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES (Freya Baetens ed. 2013) at 432.

[152] See *S.D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000) Award paragraphs 213-215.

[153] This statement is to be understood in the context of this study, and not to be misunderstood as ignoring the current developments under the global indicator framework, which was adopted by the General Assembly on 6 July 2017 and is contained in the Resolution adopted by the General Assembly on Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development (A/RES/71/313). Furthermore, there are several regional MEAs and Bilateral Environmental Agreements on specific sustainable development objectives. See: Ronald B. Mitchell and the International Environmental Agreements IEA Database Project, 2002-2016 at the University of Oregon at https://iea.uoregon.edu

3.3.3 Reference made to an environmental exception or defense

The final measure of the horizontal integration indicator is the observance of a reference to an environmental exception or defense made in the case. As the terms indicate, they can be used to defend an environmental policy alleged to be in violation of the governing economic treaty by pointing to environmental exceptions or defenses.

An environmental exception or defense means "if there is an applicable exception, no treaty obligation exists with respect to a measure within the scope of the exception or reservation".[154] This indicates a recognition by signatory states that international economic law must provide "the necessary balance between domestic regulatory autonomy in the environmental field and the [economic] liberalization disciplines set forth by the [economic treaty]".[155] Alan Boyle explains: "Ultimately, governments make policy choices about how to balance competing objectives […]. These choices will be reflected in the agreements they sign or in the state practice that contributes to general international law".[156]

As was the case with the first two indicators, the study observes not the mere existence of states' articulations, but whether a reference to an environmental exception or defense within or outside the governing treaty of the dispute was made in the case. In the end, as noted by others, "the balance or imbalance between [international economic law] and environmental consideration still depends, in large part on the interpretation of [the environmental exception or defense]".[157] And for any interpretation to take place the exception or defense must be made or submitted to the tribunal.

A reference to environmental exception or defense submitted in an international economic law dispute in which an environmental policy is challenged constitutes the last measure of horizontal integration in this study, because it calls for normative integration, i.e. for the tribunal, in determining the case, to take the referenced environmental exception or defense into account.

At level 1 horizontal integration, referenced environmental exceptions appear in the governing economic treaty under which the dispute was brought. They have been referred to as 'general'

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[154] A. NEWCOMBE, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Wolters Kluwer Law International. 2009).
[155] NATHALIE BERNASCONI-OSTERWALDER, DANIEL MAGRAW, MARIA JULIA OLIVA, MARCOS ORELLANA AND ELISABETH TUERK, ENVIRONMENT AND TRADE A GUIDE TO WTO JURISPRUDENCE (Earthscan. 2006) at 77.
[156] Alan Boyle, Relationship between International environmental law and other branches of international law, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Jutta Brunnée and Ellen Hey Daniel Bodansky eds. at 126.
[157] NATHALIE BERNASCONI-OSTERWALDER, DANIEL MAGRAW, MARIA JULIA OLIVA, MARCOS ORELLANA AND ELISABETH TUERK, ENVIRONMENT AND TRADE A GUIDE TO WTO JURISPRUDENCE (Earthscan. 2006) at 77.

exceptions,[158] such as general necessity or emergency clauses, or specific environmental provisions, including rule specific exceptions such as under the rules on performance requirements. The notion here is that drafting parties integrated environmental protection concerns already in the treaty text by providing for environmental policy space and reserving their regulatory rights or powers. At level 2 horizontal integration, referenced environmental defenses are found in Tomer's 'principles of normative integration in international law,' as noted above. These include: the police powers doctrine; the margin of appreciation principle; the principle of subsidiarity; and the international and or transnational public policy defense.

[158] Though as Saverio Di Benedetto notes, "since 'exception' often relates to the idea of 'specialty', as stated *inter alia*, in the ILC report on fragmentation, 'general exception' might appear to be an oxymoron". See: SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar.) at161.

Measure of the Horizontal Integration (HI) Indicator	Level 1 HI Within economic treaty text	Level 2 HI External to economic treaty text
Reference made to an environmental exception or defense	**For example:** **- NAFTA Article 1106(6) on environmental exception to prohibition of performance requirements (specific)** **- NAFTA Article 1114 on environmental measures; and** **- NAFTA Article 2101 on general exceptions (general necessity)**	**For example:** **- Police powers doctrine** **- Principle of margin of appreciation** **- Principle of subsidiarity** **- International and/or transnational public policy defense**

Figure 3.3: Differentiation of a level 1 and level 2 horizontal integration measure related to an environmental exception or defense

Many different environmental exception clauses exist, varying in wording and scope, as seen in various international economic law treaties, such as the WTO, FTAs, BITs and the ECT.[159] Andrew Newcombe and Lluis Paradell identify "at least five categories of exceptions and reservations in international investment treaty practice, ranging from wide (sometimes self-judging) exceptions applying to all treaty obligations, [such as essential security exceptions], to narrowly defined reservations for specific, non-conforming measures". These would include, *inter alia*: general exceptions from treaty obligations for measures necessary to meet specific objectives, such as the protection of human, animal and plant life, often modeled after GATT 1994 Article XX; specific exceptions or reservations for specific sectors or types of measures; exceptions for existing non-conforming measures which act as 'grandfathering' provision that allows for the continuation, renewal and amendment of an existing non-conforming measure, provided non-conformity does not increase; and exceptions for future measures that may be even more restrictive.[160]

[159] Ole Kristian Fauchald, International Investment Law and Environmental Protection, in YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (2008) at 3-15.
[160] A. NEWCOMBE AND ANDREW AND LLUIS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (Wolters Kluwer Law International. 2009) at 482-485.

Yet, just as the study refrains from attributing more relevance to one reference to sustainable development over another, it differentiates references to environmental exceptions also only into level 1 or 2 horizontal integration measures. It observes the specific references made and to the extent possible whether the tribunal took the references to be relevant in the case. Regarding the latter observation, the possible reasons provided by the tribunal for accepting or dismissing the environmental exception as defense for the challenged environmental measure are noted. As the conclusion of this chapter shows, these observations provide valuable insights, such as to what extent in relation to other factors horizontal integration generally and its specific measures individually or in combination may correlate to dispute outcomes. This however is not an "attempt to categorically define the subset of situations that justify the non-application of the rules affected by each exception," since, as Di Benedetto explains, "legal rules are characterized by an 'open texture and their meanings therefore maintain a certain level of indeterminacy".[161] For example, William W. Burke-White and Andreas von Staden *inter alia*: explain that exception clauses, or non-precluded measures (NPM) clauses "require that measures taken by a state, that would otherwise deviate from a treaty obligation, must be sufficiently related to the permissible objectives specified in the clause;" term this relationship the 'nexus requirement'; note however that "NPM provisions rarely provide conclusive interpretive guidance […] to their nexus term"; and observe, consequently, a variety of interpretations of NPM provisions.[162]

The following examples of the study's observed references to environmental exceptions illustrate their variety and application.

3.3.3.1 Environmental exceptions/defenses at level 1 horizontal integration: Several references to environmental exceptions at level 1 horizontal integration were made in cases, for example, where environmental policies were challenged under NAFTA. Specific environmental exception provisions to NAFTA's investment discipline include: Article 1106(2) and (6)[163] on performance requirements; and

[161] SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar.) at 217.

[162] See: William W. Burke-White & Andreas von Staden, Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties, 48 VIRGINA JOURNAL OF INTERNATIONAL LAW (2008) at 318 and 330.

[163] Note also that NAFTA Article 1108 provides an additional exception to the Article 1106 (performance requirements prohibition) to: "(a) any existing non-conforming measure that is maintained by (i) a Party at the federal level, as set out in its Schedule to Annex I or III, (ii) a state or province, for two years after the date of entry into force of this Agreement, and thereafter as set out by a Party in its Schedule to Annex I in accordance with paragraph 2, or (iii) a local government; (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment". Further, NAFTA Article 1108(2) performance requirements prohibition do not apply to any

Article 1114 on environmental measures. There are also Article 2101 (on general exceptions, which incorporates Article XX of the GATT 1994) and various other exceptions related to NAFTA's trade disciplines that came up in cases observed for this study.

NAFTA Article 1106(6) limits the scope of the investment rule that prohibits the state from enacting performance requirements. The article requires that for "measures, including environmental measures," to be permitted under the performance requirement *exception*, they must be: "necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; necessary to protect human, animal or plant life or health; or necessary for the conservation of living or non-living exhaustive natural resources". In the *Ethyl v. Canada* Case, claimant contended Canada's measure (MMT Act)[164] did not meet all criteria for the performance requirement exception Article 1106(6).[165] Canada rejected the notion that the Act imposed a performance requirement, noting "acceptance of Ethyl's contention that an import ban is equivalent of a performance requirement would lead to the absurd result that every border measure is a performance requirement".[166] However, Canada explained the Act, if understood in such way, would lie within the exception of Article 1106(6) because it was necessary to prevent the negative impacts on the exhaustible natural resource clean air and on life and health.[167] As the case was settled, the tribunal did not address the Article 1106(6) exception. However, some authors have commented on the application of this specific environmental exception in this case. Mann and von Moltke note *inter alia* that: "the government here relied on the text and form of the legislation, whereas Ethyl looked to the effect of the measure on its operations"; NAFTA Chapter 11 (on investment) does not apply to border measures such as an import ban, (or a quota, tariff rate quota or tariff), claimed here to be a performance requirement; and "the door to challenge environmental trade measures in the future as a performance requirement under Chapter 11 is open" since "Canada conceded at a jurisdictional hearing that the issue of a trade measure falling under Chapter 11 could be decided on

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measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II. However, note the need for specific listing of measures in the Annexes.

[164] Import and interprovincial trade restriction on additive Methylcyclopentadienyl manganese tricarbonyl (MMT) to unleaded gasoline.

[165] The performance requirement exception Article 1106(6), which requires the measure must be: not applied in an arbitrary or unjustified manner; not a disguised restriction on international trade or on investment; and is necessary to protect human, animal or plant life or health; or for the conservation of living or non-living exhaustive natural resources. See: *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Claim, 2 October 1997, Paragraph 49, available at: http://www.naftalaw.org.

[166] See also: *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Defense, 27 November 1997, paragraph 91, available at: http://www.naftalaw.org.

[167] See also: *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Defense, 27 November 1997, paragraph 92, available at: http://www.naftalaw.org.

the merits," and since "the Ethyl arbitration tribunal expressed the view that trade measures could in fact be raised under Chapter 11".[168]

NAFTA Article 1114 on environmental measures provides in paragraph (1) "nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". There is some debate over the provision's strength. Di Benedetto suggests while its initial part significantly corresponds to the general exception format of Article XX ('Nothing in this agreement shall be construed'), the overall text maintains a certain ambiguity and notes that some view the provision's relevance as negligible.[169] NAFTA Article 1114(2) further "attempts to address the race to the bottom" according to Moloo and Jacinto, by "recogniz[ing] that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures".[170] To this end it allows one party to request consultations with another that is seen to have derogated from such measures as an encouragement for an investment in its territory with a view to avoiding any such encouragement.

This environmental exception clause was also referred to in the *Ethyl v. Canada* Case. Canada submitted that the MMT Act constituted a health and environment measure permitted by NAFTA Article 1114(1).[171] Canada explained this in the context of the provision on expropriation: underlining the MMT Act does not constitute expropriation or a measure tantamount to expropriation under NAFTA Article 1110 (on expropriation) because it "involves the exercise of regulatory powers or police power recognized by international law". Canada thus not only submitted a level 1 horizontal integration environmental exception but also combined in its argument a level 2 horizontal integration environmental defense, namely the police powers doctrine. Canada also stated the objective of, or motivation or intent for enacting the Act was "for the maintenance of health, for the conservation of clean air and for the

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[168] The authors recommend that the scope of Article 1106 be addressed as part of an interpretive statement. The legal policy objective would be to establish when a type of regulation does not constitute a performance requirement, as opposed to when it might qualify as an exception to these disciplines. See: Mann, Howard and von Moltke, Konrad, NAFTA's Chapter 11 and the Environment Addressing the Impacts of the Investor-State Process on the Environment. (1999) at 37.

[169] See: SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar. 2013). In footnote 115 the author notes: The critical point seems to be the term 'otherwise consistent with this Chapter'. According to some authors, including Bernasconi-Osterwalder and Brown Weiss, the provision relevance is simply 'negligible.'

[170] See: Rahim Moloo Justin Jacinto, Environmental and Health Regulation: Assessing Liability under Investment Treaties, 29 BERKELEY JOURNAL OF INTERNATIONAL LAW (2011) at 10.

[171] See also: *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Defense, 27 November 1997, paragraph 97, available at: http://www.naftalaw.org.

protection of the environment".[172] Again, the tribunal did not comment on the referenced environmental exception contained in NAFTA Article 1114 in the Award on Jurisdiction and the case was settled. However, as Howard Mann identified, the consideration of the motivation or intent of the adoption of a measure by a tribunal is uncertain and may even be found irrelevant.[173]

In *S.D. Myers. Canada*, the tribunal merely recited the listing of NAFTA Article 1114 in NAFTA Article 1101 (on scope and coverage) in the context of determining that the measure related to claimant and its investments in Canada. This environmental exception was no where else mentioned or discussed in the case. The tribunal found that the US investor was entitled to monetary damages as a result of a temporary Canadian ban on exports of Polychlorinated biphenyl (PCBs), even though the ban's stated purpose was to prevent any possible significant danger to the environment or the human life or health.[174]

The *Metalclad v. Mexico* tribunal did consider NAFTA Article 1114 (on environmental measures), but found that rather than being violated it had been observed, since Mexico was satisfied with the investment being "environmentally sensitive". It further held that the measure, the Ecological Decree would be tantamount to expropriation requiring compensation. Specifically, the tribunal found *inter alia*: "the municipality's insistence upon and denial of the construction permit in this instance was improper";[175] that "this conclusion is not affected by NAFTA Article 1114";[176] and that "the tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110".[177] The Metalclad Tribunal considered "that the implementation of the Ecological Decree [or measure] would, in and of itself, constitute an act tantamount to expropriation".[178] The emphasis here seems to lie on the implementation of a measure. In the WTO 1998 Shrimp-Turtle case, the Appellate Body made it clear that both the substance of a measure and its implementation are subject to review under trade law.

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[172] See also: Ethyl Corporation v. Canada, UNICTRAL, Statement of Defense, 27 November 1997, paragraph 95, available at: http://www.naftalaw.org.
[173] Howard Mann, Assessing the Impact of NAFTA on Environmental Law and Management Processes (2002) at 235.
[174] FRANCESCO FRANCIONI (ED.), ENVIRONMENT, HUMAN RIGHTS & INTERNATIONAL TRADE (Hart Publishing. 2001) at 326.
[175] *Metalclad Corporation v. United Mexican States*, International Center for the Settlement of Investment Disputes (Additional Facility), 30 August 2000, Case No. Arb(AF)/97/1 Award paragraph 97.
[176] *Ibid*., paragraph 98.
[177] *Ibid*., paragraph 111.
[178] *Ibid*., paragraph 111.

NAFTA Article 2101 on general exceptions, in the context of trade in goods and technical barriers to trade,[179] incorporates Article XX of the GATT 1994. Mann et. al explain, "trade restrictive measures that aim at environmental protection can be justified either under GATT Article XX(b) providing for the adoption or enforcement of measures "necessary to protect human, animal or plant life of health" or under Article XX(g) justifying measures "relating to the conservation of exhaustible natural resources", with NAFTA Article 2101 particularly stressing the importance of these two paragraphs.[180] Though the general exception provision in NAFTA Article 2101 does not apply to Chapter 11 (on investment), the study observes references to this general environmental exception in investor-state-disputes.

In the *Methanex v. United States* case for example, the application of the NAFTA Article 2101 exception clause was contested by an *amicus curiae* submission in response to the investor Methanex' approach[181] to Article 2101 relying also on an expert opinion by Dr. Ehlermann,[182] which the U.S. perceived as irrelevant. IISD's *amicus curiae* submission: opposed the notion that environmental protection is an exception to international law rules; questioned Dr. Ehlermann's "entirely speculative

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[179] SAVERIO DI BENEDETTO, EDWARD ELGAR INTERNATIONAL INVESTMENT LAW AND THE ENVIRONMENT (Edward Elgar. 2013). In footnote 116 the author notes in regards to NAFTA Article 2101(1): Furthermore, trade in services is likewise excluded from the incorporation of Article XX and for this matter is provided, by the next Paragraph, an autonomous exception which is modeled on the schema of Article XX, but employs a formula similar to the ambiguous one set forth in Article 1114. 'Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on trade between the Parties, nothing [in Parts and Chapters regarding services] shall be construed to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations *that are not inconsistent with the provisions of this Agreement'* (emphasis added). This differentiation seems to confirm the doubts on the effectiveness of Article 1114 as an exception in favor of environmental measures.

[180] Howard Mann, Gary Horlick and Christiane Schuchhardt NAFTA Provisions and the Electricity Sector (2002) at 13.

[181] Noting that that there is no provision in Chapter 11 explicitly permitting environmental exceptions to the national treatment obligation, and referring to NAFTA Article 2101 which specifically incorporates Article XX GATT, Methanex claimed that GATT and WTO case law would place the burden on the U.S. regarding the validity of an environmental measure that denies national treatment. Methanex claimed that the U.S. must satisfy four criteria: it must show that the measures adopted (i) are necessary to fulfill the environmental objective, i.e. necessary to protect the environment of California, (ii) are proportionate, (iii) are the least restrictive of foreign investment, and (iv) do not constitute a disguised restriction on foreign investments. On the facts presented, it claimed that none of these criteria were satisfied. See: *Methanex Corporation v. United States of America* Final Award of the Tribunal on Jurisdiction and Merits, Parties IV, Chapter B, p.4 Paragraph 9.

[182] Dr. Ehlermann discusses the WTO exception clause "Article XX [with a] focus on the possible relevance of protectionist intent in a regulation that would perhaps otherwise be justified as an environmental regulation" (Paragraph 5). He draws attention to several WTO cases and highlights "the fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX" (Paragraph 104), citing the WTO Appellate Body Report U.S. - Standards for Reformulated and Conventional Gasoline, DSR 1996:1. See: *Methanex v. United States of America*, Opinion of Prof Claus-Dieter Ehlermann, November 4, 2002, p. 21.

assessment of how trade law might approach the present arbitration;" and stressed, as noted above that the clear absence of an [environmental] exception provision and approach for Chapter 11 imposes upon the tribunal the need to understand differently how the right to regulate ought to be addressed in the context of Chapter 11.[183] Specifically, the submission opposed the effort by the investor Methanex, (which noted Chapter 11 contains no exception provision but then carried on as if there were) to impose limitations surrounding exception provisions in GATT and NAFTA (trade related) to Chapter 11 (investment related).[184]

The submission further explicated the schema of how WTO Agreements or the relevant trade-related portions of NAFTA relate to environmental law-making;[185] stressed that only states can prosecute cases for obligations pertaining to trade under the WTO and NAFTA dispute settlement mechanisms;[186] and contrasted this relationship to be different to "the relationship between foreign investors from within NAFTA countries and the NAFTA host state". The submission stressed "no basis for reading any rules for regulations into Chapter 11 as obligations subject to litigation by foreign investors under Chapter 11," which notably "contains no exception provision".[187] Though the tribunal did not directly elaborate on the

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[183] *Methanex v. United States of America, Amicus Curiae* submission by IISD, March 9, 2004, Paragraph 23
[184] *Ibid*., Paragraph 18-24.
[185] Ibid., Paragraph 19. IISD's *Amicus Curiae* submission describes:
a. First, an environmental measure will be tested to see if in the process of making that regulation or in its application one or another constraint or prohibition under the agreements is breached.
b. In this regard, trade law sets out a variety of rules on non-discrimination between "like products", science-based risk assessment, risk management and proportionality, the application of the precautionary principle, and others.
c. Each of these different obligations is set out, in the case of the WTO, in the GATT, 1994, the Agreement on Technical Barriers to Trade, the Agreement on Sanitary and Phytosanitary Measures, and to a lesser extent the General Agreement on Trade in Services. In the NAFTA, these rules come from Chapter 3 (National Treatment and Market Access for Goods), Chapter 7 (Agriculture and Sanitary and Phytosanitary Measures), Chapter 9 (Standards-Related Measures) and again to a lesser extent, Chapter 12 (Cross-Border Trade in Services).
d. The complaining state has the burden of proof to show that a measure taken for whatever reason, including to protect the environment, breaches one of the applicable rules. It would be incorrect to characterize trade law as requiring the justification of measures to protect the environment by the state taking the measure before the complaining party has established a breach of these rules.
e. Only when a breach of any of the relevant rules is established do the NAFTA Chapters cited above and the provisions of the WTO Agreements become subject to the rules of the environmental exception cited by Methanex and the United States. These are Article XX of the GATT, 1994 and Article 2101 of the NAFTA, both of which establish additional rights of states to take measures that are otherwise inconsistent with the basic rules and obligations. As a defense by way of additional authority to breach the generally applicable rules in certain circumstances, the burden of proof does shift to the state defending a measure to show that the conditions included in the articulation of the exceptions, designed to ensure that they are not abused, are met. ; see also, Gabrielle Marceau and Joel Trachtman, A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade, 36 JOURNAL OF WORLD TRADE (2003) at 81.
[186] *Methanex v. United States of America, Amicus Curiae* submission by IISD, March 9, 2004, Paragraph 20.
[187] *Ibid*., Paragraph 21.

applicability of Article 2101,[188] the tribunal described as "carefully reasoned" the *amicus curiae* submission, which disagreed with Methanex's contention that "trade law approaches can simply be transferred to investment law".[189] Specifically and relevant with regards to the burden of proof situation in the case, the submission emphasized,[190] that since "there is no exception in Chapter 11, […] there is no basis for apportioning to the host state the proof of legitimate intent unless and until claimant has made sufficient case of impermissible intent".[191]

3.3.3.2 Environmental exceptions/defenses at level 2 horizontal integration: The following examples illustrate references to environmental exceptions at a level 2 horizontal integration that were made in the studied cases.

The police powers doctrine was referred to in many cases and by various participants, including for example by the tribunal in the S.D. Myers v. Canada case. The tribunal applied the police powers doctrine in the context of determining that the challenged measure was not "tantamount to expropriation" as claimed. Specifically, the tribunal stated[192] that: the issue be interpreted in light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases; international law makes it appropriate for tribunals to examine the purpose and effect of governmental measures; the general body of precedent usually does not treat regulatory action as amounting to expropriation; regulatory conduct by public authorities is unlikely to be the subject of legitimate complaint under NAFTA Article 1110 on expropriation, although the tribunal does not rule out that possibility; expropriations tend to involve the deprivation of ownership rights - regulations a lesser interference; and the distinction between expropriation and regulation screens out most potential cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs.[193] Moreover, the tribunal also

[188] However, the tribunal, arguably reasoned in a similar line, that "the intent of the drafters to create distinct regimes for trade and investment" when it discusses differences in terminology of 'like goods' and 'like circumstances' used in different chapters of NAFTA. See: *Methanex v. United States of America* Final Award of the Tribunal on Jurisdiction and Merits, Parties IV, Chapter B, p.12 Paragraph 29-38.
[189] See: *Methanex v. United States of America* Final Award of the Tribunal on Jurisdiction and Merits, Parties IV, Chapter B, p.12 Paragraph 27.
[190] The submission responded here to Methanex's argument that when a government decision is motivated by a variety of factors, proof of an illicit intent will invalidate the decision even if the actor also had (or might have had) a permissible motive for doing the same act," See: *Methanex v. United States of America, Amicus Curiae* submission by IISD, March 9, 2004, Paragraph 62.
[191] *Ibid*., Paragraph 64.
[192] *S. D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paras 280-282.
[193] *Ibid.*

confirmed the idea that "once applied, the police powers doctrine excludes liability".[194] Finding that the closure of the border was temporary, had the effect of eliminating the investors' competitive advantage and delaying an opportunity, the tribunal concluded that "this may be significant in assessing the compensation to be awarded in relation to Canada's breach of NAFTA Articles 1102 (on national treatment) and 1105 (on fair and equitable treatment), but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of NAFTA Article 1110".[195]

The margin of appreciation principle was referenced several times in the *Glamis v. United States of America* case. The U.S. referenced this principle in several instances. In response to Glamis' claim that the U.S. denied it fair and equitable treatment (FET) and thus violated NAFTA Article 1105 in terms of a failure to maintain a legal and business environment free from arbitrariness, the U.S. highlighted state's regulatory powers and the principle of marginal appreciation. The U.S. noted, *inter alia*: "no Chapter 11 tribunal has found that decision-making that appears 'arbitrary' to some parties is sufficient to constitute an Article 1105 violation; instead these tribunals have consistently accorded a high level of deference to administrative decision-making; imperfect legislation or regulation, however, does not give rise to state responsibility under customary international law; under international law, every state is free to 'change its regulatory policy,' and every state 'has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct;' the issue is not the legislature's motivation, but only whether the measure is rationally related to a legitimate governmental purpose; and U.S. and Canadian courts acknowledge 'the scope of review is narrow and a court is not to substitute its judgment for that of the agency.'"[196] The tribunal rejected[197] the principle as defense in the assessment of the scope of the minimum standard of treatment of aliens established by customary international law "by reference to which the FET standard of Article 1105(1) is to be understood".[198]

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[194] E. JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) at 381.
[195] *S. D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), paras 284-287.
[196] *Glamis Gold Ltd. V. USA*; ad hoc Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009) paragraphs 589-97.
[197] The tribunal rejected the application of the margin of appreciation defense argument made by the U.S. in the context of assessing the minimum standard of treatment as the tribunal disagreed "that domestic deference in national court systems is necessarily applicable to international tribunals". The tribunal explained its view by finding "the standard of deference to already be present in the standard [minimum standard of treatment] as stated, rather than being additive to that standard. The idea of deference is found in the modifiers "manifest" and "gross" that make this standard a stringent one; it is found in the idea that a breach requires something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning". *Ibid*., paragraph 617.
[198] *Ibid*., paragraph 619.

The U.S. raised the margin of appreciation principle again in the context of the process of the cultural review,[199] by pointing to "the substantial expertise of the federal and state agencies involved on the question of the impact on cultural resources and argued that review of these determinations is not the proper role of a domestic court or an international tribunal".[200] In this context, the tribunal accepted[201] the principle as relevant and applicable to the case and included it in its interpretation. The Friends of the Earth *amicus curiae* submission also referred indirectly to the margin of appreciation principle in this context.[202]

The U.S. also raised the margin of appreciation principle by stressing that "the U.S. government has an obligation to consult with Native Americans," and "claimant's participation" in the cultural review process".[203] Some authors have noted similar notions in case-law of the European Court of Human Rights when interpreting specific treaty provisions "in light of state's margin of appreciation in striking a balance among different interests," including "state's obligation to ensure the respect of rights by third parties, individuals and minorities".[204]

The *amicus curiae* submission by the Sierra Club and Earthworks also called for consideration of the margin of appreciation principle arguing, "the minimum standard of treatment required by NAFTA

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[199] The U.S. argued the process was "fully transparent and could not have upset investors legitimate expectations" *Ibid*., paragraph 665.
[200] *Glamis Gold Ltd. V. USA*; *ad hoc* Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009), paragraph 664.
[201] The tribunal stated: "it is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency. Indeed, our only task is to decide whether Claimant has adequately proven that the agency's review and conclusions exhibit a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons so as to rise to the level of a breach of the customary international law standard embedded in Article 1105". *Ibid*., paragraph 779. The tribunal found that the professionals employed to provide advice to the regulatory agencies as "qualified for the task and they provided substantial evidentiary support for their conclusions," and therefore held "that the 'novel' use of [the Area of Traditional Cultural Concern] ATCC does not breach Respondent's obligations pursuant to the customary international law minimum standard of treatment" *Ibid*., paragraph 783.
[202] The submission reads: "In the event the Tribunal considers the application of the minimum treatment standard in Article 1105, the Tribunal should not engage in a de novo review of the merits of the environmental and cultural preservation objectives pursued by the United States and California and instead should consider whether Claimant has been accorded fair and equitable treatment given these environmental and cultural preservation objectives". See Submission by Friends of the Earth, September 30, 2005, conclusion paragraph c, page 19.
[203] *Glamis Gold Ltd. V. USA; ad hoc* Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009) paragraph 672-676. Furthermore, the U.S. explained "that there is no doubt that the Quechan would prefer a complete ban on mining in sensitive areas, while Claimant would have liked to mine without incurring additional reclamation expenses, and the legislature compromised between the two. According to Respondent, "that some resources will be damaged, notwithstanding compliance with the legislation does not make the legislation arbitrary. It may not be perfect, but it certainly was not irrational or arbitrary ...". (See *Glamis Gold Ltd. V. USA; ad hoc* Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009) paragraph 726).
[204] E. JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) at 243-4.

Article 1105, extends considerable deference to governments in matters of domestic law and policy".[205] The submission argued that "U.S. mining law subjects all mining claimants to the government's substantial regulatory power"; and "has long recognized the authority of states to impose environmental conditions on mining claims that exceed federal standards"; as well as that "all mining claimants operate within this valid – if often uncertain – regulatory climate".[206] The tribunal echoed this argument.[207]

The principle of subsidiarity was also referenced in the *Glamis v. United States of America* case. The *amicus curiae* submission by the Sierra Club and Earthworks made an indirect reference to this principle, arguing "if state laws or regulations conflict with [the Bureau of Land Management regulations] regarding operations on public lands, [the mine operator] must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart".[208] The tribunal did not address this environmental defense.

The international and/or transnational public policy defense was also referenced in the *Glamis v. United States of America* case. The Quechan Indian Nation submission called for applying the international public policy defense by identifying "norms requiring States to safeguard the rights and interests of indigenous peoples in their governmental conduct [as] form[ing] a part of the ordre publique".[209] The tribunal did not decide on the relevance or applicability of this defense.

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[205] *Glamis Gold Ltd. V. USA* Submission by Sierra Club and Earthworks, October 16, 2006, paragraphs 9 and 10.
[206] *Ibid*., paragraph 11. The submission refers to several domestic court rulings that noted in some way or other that "virtually all forms of ... regulation of mining claims — for instance, limiting permissible methods of mining and prospecting in order to reduce incidental environmental damage — will result in increased operating costs, and thereby will affect claim validity". See: *Ibid*., paragraph 15.
[207] The Tribunal emphasized that Glamis "was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining" and that "the federal government did not make specific commitments to induce Glamis to persevere with its mining claims", thereby finding no "quasi-contractual inducement that the Tribunal has found is a prerequisite for consideration of a breach of Article 1105(1) based upon repudiated investor expectations" (*Glamis Gold Ltd. V. USA*; *ad hoc* Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009), paragraph 767). Compare this also to the AC submission by the Sierra Club and Earthworks, which called on the tribunal to consider: "Glamis' development of its mining interests took place in the context of a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate, continuously monitored the use and Impact of [mining operations] and commonly prohibited or restricted [certain mining practices] for environmental and/or health reasons..., [T]he process of regulation [of mining practices] in the United States involved wide participation of industry groups. non-governmental organizations, academics and other individuals, many of these actors deploying lobbyists"(*Glamis Gold Ltd. V. USA* Submission by Sierra Club and Earthworks, October 16, 2006, paragraph 43).
[208] *Ibid*., paragraph 24.
[209] The submission reads: "NAFTA Article 1136(6) provides for enforcement of a NAFTA/UNCITRAL award under the New York Convention or the Inter-American Convention, both of which recognize the concept of international public policy. As fundamental expressions of international custom, principles and conventions, norms requiring States to safeguard the rights and interests of indigenous peoples in their governmental conduct form a part of the ordre publique. Any award that requires a State to pay compensation for conduct that would be violated of international norms protecting indigenous peoples and their sacred lands could violate international public policy in so doing". The submission further reads: "It is essential that this Tribunal take into account the ways in which the

The above examples illustrate the study's observed references to environmental exceptions or defenses in their variety, including who made the reference and whether and how the references were considered by the tribunal.

3.4 CONCLUDING REMARKS ON THE HORIZONTAL INTEGRATION INDICATOR

The goal of this scientific inquiry is not to prove my hypothesis but rather to test, by observing any patterns in the universe of arbitration cases in which an environmental policy was challenged, whether horizontal integration – as a whole, in a specific combination, and to what extent in relation to other factors –may correlate to dispute outcomes. The above explained the measurements of horizontal integration are summarized in Figure 3.4 below.

The discussion also foretells how the study further gains an understanding into what possible factors other than the applied measurements may matter in the determination of a case outcome. These other factors, which address reasons for rejection of the references as defense of the challenged environmental policy in cases, are included in the conclusion of the study aiming at providing guidance for various stakeholders. One apparent example of such a factor is any state action violating the norm of good faith. In other words: where an environmental policy was developed in gravely unjust or corrupt manner that environmental policy is expected to be found impermissible in a case's ruling.

Concluding this chapter, recall the threefold reason for observing horizontal integration. First, the expectation is that cases in which horizontal integration is observed should correlate positively with environmental policy permissible outcomes unless where the policy was developed in gravely unjust or corrupt manner. This is because determining an environmental policy alleged to have violated economic rights articulated in the applicable economic treaty as permissible, should be more likely when environmental consideration that states have articulated within or external to that treaty are taking into account. This is qualified when a state acts in violation of good faith, in which case the policy should be determined impermissible.

Respondent was indeed obliged under international law to safeguard the rights and interests of the Quechan Indian Nation people, both in conducting a review of Glamis' Imperial Proposal and in regulating preconditions subject to such approval, at both the federal and state levels". See: *Glamis Gold Ltd. V. USA* Second submission by Quechan Indian Nation, 16 October 2006, pages 8-9.

Second, aiming at finding answers to what matters for dispute outcomes, the observation of horizontal integration probes several possibilities. These possible observations provide deeper insights besides confirming the above two propositions: 1) that horizontal integration matters if a positive correlation is observed between environmental policy permissible case outcomes and observed horizontal integration in these cases, however, 2) not in cases where a state's exercise of good faith condition is not met.

Additional possible observations looked for in the study include:

- Horizontal integration matters only if specific or if all of the indicators' measurements are accepted and found applicable to the case by the tribunal;

  For example, horizontal integration may matter more often in cases in which level 1 horizontal integration is observed than in cases in which level 2 horizontal integration is observed or *vis versa*;
- Horizontal integration matters only if a specific interpretation technique is employed by the tribunal;
- Horizontal integration matters/occurs more often when transparency and public representation and participation indicators are observed; and/or
- Horizontal integration matters only if other factors are given, for example, when specific policy implementation requirements have been met.

Third, observing the horizontal integration indicator in the studied cases provides

useful insights captured in the guidance to policy makers and *amicus curiae* applicants that are developed as a result of this study.

Measures of the Horizontal Integration (HI) Indicator	Level 1 HI Within economic treaty text	Level 2 HI External to economic treaty text
Reference made to sustainable development	For example: Referenced to sustainable development as aspirational goal in preamble	For example: Reference to sustainable development concept as international policy objective
Reference made to an MEA	For example: - NAFTA Article 104 on Relation to Environmental and Conservation Agreements; and its - NAFTA Annex 104.1 on Bilateral and Other Environmental and Conservation Agreements	For example: Reference to an MEA obligation in existing or evolving MEA
Reference made to An environmental exception or defense	For example: - NAFTA Article 1106(6) on environmental exception to prohibition of performance requirements (specific) - NAFTA Article 1114 on environmental measures; and - NAFTA Article 2101 on general exceptions (general necessity)	For example: - Police powers doctrine - Principle of margin of appreciation - Principle of subsidiarity - International and/or transnational public policy defense

Figure 3.4: Overview of the Horizontal Integration (HI) Indicator

4.0 TRANSPARENCY

"Adequate transparency where human rights and other state responsibilities are concerned is essential if publics are to be aware of proceedings that may affect public interest. Such transparency lies at the very foundation of what the UN and other authoritative entities have been promulgating as the percepts of good governance".

UN Special Representative to the Secretary General on Business and Human Rights, John Ruggie, Statement during the UNCITRAL Working Group on International Arbitration Session of February 2008.

This chapter explicates transparency as indicator as well as its measurements in this study. It follows from:

Hypothesis 2: Transparency increases the prospect of environmentally permissible dispute outcomes.

Independent Variable 2: Transparency in international economic law disputes

4.1 DEFINITION AND RATIONALE FOR TRANSPARENCY AS INDICATOR

Transparency in international trade and investment law "could be defined negatively and refer to a (full or partial) absence of confidentiality,"[210] suggest Euler, Gehring and Scherer. Reflecting on the above quoted intervention by John Ruggie and on confidentiality, Howard Mann reportedly stated that: "he understood human rights in the broader sense including political, civil, economic, social and cultural rights; confidentiality of treaty-based investor-state arbitration collided with human rights; and

[210] MARKUS GEHRING AND MAXI SCHERER (EDS.) AND MEAGAN WONG AND REBECCA HADGETT (OTHERS) DIMITRIJ EULER, TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION -- A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, (Cambridge University Press. 2015) at 5.

confidentiality prevented civil society from scrutinizing their democratically elected government, or from reacting in the form of democratic debates on the issues raised in the arbitral procedures".[211]

Though these authors use the term 'transparency' more broadly,[212] in the context of this study, I define transparency more narrowly as the possibility for any interested person to access information about an international public economic law dispute that may have implications for environmental policy, as in a case where an environmental policy measure is challenged. Specifically this means –and is observed as – public access to: information that a dispute commenced; documents presented during the course of dispute proceedings; and final decision, including reasoning by a given tribunal.

The nature of the "access" to information is also relevant, that is information has to be actually accessible, as captured with humor in this excerpt of Douglas Adams, The Hitchhiker's Guide to the Galaxy:

> "*But the plans were on display…"*
>
> "*On display? I eventually had to go down to the cellar to find them".*
>
> "*That's the display department".*
>
> "*With a flashlight".*
>
> "*Ah, well, the lights had probably gone".*
>
> "*So had the stairs".*
>
> "*But look, you found the notice, didn't you?"*
>
> "*Yes," said Arthur, "yes I did. It was on display in the bottom of a locked filing cabinet stuck in a disused lavatory with a sign on the door saying 'Beware of the Leopard".*[213]

The quality of access to information is affected by the distribution channel, the language used in the presentation of the information and timelines of availability. In this study, presence of public notice of commencement of proceedings has been observed in various ways, including online media releases or public notification, such as on the website of the ICSID Secretariat. An observation of access required at least publication in English, although the study also observed documents that were only published in other languages, including Spanish or German. Collecting data of the dates of disclosure was not possible in most cases, as further explained below.

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[211] *Ibid.*, at 20.

[212] Euler, Gehring and Scherer use the term "as an umbrella term" that includes access to the hearings, as well as involvement of third parties in the conduct of proceedings. In contrast, this study differentiates an indicator of transparency from an indicator of public representation and participation.

[213] This dialogue takes place in the first chapter scene when council workmen arrive at Arthur Dent's house with bulldozers about to demolish his house in order to build a bypass. DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY (Pan Books. 1979).

The underlying rationale for an indicator of transparency lies in the expectation that cases in which transparency is observed should correlate positively with environmental policy permissible outcomes. Transparency is expected to enable the widening of the scope of considerations taken by the tribunal, including public considerations of environmental protection, public health, consumer protection and preferences. The determination of an environmental policy as permissible even when that policy is alleged to have violated economic rights articulated in the applicable economic treaty, should be more likely when public considerations are taking into account.

This expectation is based on the following assumptions related to each measure of transparency (i.e. information about the existence of a case in which an environmental policy is challenged, information about the arguments made by parties, and information on the reasoning for a ruling and the final award itself).

First, public awareness of the existence of such a case can translate into public scrutiny or a "watching out" for public considerations being included in the case in general, its proceedings and subsequent reasoning and ruling. Second, public participation and representation, through the submission of *amici curiae* for example, could be dependent on –or could be strengthened by – access to information about a present case – and opinions, reasoning for and rulings of previous cases. Third, awareness that the tribunals' reasoning for a ruling in a case may undergo public scrutiny and be used use in future cases, as well as the tribunal's own access to publically available information of previous cases increases the prospect of an evolution towards horizontal integration, as perhaps initially marginal, or dissenting opinions can be considered, referred to and repeated. Related here to the outlook of harmonization in international public law, is the assumption that transparency serves the aim towards achieving greater coherency and consistency of interpretations and rulings. This in turn provides the benefits of addressing concerns of illegitimacy and increasing predictability, and in turn avoiding "regulatory chill" situations.

Finally, and also further explicated below, is the assumption that transparency prevents information imbalance among actors, relevant to the dynamics of norm contestation

These assumptions suggest interlinkages among the indicators of this study (i.e. public participation and representation, and horizontal integration) and are in line with the theoretical frameworks of this study, with particular relevance to the dynamics of norm contestation and of power negotiations respectively. Issues around observing these assumptions' validity in the real world and the measurements themselves, are discussed below.

