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Searching for purpose: Critical assessment of teleological interpretation of treaties in investment arbitration

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Abstract

This article explores the tendency of investment tribunals to resort to teleological interpretation and to the protection and promotion of foreign investments as a standard goal of investment treaties. It further explores how this tendency relates to the rule of interpretation envisaged in Articles 31–33 of the Vienna Convention on the Law of Treaties considering that the convention rule requires that text, context, and purpose are to be equally assessed when searching for the meaning of a treaty provision. The article's particular focus is on whether investment tribunals have begun to create specific rules for interpreting investment treaties that favor one of the elements of interpretation over the others, namely, the purpose of the treaty. This method of teleological interpretation is set against the general background of investment arbitration, the Vienna Convention on the Law of Treaties, and cases where investment tribunals' reliance on the preamble of the applicable treaty was decisive for the final outcome of the case. These cases, which revolved around the goal to protect and promote foreign investments and teleological interpretation, lend support to the proposition that there has been a departure from the general rule. However, they equally show the unreliability of telos in a treaty: purposes may be different, even conflicting, and their clear meaning can easily escape interpreters. Despite a growing number of cases where the purpose of a treaty comes to the forefront of legal reasoning, the functional correlation between the purpose of a treaty and the legitimacy of a claim still remains unclear.

Keywords: treaty interpretation, investment arbitration, teleological interpretation

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Introduction

"Treaty interpretation is a notoriously difficult subject."[1] This statement is hard to challenge. Legal norms and rules require interpretation, which makes interpretation central to legal reasoning.[2] A general rule of interpretation for international treaties is found in the Vienna Convention on the Law of Treaties (VCLT).[3] The Vienna Convention seems to be undisputedly accepted by various courts and tribunals as both the starting point and the benchmark for interpreting international legal texts. It sets the framework within which investment tribunals operate when interpreting international law. Given the fact that international investment arbitration is quite a vibrant and buzzing arena of international law, it is clear that investment tribunals will often be in a position to master the virtue of interpretation and have their say on the VCLT. They enjoy both the obligation to follow the rule of interpretation and the privilege of being a participant in indirect law-making by interpretation. Given the number of international investment agreements (IIAs) that today form a significant segment of international treaty law, and the growing number of international investment cases, the relevance of interpretation to the implementation and assessment of investor rights and state responsibilities can hardly be overestimated.

The aim of this article is to examine the phenomenon of teleological interpretation in international investment arbitration cases in which the arbitral tribunals have tended to favor the "object and purpose" approach, with special reliance on one particular objective usually found in IIAs – the "protection and promotion of foreign investments." Several selected investment cases will be scrutinized against the background of the general rule of interpretation envisaged in Articles 31–33 of the VCLT; this rule requires the equal assessment of text, context, and purpose when searching for the meaning of a treaty provision. Those cases, which include, *inter alia*, *Siemens v. The Argentine Republic*,[4] *Tokios Tokelės v. Ukraine*,[5] *Malaysian Historical Salvors v. The Government of Malaysia*,[6] and *Renta 4 v. The Russian Federation*,[7] seem to be quite good examples of a departure from the general rule of interpretation toward the purposive approach.[8] As this article will show, the methodology shared by these different tribunals is pretty much the same, and this phenomenon alone deserves closer inspection. Therefore, on the basis of these and similar cases, this article will raise the question whether investment tribunals have begun to

[1]Panos Merkouris Malgosia Fitzmaurice, *Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement*, *in* Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 years on 153, 153 (Malgosia Fitzmaurice et al., eds., 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384551 [hereinafter 30 years on].

[2]Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 107 (2009).

[3]Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27 1980), https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf. For a list of the parties and their level of participation in the Convention, *see* https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800390 2f.

[4]Siemens A.G. v. The Arg. Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction (Aug. 3, 2004), Award (Feb. 6, 2007). The majority of ICSID cases found in this article can be found on the italaw website: www.italaw.com.

[5]Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004),

[6]Malaysian Historical Salvors SDN, BHD v. Gov't Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007), Decision on the Application for Annulment (Apr. 16, 2009).

[7]Renta 4 v. Russian Fed'n, SCC Case No. 24/2007, Award on Preliminary Objections (Mar. 20, 2009). The majority of SCC cases cited in this article can be found on the italaw website: www.italaw.com.

[8]Investment tribunals invoke the general rule of interpretation but may implicitly favor one approach over the other. For example, based on the analysis of 98 decisions, one analyst found that the "object and purpose" approach was used as an interpretative argument in 48 decisions. *See* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 Eur. J. Int'l L. 301, 322 (2008).

create specific rules for interpreting investment treaties that favor one of the elements of interpretation over the others, namely, whether one particular purpose of a treaty has gained greater significance in investment arbitration.

This article will begin with a brief overview of the general framework within which investment tribunals operate and where investment law is being interpreted before turning to an outline of the general rule of interpretation envisaged in the VCLT, its history, and its contents. The article will then focus on selected cases where an investment tribunal's reliance on the preambles of applicable treaties seem to have been decisive for the final outcome. As usual, critical appraisal will then follow: the approach of the tribunals in the selected, and similar, cases will be challenged, not only on the basis of the general rule of treaty interpretation but also on the basis of the shared methodology used by the tribunals. The overall challenge presented will be that even if teleological interpretation is deemed to be a legitimate approach, the way investment tribunals have conducted the task of searching for purpose is not without controversy.

General framework

International investment law has quite a unique physiognomy that results from two contradictory tendencies. It falls between extreme bilateralism at one end of the spectrum and calls for homogeny in the discipline at the other end. Unlike any other area of international law, international investment law has been built upon a network of bilateral agreements.

According to UNCTAD, as of today, there are 2322 bilateral investment treaties in force.[9] This impressive number testifies to the importance and growth of the discipline, but also to the fragmentation that is inherent in bilateral treaty-making. This fragmentation is exacerbated by the dispute settlement approach used: international investment disputes are resolved through international arbitration, which means that each and every case is decided by a different panel of arbitrators. Although most of these cases are resolved within widely-recognized arbitral institutions such as the International Centre for Settlement of Investment Disputes (ICSID) or the Stockholm Chamber of Commerce (SCC), this still does not outweigh the fact that there is no standing court or tribunal in place that would be competent to hear investment disputes.[10]

As of today, more than 600 international investment cases have been brought under an IIA.[11] This fact speaks to the growth of this discipline of international law and to the progressive developments in the area of direct access to international justice. But the results of this growth reveal the inevitable lack of coherence, and sometimes even competition, that has developed between different arbitral tribunals. Inconsistency exists even in those cases where the same factual issues and same legal text were at stake.[12] In other words, the source of its success, as manifested in the number of cases brought, can as equally be a threat to the system.

[9]United Nations Conference on Trade and Development (UNCTAD), http://investmentpolicyhub.unctad.org/IIA (last visited Sep. 27, 2016).

[10]For example, Gus Van Harten has argued strongly in favor of a standing investment court. *See* Gus Van Harten, Investment Treaty Arbitration and Public Law 180-84 (2007).

[11]UNCTAD, *IIA Issues Note: Recent Trends in IIAs and ISDs*, No. 1, February 2015, p. 5, available at: http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (last visited Apr. 16, 2016).

[12]The best of examples would probably be the findings of different ICSID tribunals on the plea of necessity raised by Argentina in a series of cases initiated on the basis of the very same U.S.-Argentina BIT. While in some cases (Sempra Energy Int'l v. Arg. Rep., ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Enron Corp. v. Arg. Rep., ICSID Case No. ARB/01/3, Decision on Jurisdiction (Aug. 2 2004); and CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8,

Despite the challenges in the field, there has also been quite a strong consensus that international investment law now exists as a separate field of study[13] based on its own principles.[14] Those who place emphasis on the unifying forces within the field point to general international law and general principles of law as common denominators for international investment law.[15] Indeed, investment tribunals do seem to have understood that they belong to an international system in which their pronouncements of law are placed in a wider legal context:

> [I]t should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[16]

Investment tribunals routinely apply general rules of international law,[17] such as customary international law, rules on State responsibility, and treaty law, and they invoke decisions of other international courts and tribunals. Among international rules routinely applied by investment tribunals is the VCLT, which

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Footnote continued

Award (May 12, 2005)) the defense of necessity was not allowed, either on the basis of Article IX of the BIT or on the general doctrine of necessity, in LG&E Energy Corp. v. Arg. Rep., ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), the tribunal upheld it.