An essential precondition for any use of transparency by the public is of course information about the existence of a dispute. This effected also this study, as its aim to investigate the universe of international investment law arbitrations in which environmental policies have been challenged had to be qualified as aspirational. For cases brought under UN Commission on International Trade Law

(UNCITRAL) Arbitration Rules (1976),[214] "it is impossible for the public [and for the author of this study][215] to know even that an arbitration [had been] filed, what [was] at issue in an arbitration, what written and oral arguments [were] being advanced in a dispute, what the arbitrators' jurisdictional procedural rulings [were], and what the ultimate decision [was]".[216] These limitations are based on UNCITRAL Arbitration Rules (1976) Articles 3 (on Access to the notice of arbitration), 15 (on Access to materials during the proceedings), and 32(5) (on Access to awards), (which are discussed below under the respective measurements of my indicator of transparency). Even though a revision of these rules, "the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration"[217] and the "UN Convention on Transparency in Treaty-based Investor-State Arbitration"[218] have recently been adopted, the new Rules will not be applied retroactively and even going forward, "for existing Investment Protection Agreements concluded before 1 April 2014, the [new] Rules will only apply if either the disputing parties (i.e. the parties to the arbitration) or the treaty parties (i.e. the parties to the investment treaty) agree to the application of the Rules following their coming into force".[219] Yet this study includes, next to UNCITRAL cases for which information is available, dispute cases in which an environmental policy was challenged that were brought under the World Bank's International Centre for Settlement of Investment Disputes (ICSID). The ICSID, at a minimum, publishes information on the registration of requests for arbitration on its website.[220] And ICSID, as a forum for such cases, "accounts for the largest share of known proceedings—roughly 60%—and also has the longest history, nearing its half-centennial".[221]

Regarding my first measurement of transparency or case characteristic and assumption, one authors notes:

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[214] UNCITRAL Arbitration Rules 19 (1976) (Adopted by the UN General Assembly RESOLUTION 31/98 on December 15, 1976), available at: https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

[215] The author of this study made several attempts to access the UNCITRAL archives in Vienna, all of which were fruitless.

[216] CIEL and IISD, Revising the UNCITRAL Arbitration Rules to Address State Arbitrations, (February 2007), at 4, available at: www.iisd.org/pdf/2007/investment_revising_uncitral_arbitration.pdf

[217] UNCITRAL, 46th session (July 8-26, 2013), A/CN.9/XLVI/CRP.3 (July 9, 2013).

[218] UN Convention on Transparency in Treaty-based Investor-State Arbitration (Adopted by the UN General Assembly RESOLUTION 69/116 on December 10, 2014), available at: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last accessed 9/1/2016).

[219] Nadakavukaren Schefer, Article 1. Scope of Application, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION – A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION, (Dimitrij Euler, Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) (2015) at 52.

[220] ICSID Convention Arbitration, Confidentiality and Transparency, Rules Applicable to the ICSID Secretariat, (Administrative and Financial Regulations 22(1) (on publication), available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partC-chap04.htm#r22

[221] Emilie M. Hafner-Burton and David G. Victor:, Secrecy in International Investment Arbitration: An Empirical Analysis, 7 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2016) at 164.

"The publication of information related to the proceedings allows the population of the defendant State, other States, NGOs and the wider public to become aware of the existence of the dispute. This is the necessary prerequisite for them to exercise the rights that the Rules bestow upon them, such as filing submissions or attending public hearings. Furthermore, this early publication will put the proceedings under the spotlight, so that individuals and organisations outside of the dispute can be watchful as to the compliance with the Rules".[222]

Thus, the first measure of transparency provides for the possibility of public debate and of public lookout and scrutiny on how a tribunal will decide – or retrospectively has decided – a case. This in turn may influence a tribunal so to carefully take into account public concerns as "the world" is watching, calling for or awaiting clarification of issues presented in a given case. Such 'influence' may be felt by members of a tribunal enjoying their 'vocation' who in turn may be inclined to agree with the view of one author emphasizing: "Judicial decisions—provided they are justified convincingly, transparently, with due regard to all interests affected, and in language that remains comprehensible for ordinary citizens (e.g. avoiding reports with more than 1000 pages of legal findings)—are essential for protecting constitutional rights of citizens and transnational rule of law vis-à-vis the ubiquity of abuses of power in international economic law".[223]

However, while this study suspects a positive relation between transparency and environmental policy permissible outcomes, variation is expected on how a tribunal 'carefully' considers such issues. A tribunal may likewise be reluctant to make statements on controversial issues despite or because of a high level of public anticipation. The tribunal in *Glamis v. United States of America* for example stated in its introductory remarks:

"The Tribunal is aware that the decision in this proceeding has been awaited by private and public entities concerned with environmental regulation, the interests of indigenous peoples, and the tension sometimes seen between private rights in property and the need of the State to regulate the use of property. These issues were extensively argued in this case and considered by the Tribunal. However, given the Tribunal's holdings, the Tribunal is not required to decide many of the most controversial issues raised in this proceeding. The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree

[222] Giuseppe Bianco, Article 2. Publication of information at the commencement of arbitral proceedings, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION – A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Dimitrij Euler, Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) 2015) at 89.
[223] Ernst-Ulrich Petersmann, The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication, 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2013) at 28.

with this tendency; it believes that its case- specific mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented"[224]

Second, just as it is difficult to determine the precise influence of public representation and participation on considerations of the tribunal, it is difficult to exactly determine such influence of the transparency indicator in this study. However even where tribunals do not refer specifically to *amicus curiae* submissions, or even outright state they did not address their arguments, one can recognize parallels in a tribunal's reasoning and the arguments presented in the *amicus curiae* submissions. Likewise, and relevant to transparency, one can recognize reference in such submissions to memorials given during the case proceedings which indicates the use of transparency in informing the submissions.

For example, one *amicus curiae* submission in *Glamis v. United States of America* includes a reference to the memorials by the disputing parties in the case. In addition, one can recognize parallels in the tribunals' reasoning and the arguments presented in the submission, which reads:

"The threshold inquiry in analyzing whether a government action constitutes an expropriation is whether the claimant has established that it holds a compensable property interest. Once this property interest has been established, determination of whether an expropriation in violation of international law occurred is made through a factual inquiry into the circumstances of a particular case, which involves considering: (1) the economic effect of the action on the claimant's property; (2) the extent to which the government action interferes with the claimant' s reasonable investment-backed expectations; and (3) the character of the government action. (See Glamis Memorial at 234; US. Counter Memorial at 108.)".[225]

Compare this *amicus curiae* statement, which leans on memorials, with the tribunal's reasoning on the expropriation claim, in which the tribunal held that claimants claim under NAFTA Article 1110 failed because the "first factor in any expropriation analysis is not met: the complained of measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Claimant's investment".[226]

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[224] See: *Glamis Gold Ltd. v. USA; ad hoc* Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, paragraph 8.
[225] See: *Glamis Gold Ltd. v. USA*; *ad hoc* Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, Submission by Sierra Club and Earthworks, October 16, 2006, paragraph 30.
[226] See: *Glamis Gold Ltd. v. USA; ad hoc* Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, paragraphs 14 and specifically paragraphs 534-536.

Even though the tribunal in this case decided to confine its decision to the issues presented, noting that it did not reach the particular issues addressed by the *amicus curiae* submissions,[227] this example illustrates the fact that presence of transparency indicator may aid arguments in *amicus curiae* submissions, either by founding arguments on or adding to submissions made by parties. In the same case, a different *amicus curiae* submission based its arguments on –and added to – what it felt parties ignored to address in their memorials, such as the corporate social responsibility[228] concept referred to in the *amicus curiae* by the Quechan Indian Nation.

Third transparency is a means to achieving coherency and consistency in the context of dispute rulings or arbitration decisions carries the benefit of reducing uncertainty for regulators, investors, and public interest groups. "The ECJ's case-law on the inconsistency of EU Member States' BITs with EU law, and on the lack of standing of arbitral tribunals for requesting preliminary rulings from the ECJ," for example, "is influenced by this lack of transparency of investment arbitration and the fear that arbitrators may neglect or incorrectly apply EU law as relevant context for the settlement of commercial and investment disputes".[229] In this context I also assume a potential interaction between transparency and horizontal integration[230] because transparency allows in practice for the reference to rulings of – or a reasoning or opinion in— previous cases, which can enhance the evolution towards greater horizontal integration, even though under the current dispute settlement processes, tribunals are not obliged to –and as some argue should not – follow precedent, often delivering awards that seem to be at odds with previous decisions.[231] Some authors have suggested that "transparency (particularly the regular publication of investment awards) may indirectly help promote confidence in the system by helping to create a regime of quasi-precedent in which tribunals are able to turn vague but common treaty terms into "workable concepts" or relatively uniform meaning and application, which would make arbitration more predictable and hence more legitimate".[232]

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[227] See: *Glamis Gold Ltd. v. USA; ad hoc* Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, paragraph 8. The Tribunal stressed its awareness that its decision has been awaited by those concerned with environmental regulation, the interests of indigenous peoples and the tension sometimes seen between private property rights and state regulation.

[228] Peter Muchlinski, Corporate Social Responsibility", in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Federico Ortino, Peter Muchlinski, and Christoph Schreuer eds. 2008) at 637-88.

[229] Ernst-Ulrich Petersmann, The Judicial Task of Administering Justice in Trade and Investment Law and Adjudication, 4 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2013) at 24.

[230] And possibly vertical integration between international and supranational or domestic law, such as suggested by the ECJ's case-law on the inconsistency of EU Member States' BITs with EU law.

[231] Nathalie Bernasconi-Osterwalder and Lise Johnson, Investment Treaties & Why they matter to sustainable development (International Institute for Sustainable Development 2012) at 18.

[232] Jarrod Wong and Jason Yackee, The 2006 Procedural and Transparency-related amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW 2009-2010 (Karl P. Sauvant ed. 2010) at 252.

This is important to the theoretical framework of "norm cascade"[233] put forth by Finnemore and Sikkink (1998),[234] who "argue that norms evolve in a patterned life cycle," as "norms are shared assessments" deriving through an "agreement process". The authors show "how agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread". However, norm creation may well be hindered when some actors are excluded from this process, which includes "an extensive trail of communication" for example "prompting justification for action".[235] From the above one can recognize an inter-linkage between transparency and horizontal integration, because inconsistent decisions, while illustrating ongoing norm contestation, can also stand in the way of norm creation and prevent progress in international horizontal integration.

Fourth, transparency may play a role in securing against 'information imbalance,[236] which can disadvantage some stakeholders.[237] In line with the MCO model by Raymond C. Miller, information imbalances caused by a lack of transparency may translate into power imbalances among different stakeholders. For example, with "no requirement for an investor to publicly signal their intention to launch a dispute,"[238] public interest groups, such as NGOs, are at a disadvantage to prepare their position.[239] In this respect, Wong and Yackee note: "greater transparency (for example, notice of a pending dispute) may help domestic groups to mobilize in order to pressure state-respondents to present the 'best' arguments".[240] But as illustrated in the above cited excerpt of Douglas Adams radio comedy, information has to be actually accessible to domestic interest groups, in order for this to happen. Similarly, some authors have noted how lack of transparency may also upset the balance between the national and lower levels of government within a country. "As a consequence of the limited access to dispute proceedings, state/provincial and local authorities," who have a strong role in regulating public

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[233] Held and McGrew talk of the emergence of global norms and behavioral standards enshrined in international institutions. A 'norm cascade' in many issue-areas of international politics, "refers to the tipping point where international norms become global standards of appropriate behavior". DAVID HELD, ANTHONY G. MCGREW, GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES (Polity Press. 2007) at 133-134.
[234] Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 887-917.
[235] *Ibid.*, pp. 888 and 892-3 respectively.
[236] A. Cosbey, H. Mann, et al., Investment and Sustainable Development - A Guide to the Use and Potential of International Investment Agreements Investment and Sustainable Development (2004) at 7.
[237] Ibid., and Kyla Tienhaara, What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries, 6 GLOBAL ENVIRONMENTAL POLITICS (2006) at 76.
[238] *Ibid.*
[239] Wong and Yackee observe: "despite the intensity of NGO calls for greater participatory rights in NAFTA Chapter 11 proceedings, it appears that non-parties have asked to submit amicus briefs in only five cases. We are not aware of any instance in which a Chapter 11 tribunal has refused to grant such a request at the merits stage of a NAFTA chapter 11 dispute". Jarrod Wong and Jason Yackee, The 2006 Procedural and Transparency-related amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW 2009-2010 (Karl P. Sauvant ed. 2010) at 254.
[240] *Ibid.*, at 250.

health and the environment, "are not able to fight their own battles and they may have concerns that the federal government is not accurately representing their interests".[241] Other authors have noted how "transparency, (for example, of government brief) may also help citizens 'sanction' governments that fail to adequately defend themselves".[242]

In contrast to public interest groups which may be disadvantaged by a lack of access to information about an investment dispute, or past disputes, "states or investors with the financial resources to hire major international law firms specializing in this area will enjoy greater entrée to this disparate body of arbitral decisions through the formal and informal links those firms maintain".[243] Their advantage stems from these professional networks and "the likelihood that earlier arbitral decisions will be taken into consideration by subsequent tribunals," yet there are no uniform requirements that such decisions be publicized".[244]

In the context of international investment disputes as well as for other regimes, transparency can play a role in supporting legitimacy, understood as "a belief in the rightfulness of a decision or the system through which authority is exercised," whereby components of legitimacy include, *inter alia* "formal and procedural criteria and social acceptance, influenced by substantive issues".[245] Transparency's role in avoiding public concerns about illegitimacy of an international investment arbitration system has been described as providing a principle mean to hold governments accountable for their decisions and reducing opportunities to abuse a system by, for example powerful investors. In addition, as Gus Van Harten notes:

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[241] Kyla Tienhaara, What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries, 6 GLOBAL ENVIRONMENTAL POLITICS (2006) at 76; citing Sanford Gaines, The Masked Ball of NAFTA Chapter 11: Foreign Investors, Local Environmentalists, Government Officials, and Disguised Motives., in LINKING TRADE, ENVIRONMENT, AND SOCIAL COHESION: NAFTA EXPERIENCES, GLOBAL CHALLENGES (J. and Virginia W. MacLaren John Kirton ed. 2002).

[242] Wong Jarrod and Jason Yackee, The 2006 Procedural and Transparency-related amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW 2009-2010 (Karl P. Sauvant ed. 2010) at 252.

[243] A. Cosbey, H. Mann, et al., Investment and Sustainable Development - A Guide to the Use and Potential of International Investment Agreements Investment and Sustainable Development (2004) at 7.

[244] *Ibid.*, at 6.

[245] Kati Kulovesi, The WTO dispute settlement system and the challenge of environment and legitimacy (2008) London School of Economics and Political Science) at 33 and 35. Kati Kulovesi provides an excellent review of legitimacy theories and analysis of legitimacy among international legal scholars. For example, in her study she categorizes legitimacy theories into three groups: "the first group includes [Max] Weber and other theories that conceive legitimacy as a process, or as 'perceived as adhering to the authority issuing an order as opposed to the qualities of legitimacy that inhere in an order itself"; "the second group regards legitimacy as a mixture of process and substance and includes [Jürgen] Habermas. This understanding of legitimacy 'is interested not only in how a ruler and rule were chosen, but also in whether the rules made, and commands given were considered in light of all relevant data, both objective and attitudinal'"; and "the third group focuses on outcomes and consists primarily of neo-Marxist theories," with arguments that "a system seeking to validate itself must be defensible in terms of equality, fairness, justice and freedom" at 35.

"Public access to information is widely recognized as a fundamental principle of judicial decision-making in domestic and international courts".[246] In the context of 'environmental citizen rights,' the Heinrich Böll Foundation has called for the globalization of the Aarhus Convention, as access to information is a precondition of vigilance, a precondition for citizen influence and for accountability.[247] Tienhaara stresses how the lack of transparency in arbitration and of consistency of tribunal decisions creates uncertainty for regulators, which, "combined with the financial risk involved in proceeding to arbitration, may create situations in which the threat of an investment dispute is sufficient to convince a government to reverse, amend, or fail to enforce an environmental regulation, a phenomenon referred to as regulatory chill".[248] Legitimacy and accountability may thus be undermined, as, without access to information about cases that challenge an environmental policy measure, the public may not understand why a government decided to "reverse, amend or fail to enforce an environmental regulation". A citizen of a democracy may not be aware that such a decision was prompted by either a dispute outcome or by a regulatory chill effect, as several case studies have illustrated.[249]

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[246] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at 159 citing the Convention for the Protection of Human Rights and Fundamental Freedoms (the European convention on Human Rights ECHR) Art. 40 providing that hearings of the court shall take place in public and that documents deposited with the Registry shall be made accessible to the public.

[247] WOLFGANG SACHS, JÖRG HAAS, RITA HOPPE, ERWIN JÜNEMANN; KERSTIN KIPPENHAN AND ANNETTE MAENNEL, THE JO'BURG MEMO. FAIRNESS IN A FRAGILE WORLD (Heinrich Böll Foundation. 2002) at 73.

[248] Kyla Tienhaara, What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries, 6 GLOBAL ENVIRONMENTAL POLITICS (2006).

[249] One positive example can be found in the case of *Compania del Desarrollo de Santa Elena S.A. v. Costa Rica*. From its dispute documents Costa Ricans can see that their government defended its action to expand a national park for the protection of biodiversity, including in its argument even the fact that it "had acted in accordance with its obligations under multilateral environmental agreements". *Ibid*., at 84-85 citing from the Final Award In the Matter of the Arbitration between *Compania del Desarrollo de Santa Elena S.A. and the Republic of Costa Rica*, ICSID Case No. ARB/96/1, 2000 ILM 39 (6), paragraph 72.)
The documentation of the case also informs about the reasons for Costa Rica losing its argument, i.e. for a reduction of the amount claimed and instead for an appropriate compensation. (Tienhaara describes: "There is a longstanding international debate over compensation that generally falls on a North-South divide. Industrialized countries have long advocated the so-called Hull standard as a means to calculate compensation. It states (in its various incarnations) that compensation should be "prompt, adequate and effective". In contrast to this, the appropriate compensation doctrine often favored by developing countries suggests a more complex calculation which factors in other considerations, such as the past practices of the investor, the depletion of natural resources or environmental damage that has occurred as a result of the investment, the economic situation of the country" *Ibid.*, referring here to UNCTAD 2000, Taking of Property. Issues in International Investment Agreements, UNCTAD/ITE/IIT/15. Geneva: United Nations, p. 14.) (Costa Rica argued that setting the amount of compensation too high would discourage developing countries from adopting environmental objectives). The tribunal concluded that: "Expropriatory environmental measures, no matter how laudable and beneficial to society as a whole, are in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains". *Ibid*., citing from the Final Award In the Matter of the Arbitration between *Compania del Desarrollo de Santa Elena S.A. and the Republic of Costa Rica*, ICSID Case No. ARB/96/1, 2000 ILM 39 (6), paragraph 72.)

Transparency about cases that challenge an environmental policy measure not only may increase public awareness and allow NGOs to advocate for the upholding an environmental law, it can also provide a means to safeguard or question the legitimacy of government action. Providing examples from the natural resources sector, Sornarajah finds many foreign investment concession agreements throughout the developing world that were executed in the context of unequal bargaining power, or signed by rulers who did not care as they, being absolute rulers, could utilize the royalties they received for their own benefit. The author notes: "It is an interesting point as to whether international lawyers who promote the norms of democracy would concede that concessions and other foreign investment agreements signed by dictators or unrepresentative governments should be considered invalid. It is possible to argue that the norm of self-determination, now having acquired a near *ius cogens* status would invalidate concession agreements signed by unrepresentative rulers".[250]

For all these reasons: transparency secures against "information imbalance which can disadvantage some stakeholders; transparency can play a role in achieving coherence and consistency in the context of dispute rulings or arbitration decisions, reducing thereby uncertainty for regulators, investors and public interest groups; and transparency can help avoid concerns about illegitimacy, providing a mean to hold governments accountable for their decisions and reducing opportunities to abuse a system – I expect that transparency in economic law and disputes factors into the possibility of dispute outcomes that are environmentally permissible.

Wong and Yackee note in this respect: "Greater transparency may increase the legitimacy of the legal system, by providing the system's most persistent and vocal critics with an opportunity to more directly observe the workings of what supporters of the system view as a fair and reasonable method of dispute settlement. In other words, greater openness may serve an educative role, promoting understanding and acceptance of the system in its current form". Wong Jarrod and Jason Yackee, The 2006 Procedural and Transparency-related amendments to the ICSID Arbitration Rules: Model Intentions, Moderate Proposals, and Modest Returns, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW 2009-2010 (Karl P. Sauvant ed. 2010) at 251.

A different example is provided in Tienhaara's study of an Indonesian case involving a dispute over mining contracts in protected forests, which the author finds to provide evidence supporting the regulatory chill hypothesis. In this case, even though NGOs got actively involved to advocate for environmental protection, the Indonesian government retreated in part from its forest law that prohibited open-cast mining in protection forests. "According to several observers, the government had been 'burned' in previous arbitrations and was not eager to try their luck again". Kyla Tienhaara, What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries, 6 GLOBAL ENVIRONMENTAL POLITICS (2006) at 94.
This case is instructive with respect to legitimacy, as NGOs raised among others the issue that all contracts with mining investors in protected areas "were signed during the period of authoritative government, and the Forestry Law was made under democratic rule". *Ibid*., 89 referring to WALI (Friends of the Earth Indonesia) and JATAM (Mining Advocacy Network) released a press statement on 4 April 2002: "Mining Industry Threatens Indonesia with International Arbitration".

[250] M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (Cambridge University Press. 2004) at 42, Footnote 22

Given these powerful arguments, one may wonder who is resisting transparency, and why? There is also a need for confidentiality. Knahr and Reinisch note that "the confidential nature of arbitration proceedings may contribute to a reduction of tensions between the parties" and is assumed to be appreciated by many firms "because it protects business secrets and may help to protect the public image of companies when even the mere fact of litigation released to the public might cause harm to its reputation".[251] Others have noted, "confidentiality may be precious not only for businesses: for some governments seeking to escape public accountability in relation to investment claims, it may also be convenient".[252] One study of ICSID cases found for example "that the parties to disputes favour less transparent outcomes where strong political pressures lead governments to violate legal norms—such as when disputes involve long-lived capital assets whose ongoing operation requires politically messy deals that neither side would like exposed to public scrutiny".[253]

In *Metalclad v. Mexico*, it was in fact respondent state Mexico that requested, in part resisted by claimant Metalclad, a confidentiality order seeking proceedings be confidential.[254] The tribunal's observations regarding transparency and public disclosure is relevant and insightful:

> "*There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional facility) Rules contain any expressed restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. Indeed, as has been pointed out by the Claimant in its comments, under the US security laws, the Claimant, as a public company traded on a public stock exchange in the US, is under a positive duty to provide certain information about its activities to its shareholders,*

[251] Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration , The Biwater Gauff Compromise, 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2007) at 109.
[252] Nicolas and Wouters Hachez, Jan, International investment dispute settlement in the twenty-first century: does preservation for the public interest require an alternative to the arbitral model?, in INVESTMENT LAW WITHIN INTERNAITOAL LAW (Freya Baetens ed. 2013) at 435.
[253] Emilie M. Hafner-Burton and David G. Victor:, Secrecy in International Investment Arbitration: An Empirical Analysis, 7 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2016) at 161.
[254] See: *Metaclad Corp. v. Mexico*, ICSID (Additional Facility) Case No. ARB(AF)/97/1, Final Award, 2 September 2000, paragraph 13.

especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value".[255]

The tribunal determined: "the above being said, it still appears to the tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conductive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussions of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound".[256] Rules regarding publication of documents under ICSID and ICSID Additional Facility Arbitration are discussed below under the relevant measure of transparency sections.

Another example of a non-corporate interest in confidentiality is illustrated in the *Glamis v. United States* case. In this case, confidentiality mattered to the Quechan Indian Nation, who's designated Native American lands and areas of special cultural concern was located near to Glamis' mining project and the land area concerned in that dispute. In response to a request from the Quechan Council to remain confidential, the tribunal noted "the FTC [the NAFTA Free Trade Commission] stated that 'nothing in the NFATA imposes a general duty of confidentiality and that in fact the FTC explained that each Party agreed to make available to the public all documents submitted in a Chapter 11 dispute – including documents by non-disputing parties – subject to redaction,'" and explained "it was not willing to grant a request to keep the entire report confidential" but would consider requests for sections of the report to be redacted.[257]

4.2 MEASUREMENTS OF TRANSPARENCY

A. Public Notice of Commencement of Proceedings

B. Publication of Final Decision and Award

C. Access to Documents During the Proceedings

Observing in each case the respective measurements of transparency is generally related to: the level of transparency required by the rules governing the dispute; transparency-related provisions in the treaty under which the claim was brought; and applicable domestic statuory laws, including the statuory arbitration law of the seat of the arbitration and domestic statutory laws relating to freedom of information

[255] Ibid., paragraph 13.
[256] See *Glamis Gold Ltd. V. USA*; ad hoc Tribunal; UNICTRAL; NAFTA; [Final] award, paragraph 13.
[257] See: *Glamis Gold Ltd. V. USA*; ad hoc Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, paragraph 282.

(FOI) requests.[258] As I show below, to the extent observed in this study, these requirements differ greatly on general features of the key dimensions of disclosure, identified by Paul Nelson (2001, 2003)[259] as: fullness of disclosure, accessibility of disclosure and timeliness of disclosure.[260] Nelson[261] further identified specific features of these dimensions, noting *inter alia*: 'fullness of disclosure' varies in three important ways; some categories of documents are not released at all; borrowers are given some discretion over the handling of many documents that are subject to disclosure; some documents, are released only in summary form; accessibility of disclosure varies by the sites at which documents can be obtained, the languages in which they are available and their cost; and timeliness of disclosure is a function of whether and for how long citizens have access to the documents in different stages of a procedure, (in the context of this study the different stages of a dispute).[262] Though the study initially attempted to include these specific features, for feasibility reasons, the data collection focused instead on the general observations of the presence of identified transparency measures or case characteristics. The language of materials studied is English. For the *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A.* case, the ICSID Secretariat posted materials[263] online in both, the Spanish and English original versions. The website provides in Spanish only the Award for *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States*, which was not considered in this study.

For the *Saar Papier v. Poland* (I) case the decision by the Swiss Federal Tribunal was available only and read in German.

The rules on the disclosure of documents related to each of my measures differ among the fora under which a case is brought, including the Arbitration Rules of, *inter alia*: the International Chamber of Commerce; the Arbitration Institute of the Stockholm Chamber of Commerce; the International Centre

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[258] Christopher Kee, Article 3. Publication of Documents, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Dimitrij Euler Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) 2015) at 93-6.

[259] P. J. Nelson, Transparency Mechanisms at the Multilateral Development Banks, 29 WORLD DEVELOPMENT (2001). And P. J. Nelson, Multilateral development banks, transparency and corporate clients: 'public–private partnerships' and public access to information, 23 PUBLIC ADMINISTRATION AND DEVELOPMENT (2003) at 249 - 257.

[260] Paul Nelson also includes a fourth key dimension: "the mechanisms available for recourse and influence or the for of redress open to citizens, which I however adopt under my third independent variable: "public participatory access". *Ibid.*

[261] *Ibid*., at 252-3.

[262] *Ibid.*

[263] These materials in both languages (original versions) included: Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005); Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. (April 14, 2006);Decision on Jurisdiction (August 3, 2006); Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an Amicus Curiae Submission (February 12, 2007); and Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007).

for Dispute Resolution; and the London Court of International Arbitration.[264] The transparency rules of the three main fora relevant to the cases in this study are briefly noted below for each of my transparency measures.

Transparency provisions differ also at the treaty level. Many BITs,[265] FTAs and multilateral FTAs, such as NAFTA, do "not provide for their own arbitration rules," instead, they offer "a choice between ICSID, ICSID Additional Facility and UNCITRAL Arbitration".[266] As most cases of this study were brought under NAFTA Chapter 11, NAFTA related practice is also briefly noted below for each of my transparency measures. Case summaries and discussions include references, where relevant, to other applicable BITs or FTAs in a given case.

4.2.1 Public notice of commencement of proceedings

Under the **UNCITRAL Arbitration Rules** (1976) and (2010) there is no requirement for the Secretariat to inform the public of the commencement of arbitration. It has been noted that, in theory and unless stated otherwise in provisions of the treaty under which the claim was brought, "disputing parties presumably could unilaterally or jointly decide to voluntarily release the notice of arbitration".[267] Article 2 of the 'new' 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration[268] (on publication of information at the commencement of arbitral proceedings) requires the repository to "promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made".[269]

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[264] For a comparative review of these rules, including also the *Optional Rules for Arbitrating a Dispute between Parties, of which only one is a State* (1993) of the Permanent Court of Arbitration. See: Giuseppe Bianco, Article 2. Publication of information at the commencement of arbitral proceedings, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION – A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) Dimitrij Euler ed. 2015) at 80-2.

[265] For a comparative discussion of different levels of transparency required by various BITs see: *Ibid*., at 84-5.

[266] Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration ,The Biwater Gauff Compromise, 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2007) at 101.

[267] Lise Johnson (principle author) and Nathalie Bernasconi-Osterwalder (with input and comments from Marcos Orellana Lisa Sachs Daniel Magraw and Howard Mann), New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps (2013) at 14.

[268] The new Rules on Transparency apply on a default basis to UNCITRAL arbitrations conducted under treaties concluded after the new rules came into effect on April 1, 2014. Unfortunately, however, the previous standard will still apply in UNCITRAL arbitrations brought under treaties concluded before that date unless States or disputing parties expressly "opt into" the new rules. See: *Ibid*., at 4.

[269] See: UN Convention on Transparency in Treaty-based Investor-State Arbitration (Adopted by the UN General Assembly RESOLUTION 69/116 on December 10, 2014), available at:

The Secretariat of **ICSID and the ICSID Additional Facility Arbitration** is required, based on the ICSID Administrative and Financial Regulation 22(1), to publish on their website "information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding".[270]

At the treaty level, "NAFTA Chapter 11 does not contain any express rules on confidentiality, it does contain a number of provisions aimed at more transparency such as rules concerning the information of NAFTA States about pending cases, their possibility to intervene, etc".[271] Bianci observes state practice in this regard: "the United States makes available to the public, subject to the redaction of protected information, documents regarding the initiation of arbitral proceedings" and, with Canada, "notices of arbitration it receives" by posting them online.[272]

In this study, presence of public notice of commencement of proceedings has been observed in various ways, including online media releases or public notification, such as on the website of the ICSID Secretariat. Yet determining existence and the date of disclosure was not possible in some cases. In particular contacting relevant government agencies to find out whether the commencement of proceedings were published at the time notice of intentions were received have been fruitless during the research project. Some respondents referred to the websites of the institutions under which the dispute was housed, most explained the information is not available.[273]

4.2.2 Publication of final decision and award

The **UNCITRAL Arbitration Rules** underwent several developments. "The UNCITRAL Arbitration Rules (1976) state that awards may be made public only with the consent of both parties.[274] In the UNICTRAL Arbitration Rules (2010),[275] "this position was supplemented pursuant to a legal duty to do so, to protect or pursue a legal right, and in relation to legal proceedings before a court or other competent

https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last accessed 9/1/2016).

[270] See: ICSID Administrative and Financial Regulation 22(1), available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partC-chap04.htm#r22 (last accessed 9/20/2016).

[271] Christina Knahr and August Reinisch, Transparency Versus Confidentiality in International Investment Arbitration – the Biwater Gauff Compromise., 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS, (2007) at 101.

[272] Giuseppe Bianco, Article 2. Publication of information at the commencement of arbitral proceedings, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION – A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) Dimitrij Euler ed. 2015) at 83.

[273] All Information regarding the transparency measure is documented in the respective case summaries.

[274] 1976 UNCITRAL Arbitration Rules, Article 32(5).

[275] 2010 UNCITRAL Arbitration Rules, Article 34(5).

authority".[276] Under Article 3(1) and (7) (on publication of documents) of the new UNCITRAL Arbitration rules,[277] the repository is mandated, subject to Article 7 (on exceptions to transparency) to make decisions and awards of the arbitral tribunal available in a timely manner".[278]

The ICSID Arbitration Rules state "the Centre shall not publish the award without the consent of the parties,"[279] thus also subjecting "publication of the award to the consent of the parties". Nevertheless the 2006 Arbitration Rules obliges the Centre to promptly publish excerpts of the legal reasoning of tribunals, which previously was a possibility, but not a mandate.[280] The Secretariat of the **ICSID Additional Facility Arbitration**, also based on the Administrative and Financial Regulation 22(2) publishes awards also only "if both parties to a proceeding consent to the publication of arbitral awards". However, as noted by many, "as opposed to the Centre, the parties are in principle free to publish documents or awards unless they have explicitly agreed upon confidentiality," and as shown below, "a number of ICSID awards have been released unilaterally by one of the disputing parties".[281]

At the treaty level, as noted above, NAFTA Chapter 11 does not contain any expressed rules on confidentiality. Interestingly, NAFTA Article 1137 and Annex 1137.4 (on the publication of the award)

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[276] Christopher Kee, Article 3. Publication of Documents,, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Dimitrij Euler, Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) ed. 2015) at 95.

[277] The new Rules on Transparency will apply on a default basis to UNCITRAL arbitrations conducted under treaties concluded after the new rules come into effect on April 1, 2014. Unfortunately, however, the previous standard will still apply in UNCITRAL arbitrations brought under treaties concluded before that date unless States or disputing parties expressly "opt into" the new rules. See: Lise Johnson (principle author) and Nathalie Bernasconi-Osterwalder (with input and comments from Marcos Orellana Lisa Sachs Daniel Magraw and Howard Mann), New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps (2013) at 4.

[278] See: UN Convention on Transparency in Treaty-based Investor-State Arbitration (Adopted by the UN General Assembly RESOLUTION 69/116 on December 10, 2014), available at: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last accessed 9/1/2016). The Article further "establishes three categories of documents: (1) documents that are to be mandatorily and automatically disclosed, (2) documents that are to be mandatorily disclosed once any person requests their disclosure from the tribunal and (3) documents for which the tribunal has discretion regarding whether or not to order disclosure". See: Lise Johnson (principle author) and Nathalie Bernasconi-Osterwalder (with input and comments from Marcos Orellana, Lisa Sachs, Daniel Magraw and Howard Mann): "New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps," CIEL and IISD, August 2013, p. 15, available at: http://www.iisd.org/pdf/2013/uncitral_rules_on_transparency_commentary.pdf (last accessed 9/22/2016).

[279] ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, Article 48(5) and ICSID Arbitration Rules Article 48(4) available at http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf last accessed 9/17/2016.

[280] ICSID Arbitration Rules Article 48(4) available at http://www.worldbank.org/icsid/basic doc/CRR_English-final.pdf last accessed 9/17/2016. The language in this Article changed from "may" to "shall". See also: Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration, The Biwater Gauff Compromise, 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2007) at 100.

[281] Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration, The Biwater Gauff Compromise, 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2007) at 100.

"treats Canada and the U.S. differently than Mexico with respect to the public disclosure of awards," providing that "in any dispute involving the governments of Canada or the USA, either disputing party may make the award public".[282]

In this study, presence of publication of final decision and award is observed were it has been published in the English language on a publicly accessible website by either the institution housing the case, the claimant or responding party. In some cases this observation was not applicable because no award was issued, a case was settled by parties, withdrawn or abandoned.

4.2.3 Access to documents during the proceedings

The **UNCITRAL Rules** 1976 are silent with respect to the confidentiality of the materials produced during the proceedings. Article 15(3) only states: "all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party". This leaves it, in theory, to the disputing parties to decide to release documents about the case.

Under Article 3(1) and (7) (on publication of documents) of the new UNCITRAL Arbitration rules,[283] the repository is mandated, subject to Article 7 (on exceptions to transparency) to make the following documents available in a timely manner, in the form and in the language in which it receives them: "the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defense and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party(ies) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal".[284]

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[282] Joachim Delaney and Daniel Barstow Magraw, Procedural Transparency, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Federico Ortino Peter Muchlinski, Christoph Schreuer (eds.) ed. 2008) at 750.

[283] The new Rules on Transparency will apply on a default basis to UNCITRAL arbitrations conducted under treaties concluded after the new rules come into effect on April 1, 2014. Unfortunately, however, the previous standard will still apply in UNCITRAL arbitrations brought under treaties concluded before that date unless States or disputing parties expressly "opt into" the new rules. See: Lise Johnson (principle author) and Nathalie Bernasconi-Osterwalder (with input and comments from Marcos Orellana, Lisa Sachs, Daniel Magraw and Howard Mann): "New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps," CIEL and IISD, August 2013, at .4.

[284] See: UN Convention on Transparency in Treaty-based Investor-State Arbitration (Adopted by the UN General Assembly RESOLUTION 69/116 on December 10, 2014), available at: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last accessed 9/1/2016). The Article further "establishes three categories of documents: (1) documents that are to be mandatorily and automatically disclosed, (2) documents that are to be mandatorily disclosed once any person

The **ICSID and ICSID Additional Facility Arbitration**, based on the Administrative and Financial Regulation 22(2) states that "the Centre publishes other material with the parties' consent (for example, decisions of the tribunal, procedural orders, parties' submissions, transcripts and minutes of hearings, etc.)" and that "the Centre is committed to enhancing understanding of the ICSID process and international investment law and contacts parties to concluded and pending cases to seek their authorization to publish material from the record".[285] However, as noted above, "there are no ICSID rules or regulations governing the actions of the parties" and to many it is thus "not clear whether they are allowed to disclose any documents to the public during or after the proceedings".[286]

At the treaty level, it is important to note that the FTC, issued binding interpretative statements[287] on this issue, making clear that "there was no separate stand-alone confidentiality obligation to be found in the NAFTA agreement that would, of itself, prevent the parties to the arbitration from publishing documents," including sharing "arbitration documents (i.e. publishing them) to subnational government officials".[288]

The ICSID case between *Biwater Gauff v. United Republic of Tanzania* is illustrative as its tribunal examined all the above noted rules, including ICSID Additional Facility Rules, the UNCITRAL Rules and the rules governing investment arbitration under NAFTA Chapter 11. In this case, the claimant complained about the unilateral disclosure by the respondent of minutes and a procedural order on the Internet without an agreement of both parties to this effect and filed a request for provisional measures on confidentiality.[289]

With respect to the UNCITRAL Arbitration Rules, the tribunal noted that other than that "awards are to be made public only with the consent of both parties" and that "hearings are to be held in camera

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requests their disclosure from the tribunal and (3) documents for which the tribunal has discretion regarding whether or not to order disclosure". See: Lise Johnson (principle author) and Nathalie Bernasconi-Osterwalder (with input and comments from Marcos Orellana Lisa Sachs Daniel Magraw and Howard Mann), New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps (2013) at 15.

[285] See: Transparency Rules of the Additional Facility Arbitration applying to the Secretariat available at: https://icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Confidentiality-and-Transparency---AF-Arbitration.aspx (last accessed 9/20/2016) and ICSID Administrative and Financial Regulation 22(2), available at: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partC-chap04.htm#r22 (last accessed 9/20/2016).

[286] Christina Knahr and August Reinisch, Transparency Versus Confidentiality in International Investment Arbitration – the Biwater Gauff Compromise., 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS, (2007) at 100.

[287] NAFTA Free Trade Commission, NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

[288] Christopher Kee, Article 3. Publication of Documents,, in TRANSPARENCY IN INTERNATIONAL INVESTMENT ARBITRATION A GUIDE TO THE UNCITRAL RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION (Dimitrij Euler, Markus Gehring and Maxi Scherer (eds.) and Meagan Wong and Rebecca Hadgett (others) 2015) at 95.

[289] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanza*nia, ICSID Case No. ARB/05/22, Procedural Order No. 3, (29 September 2006) paragraph 13.

unless the parties agree otherwise, there are no provisions [expressly imposing a general duty of confidentiality, or prohibiting disclosure of documents prepared for or disclosed in the arbitration".[290] The tribunal also: observed a "lack of general rule on the issue" in both the UK- United Republic of Tanzania (UROT) BIT and the ICISD; "acknowledged the 2006 amendments to the ICSID Arbitration Rules reflect the trend in international investment arbitration towards transparency"; concluded "that there existed a sufficient risk of aggravation of the dispute that would warrant some form of control by the tribunal"; and "also emphasized the significance of the public interest in the case, therefore determining that "any restrictions must be carefully and narrowly delimited".[291]

Knahr and Reinisch provide a good discussion on how the tribunal in this case distinguished between documents, and between the timing of release of documents, i.e. while proceedings are pending, after the conclusion of the proceedings, and the publication of final awards. In distinguishing between documents, the tribunal found that: "restrictions on the publication of a party's own documents would not be appropriate in general; the publication of minutes of hearings, pleadings or written memorials, correspondence between the parties and/or the tribunal, as well as any documents produced by the opposing party may threaten the procedural integrity of the arbitral process and should thus not be permitted in principle; and parties could ask the tribunal for exceptions to these restrictions on a case-by-case basis".[292]

In distinguishing between the release of documents while proceedings are pending, after the conclusion of the proceedings and the publication of final awards, the tribunal: "concluded disclosure of documents during the proceedings was problematic and should therefore be handled restrictively" while "the publication of awards, other tribunal decisions, but also pleadings and written memorials after the conclusion of proceedings would cause less trouble".[293]

In the end, the tribunal recommended in its procedural order that "for the duration of these arbitration proceedings, and in the absence of any agreement between the parties" that "all parties refrain from disclosing to third parties: the minutes or record of any hearings; any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise; any of the pleadings or written memorials (and any attached witness statements or expert reports); and any correspondence between the parties and/or the Arbitral Tribunal exchanged in respect of the arbitral

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[290] *Ibid*., paragraph 132
[291] Christina Knahr & August Reinisch, Transparency versus Confidentiality in International Investment Arbitration, The Biwater Gauff Compromise, 6 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2007) at 105 and 107.
[292] *Ibid*., at 108.
[293] *Ibid*.

proceedings".[294] Furthermore that: " all parties are at liberty to apply to the Arbitral Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis; any disclosure to third parties of decisions, orders or directions of the Arbitral Tribunal (other than awards) shall be subject to prior permission by the Arbitral Tribunal; and for the avoidance of doubt, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the parties, exacerbate their differences, unduly pressure".[295]

In this study, the presence of official access to documents during proceedings is observed where case documents have been published in the English language on a publicly accessible website by either the institution housing the case, the claimant or responding party including: pleadings, memorials and briefs submitted to the panel or tribunal by a disputing party; written submissions by non-disputing parties to the treaty or non-parties, such as *amicus curiae*; and minutes or transcripts of hearings for the tribunal. My data collection includes tribunals' official recommendations or orders on the matter, as well as unofficial online releases on media or other websites where sometimes "leaked" documents were reported. Yet, as in the case of my first measure, determining existence and the date of disclosure was not always possible.