[13] *See, e.g.*, Rudolph Dolzer & Christoph Schreuer, Principles of International Investment Law, 3 (2008) ("Foreign investment law consists of layers of general international law, of general standards of international economic law, and of distinct rules peculiar to its domain. (. . . .) As a result of these peculiarities, contemporary international investment law has acquired distinct characteristics the understanding of which requires separate study."); Stephan Schill, *Ordering Paradigms in International Investment Law: Bilateralism – Multilateralism – Multilateralization*, *in* The Foundations of International Investment Law: Bringing Theory into Practice 109, 115 (Zachary Douglas et al., eds., 2014) ("[T]he argument is that there is enough convergence in order to understand IIL [international investment law] as a specialized legal discipline that provides structured legal foundations for international investment relations in a global economy even in areas where no customary international law underpinning of investment treaty law exists.").

[14] *See, e.g.*, Rafael Leal-Arcas, *The Multilateralization of International Investment Law*, 35 N. C. J. Int'l L. & Com. Reg. 101, 134 (2009) ("[E]ven if there is no complete uniformity yet, there is enough convergence to be able to speak of international investment law as an existing international law discipline made up of uniform investment law principles.").

[15] *See, e.g.*, Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals: An Empirical Analysis*, 19 Eur. J. Int'l L., 301, 312 (2008) (citations omitted):

> General principles of law are a source of law that plays a marginal role in most areas of public international law. However, such principles could be expected to play a significant role in international investment law. One reason is that there is a close substantive relationship between public international law, private international law, and domestic law in relation to international investments. Moreover, ICSID tribunals often have competence to make decisions in accordance with international law, domestic law, and contractual obligations simultaneously. It may be difficult or even impossible to distinguish clearly between these legal bases in a given decision. General principles of law can thus be a "common denominator" for and function as a bridge between these three sources of law.

See also Campbell McLachlan, *Investment Treaties and General International Law*, *in* Investment Treaty Law: Current Issues iii 105, 143 (Andrea K. Bjorklund et al., eds., 2009) ("The emergence of over-arching common principles as the unifying feature of international investment law . . . ").

[16] Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 21 (June 27, 1990).

[17] They do so even in the absence of a specific provision in applicable law that would mandate the application of international law. For example, UNCITRAL Arbitration Rules do not contain a provision analogous to the provision in Article 42(1) of the ICSID Convention that makes international law applicable, (and even Article 42(1) makes the application of international law only a second choice following the agreement of the parties and conflict of laws rules).

should, together with other general rules, create a unifying force against the bilateralism and fragmentation that seem to undermine the system of international investment law. However, there is a risk that investment tribunals can hurt the system to which they belong by erroneously interpreting and applying general international law. Therefore, we should turn now to the application of the VCLT in investment arbitration.

Vienna Convention on the Law of Treaties in investment arbitration

History of the VCLT rule on teleological interpretation

Since the focus of this article is on teleological interpretation, it is helpful to review how the "object and purpose" standard found its place in the general rule on interpretation in the VCLT. The history of treaty law reveals an interesting trend with regards to the "object and purpose" standard of interpretation. The first comprehensive draft on treaty law, the Harvard Draft Convention on the Law of Treaties,[18] "placed emphasis in treaty interpretation on achieving the 'purpose' of the treaty"[19] and provided a "formulation based on an extreme teleological or purposive approach."[20] Article 19 of the Harvard Draft begins and ends with the teleological approach.[21]

However, this approach was abandoned by the International Law Commission (ILC) in the course of drafting the Vienna Convention on the Law of Treaties. Not only was the rule on interpretation included in the Draft quite late, that is, only two years before its final adoption in 1966,[22] but even then there seemed

Footnote continued

Still, even in investment cases conducted under UNCITRAL Rules on the basis of BITs that do not contain provision on applicable law, investment tribunals have easily assumed the applicability of international law:

> The substantive law to be applied by the Tribunal consists of the substantive provisions of the BIT, the VCLT, the ILC Draft Articles on State Responsibility and any relevant provisions of customary international law. The Tribunal notes that the VCLT, while being treaty law, has not been ratified by the United States. Therefore, both it and the ILC Draft Articles may only apply in the present case as customary international law. However, neither Party has disputed the relevant provisions of the VCLT and ILC Draft Articles as authoritative statements of customary international law.

Chevron Corp. (U.S.A.) v. Rep. of Ecuador, UNCITRAL, PCA Case No. 34877, Interim Award, ¶118 (Dec. 1, 2008). In the *Chevron* case, neither the arbitration rules nor the applicable BIT contained a provision on applicable law. Still, the arbitral tribunal concluded that general international law is applicable either as a treaty or customary law.

[18]The Harvard Draft Convention on the Law of Treaties was first published in 1929 and then with commentaries in 1935. *See Draft Convention on the Law of Treaties*, 29 Am. J. Int'l L. 657–65 (Supp.: Research in International Law 1935) [hereinafter *Harvard Draft Convention*].

[19]Richard Gardiner, Treaty Interpretation 57 (2008).

[20]*Id.* at 57–58.

[21]*See Harvard Draft Convention, supra* note 19, Article 19 (Interpretation of Treaties):

> (a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux préparatoires, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.
> (b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.

[22]Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties 423 (2009).

to be some reluctance over the reference to "object and purpose." The main approach of the ILC seems to have been textual, an approach heavily criticized by United States delegates at the Vienna Conference. As a result, a concession was made: a reference to "object and purpose" would be included in the rule on interpretation for reconciling texts in different languages when reconciliation could not be otherwise reached.[23]

Still, "object and purpose" found its way into the general rule of interpretation together with, or rather after, text and context; it seems that "object and purpose" was seen as the last of the three elements given its formulation "in the light of object and purpose."[24] Finally, as one of the commentators of the Draft noted: "Interpretation in the light of a treaty's object and purpose finds its limits in the treaty text itself. One of the (originally many possible) ordinary meanings will eventually prevail. In other words, Article 31 avoids an extreme functional interpretation which may, in fact, lead to 'legislation' or the revision of a treaty."[25]

Vienna Convention on the Law of Treaties as applied by investment tribunals

Investment tribunals quite regularly invoke the VCLT when interpreting investment agreements.[26] The opinion of the *Tokios Tokelės* tribunal could be considered as generally accepted in investment arbitration:

> As have other tribunals, we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law. Article 31 of the Vienna Convention provides that "[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 light of its object and purpose."[27]

Such an approach is expected and commendable. The general rule on interpretation is to be found in Articles 31–33 of the VCLT. As many scholars suggest, although Article 31 refers to more than one method of interpretation, so that the general rule requires equal examination of "text, context, and object and

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[23] Gardiner, *supra* note 19, at 73.

[24] *See Draft Articles on the Law of Treaties with commentaries*, II Y.B. Int'l L. Comm'n, 220, ¶11 (1966) (citations omitted), http://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf.

> The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties. The Institute of International Law adopted this—the textual—approach to treaty interpretation. The objections to giving too large a place to the intentions of the parties as an independent basis of interpretation find expression in the proceedings of the Institute. The textual approach, on the other hand, commends itself by the fact that, as one authority has put it, *"le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties."* Moreover, the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law.

[25] Villiger, *supra* note 22, at 428, ¶14.

[26] According to a survey commissioned by the UNCTAD that was based on a representative sample, Articles 31 and 32 of the Vienna Convention on the Law of Treaties have been invoked in two-thirds of the cases covered by the survey. *See* Andrea Saldarriaga, *Investment Awards and the Rules of Interpretation of the Vienna Convention: Making Room for Improvement*, 28 ICSID Rev. 197, 203–204 (2013).

[27] Tokios Tokelės, *supra* note 5, at ¶27 (citations omitted).

purpose of a treaty,"[28] it is still a single rule of interpretation given that the title of Article 31 is in the singular (general rule on interpretation) rather than in the plural.[29] Although the rule requires integration of different methods and considerations when assessing the meaning of a treaty provision, it is still a single rule of interpretation. This argument is relevant for investment arbitration because it disapproves giving preference to one of the methods of interpretation over the others. For example, giving preference to the object and purpose of a treaty over the text would run against the single and integrated rule of interpretation that requires assessment of all methods equally.

The object and purpose of a treaty is usually in its preamble, and the wording and style of preambles are different from the wording and style of the treaty main text.[30] The choice between teleological and textual interpretation can thus amount to a choice between the preamble and the dispositive part of a treaty. Therefore, the issue discussed here is whether any choice of this kind may disturb the equilibrium of a treaty as a legal text and thus distort the balance contemplated by the general rule of interpretation.

Another relevant issue for interpretation of investment treaties is whether the abundant case law and specific features of the discipline have given rise to the creation of special rules of interpretation within investment law.[31] Such arguments can be traced back not only to those cases where arbitral tribunals applied special rules of interpretation,[32] but also to those cases where reliance on the VCLT did not yield the result mandated by it and where the methodology employed departed from the general rule of interpretation.[33]

This analysis of treaty interpretation could thus be changed to a discussion of whether international investment law has created a special treaty regime that warrants different methods of interpretation. Some scholars, such as Judge Schwebel and Salacuse, support according a special character to the investment

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[28] Anthony Aust, Modern Treaty Law and Practice 234 (2d ed. 2007).

[29] *See id.* ("The singular noun emphasizes that the article contains only one rule, that set out in paragraph 1."); Saldarriaga, *supra* note 27, at 170 ("[I]t indicates that elements of Article 31 were to be used in a single operation and not in a hierarchical relation."); Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. Int'l Dispute Settlement 97, 109 (2011):

> Each of these four elements of Article 31 is expressed in mandatory terms and is designed to apply within a single and integrated exercise of treaty interpretation. Article 31 of the Vienna Convention is entitled "General rule of interpretation" and not "General rules of interpretation." The significance of this is often overlooked.

[30] Gardiner, *supra* note 19, at 186 ("It should not, however, be assumed that all preambles are of equal value. Some are very carefully negotiated, others cobbled together more or less as an afterthought.").

[31] *See* Antonio Parra, *Convention and Centre for Settlement of Investment Disputes*, *in* 374 Collected Courses of the Hague Academy of International Law / Recueil des cours de l'Académie de Droit International de la Haye 390 (2015); Gary Born & Mitchell Moranis, *Should Investment Treaties Have Their Own Rules of Interpretation?*, Kluwer Arbitration blog, Feb. 3, 2015, http://kluwerarbitrationblog.com/blog/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation/.

[32] Christoph Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, *in* 30 Years on, *supra* note 1, at 129, 134–135.

[33] *See* Thomas Wälde, *Interpreting Investment Treaties: Experiences and Examples*, *in* International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 730 (C. Binder et al., eds., 2009) ("Tribunals often do not practice what they preach; reference to the Vienna Rules is now mandatory, but such reference does not mean the Rules are taken and applied seriously."); Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment 60 (2015) ("Though reliance is often placed on the Vienna Convention on the Law of Treaties for the interpretive techniques that are used, there is little evidence that the convention's prescriptions were followed in the awards.").

treaty regime. While Schwebel argues that the great number of bilateral investment treaties has led to the creation of special customary rules of international law,[34] including the rules of interpretation, Salacuse argues that the 3,000 bilateral treaties have created a special treaty regime that falls out of the scope of application of the VCLT and so requires special and different rules of interpretation.[35]

On the other hand, scholars who criticize the concept of investment law as a special treaty regime submit that a significant number of bilateral treaties entered into by different parties cannot be equated with a multilateral regime:[36] instead, the current phenomenon simply is the result of a large number of bilateral treaties. The network of bilateral treaties can never be equated with the multilateral regime because mutual rights and obligations are owed only between two parties and are thus confined to the regime agreed upon by those two. Multilateralism is manifestly missing in the realm of international investment law.

As a comparison, the World Trade Organization (WTO) stands in stark contrast to investment arbitration in terms of multilateralism. The whole WTO system rests on an international organization, complex multilateral WTO-covered agreements, and a uniform system for dispute settlement. While both investment treaty and WTO provisions aim at economic liberalization, their architectures are sufficiently different to justify a specific legal regime for the WTO and its Dispute Settlement Body. In other words, the strong multilateralism of the WTO mandates uniform application of specialized norms and principles, thereby justifying its status as a special legal regime. Still, both WTO Panels and the Appellate Body regularly rely on the VCLT and its rules of interpretation when discussing the object and purpose of WTO agreements,[37] although it seems that resort to "object and purpose" is not that frequent within the WTO dispute settlement system.[38]

Therefore, even if there is a special investment treaty regime despite the strong bilateralism of the system, this regime still should not lead to the exclusion of the VCLT and its general rule of treaty interpretation.

Focusing on the preamble: investment cases illustrating the teleological approach to investment treaties

As already discussed, the rule of interpretation of treaties is a complex one. It requires that the terms of a treaty are given their ordinary meaning (unless the parties intended to give a special meaning to a term) in their context and in light of the object and purpose of the treaty.[39] The general rule of interpretation

[34]Stephen Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, Proceedings 98th Annual Meeting of the Am. Soc. Int'l L. 27 (2004).

[35]Jeswald Salacuse, *The Emerging Global Regime for Investment*, 2 Harv. Int'l L. J. 427 (2010).

[36]"While the investment treaty system may look, talk, and act like a 'regime', it is not a multilateral system." Born & Moranis, *supra* note 31.

[37]Appellate Body Report, *US — Shrimp*, WT/DS58/AB/R (1998), para. 153; Appellate Body Report, *EC – Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, WT/DS269/AB/R/Corr.1, WT/DS286/AB/R/Corr.1 (2006), paras. 238–240; Appellate Body Report, *US — Tyres (China)*, WT/DS399/AB/R (2011), para. 184.

[38]Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body 263, 263 (2009) ("The above discussion of how and when the Appellate Body has looked at the object and purpose of the treaty or provisions thereof does not warrant labeling its interpretative practices as 'teleological'.").

[39]Article 31 (General rule of interpretation) of the *Vienna Convention on the Law of Treaties*, *supra* note 3, provides:

> 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.

implies that all these different methods are to be given equal consideration because the purpose of interpretation is to ascertain what the parties agreed upon. An integrated approach to interpretation reinforces the rule of *pacta sunt servanda*.[40]

Against this background, it seems that giving preference to one method over the other, either explicitly or implicitly, can distort the balance incorporated in Article 31 of the VCLT.[41] Such an approach can easily reshape the content of obligations agreed upon by parties to a treaty. While sometimes one of the methods will naturally prevail as more helpful for determining the true meaning of the commitment, this still needs to happen as a result of looking at the treaty as a whole. True meaning is to be found in the provisions of a treaty, which should not be contradicted by reference to preamble, context, or other treaties.[42] The issue here is whether it is permissible to rely on the preamble to depart from the basic agreement envisaged in applicable treaties.[43] An additional issue is whether the reading and interpretation of the preamble, even after it has been chosen as the point of reference, is accurate.

Now we shall turn to arbitral decisions where teleological interpretation seems to have been decisive for the final outcome in these cases. Moreover, it is not only the purposive approach that stands out in these decisions but also the selection of objectives that seem to have determined the final result in these decisions.

Footnote continued

> 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 connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion 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.

[40]Latin for "agreements must be kept." *Pacta sunt servanda*, Encyclopædia Britannica https://www.britannica.com/topic/pacta-sunt-servanda. *See* Lone Wandahl Mouyal, International Investment Law and the Right to Regulate: A Human Rights Perspective 51 (2016) (citations omitted) ("Turning to the VCLT, article 31 reflects customary international law and embraces a more integrated approach to interpretation of treaties.").

[41]*See* Mouyal, *supra* note 40, at 51:

> Each of these approaches [objective, subjective and teleological] to treaty interpretation tends to confer the primacy on one particular aspect of treaty interpretation, if not to the exclusion than to the subordinate of the others. These three approaches may produce the same result in practice. Yet, they are also capable of leading to radically divergent results.

[42]*See* Aust, *supra* note 28, at 235:

> In practice, having regard to the object and purpose is more for the purpose of confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong. Thus, although paragraph 1 contains both the textual (or literal) and the effectiveness (or teleological) approaches, it gives precedence to the textual.

[43]The International Court of Justice expressly and firmly denied the possibility that the object and purpose of a treaty can be used to counter clear substantive provisions, especially provisions of an arbitration agreement. *See* Gardiner, *supra* note 19, at 197–198.