In conclusion, the indicator of transparency is measured by observing in any given case public access to: information that a dispute commenced; documents presented during the course of dispute proceedings; and final decision, including reasoning by a given tribunal. To test the hypothesis that transparency increases the prospect of environmentally permissible dispute outcomes, the study looked for patterns of cases in which transparency correlate positively with environmental policy permissible outcomes. Additional possible observations from the study include:

- Transparency measures are dependent on each other, i.e. where no access to public notice is observed, no access to documents during the proceedings is observed;
- Transparency matters only if specific or all of the indicators' measurements are observed;
- Transparency matters/occurs only when public representation and participation is observed;
- Transparency matters/occurs only when public representation and participation and/or horizontal integration is observed;
- Transparency matters even if horizontal integration is not observed;
- Transparency matters even if horizontal integration measures are not accepted as relevant or applicable;

[294] *Biwater Gauff* Procedural Order No. 3, 29 September 2006, paragraphs 140-167.
[295] *Ibid.*

- Transparency matters only if a specific interpretation technique is employed by the tribunal/panel; and/or
- Transparency matters only if specific policy implementation requirements have been met.[296]

Observing such possible patterns of case outcome in relation to the transparency indicator, including in combination with the indicators of horizontal integration and public representation and participation thus aims at finding answers to the research question. Results may provide useful insights into institutional reform recommendations and, given the recently adopted new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration"[297] and the "UN Convention on Transparency in Treaty-based Investor-State Arbitration,"[298] inform states in their decision to apply the new rules for existing Investment Protection Agreements concluded before 1 April 2014.

Concluding this chapter with another expressed view, Ernst-Ulrich Petersmann suggests:

"The more intergovernmental rulemaking (e.g. in the WTO, BITs, UN environmental negotiations, EU violations of WTO and EMU obligations) neglects human rights and consumer welfare in international economic law, the more may judicial protection of cosmopolitan rights (e.g. of access to transparent judicial procedures, submission of amicus curiae briefs), 'dynamic' and 'systemic interpretation', judicial 'balancing' of economic and non-economic interests, and other 'judicial checks and balances' of discretionary foreign policy powers be constitutionally justifiable".

[296] Additional observations to be discussed in future studies could include: transparency is more frequently observed in cases brought under specific Arbitration Rules or treaties; transparency is more frequently observed after the NAFTA FTC issued its binding interpretative statements in 2001; and/or transparency is cumulatively more frequently observed following prior cases where transparency is observed.

[297] See: UNCITRAL, 46th session (July 8-26, 2013), A/CN.9/XLVI/CRP.3 (July 9, 2013).

[298] See: UN Convention on Transparency in Treaty-based Investor-State Arbitration (Adopted by the UN General Assembly RESOLUTION 69/116 on December 10, 2014), available at: https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last accessed 9/1/2016).

5.0 PUBLIC REPRESENTATION AND PARTICIPATION

This chapter explicates public representation and participation as indicator as well as its measurements in this study. It follows from:

Hypothesis 3: Public representation and participation increases the prospect of environmentally permissible dispute outcomes.

Independent Variable 3: Public representation and participation in international economic law disputes

5.1 DEFINITION AND RATIONALE FOR PUBLIC REPRESENTATION AND PARTICIPATION AS INDICATOR

This study defines public representation as indirect or direct representation of public matters, including environmental concerns, in an international economic law dispute case. Public participation is defined as active or passive participation in such dispute cases, including through the acceptance of *amicus curiae* submissions or granting of observer status in a dispute case.

The underlying rationale for an indicator of public representation and participation lies in the expectation that cases in which public representation and participation is observed should correlate positively with environmental policy permissible outcomes. The reason is twofold. First public representation and participation in a case is expected to promote public considerations, including environmental protection, public health, consumer protection and preferences along with other public considerations such as economic interests. Second, public representation and participation in a case is expected to influence a tribunal so to take into account such public considerations as environmental protection, public health, consumer protection and preferences. And the determination of an environmental policy alleged to have violated economic rights articulated in the applicable economic treaty as permissible, should be more likely when public consideration are taking into account. This is again qualified by a state's act in violation of good faith, in which case the policy should be determined impermissible.

Whether and how a tribunal is influenced or affected by public representation and participation in a case is difficult to determine. Yet this does not prohibit the hypothesis that public representation and participation in a case can influence – or entail the capacity of causing an effect in indirect or intangible ways on – a tribunal in the determination of a case. Influence in this context does not mean improper interference nor a violation of the basic principles of independence of an international arbitration tribunal, including, that they, *inter alia*: shall still decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect; have exclusive authority to decide whether an issue submitted for their decision is within their competence as defined by law; shall not be any inappropriate or unwarranted interference with the judicial process; and are entitled and required to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.[299]

Public representation and participation can increase factual information and legal understandings in case proceedings, for example through *amicus curiae* submissions. By adding a sense of accountability, public observance of hearings can affect the scope of presentations and testimonies given by public representatives that are participating in hearings. With involved observers in the room, they may be inclined to include public input that was provided during the development process of a policy. Indirect public representation on both sides of disputing parties, such as in state-state disputes can influence presentations and arguments to include a wider scope of public interest on both sides of disputing parties than one expects in investor-state disputes where the investor as dispute party is likely to focus more narrowly on economic interest.

[299] See for example: United Nations General Assembly "Basic Principles on the Independence of the Judiciary" UN GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The indicator of public representation and participation in this study was measured by observing in any given case: submission and acceptance of an *amicus curiae* brief and granting of public observance of hearings. In the end, the study's observations of a third measure, i.e. whether both disputing parties are states, showed no data variation because of the study's ultimate focus on investment arbitrations only.

Public representation and participation as variable is based on the premise that there exists a public interest in international economic law cases. Besides the fact that both economic as well as environmental issues are of public concern and are inherent to general international public and the specific UN sustainable development goals, public interest in a dispute may more specifically be based on several public implications that can result from a case. These include: the fact that disputes often arise in public service sectors; disputes may concern government regulation aimed at the protection of public welfare; disputes may have a "chilling" effect on government policy; arbitration is costly and has implications for the public purse; and case law may have implications for future public-interest cases, such as considering reciprocity when an environmental policy in one's own country is challenged in the future.[300] With disputes potentially having an implication for public interest, public representation and participation in a dispute may thus be relevant for the outcome of a dispute. This may be through a sense of accountability, for example by mere observation by the public of the disputing arguments and reasoning, to confirm whether public interest is responsibly taken into account –or by providing directly or indirectly facts, testimonials, expertise and relevant views that might otherwise be ignored by the disputing parties and the arbitration tribunal.

In the *Methanex v. United States* case for example, the petitioners for *amicus curiae*: noted the case raised issues of constitutional importance concerning government authority to implement environmental regulations and property rights; explained the interpretation of NAFTA Chapter 11 should reflect legal principles underlying the concept of sustainable development and offered assistance to the tribunal in this respect; highlighted the increased urgency for *amicus* participation in light of an alleged failure to consider environmental and sustainable development goals in the *Metalclad v. Mexico* 2000 case; noted permissibility to appear as *amicus* in equivalent court proceedings in the jurisdictions of both Canada and the US; and suggested participation of an *amicus* would allay public disquiet as to the closed nature of arbitration proceedings under NAFTA Chapter 11. [301]

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[300] Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, 16 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW (2007) at 230, referring here to H. Mann and F. Marshall, Revision of the UNICTRAL Arbitration Rules, Good Governance and the Rule of Law: Express Rules for Investor-State Arbitrations Required (2006).

[301] *Methanex v. USA* Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, paragraphs 5-7.

Yet an *amicus* is not equivalent to the public. Daniel Bodansky notes: "the phrase 'public participation' is a bit of a euphemism". Since "relatively few members of the public would, in practice, be able to participate," the phrase "refers to participation, not by the 'public' but by non-governmental groups".[302] And relatively few NGOs that take an interest in the matters being considered have the capacity to submit an *amicus* brief.

Public interest encompasses a variety of issues and positions of multi-centric organizations. NGOs differ in their advocacy and positions with regards to: human rights, development rights as well as business, labor, public health, environmental, religious, security, indigenous peoples and local communities, and many more types of 'public interest.' Acknowledging these as relevant, this study concentrates however on environmental policy permissible outcomes in international economic law disputes. Therefore the idea of public interest in this study refers specifically to inclusive environmental views, such as advocating for the predominance of the protection of domestic or global environmental goods or ecosystem services in the balancing exercise of other public and private interest issues.[303]

Another reason for testing whether this indicator matters to environmental policy permissible dispute outcomes is that public participation has been recognized as an important factor in fostering sustainable development in several MEAs and soft law instruments. For example, the United Nations Rio Declaration on Environment and Development proclaims in Principle 10 that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. […]. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided".[304] Similarly, the United Nations Agenda 21, Article 8.3, states as one of its objectives "to develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and organizations in decision-making at all levels".[305] The International Law Association adopted the principle of public participation and access to information and justice as one of the principles of international law relating to sustainable development.[306]

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[302] Daniel Bodansky, Legitimacy, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds.) (2007) at 718.

[303] This should not be misunderstood as a green-protectionist idea or as undermining development needs. Rather the statement is meant in Satish Kumar's sense of the meaning of Economics and Ecology. He reminds that Economy and Ecology come from the same Greek language roots. *Oikos* refers to home or the place we live. He underscores the ultimate home is planet Earth. *Logos* refers to knowledge, which he emphasizes must include knowledge about the interconnectedness of the Earth's ecosystems. And *nomos* referring to management. Thus, the public interest lies in wisely managing the earth's ecosystems based on an understand of human's interconnectedness with and benefits from ecosystem services.

[304] 1992 Rio Declaration on Environment and Development available at http://www.un.org/documents

[305] 1992 Agenda 21, Article 8.3 available at http://www.un.org/documents

[306] NICO SCHRIJVER AND FRIEDL WEISS (EDS.), INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Martinus Nijhoff Publishers. 2004) at xii.

Besides the recognition in MEAs of the value of public representation and participation in support of the international community's policy objective of sustainable development, some statements and practice of international tribunals and panels have indicated the potential permissibility and value of public representation and participation in disputes. For example, a note of the Iran-US Claims tribunal states: "The arbitral tribunal may, having satisfied itself that the statement of one of the two governments – or under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such government or person to assist the arbitral tribunal by presenting written and [or] oral statements".[307] The WTO Appellate Body (AB), in *Hot-rolled Lead and Carbon Steel*, clarified, *inter alia*: that neither have "individuals and organisations, which are not members of the WTO, [a] legal 'right' to make submissions to or to be heard by the AB"; nor has "the AB [a] legal 'duty' to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organisations, not members of the WTO"; but that "it had the power to accept *amicus* submissions".[308] In contrast, observers have noted the International Court of Justice (ICJ): "has been traditionally reluctant to accept amicus curiae submissions from non-parties"; "does not admit non-governmental organizations (which are treated as individuals)";[309] and "the only case in which the ICJ has ever allowed the submission of information by an NGO was in 1950, in the advisory proceedings on the International Status of South West Africa".[310]

For all these reasons—the potential public interest in international economic law disputes, the environmental policy advocacy and defense function of public representation and participation, the recognition in international soft law instruments of participatory access as important implementation feature for sustainable development and an indication by some international dispute panels and tribunals

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[307] The *Methanex* tribunal referred to this in its decision on Petitions from Third Persons to Intervene as "amici curiae, 15 January 2001, Paragraph 32, noting: "this provision was specifically drafted for the Iran-US Claims tribunal as supplementary guide. Although (so it appears from published commentaries) it was invoked by Iran or the US as non-arbitrating parties, it was subsequently invoked by non-state third persons (albeit infrequently), such as the foreign banks submitting their own memorial to the tribunal.

[308] The *Methanex* tribunal, in its decision on Petitions from Third Persons to Intervene as "amici curiae, 15 January 2001, Paragraph 33, referred to this statement by the WTO AB in *Hot-Rolled Lead and Carbon Steel* paragraph 41.

[309] The *Methanex* tribunal referred to this in its decision on Petitions from Third Persons to Intervene as *Amici Curiae*, 15 January 2001, paragraph 34.

[310] International Status of South West Africa, Advisory Opinion, ICJ Pleadings, at 324; as noted in the data base of The Project on International Courts and tribunals (PICT) available at: http://www.pict-pcti.org/matrix/discussion/icj/icj_amicus.htm The data entry further notes however, that: "in that case, the chosen NGO was the International League for Human Rights. But 20 years later, in the 1970-1971 advisory proceedings on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court backed off from it previous stance because it refused to let the same NGO submit information. More recently, in the advisory proceedings on the *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict (4)*, the Court refused, as a matter of discretion, a request to submit information made by International Physicians for the Prevention of Nuclear War".

of the potential permissibility and value of specified types of public representation and participation in disputes —public representation[311] and participation is an explanatory variable in this study.

5.2 CONCERNS AROUND PUBLIC REPRESENTATION AND PARTICIPATION

The existing complexity around the idea of public interest, including among the variety of public interest issues also the question of what public or civil society we are concerned with, i.e. that of the claimant state, of the responding state, of a non-disputing third party state or of the international public community at large, is revealed in concerns around public representation and participation.

Several concerns have been raised. Direct public representation and participation in dispute cases may not be practical, notes Jonas Ebbesson stating "an argument sometimes made against public participation is that it is time-consuming, obstructing, and costly".[312] He further observes "criticisms against NGO's participation are concerns about their accountability and transparency and about the geographical regions and societal classes whose interests they represent".[313] In addition,[314] developing countries' concerns around the introduction of *amici curiae* in disputes, include: a generally disadvantage for the developing countries with limited resources facing undue burden and cost on the proceeding; favoring of a court process of some parties over others, noting the absence of *amici curiae* submissions in the civil law legal systems in many developing countries, (an argument also made by Mexico in the *Methanex v. United States* case); potentially unduly broaden the scope of the dispute between the parties;

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[311] Some forms of participation have been shown to be relevant to possible causal claims in my research, "causation" [being used] here in a way that recognizes that ideas and norms are often reasons for actions". See: Martha Finnemore & Kathryn Sikkink, International Norm Dynamics and Political Change, 52 INTERNATIONAL ORGANIZATION (1998) at 890. For example, in certain cases open hearings have revealed specific government positions that would have been impossible without [public or non-disputing third person] participation. See: Aaron Cosbey, Howard Mann, Luke Peterson and Konrad von Moltke, Comments on ICSID Discussion Paper, "Possible Improvements of the Framework for ICSID Arbitration, in APPLEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant with Michael Chiswick-Patterson (eds.) ed. 2008).

[312] Jonas Ebbesson, Public Participation, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Jutta Brunée and Ellen Hey (eds.) Daniel Bodansky ed. 2007) at 688.

[313] *Ibid*., at 688. On this point, Alexis Mourre asks: "Is it realistic to expect that an arbitral tribunal will assess the representability of an NGO? Probably not". Alexis Mourre, Are *Amici Curiae* the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?, 5 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2006) at 267.

[314] With regards to additional burden and delay of the whole proceeding, developing countries have pointed to the *Aguas Del Tunari v. Bolivia* case (ICSID Case No. ARB/02/3) that involved a dispute regarding the privatization of water services demonstrates this well. Over 300 interested parties petitioned the tribunal to be allowed to intervene in and attend the hearing, as well as to be allowed to receive full public disclosure of all evidence and pleadings. See: South Center. "Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries". In South Center Analytical Note. Geneva: South Center, 2005.

and raising concerns about undue prejudice and influence of the arbitral tribunal to their disadvantage because civil society in the developed countries are more experienced, better organized and equipped as well as better funded. [315]

With regards to public hearings, some[316] have noted that the evidence and the strategy of litigation will thereby be exposed for examination and criticism that may trigger public pressure on the arbitral proceeding, noting the defense of developing countries during arbitral proceedings may also affect the promotion of investment.[317] Investors have opposed public representation and participation based on concerns around confidentiality[318] and fairness.[319]

However, these concerns can be addressed in a tribunal's decision on *amici curiae* petitions. In *Methanex v. United States* for example, the tribunal concluded it had the power to accept *amici curiae* submissions and explained "in coming to this conclusion, [it] has not relied on the fact that *amici curiae* submissions feature in the domestic procedures of the courts in two, but not three, NAFTA Parties".[320] As an important factor for the exercise of its discretion, it noted the public interest in the arbitration arising from its subject matter.[321] The tribunal carefully addressed the issue of safeguarding equal treatment with regard to any burden which could be added with an acceptance of *amici curiae* submissions and found that the burden would be shared by both disputing parties; and would not be inevitably excessive nor cause any immediate risk of unfair or unequal treatment of any disputing party or party.[322] On the risk of

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[315] *Ibid.*

[316] Some developing countries fear that 'well intended' environmental NGOs from developed countries may undermine developing countries' ability to attract foreign investment for economic development, and, as noted, are concerned that public representation and participation in disputes may expose strategies of litigation for public criticism. These complex concerns around sustainable development reflect power struggles in the current negotiations, involving norm contestation in the process of a paradigm shift. The issue of lowering environmental standards (also referred to as race to the bottom) to attract FDI has already been addressed in treaty provisions of some FTAs among parties committing from refraining from such strategies. The problem of green protectionism, i.e. exports from presumably predominantly developing countries facing trade restrictions based on environmental standards in presumably predominantly developed countries, could be equally addressed in treaty provisions that, for example promote active technology transfer through open access to information and a limiting of IPRs, all which would however require a transformative paradigm shift in the international political economy and its legal structure.

[317] South Center. "Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries". In South Center Analytical Note. Geneva: South Center, 2005.

[318] Mistelis notes "it is questionable whether they are bound by any duty of confidentiality," and "although one would expect them to do so […] it would be difficult to enforce such a duty". Loukas A. Mistelis, Confidentiality and third party participation: *UPS v. Canada* and *Methanex Corporation v. United States*, 21 ARBITRATION INTERNATIONAL p211(2005) (concluding remarks). In the *Methanex* case, the tribunal observed that confidentiality is determined by disputing parties.

[319] *Methanex v. USA*, Decision of the tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, paragraphs 12-15, arguing for example as to unfairness, that if petitioners were to appear as *amici curiae*, disputing parties would not have the opportunity to test by cross-examination the factual basis of their contention.

[320] *Ibid.*, Paragraph 47.

[321] *Ibid.*, Paragraph 49.

[322] *Ibid.*, Paragraphs 35-37.

imposing an extra burden on one of the disputing parties, the tribunal noted that such disputing party should receive whatever procedural protection might be necessary.[323] In addition, some guidance and recommendations on non-disputing party participation, including the scope of submissions, has been developed by the NAFTA's Free Trade Commission and the WTO Appellate Body.[324]

Given these concerns around public representation and participation in dispute cases, the study found presence of acceptance of *amicus curiae* and granting of observer status varied among cases.

5.3 MEASUREMENTS OF PUBLIC REPRESENTATION AND PARTICIPATION

A. Acceptance of *amicus curiae*

B. Public observation of panel or arbitration hearings

C. Both parties to the dispute are states versus investor state dispute

The study operationalizes public representation and participation and recognizes its presence in a given case by observing: the acceptance of an *amicus curiae* brief and practices allowing public

[323] *Ibid*., Paragraph 50.

[324] **In the context of NAFTA**, the NAFTA Free Trade Commission on non-disputing party participation recommended, *inter alia* that any non-disputing party with significant presence in the territory of a Party, [..] will apply for leave from the tribunal to file such a submission to be attached to the application. The application to, among others: disclose any affiliation, direct or indirect, with any disputing party; identify any assistance that was provided in preparing the submission; specify the nature of the interest in the arbitration; identify the specific issues of fact or law in the arbitration that the applicant addressed in its written submission; and explain, why the tribunal should accept the submission.
The submission filed by a non-disputing party to, *inter alia*: set out a precise statement supporting the applicant's position on the issues; and only address matters within the scope of the dispute. In determining whether to grant leave to file a non-disputing party submission, the tribunal will consider, *inter alia*, the extent to which: the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; the non-disputing party submission would address matters within the scope of the dispute; the non-disputing party has a significant interest in the arbitration; and there is a public interest in the subject-matter of the arbitration. The tribunal will ensure that any non-disputing party submission avoids disrupting the proceedings; and neither disputing party is unduly burdened or unfairly prejudiced by such submissions. The granting of leave to file a non-disputing party submission does not require the tribunal to address that submission at any point in the arbitration. The granting of leave to file a non- disputing party submission does not entitle the non-disputing party that filed the submission to make further submissions in the arbitration.

In the context of the WTO, the WTO Appellate Body adopted additional procedure in the hearing of the appeal in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*. See WT/DS135/9. In this appeal, the Appellate Body adopted an additional procedure "for the purposes of this appeal only" to deal with *amicus curiae* submissions. The Appellate Body received, and refused, 17 applications to file such a submission. The Appellate Body also refused to accept 14 unsolicited submissions from non-governmental organizations that were not submitted under the additional procedure. See: WTO case summary, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm

observation of hearings. These are explained below. In addition, a third case characteristic was observed, the categorization of a state-state disputes as distinguished from investor-state disputes, however no variation was found due to the study's ultimate focus on international investment arbitration.

5.3.1 Acceptance of *amicus curiae*

Acceptance of *amicus curiae* in a dispute serves as the first measure or case characteristic of public representation and participation in my study. As noted by Tienhaara they generally contain "supplementary information on the case, particularly the occurrence of events or technicalities relating to the subject at hand".[325]

In some cases, an indirect representation observed in form of a state party to the dispute does not seem to suffice. For example, such representation can be viewed as insufficient or as not applicable to indigenous peoples. In the *Glamis v. United States* case for example, the Quechan Indian Nation, in its *amicus curiae* application and two submission, stressed, *inter alia*: the fact that neither claimant nor respondent can represent the tribe as sovereign nation nor has expertise on the cultural, religious and spiritual values at stake; the interest of indigenous peoples worldwide in how their interest in the protection of sacred areas will be treated in this case; and that a decision in favor of Glamis could put political pressure on California with adverse impacts on the tribunals interests.[326] In its second submission to this case, the Quechan Indian Nation highlighted that the tribunal should be guided by the considerations that "the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed, by both the NAFTA parties and any treaty interpreter […]; and that an investor seeking compensation for an alleged taking of property cannot rely upon a claim to acquired rights in which no legitimate expectation to enjoy such rights existed".[327]

The problem is that there is "no tradition of involving non-disputant third [persons] in arbitration, as Tienhaara notes, and "the most common means of non-party third person participation in international tribunals is through the submission of *amicus curiae* briefs".[328] Non-party third persons are neither parties nor third state parties to the dispute, nor are they parties to the treaty claimed to have been violated and they have not engaged in negotiations of the rules governing the dispute. Neither are non-party third

[325] Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, 16 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW (2007) at 230-231.
[326] Submissions by the Quechan Indian Nation to the Glamis case are available at: http://www.state.gov/s/l/c10986.htm last accessed December 15, 2015.
[327] *Ibid.*
[328] Kyla Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, 16 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW (2007) at 230.

persons necessarily neutral, such as, theoretically, the dispute panel or appellate body (in WTO disputes) or the arbitration tribunal (in investment arbitration). The tribunal in *Methanex v. United States*, which uses the term 'non-party third persons', noted furthermore: "*Amici* are not experts; such third persons are advocates (in the non-pejorative sense) and not "independent" in that they advance a particular case to a tribunal".[329]

Next to civil society organizations, a non-party third person could be a for-profit business. Clearly some corporate organizations have special attributes of, such as: "being state-chartered, having an indefinite lifetime, sharing ownership with limited liability, and enjoying unlimited fundraising capacity and operational size".[330] Entities with such characteristics differ from an individual in the ordinary meaning. One could argue the view of a corporation as individual or person is in itself situated in the context of a specific liberal-market paradigm or worldview.[331] On the other hand there exist also an increasing number of international corporations that include environmental considerations in their business model. Especially those taking a front-runner approach value environmental policies as validating this approach vis-à-vis competing companies that have ignored environmental considerations.

The study adopts the definition of a non-party third person as provided in the Statement by the NAFTA FTC of 7 October 2003, namely: "any non-disputing party that is a person of a Party, or that has a significant presence in the territory of a Party".[332] Description of any given *amicus curiae* applicant, however vary. They can be found in the respective application for *amicus curiae* submission. Following from the NAFTA FTC Statement, such description should including: "membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant); whether or not the applicant has any affiliation, direct or indirect, with any disputing party; whether any government, person or organization has provided any financial or other assistance in

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[329] See: *Methanex v. USA* Decision of the tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, paragraph 38.

[330] RAYMOND C. MILLER, INTERNATIONAL POLITICAL ECONOMY: CONTRASTING WORLD VIEWS (Routledge. 2008) at 240.

[331] One can look back to Adam Smith, who "believed that though the market was driven by individuals seeking the highest material gain (a morally suspect motivation), the positive outcomes of the competitive market for the whole society justified the self-interested motivations of the individual participants," notes Raymond C. Miller. He explains, *inter alia*: "by a strange historical twist, U.S. corporations are considered under the law as 'artificial persons' with all the legal rights and obligations of individuals. This interesting fiction was not passed by any legislature; it is usually attributed to a Supreme Court decision in 1886 (*Southern Pacific Railroads v.. Santa Clara County*); however, [though] it turns out that the Court made no such decision, [but] it has subsequently been referenced in later Supreme Court decisions and has become part of the received legal doctrine"; and "the statement that corporations were 'persons and therefore subject to the protections provide by the Fourteenth Amendment was put into the head notes on the 1886 case by a government official who had connections to the railroad. The reference was to testimony given in an earlier case by former Senatro Roscoe Conklin. Conklin claimed that the Senate had intended the concept of persons in the Fourteenth Amendment to include corporations". *Ibid.*, 9 and 95-96.

[332] See Statement by the NAFTA Free Trade Commission on non-disputing party participation of October 7, 2003.

preparing the submission; the nature of the interest that the applicant has in the arbitration; and the specific issues of fact or law in the arbitration that the applicant has addressed in its written submission".[333]

Variation in observations of this procedural case characteristic is expected because tribunals have discretion over granting leave to file a non-disputing party submission. Taking such a decision in the context of NAFTA, the tribunal will likely consider, whether, *inter alia*: "the non-disputing party submission would assist the tribunal in the determination of a factual or legal issue related to the arbitration by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; the non-disputing party submission would address matters within the scope of the dispute; the non-disputing party has a significant interest in the arbitration; and there is a public interest in the subject-matter of the arbitration".[334]

For example, already in the *Methanex v. United States* case, the tribunal noted in its decision on petitions from third persons to intervene as *amici curiae*: "there is an undoubtedly public interest in this arbitration; [t]he substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the disputing parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the petitions".[335]

Variation in the observations of acceptance of *amicus curiae* is also expected because there is no uniform practice established in this regard. The practice of accepting *amicus curiae* "has become frequent in the WTO context" as observed by Mourre.[336] In the investment law context, van Harten tells us "the practice of courts to appoint *amicus curiae* to assist in the consideration of outside interests that are affected by a dispute, and that would not otherwise be represented by the disputing parties, is largely an innovation of US law that has spread to other jurisdictions".[337]

This issue of differing domestic practices with regard to *amicus curiae* was brought up in the *Methanex v. United States* case, with the non-disputing third party Mexico, opposing the *amici* arguing that "the existence of a specific procedure in one Party's domestic state court procedure [to receive

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[333] See Footnote 321.
[334] *Ibid*.
[335] See: *Methanex v. USA*, Decision of the tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, paragraph 49.
[336] Alexis Mourre, Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?, 5 LAW & PRACTICE OF INTERNATIONAL COURTS & TRIBUNALS (2006) at 257 and 258.
[337] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (Oxford University Press. 2007) at 159.

amicus briefs] did not mean that it could be transported to a transnational NAFTA arbitration".[338] Methanex supported Mexico's statement and added "it had been unable to find any precedent where a tribunal had granted *amicus curiae* status to non-parties in an arbitration under the UNICTRAL Arbitration rules" and opposed the *amici* as "an undesirable precedent [that] would be set and [concerned that] other groups might be encouraged to seek to appear as amici in arbitrations under [NAFTA Chapter 11]".[339] The tribunal decided that it had the power to and would accept *amicus* submissions. The tribunal also noted that, in its decision, it did "not rel[y] on the fact that *amicus* submissions feature in the domestic procedure of the courts in two, but not three, NAFTA parties". [340] And in its final award, the tribunal noted reference to its decision in a FTC joint statement of 16 July 2004: "We are pleased that the transparency initiatives we took during our October 2003 meeting have already begun to improve the operation of the investment chapter investor-state dispute-settlement mechanism. Earlier this year, for the first time a tribunal accepted written submissions from a non-disputing party and adopted the procedures that we recommended […] October 7, 2003 for the handling of such submissions".[341]

5.3.2 Public observation of panel or arbitration hearings

Granting the public the right to observe hearings is the second measure of public representation and participation in my study. Howard Mann speaks of "the right of the public to witness the process," and argues that—in matters central to public policy decision making, where the conflict is not just about private sector money, but about the balance between the public welfare and private interests –the opportunity to be present and witness the hearings, and to hold parties to account for their positions, is crucial.[342] Public hearings can expose the evidence and strategy of litigation for examination and may trigger public pressure on the arbitral proceeding.[343] For example, public pressure could demand the defense of an environmental policy that emerged with public participation so to prevent undermining their respective rights, where applicable, possibly including domestic democratic rights, or international public

[338] See: *Methanex v. USA*, Decision of the tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, paragraph 9.
[339] *Ibid*., paragraphs 14-15.
[340] *Ibid*., paragraph 47.
[341] See: *Methanex v. USA*, Final Award on Jurisdiction and Merits, 3rd August 2005, Ad Hoc tribunal (UNCITRAL), Parties II, Chapter C, page 16, footnote 8.
[342] Howard Mann et al. "Possible Improvements of the Framework for ICSID Arbitration" in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant ed. 2008) at 366.
[343] See: South Center. "Developments on Discussions for the Improvement of the Framework for Icsid Arbitration and the Participation of Developing Countries". In South Center Analytical Note. Geneva: South Center, 2005.

rights such as public participation in environmental decision-making under the Aarhus Convention.[344] If public pressure is triggered, public discourse can call into question legal concepts, such as 'scientific evidence' or 'necessity tests' and juxtapose these with evolving alternative principles and norms, such as 'scientific plausibility' or the 'precautionary principle'.

Lack of observing rights may also limit the effectiveness of non-disputing third person participation. This is because observing the initial substantive meetings of the tribunal with the parties, (in which parties make opening and closing statements, and they as well as the tribunal may make comments or pose questions) is useful for the development of *amicus curiae*. Mann et al highlight the benefits of open hearings, as in the case of the *Methanex v. United States* case arbitration, where "the US. position on a specific issue was revealed in a way that would have been impossible without open hearings".[345]

Concerns around open hearings echo those against third party participation in general, in particular costs involved for facility and technology in case of broadcasting settings and security staff. Mann et al note however "there is no need to fear an open hearing. Observers will generally act with proper decorum and where problems arise […] the exclusion of observers [is] the ultimate sanction".[346]

Traditionally dispute and arbitration hearings have been closed to the public, however, a practice of open hearings has not always been ruled out.

For example, in the *Methanex v. United States* case the tribunal found, referencing the travaux prepartoires, the UNCITRAL drafting committee deleted a provision in an earlier draft which could have allowed the arbitration tribunal to admit into an oral hearing persons other than the parties. In this case, the tribunal decided it has no power to accept petitioners request to attend oral hearings of the arbitrations.[347] Yet, the main hearing in this case, which "addressed all issues of jurisdiction and merits arising from Methanex's amended claim (excepting only quantum), was held in public, by agreement of the disputing parties, excepting one procedural issue heard in camera at Methanex's request".[348]

In the context of WTO disputes, former Chair of the WTO Dispute Settlement Body Ambassador Shahid Bashir also recalls "on several occasions the Appellate Body and arbitrators have opened for

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[344] See: The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. The Convention has 47 parties from Europe and Central Asia.
[345] Howard Mann et al., "Possible Improvements of the Framework for ICSID Arbitration" in APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES (Karl P. Sauvant ed. 2008) at 367.
[346] *Ibid*., at 366.
[347] See: *Methanex v. USA*, Decision of the tribunal on Petitions from Third Persons to Intervene as "amici curiae" 15 January 2001, Paragraph 47.
[348] See: *Methanex v. USA*, Final Award on Jurisdiction and Merits, 3rd August 2005, Ad Hoc tribunal (UNCITRAL), Paragraph 8.

public viewing their hearings (called "meetings" in WTO dispute settlement) and oral hearings[349] with disputing parties, where for example the public is permitted to view the panel meeting via closed circuit television in a WTO meeting room".[350]

The study found variation in the presence of this procedural case characteristic of granting observer status.

In conclusion, the indicator of public representation and participation is measured by observing in any given case: acceptance of *amicus curiae* and granting public observance of hearings. To test the hypothesis that public representation and participation increases the prospect of environmentally permissible dispute outcomes, the study looked for patterns of cases in which public representation and participation correlate positively with environmental policy permissible outcomes.

Additional observations include:

- Public representation and participation matters only if specific or all of the indicators' measurements are observed;
- Public representation and participation matters even if horizontal integration is not observed;
- Public representation and participation matters even if horizontal integration measures are not accepted as relevant or applicable;
- Public representation and participation matters only if a specific interpretation technique is employed by the tribunal;
- Public representation and participation matters/occurs only when transparency and/or horizontal integration is observed; and/or
- Public representation and participation matters only if specific policy implementation requirements have been met.

Observing such possible patterns of case outcome in relation to the public representation and participation indicator, including in combination with the indicators of transparency and horizontal integration thus aimed at gaining further insights and finding answers to the research question. Results may provide useful insights into institutional reform recommendations adding evidence to a principle-based debate.

[349] See for example *US — COOL* (WT/DS384, 386) and specified procedure https://www.wto.org/english/tratop_e/dispu_e/384_386r_f_e.pdf

[350] See for example *Canada — Renewable Energy* (WT/DS412) and Canada — Feed-in Tariff Program (WT/DS426).

5.3.3 State-State versus Investor-State-Dispute

Because of the study's ultimate focus on investment arbitrations only, no data variation was found for the specific case characteristic of public representation and participation observed as a case involving a state-state dispute. The decision to focus on investment arbitrations was based on a cost-benefit analysis, and enabled a richer analysis of norm contestation because many of the international trade law principles or norms in addition to more specific investment related norms could be addressed. Acknowledging that a choice had to be made illustrates also the humbling experience a researchers undergoes, starting with much ambition going into a project to later realize the limits of one person attempting an in-depth qualitative study involving multiple distinct international regimes. What follows in this section is thus useful for consideration in future studies, but not addressed in the final analysis of this project.

Institutional settings, such as investor-state case arbitrations that allow investors to directly represent themselves and bring a claim against foreign government, may matter to dispute outcomes. Such institutional settings are expected to more frequently lead to outcomes favorable to corporate and less favorable to public interest, such as environmental protection, including in the home country of the investor. In contrast, in state-state arbitration cases (where both states presumably represent the public interest at large) the outcome is expected to be more favorable to public interest such as environmental protection policies.[351] A state is more likely to be held accountable and subject to public scrutiny for misrepresenting public interest whereas an investor is 'at best'[352] primarily accountable to its shareholders rather than the general public.

In state-state disputes, public representation and participation can be assumed to take place indirectly through the state. This is because nation states[353] are political organizations of a society, invested with its governance and thus theoretically represent in a dispute case the public interest of a society at large. Naturally, the public interest has several dimensions, including next to environmental protection interest also labor rights or effects on consumer prices. In contrast, public participation and representation is limited in investor-state arbitrations. This is because in such cases, one party to the dispute, the investor, does not propose to represent the interest of the larger society. In international

[351] Nathalie Bernasconi-Osterwalder (et al): Investment treaties & why they patter to sustainable development – Questions & answers, IISD, Winnipeg, Canada, 2012, at 51.
[352] See: Raymond C. Miller's discussion of John Kenneth Galbraith idea of a 'techno structure' in mature corporation and Thorstein Veblen's distinction between similar engineer mentality versus entrepreneur mentality among corporate managers along with the more critical view presented in Robert B. Reich's "Supercapitalism". See: RAYMOND C. MILLER, INTERNATIONAL POLITICAL ECONOMY: CONTRASTING WORLD VIEWS (Routledge. 2008) at 95; and ROBERT REICH, SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE (Vintage Books. 2008) at 27 and 71.
[353] This study uses the term state to refer to nation state.

investment arbitrations under study in this research, an investor is granted the right for direct representation of its interest rather than having to rely on an indirect representation through the state.[354]

Investor-State Dispute Settlement (ISDS) settings are highly controversial among the public (and as result a number of countries are currently reassessing their positions in treaty negotiations as to whether to include such a provision) precisely because it provides investors with the ability to bypass a national court and offers them more choices among legal processes.[355] ISDS is not contained in the WTO agreement but found in some BITs and FTAs such as NAFTA. Even then, the mechanism in NAFTA for example is limited to disputes under the *investment* provisions in chapter 11. In disputes involving *trade* matters, the state-state dispute settlement in NAFTA chapter 20 prevails.

However, as the *Ethyl v. Canada* case illustrates, in practice an investor can succeed in using ISDS even in cases involving trade in goods, despite the fact that enforcements of rights of NAFTA under Chapter 3 (on trade in goods, national treatment and market access) accrue not to the investor but the home state through which the investor may seek representation.[356] Ethyl challenged an import and interprovincial *trade* restrictions on additive to unleaded gasoline in four different legal processes. In addition to the NAFTA Chapter 11 challenge, Ethyl: unsuccessfully sought to convince the U.S. government to take up its claim under a NAFTA Chapter 20 (state-state dispute settlement); attempted a Canadian constitutional challenge, which did not proceed to trial; and persuaded the provisional government of Alberta, backed by the governments of Quebec, Nova Scotia, and Saskatchewan, who brought and subsequently won a dispute under Canada's Agreement on Internal Trade.[357]

Finally, the idea of a state representing public interest in international economic law disputes could also apply to non-disputing third 'state' parties, which are parties to the treaty claimed to have been violated by one disputing party, but which are not one of the disputing parties. Non-disputing third parties' participation in dispute settlement proceedings is specified in the respective treaty text on which a dispute is based. For example, NAFTA Article 1128 provides that "on written notice to the disputing parties, a [NAFTA] Party may make submissions to a tribunal on a question of interpretation of this Agreement". In WTO disputes, third parties' participation opportunities at various stages of a dispute are

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[354] For example, the position represented by US based company Bechtel and its claims against Bolivia did not represent the views of US citizens at large, as the public awareness campaign and public outcry that influenced the final settlement illustrated.

[355] For example, Germany and France also opposed ISDS and pursued in the negotiations to remove it from the Transatlantic Trade and Investment Partnership (TTIP).

[356] *Ethyl Corporation v. Canada,* UNICTRAL, Award on Jurisdiction, 24 June 1998, paragraphs 63-64

[357] The challenge with regard to Canada's Agreement on Internal Trade was based, *inter alia* on: lack of federal-provincial consultation; not employing alternative less-trade restrictive measures and/or "the issue of indirect v. direct legislation: the federal government could not justify what it wanted to do (ban a substance) under environmental legislation, so turned to trade legislation to accomplish the same end indirectly". For a summary of all four challenges see: Julie A. Soloway, Environmental Trade Barriers Under NAFTA: The MMT Fuel Additives Controversy, 8 MINNESOTA JOURNAL OF GLOBAL TRADE (1999) at 75-91.

specified in relevant provisions,[358] and include, *inter alia*: to present their views orally to the panel during the first substantive meeting; and in practice to make written submissions.

However, as noted above in the discussion on the complexity of public interest and concerns with its representation and participation, a non-disputing third party may or may not be supportive of the public interest of environmental protection that the responding state party to the dispute seeks to defend. The study also observed in the raw data collection whether a non-disputing third party, in its submission to the tribunal pointed to: the objective of sustainable development, which also embraces the development rights focus of potential non-disputing third parties from developing countries; an environmental exception; and/or relevant MEAs.

Chapters 3, 4 and 5 presented the basis for my hypothesized three case features that could matter to the outcome of international economic law disputes. In the following chapters I discuss my methodological research approach, I analyze my research findings and present some recommendations that government and non-government actors may take with caution from these findings.