Siemens v. The Argentine Republic[44]

In *Siemens v. The Argentine Republic*, the claimant argued that termination of a contract for providing a variety of technical services and equipment, which was entered into by Argentina and Siemens' wholly owned subsidiary (SITS) following a bidding procedure, led to indirect expropriation and other breaches of the Germany-Argentina BIT. This case gave rise to two separate decisions, one on jurisdiction and the other, the award on the merits.[45] In both the jurisdictional and the merits proceedings, teleological interpretation turned out to be crucial for the outcome of the case.

During the jurisdictional phase, the rule of interpretation came up as the first relevant issue for interpretation and application of several BIT provisions, including the most-favored-nation clause (MFN) and the definition of investment. At the very outset, the tribunal declared the general rule of interpretation and Article 31 of the VCLT to be applicable.[46] However, at the very next step the tribunal departed from the integrated approach required by Article 31 to rely solely on the object and purpose of the BIT and teleological interpretation:

> The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty "to protect" and "to promote" investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.[47]

The tribunal thus assured the reader that the intention of the parties was clear: this intention was in the preamble of the BIT.

This line of reasoning naturally raises the question of whether the intention of the parties is to be deduced solely from the preamble or from the text as a whole. Then, even if that is an acceptable interpretative approach, the question may well be whether that intention was correctly deduced in *Siemens* given that the tribunal's reading of the preamble's purpose was restricted to the words "to create favorable conditions for the investments and stimulate private initiative," while the full text of the preamble mentioned other purposes as well, such as to "increase the well-being of the peoples of both countries." This slip of the pen distorts the equilibrium envisaged in the preamble as it is the protection of

[44] *Siemens*, *supra* note 4.

[45] *Id.*

[46] *Id.*, Decision on Jurisdiction ¶ 80 (Apr. 29, 2004):

> Both parties have based their arguments on the interpretation of the Treaty in accordance with Article 31(1) of the Vienna Convention. This Article provides that a treaty 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." The Tribunal will adhere to these rules of interpretation in considering the disputed provisions of the Treaty.

[47] *Id.*, ¶ 81 (citations omitted).

foreign investment—together with the well-being of the peoples of both countries—that seem to have been equally proclaimed as goals of the parties to the BIT.

This selective approach to interpretation methods and to the goals of the BIT resulted in a very extensive interpretation of BIT provisions relevant to jurisdiction. While the MFN clause referred only to investors, thus excluding investments as such, the tribunal found that restricting the MFN clause to investors would be contrary to the object and purpose of the BIT. Although there were other provisions of the BIT that explicitly embraced both investments and investors, while others were reserved only for investments, the tribunal found that enforcing such differences found in the text would be contrary to the purpose of the BIT, i.e., the protection of investments. Therefore, the tribunal decided to extend the protection envisaged in the BIT equally to investments and investors.[48] This interpretation is not without practical consequences because it is possible for a certain measure to have an effect solely on investments without affecting investors, and *vice versa*. While the text was fairly clear—it opted for different objects of protection for different standards—the tribunal decided to ignore these differences, instead relying on the preamble and selective teleological interpretation in order to extend the protection more broadly than was stated in the text.

Later, at the merits stage, the tribunal again invoked Article 31 of the VCLT as a general rule of treaty interpretation.[49] When assessing the content of the fair and equitable treatment standard, the tribunal first opted for a textual approach. The tribunal relied on English and Spanish dictionaries and found that the ordinary meaning of the terms "fair" and "equitable" is "just," "even-handed," "unbiased," and "legitimate."[50] But it has been widely known that the fair and equitable treatment is a standard that has been traditionally devoid of any prescribed content. As a widely tailored standard,[51] it has been open for different interpretations.[52] The tribunal must have been aware of all the ramifications stemming from the

[48] *Id.*, ¶ 92:

> The Treaty is a treaty to promote and protect investments, investors do not figure in the title. Fair and equitable treatment would be reserved to investments, and denial of justice to an investor would be excluded. While these considerations may follow a strict logical reasoning based on the terms of the Treaty, their result does not seem to accord with its purpose.

[49] *Id.*, Award ¶ 80 (Feb. 6, 2007).

[50] *Id.*, ¶ 290.

[51] *See* N. Jansen Calamita, *International human rights and interpretation of international investment treaties: constitutional considerations*, *in* Investment Law within International Law: Integrationist Perspective 164, 167 (Freya Baetens ed., 2013).

> The truth is that as the number of investment treaties concluded among states approaches nearly 3,000, the content of the standards of protection afforded under those treaties remains almost as uncertain and as controversial as it ever was under customary international law. Even though the language used in these treaties has displayed a remarkable uniformity, the meaning of much of that language remains indeterminate.

[52] *See* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States*, 104 Am. J. Int'l L. 179, 189–190 (2010) (citations omitted)

> Investment treaties typically involve a high level of obligation and delegation, because they establish legally binding commitments and delegate enforcement power to tribunals, but a low level of precision, because the commitments themselves are broad and vague (e.g., the promise to treat investors fairly and equitably). Although imprecision is normally associated with state discretion, when it is coupled with a high degree of obligation and delegation, the opposite is true: the body charged with interpreting and applying the standard is afforded wide discretion. The net result is to shift interpretive power from the treaty parties to investment tribunals.

vague formulation of this provision, so its resort to dictionaries seems a bit odd. It should have been clear even beforehand that not much help would be found in synonyms.[53] As difficult as it is to square the word "fair" into the binary concept of a litigated dispute in given circumstances without being overly arbitrary, it is just as difficult to achieve the same goal with the word "just." This "dictionary approach" does not seem quite helpful here.[54]

Argentina argued for a contextual approach in assessing the meaning of fair and equitable treatment, both in terms of the treaty and the facts of the case, in order to assess what would be fair in a given context; the tribunal opted for the preamble and teleological interpretation. Immediately after dropping the textual approach, which manifestly did not yield any result, the tribunal moved to the object and purpose of the BIT, namely to the purpose of promoting foreign investments. Against this background, the tribunal comfortably opted for extensive interpretation again:

> The Tribunal has already noted that the standards of conduct agreed by the parties to the Treaty indicate a favorable disposition to foreign investment. The purpose of the Treaty is to promote and protect investments. It would be inconsistent with such commitments and purpose and the expectations created by such a document to consider that a party to the Treaty has breached its obligation of fair and equitable treatment only when it has acted in bad faith.[55]

The tribunal extensively relied on the case law of other arbitral tribunals in assessing the content of the fair and equitable treatment standard found in the Germany-Argentina BIT.[56] Therefore, the case law was found to be a more appropriate context for the tribunal than the treaty itself or the factual ramifications of the case. The final conclusion was that termination of the contract led to the breach of the fair and equitable treatment standard.

In the end, it seems that teleological interpretation played a pivotal role in reaching the rules of the decision in *Siemens*, and to an extent not contemplated by the VCLT. In addition, the identification of the object and purpose of the treaty can raise doubts given that the tribunal opted for only one: promotion and protection of foreign investments. Ultimately, heavy reliance on teleological interpretation at the expense of the text and context of the treaty was coupled with a selection of a convenient purpose that was, in the final strike, interpreted so as to favor the position of the claimant. The criticism by Van Harten fits here fairly well: "Read with care, and in light of the representative role of the state as juridical sovereign, the preambular language of investment treaties does not provide a basis for adopting a presumption in favour of safeguarding the claimant against the state."[57]

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[53] *See* CampbellMclachlan, Laurence Shore, & Matthew Weiniger, International Investment Arbitration: Substantive Principles, 221 (2007) ("Although the starting point of any analysis of the investor treatment provisions of an investment treaty must be the ordinary meaning of the terms, it is unlikely that this part of the process will take the interpreter very far. It may simply result in an exchange of synonyms.")

[54] *See* Zachary Douglas, The International Law of Investment Claims, 82, ¶ 145 (2009):

> Thus, if the ordinary meaning of the terms "fair and equitable treatment" were somehow unclear, then the tribunal could make reference to the preamble of the treaty to resolve that textual ambiguity. The point is, however, that there is no textual ambiguity in relation to the terms "fair and equitable treatment". The question for the tribunal is rather the substantive content that must be ascribed to that standard of treatment.

[55] *Siemens*, *supra* note 4, Award, ¶ 300.

[56] *Id.*, ¶¶ 294-99.

[57] Van Harten, *supra* note 10, at 140.

Tokios Tokelės v. Ukraine[58]

Access to international investment arbitration is an important benefit and privilege enjoyed by foreign investors. Certain arbitral tribunals have found that access to international arbitration is a substantive standard of protection of foreign investors, rather than just a procedural mechanism for litigating breaches of BIT.[59] As a general rule, access to arbitration is conditioned upon the consent of both parties. In the international investment context, such consent is usually reached by acceptance of an express offer of a state given in the BIT to arbitrate disputes arising under applicable treaties. If consent refers to a specific kind of arbitration, such as ICSID, UNCITRAL or SCC, additional rules will apply, such as the ICSID Convention and ICSID Arbitration Rules, etc. These rules create the legal framework that defines access to arbitration. In the ICSID context, that framework involves two layers of conditions, applying both the applicable BIT and the ICSID Convention. This approach is also known as the "double barrelled test."[60]

The *Tokios Tokelės* case was brought by a Lithuanian company against Ukraine on the basis of the Lithuania-Ukraine BIT. The main issue here was whether the claimant had access to international arbitration and could enjoy the protection of an international treaty, given that it was fully owned by Ukrainian citizens. In other words, the issue was whether international protection could be extended even when both investment and investors seemed to lack international or foreign character. On the other hand, the company itself had Lithuanian nationality and thereby formally met the criteria envisaged in the applicable BIT.

The *Tokios Tokelės* tribunal decided to grant access to ICSID to the Lithuanian company even though the benefits of the protection would be ultimately provided to domestic investors who otherwise would be excluded from both the BIT and ICSID. The challenge was the interpretation of Article 25 of the ICSID Convention, which provides for the international protection of domestic companies when they are controlled by foreign investors. Therefore, the question was whether Article 25 equally means that foreign companies are deprived of protection if they are controlled by domestic investors. It seems plausible to claim that Article 25 contemplated a situation where international protection would not be granted under applicable law because international protection generally is not extended to domestic investors. However, was the contrary situation in line with the rationale of Article 25 or not? Was the "control test" (discussed below) applicable both ways, i.e., to both include and exclude certain categories of claimants?

The majority of the tribunal first went for a restrictive and somewhat formalistic definition of the investor as defined in the applicable Lithuania-Ukraine BIT. It simply concluded that the company had Lithuanian nationality and that no further discussion on the issue was warranted. It also refused to apply the "control test" under which the nationality of the owner should be taken into account in assessing the definition of an investor and its right to access to arbitration. In reaching its decision, the tribunal relied on the preamble of the BIT to conclude that the intention of the parties was to provide extensive international protection of investors:

[58]Tokios Tokelės, *supra* note 5.

[59]Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 54 (Jan. 25, 2000).

[60]Christoph Schreuer et al., The ICSID Convention: A Commentary 117, ¶124 (2d ed. 2009).

> The object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of "investors" in Article 1(2)(b). The preamble expresses the Contracting Parties' intent to "intensify economic cooperation to the mutual benefit of both States" and "create and maintain favourable conditions for investment of investors of one State in the territory of the other State." The Tribunal in SGS v. Philippines interpreted nearly identical preambular language in the Philippines-Switzerland BIT as indicative of the treaty's broad scope of investment protection. We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments.[61]

While in *Siemens* the preamble served as justification for extensive interpretation of the applicable BIT, in *Tokios Tokelės* the preamble's purpose was seen as the opposite: it served as justification for restrictive interpretation of the treaty. Despite these seemingly contradictory uses of preambles, however, in both cases preambles led to extensive interpretation of investors' rights.

Still, there is one question that remains to be answered, and that is whether the *Tokios Tokelės* tribunal correctly understood the goals of the applicable treaties. Both applicable treaties, the Ukraine-Lithuania BIT[62] and the ICSID Convention,[63] speak of the protection of foreign investments. It is the protection of foreign, as opposed to domestic investments, that features as the primary goal of not only bilateral and multilateral investment treaties, but also of the ICSID system. Protection of domestic investors is outside the reach of the given legal framework. As has already been explained, access to international arbitration is a valuable benefit and privilege for investors, for several reasons. For example, due to the operation of Article 26 of the ICSID Convention, they are not required to exhaust local remedies before resorting to international procedure. It would be really odd to assume that State parties intended to extend such protection to domestic investors in the absence of any provisions to that effect. Finally, would it really be the purpose of any bilateral regime, which is inherently based on the nationality principle, to protect domestic investors in their home countries? It seems that in such cases a bilateral regime is completely redundant.

Some of these arguments were indeed raised by a dissenter, Prosper Weil, who happened to be the presiding arbitrator in *Tokios Tokelės* tribunal.[64] This fact alone, that the presiding arbitrator was in the minority in an arbitral case, is curiosity in itself. However, his dissent is more important for his arguments in favor of a different approach to preamble and teleological interpretation. Prosper Weil insisted that the effect of object and purpose in the given legal framework would be the denial of access to investment

[61]Tokios Tokelės, *supra* note 5, ¶ 31 (references omitted).

[62]The Preamble of the Ukraine-Lithuania BIT, entry into force June 3, 1995, includes the language: "to create and maintain favourable conditions for investment of investors of one State in the territory of the other State." http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/2432

[63]*See* The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Oct. 14, 1966, [ICSID Convention], https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm. Article 25(1) states: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."

[64]The dissenting opinion of Professor Prosper Weil in *Tokios Tokelės* is available at: http://www.italaw.com/sites/default/files/case-documents/ita0864.pdf (last visited Sept. 4, 2016).

arbitration. At the very outset of his dissent, he stated that the majority decision ran against the object and purpose of the ICSID Convention and that it could put the whole system into danger.[65] He insisted that the system was tailored for the protection of foreign investors and settlement of international disputes.[66]

However, the real point of difference between Prosper Weil and the other two arbitrators concerned was whether the origin of the capital in question is relevant for assessing the right of access to arbitration. In other words, if a domestic investor with domestic capital registers an off-shore company, as a shell company, would that suffice for him to gain access to international arbitration? The majority of the tribunal found the origin of the capital irrelevant. Professor Weil's response was: "This assumption is flying in the face of the object and purpose of the ICSID Convention and system as explicitly defined both in the Preamble of the Convention and in the Report of the Executive Directors."[67] In addition, Prosper Weil pointed to Article 25, which allows for, and even requires, the "control-test," i.e., it allows for departure from a quite formalistic approach to nationality. Although Article 25 seems to address only situations when domestic companies are controlled by foreign investors who would gain access to arbitration which they would not otherwise have, it is equally plausible to claim that foreign companies controlled by domestic investors would be denied such access. Prosper Weil relied on both Article 25 and the Preamble of the ICSID Convention to conclude:

> It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the international investment that the Convention governs, that is to say, an investment implying a transborder flux of capital. This appears from the Convention itself, in particular from its Preamble which refers to 'the role of private international investment' and, of course, from its Article 25.[68]

Where the wording of a provision falls short of a clear meaning (as arguably was the case here), reference to a preamble could be justifiable. However, the real point of difference was how to read roles and interaction of the preambles in question. While the majority relied on the Preamble of the BIT to provide more extensive protection, the presiding arbitrator relied on the ICSID Convention's Preamble to find that access to arbitration is denied. This difference, in itself, proves that reference to a preamble can be a fragile concept and an unreliable tool for an operation leading to outcomes that are far from irrelevant. It further proves that once the "protection and promotion" standard wins over other treaty goals, extensive interpretation in favor of the claimant is bound to happen.

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[65] See *id.*, ¶ 1:

> If I have decided to dissent, it is because the approach taken by the Tribunal on the issue of principle raised in this case for the first time in ICSID's history is in my view at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution. In other words, my dissent does not relate to any particular aspect of this brilliantly drafted Decision, or to any particular assessment of the facts, but rather to what I would call the philosophy of the Decision.

[66] *Id.*, ¶ 5.
[67] *Id.*, ¶ 6.
[68] *Id.*, ¶ 19.

Malaysian Historical Salvors v. Malaysia[69]

This particular dispute arose out of the contract entered into between the government of Malaysia and the UK marine salvage company. The case resulted in two separate decisions, on jurisdiction[70] and on the application for annulment.[71] The award on jurisdiction found in favor of the respondent and the tribunal declined jurisdiction to hear the claims. The Annulment Committee disagreed with this finding and annulled the decision. The point of difference between the two tribunals was the interpretation of the relevant legal framework. More precisely, it was the relevance of the preambles of the UK-Malaysia BIT and of the ICSID Convention that determined the decisions of both tribunals, but with different outcomes.