[358] In WTO disputes, third parties' participation opportunities at various stages of a dispute are explicated on the WTO website as follows: First, during the consultation stage, third parties can join only when consultations are held pursuant to Article XXII of GATT 1994, Article XXII:1 of GATS, or the corresponding provisions in the other covered agreements (Article 4.11 of the DSU). If the complainant invokes Article XXII:1, the admission of interested third parties based on their substantial 'trade' interest in dispute matter depends on the respondent, who may or may not accept them. However, launching a dispute with a request for consultations by choosing Article XXIII:1, the complainant can prevent the involvement in the consultations of third parties.
Second, if the consultations have failed to settle the dispute, and the complainant requests the establishment of a panel to adjudicate the dispute, third parties will be informed of the basis of the complaint and have an opportunity to be heard by panels and to make written submissions, even if they have not participated in the consultations. To participate in the panel procedure, third parties must notify in writing their substantial 'systemic' interest in the matter before the panel to the DSB (Article 10.2 of the DSU) within ten days from the establishment of the panel. In practice, any third party who invokes a systemic interest is admitted to a panel procedure without any scrutiny whether the interest truly is "substantial". Third parties receive the parties' first written submissions to the panel and present their views orally to the panel during the first substantive meeting (Article 10.3 of the DSU). Third parties have no rights beyond these although a panel can, and often does, extend the rights of participation of third parties in individual cases.
And third, DSU Article 16.4 makes clear that third parties can not appeal the panel report.
See: https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s2p1_e.htm; https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p1_e.htm; and https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p1_e.htm

6.0 METHODOLOGY

6.1 INTRODUCTION

This study applies a unique approach to analyse environmental-policy related cases brought under international investment arbitration. It does so by observing specific characteristics of horizontal integration, public participation and representation, and transparency in such cases. The research provides an initial database which can complement existing databases to inform a variety of analysis and the approach taken here could be also applied for analysis of broader public policy related international investment arbitration cases. For example, the data collected can be mined in various ways, depending on research questions posed. And this initial database can also be expanded to include economic law disputes more generally, including not only investment law focused but also trade law specific cases.

The previous chapters introduced: the policy problem that sparked my interest in investigating economic law disputes in which environmental policies have been challenged (chapter 1); the theoretical frameworks underlying my conceptual approach to understand motivations of various actors interacting in the arena of international law generally and international economic law disputes more specifically (chapter 2); and the basis for my hypotheses of three features that could matter in international economic law disputes (chapters 3, 4 and 5). These hypotheses included an initial identification of three broad indicators, namely horizontal integration, transparency and public representation and participation. The ideas developed towards a subsequent further specification of characteristics for each of these indicators. This chapter 6 describes my method of data collection and my methods used for the analysis in chapter 7.

The data collection resulted in comprehensive but targeted case summaries, a cumulative case summary table and a data table in which observations are presented in binary form, captured as either presence or absence of the identified characteristics for each of the three indicators.

The analysis in chapter 7 examines whether the three hypothesized features were observed in the real world of international investment disputes. Though the analysis refrains from concluding causality and from making predictions, it does inspect specifically whether any contradictions were observed for my given hypotheses about the co-occurrence of a case characteristic with a case outcome. To illustrate

this, please consider the three ideal type Tables and related Figures 6.1-3 below. Illustrative Table 6.1 displays an ideal type scenario in which my hypothesis about a specific case characteristic would be most strongly supported, namely that reference to the concept of sustainable development in a case could have a positive influence on the case outcome that is environmental policy permissible.

Table 6.1: Hypothetical ideal type scenario with strongest support of hypothesis with observations of co-occurrence no contradictions

Y or Environmental Policy Permissible Outcome		**X or Concept of sustainable development referenced in case**	
		1	**0**
	1	**10**	**0**
	0	**0**	**10**
	Total	10	10

Δ_1 = 1 (The measure Δ_1 is explicated further below in this chapter).

In this scenario, the strongest support for my hypothesis would be based on the following observations of co-occurrences and contradictions. My hypothesized case characteristic X, a reference to the concept of sustainable development, is observed as present (1) in a total of ten cases and in all ten of these cases a co-occurrence with my expected case outcome Y, an environmental policy permissible outcome was also observed as present (1). Moreover, in the additional equal number of ten cases in which my X was not present (0), all ten cases observed a co-occurrence with environmentally impermissible case outcomes or Y (0). No contradictions are observed in this scenario, since no case was observed in which my X was observed as present (1) and an environmental impermissible case outcome, or Y of (0) was observed. Neither is a contradiction observed in the ten cases in which my X was observed as not present (0) because in none of these cases had an environmental permissible case outcome, or Y (1). Table 6.1 represents an illustrative hypothetical ideal type table only, since in the real world the number of cases for each possible observation is expected to differ. Another way to illustrate this ideal type scenario of co-occurrence with no contradictions is shown in Figure 6.1, which illustrates this scenario with the positive delineation that presence of the hypothesized case characteristic should co-occur with the expected case outcome. (The measure $\Delta 1$ is explicated further below in this chapter).

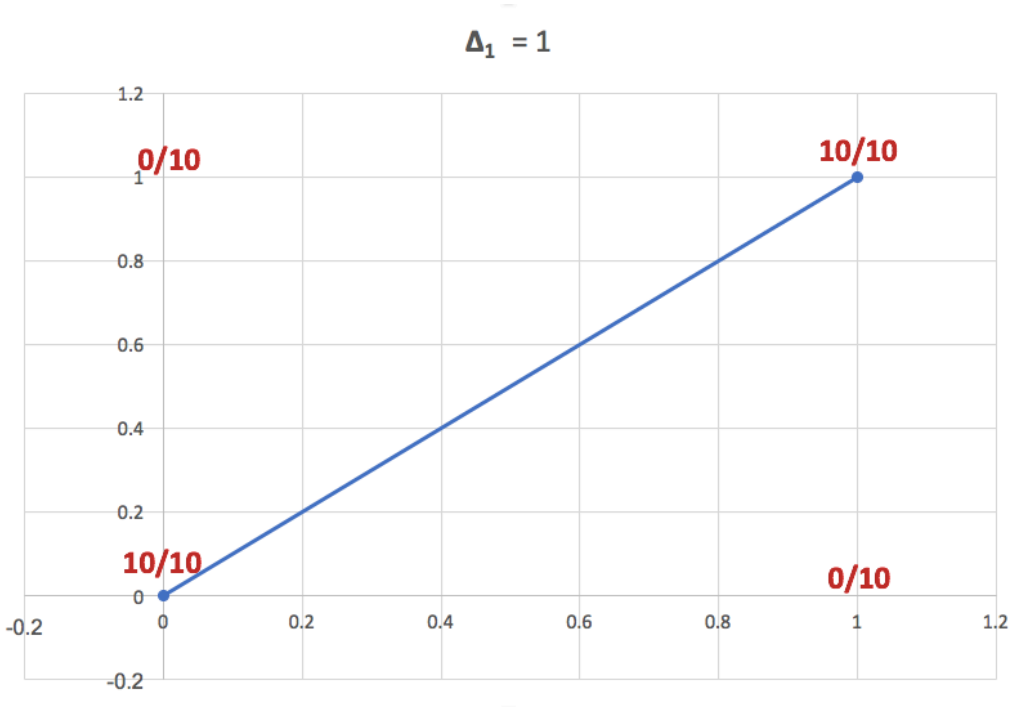

Figure 6.1: Support for hypothesis when Δ1 > 0 and here strongest support with Δ1 = 1

The line illustrates co-occurrences whereby in this ideal scenario:

- 10/10 on the lower left represents 10 co-occurrences in the 10 cases in which X is not present (0), namely co-occurring with 10 observations of Y not present (0);
- 10/10 on the upper right represents 10 co-occurrences in the 10 cases in which X is present (1), namely co-occurring with 10 observations of Y present (1).

The area outside of the line illustrates contradictions, whereby in this ideal scenario:

- 0/10 on the lower right represents 0 contradictions in 10 cases in which X present (1) because no or 0 observations of Y present were made.
- 0/10 on the upper left represents 0 contradictions in 10 cases in which X is not present (0) because also no or 0 observations of Y not present were made.

A finding of no contradictions would provide the strongest support for my hypothesis compared to a finding of a balance between co-occurrences and contradictions (shown in Table 6.2 and Figure 6.2 below). The weakest support for my hypothesis would be a finding of co-occurrence in exactly the

opposite direction of what I expected and without any contradictions (shown in Table 6.3 and Figure 6.3 below).

Table 6.2: Balance between co-occurrence and contradictions

Y or Environmental Policy Permissible Outcome		X or Concept of sustainable development referenced in case	
		1	**0**
	1	**5**	**5**
	0	**5**	**5**
	Total	10	10

$\Delta 1 = 0$ (The measure $\Delta 1$ is explicated further below in this chapter).

In this scenario, no clear support for my hypothesis would be based on the following observations of co-occurrences and contradictions. My hypothesized case characteristic X, a reference to the concept of sustainable development, is observed as present (1) in a total of ten cases and but only in five of these cases was a co-occurrence with my expected case outcome Y, an environmental policy permissible outcome also observed as present (1). Moreover, in the additional equal number of ten cases in which my X was not present (0), again only five cases observed a co-occurrence with environmentally impermissible case outcomes or Y (0). A balance of contradictions is also observed in this scenario, since again five case were observed in which my X was observed as present (1) yet an environmental impermissible case outcome, or Y of (0) was observed. And a balance of contradictions is also observed in the ten cases in which my X was observed as not present (0) because five of these cases had an environmental permissible case outcome, or Y (1). Figure 6.2 below displays an ideal type of perfect balance between co-occurrence and contradictions.

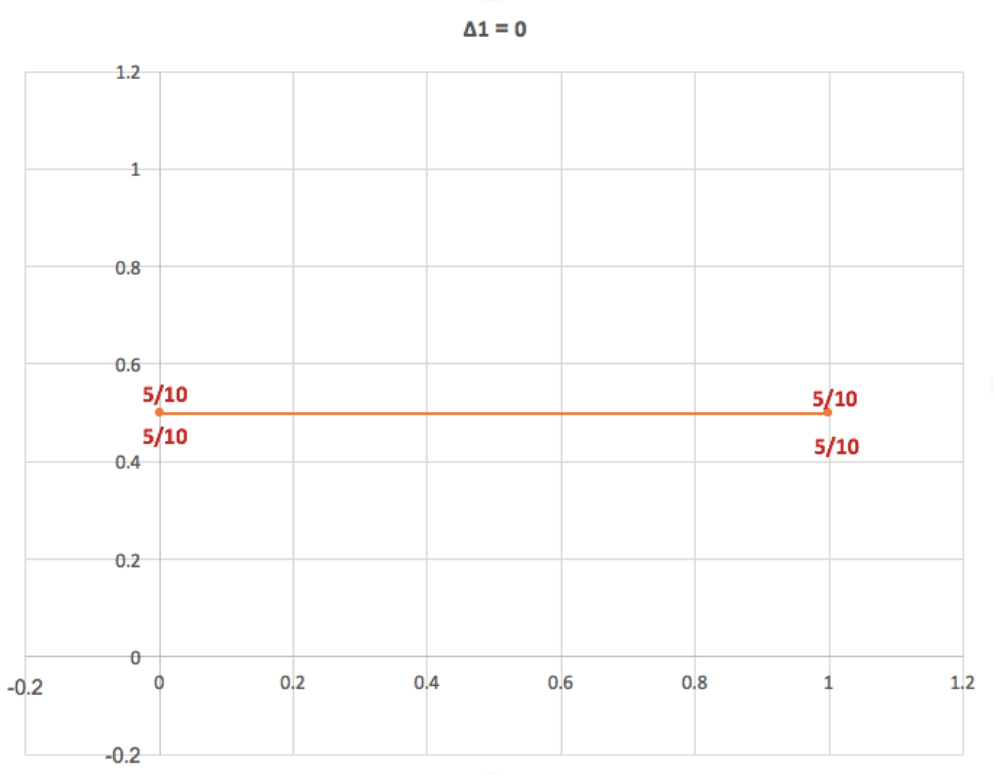

Figure 6.2: No clear support for hypothesis when Δ1 = 0 or balance between co-occurrence and contradictions

No support for my hypothesis is illustrated in the following scenario where co-occurrences are observed in exactly the opposite way of what I expected and without any contradictions.

Table 6.3: No contradictions but in opposite direction no support for hypothesis when Δ1=-1 or balance between co-occurrence and contradictions

Y or Environmental Policy Permissible Outcome		X or Concept of sustainable development referenced in case	
		1	**0**
	1	**0**	**10**
	0	**10**	**0**
	Total	10	10

Δ1 = -1 (The measure Δ1 is explicated further below in this chapter).

In this scenario, least support for my hypothesis would be based on the following observations of co-occurrences and contradictions. My hypothesized case characteristic X, a reference to the concept of sustainable development, is observed as present (1) in a total of ten cases and but in none of these cases was a co-occurrence with my expected case outcome Y, an environmental policy permissible outcome observed as present (1). Moreover, in the additional equal number of ten cases in which my X was not present (0), again no cases observed a co-occurrence with environmentally impermissible case outcomes or Y (0). Furthermore, no contradictions are observed in this scenario of findings that is however opposite to what I expected, since all or ten cases were observed in which my X was present (1) yet an environmental impermissible case outcome, or Y of (0) was observed. And no contradictions were observed in this scenario of findings opposite to what I expected, because in the ten cases in which my X was observed as not present (0) all ten of these cases had an environmental permissible case outcome, or Y (1).

Figure 6.3 below displays an ideal type of this scenario of co-occurrence in the opposite direction than expected and with contradictions.

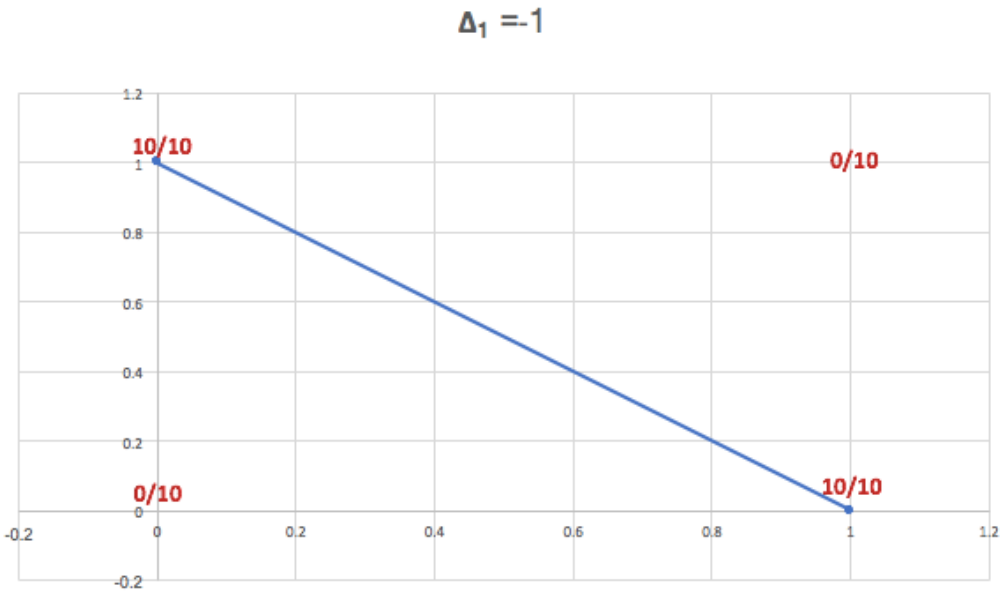

Figure 6.3: Least support for hypothesis when Δ1 = -1 or co-occurrence opposite to what expected with no contradictions

The above Tables and Figures 6.1-6.3 describe my approach to inspecting whether any contradictions were observed for my given ideas about the co-occurrence of a case characteristic with a case outcome. They apply the concept of ideal type scenarios to explain that in my study a finding of no contradictions would provide the strongest support for my ideas compared to a finding of a balance between co-occurrences and contradictions. The weakest support, on the other hand, would be a finding of co-occurrence without any contradictions however that the co-occurrence is exactly the opposite of what I expected.

Table 6.4 below concludes this explanation with an actual observation in this study with regards to my hypothesis that reference to an environmental exception or defense in a case accepted by the tribunal. The corresponding Figure 6.4 serves to further illustrate visually my conceptualization of co-occurrence and contradictions.

Table 6.4: Observations of the hypothesized influence of a reference to an environmental exception or defense in a case accepted by the tribunal on an environment policy permissible case outcome

Y or Environmental Policy Permissible Outcome		X or Environmental Exception or Defense referenced and accepted by tribunal	
		1	**0**
	1	**10**	**4**
	0	**2**	**6**
	Total	12	10

Δ_1 = 0.433333 (The measure $\boldsymbol{\Delta_1}$ is explicated further below in this chapter).

In this real-world observation, the co-occurrence of the specific hypothesized case characteristics with case outcomes, the contradictions and the total number of observed cases do not neatly equal up evenly as in the ideal type scenarios above. Yet support for the hypothesis is observed as Figure 6.4 illustrates this positive delineation, though not as strong as in the ideal type of Table and Figure 6.1 yet not as weak as an ideal type balance between co-occurrence and contradictions seen in Figure 6.2.

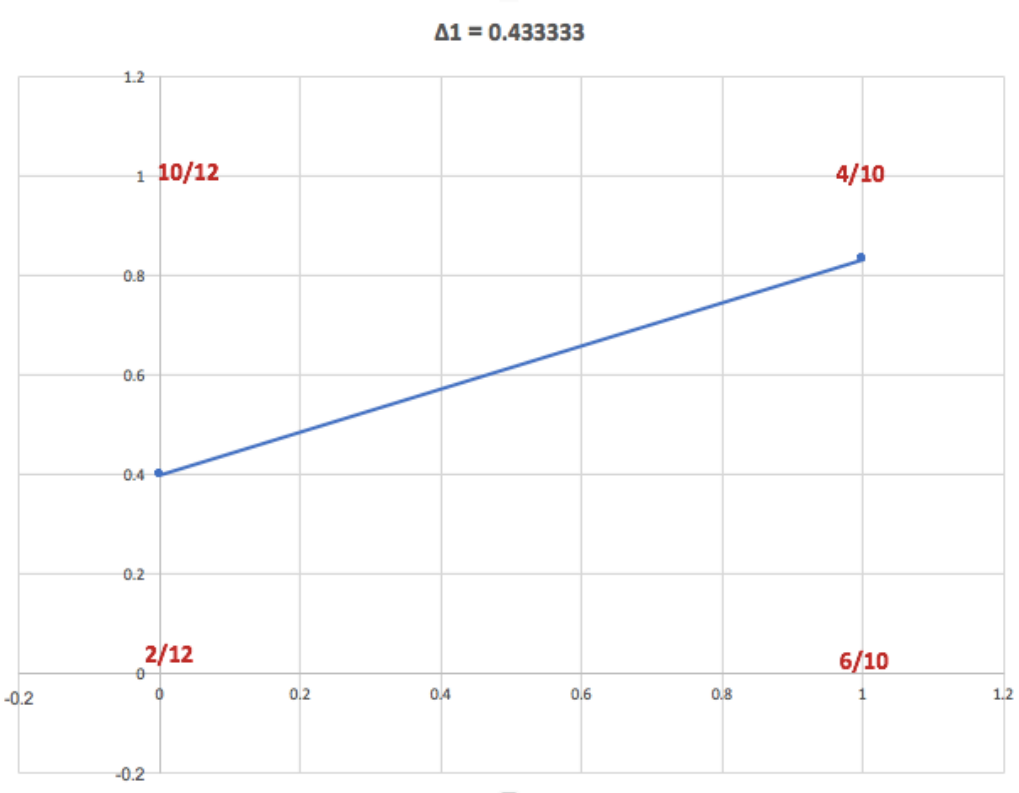

Figure 6.4: Some support based on observations of the hypothesized influence of a reference to an environmental exception or defense in a case accepted by the tribunal on an environment policy permissible case outcome with $\Delta 1 = 0.43333$

The measure delta for the occurrence of contradictions is explicated below. Provided per request can be the delta calculations for the individual indicator characteristics, as only the results are discussed in the analysis chapter. Rather than stopping at the methodological level, the analysis chapter 7 further aimed at gaining practical insights from an additional deeper inspection of specific cases highlighting contradictions to my hypotheses. This resulted in recommendations for governments and NGOs and pointed to the status of norm contestation within the economic-environment nexus of international law.

The methodological approach used to analyse the research data followed three main steps: First, a data description was provided focusing on observed occurrences of specified indicators with identified characteristics, including explanations of specific case observations based on an examination of the raw data. Second, a test of these individual characteristic observations was conducted using the measure for the occurrence of contradictions. Third, a Boolean truth table approach for qualitative comparative analysis was applied to consider specific combinations of indicator characteristics to assess support for my hypotheses. The Boolean truth table approach for qualitative comparative analysis is explicated below. The respective Boolean tables and equations can be provided per request as only the results are discussed in the analysis chapter.

What follows is a summary of the approaches and methods used for the data collection and analysis in this research.

6.2 DATA COLLECTION

This dissertation study began with my dissertation proposal, outlining the path to accumulating the required knowledge to answer my research question. “What explains variation in environmental policy permissibility in international trade and investment law? What matters for the dispute outcome in such cases?” However, my initial data collection proved to be too simplistic, leading me to revise my data collection several times as I gained deeper insights to the complexity of issues relevant for my research question itself. “Do institutional factors matter in the outcome of my cases” seemed unanswerable, even if I correctly identified what institutional factors are relevant, without understanding why and how they would matter. To answer the why and the how questions, I had to revise my data collection to capture explanatory factors. Aspects of the methodology underwent revision in the course of exploration and early collection of the data. The complexity of the cases, the large number of variables and the

importance of interaction among several factors all encouraged the changes that are described in the following sections.

Initially my hypothesis was centered around the presence of concepts, such as sustainable development, and certain provisions, such as an environmental exception provision, present in the legal text of the treaty invoked under an economic law dispute in which an environmental policy was challenged. The focus was whether the concept of sustainable development was mentioned in the preamble, an environmental exception clause was incorporated in the treaty, and a specific reference to an MEA was spelled out in the treaty invoked under such a dispute. Reading through the many disputes, I recognized that much more detailed legal language in the treaty was contested. Guided by Asa Romson's questionnaire,[359] I added on to my initial approach to collect data of only a few treaty text provisions many more specific legal text issues. For example, I added to my data collection whether the invoked treaty contained a wide definition of investment, as well as the scope of provisions on 'fair and equitable treatment', the most favored nations and the national treatment principles. While this exercise was helpful in gaining a better understanding of the legal concepts, the data collection itself turned out to be too comprehensive, with never ending data sheets reporting as many as 178 variables. These included besides specifics about many legal text provisions also institutional and procedural notes, such as administrating institutions, applicable rules, treaty involved, document numbers, year, economic development status of state parties involved. Yet, after several revisions, I finally narrowed down the question of how institutional factors might or might not matter to a manageable data size. Realizing that many investment treaties invoked in the cases studied contain similar if not identical core legal provisions, I reallocated too specific issues from my data sheet to my case summary and discussion and retained in the data set the crucial elements that I originally hypothesized. This relocation of too specific legal definitions and arguments from my data set to the individual case summaries proofed beneficial for the analysis. With fewer and more focused binary variables I could gain a better overview of my observations, and because much of the rich raw data was maintained in the case summaries, I could further inspect specific cases for which the data presented surprising observations or otherwise deviations from the general trends observed.

I also narrowed the focus in my methodology on disputes involving international public investment law which is a subset of international economic law regime. This choice to focus on international investment arbitrations or disputes, enabled a richer analysis of norm contestation because many of the international trade law principles or norms, such as most-favoured nations, national treatment or the concept of "like circumstances" still applied, while also in addition more specific investment

[359] ASA ROMSON, ENVIRONMENTAL POLICY SPACE AND INTERNATIONAL INVESTMENT LAW (Stockholm University. 2012).

related norms such as “fair and equitable treatment” or “legitimate and reasonable expectations” were also addressed. The benefits of this choice outweigh the loss of variety in one of my case characteristics, namely all cases under investigation where investor-state disputes and none a state-state dispute.

The most important change made in the evolution of my study was first, moving from observing whether treaty text contained my horizontal integration measurements to differentiating the measurements at two levels of horizontal integration. Second my research evolved from merely observing whether the concept of sustainable development, was mentioned, an environmental exception clauses was contained and an MEA referenced in the treaty invoked towards whether these hypothesized case elements indicating horizontal integration were mentioned or referred to in the dispute case. And if so, whether these references were recognized by the tribunal as relevant and accepted as applicable to the case. This change was based on a deeper understanding of the case interpretation process, which further allowed me to recognize why and how observation of these measurements could explain interpretation of provisions, inter-linkage to the measurements of transparency and public participation and ultimately case outcomes. This decision was reinforced by the feedback I received from trade, investment and environmental law experts such as Aaron Cosby, Senior Associate at the International Institute for Sustainable Development and Professor Kati Kulovesi at the University of Eastern Finland. Having found the path after several detours has brought me closer to the destination, where I can analyze my findings to answer my question.

By amending my data collection from quantitative to more and more qualitative research, my method of data collection tested also several approaches before advancing in an acceptable manner. I began with reading all available primary documents of a case in chronological order, considering this to allow for the most thorough and comprehensive research of contested norms in my identified population of cases. Because of the voluminous submissions and documents, this proved to be time consuming, and based on the suggestion from the Chair of my Committee, I agreed to begin my data collection on each case with simply reading its final award. This may be justified not only because of the time saved and the need to speed up data collection, but also, the fact that many cases deal with a series of procedural applications, orders, decisions and directions, which seemed not to have an impact on the award and in any case was assumed to be otherwise reflected in the final award. As the ICSID Tribunal noted in the *Santa Elena v. Costa Rica* case, “since none of these procedural orders or other decisions of the Tribunal have any impact on the present Award, it is not necessary to review and summarize them here”.[360]

However, in some cases it became clear that merely looking at the final award would be insufficient to understand the underlying issues of the case. For example, in the *S.D. Meyers v. Canada* case, the final award concerns the costs of the dispute. In this case, only by looking at the Partial and

[360] *Santa Elena v. Costa Rica*, ICSID, In the Matter of the Arbitration between Compañía del Desarrollo de Santa Elena, S.A. and the Republic of Costa Rica, Case No. ARB/96/1, Final Award 2000, paragraph 32, footnote 19.

Second Partial Award as well as the dissenting opinions can the normative contestation be extracted for my data.

In amending my methodology in data collection, to start with the final award, I ensured that wherever the tribunal did make reference to a point in other documents that may be relevant to this study, I also read the referred documents. Yet, I could not abandon reading all memorials of disputing parties and non-disputing party's or person's submissions. This reflects by no means a compulsive impulse or joy in reading mounts of documents, but rather points to the fact that interpretation influence of presentation is hard to detect.

In the *Glamis v. United States* case, for example, were I to merely note the tribunals decision to confine its decision to the issues presented, noting that it did not reach the particular issues addressed by the *amicus* submissions,[361] and stressing its reluctance or opposition to broaden its interpretation and consider "controversial issues raised," I would not have been able to collect the data on various horizontal integration measures presented in these submissions, including the environmental exception or defense argument of international public policy as well as the MEA references seeking a human rights-based approach that is evolving in international environmental law jurisprudence. My data collection would thus only have served a partial picture, rather than the full picture I sought, namely to observe horizontal integration, including: in relation to transparency and public participation indicators; patterns related to specific horizontal integration measures in relation to relevance and interpretation; and patterns related to case outcomes. Only such full picture can lead to comprehensive observations despite the fact that the degree of influence presentations have on interpretation are difficult to show. Otherwise I entrusted that all relevant aspects found in the final award included those captured in submissions and those that informed the reasoning for the decision taken have been accounted for in this study. For that reason, in the end, the data collection for most cases did go beyond final awards.

In addition, I considered the use of software programs for data collection. Such programs allow a large volume of documents to be screened for specific language, for example words such as sustainable development or contained in MEAs or exception clauses. However, while such technology appears attractive for timesaving purposes, it is prone to miss important details that cannot yet be recognized by artificial intelligence. In the end, the learning process and deeper understanding gained through the process of human reading and analysis, albeit time consuming, would be required to be undergone first before even attempting to code an artificial intelligence to deliver the desired outcome.

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[361] *Glamis Gold Ltd. v. USA*; ad hoc Tribunal; UNICTRAL; NAFTA; Award, 16 May 2009, paragraph 8. The Tribunal stressed its awareness that its decision has been awaited by those concerned with environmental regulation, the interests of indigenous peoples and the tension sometimes seen between private property rights and state regulation.

To illustrate this point, let's consider the case reading of *S.D. Myers v. Canada*: First, a word search for the word "sustainable" to detect the measure "reference to sustainable development" may lead to the use of the word in the wrong context, i.e. the tribunal stating "the contention also is not sustainable on a proper interpretation of the NAFTA". Only with her experience and knowledge in international negotiations, the author was able to detect a reference, though not specific, by the tribunal to the sustainable development in the preamble of NAFTA, because of the complexity around the concept of sustainable development, including different views among countries at different levels of development.[362]

The same applies to environmental exceptions. For example, "although the exceptions envisaged in Article XX of the GATT do not mention 'environment,' there is little difficulty in interpreting 'conservation of exhaustible natural resources' or protection of 'human, animal or plant life or health' broadly enough to cover any of the exiting environmentally related treaty restrictions to trade".[363]

Second, the level of horizontal integration (HI) measurements, at the treaty interpretation level 1 or the more general international law level 2, are not obvious and require similar deeper understanding of the issues involved. In this case, a computer program may have found a level 1 interpretation of HI because the Tribunal initially excluded in its reference to relevant context of VCLT 31(3)(c), yet later in the interpretation applies a level 2 HI, which was detected by the author due to her knowledge of the indirectly referenced MEAs, including the principles contained in their text, in the referenced NAAEC.[364]

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[362] There are four preambular paragraphs in NAFTA related to sustainable development: undertake each of the preceding in a manner consistent with environmental protection and conservation (Paragraph 11); preserve their flexibility to safeguard the public welfare (Paragraph 12); promote sustainable development (Paragraph 13); and strengthen the development and enforcement of environmental laws and regulations (Paragraph 14). The Tribunal referred to the concept of sustainable development in several places: in the preamble to the NAFTA (level 1) to preambular paragraph 11, but did not specifically refer to sustainable development as in preambular paragraph 13; in the text of the transboundary agreement between the US and Canada, "recognizing that the most effective and efficient means of achieving environmentally sound management procedures for hazardous waste crossing the United States - Canada border is through cooperative efforts and controlled regulatory schemes"; in the context of the Basel Convention "insistence on environmentally sound management of waste (See Partial Award Paragraph 211-3); in the context of the NAAEC; "*and the international agreements affirmed in the NAAEC*" which are the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio declaration on Environment and Development (see NAAEC preambular paragraph 8) (Partial Award Paragraph 220-1).; and by recognizing "indirect environmental objective to keep domestic industry strong to ensure capability for continued waste disposal (Partial Award Paragraph 195). They were rejected because the Canada did not choose an available alternative (did not stay within the scope for such legitimate objective as specified in the text). This last reference to "indirect environmental objective" to keep domestic industry strong and ensure capability for the service is in particular relevant to the view and understanding of sustainable development by developing countries, seeking to protect their, in part green, infant industries.

[363] Alan Boyle, Relationship between International environmental law and other branches of international law,, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky, Jutta Brunnée and Ellen Hey eds.) at 138.

[364] Albeit the Tribunal does set out referencing only VCLT Article 31(1) and (2) (indicating HI level 1), VCLT Article 27 (indicating potential restrictive interpretation of police powers), the Tribunal did not reference VCLT Article 31(3)(c) (on taking into account together with context, "any relevant rules of international law applicable in the relations between the parties" which indicates HI level 2). However, the Tribunal later does consider HI level 2

The same applies to references to MEAs, that may be hidden in the text, or exceptions, such as the police powers doctrine, which may be used in a case but not literally stated. Finally, in terms of observing whether a tribunal accepted a HI reference as relevant context, or rejected it and on what grounds, as well as subsequent interpretation technique, such as restrictive or broad of specific provisions and legal concepts, gets at a level of complexity that requires careful reading comprehension beyond what a legal word search program could master.

The relative lack of transparency in international investment arbitrations made capturing my transparency indicator difficult. The procedural history summarized in a final award did not always help with data collection either. Next, to checking whether notice of intent was published, I: did a google search within specific timeframes around the notice; I searched publications, such as ICSID news on whether registration of the case was published, I contacted respondent government party and asked whether the notice was made public, for example through a press release. I also interviewed relevant experts in trade and investment disputes from government, civil society and business organizations, such as US Trade Representative office, Respondent party ministry of economics and environment, Ralph Nader, Public Citizens and IISD, and various Chambers of Commerce of relevant countries. Few attempts were fruitful, especially with regards to my question whether access to documents during the case proceedings was provided.

The data collection for this transparency measurement was aided by my data collection for my public participation indicator. I could detect my transparency indicator of access to documents during case proceedings by reading through the adjudicatory body's decision on the petition of non-state third parties, which often requested to be not only considered as *amici curiae*; allowed to make written submissions; granted access to the hearings; but also to redacted versions of documents of the case file. The data entry is based on the results of this research.

MEAs and customary [case] law. First, the Tribunal explains: "The Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC [which are the 1972 Stockholm Declaration on the Environment and 1992 Rio Declaration on the Environment and Development in NAAEC preambular paragraph 8] suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles: 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" (See Partial Award Paragraphs 220). The Tribunal explained its view, that "these principles are consistent with the express provisions of the Transboundary Agreement and the Basel Convention". The Tribunal rejected, however, the determining relevance to this case because the measure was not implemented within the given scope of such norms, by adopting in its interpretation the principle of mutual supportiveness and supporting it with relevant WTO case law: "A logical corollary of them is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements. (See Partial Award Paragraphs 221).

6.3 MEASURE FOR THE OCCURRENCE OF CONTRADICTIONS

To analyse my collected data and inspect specifically whether any contradictions were observed in the real world for my given hypotheses about the co-occurrence of a case characteristic with a case outcome, I used the measure delta for the occurrence of contradictions. Specifically, for any of my given hypotheses about the co-occurrence of a case characteristic with a case outcome, $\Delta 1$ tells us about the existence of contradictions in regard to this hypothesis. To illustrate the application and my use of this measure, I use an example from the research.

Table 6.5 below relates to my hypothesis that transparency, and specifically Document Access During Proceedings as one characteristic of transparency, could have an influence on dispute outcomes.

Table 6.5: Measure for the occurrence of contradictions

	x=1	x=0
y=1	a	b
y=0	c	d

Definitions: In Table 6.5,

x represents Document Access During Proceedings

y represents Environmental Policy Permissible Outcome

x=1 represents the presence of the characteristic x

x=0 represents the absence of the characteristic x

y=1 represents the presence of an Environmental Policy Permissible Outcome

y=0 represents the absence of an Environmental Policy Permissible Outcome

a represents the number of observed cases in which the presence of characteristic x co-occurred with an Environmental Policy Permissible Outcome

b represents the number of observed cases in which the absence of characteristic x co-occurred with the presence of an Environmental Policy Permissible Outcome

c represents the number of observed cases in which the presence of characteristic x co-occurred with the absence of an Environmental Policy Permissible Outcome

d represents the number of observed cases in which the absence of characteristic x co-occurred with the absence of an Environmental Policy Permissible Outcome

With respect to Table 6.5 and the definitions:

Probability is expressed $p_1 = \frac{a}{a+c}$

Antithesis is expressed $k_2 = \frac{c}{a+c}$

Probability is expressed $p_2 = \frac{d}{b+d}$

Antithesis is expressed $k_1 = \frac{b}{b+d}$

The term antithesis is only used to describe the probability of contradictions in this context.

One can write down the equations 1 to 5:

$\Delta 1 = p1 - k1$ (equation 1)

$\Delta 2 = k2 - p2$ (equation 2)

$\Delta 1 + \Delta 2 = 0$ (equation 3)

$p1 + k2 = 1$ (equation 4)

$k1 + p2 = 1$ (equation 5)

The combination of equation 1 and equation 4 leads to equation 6:

$\Delta 1 = 1 - k1 - k2$ (equation 6)

Equation 6 makes clear that Δ1 depends only on "the antithesis" k1 and k2. So Δ1 is a measure that expresses the occurrence of contradictions related to the frequency of cases with x = 0 and x = 1.

Δ1 spans from -1 to 1 and allows me to test my data:

a finding of Δ1 = 1 means no contradictions;

a finding of Δ1 = 0 means a balance between co-occurrences and contradictions; and

a finding of Δ1 = -1 means that co-occurrence is given without any contradictions however that the co-occurrence is exactly the opposite of what I expected.

The following illustrates and explains why Δ1 allows for an evaluation of the existence of contradictions, and why I refer to Δ1 only. Using an example from the study's data on the transparency indicator, the following Table 6.6 presents the case outcome y on the left as either presence of an environmental policy permissible outcome (1) or absence thereof (0). The rows to the right present the individual transparency characteristic of Document Access During Proceedings, as either present (1) or absent (0).

Table 6.6 : Evaluation of the existence of contradictions

$\Delta_1 = 0.0827$	x=1		x=0	
y=1	a=5	$p_1 = 0.714285$	b = 12	$k_1 = 0.6315789$
y=0	c=2	$k_2 = 0.285714$	d=7	$p_2 = 0.368421$

The specifically calculated Δ1 (please see Table 6.6) based on the numbers from the data for this transparency characteristic presented in this table, resulted in Δ1 = 0.0827. For this characteristic, the Δ1 calculation of 0.08 indicates a balance between co-occurrence and contradictions, however with a slight tendency of stronger observations of co-occurrences. My hypothesis that Document Access During Proceedings could have an influence on dispute outcome is thus not strongly, if at all, supported.

Compared to this weak result, my hypothesis that the public representation and participation characteristic of Observer Status Granted could have an influence on the case outcome seems more supported based on the Δ1 calculations of the study's data. For that specific characteristic, the calculated Δ1 of almost 0.22 indicates still nearly a balance between co-occurrences and contradictions however with a good visible tendency of stronger observations of co-occurrences.

An even stronger support was found for the hypothesis that the public representation and participation characteristic of '*amicus curiae* accepted' could have an influence on the case outcome. For that specific characteristic, the calculated Δ1 of nearly 0.27 indicates no longer a balance between co-occurrences and contradictions but a strong visible tendency of observations of co-occurrences.

The strongest support was found for my hypothesis that a reference to an environmental exception of defense made and accepted by the tribunal could have an influence on the case outcome. For that specific characteristic, the calculated Δ1 of 0.43 indicates a strong visible tendency of observations of co-occurrences.

6.4 BOOLEAN TRUTH TABLE APPROACH FOR QUALITATIVE COMPARATIVE ANALYSIS

Charles Ragin used Boolean algebra to develop a technique that allows for systematic case comparisons and enables researchers to make causal inferences on the basis of only a small number of cases. The technique is based on the binary logic of Boolean algebra, and attempts to maximize the number of comparisons that can be made across the cases under investigation, in terms of the presence or absence of characteristics (variables) of analytical interest.[365]

The analysis in this study refrains from concluding causality and from making predictions but aims instead at testing my hypotheses about specified characteristics that could have an influence on a case outcome. In addition to the application of the measure for the occurrence of contradictions that was applied in this study to the hypotheses of individual characteristics, applying Ragin's approach allows me to test for the effects of combinations of characteristics. The focuses here is: what combination of characteristics are observed to influence dispute outcomes. A precise influence of the characteristics of the theorized indicators on the case outcome was not determined in this study. However, the study sought to confirm support of my hypotheses, including that such theoretical influence is best understood in an interactive way. The study sought to illustrate this based on observations made, whereby assessing observations of co-occurrences of case outcomes with combination of characteristics was also seen as useful.

[365] A Dictionary of Sociology (Oxford University Press 1998).

The basic features of the Boolean approach include:[366]

- the use of binary data;
- the use of a truth table to represent the data;
- Boolean addition which is represented with the logical operator OR with uppercase letters indicating presence and lowercase letters indicating absence;
- Boolean multiplication is represented with AND, whereby a product is a specific combination of causal conditions;
- combinatorial logic, whereby causes are never viewed in isolation but in the context of presence and absence of other causally relevant conditions;
- Boolean minimization, following from the rule that if two Boolean expressions differ in only one causal condition yet produce the same outcome, then the causal condition that distinguishes the two expressions can be considered irrelevant and can be removed to create a simpler, combined expression; and
- the theoretical factoring of Boolean expressions to identify conditions that are causally equivalent and to show which context is required for a condition to be present for the outcome of interest to occur.

Provided per request can be the documentation of the results of the constructed truth tables, simplified truth tables based on a minimization process and resulting Boolean expressions for: specific characteristics of the horizontal integration indicator; relevant characteristics of the transparency and public representation and participation indicators; and for the total data set.

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[366] Charles Ragin explicates these features, and emphasizes that "in all these procedures there is an element of investigator input that is crucial and the use of theory is used to evaluate the results of Boolean analysis. See: CHARLES RAGIN, COMPARATIVE METHOD (University of California Press. 1987), Chapters 6-8 and quoted here at 98.