Under the contract the company was to locate and salvage a vessel that sank off the coast of Malacca in 1817. The company was required to utilize its expertise, labor, and equipment to carry out the salvage operation; to invest and expend its own financial and other resources; and to assume all risks of the salvage operation, financial and otherwise. The company was also under obligation to clean, restore, and catalogue the recovered items, and to arrange for the auction of the recovered items in Europe by the international auction firm, Christie's.[72] It was a "no finds-no pay" contract which meant that all the costs of the search and salvage operation (and its attendant risks) would be borne exclusively by the company. It also meant that the company would recover its expenditure and make a profit only if both the salvage operation and the subsequent sale of the recovered items were successful.[73] The contract provided for the government to receive the sale proceeds of the recovered items, and thereafter to disburse to the company its portion of the sale proceeds, where the portion to be received depended on the aggregate amount received at the auction.[74] The government reserved the right to withhold salvaged items from sale, provided that the company was paid its share of the best attainable value for such items.[75]

The salvage operation lasted four years and the items that were not withheld from sale were auctioned for nearly USD 3 million.[76] Dissatisfied with the amount received under the contract, the company launched a proceeding under the contractual arbitration clause before the Malaysian court of arbitration. Those claims were dismissed.[77]

In the ICSID proceeding one of the first issues crucial for jurisdiction was whether the claimants had an investment within the meaning of the applicable BIT. The claimant argued that under the contract it was entitled to an amount equal to 70% of the value of the recovered and auctioned items, as well as to expenses incurred in relation to the salvage operation (although these expenses were not recoverable under the contract). The claimant further argued that this was an investment within the meaning of the BIT as it fell under the definition of "claims to money or to any performance under contract, having a financial value" found in Article 1(1)(iii) of the UK-Malaysia BIT. The respondent opposed this interpretation, arguing

[69] Malaysian Historical Salvors, *supra* note 6.
[70] *Id.*, Award on Jurisdiction (May 17, 2007).
[71] *Id.*, Decision on the Application for Annulment (Apr. 16, 2009).
[72] *Id.*, Award on Jurisdiction, ¶¶ 7–8 (May 17, 2007).
[73] *See id.*, ¶ 10.
[74] *Id.*, ¶ 11.
[75] *Id.*
[76] *Id.*, ¶ 13.
[77] *Id.*, ¶¶ 14–17.

that the main purpose of the contract was archeological research and that this transaction fell short of the conditions envisaged in the so-called *Salini* test,[78] which requires certain duration, risk, substantial commitment, and contribution to the host State's development.

The arbitrator on the single-person panel agreed with the contention that the existence of an investment was the key issue in the case. In order to resolve the issue, the arbitrator undertook the so-called "double-barrelled" test,[79] which requires the investment to pass two tests, one set by the ICSID Convention and the other by the applicable BIT.[80] Although the ICSID Convention does not define investments, this issue is still usually raised within the ICSID context. The arbitrator relied on Article 31 of the VCLT and the preamble of the ICSID Convention,[81] and expressly relied on the teleological approach to interpretation:

> The Tribunal considers that, taking a teleological approach to the interpretation of the ICSID Convention, a tribunal ought to interpret the word "investment" so as to encourage, facilitate and to promote cross-border economic cooperation and development. Support for such an approach can be found in the ***Preamble* to the ICSID Convention** ("*Considering the need for international cooperation for economic development* . . . ") and the Report of the Executive Directors on the Convention on Settlement of Investment Disputes Between States and Nationals of other States ("the Report of the Executive Directors") dated March 18, 1965, at Paragraph 9, which points out that the idea of ICSID was "*prompted by the desire to strengthen the partnership between countries in the cause of economic development*." The ICSID Tribunal in *CSOB* considered that the phrase found in the ***Preamble* to the ICSID Convention** "*permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention*."[82]

The arbitrator then concluded that "the term 'investment' should be interpreted as an activity which promotes some form of positive economic development for the host State."[83] The finding would be reinforced by the "Salini" test,[84] which equally requires the economic development of the host State as a constitutive element of an investment. Consequently, the arbitrator declined jurisdiction as there was no substantial contribution to the economy of Malaysia nor did the contract provide substantial benefits because the nature of the benefits that the contract offered to Malaysia did not provide substantial and lasting economic benefits for the host State.[85]

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[78]Salini Costruttori S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001).
[79]Malaysian Historical Salvors, *supra* note 6, Award on Jurisdiction, ¶ 55 (May 17, 2007).
[80]*See* SCHREUER ET AL., *supra* note 60, at 117, ¶ 124:

> In examining whether the requirements for an "investment" have been met, most tribunals apply a dual test: whether the activity in question is covered by the parties' consent and whether it meets the Convention's requirements. If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of investment will be relevant. In addition, the tribunal will have to establish that the activity is an investment in the sense of the Convention. This dual test has at times been referred to as the "double keyhole" approach or as a "double barreled" test.

[81]Malaysian Historical Salvors, *supra* note 6, Award on Jurisdiction, ¶¶ 65–68 (May 17, 2007).
[82]*Id.*, ¶ 66 (emphases original, citations omitted).
[83]*Id.*, ¶ 68.
[84]*Id.*, ¶¶ 74–83.
[85]*Id.*, ¶ 143.

The claimant successfully challenged the award on jurisdiction in the annulment proceeding. The *ad hoc* Annulment Committee agreed with the claimant that the sole arbitrator had exceeded its powers when defining the investment that consequently led to denial of jurisdiction. The annulment decision is all about treaty interpretation. And, indeed, the committee begins its analysis with the following statement: "This case concerns the interpretation of treaties."[86] The committee also opted for teleological interpretation but relied on the object and purpose of the applicable BIT to conclude that it could not have been the intention of the parties to exclude the recourse to international arbitration.[87] Historical interpretation of *travaux préparatoires* of the ICSID Convention also played a significant role in the committee's finding that the award on jurisdiction was fundamentally flawed in its assessment of the investment.[88] Therefore, with another look at the purpose of the ICSID Convention, which is the recourse to international arbitration, the *ad hoc committee* annulled the decision of the sole arbitrator.[89]

Both these cases illustrate the pitfalls of teleological interpretation. Imprecise and vague preambles generate uncertainty and can lead to different and conflicting results. While the sole arbitrator in the first Malaysian case chose the development of the host state as one of the purposes of the ICSID Convention, the other tribunal opted for the international procedural protection of investors that was allegedly the purpose of the BIT and ICSID. These cases again illustrate that states contemplate different goals for an investment protection treaty. The question is: Are the different goals necessarily conflicting ones, or more precisely, is the development of the host state in conflict with the protection of foreign investments?[90]

Renta 4 S.V.S.A v. The Russian Federation[91]

The *Renta* case was one of many so-called *Yukos* cases brought by various shareholders against Russia,[92] where the issue was whether the arbitration clause in the Russia-Spain BIT vested arbitral tribunals with jurisdiction to decide not only the amount of compensation due for a breach of Article 6 of the Russia-Spain BIT (nationalization and expropriation) but also whether there was a breach of this provision.[93]

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[86]Malaysian Historical Salvors, *supra* note 6, Decision on the Application for Annulment, ¶ 56 (Apr. 16 2009).

[87]*Id.*, ¶ 62.

[88]*Id.*, ¶¶ 63–74, 80.

[89]*See id.*, ¶ 80:

> It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it "manifestly" did so, for these reasons: (a) it altogether failed to take account of and apply the Agreement between Malaysia and the United Kingdom defining "investment" in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention; (. . .) (c) it failed (. . .) to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID.

[90]*See* Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital 169 (2015) ("And, as the objective of protecting foreign investment is given primacy in bilateral investment treaties, and often in their interpretation by arbitral tribunals, adequate consideration of public interest issues in investment disputes has not been a priority.").

[91]Renta 4, *supra* note 7.

[92]An overview of these cases is available at http://www.italaw.com.

[93]Article 10(1) of the Spain-USSR BIT, http://investmentpolicyhub.unctad.org/IIA/country/175/treaty/2851, states:

> *Disputes between one Party and investors of the other Party*
> 1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under article 6 of this Agreement, shall be communicated in writing, together

In reaching its decision, and probably sensing the trend of overly pro-investor awards reached by reliance on teleological interpretation, the arbitral tribunal emphatically stated:

> Article 31 of the Vienna Convention is frequently debated in the context of BITs. It provides that treaties are to 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." Article 31 (of the VCLT) must be considered with caution and discipline lest it become a palimpsest constantly altered by the projection of subjective suppositions. It does not for example compel the result that all textual doubts be resolved in favour of the investors. The long-term promotion of investments is likely to be better ensured by a well-balanced regime rather than by one which goes so far that it provokes a swing of the pendulum in the other direction.[94]

However, immediately after having diagnosed the problem, the tribunal was quick to change its course and do what it had criticized one paragraph earlier. It reached out for the preamble in order to read text into the applicable BIT that was patently missing:

> Yet some considerations of purpose have a solid foundation. It must be accepted that investment is not promoted by purely formal or illusory standards of protection. It must more specifically be accepted that a fundamental advantage perceived by investors in many if not most BITs is that of the internationalisation of the host state's commitments. It follows that it is impermissible to read Article 10 of the BIT as a vanishingly narrow internationalisation of either Russia's or Spain's commitment.[95]

Breach and remedy are certainly close and interconnected. The International Court of Justice (ICJ) had long ago discussed the matter but from a different perspective. It concluded that its jurisdiction to decide whether there had been a breach automatically implied jurisdiction to decide on compensation.[96] Whether the reverse is true remains unanswered by the ICJ but this possibility was clearly rejected by other investment tribunals.[97]

The text of the arbitration clause in the Russia-Spain BIT was quite precise and clear. Article 10(1) was devoid of any literary ambiguity of medieval palimpsests and hardly raised any textual doubts. Still, the tribunal altered and extended this precise provision by reliance on Article 31 of the Vienna Convention. In addition, it approvingly relied on the *SGS v. Philippines* and its understanding of the preamble:

Footnote continued

with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavor to settle the dispute amicably.

[94]Renta 4, *supra* note 7, ¶ 55.

[95]*Id.*, ¶ 56.

[96]Factory at Chorzów (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 22 (July 27). A number of years later, in LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶ 48 (June 27), the ICJ relied on the *Chorzów* case to find: "Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation."

[97]*See, e.g.*, Berschader v. Russ. Fed., Award, SCC Case No. 080/2004, ¶¶ 151–59 (Apr. 21, 2006). In *Berschader*, the identical issue was at stake: whether the wording of Article 10 in the Belgium-USSR BIT provided the arbitral tribunal with jurisdiction to assess the compensation for expropriation or whether it could be extended to jurisdiction to establish expropriation. The tribunal rejected the latter option. *See also* RosInvestCo UK Ltd. v. Russian Fed., Final Award, SCC Case No. V7009/2005, ¶¶ 110–123 (Sep. 12, 2010) (in a fairly similar setting the tribunal opted for the ordinary meaning of the words used in the arbitration clause in Article 8 of the UK-USSR BIT to exclude its jurisdiction over expropriation claims).

> The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended 'to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other'. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[98]

Here again, a preamble and considerations of purpose worked in favor of the claimants. The tribunal decided to confront text with the preamble and give precedence to the latter. Although the tribunal vouched that teleological interpretation would not mean that the investor is right,[99] the chosen approach provoked a swing of the pendulum in that direction.

Other investment treaty arbitration cases manifesting reliance on teleological interpretation and the "promotion and protection of investments" standard

The four cases discussed in the previous section represent only a fraction of the cases that demonstrate that resort to the object and purpose of the BIT can lead to extensive interpretation of investment treaties. These cases were selected because the reasons given by the tribunals manifest uniformity in equating the purpose of promoting and protecting foreign investments with a pro-investor outcome of the award. Although this equation will be further challenged later in this article, the next discussion will turn to other decisions where a similar approach was taken in order to respond to the second question raised herein: whether there is any trend that might show the close connection between the reliance on a particular purpose and an interpretative technique that leads to the final outcome of the award. It should go without saying that a set of different circumstances and legal rules will determine the destiny of a dispute. However, the aim here is to see whether there is any correlation between the chosen purpose of a treaty, such as "promotion and protection of investments," and how favorable for investors its interpretation was. So it is worth looking at the bigger picture to see whether equations favored by the tribunals under consideration have been a part of wider trend.

Research has identified more than 80 decisions where tribunals resorted to a teleological approach based on the "promotion and protection of investments" purpose stated in applicable BITs. Though the research is not necessarily exhaustive, it still demonstrates a frequency that may justify both the assumptions of this paper and a further inquiry into the link between this particular purposive approach and the final outcome of interpretations that upheld a particular argument raised by the claimant.

The research focused on finding those decisions where teleological interpretation in general, and reliance on the promotion and protection of investments in particular, played an important role in the tribunal's decision-making. The decisions selected as demonstrating the relevance of teleological interpretation in investment arbitration can be divided into several groups:

- The first group consists of decisions where there was a reference to "promotion and protection of investments" that did not result in either protection that was favorable for the investor or in upholding the claimant's argument.
- The second group gathers decisions where the tribunals relied on the purpose agreed in the BIT and ultimately favored the claimant.

[98]Renta 4, *supra* note 7, ¶57 (citing SGS v. Phil., ICSID Case No. ARB/02/6, Decision of Tribunal on Objections to Jurisdiction, ¶¶ 116 (Jan. 29, 2004)).

[99]*Id.*, ¶ 57.

- The third group of cases manifests a more balanced approach, where tribunals directly addressed the goal of promotion of investments but with an attempt to read it differently and against the mainstream.

Broken down in numbers, these three groups reveal inequality in the distribution of cases among them. The cases comprising the first[100] and third group[101] come in small numbers, whereas the second represents the largest group by far, comprising around 50 decisions.[102]

[100]Gruslin v. State of Malaysia, ICSID Case No. ARB/99/3, Award (Nov. 27 2000); Plama Consortium Ltd v. Republic of Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8 2005); Berschader, supra note 99; Wintershall Aktiengesellschaft v. Arg. Republic, ICSID Case No. ARB/04/14, Award (Dec. 8 2008); Standard Chartered Bank v. United Republic of Tanz., ICSID Case No. ARB/10/12, Award (Nov. 8 2012).

[101]Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶¶ 299–301 (Mar. 17, 2006); Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction & Liability, ¶¶ 272-73, 510 (Jan. 14, 2010); HICEE B.V. v. The Slovk. Republic, UNCITRAL, PCA Case No. 2009, Partial Award, ¶ 116 (May 23, 2011); Daimler Fin. Servs. AG v. Arg. Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 256–59 (Aug. 22, 2012); Quiborax S.A., Non Metallic Minerals S.A. v. Plurinational State of Bol., ICSID Case No. ARB/06/2, Decision on Jurisdiction, ¶ 264 (Sept. 27, 2012).