Due to the Boolean technique, the research acronyms for the individual characteristics had to be changed for this test. The letters assigned for the individual characteristics in the constructed truth table of the complete data set below are:

A = Reference to Sustainable Development (SD) made
B = reference to Sustainable Development (SD) accepted
C = Reference to Environmental Exception or Defense (EED) made
D = Reference to Environmental Exception or Defense (EED) accepted
E = Reference to a Multilateral Environmental Agreement (MEA) made
F = Reference to a Multilateral Environmental Agreement (MEA) accepted
G = Public Notice of Intent
H = Document Access During Proceedings
I = Published Final Award (since all data entries are present because in the end the research only included cases where a published award with information about the case outcome, the Boolean truth table analyses did not consider this characteristic)

J = Amicus Curiae Accepted
K = Observer Status Granted
L = State-State Dispute (since all data entries are absent because in the end the research only included investor-state disputes, the Boolean truth table analyses did not consider this characteristic)

M = Systemic-Integration Interpretation Approach (Interpretation Approach represents an alternative explanation, and was juxtaposed with a Treaty-Specific Interpretation Approach)

Y = Environmental Policy Permissible Dispute Outcome

In the truth tables:

0 indicates the absence of a specific characteristic;
1 indicates presence of a specific characteristic; and
-- dash means the specific characteristic could be either present or absent for the outcome to occur in the specified combination.

For the Boolean equation:

a small letter such as “a” means that the characteristic is absent
a capital letter such as “A” means that the characteristic is present
* represents the logical operator of AND
+ represents the logical operator of OR

With regards to horizontal integration, as noted in the relevant chapter, the study evolved from an early idea of what factors could matter, including for example whether the governing economic law treaty included a reference to sustainable development or included an environmental exception provision. As the conceptual hypotheses advanced, the interest grew as to why such factors could matter, including whether such reference was made, or whether such reference was accepted. In the final Boolean truth table approach to test initial analysis results, the focus progressed to whether references to specific characteristics of the horizontal integration indicator was accepted in a case, represented by the characteristics B, D and F. This is because by definition, only where a reference was made could it be also accepted. However, this does not mean that the possible invisible influences of a reference being made but not accepted were disregarded.

In addition and related, the Boolean truth table also includes the alternative explanation or specific characteristics of interpretation approach taken by the tribunal in a case, represented by the characteristics M. Where (1) represents a systemic-integration interpretation approach juxtaposed to a (0) representing a treaty-specific interpretation approach.

Displayed in the tables are the existing combinations observed, where observed cases with environmental permissible outcome show Y = 1 and observed cases with impermissible outcome show Y = 0.

To illustrate the application of this approach I am using the example of the theme horizontal integration. In this example, I assess my hypothesis that specific horizontal integration characteristics could have an influence on dispute outcome, by looking at what combination of horizontal integration characteristics co-occurred with an environmental policy permissible dispute outcome. This approach involves the four steps. First, a truth table (please see Figure 6.5 below) with Boolean equation was constructed based on the data. Here the first column presents the assigned case numbers assigned to a case in this research. Second, a simplified truth table (please see Figure 6.6 below) was established showing a condensed set of combinations of case characteristics resulting in the outcome. Here, the first column no longer represents a case number but instead an assigned combination number for a particular combination of characteristics that co-occurred with the outcome of interest observed in the research. It does not represent the number of observed occurrences of that combination. Third based on the Boolean

minimization process simpler, combined equations were establish; and fourth, the findings were described in a meaningful and 'real world relevant' way.

	A	B	C	D	E	F	M	Y
1	1	0	1	0	1	0	0	0
2	1	0	1	1	1	0	1	1
3	1	0	1	1	1	0	1	1
4	1	0	1	1	1	0	0	0
5	1	1	1	1	1	1	1	0
6	1	0	1	1	1	0	1	1
7	1	1	1	0	1	0	1	1
8	1	0	1	0	0	0	0	1
9	0	0	1	0	0	0	0	0
10	1	0	1	0	1	0	0	0
11	0	0	1	0	0	0	0	0
12	0	0	0	0	0	0	0	1
13	0	0	1	1	1	1	1	1
14	1	1	0	0	1	1	1	1
15	0	0	1	1	0	0	0	0
16	0	0	0	0	0	0	0	0
17	0	0	0	0	1	1	1	1
18	0	0	1	1	0	0	1	1
19	0	0	1	1	1	1	1	1
20	0	0	1	1	1	0	1	1
21	0	0	1	1	1	0	1	1
22	1	0	1	0	0	0	1	0
23	1	1	1	0	1	0	0	0
24	1	1	1	1	0	0	0	1
25	1	1	1	1	1	0	1	1
26	1	1	1	1	0	0	1	0
27	0	0	0	0	0	0	0	1
28	0	0	0	0	1	1	1	1
29	0	0	0	0	1	1	0	1

Figure 6.5: Constructed truth table for the characteristics of horizontal integration with interpretation approach taken

The long Boolean equation for the table in FIGURE 6.5 is:

Y = A*b*C*D*E*f*M + A*b*C*D*E*f*M + A*b*C*D*E*f*M + A*B*C*d*E*f*M + A*b*C*d*e*f*m + a*b*c*d*e*f*m + a*b*C*D*E*F*M + A*B*c*d*E*F*M + a*b*c*d*E*F*M + a*b*C*D*e*f*M + a*b*C*D*E*F*M + a*b*C*D*E*f*M + a*b*C*D*E*f*M + A*B*C*D*e*f*m + A*B*C*D*E*f*M + a*b*c*d*e*f*m + a*b*c*d*E*F*M + a*b*c*d*E*F*m

	A	B	C	D	E	F	M	Y
1	-	0	1	1	1	0	1	1
2	1	1	1	1	0	0	0	1
3	1	1	0	0	1	1	1	1
4	0	0	0	0	0	0	0	1
5	0	0	0	0	1	1	-	1
6	1	0	1	0	0	0	0	1
7	1	1	1	-	1	0	1	1
8	0	0	1	1	-	0	1	1
9	0	0	1	1	1	-	1	1

Figure 6.6: Simplified truth table for the Horizontal Integration Theme showing a condensed set of combinations of case characteristics resulting in the outcome of interest

The minimization process resulted in the following Boolean equation for the table in Figure 6.6:

Y = b*C*D*E*f*M + A*B*C*D*e*f*m + A*B*c*d*E*F*M + a*b*c*d*e*f*m + a*b*c*d*E*F + A*b*C*d*e*f*m + A*B*C*E*f*M + a*b*C*D*f*M + a*b*C*D*E*M

This equation shows the combinations of horizontal integration case characteristics that co-occurred with environmental policy permissible outcomes in this study.

From this equation result I can infer, based on my strong familiarity with the data and understanding of real world scenarios, the following.

Cases with an environmental policy permissible outcome co-occurred with specific horizontal integration characteristic combinations of:

- **b*C*D*E*f*M** that is with a combination of reference to an environmental exception or defense made and accepted as defense AND reference to an MEA was made but still not accepted AND the tribunal taking an interpretation approach of systemic integration; OR

- **A*B*C*D*e*f*m** that is with a combination of reference to sustainable development AND to an environmental exception or defense made and accepted AND the tribunal still taking a treaty-specific interpretation approach; OR

- **A*B*c*d*E*F*M** that is with a combination of reference to sustainable development AND to an MEA made and accepted AND the tribunal taking an interpretation approach of systemic integration; OR

- **a*b*c*d*E*F** that is with a combination of a reference to an MEA was made and accepted no matter what interpretation approach was taken by the tribunal; OR

- **A*b*C*d*e*f*m** that is with a combination of reference to sustainable development AND to an environmental exception or defense made but neither was still accepted AND showing a treaty-specific interpretation approach taken by the tribunal; OR

- **A*B*C*E*f*M** that is with a combination of references to sustainable development, an environmental exception or defense and an MEA made with still only the sustainable development reference accepted AND the tribunal taking an interpretation approach of systemic integration; OR
- **a*b*C*D*f*M** that is with a combination of reference to an environmental exception or defense made and accepted even if reference to an MEA was not accepted AND the tribunal taking an interpretation approach of systemic integration; OR

- **a*b*C*D*E*M** that is with a combination of references to an environmental exception or defense and an MEA made with still only the environmental exception or defense reference accepted AND the tribunal taking an interpretation approach of systemic integration; OR

- **a*b*c*d*e*f*m** showing that cases in which none of the horizontal integration characteristics were present AND the tribunal was taking a treaty-specific interpretation approach also co-occurred with an environmental policy permissible outcome.

All constructed tables and equations can be provided per request. The analysis chapter refers to these results, compares them with findings based on my other analysis approaches and further elaborates

on the equations. For example, the equations above conform with my finding of strong support for my hypothesis that a reference to an environmental exception of defense made and accepted by the tribunal could have an influence on the case outcome. For that specific characteristic, the calculated Δ1 of 0.43 indicates a strong visible tendency of observations of co-occurrences. Moreover, the equations provide further insights into the relevant combination of this characteristic with other characteristics, including when the reference was made but not accepted. The value of assessing these combinations relates to the recommendations made for governments and NGOs based on my data analysis. This is further addressed in the conclusions chapter 9.

Furthermore, in the example above, the last equation is also important and requires further elaboration. Looking at the raw data of the two specific cases in which this surprising scenario was observed reveals, as elaborated in the analysis chapter, what other features of the cases mattered, namely the facts of the contractual nature of the dispute. This important Boolean equation also underlines that elements of facts, evidence and applicable law are overriding features influencing the outcome of a case. These elements are also captured in the illustration provided in the conclusion chapter. That illustration shows why a precise influence of the characteristics of the theorized indicators on the case outcome was not intended in this study. Rather, the study aimed at showing that such theoretical influences may exist but are best understood in an interactive way, and sought to illustrate this based on observations made.

7.0 ANALYSIS

7.1 INTRODUCTION

This chapter provides a summary analysis of my research observations. I analyse the data collected and resulting from qualitative case analysis with the aim to examine whether my hypotheses postulated in chapters 3, 4 and 5 were observed in real world international investment arbitration cases in which an investor challenged the legitimacy of a state's environment-related policy. Though the analysis refrains from concluding causality and from making predictions,[367] it does inspect specifically whether any contradictions can be observed for my given hypotheses about the co-occurrence of a case characteristic with a case outcome, as explicated in chapter 6.

A three-pronged approach was used to analyse the research data beginning first with a description of observed occurrences of hypothesized case characteristics in relation to the expected case outcome. Where relevant, explanations of specific case observations in this analysis are explored by examination of the raw data. A substantial amount of raw data, which was captured in individual case summaries, is investigated to further inspect observations related to horizontal integration features. Because of that, this chapter is divided into several sections, with a comparative longer section on the horizontal integration hypotheses followed by a section on the transparency and public participation and representation hypotheses. The overall length of the chapter is due to its 27 tables included to illustrate the data description while accommodating a reading without having to skip back-and-forth to some reference Annex. Since the tables are uniform in format, the reader may find that after initially familiarizing with a table, later tables are self-explanatory and require less reading time. The table contains binary data entries, where observed case characteristics are coded as present (1) or absent (0). The outcome of interest this study is an environmental policy permissible ruling. Therefore, an entry (0) means the tribunal concluded with an environmental policy *impermissible* ruling. Likewise, regarding the alternative explanation, that a

[367] **DISCLAIMER:** In this regard, where ever I state in this analysis that the data on a case characteristic "does not confirm a clear influence on case outcomes" I do not wish to imply that it would be possible to determine a clear influence, which could never be conclusively verified. I discuss the limitations of this research in the following chapters 8 and 9.

systemic-integration interpretation approach taken by a tribunal could have a positive influence on an environmental policy permissible outcome, an entry (0) means the tribunal took a treaty-specific interpretation approach.

A test of individual case characteristic observations is conducted using the measure for the occurrence of contradictions, explicated in chapter 6. I also consider specific case characteristics in combination to assess whether support for my hypotheses can be found. For this, I applied a Boolean truth table approach for qualitative comparative analysis, also explicated in chapter 6. This assessment of characteristic combinations is conducted by themes: beginning with horizontal integration; then a combined theme of transparency and public representation and participation; and finally, all characteristics considered in the research combined.

7.2 HORIZONTAL INTEGRATION

Does horizontal integration co-occur with environmental policy permissible case outcomes, as hypothesized? Looking first at the three individual characteristics constructed as 'measures' of horizontal integration, the data does not strongly confirm the hypotheses that references to sustainable development, an environmental exception and defense or an MEA have an influence on the case outcome. However, the hypotheses that such influence could exist when an environmental exception and defense or an MEA reference is not only made but also accepted by the tribunal as relevant is more strongly supported by the findings of the data.[368]

The analysis approach starts with a description of observed individual characteristics in relation to case outcomes; next with the individual characteristic and its observed acceptance by the tribunal in relation to the outcome; followed by the individual characteristic, an observed acceptance by the tribunal and the observed interpretation technique applied by the tribunal in relation to the outcome. Additional expected interactions between these sub-characteristics, such as acceptance of a horizontal integration characteristic by a tribunal with the interpretation technique applied are observed and explained where applicable.

Conversely, a subsequent examination of cases in which an absence of an individual horizontal characteristic is observed in relation to the expected environmental policy impermissible outcome is

[368] The Delta measure calculations for the occurrence of contradictions indicates this, with the result of Delta 1 = 0.22 for an MEA accepted by a tribunal, and even more strongly with the result of Delta 1 = 0.43 for an environmental exception or defense accepted by a tribunal. See also Chapter 6 on methods.

performed. Here, some of the sub-characteristic interaction analysis is groundless. For example, where no reference to sustainable development was made (an observation which includes references made by the tribunals themselves), the relation or observation as to whether a tribunal accepted such reference is clear, namely not observed since such would be by definition not possible.

7.2.1 Reference to the concept of sustainable development

Reference to the concept of sustainable development: The data does not confirm the hypothesis that reference to the concept of sustainable development could individually have a clear influence on case outcomes.

The study observed 15 cases in which a reference to the concept of sustainable development was observed as shown in Table 7.1 below. Eight of these cases had an environmental policy permissible outcome, and seven of these cases had an environmental policy impermissible outcome.

Table 7.1: Observed case outcomes of cases with observed reference to the concept of sustainable development as individual characteristic of horizontal integration

Study Case Number	Sustainable Development Reference	Environmental Policy Permissible Outcome
7	1	1
14	1	1
25	1	1
26	1	1
2	1	1
3	1	1
6	1	1
8	1	1
5	1	0
24	1	0
27	1	0
1	1	0
4	1	0
10	1	0
23	1	0
TOTAL	15	8

Acceptance of the sustainable development reference: Looking further at whether a tribunal's acceptance of a sustainable development reference made in the dispute could illuminate a potential influence on the outcome, the data also does not offer strong support for this hypothesis, illustrated in Table 7.2 below. In the eight cases in which both a sustainable development reference and an environmental policy permissible outcome was observed an equal number of four cases each showed presence and absence of an acceptance by the tribunal of the reference to sustainable development made in a case. In the seven cases with an environmental policy impermissible outcome and in which a sustainable development reference was observed, three cases showed presence of an acceptance of the reference made, and four showed an absence of such acceptance.

Table 7.2: Observed case outcomes of cases with observed reference to the concept of sustainable development and observation regarding tribunal's acceptance of such references

Study Case Number	SD Reference	SD accepted	Environmental policy permissible Outcome
7	1	1	1
14	1	1	1
25	1	1	1
26	1	1	1
2	1	0	1
3	1	0	1
6	1	0	1
8	1	0	1
5	1	1	0
24	1	1	0
27	1	1	0
1	1	0	0
4	1	0	0
10	1	0	0
23	1	0	0
TOTAL	15	7	8

The color-coded illustration of the data triggers further investigation as to what could explain: the observation of four cases in which the sustainable development reference was not accepted but the outcome was nevertheless environmental policy permissible; and conversely, the three cases in which the sustainable development reference was accepted but nevertheless the outcome was environmental policy impermissible.

We find in the first scenario group, a three out of four majority of tribunals took a systemic-integration interpretation approach. In the latter scenario, a two out of three majority of tribunals took a systemic-integration interpretation approach. Thus, though no clear answer can be derived from looking at the interpretation approach taken, recognition that tribunals often perform a balancing act may be at play here. Below I investigate more specifically the cases in which a systemic-integration approach was taken but a sustainable development reference not accepted.

The raw data reveals some common characteristics, namely that specific and at best treaty-specific sustainable development references are more likely to be accepted by tribunals, no matter what their interpretation approach. In the three out of four cases with policy permissible outcomes in which sustainable development reference was not accepted, despite the tribunal applying a systemic-integration

interpretation approach, these references were in part only indirect and vague and included non-treaty specific references (*Methanex v. USA, Santa Elena v. Costa Rica*, and *Glamis Gold Ltd. v. USA*).

The fourth case, *Aguas del Tunari, S.A. v. Republic of Bolivia*, in which the tribunal rejected the sustainable development reference while taking a treaty-specific interpretation approach, the reference was also only vaguely and indirectly implied by the *amici*. The tribunal in that case noted and recited the economic development and investment-stimulation emphasis in the preamble to the 1992 Bolivia-Netherlands BIT.[369] In this case, a treaty-specific sustainable development reference was indeed not possible because the relevant BIT Preamble does not contain references to: "sustainable development; right to regulate (e.g. regulatory autonomy, policy space, flexibility to introduce new regulations); nor text on environmental aspects (e.g. plant or animal life, biodiversity, climate change)".[370]

Sustainable development references made at the treaty-specific level also explain in part the scenario of the *Claytons and Bilcon of Delaware Inc. v. Canada* case[371] (with policy impermissible outcome) in which a treaty-specific interpretation approach was taken and the sustainable development reference was accepted.

Relevant common features can also be observed in the two out of three cases (*S.D. Myers v. Canada* and *Copper Mesa v. Ecuador*) with policy impermissible outcomes in which the tribunal did accept the sustainable development reference while applying a systemic-integration interpretation approach. In these cases, the tribunals themselves made a sustainable development reference, yet rejected its use as defense because the measure was not implemented within the given requirements of being least inconsistent with NAFTA, as in *S.D. Myers v. Canada*,[372] or because, as in *Copper Mesa v. Ecuador*,[373]

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[369] *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 (Petition for amici) (August 29, 2002), paragraph 145 and footnote 120.

[370] UNCTAD Investment policy hub, available at http://investmentpolicyhub.unctad.org/IIA/mappedContent/treaty/587 (accessed 10/1/2016).

[371] The *Claytons and Bilcon of Delaware Inc. v. Canada* tribunal accepted as relevant and applicable the concept of sustainable development, noting: "The concepts of promoting both economic development and environmental integrity are integrated into the Preamble's endorsement of the principle of sustainable development". See: *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, 1976 UNCITRAL, PCA Case No. 2009-04 (2015); NAFTA, Award on Jurisdiction and Liability, March 17, 2015, paragraph 596, but also paragraphs 595 and 597 on mutual supportiveness between economic and environmental norms.

[372] The tribunal referenced the concept of sustainable development indirectly in various instances: by reference to NAFTA preamble; by reference to the 1972 Stockholm and 1992 Rio Declarations; by reference to the mutual supportiveness of economic and environmental policies; and by noting the indirect environmental motive in Canada's attempt to ensure future viability of its domestic waste management industry, a notion that is particular relevant to developing countries view on sustainable development. However, the tribunal did not view the concept as relevant enough to directly recall it as stated in NAFTA, and in anyway rejected its use as defense in this case because the measure was not implemented within the given requirements of being least inconsistent with NAFTA. See: *S.D. Myers v. Canada*, ad hoc tribunal under UNCITRAL; UNCITRAL (1976); NAFTA Partial Award November 13, paragraphs 196, 217, 220-1 and 247.

the concept did not help defend against breaches of fair and equitable treatment (FET) since the tribunal found the termination resolutions were made in an arbitrary manner and without due process.

Interpretation Approach: Looking further at the interpretation approach taken by a tribunal in a case, as an alternative explanation for a possible influence of a reference to sustainable development and acceptance thereof on a case outcome, the data also does not clearly confirm the expectation that a sustainable development reference could have an influence on the case outcome. Table 7.3 below illustrates that in the eight cases in which both a sustainable development reference and an environmental policy permissible outcome was observed, six cases observed the tribunal took an interpretation approach of systemic integration and only two cases were observed in which the tribunal applied a treaty-specific interpretation approach. In the seven cases in which a sustainable development reference was made but an environmental policy impermissible outcome was observed, four cases observed the tribunal applied a treaty-specific interpretation approach and three cases in which the tribunal took an interpretation approach of systemic integration.

[373] For example, the tribunal recites, as submitted by respondent, Ecuador's 1998 Constitution, granting "more extensive powers to local government; in particular, Article 86 provides (*inter alia*) that the State shall protect the right of its people to live in a healthy and ecologically balanced environment to ensure sustainable development, ensure that this right is not affected and guarantee the preservation of nature; and Article 88 obliges the State to consult in relation to decisions that may affect the environment".
The tribunal also cited at length the 2005 Resolution by the Cantonal Unity Assembly of Cotacachi and the Development and Action Council, entitled 'With a single voice: NO TO MINING' and signed by Mayor Tituaña and representatives of the Council. One excerpt of the resolution the tribunal recites, reads: "Organized civil society and the Intag and Cotacachi authorities have chosen sustainable development, framed in solidarity, reciprocity, democratic principles and involvement, respecting human rights, both individual and collective and the right of the communities to create and enjoy their own forms of development and to say NO to projects that may endanger their natural and socio-cultural wellbeing". See: *Copper Mesa Mining Corporation (Canada) v. Republic of Ecuador;* UNCITRAL; PCA Case No. 2012-2; Award, 15 March 2016, paragraphs 4.39 and 4.115.

Table 7.3: Observed case outcomes of cases with observed reference to the concept of sustainable development and observations regarding the interpretation approach taken by the tribunal

Study Case Number	SD Reference	Systemic-integration Interpretation Approach	Environmental policy permissible Outcome
7	1	1	1
14	1	1	1
26	1	1	1
2	1	1	1
3	1	1	1
6	1	1	1
25	1	0	1
8	1	0	1
5	1	1	0
27	1	1	0
23	1	1	0
24	1	0	0
1	1	0	0
4	1	0	0
10	1	0	0
TOTAL	15	9	8

The above examination on acceptance of a sustainable development reference warrants further inspection related to the reasonable expectation that acceptance of a sustainable development reference should more likely concur with an interpretation approach of systemic integration. This is also not clearly confirmed by the data.

Among the cases in which a reference to sustainable development was observed, the study observed both, cases in which such reference was accepted by a tribunal generally taking a systemic-integration approach, as well as by a tribunal taken a treaty-specific approach.

Specifically, of the eight cases (displayed in Table 7.3) in which a reference to sustainable development and an environmental policy permissible outcome was observed, a majority of six cases is observed in which the tribunal applied a systemic-integration interpretation approach. In these cases, an equal number of three cases each showed the tribunal accepting or as not specifically accepting the sustainable development reference, as shown in Table 7.4 below.

In two of the eight cases (displayed in Table 7.3) in which a reference to sustainable development and an environmental policy permissible outcome was observed, the tribunal applied a treaty-specific interpretation approach. Again, an equal division of cases showed the tribunal either as accepting the sustainable development reference, or, not specifically indicating any acceptance of the sustainable

development reference, as shown in Table 7.4 below. Thus, no obvious relationship between interpretation approach and acceptance or application of a sustainable development reference by the tribunal can thus be clearly confirmed from the observations.

Table 7.4: Observed cases with environmental policy permissible outcomes and reference to sustainable development and observations regarding both tribunal's acceptance of the sustainable development reference and the tribunal's interpretation approach

Study Case Number	SD Reference	SD accepted	Systemic- integration Interpretation Approach	Environmental policy permissible Outcome
7	1	1	1	1
14	1	1	1	1
26	1	1	1	1
2	1	0	1	1
3	1	0	1	1
6	1	0	1	1
25	1	1	0	1
8	1	0	0	1
TOTAL	8	4	6	8

Looking at the seven cases (displayed in Table 7.3) in which a reference to sustainable development was made but an environmental policy impermissible outcome was observed, only three cases are observed in which the tribunal applied a systemic-integration interpretation approach. In these three cases, two cases showed the tribunal accepted the sustainable development reference and in one case it did not as shown in Table 7.5 below. In four of the seven cases, in which a reference to sustainable development was made but an environmental policy impermissible outcome was observed, the tribunal took a treaty-specific interpretation approach. In only one of these four cases did the tribunal accept the reference to sustainable development.

Table 7.5: Observed cases with environmental policy impermissible outcomes and reference to sustainable development as individual characteristic of horizontal integration as well as with observations regarding both tribunal's acceptance of the sustainable development reference and the tribunal's interpretation approach

Study Case Number	SD Reference	SD accepted	Systemic- integration Interpretation Approach	Environmental policy permissible Outcome
5	1	1	1	0
27	1	1	1	0
23	1	0	1	0
24	1	1	0	0
1	1	0	0	0
4	1	0	0	0
10	1	0	0	0
TOTAL	7	3	3	7 ***IMPERMISSIBLE***

A closer look at the raw data provides an explanation for the study's observation of cases where the tribunal took a treaty-specific interpretation approach while also accepting the sustainable development reference. It also confirms the initial conceptual thoughts that went into the structuring the research. One explanation for this observation lies in the differentiated levels of horizontal indicator characteristics. In this context, a sustainable development reference can be treaty-specific (level 1) or non-treaty specific (level 2).

Table 7.6: Case outcomes of cases with observed reference to the concept of sustainable development and with highlighted differing observations regarding tribunal's acceptance of such reference and tribunal's interpretation approach

Study Case Number	SD Reference	SD accepted	Systemic-integration Interpretation Approach	Environmental policy permissible Outcome
7	1	1	1	1
14	1	1	1	1
26	1	1	1	1
2	1	0	1	1
3	1	0	1	1
6	1	0	1	1
8	1	0	0	1
25	1	1	0	1
24	1	1	0	0
1	1	0	0	0
4	1	0	0	0
10	1	0	0	0
5	1	1	1	0
27	1	1	1	0
23	1	0	1	0
TOTAL	15	7	9	8

Table 7.6 above highlights two cases (with different case outcomes) where the tribunal took a treaty-specific interpretation approach while also accepting the sustainable development reference. In both cases, the sustainable development reference occurred at the treaty-specific level. In the first case with an environmental policy permissible outcome, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the tribunal assessed the FTA parties' intent.

The tribunal explained that:

"*the Preamble to the US–Oman FTA, which includes as one of the Treaty's objectives the desire to 'strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation' [provided] a further clear indication by*

the State parties that the Treaty is to be interpreted to give effect to the objectives of environmental protection and conservation".[374]

In the second case with an environmental impermissible outcome, *Claytons and Bilcon of Delaware Inc. v. Canada*, the tribunal mentioned "the Laws of Canada and Nova Scotia, as well as the NAFTA itself, expressly acknowledge that economic development and environmental integrity can not only be reconciled, but can be mutually reinforcing".[375] The tribunal accepted as relevant and applicable the concept of sustainable development, noting: "the concepts of promoting both economic development and environmental integrity are integrated into the preamble's endorsement of the principle of sustainable development".[376]

Next to the treaty-specific sustainable development reference and a mutual supportive interpretation approach taken by the tribunal, another feature in both cases is that the tribunals themselves made the sustainable development reference.

Unsurprisingly, sustainable development references were not made by the tribunals themselves in the four cases in which such references were not accepted, but where the tribunal nevertheless applied a systemic-integration interpretation approach. Explanations for these observed cases are less clear.

Looking at the raw data the sustainable development references in these cases were: not made by the tribunal but by the responding state and / or by *amici curiae*; [377] made at both horizontal integration levels 1 and 2 but predominantly at level 2 as well as made implicitly, vaguely or indirectly;[378] and either

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[374] *Adel A Hamadi Al Tamimi v. Sultanate of Oman*; ICSID; ICSID Case No. ARB/11/3; FTA Oman – United States of America 2006; Award November 3, 2015, paragraph 389, footnote 777.
[375] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, 1976 UNCITRAL, PCA Case No. 2009-04 (2015); NAFTA, Award on Jurisdiction and Liability, March 17, 2015, paragraphs 595 and 597.
[376] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, 1976 UNCITRAL, PCA Case No. 2009-04 (2015); NAFTA, Award on Jurisdiction and Liability, March 17, 2015, paragraph 596.
[377] In *Methanex Corporation v. United States of America*, sustainable development references were made also by amicus curiae, including by IISD in its Petition for *amicus curiae* status. In it, IISD explained: that consistent with NAFTA's objectives as set out in the preamble, there are limits placed by NAFTA on governments' authority to ensure economic and sustainable development are integrated, rather than hierarchical legal, and policy objectives; that a sustainable investment strategy requires governments ability to maintain optimal environmental protection process; that interpretation of provisions must reflect NAFTA parties' commitments in the preamble to maintain their flexibility to safeguard public welfare, including environmental protection; and that the public interest in this case regarding the ability of host states to meet their responsibilities towards their citizenry lies also within the context of their international legal obligations. However, the tribunal in the Methanex case refrained from addressing references to NAFTA's preambular language. See: *Methanex v. United States of America*, Petition for Amicus Curiae submission by IISD, March 9, 2004, paragraphs 10, 14, 27.
[378] In *Glamis Gold Ltd. v. USA* for example, the Quechan submission referenced sustainable development only implicitly, stating its intent to use the land area concerned in this dispute "into the future with future generations" as well as that "for indigenous populations, land does not represent simply a possession or means of production … it is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother

not referred to at all by the tribunal or rejected because the tribunal found other illegitimate political priorities than sustainable development as the motivation behind a challenged measure.[379]

Taking the above inspection into account, the expectation that acceptance of a sustainable development reference should concur with an interpretation approach of systemic integration may still be reasonable, though no clear influence of a possible relationship between interpretation approach and acceptance of a sustainable development reference on a specific case outcome can be confirmed.

Table 7.7 below illustrates this by looking at this relationship and influence separately from cases in which differing observations in the sub-characteristics of "sustainable development reference accepted" and "interpretation approach" were made as highlighted in Table 7.6. Underlying this partial observation as separate from the above comments, we find some support of the reasonable expectation, because four cases in which a systemic-integration interpretation approach was taken concurred with an acceptance of a sustainable development reference and three cases in which a treaty-specific interpretation approach concurred with the absence of an acceptance of sustainable development reference. However, no clear influence on the case outcome was found, because only in three out of the five cases in which a systemic-integration interpretation approach concurred with an acceptance of a sustainable development reference was an environmental policy permissible outcome observed. In the other two cases an environmental policy impermissible outcome was observed.

Earth as basic to their existence and to all their beliefs, customs, traditions and culture". Specifically, see: *Glamis Gold Ltd. v. USA*; ad hoc Tribunal; UNCITRAL (1976); NAFTA; (Award, June 8, 2009), First amici submission by the Quechan Indian Nation to Glamis vs. United States page 10, August 19, 2005. The notion of "means of production" refers to the economic, while reference to Mother Earth refers to the environmental aspect of the sustainable development concept. As noted by some, "references to their spiritual relationship with lands, natural resources and Mother Earth are central to indigenous peoples' demands for the recognition of their human rights"; see for example MAURO BARELLI, SEEKING JUSTICE IN INTERNATIONAL LAW –THE SIGNIFICANCE AND IMPLICATIONS OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Routledge. 2016) at 133.

[379] *Gold Reserve Inc. v. Venezuela*; ICSID Case No. ARB(AF)/09/1; Award, September 22, 2014, paragraphs 580-1.

Table 7.7: Case outcomes of cases with observed reference to the concept of sustainable development and with converging observations only regarding tribunal's acceptance of such reference and tribunal's interpretation approach

Study Case Number	SD Reference	SD accepted	Systemic- integration Interpretation Approach	Environmental policy permissible Outcome
7	1	1	1	1
14	1	1	1	1
26	1	1	1	1
5	1	1	1	0
27	1	1	1	0
1	1	0	0	0
4	1	0	0	0
10	1	0	0	0
TOTAL	8	5	5	3

The following section looks conversely at cases where no reference to the concept of sustainable development was made. This check examines whether an absence of this individual horizontal integration feature could indicate an influence on case a outcome, conversely expected to be environmental policy impermissible.

Three preliminary observations must be made. First, in all of the study's observed cases in which no sustainable development reference was made, no such reference could have been accepted. Hence needless to say no acceptance of a sustainable development reference could be observed in these cases. Anything to the contrary would have indicated a data transfer mistake. Second, an assessment of the relationship between acceptance of a sustainable development reference and interpretation technique in such cases is therefore unfounded in this examination.

Third, note that the specific case of *Piero Foresti and others v. South Africa* is not further included in the analysis because claimants withdrew their claims. Thus, the case was discontinued and therefore lacks data on interpretation technique and clear outcome. For example, although initially viewing the outcome in favor of the state, the tribunal stressed in its award on discontinuance and costs that: "it wishes to state in the plainest possible terms that the resolution of this dispute cannot be understood in terms of success or failure for either side, but only in terms of the ultimate success of all

parties in their struggle to find a fair, viable structure for the future of this particular part of the South African economy".[380]

Examining the data substantiates the above finding in that also the absence of a reference to the concept of sustainable development as specific horizontal integration characteristic does not individually confirm a clear influence on case outcomes. Table 7.8 below shows that the study observed 14 cases[381] without a reference to the concept of sustainable development. Ten of these cases had an environmental policy permissible outcome, and four of these cases had an environmental policy impermissible outcome.

[380] *Piero Foresti and others v. South Africa*; ICSID Additional Facility Arbitration Rules; ICSID Case No ARB(AF)/07/1; Award, August 4, 2010, paragraph 113.
[381] The number of 14 cases is based on the exclusion of the *Piero Foresti and others v. South Africa* Case.

Table 7.8: Case outcomes of cases with no observed reference to the concept of sustainable development and tribunal's interpretation approach and preconditioned observations regarding tribunal's acceptance of such reference

Study Case Number	SD Reference	SD accepted	Interpretation Approach	Environmental policy permissible Outcome
13	0	0	1	1
17	0	0	1	1
18	0	0	1	1
19	0	0	1	1
21	0	0	1	1
22	0	0	1	1
29	0	0	1	1
12	0	0	0	1
28	0	0	0	1
30	0	0	0	1
9	0	0	0	0
11	0	0	0	0
15	0	0	0	0
16	0	0	0	0
[20]	[0]	[0]	[X]	[1*]
TOTAL	**15-1=14 no reference**	**14 not accepted**	7 ***treaty-specific*** approach	10 environmental policy permissible

The above illuminates that based on the study's data, an expectation that a presence of a reference to sustainable development as individual characteristic of horizontal integration could individually have a meaningful influence on a case outcome is not confirmed. Neither does the initial data review suggest that it mattered whether such reference was accepted by the tribunal nor what interpretation approach the tribunal applied. Additional observations point to a tendency that supports a reasonable expectation that a systemic-integration interpretation approach concurs with an acceptance of a sustainable development reference, however without any clear influence on a case outcome. Vice versa a treaty-specific interpretation approach taken by a tribunal tends to concur with an absence of acceptance of a sustainable development reference made. A closer inspection of a deviation from this trend showed that in all cases (with different case outcomes) where the tribunal took a treaty-specific interpretation approach while also accepting the sustainable development reference, the sustainable development reference was made by the tribunals themselves and occurred at the treaty-specific level.

Cases in which a systemic-integration interpretation approach was taken but nevertheless an existing sustainable development reference was not accepted by the tribunal had the following traits. The sustainable development references in these cases were: not made by the tribunal but by the responding state and / or by *amici curiae*; made at both horizontal integration levels 1 and 2 but predominantly at level 2 as well as vaguely or indirectly; and either not referred to at all by the tribunal or rejected because the tribunal found other illegitimate political priorities than sustainable development as the motivation behind a challenged measure. In conclusion, from the above we can summarize the following findings for further review and evaluation.

The specific sustainable development reference as characteristic of the horizontal integration indicator:

- should be referenced, if possible, treaty-specifically that is at HI level 1 to increase the likelihood of acceptance;

- however, no clear indication was found as to whether it mattered by whom it was mentioned, with the obvious observations that a) if not mentioned at all no acceptance or application was possible and b) when mentioned by the tribunal the reference was always accepted, even if not as ultimate defense of an otherwise illegitimately implemented measure;

- a sustainable development reference may also be accepted when made at HI level 2 (non-treaty specific), especially when the tribunal employs an understanding of mutual supportiveness, i.e. that the goals of environmental protection and economic development should and can be mutually supportive; and

- a sustainable development reference made at either HI level may still not be accepted as defense of a challenged measure when the reference, including in treaty-specific objective is
    - too vague vis a vis the investment goal in the treaty objective; or
    - the measure is not implemented within the legitimate scope. This scope requires the measure to be
        - least-NAFTA inconsistent,
        - least-trade or least-investment restrictive,
        - following the norms of due process (in a timely, transparent and participatory manner) and
        - not in a gravely unilateral, protectionist or corrupt manner.

7.2.2 Reference to an environmental exception or defense

Reference to an environmental exception or defense: The data does not confirm that reference to an environmental exception or defense as specific horizontal integration characteristic has individually a clear influence on case outcomes.

Table 7.9 below illustrates this study found 22 cases in which a reference to an environmental exception or defense was observed.[382] No meaningful influence on the outcome is shown with an almost equal divide, namely 12 of these cases with such a reference had an environmental policy permissible outcome, and ten of these cases had an environmental policy impermissible outcome. Conversely, the expectation that cases with no reference to an environmental exception or defense should show an environmental policy impermissible outcome is also not confirmed. The study observed seven cases with no reference to an environmental exception or defense. Only one of these cases had an environmental policy impermissible outcome, and six of these cases had an environmental policy permissible outcome.

[382] The number of 22 cases is based on the exclusion of the *Piero Foresti and others v. South Africa Case* as explained above.

Table 7.9: Observed presence and absence of reference to an environmental exception or defense with case outcomes

Study Case Number	Environmental Exception or Defense	Environmental Policy Permissible Outcome
26	1	1
6	1	1
2	1	1
19	1	1
3	1	1
13	1	1
18	1	1
21	1	1
22	1	1
25	1	1
8	1	1
7	1	1
30	0	1
12	0	1
28	0	1
14	0	1
17	0	1
29	0	1
5	1	0
27	1	0
4	1	0
15	1	0
23	1	0
24	1	0
1	1	0
10	1	0
9	1	0
11	1	0
16	0	0
TOTAL	22	18

Acceptance of the environmental exception or defense reference: The data, however, does appear to support the hypothesis that a tribunal's acceptance of the reference to an environmental exception or defense is associated with environmentally permissive outcomes.

In the 12 cases in which both an environmental exception or defense referenced and an environmental policy permissible outcome were observed only two cases show that the tribunal did not accept the reference an environmental exception or defense, as illustrated in Table 7.10 below. Table 7.10 also shows that in the ten cases in which an environmental exception or defense referenced and an environmental policy impermissible outcome was observed most tribunals, i.e. in six cases, did not accept the reference to an environmental exception or defense.

Table 7.10: Observed case outcomes of cases with observed reference to an environmental exception or defense and with observation regarding tribunal's acceptance of such references

Study Case No	Environmental Exception or Defense	EE/D accepted	Environmental Policy Permissible Outcome
2	1	1	1
3	1	1	1
6	1	1	1
13	1	1	1
18	1	1	1
19	1	1	1
21	1	1	1
22	1	1	1
25	1	1	1
26	1	1	1
7	1	0	1
8	1	0	1
4	1	1	0
5	1	1	0
15	1	1	0
27	1	1	0
1	1	0	0
9	1	0	0
10	1	0	0
11	1	0	0
23	1	0	0
24	1	0	0
TOTAL	22	14	12

The color-coded illustration of the data triggers further investigation as to what could explain: the observation of four cases in which an environmental exception or defense reference was accepted but the outcome was nevertheless environmental policy impermissible; and conversely, the two cases in which an environmental exception or defense reference was not accepted but nevertheless the outcome was environmental policy permissible?

An inspection of the raw data found that several features stand out. First, in the two cases (*Biwater Gauff Ltd. v. Tanzania* and *Aguas del Tunari, S.A. v. Bolivi*a) in which the environmental exception or defense was not accepted yet the outcome was nevertheless environmental policy permissible, we find a lesser number of references overall and those made being indirect or vague references and references at horizontal integration (HI) level 2. In contrast the group of cases in which the environmental exception or defense was accepted yet the outcome was nevertheless environmental policy impermissible, we find multiple environmental exception or defense references made and at both HI level 1 and 2. One explanation for the observed phenomena contrariwise to expectation could be the need to critically review the data collection and data entry design. The data entry in the first group may simply and naturally not have clearly captured the possibility of an acceptance of additional environmental exception or defense, if such would have been made, whereas the data entry in the second group may have captured an acceptance of some but not all environmental exception or defense references. In the future, the data entry design could be refined by including the number of defenses made as well as decisiveness of a particular environmental exception or defense reference. The analysis approach taken here however addresses precisely such issues by referencing back to the raw data where needed.[383]

Second, one common feature in both groups is the finding of expropriatory acts. In the *Biwater Gauff Ltd. v. Tanzania* the tribunal did neither mention the necessity defense referenced by the *amici* in this case,[384] nor the margin of appreciation defense argued by Tanzania.[385] The tribunal found instead

[383] For example, by taking substantive observations into account in the coding process I tried to reduce the risk of coding errors stemming from simplification and accomplished a richer data set. Still even then, reasonable critics may disagree with my coding as environmental policy permissible or as an outcome in which the responding state prevailed, a ruling in which an environmental measure was determined as legitimate expropriation yet still requiring compensation. The Biwater case offers critics similar opportunities to disagree with my coding. In my decision between binary data entries, I opted in this case for determining a permissible ruling in which the responding state prevailed. This is because the claims for damage were dismissed although state actions were found in part unreasonable and politically motivated. And lacking causation, no injury was observed and instead losses were found to have been caused by claimant himself. This provides a good example of the benefits of a thorough qualitative research that was required for my data collection and the fruits of keeping some of the data's richness for deeper inspections. In this case, the surprising finding in the analysis may seem less surprising once one mine's the data set. Though my data collection did include the number of references made and tried to capture decisiveness (by differentiating between treaty-specific and non-treaty specific references), this data is not revealed in the binary coding but in the richer data set.

[384] See: *Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania* ICSID (W. Bank) ICSID, ARB/05/22, Award 24 July 2008, paragraph 387.

several acts as expropriatory, emphasizing the occupation of city water's facilities and usurpation of management control were unjustified by any public purpose, there being no emergency at the time. Specifically, the tribunal observed that "in all the circumstances, therefore, there was no necessity or impending public purpose to justify the Government's intervention in the way that took place".[386] However, the tribunal also noted that "at least in theory, and viewed at that time, this crisis could have threatened a vital public service and the situation therefore had to be resolved one way or the other in the near future".[387] The case highlights that an emergency situation with severe impacts on the public can justify state actions. An environmental or public policy exception in the economic treaty text with specific language on what would qualify as such an emergency situation could help responding states defend their action. However, the investor Biwater Gauff in this case successfully stressed the abnormal, unilateral, arbitrary and unjustified acts by Tanzania, (*puissance publique* or abuse of government power) including procuring "its police force to apprehend City Water's managers and its Immigration Authority to arrange their hasty deportation out of Tanzania in most irregular circumstances," which was argued to have constituted, cumulatively, "the effective expropriation of Biwater Gauff's investment".[388]

Expropriatory acts were also found in the second group of cases in which the environmental exception or defense was accepted yet the outcome was nevertheless environmental policy impermissible. The tribunal in *Metaclad v. Mexico* found that whatever the motivation or intent, the implementation of the Ecological Decree issued by a local government would, in and of itself, constitute an act tantamount to expropriation requiring compensation.[389] The tribunal in *Tecmed v. Mexico* recognized the relevance of the police powers doctrine referenced by Mexico,[390] but explained that a determination that the exercise of such power is legitimate "includes that of the limits which, if infringed, would give rise to the obligation to compensate an owner for the violation of its property rights."[391] The *Tecmed* tribunal further established, based on the Spain - Mexico BIT and by reciting[392] the *Santa Elena v. Costa Rica* tribunal,

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[385] *Ibid*., paragraphs 436, 424, 434 and 428.
[386] *Ibid*., paragraphs 497-503.
[387] *Ibid*., paragraph 654.
[388] *Ibid*., paragraphs 393-413.
[389] *Metaclad Corp. v. Mexico,* ICSID (Additional Facility) Case No. ARB(AF)/97/1, [Final] Award August 30, 2000, paragraph 111.
[390] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); Award of the Tribunal (May 29, 2003) English (Translated) paragraph 97.
[391] *Ibid*., paragraph 119.
[392] In addition to the above suggested data refinements for future studies, the role of references to prior decisions could be more explored. However, "the principle of stare decisis does not apply to investor-state disputes," yet as Katherina Berner notes, "arbitral tribunals nevertheless tend to acknowledge, analyse and rely on previous awards". She argues that "tribunals must not rely on previous arbitral awards to interpret international investment agreements *before* they have applied the general rule of interpretation". Katharina Berner, Reconciling Investment Protection and Sustainable Development, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE

that: "expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains."[393]

Other informative features among the second group of cases (in which the environmental exception or defense was accepted yet the outcome was nevertheless environmental policy impermissible) include the following. Although the tribunals found the environmental exception or defense references made were relevant and applicable, they could not serve as decisive defense because:

- the challenged measures were not implemented within the required scope, i.e. not implemented in accordance with due process, not reasonably proportional to the aim of the policy or the least trade-effecting alternative measure;

- the referenced environmental exception did not require the measure to avoid infringement of state's rights provided in that exception; and

- evidence showed that political circumstances or motivations were decisive in a case however not justifying the challenged measure.

On the implementation of a measure within the required scope, the specific additional observations are particular informative with regards to the status of norm contestation. In line with the examination of sustainable development references, we find also here tribunals endorsing as legitimate scope a policy implementation that: is the least trade-effecting alternative among available measures; follows the norms of due process (in a timely, transparent and participatory manner); and is not gravely unilateral, protectionist or based on corruption.

For example, the tribunal in *S.D. Myers v. Canada* recognized the relevance of several environmental exception and defense references but ultimately found that the environmental measure was not implemented in the least-trade effecting way and, by reference to relevant treaty text, did not meet the requirement to employ the most cost-effective and environmentally sound solution. In addition, in finding Canada's breach of national treatment, the tribunal took into account whether the practical effect of the

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BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski eds. 2016) at 200-1.

[393] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); Award of the Tribunal (May 29, 2003) English (Translated) paragraph 121.

measure is to create a disproportionate benefit for nationals over non-nationals, thereby considering proportionality. Thus, even if the reason behind a policy choice would benefit the future viability of domestic capacity, which the tribunal in this case noted as a potentially valid indirect environmental purpose, the importance to be in line relevant treaty text remains, i.e. in this case to employ the most cost-effective and environmentally sound solution.

Given that "the *S.D. Myers* case was the first NAFTA Chapter 11 case to reach a decision on a new environmental measure adopted by a government,"[394] it is important to keep in mind that the required scope on this particular issue may be further refined in the process of norm contestation. Here, the evolving System of Environmental-Economic Accounts (SEEA) developed under the UN could be helpful in the future, as its new Measurement Framework in Support of Sustainable Development and Green Economy Policy aims to "inform integrated policies, evaluate trade-offs between different policies and evaluate their impacts across domains of the economy, the environment and society."[395]

Also on the implementation of a measure within the required scope, the tribunal in *Copper Mesa Mining v. Ecuador* accepted the police powers defense argued by Ecuador as relevant, but found that although claimant could not establish legitimate expectations such as based on prior commitments made by the respondent, the respondent nevertheless implemented the termination resolution in an arbitrary manner and without due process. It thus did not accept the doctrine as critical defense in this case.[396] For the same reason, the tribunal decided that though relevant, the general exception clause referred to by Ecuador was not able to successfully defend the action.[397] In finding the measure was an unlawful expropriation as well as a breach of the FET standard of the treaty, the tribunal underlined that "it is no answer for the respondent to assert that no such compensation, legal remedy or administrative review

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[394] Howard Mann, Private rights, public problems - A guide to NAFTA's controversial chapter on investor rights (IISD and WWF 2001) at 89.

[395] UN Statistics, System of Environmental-Economic Accounts (SEEA) - Measurement Framework in Support of Sustainable Development and Green Economy Policy (n/a) at 4, available at: https://unstats.un.org/unsd/envaccounting/Brochure.pdf last accessed November 2017.

[396] *Copper Mesa Mining Corporation (Canada) v. Republic of* Ecuador; UNCITRAL; PCA Case No. 2012-2; Award, 15 March 2016, paragraph 6.66.

[397] The general exception clause in Article 8(3) of the BIT provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
(a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
(b) necessary to protect human, animal or plant life or health; or
(c) relating to the conservation of living or non-living exhaustible natural resources."
Respondent explained: "the Mining Mandate was adopted for the legitimate public policy purposes of protecting public health and the environment where the requirement to consult the local population on the basis of an EIS was specifically intended to protect the residents and local communities and to reduce the environmental impacts of mining activities. *Ibid*., paragraphs 6.15-16. 4.2.

were permitted, in theory, under the Mining Mandate or otherwise under its national laws: the Treaty, to which the Respondent had voluntarily agreed, imposed higher standards as a matter of international law; and it does not require an investor to pursue ineffective legal remedies when its goose is well and truly cooked."[398]

Thus, the tribunal underlined the important requirement of *effective* due process. In addition, this statement of the *Copper Mesa Mining* tribunal also echoes the *S.D. Myers* tribunal providing another reason for a tribunal to accept a reference to an environmental exception or defense as relevant but yet determine it as insufficient defense. Specifically, in the *S.D. Myers* case, with regards to Canada's claim that the measure was in accordance with its domestic law and necessary to protect health and the environment,[399] the tribunal recited the general principle contained in VCLT Article 27 that "a party may not invoke the provisions of its own internal law as justification for its failure to perform a treaty;" [400] and stated that "it did not suggest that national law is irrelevant, as it may be relevant in various ways but [that] the general principle of interpretation is clear." [401] The tribunal in *Metaclad Corp. v. Mexico* also noted VCLT Articles 27 on internal laws not justifying compliance failure with a binding international treaty. That tribunal found, *inter alia*, that the municipality acted improper and outside its authority in denying Metalclad the local operation permit and that Metalclad relied on federal government authorities representation, which failed to ensure transparency (required under NAFTA Article 102(1)) by not clearly and promptly determining legal requirements for the full operation of investments.[402]

The second feature among cases with environmental policy impermissible outcomes in which the tribunal accepted and considered environmental exception or defense references as relevant yet not as decisive defense concerns the issue of applicability of the exception or defense *under the specific circumstances*. In these cases, the rights granted to states in the referenced environmental exceptions were not infringed and alternative means were available to meet the policy objective.

For example, in *Metaclad Corp. v. Mexico*, the tribunal considered Mexico's reference[403] to the environmental defense contained in NAFTA Article 1114 on environmental measures, which permits a Party to ensure that an investment activity is undertaken in a manner sensitive to environmental concerns. However, the tribunal decided that its conclusion (that the municipality's insistence upon and denial of the construction permit was improper) is not affected by NAFTA Article 1114, emphasizing that "the

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[398] *Ibid*., paragraph 6.69.
[399] *S. D. Myers Inc. v. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000), page 48, footnote 35 (under paragraph 208).
[400] *Ibid.*, paragraph 203.
[401] *Ibid.*, page 46, footnote 34.
[402] *Metaclad Corp. v. Mexico*, ICSID (Additional Facility) [Final] Award, Case No. ARB(AF)/97/1, paragraphs 76 and 88.
[403] *Metaclad Corp. v. Mexico*, ICSID (Additional Facility) Respondent's Counter Memorial,22 May 1998, paragraph 838.

issuance of the federal permits show clearly that Mexico was satisfied that this project was consistent with, and sensitive to, its environmental concerns."[404] A lesson to be learned from this case is the need to harmonize rules and requirements among different levels of governments and to ensure any application of the principle of subsidiary is coordinated with –and confirmed by– federal government.

In in the *S.D. Myers* case, Canada argued even if the measure would have violated Article 1106 (on performance requirements), the Articles' specific environmental exceptions under NAFTA Articles 1106(6)(b) and (c) would apply because the measure was necessary to protect human, animal or plant life or health or was necessary for the conservation of living or non-living exhaustible natural resources. Although accepting the exception as relevant, the tribunal did not further consider it because it found no requirement was imposed on the investor that would constitute a breach of Article 1106 (on performance requirements).

With regards to Canada's claim that the measure was necessary to protect health and the environment,[405] the *S.D. Myers* tribunal rejected Canada's use of the customary necessity defense by observing that the requirements for necessity were not met, as alternative means to achieve the policy objective were available and encouraged.[406] In the *Tecmed v. Mexico* case, the tribunal reached its conclusion based on the evidence that the measure taken, specifically "the resolution, [did] not specify any reasons of public interest, public use or public emergency that may justify it."[407]

The third feature among cases with environmental policy impermissible outcomes in which the tribunal accepted and considered environmental exception or defense references as relevant yet not as decisive defense concerns the issue of political circumstances and motivations.

The *Tecmed v. Mexico* tribunal found that political circumstances rather than compliance or non-compliance with the required permit's conditions or the Mexican environmental protection laws had a decisive effect in the decision to deny the permit's renewal.[408] Considering "whether community pressure was so great as to lead to a serious emergency situation, social crisis or public unrest" the tribunal concluded the police powers doctrine did not apply as defense in this case as "the absence of any evidence that the operation of the landfill was a real or potential threat to the environment or to the public health, coupled with the absence of massive opposition, limits 'community pressure' to a series of events, which, although they amount to significant pressure on the Mexican authorities, do not constitute a real crisis or

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[404] *Metaclad Corp. v. Mexico*, ICSID (Additional Facility) [Final] Award, Case No. ARB(AF)/97/1, paragraph 98.
[405] *S.D. Myers Inc. vs. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000) page 48, footnote 35 (under para 208).
[406] *Ibid*., paragraphs 212-213.
[407] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); Award of the Tribunal (May 29, 2003) English (Translated) paragraphs 123-125.

[408] *Ibid*., paragraph 127.

disaster of great proportions, triggered by acts or omissions committed by the foreign investor or its affiliates."[409]

The *S.D. Myers* tribunal applied an interpretation approach allowing for regulatory flexibility when it emphasized "the assessment of like circumstances must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."[410] However, the tribunal recognized that it was because they were in like circumstances, "the investor SDMI's Canadian competitors lobbied the Minister of the Environment to ban exports when the US authorities opened the border."[411] In its examination of the export ban,[412] the tribunal took note of lobbying activities by Canadian industry targeting the lead minister and subsequent statements by the lead minister,[413] and reviewed documented evidence of exchanges that took place prior to the interim and final orders, including policy advise against the ban from Canadian federal and provincial politicians and government departments, (Environment, Foreign affairs and international trade, and a request for a note from the Department of Justice).

Thus, the raw data inspection, just as performed for sustainable development references, provides valuable insights pointing to the status of norm contestation.

***Interpretation Approach*:** To recapitulate, the discussion above examined the raw data to find further insights regarding the two cases in which an environmental exception or defense reference was not accepted but nevertheless the outcome was environmental policy permissible; and conversely four cases in which an environmental exception or defense reference was accepted but the outcome was nevertheless environmental policy impermissible. These are highlighted in Table 7.11 below.

[409] *Ibid*., paragraph 144.
[410] *S.D. Myers Inc. vs. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000) paragraph 250.
[411] *Ibid*., paragraphs 251 and 296.
[412] *Ibid*., Chapter V.
[413] *Ibid*., paragraphs 161-192.

Table 7.11: Observed case outcomes of cases with observed reference to an environmental exception or defense as individual characteristic of horizontal integration as well as with observation regarding tribunal's acceptance of such references

Study Case No	Environmental Exception or Defense	EE/D accepted	Environmental Policy Permissible Outcome
2	1	1	1
3	1	1	1
6	1	1	1
13	1	1	1
18	1	1	1
19	1	1	1
21	1	1	1
22	1	1	1
25	1	1	1
26	1	1	1
7	1	0	1
8	1	0	1
4	1	1	0
5	1	1	0
15	1	1	0
27	1	1	0
1	1	0	0
9	1	0	0
10	1	0	0
11	1	0	0
23	1	0	0
24	1	0	0
TOTAL	22	14	12

Concentrating for a moment on these specific cases, the tribunal's interpretation approach taken in these cases does not seem to matter in a meaningful way for either group, as illustrated in Table 7.12 below. In the two cases of the first group in which the environmental exception or defense was not accepted as relevant but the outcome was nevertheless environmental policy permissible, one tribunal took a systemic-integration interpretation approach the other a treaty-specific interpretation approach. Among the four cases of the second group in in which the environmental exception or defense was accepted as relevant but the outcome was nevertheless environmental policy impermissible, two tribunals took a systemic-integration interpretation approach the other two a treaty-specific interpretation approach.

Table 7.12: Specific observed cases with observed references to environmental exception or defense, observations regarding tribunal's acceptance of such references and interpretation approach taken and case outcomes

Study case no	Environmental exception or defense	EE/D accepted	Systemic –integration Interpretation approach	Environmental policy permissible outcome
7	1	0	1	1
8	1	0	0	1
5	1	1	1	0
27	1	1	1	0
4	1	1	0	0
15	1	1	0	0
TOTAL	6	4	3	2

Neither did the tribunal's interpretation approach taken in cases in which no environmental exception or defense was observed and hence none could have been accepted seem to matter in a meaningful way for the outcome of the case, as illustrated in Table 7.13 below.

Table 7.13: Specific observed cases with neither reference to environmental exception or defense, nor acceptance thereof, and interpretation approach taken and case outcomes

Study case no	Environmental exception or defense	EE/D accepted	Systemic-integration interpretation approach	Environmental policy permissible outcome
30	0	0	0	1
12	0	0	0	1
28	0	0	0	1
14	0	0	1	1
17	0	0	1	1
29	0	0	1	1
TOTAL	6 not observed	6 not observed	3	6

However, Table 7.14 shows that in the 12 cases in which both a reference to environmental exception or defense and an environmental policy permissible outcome was observed, ten cases observed the tribunal took an interpretation approach of systemic integration and only two cases in which the tribunal applied a treaty-specific interpretation approach.

Table 7.14: Observed cases with environmental policy permissible outcomes and reference to environmental exception or defense and observations regarding tribunal's interpretation approach

Study case no	EE/D Environmental exception or defense	Systemic- integration interpretation approach	Environmental policy permissible outcome
26	1	1	1
6	1	1	1
2	1	1	1
19	1	1	1
3	1	1	1
13	1	1	1
18	1	1	1
21	1	1	1
22	1	1	1
7	1	1	1
8	1	0	1
25	1	0	1
TOTAL	12	10	12

And Table 7.15 below shows that in the ten cases in which a reference to an environmental exception or defense was made but an environmental policy impermissible outcome was observed, seven cases observed the tribunal applied a treaty-specific interpretation approach and three cases in which the tribunal took an interpretation approach of systemic integration.

Table 7.15: Observed cases with environmental policy impermissible outcomes and reference to environmental exception or defense and observations regarding tribunal's interpretation approach

Study case no	EE/D Environmental exception or defense	Systemic integration interpretation approach	Environmental policy impermissible outcome
5	1	1	0
27	1	1	0
23	1	1	0
4	1	0	0
15	1	0	0
24	1	0	0
1	1	0	0
10	1	0	0
9	1	0	0
11	1	0	0
TOTAL	**10**	**3 systemic-integration and 7 *treaty-specific***	**10 *impermissible* outcomes**

Drawing our attention back from the specific cases investigated to the overall observations in this study, Table 7.16 below illustrates the reasonable expectation that in cases where a reference to an environmental exception or defense is made and the tribunal applies a systemic-integration interpretation approach the environmental exception is likely to be accepted, as is an environmental policy permissible outcome. Similarly, a tribunal applying a treaty-specific interpretation approach is less likely to accept the environmental exception or defense resulting more likely in a policy impermissible outcome. Some of the cases *not* following this trend have been discussed in detail above, including the *Metalclad*, *Tecmed* and *Biwater* cases.

Table 7.16: Observed cases in which environmental exception or defense was made with observations regarding the tribunal's acceptance of the references and interpretation approach as well as case outcome

Study Case No	Environmental exception or defense *ccepted*	Systemic-integration interpretation approach	Environmental policy ermissible outcome
26	1	1	1
6	1	1	1
2	1	1	1
19	1	1	1
3	1	1	1
13	1	1	1
18	1	1	1
21	1	1	1
22	1	1	1
5	1	1	1
27	1	1	1
25	1	0	1
4	1	0	0
15	1	0	0
7	0	1	0
23	0	1	0
8	0	0	0
24	0	0	0
1	0	0	0
10	0	0	0
9	0	0	0
11	0	0	0
TOTAL	14	13	12

In conclusion, the data does not confirm that reference to an environmental exception or defense as specific horizontal integration characteristic has individually a clear influence on case outcomes. The data, however, does appear to support the hypothesis that a tribunal's acceptance of the reference to an environmental exception or defense is associated with environmentally permissive outcomes. The observations also supported as reasonable the expectation that in cases where a reference to an environmental exception or defense is made and the tribunal applies a systemic-integration interpretation approach the environmental exception is likely to be accepted, as is an environmental policy permissible outcome. Similarly, a tribunal applying a treaty-specific interpretation approach is less likely to accept the

environmental exception or defense resulting more likely in a policy impermissible outcome. From the above, including the raw data inspection, we can summarize the following findings. Environmental exception or defense references as characteristic of the horizontal integration indicator:

- should be made clearly and numerously where applicable and when possible at both levels of horizontal integration to increase the likelihood of acceptance;

- where a case involves potentially expropriatory acts, even for an environmental purpose, the obligation to pay compensation remains and the environmental purpose behind the acts may influence the calculation of compensation, (where the amount should be reasonably related to the value of the property and should ensure that the investor does not bear a disproportional burden for the policy aim);

- for an environmental exception or defense to be successfully accepted and applied in a case, the environmental purpose of a measure should be clearly identified, at best on the basis of science and international standards, and should be recognized by all levels of governments, including not just local but also federal government agencies; and

- for an environmental exception or defense to be successfully accepted and applied in a case, the measure should be designed and implemented within a legitimate scope.

  That scope, based on the review of these cases, includes that:

  - an investor has access to an *effective* due process;

  - the measure is designed and implemented in a way that is not gravely unjust, discriminatory or based on corruption;

  - the measure is reasonable and proportional to the aim of the policy, whereby practical effects, alternative policy options should have been considered in the determination of the most cost-effective solution and least investment-effecting available alternative;

- the measure or regulation is implemented in a transparent and coherent manner to allow the investor to access information regarding legal rules and requirements, including potential changes thereof; and

- the measure or regulation is implemented in good faith observation of the treaty, and follows the general principle contained in VCLT Article 27, that internal laws may not be used as justification of failure to perform a treaty.

7.2.3 Reference to a Multilateral Environmental Agreement

***Reference to a Multilateral Environmental Agreement*:** The data does not confirm that reference to an MEA as specific horizontal integration characteristic has individually a very strong influence on case outcomes, however confirms a tendency of such influence when an MEA reference is also accepted by the tribunal.

The study found 18 cases in which a reference to an MEA was observed. A slight tendency of a potential influence could be observed in Table 7.17 below, showing 13 of these cases had an environmental policy permissible outcome, and only five of these cases (or less than one third) had an environmental policy impermissible outcome.

Table 7.17: Cases with observed reference to an MEA and case outcomes

Study Case No	MEA reference	Environmental Policy Permissible Outcome
2	1	1
3	1	1
6	1	1
7	1	1
13	1	1
14	1	1
17	1	1
19	1	1
21	1	1
22	1	1
26	1	1
29	1	1
30	1	1
1	1	0
4	1	0
5	1	0
10	1	0
24	1	0
Total	18	13

No clear tendency is observed contrariwise in Table 7.18 below, which shows that in 11 cases in which no reference to an MEA was made a tiny majority of six cases had an environmental policy impermissible outcome. The sectors addressed in all these cases (including tourism, mining, waste management and manufacturing in chemical products) don't differ between the two groups (with observed MEA references and with absence of MEA references) and thus do not indicate support for a possible explanation that MEA references only occur in cases related to industry sectors in which MEAs have substantially evolved.

Table 7.18: Case outcomes of cases with no observed reference to an MEA

Study Case No	MEA reference	Environmental policy permissible Outcome
8	0	1
12	0	1
18	0	1
25	0	1
28	0	1
9	0	0
11	0	0
15	0	0
16	0	0
23	0	0
27	0	0
Total	**11**	**5 (that is 6 *impermissible)***

Acceptance of an MEA reference: Looking further at whether a tribunal's acceptance of the reference to an MEA could illuminate further a tendency of a potential influence of this individual characteristic of horizontal integration on the outcome, the data seems more supportive of such expected influence.

In the five cases (highlighted in Table 7.17 above) in which an MEA reference was made but an environmental policy impermissible outcome was observed, four cases show that the tribunal did not accept the reference and only in one case did the tribunal did accept the MEA reference. Table 7.19 below shows a tendency that where an MEA reference is made and accepted, the outcome is likely

environmental policy permissible. A tendency of an MEA reference on outcome is also supported in Table 7.20 showing that even in the 11 cases where an MEA reference was *not* accepted still seven cases showed an environmental policy permissible outcome.

Table 7.19: Case outcomes of cases with observed reference to an MEA and acceptance by the tribunal

Study Case No	MEA reference	MEA accepted	Environmental policy permissible Outcome
13	1	1	1
14	1	1	1
17	1	1	1
19	1	1	1
29	1	1	1
30	1	1	1
5	1	1	0
TOTAL	7		6

Table 7.20: Case outcomes of cases with observed reference to an MEA but no acceptance by the tribunal

Study Case No	MEA reference	MEA accepted	Environmental policy permissible Outcome
2	1	0	1
3	1	0	1
6	1	0	1
7	1	0	1
21	1	0	1
22	1	0	1
26	1	0	1
1	1	0	0
4	1	0	0
10	1	0	0
24	1	0	0
TOTAL	**11** MEA reference **but not accepted**		**7** **permissible**

Examining the raw data of *S.D. Myers v. Canada* (the highlighted case in Table 7.19 above), in which an MEA reference was made and accepted as relevant however not successful as ultimate defense in this case, provides useful insights to the status of norm contestation. In this case, Canada made the reference to its MEA obligations under the Basel Convention at the horizontal integration level 1 (treaty-specific), because this MEA is specifically listed in NAFTA text as to prevail over NAFTA provisions in case of conflict.

The Tribunal accepted its relevance to this case, however determined Canada's defense based on the MEA obligation as unsuccessful. The tribunal came to this conclusion by: noting NAFTA Annex 104 provides the Basel Convention would have priority if and when it was ratified by the NAFTA parties, and the US had not yet ratified; emphasizing that even if it was ratified by the US, the MEA obligation required Canada to choose among alternatives the option least inconsistent with NAFTA to meet its obligation; and noting that the Basel Convention did permit "the continuation of the Transboundary Agreement with its emphasis on including cross-border movements as a means to be considered in achieving the most cost-effective and environmentally sound solution to hazardous waste management."[414] Emphasizing that Canada had alternative policy options available, the tribunal

[414] *S.D. Myers Inc. vs. Canada*, NAFTA (UNCITRAL), Partial Award (13 November 2000) paragraphs 213-215.

ultimately found the measure was not implemented within the requirements of the obligation to choose an available least trade restrictive alternative.

Although this specific explanation of the tribunal's conclusion suggests a treaty-specific reading, and as noted the MEA reference was made at the treaty-specific HI level 1, the tribunal in this case overall applied an interpretation approach of specific systematic integration and mutual supportiveness, in line with VCLT Article 31(1) and (2),[415] which the tribunal recited as guidance for its interpretation. Though the interpretation approach in this case does not warrant further inspection, the interpretation technique applied in cases where a MEA reference was not accepted in relation to case outcome could further illuminate the tendency of this characteristic of our horizontal integration indicator displayed so far.

Interpretation Approach: Examining the eleven cases captured in Table 7.20 above in which an MEA reference was made but not accepted shows that an expected influence of interpretation approach on case outcome seems to be confirmed. Table 7.21 below illustrates this. All seven such cases in which the tribunal applied a systemic-integration interpretation approach concurred with an environmental policy permissible outcome, and all four such cases in which the tribunal applied a treaty-specific integration interpretation approach concurred with an environmental policy impermissible outcome.

[415] *Ibid*., paragraphs 201 and 202. Specifically reciting only VCLT Article 31(1) and (2)(a) and (b) but not (3)(c) hence suggesting a level 1 focus (on the treaty text) in the interpretation.

Table 7.21: Case outcomes of all observed cases with MEA reference made but not accepted with interpretation approach

Study Case No	MEA reference	MEA accepted	Systemic-integration Interpretation approach	Environmental policy permissible Outcome
2	1	0	1	1
3	1	0	1	1
6	1	0	1	1
7	1	0	1	1
21	1	0	1	1
22	1	0	1	1
26	1	0	1	1
1	1	0	0	0
4	1	0	0	0
10	1	0	0	0
24	1	0	0	0
TOTAL	**11 MEA reference but not accepted**		7 systemic-integration interpretation concurrent with permissible outcome	

Looking at the raw data to detect a possible influence of interpretation approach on the acceptance of the MEA, the four cases in which tribunal the applied a treaty-specific integration interpretation approach concurred with an environmental policy impermissible outcome confirm this expectation. More specifically, a common feature in these cases is that the MEA reference was *not* at horizontal integration level 1 (treaty-specific). Some of these cases also presented fairly recent or new elements entering ongoing norm contestation in the economic-environment nexus of relevant regimes, such as the human rights-based approach and the 'community core values' approach. And the references in these cases were not made by the responding state. In one case the reference was made by the claimants accusing deviation from established standard principles in MEAs. It is unclear, whether a tribunal applying a systemic-integration interpretation approach would have been more likely to accept these specific MEA references as ultimate defense of actions taken by the responding state. In the *Glamis Gold Ltd. v. USA* case for example one *amici* submission, which also made several MEA references at level 2 of horizontal integration (non-treaty specific), called on the tribunal to take a human rights-based approach[416] in the interpretation of the case. This the tribunal, which ultimately took a systemic-integration interpretation approach, however rejected by emphasizing its case-specific mandate. Furthermore, in one exceptional case among this group the data is not conclusive with regards to the interpretation technique.

For example, in the *Ethyl v. Canada* case, Canada made an MEA reference at level 2 of horizontal integration. It did so by noting that a key component of international agreements to which Canada had committed itself in order to stabilize or reduce emissions of airborne pollutants, (including the United Nations Economic Commission for Europe, Protocols on VOCs and NOx and Canada-U.S. discussions concerning NOx and other transboundary pollutants) is the requirement for minimum national emission control standards for automobiles based upon the best available vehicle technology or specified emission control levels.[417] However, in this exceptional case in this study the interpretation technique employed by the tribunal remains unconfirmed as the case was settled and did not reach an award on merits. Based on the award on jurisdiction only, acceptance of the MEA reference cannot be confirmed and one could argue the tribunal took a treaty-specific interpretation approach with a focus on an economic objective.[418] For example, in its award on jurisdiction the tribunal implied a reluctance to

[416] For an overview of the human right- based approach to foreign investment and biological and cultural diversity, see for example E. JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) Chapter 8.
[417] *Ethyl Corporation v. Canada*, UNICTRAL, Statement of Defense, 27 November 1997, Notice of Intent to Submit a Claim to Arbitration, 10 September 1997, paragraphs 42-43, available at: http://www.naftalaw.org.
[418] Some may even argue a potential institutional biased based on jurisdictional assertion. However, without reaching the merits phase it is unclear what ultimate interpretation approach this tribunal would have taken in this case.

dismiss the claim despite several environmental policy-relevant arguments made by the responding and third party states.[419]

In the *Metalclad v. Mexico* case the respondent referred to the North American Agreement on Environmental Co-operation (NAAEC) in its counter memorial, noting NAAEC's preamble "includes reconfirming the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection and emphasizing the importance of public participation in conserving and enhancing the environment."[420] The tribunal did not refer to this NAAC reference and instead took a narrow reading of NAFTA's objectives stressing the economic over the environmental elements.

On fairly recent approaches entering norm contestation in the economic-environment nexus of relevant regimes the following two cases are illustrative.

Only when considering the current human-rights based approach taking place in MEAs and related regimes, which this study did not disregard, the *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina* case observes that the *amici* made arguably an MEA reference at the horizontal integration level 2. Specifically, the *amici* brief discussed human rights law implicated in this case, including: "the right to water is essential for sustaining human life, protected under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights;" "Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women requiring States to take appropriate measures to ensure women's right "[t]o enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply;" and Article 12 of the Convention on the Rights of the Child, requiring States to protect "the right of the child to the enjoyment of the highest attainable standard of health" through appropriate measures '[t]o combat disease [...] through [...] the provision of adequate nutritious foods and clean drinking water.'"[421] It further noted that, *inter alia*: "The International Covenant on Civil and Political Rights and the American Convention on Human Rights protect the right to water in order to ensure the right to life."[422] The *amici* emphasized that "in light of the primacy of human rights law, a conflict of norms would be resolved in this case by justifying the treatment given to the water concessionaire on the basis of the human rights obligations of

[419] Canada settled the case on July 20, 1998 by: paying Ethyl $13 million for costs and lost profits while the Act was in place; withdrawing the legislation that Ethyl opposed; and giving Ethyl a letter to use as it saw fit saying there was no scientific evidence of any health risk of MMT or any impact on car exhaust systems.
[420] *Metalclad Corp. v. Mexico*, ICSID (Additional Facility) Respondent's Counter Memorial,22 May 1998, paragraphs 838-9.
[421] Amici curiae submission ICSID Case No. ARB/03/19 (April 4, 2007), reprinted in: University of Toronto, Faculty of Law, International Human Rights Program and CIEL: "Guide for Potential Amici in International Investment Arbitration," January 2014, pages 63-4, available at http://ciel.org/Publications/Guide_PotentialAmici_Full_Jan2014.pdf (accessed 9/15/2016).
[422] *Ibid.*

the host State."[423] The tribunal noted the relevance but rejected the argument based on human rights law because Argentina could have respected both the BIT and human rights law in this case.

The remaining two other cases of this group are exceptional in that in one the respondent called on adherence with MEAs and related principles.

In the *Claytons and Bilcon v. Canada* case, it was claimants rather than Canada that critically referenced the Kyoto Protocol and principles found in other international instruments, such as the principle to consider traditional knowledge. Specifically claimants criticized "that the final Environmental Impact Study (EIS) departed substantially from the expected scientific and technical focus of an EIS, and also required Bilcon to address non-scientific and non-technical questions;" and "these requirements included a distorted precautionary principle, the influence of the *NAFTA* and the *Kyoto Protocol* on the Whites Point Quarry, the need to consider traditional knowledge, a strong emphasis on sustainable development, a more stringent ecosystem analysis approach, cumulative effects, as well as other improper considerations."[424] In their critic, claimants successively argued that "in relying on outside factors (such as public involvement, ecosystem approach, sustainable development, an improperly expansive precautionary principle, community core values and effects on future similar projects under the NAFTA), the Joint Review Panel taking actions in this case exceeded its Terms of Reference and effectively 'advance[d] its own view of environmental law reform.'"[425]

Since cases in which no reference to an MEA was made, none could have by definition been accepted by the tribunal. Those cases are not further considered in this part of the analysis.

In conclusion, from the above we can summarize the following findings. The data does not strongly support that reference to an MEA has individually a very strong influence on case outcomes, however confirms a tendency of such influence when an MEA reference is also accepted by a tribunal. References to MEA obligations as defense of an environmental policy is more likely to be considered by a tribunal when that MEA is ratified by all parties that are also party to the economic treaty. However, the study also found that in practice even if the MEA lacks ratification by all parties that are also party to the economic treaty, such may still be considered by a tribunal.[426]

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[423] *Ibid.*

[424] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, 1976 UNCITRAL, PCA Case No. 2009-04 (2015); NAFTA, Award on Jurisdiction and Liability, March 17, 2015, paragraph 201.

[425] *Ibid*., paragraph 214.

[426] In *Emilio Agustín Maffezini v. Spain* the tribunal referenced the Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February 25, 1991, (under the United Nations Economic Commission for Europe (UNECE) to which only Spain but neither Argentina nor Chile are parties and the dispute was brought under the Spain-Argentina BIT (and the Spain-Chile BIT). The tribunal did so when it noted "the Environmental Impact Assessment procedure is basic for the adequate protection of the environment and the application of appropriate preventive measures. This is true, not only under Spanish and EEC law, but also

When referencing to MEA obligations as defense of an environmental policy, even at horizontal integration level 1, the state must still ensure that its measure meets the specific scope of such MEA obligations in relation to the economic treaty. Such was identified in *the S.D. Myers v. Canada* case in the relevant NAFTA provision to mean that the state should consider alternative measures and choose an option least inconsistent with NAFTA. Similarly, the tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* implied alternative measures available to Argentina when emphasizing that Argentina could have respected both its obligations under the BIT and under human rights law in this case.

As the *Claytons and Bilcon v. Canada* case showed, (in which Canada was found to have violated treaty provisions, because its environmental measure was not implemented in conformity of its own laws),[427] when a government wishes to set a new environmental policy,[428] including new procedures for environmental assessments, legal process must still be followed. The tribunal stressed that Canada can set demanding and broad environmental standards and can vest any mandate in various administrative bodies. The tribunal thus clarified that Canada's legislator could have adopted different environmental assessments and processes than they had in place at the time of the Project, which in this case it did not. In addition, as was the case in the other characteristics of the horizontal integration indicator, due process must be followed. And in this case the tribunal noted that the government failed to ensure that investors' experts that were invited to hearings concerning policy design and implementation were also given an *effective* opportunity to respond to questions.[429]

The take from the descriptive findings from the data review so far suggests that of the three characteristics of horizontal integration an MEA reference especially when accepted, appears to show the

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increasingly so under international law". *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7); ICSID arbitration rules; BIT Spain - Argentina 1991 (and BIT Spain – Chile 1991); (Award, November 13, 2000) at 22 footnote 17.

[427] The Tribunal stressed it "**is not suggesting that there is the slightest issue with the level of protection for the environment provided in the laws of Canada and Nova Scotia**. Each is free under NAFTA to adopt laws that are as demanding as they choose in exercising their sovereign authority. Canada and Nova Scotia have both adopted high standards. There can be absolutely no issue with that under Chapter Eleven of NAFTA. The Tribunal's concern is actually that the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada was not in fact carried out." The tribunal noted the that instead of not following its own laws, Canada had other choices: "It was open under NAFTA for legislatures to adopt different environmental assessment standards and processes than they had in place at the time of the Bilcon Project. Nova Scotia lawmakers could, for example, have provided that local governments must approve the project or that it could not proceed without support in a local referendum. Federal Canada could by legislation have relaxed its requirement that to be assessable, an effect must have a biophysical pathway." It explained: "the problem in this case is whether the Investors' application was assessed in a manner that complied with the laws that Canada and Nova Scotia actually chose to adopt. The Tribunal has considered all the evidence from participants and experts on both sides, and concluded, based on the reports of two highly experienced and respected experts in Canadian environmental law that there was in fact a fundamental departure from the methodology required by Canadian and Nova Scotia law." *Ibid*., paragraphs 598-601.

[428] *Ibid*., paragraph 214.

[429] *Ibid*., paragraph 553.

clearest tendency of influence on dispute outcomes. The next section of this analysis addresses the tests conducted regarding the findings above.

7.2.4 Testing of findings

The above analyzed observations are generally confirmed by the calculations of the delta measure for the occurrence of contradictions. However, the test results suggest a slight difference in the order of importance.

Calculations of the measure for the occurrence of contradictions regarding the hypothesis that a reference to sustainable development made and accepted could have an influence on the dispute outcome resulted in a $\Delta 1$ of 0.07. This indicates a balance between co-occurrence and contradictions, however with a slight tendency of stronger observations of co-occurrences.

Calculations of the measure for the occurrence of contradictions regarding the hypothesis that a reference to an MEA made and accepted could have an influence on the dispute outcome resulted in a $\Delta 1$ of 0.22. This indicates still nearly a balance between co-occurrences and contradictions however with a good visible tendency of stronger observations of co-occurrences.

The strongest support was found for my hypothesis that a reference to an environmental exception of defense made and accepted by the tribunal could have an influence on the case outcome. For that specific characteristic, the calculated $\Delta 1$ of 0.43 indicates a strong visible tendency of observations of co-occurrences.

The above findings of the initial description of the data are further in line with the results of the Boolean analysis approach and resulting equations.

Cases with an environmental policy permissible outcome co-occurred with specific horizontal integration characteristic combinations of:

- reference to an environmental exception or defense made and accepted as defense and reference to an MEA was made but still not accepted and the tribunal taking a systemic-integration interpretation approach; or

- reference to sustainable development and to an environmental exception or defense made and accepted and the tribunal still taking a treaty-specific interpretation approach; or

- reference to sustainable development and to an MEA made and accepted and the tribunal taking a systemic-integration interpretation approach; or

- reference to an MEA was made and accepted no matter what interpretation approach was taken by the tribunal; or

- reference to sustainable development and to an environmental exception or defense made but neither was still accepted and showing a treaty-specific interpretation approach was taken by the tribunal; or

- references to sustainable development, an environmental exception or defense and an MEA made with still only the sustainable development reference accepted and the tribunal taking a systemic-integration interpretation approach; or

- reference to an environmental exception or defense made and accepted even if reference to an MEA was not accepted and the tribunal taking a systemic-integration interpretation approach; or

- references to an environmental exception or defense and an MEA made with still only the environmental exception or defense reference accepted and the tribunal taking a systemic-integration interpretation approach.

The results of the Boolean equations show that the alternative explanation of interpretation approach taken by a tribunal, for which the calculated $\Delta 1$ of 0.428 also indicates a strong visible tendency of observations of co-occurrences, must be taken into account here as well. Several characteristic combinations co-occurring with the outcome of interest include a combination of a systemic-integration interpretation approach with the characteristic of environmental exception or defense made and accepted. However, the interpretation approach taken cannot be said to be at play alone, because combinations of a treaty-specific interpretation approach with reference to sustainable development and to an environmental exception or defense made whether accepted or not also showed co-occurrence with environmental policy permissible outcomes. In addition, cases where a reference to an MEA was made and accepted no matter what interpretation approach was taken by the tribunal also co-occurred with the outcome of interest.

Finally, an important Boolean equation result shows that cases in which none of the horizontal integration characteristics were present and the tribunal was taking a treaty-specific interpretation approach also co-occurred with an environmental policy permissible outcome. The last observation is

particularly important and requires further elaboration. Looking at the raw data of the two specific cases in which this surprising scenario was observed reveals what other features of the cases mattered, namely the facts of the contractual nature of the dispute. In the *Robert Azinian and others v. Mexico*, the tribunal emphasized the contractual nature of the case, noting that: "NAFTA does not allow investors to seek international arbitration for mere contractual breaches;"[430] and "the critical distinction between expropriation and an ordinary breach of contract is to be made." [431]

In the only other case with this surprising combination, *Waste Management, Inc. v. United Mexican States II*, the tribunal did address contractual issues, noting "that it is one thing to expropriate a right under a contract and another to fail to comply with the contract; non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation; and in the case the claimant did not lose its contractual rights."[432] However, the tribunal stressed in its conclusion that:

> "*it is not the function of international law of expropriation as reflected in NAFTA Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance; a failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled; and the position may be different if the available legal avenues for redress are blocked or are evidently futile in the face of governmental intransigence. But this was not the case here."* [433]

This important observation underlines that elements of facts, evidence and applicable law are overriding features influencing the outcome of a case. These elements are also captured in the illustration presented in chapter 2 on my theoretical framework, where I showed why a precise influence of the characteristics of the theorized indicators on the case outcome was not intended in this study. Rather, this explorative research aimed at: inspecting whether such theoretical influences may exist, showing that such influences are best understood in an interactive way, and illustrating this based on observations made.

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[430] *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of the Tribunal (November 1, 1999), paragraph 87.
[431] *Ibid.*, paragraph 90.
[432] *Waste Management, Inc. v. United Mexican States*; ICSID Additional Facility Arbitration Rules; ICSID Case No. ARB(AF)/00/3; NAFTA; Award April 30, 2004, paragraph 175.
[433] *Ibid.*, paragraph 177.

7.3 TRANSPARENCY AND PUBLIC REPRESENTATION AND PARTICIPATION

7.3.1 Transparency

An important caveat of this study concerns the difficult data collection process and the data entry of the characteristics of the transparency indicator with some data entries of presence being indefinite or not easily replicable.

First, regarding the specific characteristics of document access during proceedings for example, the data entry for the *Biwater Gauff v. Tanzania* case is indefinite but ultimately was determined as "present, in part." This is because Tanzania published some documents initially before the tribunal ordered: no restrictions on a party publishing its own submissions but restrictions on publication of minutes or opponents' submissions, among others, during the course of the proceedings. Specifically in its Procedural Order No. 3, which came after the initial public disclosure activities by Tanzania, the tribunal recommended "for the duration of these arbitration proceedings, and in the absence of any agreement between the parties that all parties refrain from disclosing to third parties: the minutes or record of any hearings; any of the documents produced in the arbitral proceedings by the opposing party, whether pursuant to a disclosure exercise or otherwise; any of the Pleadings or Written Memorials (and any attached witness statements or expert reports); and any correspondence between the parties and/or the Arbitral Tribunal exchanged in respect of the arbitral proceedings."[434]

Second, data entries of publications of the intent to arbitrate and the final award cannot always be replicated by reference to the institutional website administering a case. For example, when a case is followed up by annulment procedures, the ICSID website will change the status of the case from "concluded" to "pending," whereby previously available links to the documents disappear pending the conclusion of these proceedings.

Third, data entries of "presence" of a characteristic of the transparency indicator include: cases in which documents are found on the internet as having occurred during the course of proceedings, as well as on the state department website of parties to the invoked economic treaty, or other data bases such as italaw.com. However, the exact time of publishing of such documents on such websites is not available.

Fourth, while the wider public may be informed of a case when such is announced in well-established and widely distributed newspapers, such as the Financial or New York Times, a case may well

[434] *Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania* ICSID (W. Bank) ICSID, ARB/05/22, Procedural Order No. 3, 29 September 2006, paragraphs 140-167.

go unnoticed when information is published on academic or specified institutional websites, such as under UNCTAD.

Taking these limitations into account, Table 7.22 shows that among the three characteristics of the transparency indicator, public notice of intent and publication of final award are observed in most cases with few exceptions.[435] This lack of variance undermines the value of calculating the measure delta for the occurrence of contradictions. Rather than confirming support for the hypothesis that the individual transparency characteristics of public notice of intent and publication of final award could have an influence on dispute outcome, the observed situation is best explained by the data collection problem of these characteristics in this study.

For example, no variance on publication of final award and limited variance on notice of intent is the result of the research design and limited institutional transparency provisions. Since the research design required data with a case outcome, existing cases in the real world for which the researcher could not access any published final award informing of the outcome have not been considered in the study. In Karl Popper's sense of the word, there may well be a black swan out there.

Compared to sighting a black swan the study's observation that, where no public notice of intent is observed no document access during proceedings is observed, is unexciting and merely in line with the expectation that where the public is not aware of a case, the public is unable to request document access during the proceedings.

These general observations explain further examination of document access during proceedings in relation to case outcome.

[435] Cases in which no public notice of intent is observed include: *Saar Papier Vertriebs GmbH v. Poland* and *Grand River Enterprises Six Nations, Ltd., et al. v. USA*, both which observed no administering institution; and *Copper Mesa Mining Corporation (Canada) v. Ecuador*, which is a UNCITRAL case administered by the PCA.
Cases in which the data observed on the Final Award is indefinite though entered as public include: *Saar Papier Vertriebs GmbH v. Poland*; and *Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A.* and *InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic* in which the award is no longer available on the website of the administrating institution because annulment proceedings have commenced and are pending at the time of writing.

Table 7.22: Case outcomes and observed characteristics of the transparency indicator

Study Case No	Public Notice of Intent	Document access during proceedings	Publication of Final Award	Environmental policy permissible Outcome
19	1	1	1	1
6	1	1	1	1
7	1	1	1	1
26	1	1	1	1
25	1	1	1	1
13	1	0	1	1
14	1	0	1	1
17	1	0	1	1
29	1	0	1	1
2	1	0	1	1
3	1	0	1	1
21	1	0	1	1
22	1	0	1	1
18	1	0	1	1
8	1	0	1	1
12	1	0	1	1
28	1	0	1	1
30	0	0	1	1
5	1	1	1	0
24	1	1	1	0
1	1	0	1	0
4	1	0	1	0
10	1	0	1	0
23	1	0	1	0
27	0	0	1	0
16	0	0	1	0
11	1	0	1	0
9	1	0	1	0
15	1	0	1	0
Total	26	7	29	18

The study observed 18 cases with an environmental policy permissible outcome. Table 7.23 below shows that among all 17 cases with an environmental policy permissible outcome and where notice of intent was observed (thus request for document access was possible), five cases observed document access during the proceedings of the dispute. The study observed 11 cases with an environmental policy impermissible outcome. Table 7.24 below shows that among all nine cases with an environmental policy impermissible outcome and where notice of intent was observed (thus request for document access was possible), two cases observed document access during the proceedings of the dispute.

Table 7.23: Cases with an environmental policy permissible outcome and with notice of intent observed as well as observed instances of document access during proceedings

Study Case No	Document access during proceedings	Environmental policy permissible Outcome
19	1	1
6	1	1
7	1	1
26	1	1
25	1	1
13	0	1
14	0	1
17	0	1
29	0	1
2	0	1
3	0	1
21	0	1
22	0	1
18	0	1
8	0	1
12	0	1
28	0	1
TOTAL	**5**	**17**

Table 7.24: Cases with environmental impermissible outcomes and with notice of intent observed as well as instances of observed document access during proceedings

Study Case No	No document access during proceedings	Environmental policy impermissible Outcome
5	1	0
24	1	0
1	0	0
4	0	0
10	0	0
23	0	0
9	0	0
11	0	0
15	0	0
TOTAL	**2**	**9 impermissible outcome**

This illustrates only a slight tendency of stronger observations of co-occurrences regarding my hypothesis that document access during proceedings could have an influence on dispute outcome. Inspecting this statement further with the delta measure for the occurrence of contradictions confirms this observation. The calculations result of a $\Delta 1$ of 0.08 indicates a balance between co-occurrence and contradictions, however with a slight tendency of stronger observations of co-occurrences.

This result seems to offer a rather weak support for my hypothesis regarding the transparency characteristic of document access during proceedings, especially when compared to result the calculations results of a $\Delta 1$ of 0.32 for my idea that public notice of intent could have an influence on dispute outcome is observed.

Yet as noted above, the usefulness of such comparison must be treated with caution because of the practical significance of the specific transparency indicator observations with limited diversity. Therefore, it is important to stress that the influence of the document access characteristic of the transparency indicator on the case outcome is best understood in an interactive way. In this regard the presence of this characteristic in combination with characteristics of the other indicators, especially public representation and participation must be further examined.

Table 7.25: Cases with environmental permissible outcomes and observations regarding document access during proceedings, an acceptance of an *amici curiae* and the granting of observer status

Study case no	Document access during proceedings	*Amici Curiae* Accepted	Observer status Granted	Environmental policy permissible Outcome
6	1	1	1	1
7	1	1	0	1
26	1	1	1	1
19	1	0	0	1
25	1	0	0	1
2	0	1	1	1
30	0	1	1	1
3	0	0	0	1
8	0	0	0	1
12	0	0	0	1
13	0	0	0	1
14	0	0	0	1
17	0	0	0	1
18	0	0	0	1
21	0	0	0	1
22	0	0	0	1
28	0	0	0	1
29	0	0	0	1
TOTAL	**5**	**5**	**4**	**18**

Table 7.25 above provides an overview of cases with environmental permissible outcomes and observations regarding document access during proceedings, an acceptance of an *amici curiae* and the granting of observer status. Two cases occurred where document access during proceedings was observed although no *amici curiae* submission was observed. Thus, document access during proceedings is not dependent on an *amici* application requesting such access. In fact, inspection of the raw data revealed that not every *amici* application does specify a request to access documents during proceedings, nor to be granted observer status during hearings. And, in cases where such specific request is made in an *amici* application, neither document access during proceedings nor observer status during hearings is necessarily granted.

Moreover, examining the raw data does not confirm, that all *amici* would be necessarily interested in full transparency. For example, in the *Glamis Gold v. USA* case, one *amici* from the Quechan Council requested confidentiality. The tribunal in this case referred to a 2003 statement by the NAFTA

Free Trade Commission (FTC) "that 'nothing in the NAFTA imposes a general duty of confidentiality". The tribunal also noted that "the FTC explained that each Party agreed to make available to the public all documents submitted in a NAFTA Chapter 11 dispute—including documents by non-disputing parties --- subject to redaction,'" and explained "it was not willing to grant a request to keep the entire report confidential" but would consider requests for sections of the report to be redacted".[436]

Table 7.26 below shows cases with environmental *im*permissible outcomes and observations regarding document access during proceedings, an acceptance of an *amici curiae* and the granting of observer status. Two cases occurred where document access during proceedings was observed although no *amici curiae* submission was observed which is in line with the earlier observation that document access during proceedings seems not to necessitate an *amici* application requesting such access. And the raw data reveals that where an *amici* application does specifically request access to documents during proceedings and to be granted observer status during hearings, neither request may necessarily be granted by a tribunal.

Table 7.26: Cases with environmental impermissible outcomes and observations regarding document access during proceedings, an acceptance of an amici curiae and the granting of observer status

Study case no	Document access during proceedings	*Amici* curiae Accepted	Observer status Granted	Environmental policy *im*permissible Outcome
5	1	0	0	0
24	1	0	1	0
1	0	0	0	0
4	0	0	0	0
9	0	0	0	0
10	0	1	0	0
11	0	0	0	0
15	0	0	0	0
16	0	0	0	0
23	0	0	0	0
27	0	0	0	0
TOTAL	2	1	1	11 *impermissible*

The study confirms the practice that it is parties who ultimately determine whether access to documents during proceedings shall be granted. Generally state parties to relevant treaties specify therein

[436] *Glamis Gold Ltd. V. USA*; ad hoc Tribunal; UNICTRAL; NAFTA; Award, (16 May 2009) paragraphs 589-97.

dispute settlement mechanisms, applicable arbitration rules and procedures. State parties can also subsequently amend these. Dependent on these rules, disputing parties during case procedures can agree or object to document access. For example, in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, (specified ICSID Case No. ARB/03/19) five non-governmental organizations, filed a "Petition for Transparency and Participation as *Amicus Curiae*," which claimants opposed and the respondent supported. The petitioners asserted that the case involved matters of basic public interest and the fundamental rights of people living in the area affected by the dispute in the case," and "requested the tribunal to allow petitioners: access to the hearings in the case; opportunity to present legal arguments as *amicus curiae*; and timely, sufficient, and unrestricted access to all of the documents in the case".[437] The tribunal made several comments on the *amici curiae* petitioner's request for access to records during the proceedings, which it ultimately denied. The tribunal explained that "the purpose in seeking access to the record is to enable a nonparty to act as *amicus curiae* in a meaningful way," and decided to "defer a decision on petitioners' request for access to documents until such time as the tribunal grants leave to a non-disputing party to file an *amicus curiae* brief."[438] In response to the later petition for an *amici curiae* submission, the tribunal, *inter alia*:

- noted the subsequent "revision of the ICSID Arbitration Rules[439] on *amicus curiae* did not deal with the *amicus curiae's* access to the record and thus provided no guidance";

- suggested "as a general proposition, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide "perspectives, expertise and arguments";

- observed "in this case, the petitioners had sufficient information even without being granted access to the arbitration record";

[437] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19; (Order in response to a Petition for Transparency and Participation as Amicus Curiae, May 19, 2005), paragraph 1.
[438] *Ibid.*, paragraphs 30 and 33
[439] Specifically the revised 2006 ICSID Arbitration Rules read: "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non- disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which: (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties; (b) the non-disputing party submission would address a matter within the scope of the dispute; (c) the non-disputing party has a significant interest in the proceeding. The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission".

- emphasized that "the role of an *amicus curiae* is not to challenge the arguments or evidence put forward by parties" but rather to "provide their perspective, expertise, arguments";

- referred to the tribunal's earlier Decision on Jurisdiction on this case which contained information about the nature of the claims being advanced by parties; and

- "dispensed with resolving the general question of a non-party's access to the record".[440]

In conclusion, from the above we can summarize the following findings:

Of the three characteristics of the transparency indicator only 'document access during proceedings' shows a meaningful variance in the data. Most cases observed 'information about commencement of arbitration provided' and all cases observed 'publication of Final Award'. Therefore, support for the hypotheses of potential influence on dispute outcomes cannot be found for these two characteristics. The observations do not suggest that if all transparency characteristics are observed the case outcome would necessarily be environmental policy permissible, a scenario which was observed five times. Such cases with an environmental policy impermissible outcome observed two times. Finally, when the specific characteristic of document access during proceedings was observed only a slight tendency of potential influence on dispute outcome could be seen.

Document access during proceedings only occurs when knowledge of the commencement of a dispute is publicly available. This confirms the assumption that only when the public is aware of a case can access to documents during proceedings be requested. However, such request for documents during proceedings to be made available is not always observed, nor is its success.

Document access during proceedings in combination with public representation and participation indicator characteristics of *amicus curiae* accepted and observer status granted always observed an environmental policy permissible outcome. This observation supports the idea that document access during proceedings can strengthen public representation and participation. However, some cases also observed an environmental policy permissible outcome where no access to documents during proceedings was observed yet these combined characteristics of the public representation and participation indicator were present.

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[440] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19; (Order in response to a petition by five non-governmental organizations for permission to make an *amicus curiae* submission), February 12, 2007, paragraph 24-5.

7.3.2 Testing of transparency characteristic combined with public representation and participation findings

The above findings are further in line with the results of the test results based on a Boolean analysis approach and resulting equations. Cases with an environmental policy permissible outcome co-occurred with specific combinations of relevant characteristics of the transparency and public representation and participation indicators. These are characteristic combinations of:

- document access during proceedings no matter whether an *amici curiae* was accepted or not and no observer status was granted and the tribunal taking a systemic-integration interpretation approach; or

- a combination of neither public notice of intent nor document access during proceedings provided and an *amici curiae* accepted and observer status granted and a treaty-specific interpretation approach was taken by the tribunal; or

- public notice of intent observed and *amicus* curiae accepted and observer status granted and a tribunal taking a systemic-integration interpretation approach; or

- observing only public notice of intent among these specified relevant characteristics of the transparency and public representation and participation indicators.

The first combination, with cases where the public representation and participation characteristics are absent, highlights again that the alternative explanation of a systemic-integration interpretation approach taken by the tribunal is notable. The next combinations listed indicate that neither interpretation approach taken nor document access during proceedings seem to matter when both *amici curiae* petitions and observer status are granted. With regards to the final combination, I can infer, based on my strong familiarity with the data, that since most cases observed public notice of intent the equation basically points to the fact that cases where none of the relevant transparency and public representation and participation characteristics are present, an environmental policy permissible outcome is still possible. This is in line with the above observation of overriding features of facts, evidence and applicable law. It is also confirmed when inspecting the raw data on the specific cases where such scenarios where observed, as the cases either did not or should not have gone beyond jurisdictional matters based on the facts and evidence provided.

The next section addresses the data observations on the public representation and participation indicator more specifically and the chapter concludes with the presentation of the results of the Boolean analysis approach and resulting equations for combinations including all characteristics. With the findings of those results, the transparency characteristic of document access during proceedings will deserve new attention which the unsatisfying results of the observations so far wouldn't necessarily suggest. This is because the study's observations regarding what case characteristics (including six under the horizontal integration indicator) co-occur with environmental policy permissible outcomes provides valuable information to participating actors in a dispute. Adding document access during proceedings can empower especially *amici curiae* petitioners to adjust strategies in terms of what relevant elements to include in their submissions of limited word count.

7.3.3 Public representation and participation

Table 7.27 below shows that among the three characteristics of the public representation and participation indicator, no case observed a state-state dispute, reflecting that the study's population concerns investment-state arbitrations only. Most of the 29 cases with conclusive data entries did neither observe an acceptance of an *amicus curiae* or a granting of observer status, with 18 of these observing an environmental policy permissible outcome and 11 observing an environmental impermissible outcome. Six cases accepted an *amicus curiae* and five cases granted observer status.

Table 7.27: Case outcomes of cases with observed characteristics of the public representation and participation indicators

Study Case No	*Amicus Curiae* accepted	Observer status granted	State-state dispute	Environmental policy permissible Outcome
6	1	1	0	1
26	1	1	0	1
2	1	1	0	1
30	1	1	0	1
7	1	0	0	1
19	0	0	0	1
25	0	0	0	1
13	0	0	0	1
14	0	0	0	1
17	0	0	0	1
29	0	0	0	1
3	0	0	0	1
21	0	0	0	1
22	0	0	0	1
18	0	0	0	1
8	0	0	0	1
12	0	0	0	1
28	0	0	0	1
10	1	0	0	0
24	0	1	0	0
5	0	0	0	0
1	0	0	0	0
4	0	0	0	0
23	0	0	0	0
27	0	0	0	0
9	0	0	0	0
11	0	0	0	0
15	0	0	0	0
16	0	0	0	0
Total	6	5	0	18

Of the six cases in which an *amicus curiae* were accepted, five cases observed an environmental policy permissible outcome and only one an environmental policy impermissible outcome. Of the five cases in which observer status was granted, four cases observed an environmental policy permissible

outcome and only one an environmental policy impermissible outcome. This suggests only a tendency that cases where an *amicus curiae* is accepted or an observer status is granted co-occur with an environmental policy permissible outcome. One case each with either an *amicus curiae* accepted or an observer status granted was observed to co-occur with an environmental impermissible outcome.

A stronger tendency is observed in cases where both an *amicus curiae* is accepted and an observer status is granted since in those cases the outcome was always environmental policy permissible. Also observed is that of the five cases in which observer status was granted, four cases observed that an *amicus curiae* was accepted. This points at an interplay between an *amici* submission and observer status, because *amici* submissions most often contain a request for observer status.

However, the inspection of the raw data revealed that not every *amici* application does specify a request to be granted observer status during hearings, as was also seen in regards to requests to access documents during proceedings. And, as noted earlier, in cases where such specific request is made in an *amici* application, neither observer status at hearings nor document access during proceedings is necessarily granted.

The stated tendency that cases where an *amicus curiae* is accepted or an observer status is granted should co-occur with an environmental policy permissible outcome was further tested with the measure for the occurrence of contradictions.

My hypothesis that the public representation and participation characteristic of observer status granted could have an influence on the case outcome seems more supported based on the $\Delta 1$ calculations of the study's data. For that specific characteristic, the calculated $\Delta 1$ of almost 0.22 indicates still nearly a balance between co-occurrences and contradictions however with a good visible tendency of stronger observations of co-occurrences.

An even stronger support was found for my hypothesis that the public representation and participation characteristic of *amicus curiae* accepted could have an influence on the case outcome. For that specific characteristic, the calculated $\Delta 1$ of nearly 0.27 indicates no longer a balance between co-occurrences and contradictions but a strong visible tendency of observations of co-occurrences.

The above findings of the initial description of the data and delta calculations are further in line with the results of my further testing with a Boolean analysis approach and resulting equations. Cases with an environmental policy permissible outcome co-occurred with specific combinations of relevant characteristics of public representation and participation indicators. The next section considers the combinations of all characteristics identified in this study co-occurring with an environmental policy permissible outcome.

7.4 COMBINATIONS OF CASE CHARACTERISTICS WITH CASE OUTCOME OF INTEREST

I also studied combinations of all characteristics identified in this study and the additional alternative explanation of interpretation approach in relation to my outcome of interest. Through careful investigation and analysis of the data using a Boolean truth table I could distill, from what seemed like a binary numeral ocean, specific case characteristic combinations that co-occur with an environmental policy permissible outcome. From the resulting Boolean equation and careful reading of the cases I could infer the following.

Cases with an environmental policy permissible outcome co-occurred with characteristic combinations of:

- an MEA reference made and accepted and an *amicus curiae* accepted and observer status granted and no access to documents during the proceedings and a tribunal taking still a treaty-specific interpretation approach; or

- references to sustainable development, environmental exception or defense and an MEA made with only the environmental exception or defense reference being accepted and document access during proceedings and *amicus curiae* accepted and observer status granted and a tribunal taking a systemic-integration interpretation approach; or

- references to sustainable development and an environmental exception or defense made and accepted and document access during proceedings observed but no *amicus curiae* accepted nor observer status granted and the tribunal taking still a treaty-specific interpretation approach; or

- references to sustainable development, environmental exception or defense and an MEA made with only the sustainable development reference being accepted and document access during the proceedings and an *amicus curiae* accepted but no observer status granted and the tribunal taking a systemic-integration interpretation approach; or

- references to sustainable development and an MEA made and accepted and the tribunal taking a systemic-integration interpretation approach but neither document access during proceedings nor *amicus curiae* accepted nor observer status granted; or

- references to sustainable development, an MEA and an environmental exception or defense made and only the latter accepted and *amicus curiae* accepted and observer status granted and the tribunal taking a systemic-integration interpretation approach; or

- reference to an MEA made and accepted and the tribunal taking a systemic-integration interpretation approach but neither document access during proceedings nor *amicus curiae* accepted or observer status granted was observed; or

- references to environmental exception or defense and an MEA made and accepted and the tribunal applying a systemic-integration interpretation approach but neither *amicus curiae* accepted or observer status granted was observed; or

- references to environmental exception or defense made and accepted and the tribunal taking a systemic-integration interpretation approach but neither document access during proceedings nor *amicus curiae* accepted nor observer status granted was observed; or

- references to an MEA and an environmental exception or defense made and only the latter accepted and the tribunal taking a systemic-integration interpretation approach but neither document access during proceedings nor *amicus curiae* accepted nor observer status granted was observed; or

- references to sustainable development and environmental exception or defense made but not accepted and the tribunal still takes a treaty-specific interpretation approach and none of the other relevant characteristics are observed; or

- none of the relevant characteristics are present.

The Boolean equation results showing case characteristic combinations co-occurring with an environmental policy permissible outcome again highlight that the alternative explanation of interpretation approach taken by a tribunal cannot be ignored. In most characteristic combinations, the tribunal took as expected a systemic-integration interpretation approach. The few characteristic combinations with a treaty-specific interpretation approach show, after inspecting the raw data, as a common overriding case feature lack of evidence. The only arguable exception to this is the *Grand River Enterprises Six Nations, Ltd., et al. v. USA* case. However, in this case the interpretation approach

evaluation can be further qualified because the tribunal took a treaty-specific interpretation approach yet also with an understanding of mutual supportiveness. For example, one can detect the tribunal's treaty-specific interpretation approach in its statement that "this is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA."[441] This clarification was in response to claimants advocacy, opposed by respondent, calling on the tribunal to take into account horizontal integration level 2 "treaties between the United States and Canada affecting the Haudenosaunee, customary law rules affecting indigenous peoples, and fundamental human rights norms, including but not limited to *jus cogens* principles,"[442] and "invoked the jurisprudence of the Inter-American Court of Human Rights in contending that their interests should be assessed in harmony with the communal property rights of indigenous peoples." [443] In addition one can further qualify that the tribunal also took a mutual supportive interpretation approach looking at its statement that "NAFTA involves a balance of rights and obligations, and does not point unequivocally in a single direction. While NAFTA's preamble speaks of promoting investment, it also affirms the need to preserve the NAFTA Parties' "flexibility to safeguard the public welfare." [444]

The calculations of the measure for the occurrence of contradictions regarding the hypothesis that a systemic-interpretation interpretation approach taken by the tribunal could have an influence on the dispute outcome support the relevance of this alternative explanation. The calculated $\Delta 1$ of 0.4279 indicates a strong visible tendency of observations of co-occurrences.

The Boolean equation test also supports my hypotheses overall showing that a case with a combination of all relevant characteristics present co-occurs with an environmental policy permissible outcome.

Another interesting finding from the Boolean equation test is that combination results including the characteristic of *amicus curiae* accepted also involve (besides some horizontal integration characteristics) also characteristics of observer status granted and/or document access during proceedings or both. This can be explained by the fact that often *amicus curiae* petitioners specifically request for document request and/or observer status. In three characteristic combination results both *amicus curiae* accepted and observer status granted appear. In two characteristic combination results both *amicus curiae* accepted and document access during proceedings appear. In these latter two combination results, all references to all three horizontal integration characteristics are made.

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[441] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*; UNCITRAL 1976; NAFTA; Award, January 12, 2011; Paragraph 71.
[442] *Ibid*., Paragraph 66.
[443] *Ibid*., Paragraph 67.
[444] *Ibid*., Paragraph 69.

With regards to horizontal integration characteristics several interesting observations can be made from the Boolean equation results. First combination results for the co-occurrence with an environmental policy permissible outcome always involved at least the acceptance of one of the horizontal integration characteristics, (leaving aside cases where overriding features of lack of evidence was determined). Specifically, acceptance of an environmental exception or defense occurs most frequently in the combination results, with acceptance of MEA and acceptance of a reference to sustainable development following on second and third place respectively. This corresponds with their respective delta measurements for the occurrence of contradictions with: a $\Delta 1$ of over 0.43 for acceptance of an environmental exception or defense; a $\Delta 1$ of 0.22 for acceptance of an MEA; and a $\Delta 1$ of only 0.07 for acceptance of a reference to sustainable development.[445]

Corresponding to these individual characteristic delta measures is also the following observation. Only acceptance to an environmental exception or defense or to an MEA succeeded as standalone horizontal integration characteristic among the combination results for the co-occurrence with an environmental policy permissible outcome. References to and acceptance of the concept of sustainable development always occurred in combination of a reference to at least one or both of the other horizontal integration characteristics.

Second, the Boolean equation results for the co-occurrence of characteristic combinations with an environmental policy permissible outcome furthermore reveal that all combination results (besides those where none of the characteristics were present) involve a characteristic of the horizontal integration indicator. This is more than and can neither be observed for any of the other indicators (with regards to their respective relevant characteristics) nor for the alternative explanation or characteristic of interpretation approach. In addition, the Boolean equation results also show combinations with presence of horizontal integration characteristics alone and not in combination with characteristics of the transparency or public representation or participation indicators co-occur with environmental policy permissible outcomes.

Perhaps the most important point visible from the last Boolean equation is that cases where none of the characteristics are present can still co-occur with an environmental policy permissible outcome. This is in line with the above observation of overriding features of facts, evidence and applicable law and the reality of empirical limitations.

In the remaining chapters I discuss some recommendations one may see following from the findings, emphasize my studies limitations and explain why these results fall short of determining a

[445] The importance of environmental exception and defense, which the initial descriptive data review suggested would come in second place after MEA seems to come in first place followed by MEA according to the additional delta measure and Boolean equation 'referees'. Or, as the next paragraph suggests, could it be tie?

precise influence of the characteristics of the theorized indicators on a case outcome. However, the results confirm that such theoretical influence is best understood in an interactive way.

8.0 RECOMMENDATIONS

The following briefly summarizes some of the recommendations supported by the preliminary findings of my research. I then discuss in chapter 9 how the study overall contributes to our understanding of conflicts between international economic and environmental law and policy implications, and highlight the limitations of this explorative research. These limitations underscore calls to refrain from attributing exaggerated importance to the specific findings, such as of this study.[446]

The findings from the analysis in chapter 7 imply several suggestions for government agencies and *amici curiae* petitioners and yet likewise provide an example of the risk of giving excessive weight or predicating proposed recommendations on limited findings.[447] For example, the findings of specific case characteristic combinations co-occurring with environmental policy permissible outcomes could be of use to government and non-government actors in their preparation for disputes. They can use the knowledge revealed in this study to tailor their legal arguments in their advocacy of an environmental policy permissible case outcome. For instance, especially disputing state parties with access to information on the dispute proceedings can emphasize specific elements in their legal arguments depending on the interpretation approach expected to be taken by arbitrators. Consider one could read the following two suggestions into the study's findings. First, that where a tribunal is likely to take a treaty-specific interpretation approach, focus should be on making treaty-specific relevant MEA references, where possible, or alternatively making references to sustainable development and an environmental exception or defense combined. Or second, where a tribunal is likely to take a systemic-integration interpretation approach, the findings seem to suggest focus should lie on ensuring that at least one of the horizontal integration case characteristics will be accepted— even if only acceptance of a reference to sustainable development—seems possible. However, I find this reading of limited use in practice, because independent of an expected if not speculated interpretation approach to be taken by arbitrators, the study overall recommends that if possible, *all* and at best treaty-specific horizontal integration references should be made. And, legal arguments depend foremost on the case-specific contextual situation and availability

[446] Catherine Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2014) at 234.
[447] *Ibid*., at 234.

or ability to have recourse to such references. To me, the findings from the qualitative analysis seem to offer more value as discussed below and in my conclusion.

However, noting the risks of giving too much importance to specific findings does not mean that the study's findings do not inform opportunities for prioritization strategies which some actors may have to consider. For example, international arbitration tribunals usually impose a set of restrictions on *amici*, such as page limits of their written briefs.[448] Similarly, some states may lack the capacity of "sophisticated in-house legal departments or outside legal counsel," which as Rogers notes can also be relevant for effectively "managing the arbitrator selection process".[449] And, in the difficult negotiation and renegotiation process of BITs and FTAs, prioritization is routine practice. Some of the findings may thus be of use in the law-applying and law-making processes.

In the law-applying process, the findings confirm that *amici curiae* briefs in international investment disputes challenging environmental policies can matter with regards to an environmental policy permissible outcome. NGOs are encouraged to engage in such disputes using this avenue. *Amici curiae* petitioners should make specific requests in their submissions,[450] including to access to documents and observer status by way of permission to attend and pose questions during oral proceedings. Furthermore, petitioners should use applicable law in their submissions and make, in their legal arguments, references to horizontal indicator characteristics identified in this study. In their legal arguments *amici* could also go beyond traditionally applicable law and highlight an expertise they can provide in areas of evolving standards, guidelines and practices in the science-policy or industry arenas. Such may be already adopted by organisations such as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), the International Union for Conservation of Nature (IUCN) or the United Nations Industrial Development Organization (UNIDO). If this is the case, these links could be highlighted. The study further showed that even when *amicus curiae* petitions are denied, public representation can still be strengthened using the recommendations following from this study in advisory briefs to responding state parties in a dispute, or even non-disputing state parties engaged in the dispute.

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[448] Patrick Wieland, Why the Amicus Curia Institution is Ill-suited to address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention, 3 TRADE, LAW AND DEVELOPMENT (2011) at 335.

[449] She notes, "in selecting arbitrators, parties generally consider arbitrators' background, experience, existing decisional history, and legal and cultural background. They seek, subject to standards for challenge based on bias, to ensure that the arbitrator they appoint will represent on the tribunal their perspectives on the case". Catherine Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2014) at 246 and 252.

[450] See for example: Jennifer Liu Benjamin Miller, Ramin Wright, Jenny Yoo and Renu Mandhane, Marcos Orellana, David Scheiderman, Carmen Cheung (eds), Guide for Potential Amici in International Investment Arbitration (International Human Rights Program at the University of Toronto, Faculty of Law and the Center for International Environmental Law 2014).

These states can consider some of the study's findings in their legal arguments. Taking note of the above-mentioned risks, the findings suggest overall that references to environmental exceptions and defenses as well as MEAs should be emphasized over references to sustainable development. Again, clear treaty-specific references should be preferred over more vague formulations. Yet even where applicability is in question, the study's observations from practice suggest that references to an MEA even if not ratified by all parties to the invoked economic treaty can also be referred to and considered by the tribunal.[451] A legal argument may further request the tribunal for a fair consideration of legal arguments, whereby specific requests can be made to recognize a "broad" understanding of concepts such as: 'in like circumstances' progressively understood to include considerations of consumer or public preference; 'legitimate expectations' understood to be balanced against 'reasonable expectations'; 'cost-benefit analysis' understood to entail taking into account new developments and international standards; 'science-based evidence' understood to include various knowledge sources; or 'front-runner policy approaches' evolving also among sub-national governments and other actors as a practice of pursuing environmental measures based on the precautionary principle or going beyond national commitments.

Naturally, to be able to make any such references to horizontal integration especially at the treaty-specific level in any dispute, the law-making process must have produce them. The above recommendations may thus also be considered by states engaging in negotiations and re-negotiations of BITs and FTAs. However generally these activities suggest states are perhaps politically unable to - or not so much focused on – drafting specific MEA linkages nor revising environmental exceptions or specific concepts in investment related provisions of such treaties. Instead, and not intuitive from the findings of this study, we see in new text more emphasis on sustainable development references often in close proximity of mentions of a mutual supportiveness approach. Still, my research's findings support, in part, also the benefits of linking sustainable development references with the mutual supportiveness approach.

Noteworthy are some FTA negotiation outcomes involving the European Union. The trade and sustainable development chapter[452] in the EU-Korea FTA includes Article 13.5 on MEAs in which parties reaffirm their commitments to the effective implementation in their laws and practices of the MEAs to which they are party and makes specific reference to the UNFCCC. The chapter further clarifies in Article 13.8 that parties recognize the importance, when preparing and implementing environmental measures that affect trade between the parties, of taking account of scientific and technical information, and relevant international standards, guidelines or recommendations. And Article 13.10 commits parties to reviewing, monitoring and assessing the impact of the implementation of this agreement on sustainable

[451] See Footnote 422 above.
[452] The chapter further provides, among others, a specific institutional mechanism, a civil society dialogue mechanism and government consultations process.

development through their respective participative processes and institutions, as well as through trade-related sustainability impact assessments. All these treaty-specific references may be of use in legal arguments seeking their consideration in the interpretation of the entire treaty. But, as Frank Hoffmeister notes the chapter falls short on an effective enforcement mechanism overall.[453]

In the context of investment agreements, the UNCTAD's Investment Policy Framework for Sustainable Development[454] provides various options for specific textual reforms and presents a variety of mechanisms to do so, such as by using hortatory language, clarifications, qualifications, reservations exceptions and omissions. In line with this study's findings, the report lists options for treaty-specific horizontal integration references, including through preambular text on sustainable development, specific interpretation guidance on public policy exceptions and clarifications on the relationship to MEAs, to establish for example a hierarchy in case of competing international norms. The Framework also provides suggestions on how provisions such as FET, observed in this study as contentious, could be addressed in support of sustainable development.

Yet, given the costs involved in disputes and the slow pace of international negotiations, the most important recommendations that could be considered from this research apply to the domestic policy design and implementation process. The findings of the qualitative analysis conducted for the study's data collection provides several insights that were confirmed in the testing of the influence of references to an environmental exception or defense on an environmental policy permissible outcome. In short, to avoid that environmental measures face a potential challenge in international investment disputes the study supports that government agencies consider the following recommendations.

First, ensure that general environmental regulations or environmental measures are clear, non-discriminatory, enacted in accordance with due process and not contrary to any specific assurances or commitments given to an investor. Here, the design of the environmental policy aimed at achieving an environmental purposes should consider issues raised by the public, including investors during consultation processes to better ensure that the measure avoids a disproportional effect on an investor. In other words, make sure that support for a measure is achieved through a participatory and transparent process and is not based on lobbying efforts of an industry or too narrow community interest. The legitimacy of a measure can further be increased by assessing the feasibility or availability of alternative measures. When no alternative measure was determined to be available, an environmental exception or

[453] Frank Hoffmeister, The Contribution of EU Trade Agreement s to the Development of International Investment Law, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski eds. 2016) at 361.
[454] UN Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (2012 and 2015) at 85-121.

defense, which grants the state regulatory rights, is more likely to be accepted by a tribunal when shown that this right to regulate would be infringed if the measure is found impermissible.

Second, ensure that coordination takes place between government agencies at all levels, so to warrant clarity, transparency and conformity of environmental policies, which in turn should be motivated by and determined based on science and international standards (which can involve evolving awareness). Following this approach can underscore the legitimacy of the purpose of the environmental measure.

Third, in communicating with investors, demonstrate the harmonization of rules and requirements among government agencies and clearly link any assurances given to an investor with the state-determined environmental requirements, including procedural needs of providing and passing environmental impact assessments and obtaining permits. In states embracing the principle of subsidiary, allocated competencies should be coordinated with – and confirmed by – federal government agencies as well as transparently communicated to inform investors.

Forth, to ensure procedural fairness, implement rules and regulations in a regular, proper and timely manner. Finally, situations may occur, and have led to the situation, where a state of emergency requires government agencies to act in the heat of the moment. This may include taking environmental measures in response to an emergency so that grave impacts from such an emergency on the public or on public order are prevented. To avoid that such measures are seen and challenged as an abuse of state power with unjustifiable negative effects on an investor is tricky. Here states may have to review their investment agreements and clarify public security or national security exceptions, such as to include economic crisis, national circumstance of natural resources shortage or catastrophic weather events.

In conclusion, some of the findings may provide useful suggestions for actors engaged in the law-applying, law-making and policy implementation processes. However, they should be read with caution and checked against practical applicability to avoid the risk of giving too much importance to specific findings. In the following chapter, I present the study's overall contribution to our understanding of conflicts between international economic and environmental law, potential policy implications, while also highlighting the limitations of this explorative research.

9.0 CONCLUSION

The greatest sin of the age is to make the concrete abstract

Nicholas Berdyaev

9.1 INTRODUCTION

This research project was sparked by an initial interest in the problem of existing conflicts between economic and environmental policies, and was also motivated by many long nights spent at Free Trade Agreement (FTA) and Multilateral Environmental Agreement (MEA) negotiations where a reoccurring question arose with the morning sun: does this all matter in the end? By "this" I am referring to discussions around drafting an innovative chapter in an international agreement, such a Chapter 13 of the EU-South Korea FTA on trade and sustainable development. I am also referring to exchanges on what words to be included or deleted from preambular or operational paragraphs in the drafting process of a given international agreement, such as the Paris Agreement under the United Nations Framework Convention on Climate Change. The difference between a "shall", "should" or "can," for example, clearly differentiates the understanding of obligations that parties take on under an agreement resulting from such drafting sessions. Potential policy problems can occur when obligations are undertaken under different regimes with distinctive policy objectives, such as economic growth or environmental protection, and are formulated by different policy experts, such as from economic or environmental ministries. And in line with a historic world view, norms that have been once defined through such processes can be challenged, contested and reformulated to adjust to an ever-evolving economic, social and environmental reality of concern to different societies.

In this study, I explored the idea that existing conflicts between economic and environmental policy at the domestic and international level are the result of norm contestation taking place among various actors of societies and the international community. They can pose problems to policy makers in charge with pursuing formulated policy objectives and required to comply with sometimes seemingly

conflicting obligations under different international law regimes. To better understand the dynamics present when problems arise and their origins, I proposed the theory that institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes. My aim in this exploratory research was to explain norm contestation about sustainable development in the context of international investment law disputes in which environmental policies have been challenged as violation of an investor's rights. I examined what, in addition to facts provided in such cases, could matter in the determination of a case outcome. My outcome of interest was an environmental policy permissible ruling in such disputes.[455] By looking at institutional factors observable at the systemic level that may influence case outcomes the study attempts to explain influences on case outcomes in a different light or perspective than some of the empirical studies and literature that have focused on individual factors or bias. To me, and in this context of this study, institutional factors include both procedural and substantive case characteristics.

I tested my two hypotheses that cases in which procedural characteristics of transparency and of public representation and participation are present should result in environmental policy permissible outcomes. Transparency and public representation and participation constitute intra-institutional factors, because they depend on the governing rules for dispute settlement of the organization administering the dispute, where applicable. Categorized as inter-institutional factor that can have an influence on case outcomes is horizontal integration between international economic and environmental law. It is understood as an inter-institutional feature because it concerns the horizontal integration between two distinct international regimes. I also tested my third hypothesis that cases in which the substantive case characteristic of horizontal integration is observed should result in environmental permissible outcomes. As alternative explanation, the study examined the possible influence of an interpretation approach taken by a tribunal on case outcome. In addition to testing these hypothesized case features for their individual potential influence on case outcomes, I also examined what case characteristic combinations co-occur with environmental policy permissible case outcomes.

In testing my three hypotheses, I developed specific 'measurements' or case characteristics for each of the three features, elaborated in chapters 3, 4 and 5. For example, an indication of horizontal integration was observed by the presence of a reference made to the concept of sustainable development,

[455] Some authors, such as Catherine Rogers have suggested that "purportedly neutral empirical inquiries about the potential bias of investment arbitrators may themselves at times be colored by particular policy preferences". To clarify and avoid misunderstandings while welcoming disagreement, in this study I neither focus on detecting bias nor on determining what a legally correct outcome of a given case would or should be. And, I don't shy away from my conviction that states' "commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development" (as stated in the preamble of the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States) is a policy choice of ethical and moral nature that ought to implemented as a *de facto* norm in the 'real' world political economy.

or to an environmental exception or defense or to a MEA, as well as the acceptance thereof by the tribunal in any given case. An indication of transparency was observed by publication of notice of intent or commencement of a case, document access during case proceedings, or publication of the final award. An indication of public representation and participation was measured by observed case characteristics of acceptance of an *amicus curiae* or the granting of observer status to hearings.

9.2 MAIN FINDINGS

The evidence from 29 cases investigated supports the hypotheses, that all three identified case features, namely the presence of horizontal integration, transparency, and public representation and participation can influence case outcomes in the direction of environmental policy permissible rulings, though to different degrees and under a variety of conditions. The long-night drafting sessions in which state parties negotiate what references and provisions to include in preambular and operational paragraphs of international treaties do seem to matter. Given the state-centric model of international law, they set the framework for the *procedural* and *substantive* case characteristics investigated here as to play out in the dynamics of international investment disputes. States determine the specific dispute settlement and compliance mechanisms and the transparency and public representation and participation rules applicable to parties of specific treaties. Through textual incorporation, they also facilitate horizontal integration by way of enabling that references to the concept of sustainable development, to environmental exceptions and defenses or to an MEA can be made in a dispute case. The findings showed, however, that the mere existence of such references even if specified in a treaty text is not sufficient. They must be referred to by an actor in a dispute case—and more importantly accepted by the tribunal—for us to detect their potential influence on an environmental policy permissible outcome.

This influence could be seen in the patterns or trends that the observations of specific case characteristics concurring or co-occurring with case outcomes revealed. These patterns portrayed by the data were further tested to inspect whether any contradictions were observed for my given hypothesis about the co-occurrence of a case characteristic with a case outcome. First, using a measure for the occurrence of contradictions allowed the calculations and evaluations of the existence of contradictions for each of my hypotheses about the co-occurrence of an individual case characteristic with a case outcome. The evidence showed support for six of the nine hypothesized case characteristics, whereby the reason for the three undetermined conclusions is lack of diversity in data entries (and not a finding of a balance between co-occurrences and contradictions, nor a finding of co-occurrences in the opposite

direction than expected). Second, applying Charles Ragin's Boolean truth table approach for qualitative comparative analysis allowed the testing for the effects of combinations of case characteristics. The Boolean equation results confirmed the study's findings and illuminated further insights, for example that a case in which all my identified case characteristics are present co-occurs with an environmental policy permissible outcome. The evidence also showed that cases that resulted in an environmental policy permissible outcome always co-occurred with —or involved—at least the acceptance of one of the horizontal integration characteristics.

9.2.1 The influence of three hypothesized case features –horizontal integration, transparency and public participation and representation—on case outcomes

The tendencies of co-occurrences with environmental permissible case outcomes varied for each of the individual ***case characteristics of horizontal integration***. Here, the strongest visible support was found for cases in which environmental exception or defense references were made and accepted by the tribunal, followed by acceptance of references made to an MEA and to sustainable development.

The transparency feature in this study presents a unique situation because, of the three ***transparency characteristics***, only 'document access during proceedings' showed a meaningful variance in the data. Only weak support was found for the hypothesis that document access during proceedings could have an influence on dispute outcome in the direction of environmental policy permissible rulings.

However, in cases where document access during proceedings was given in combination with observed ***public representation and participation*** (with *amicus curiae* accepted and observer status granted) environmental policy permissible outcomes always occurred. Looking at the public participation and representation case characteristics individually, the evidence showed a good visible tendency of stronger observations of cases with observer status granted co-occurring with environmental policy permissible dispute outcomes. An even stronger visible tendency in this direction was found in cases with *amicus curiae* accepted.

The study also found that ***the alternative explanation*** –that the ***interpretation approach*** taken by a tribunal should have an influence on dispute outcomes –cannot be ignored. For example, in most case characteristic combinations co-occurring with an environmental policy permissible outcome the tribunal took, as expected, a systemic-integration interpretation approach. An influence or possible relationship between interpretation approach and individual horizontal integration characteristics on case outcome was also observed, although to different degrees and under specific conditions as noted in the discussion below.

9.2.2 The influence of the three horizontal integration case characteristics on case outcomes

Acceptance of a reference to sustainable development: Considering each case characteristic specifically, the study found only some but no strong support for the hypothesis that acceptance of a reference to sustainable development should concur with environmental permissible outcomes. No clear influence or a possible relationship between interpretation approach and acceptance of a sustainable development reference on a specific case outcome was found. Specific and at best treaty-specific sustainable development references were shown to be more likely to be accepted by tribunals, no matter what interpretation approach was taken. Also observed was that a non-treaty specific sustainable development reference can be accepted, especially when the tribunal employs an understanding of mutual supportiveness, i.e. that the goals of environmental protection and economic development should and can be mutually supportive. The study highlighted that a sustainable development reference made might not be accepted as defense of a challenged measure when such substantive reference, including in a treaty-specific preambular objective, is too vague vis a vis a treaty objective specifying increasing investment opportunities as purpose. A sustainable development reference made might also not be accepted as defense of a challenged measure when the challenged environmental measure was not implemented within the legitimate scope. This scope involves for example that the measure must be: least-NAFTA inconsistent, where NAFTA is applicable; least- trade or investment restrictive; following the norms of due process (in a timely, transparent and participatory manner); and implemented not in a gravely unilateral, protectionist or corrupt manner.

Acceptance of a reference to an environmental exception or defense: A much stronger and visible support was found for the hypothesis that a tribunal's acceptance of a reference to an environmental exception or defense is associated with environmentally permissible outcomes. The findings further suggest that references to an environmental exception or defense should be made clearly and be numerous where applicable and when possible at both levels of horizontal integration (treaty and non-treaty specific) to increase the likelihood of acceptance. The data also confirmed the expectation that a tribunal applying a systemic-integration interpretation approach seems to make the acceptance of an environmental exception and an environmental policy permissible outcome more likely than a tribunal applying a treaty-specific interpretation approach.

In some cases, the tribunals determined the environmental exception or defense references made were relevant and applicable, yet found that they could not serve as decisive defense and therefore concluded with an environmental policy impermissible decision. This was the case when the referenced environmental exception did not require the measure to avoid infringement of state's rights provided in that exception. Or, when evidence submitted to the tribunal showed that non-environmental related

political motivations were decisive in a case making the challenged measure unjustifiable. In addition, the findings show that in the context of environmental exception or defense references, a policy measure cannot easily be defended when that measure was not implemented within a legally required scope. Based on the review of the cases studied, these requirements can include that:

- an investor has access to an effective due process;
- the measure is designed and implemented in a way that is not gravely unjust, discriminatory or based on corruption;
- the measure is reasonable and proportional to the aim of the policy, whereby practical effects and alternative policy options should have been considered in the determination of the most cost-effective solution and least investment-affecting available alternative;
- the measure or regulation is implemented in a transparent and coherent manner to allow the investor to access information regarding legal rules and requirements, including potential changes thereof; and
- the measure or regulation is implemented in good faith observation of the treaty and follows the general principle contained in VCLT Article 27, that internal laws may not be used as justification of failure to perform a treaty.

Furthermore, the study found that for an environmental exception or defense to be successfully accepted and applied in a case, the environmental purpose of a measure should be clearly identified, at best based on science and international standards, and recognized by all levels of government. However, in cases involving potentially expropriatory acts, even for an environmental purpose, the obligation to pay compensation remains, though the environmental purpose behind the acts may influence the calculation of compensation so that it is a reasonable reflection of the value of the property and ensures that the investor does not bear a disproportionate burden for the policy aim.

Reference to a Multilateral Environmental Agreement: While the study could not clearly confirm that a reference to an MEA simply appearing in treaty text, or made in a case, influenced case outcomes in itself, the evidence shows what matters is that such reference is accepted by the tribunal as relevant and applicable. The data illuminated this hypothesized influence with a visible tendency of such cases concurring with environmental policy permissible case outcomes. In cases where an MEA reference was made but not accepted, the interpretation approach appeared to matter, finding that all such cases in which the tribunal applied a systemic-integration interpretation approach concurred with an environmental policy permissible outcome, and all such cases in which the tribunal applied a treaty-specific integration interpretation approach concurred with an environmental policy impermissible outcome. The study also found that in practice, references to MEA as defense of an environmental policy

may still be considered by a tribunal even if the MEA lacks ratification by all parties that are also party to the economic treaty.[456] And, when referencing to MEA obligations as defense of an environmental policy, even at the treaty-specific level, a responding state must still ensure that its measure meets the specific scope of such MEA obligations in relation to the economic treaty invoked.

9.2.3 The influence of transparency case characteristic on case outcomes

Of the three characteristics of the transparency indicator only '***document access during proceedings***' showed a meaningful variance in the data so that support for the hypotheses of potential influence could not be determined or confirmed for the other two specific transparency characteristics. Less than 25 percent of all studied cases showed the characteristic of document access during proceedings, indicating the institutional and procedural situation in these cases that the presence of this transparency characteristic required consent by disputing parties and a permitting ruling by the tribunal. For cases with the specific characteristic of document access during proceedings only a slight tendency of co-occurrences with environmental policy permissible dispute outcomes was observed. The data also showed that document access during proceedings only occurred when knowledge of the commencement of a dispute was publicly available. This supports the assumption that only when the public is aware of a case can access to documents during proceedings be requested. Notably 'making such a request' illustrates an action element in this dynamic interplay of the cases studied. Recent institutional reform developments, as discussed further below, may lead to institutional and procedural situations that "provide for transparency of [investor-state investment dispute] proceedings as default".[457]

Because of the qualified potential influence of the document access during proceedings, the study also examined the presence of this characteristic in combination with characteristics of the other indicators, especially the two characteristics of public representation and participation. For example, the study observed that document access follows typically from requests made in an *amicus curiae* petitions; however, the presence of the document access characteristic was not found to be dependent on an *amici* application requesting such access. Some cases where no *amici* petition was filed still observed document access during the proceedings, as parties agreed to - and the tribunal issued a confidentiality order - permitting such. Moreover, the evidence revealed that not every *amici* application does specify a request to access documents during proceedings, nor to be granted observer status during hearings. Neither did

[456] See footnote 422.
[457] Steffen Hindelang and Markus Krajewsky, Conclusion and Outlook Wither International Investment Law?, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewsky eds. 2016) at 387.

the data confirm that all *amici* would be necessarily interested in full transparency. And, in cases where such specific request is made in an *amici* application, neither document access during proceedings nor observer status during hearings was necessarily granted. In those cases, the rules governing the dispute still provided disputing parties with the power to ultimately determine whether access to documents during proceedings shall be granted. As discussed further below, state parties to relevant treaties specify dispute settlement mechanisms, applicable arbitration rules, and procedures. State parties can also subsequently amend these. Dependent on these rules, disputing parties during case procedures can agree or object to document access.

The findings further showed that cases in which document access during proceedings was present in combination with public representation and participation indicator characteristics (of *amicus curiae* accepted and observer status granted) an environmental policy permissible outcomes always occurred. This finding supports the idea that document access during proceedings can strengthen public representation and participation. However, the study also found that cases without document access during proceedings but with *amicus curiae* accepted and observer status granted can have an environmental policy permissible dispute outcome.

9.2.4 The influence of public participation case characteristics on case outcomes

The findings of the research supported my hypotheses that observer status granted and *amici curiae* accepted can have an influence on the case outcome in the direction of an environmental policy permissible ruling, with acceptance of an *amici* receiving more support. No case observed the presence of an initially considered third characteristics of the public representation and participation indicator, a *state-state* dispute. This is because the study's population concerns *investor-state* public investment law disputes only.

Most of the 29 cases with conclusive data entries observed neither ***acceptance of an amicus curiae*** nor ***granting of observer status***. The study observed that of the five cases in which observer status was granted, an *amicus curiae* was accepted in four of them. This points to an interplay between an *amici* submission and observer status, because *amici* submissions most often contain a request for observer status. Yet, not every *amici* application specifies a request to be granted observer status during hearings, as was also seen with regard to requests to access documents during proceedings. And, as noted earlier, in cases where such a specific request is made in an *amici* application, neither observer status at hearings nor document access during proceedings is necessarily granted. The study found that all cases in which both

an *amicus curiae* was accepted and observer status granted resulted in an environmental policy permissible outcome.

9.2.5 The influence of all case characteristics in combination on a case outcome

All case features investigated in this study are distinct, but the conceptual interconnection among them must be emphasized and the results of this study are best understood in a holistic way capturing the complexity of issues at play.

Findings from the analysis of all relevant case characteristics in *combination* co-occurring with an environmental policy permissible outcome also support my hypotheses overall. As noted, the results confirmed that a case with a combination of all relevant characteristics present co-occurs with an environmental policy permissible outcome. And, combination results for the co-occurrence with an environmental policy permissible outcome always involved at least the acceptance of one of the horizontal integration characteristics. This is more than and could neither be observed for both the transparency and public participation and representation case characteristics nor for the alternative explanation or characteristic of interpretation approach. In addition, combinations with presence of horizontal integration characteristics alone (and not in combination with characteristics of the transparency or public representation or participation indicators) co-occur with environmental policy permissible outcomes. Only acceptance of an environmental exception or defense or of an MEA succeeded as a standalone horizontal integration characteristic among the combination results for the co-occurrence with an environmental policy permissible outcome. References to and acceptance of the concept of sustainable development always occurred in combination with a reference to at least one or both of the other horizontal integration characteristics. Finally, an important point to be made is that cases where none of the characteristics are present can still result in an environmental policy permissible outcome. This is in line with the understanding of overriding features of facts, evidence and applicable law in any given case.

9.3 CONTRIBUTION TO OUR UNDERSTANDING OF CONFLICTS BETWEEN INTERNATIONAL ECONOMIC AND ENVIRONMENTAL LAW AND POLICY IMPLICATIONS

9.3.1 Limitations of this exploratory empirical research

Catherine Rogers underscores the "limitations of empirical research as methodology for measuring phenomenon as complex as legal decision-making".[458] While emphasizing her aim "is not to discourage empirical research, or to discount the contributions it can make to our understanding of this emerging field," I hardly feel encouraged by her point, well taken, that "empirical research can neither identify the extent to which extra-legal factors affect arbitral decision-making, nor disprove definitely the effect of those factors".[459]

In this section I provide some clarification to my research approach and its limitations before presenting the contributions my study may provide to our understanding of conflicts between international economic and environmental law and the possible policy implications of its findings that may be considered as a result. In full agreement with Rogers' caution, my aim is to avoid misunderstandings among readers while welcoming disagreement and constructive critiques.

First, Rogers correctly notes, as one of the methodological challenges raised by empirical research into adjudicatory decision making, that "absent control for the correct outcome, or at least the relative strength of a particular party's case, the extent and even existence of deviations from it cannot be known for certain".[460] The outcome of interest in my study is an environmental policy permissible ruling in dispute cases in which an environmental policy measure has been challenged as violating investors rights under an economic treaty. I am thus not so much interested in detecting bias, but rather in what can be observed from the *practice* in such disputes, specifically the norm contestation *process* therein.

However, bias is not disregarded but forms perhaps conceptual shadows to this study which is concerned in its most general terms with a paradigm shift in international political economy towards sustainable development. These shadows are produced by different public interest illuminations that are directed at decision-makers from various directions. I find Thomas Kuhn's concept of paradigm shift also useful in the non-scientific legal, and particular law-applying context of disputes, as:

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[458] Catherine Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2014) at 233.
[459] *Ibid.*, at 234 and 254.
[460] *Ibid.*, at 229 and 234.

> *"The starting point of every contemporary legal doctrine is that legal decision-making always involve interpretation. The meaning of the existing law must be determined and the abstract rule adjusted to the requirements of the concrete situation. According to one understanding, as long as the process of reformulation is understood to be 'semantic' or 'deductive,' in the sense of looking for the 'meaning' of words that compose the rule to be applied, it is not, in this understanding, rule making, even if the case is a hard one. However, judges constantly do something that can be better described as making rather than applying the law. At a minimum they must resolve gaps, conflicts or ambiguities in the legal system and by doing so, they make new rules rather than merely applying existing ones. The question then arises concerning the limits of such judicial creativity".*[461]

Bias in epistemological communities among law makers and law interpreters may well exist. Likewise, in the context of international political economy Peter Haas observes "we are persuaded that our bias is justified because the epistemological presuppositions that accompany our notion of consensual knowledge seem to be emulated widely by non-Western cultures".[462]

Some elements of norm contestation about sustainable development in trade and investment law, such as issues of green protectionism or equitable sharing of the global carbon budget, may well be the result of such paradigms as economic growth being emulated by developing countries.

Therefore, while my research question and outcome of interest were not designed to specifically identify or measure bias, the issue of bias cannot be considered as external to this study either. However, my point that my research design and outcome of interest followed from my interest in observing the practice of dispute proceedings rather than tribunal's bias can be seen in that no 'proper' or 'legally correct dispute' outcome or interpretation approach were assigned, albeit perhaps contemplated. I nevertheless chose to use binary data for "ease" of analysis, where my aim was to inspect whether any contradictions were observed in the real world for my given hypotheses about the co-occurrence of a case characteristic with a case outcome. For this I used the measure delta for the occurrence of contradictions. I also employed Charles Ragin's truth table approach making use of the binary logic of Boolean algebra to maximize the number of comparisons that can be made across cases in terms of the presence or absence of characteristics of analytical interest. Still, Rogers' is correct in noting that "the complexity of outcomes

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[461] Kati Kulovesi, The WTO dispute settlement system and the challenge of environment and legitimacy (2008) London School of Economics and Political Science) at 162-3 referencing DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (Harvard University Press. 1997) and Kati Kulovesi, Legality or Otherwise: Nuclear Weapons and the Strategy of Non Liquet, in FINNISH YEARBOOK OF INTERNATIONAL LAW (1999).
[462] PETER M. HAAS, EPISTEMIC COMMUNITIES, CONSTRUCTIVISM, AND INTERNATIONAL ENVIRONMENTAL POLITICS (Routledge. 2016) at 240.

to legal disputes can lead to coding errors when reducing dispositions to binary outcomes"[463] and I certainly am not immune to this risk. And because of the complexities involved, insuring against such risks through hiring secondary coders comes with the price tag of expert legal professionals.

Second, this risk of coding errors applies not only to my outcome of interest but all my binary case characteristics whose presence or absence in each dispute I determined from observations. In this process, I undertook a thorough substantive and qualitative data collection, which further allowed refinement of case characteristics. For example, each of the three case characteristics of my horizontal integration indicator were further distinguished as occurring at a treaty-specific or non-treaty specific horizontal integration level. Likewise, data collection on outcomes included beyond environmental permissible or impermissible rulings or whether the responding state prevailed, specifics, such as: "claims for damages dismissed though state actions were found, in part, unreasonable and politically motivated - but lacking causation, no injury was observed". By taking substantive observations into account in the coding process I tried to reduce the risk of coding errors stemming from simplification and accomplished a richer data set. Still even then, reasonable critics may still differ in their views on - and disagree with my - coding as environmental policy permissible a tribunal's ruling which determined an environmental measure as legitimate expropriation yet still requiring compensation.

The most important limitation that my explorative study shares with other research projects, is that at best empirical data can only show correlation, which can provide support for a hypothesis, but cannot prove causation. Indeed, my study merely found tentative support of the likelihood of my hypotheses.[464] To be clear on this point and avoid misunderstandings I explicated my methodological approach in chapter 6. I clarified that though my analysis refrains from concluding causality and from making predictions, it does inspect specifically whether any contradictions were observed for my given hypotheses about the co-occurrence of a case characteristic with a case outcome. As noted above, for this I used the measure delta for the occurrence of contradictions, because for any of my given hypotheses about the co-occurrence of a case characteristic with a case outcome, delta tells us about the existence of contradictions in regard to this hypothesis. The measure allowed me to evaluate my findings, whereby a finding of no contradictions would provide the strongest support for my hypothesis compared to a finding of a balance between co-occurrences and contradictions. And weakest support for my hypothesis would be a finding of co-occurrence in exactly the opposite direction of what I expected and without any contradictions. The study's findings for my hypotheses that the identified cases characteristics could have an influence on the case outcome ranged from strong visible tendencies of observations of co-occurrences

[463] Catherine Rogers, The Politics of International Investment Arbitrators, 12 SANTA CLARA JOURNAL OF INTERNATIONAL LAW (2014) at 239.
[464] *Ibid.*, at 235, 237 and 240.

to a balance between co-occurrence and contradictions, however with a slight tendency of stronger observations of co-occurrences.

Therefore, the findings of this study should be considered as providing partial and provisional insights, and thus should be evaluated in light of other possible hypotheses in future research. As noted above, the study did consider as strong overriding alternative hypothesis that a case outcome is ultimately related to facts, contextual evidence, the applicable law or specific provisions in the economic treaty invoked, and, the way in which an environmental measure is designed and implemented. Yet there remain still other possible alternative hypotheses that could explain environmental policy permissible outcomes in the cases studied.

9.3.2 Contribution to our understanding of conflicts between international economic and environmental law and policy implications

Despite all these limitations, this exploratory research may nevertheless contribute to our understanding of the complexities around conflicts between economic vis a vis environmental –policies and international law. Among the most important contribution is perhaps that the study casts some light on procedural and substantive elements that inform dynamics at play among actors in environment related international public investment law disputes. Unlike previous research and literature, from which I greatly benefited, this study tested the influence of specified constructs of transparency, public participation and horizontal integration on outcomes in such disputes, as explained in chapters 3, 4, 5 and 6. As alternative explanation, I focused in this study also on the interpretation approach taken by a tribunal. The value of this approach should naturally be tested and evaluated in subsequent research and could be replicated in other specified settings. Perhaps refined constructs could be used, depending on the public interest issue at stake, for example public health, labor rights or human rights issues. One could thus also expand on the initial database which this research established from the data collection.

In general terms, my academic background in international political economy and professional experience in international law-making processes stimulated me to take a more holistic approach to study norm contestation about sustainable development in the context of international public investment law disputes. I proposed the theory that institutional factors influence the respective power of organizations engaged in strategic social construction and norm contestation in international economic law disputes. To measure the influence of hypothesized institutional factors on case outcomes, I constructed the above listed procedural and substantive case characteristics to capture both: power distribution among organizations, and, some of the outcomes of norm contestations resulting from national and international

law-making processes. I then explored whether –and found that indeed some of –these case characteristics seem to show an influence on case outcomes, that is in the realm of an international *law-application process*.

In this way, the study integrated international law-application and law-making processes, suggesting that existing conflicts between environmental and economic policies could be understood as the outcome of a norm contestation *processes* in different arenas engaging different actors. Finding support for the hypotheses that transparency, public participation and horizontal integration as well as interpretation approach can matter in international public investment law disputes informs the law-making process and thus can have policy implications, as further described below. However, resulting policies in turn depend on outcomes of norm contestation among various actors in the law-making process and the decisions taken by states. This circular flow involving various processes at the domestic and international level was explicated in chapter 2, presenting a model of interactions among actors in the context of norm contestation about sustainable development.

In more specific terms, each of the study's findings in the three focus areas, (i.e. procedural case characteristics, substantive case characteristics and a tribunal's interpretation approach) informs different reform options to improve international public investment law in the direction of contributing to sustainable development.

First, power inequalities among actors in the international political economy and specifically among stakeholders in international public investment law disputes exist. States have, in part, some power to address such power inequalities, for example by providing participatory access to stakeholders in the law-making and law-applying processes. It is a difficult task for any government to find the right balance in considering economic, environmental and social impacts of their sustainable development policies. In this law-making process governments can benefit from inputs from various organizations, and advocacy groups vary in interests pursued, motivation and methods of influence. And such input can have an influence on policy outcomes.

The study's findings encourage governments to be mindful that also in the law-applying process of international economic disputes, inputs from various organizations can have an influence on such case outcomes. Some governments already seem to have considered that and have decided to give some organizations, namely investors, direct and meaningful participatory access in the law-applying process of international public investment law disputes. In fact, in some instances they have provided investors with equal footing in investor-state dispute settlement provisions, allowing, often 'multinational', corporations to represent themselves in claims against any state party of such economic treaty, including themselves.

Conceivably, this transfer of power was motivated by considerations of how to shift the burden of financial[465] costs of such disputes.

Finding that the presence of transparency and public participation case characteristics can have a positive influence on environmental policy permissible outcomes in such disputes suggests that governments could further consider to open participatory access up to a wider range of organizations. States can do so either by amending existing treaty provisions and rules governing dispute settlement, or in disputes themselves by considering to welcome rather than oppose transparency and public participation and representation requests made by relevant groups.

Some reforms on procedural aspects of transparency and public participation and representation in this direction are already being considered and undertaken since this study began, though scholars differ in their evaluation of consistent and actual progress.[466] For example, the UN Conference on Trade and Development (UNCTAD) suggested in its Investment Policy Framework for Sustainable Development[467] that states "can increase transparency of procedures" in Investor-State Dispute Settlements.[468] The report further recommended, as policy option for "introducing improvements and refinements to the arbitral process in international investment agreements" that states provide, *inter alia*, "for more transparency, including by granting public access to arbitration documents (including settlement agreements) and arbitral hearings as well as allowing participation of interested non-disputing parties such as civil society organizations in proceedings".[469]

The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (discussed in chapter 4) and the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) have recently been adopted and can also be regarded as initial steps in the right direction. The Mauritius Convention builds on - and "facilitates States opting into the regime of transparency and participation created by" - the UNICTRAL Transparency Rules. It does so by providing a mechanism for States to apply these rules moreover, also to arbitrations under investment treaties entered into prior to 1 April 2014, as well as non-UNCITRAL arbitrations.[470] States have also issued binding interpretative

[465] Some may critically argue that the benefits of shifting financial costs should be analyzed against other, such as social, environmental or democratic costs.
[466] See Gus Van Harten, The European Commission and UNCTAD Reform Agendas: Do they ensure Independence, Openness, and Fairness in Investor-State Arbitration? And Jonathan Ketcheson, Investment Arbitration: Learning from Experience, both in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW (Steffen Hindelang and Markus Krajewski eds. 2016) at 137 footnote 38.
[467] UN Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (2012 and 2015).
[468] UN Conference on Trade and Development (UNCTAD), Investment Policy Framework for Sustainable Development (2015) at 84.
[469] *Ibid*., at 107.
[470] Jonathan Ketcheson, Investment Arbitration: Learning from Experience, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW (Steffen Hindelang and Markus Krajewski eds. 2016) at 112.

statements[471] on procedural aspects of disputes and specified such in new trade and investment treaties. In the recently signed Comprehensive and Economic Trade Agreement (CETA), Canada and the EU decided to clarify their position on transparency and non-disputing party participation in Articles 8.36 (on transparency of proceedings) and 8.38 (on respondent's obligation and timeline to provide information to non-disputing parties on request, tribunal's acceptance of non-disputing parties submissions and non-disputing parties' attendance to hearings). The preliminary findings of this study based on the studied disputes, (i.e. that that the presence of transparency and public participation case characteristics can have a positive influence on environmental policy permissible outcomes in such disputes) supports these developments and proposals of textual reforms on procedural matters.

Second, my findings that case characteristics of horizontal integration can have a positive influence on environmental policy permissible outcomes supports also proposals of textual reforms on substantive matters in international trade and investment agreements. The evidence supports the inclusion, in such treaties, of more specific, clear and concrete language and provisions on: sustainable development, environmental exception and defenses and MEA linkages. Moreover, the study identified, through the qualitative analysis of disputes, core and substantive textual issues of norm contestation relevant to dispute outcomes and presented these in a sketch of the status of embedded liberalism (chapter 2) and in the specific recommendations for actions by various actors in law-applying and law-making and implementation processes (chapter 8). These insights to substantive textual issues include in part some of the required scope described above within which environmental measures should be designed and implemented in order to increase the likelihood for an environmental policy permissible ruling in a dispute. Should a required scope seem to be lacking clarity or impeding other considerations, states can address such inadequacies through textual negotiations of international investment and trade agreements, and make use of the sketch of the status of embedded liberalism provided in this study.

Certainly, all negotiations and in particular re-negotiations of such treaties are difficult and take a long time. Regarding difficulty, some have noted the need to resolve questions about "what competences the contracting (governmental) parties in fact retain after entering into treaties aimed at the protection of non-governmental actors such as private foreign investors".[472] Norm contestation involving various actors in different arenas will slow down this law-making or law-remaking process. However, the outcomes of such process can further inform and improve law-applying processes in the future. And despite these

[471] NAFTA Free Trade Commission, NAFTA Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001.
[472] Karsten Nowrot, Termination and Renegotiation of International Investment Agreements, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW (Steffen Hindelang and Markus Krajewski eds. 2016) at 265.

complexities, one can already see developments in proposals being made and state action being taken with regards to substantive textual reforms since this research began.

We find examples of proposals for - and negotiations of - textual reforms on substantive matters again in UNCTAD's Investment Policy Framework for Sustainable Development and the European Union negotiations of economic treaties with several countries, among other similar state initiatives. Looking at Europe's "transformative power," Frank Hoffmeister points out recent developments towards the view that "the EU's Common Commercial Policy should be conducted in line with its external action objectives" including "the eradication of poverty by fostering the sustainable […] development of developing countries".[473] Observing developments of textual redesign in several EU FTA negotiations, he notices "the EU does not present the concept of sustainable development as simply serving host State interests," but rather emphasizes the mutual supportiveness[474] between trade and investment and sustainable development.[475] In addition, he further notes "the EU reform agenda is an expression of an internal policy discussion about public preferences with respect to granting rights to investors against European measures".[476] The value of his tracking of this trail of communication is that it describes different concerns flowing into norm contestation processes that can be understood as directional pulls, including, as exemplified here, towards: serving sustainable development needs of the global community, of the domestic community needs, and preserving domestic policy space.

More specific textual reforms on substantive matters are manifested in the inclusion of sustainable development chapters and provisions, and specific refinements of preambular and operational paragraphs. This also includes updating investment related provisions in which contentions around the status of embedded liberalism can be clarified, for example referencing evolving legal concepts and emerging standards, among others. Like the recommendations supported by the findings of the study, the UNCTAD Investment Policy Framework for Sustainable Development lists various options for states to consider in this regard. Several scholars have also examined what approaches states from various regions

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[473] Frank Hoffmeister and Gabriela Alexandru, A First Glimpse of Light on the Emerging Invisible EU Model BIT, 15 THE JOURNAL OF WORLD INVESTMENT & TRADE (2014), and Frank Hoffmeister, in *Ibid*., at 360.
[474] Some have described mutual supportiveness as mainly being a policy goal, noting his does not mean that references to mutual supportiveness have no legal value. Yet others question its value based on the ecological limits within a global economy focused on economic growth cannot be sustained. E. JORGE VIÑUALES, FOREIGN INVESTMENT AND THE ENVIRONMENT IN INTERNATIONAL LAW (Cambridge University Press. 2015) at 148-51; and HERMAN DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (Beacon Press. 1996).
[475] Frank Hoffmeister, The Contribution of EU Trade Agreement s to the Development of International Investment Law, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski eds. 2016) at 362.
[476] *Ibid*., at 365.

have recently chosen to address institutional and sustainable development concerns raised in the context of their international investment law obligations.[477]

Third, my findings highlight that horizontal integration case characteristics (i.e. reference to sustainable development, environmental exception and defenses and MEAs) whether treaty-specific or not must actively be referred to in legal arguments and applied, in practice, by a tribunal to increase the likelihood for an environmental policy permissible outcome in a dispute case. Textual reforms on substantive and procedural matters accomplishable through re-drafting in international treaties enable that horizontal integration references can be used for legal arguments in the law-applying process. To address the issue of application of such references by a tribunal, further clarification on interpretation approaches can be pursued. The study found that a systemic-integration interpretation approach taken by a tribunal can have a positive influence on environmental policy permissible outcomes and supports further guidance in this direction. Supported are recommendations for various activities, including to raise awareness among investment arbitrators and investors about mutual supportiveness approaches and the evolution of non-treaty specific sustainable development norms, standards and practices. Calls for further clarification are reflected in valuable studies about fragmentation in international law, such as by the International Law Commission (ILC). The ILC recently noted in a draft guideline that

> *"The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including inter alia the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties [VCLT] of 1969, including articles 30 and 31, paragraph 3(c), and the principles and rules of customary international law".*[478]

Another recommendation for clarification comes from Katherina Berner, who has proposed that "applying the [VCLT] rules can help reconcile investment protection with external concerns such as

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[477] STEFFEN HINDELANG AND MARKUS KRAJEWSKI, SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Oxford University Press. 2016), in particular section IV.

[478] Draft Guideline 9 (on Interrelationship among relevant rules) on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the International Law Commission in Commission in its Report of the Sixty-ninth session (1 May-2 June and 3 July-4 August 2017) General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10).

sustainable development".[479] She argues that "the Vienna Rules are in an impartial way, inherently open-minded to encompassing new developments and to adapting treaties to changed conditions."[480] My research approach differs from Berner's study in that I focused on tribunals' practice. For this purpose, I also constructed a very specific differentiation between treaty-specific and systemic-integration interpretation approaches taken by tribunals. The former approach is characterized by - what Berner identifies as legally incorrect – a separation of VCLT Article 31(3)(c) from the remainder of the general rule and an introduction of "the very interpretive hierarchy which the drafters of the Convention did not want to establish".[481] However, my study supports Berner's conclusion that "it would be desirable to insist –and, if necessary, to ensure through procedural changes – that arbitral tribunals faithfully and openly apply the Vienna rules as they ought to apply any other element of the applicable law". [482]

To ensure that they are applied, states can use textual formulations of provisions on substantive and procedural matters in treaties to specify their intentions. The CETA chapter on investment, for example, states in Article 8.31(1) (on applicable law and interpretation): "When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the VCLT, and other rules and principles of international law applicable between the Parties". This study also supports suggestions that states utilize interpretation mechanisms to clarify their intentions. However, this study does not provide input to institutional and procedural reforms such as establishing appeals mechanism or even a new permanent international investment court which other scholars have suggested states should consider. My study underscores instead, that states can provide guidance to an international judge or arbitrator serving in any such law-applying institutional setting. They can do so by clearly expressing in treaty text or interpretative statements, their intended interlinkages between different regimes or their expanding understanding of concepts, such as: 'in like circumstances' increasingly understood to include considerations of consumer or public preference; 'legitimate expectations' understood to be balanced against 'reasonable expectations'; 'cost-benefit analysis' understood to entail taking into account new developments and international standards; 'science-based evidence' understood to include various knowledge sources; or 'front-runner policy approaches' evolving also among sub-national governments and other actors as a practice of pursuing environmental measures based on the precautionary principle or going beyond national commitments. In this way, states can make best use of

[479] Katharina Berner, Reconciling Investment Protection and Sustainable Development, in SHIFTING PARADIGMS IN INTERNATIONAL INVESTMENT LAW - MORE BALANCED, LESS ISOLATED, INCREASINGLY DIVERSIFIED (Steffen Hindelang and Markus Krajewski eds. 2016) at 202.
[480] *Ibid.*, at 202.
[481] *Ibid.*, at 197.
[482] *Ibid.*, at 203.

their power, keep such decisions within the law-making process and facilitate that VCLT rules and any other element of the applicable law are properly applied in law-applying processes.

9.3.3 Conclusion

Conflicts between economic vis-à-vis environmental policies and international law are a sign of an unsettled compromise of John Ruggie's embedded liberalism in the context of sustainable development. The state-centric international law process has not yet produced a norm-transforming change that he suggests occurs at the level of the normative framework itself. Without a paradigm shift, will sustainable development remain an oxymoron?

And even when sustainable development will be established as a *de jure* norm – making it a *de facto* norm resulting in the implementation of large-scale economic transformations such as phasing-out emissions entirely will require actions by sub-national government and non-state actors, including businesses, as well. This has been recognized in several MEA processes. However, in international investment disputes, we have seen environmental policies implemented by sub-national governments being challenged by investors. Some of these challenges may be a sign of business resisting a paradigm shift towards sustainable development. Yet there exist also many corporations in today's global economy that qualify as front-runners paving the way for a paradigm shift, and even demanding clear and stricter environmental regulations which could reward them with a competitive advantage.[483]

Existing conflicts and unsettled compromises support the idea explored in this research that an ongoing process of norm contestation about sustainable development among various actors takes place in various law-making and law applying arenas. In my introduction, I suggested that norms once defined through such processes can be challenged, contested and reformulated to adjust to an ever-evolving economic, social and environmental reality of concern to different societies. Norms do however evolve. And Martin Luther King Jr. believed they do historically progress when he said, "the arc of the moral universe is long, but it bends toward justice." Progressive steps in the evolution of norms can be observed in the discussions, deliberations and considerations of international investment disputes. However, the study suggests that these steps, though their marks can be tracked in dispute rulings, are to be taken by states on their path to improving international public investment law in the direction of contributing to sustainable development.

[483] For example for their leadership in reducing negative social and environmental impacts or implementing circular-economy or zero-emission business models.

My findings that specific procedural and substantive case characteristics can influence dispute outcomes towards environmental policy permissible rulings informs states in their consideration of updating treaty text on procedural and substantive matters. As international law 'makers' states can amend existing or create new treaty provisions and rules governing dispute settlement. As disputing parties, states can make references to horizontal integration in their legal arguments and support procedural transparency and public participation in such disputes.

Finding that cases where transparency and public participation is observed can have an influence on environmental policy permissible rulings informs also activity policies of civil society groups. Their influence on the evolution of norms should not be considered as to end in the law-making process, including at the international level. This research showed clearly that achieving the inclusion of references to sustainable development, environmental exceptions or MEAs in an economic treaty may only matter to outcomes of international economic law disputes in which an environmental policy is challenged when such references are being actively referred to. Therefore, the study also suggests civil society groups consider their influence and role in the law-applying process as well, and pursue and refine their participation in relevant disputes.

This requires also an interest among practitioners and researchers, or the courage to engage, in disciplinary cross pollination to grow awareness about developments in different fields, such as of economic and environmental law. Perhaps it is time to reconsider the benefits of a specialization trend observed in professional fields and educational disciplines which has produced experts in complexities of one or another field of international public law. And I am referring here not only to fostering systemic-integration interpretation approaches to be taken- by legal professionals sitting in tribunals of international investment disputes, which the study's findings also support.

Encouraging in this regard is the recent trend of economic experts from government and the business sector taking part in international environmental law negotiations. Inter-governmental organizations, such as UNCTAD, non-governmental civil society organizations, such as the International Institute for Sustainable Development and several other research organizations have promoted the development of expertise in the nexus between economic and environmental law regimes. In the legal profession, the International Law Commission has also produced useful studies about fragmentation in international law, and has recently supported principles of harmonization and systemic integration. All these developments, suggest to me that there is already some recognition of an increased potential to realize sustainable development when interdisciplinary expertise and multi-stakeholder engagement have influence on policy development, implementation and review. Based on my research I can endorse these developments. And the ideas assessed and presented in this study are themselves a result of an

interdisciplinary research, which may resonate with some readers or encourage others to examine the benefits thereof.

As natural - rather than social - scientist, Rachel Carson arguably spread the idea for a needed paradigm shift that moves beyond the post-WWII focus on economic growth to make the world a better and more peaceful place towards a recognition that ecological impacts and limits must be taken into account in the pursuit of this goal. Naturally, such a fundamental change involves a difficult process and norm contestation still continues long after her book "Silent Spring," was published in 1962. One could easily be discouraged by the slow pace towards this shift, by the technicalities of this process and the realities of unequal powers among actors involved. And yet another biologist, Wangari Maathai inspires us with her story of being a humming bird that less pondering upon abstract ideas and more concrete actions should be pursued by everyone.

At the end of the day, to realize the idea of sustainable development, decision makers must weigh in all three aspects of its unique scale, namely economic, social and environmental impacts of their decisions, before determining how to balance them so to reach an equilibrium. Human societal evolution shows for better and for 'worst' past experiences in balancing power, justice and wisdom and continues to demand such exercise to achieve development that is sustainable.

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