[102]Sedelmayer v. Russian Fed'n, SCC Award, 59 (July 7, 1998): Maffezini, *supra* note 60, ¶¶ 32–54; Metalclad v. United Mex. States, ICSID Case No. ARB(AF)/97/1), Award, ¶¶ 70, 75 (Aug. 30, 2000); Feldman v. United Mex. States, ICSID Case No. ARB(AF)/99/1, Award on Jurisdiction, ¶ 35 (Dec. 6, 2000); The Loewen Group, Inc. v. U.S., ICSID Case No. ARB (AF)/98/3, Decision on Competence & Jurisdiction, ¶ 50 (Jan. 5, 2001); Pope & Talbot Inc. v. Can., UNCITRAL (NAFTA), Award on Merits, ¶ 70 (April 10, 2001); SGS v. Phil., ICSID Case No. ARB/02/6, Decision of Tribunal on Objections to Jurisdiction, ¶¶ 116 (Jan. 29, 2004); Tokios Tokelės, *supra* note 5, ¶¶ 31–32, 77, 85–86; MTD Equity Sdn. Bhd. v. Rep. of Chile, ICSID Case No. ARB/01/7, Award, ¶¶ 104, 113 (May 25, 2004); Enron Corp., *supra* note 13, Decision on Jurisdiction, ¶ 32; Siemens, *supra* note 4, Decision on Jurisdiction, ¶¶ 81, 92, 106; CMS Gas Transmission Co., *supra* note 13, ¶¶ 274, 353–354, 359; Eureko v. Pol., Ad Hoc Arbitration, Partial Award on Liability, ¶¶ 248-50 (Aug. 19, 2005); Bogdanov v. Rep. of Mold., SCC Award, 16 (Sept. 22, 2005); Noble Ventures v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 48, 52 (Oct. 12, 2005); Aguas del Tunari, S.A. v. Rep. of Bol., ICSID Case NO. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, ¶ 241 (Oct. 21 2005); Continental Cas. Co. v. Arg. Rep., ICSID Case No. ARB/03/9, Decision on Jurisdiction, ¶¶ 79–80 (Feb. 22, 2006); Suez, Sociedad General de Aguas de Barcelona, S.A. v. Arg. Rep., ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 57 (May 16, 2006); Azurix I v. Arg. Rep., ICSID Case No. ARB/01/12, Award, ¶ 36014 (July 14, 2006); Suez, Sociedad General de Aguas de Barcelona, S.A. v. Arg. Rep., ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶ 59 (Aug. 3, 2006); Total, S.A. v. Arg. Rep., ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, ¶¶ 74–76 (Aug. 25, 2006); Mytilineos Holdings, S.A. v. State Union of Serb. & Montenegro, UNCITRAL, Partial Award on Jurisdiction, ¶¶ 99–100 (Sept. 8, 2006); LG&E Energy Corp., *supra* note 13, ¶¶ 124, 158; Siemens, *supra* note 4, Award, at 290-91, 300; Eastern Sugar B.V. (Netherlands) v. Czech Rep., SCC Case No. 088/2004, Partial Award, ¶ 165 (Mar. 27, 20); Enron Corp., *supra* note 13, Award, ¶¶ 331-32 (May 22, 2007), Decision on Juridiction, ¶¶ 181–82(July 6, 2007); Compañía de Aguas del Aconquija S.A. v. Arg. Rep., ICSID Case No. ARB/97/3), Award, ¶ 7.4.4 (August 20, 2007) (Vivendi II), para. 7.4.4; Sempra Energy Int'l, *supra* note 13, ¶ 373; Desert Line Projects LLC v. Rep. of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 106 (Feb. 6, 2008); Chevron Corp. (U.S.A.), *supra* note 18, ¶ 194; Hulley Enters. Ltd. (Cyprus) v. Russian Fed., UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, ¶¶ 285, 433, 457 (November 30, 2009); Veteran Petroleum Ltd. (Cyprus) v. Russian Fed., UNCITRAL, PCA Case No. AA 228, Interim Award on Jurisdiction and Admissibility, ¶¶ 285, 490, 514 (Nov. 30, 2009); Yukos Universal Ltd. (Isle of Man) v. Russian Fed., UNCITRAL, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, ¶¶ 285, 434, 458 (Nov. 30, 2009); Kardossopoulos v. Geor., ICSID Case No. ARB/05/18, Award, ¶¶ 432–33 (Mar. 3, 2010); Millicom Int'l Operations BV v. Sen., ICSID Case No. ARB/08/20, Decision on Jurisdiction, ¶ 65 (July 16, 2010); Suez, Sociedad General de Aguas de Barcelona, S.A. v. Arg. Rep., ICSID Case No. ARB/03/19, Decision on Liability ¶¶ 215–20 (July 30, 2010); Abaclat v. Arg. Rep., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 354, 518–519 (Aug. 4, 2011); HOCHTIEF Aktiengesellschaft v. Arg. Rep., ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 68 (Oct. 24, 2011); El Paso Energy Int'l Co. v. Arg. Rep., ICSID Case No. ARB/03/15, Award, ¶¶ 604, 614 (Oct. 31, 2011); Swisslion d.o.o. Skopje v. The FYROM, ICSID Case No. ARB/09/16, Award, ¶ 274 July 6, 2012); Garanti Koza LLP v. Turkm., ICSID Case NO. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, ¶¶ 63–64 (July 3, 2013); Micula v. Rom., ICSID Case No. ARB/05/20, Final Award, ¶¶ 322–23, 412, 418 (Dec. 11, 2013); IMB WTC v. Ecuador, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence, ¶¶ 44–45 (Dec. 22, 2013); Hulley Enters. Ltd. (Cyprus), *supra*, Final Award, ¶¶ 1355,

While the largest group favors the purposive approach, the cases in that group manifest different goals the tribunals sought to achieve by resorting to "protection and promotion of investments." This approach was used, *inter alia*, to extend most-favored-nation (MFN) clause to procedural provisions of the IIAs,[103] define covered investments[104] and protected investors,[105] broaden the scope of the umbrella clause,[106] exclude necessity defense,[107] or expand the fair and equitable treatment standard.[108]

Further, there are a number of cases where the findings of tribunals follow the rationale of the cases discussed above. For example, in *Suez, Sociedad General de Aguas de Barcelona, and Vivendi v. Argentine*, the tribunal heavily relied on object and purpose for both jurisdiction[109] and merits.[110] In *Abaclat v. Argentina* the tribunal used object and purpose to allow collective claims to investment arbitration,[111] while in *Sempra v. Argentina* it was the purpose that was used to solidify the rights of investors against a necessity defense.[112] There are cases where object and purpose were simply used as a means of providing

Footnote continued

1413 (July 18, 2014); Veteran Petroleum Ltd. (Cyprus), *supra*, Final Award, ¶¶ 1355, 1413 (July 18, 2009); Yukos Universal Ltd. (Isle of Man), *supra*, Final Award, ¶¶ 1355, 1413 (July 18, 2014); Petzold v. Zim., ICSID Case No. ARB/10/15, Award, ¶ 323 (July 28, 2015).

[103]Suez, Sociedad General de Aguas de Barcelona S.A., *supra* note 102, ¶¶ 57, 59; HOCHTIEF Aktiengesellschaft, *supra* note 102, ¶¶ 59–76; Garanti Koza LLP, *supra* note 102, ¶¶ 63–64.

[104]Mytilineos Holdings, *supra* note 102, ¶¶ 99–100.

[105]Continental Casualty, *supra* note 102, ¶¶ 79–80; Total S.A., *supra* note 102, ¶¶ 74–76; IMB WTC, *supra* note 102, ¶¶ 44–45.

[106]Eureko, *supra* note 102, ¶¶ 248-50.

[107]Enron, *supra* note 102, ¶¶ 331-32.

[108]*See* MTD Equity, *supra* note 102, ¶ 104.

> The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose.

See also CMS Gas Transmission Co., *supra* note 13, ¶274; *Azurix I*, *supra* note 102, ¶ 360.

[109]*See* Suez, Sociedad General de Aguas de Barcelona, S.A., *supra* note 102, ¶ 59.

> After an analysis of the substantive provisions of the BITs in question, the Tribunal finds no basis for distinguishing dispute settlement matters from any other matters covered by a bilateral investment treaty. From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon. In this context, the Respondent further argues that this Tribunal should apply the principle of *ejusdem generis* in interpreting the BITs so as to exclude dispute settlement matters from the scope of the most-favored-nation clause, because the category 'dispute settlement' is not of the same *genus* as the matters addressed in the clause. The Tribunal finds no basis for applying the *ejusdem generis* principle to arrive at that result.

[110]*Id.*, ¶¶ 215–220.

[111]*See Abaclat*, *supra* note 102, ¶ 519:

> For these same reasons and as further developed below, the Tribunal finds that it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a—qualified silence ‖ categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention.

[112]*See* Sempra, *supra* note 102, ¶ 373.

> In weighing this discussion, the Tribunal must first note that the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries. To this extent, any interpretation resulting

broad protection of the investment *sub judice*.[113] Although all these findings are tentative, they are still significant. The facts and arguments make each case different, and the reasons leading to decisions are certainly varied and not necessarily restricted to the tribunal's reading of the goals of the BIT. Nevertheless, the overview of cases supports the initial assumption that any extensive reading of the BIT seems to favor protection of claimants and simultaneously be the result of reliance on the goal of "promotion and protection of investments."

Critical appraisal of teleological treaty interpretation within investment arbitration context

The cases analyzed illustrate quite well how teleological interpretation has been perceived and used by investment arbitrators. Preambles, objects, and purposes of treaties play an important role in interpreting BITs. What these cases equally show is that resort to teleological interpretation pursuing a BIT's "promotion and protection of investments" purpose is likely to lead to pro-investor outcomes. All these features deserve some attention as they raise several issues.

The first issue is whether it is really justifiable to give precedence to the preamble over the text of the treaty given that the latter is the dispositive part of the text where rights and obligations are traditionally

Footnote continued

in an escape route from the defined obligations cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.

[113]A sampling of such cases includes the following:Sedelmayer, *supra* note 102, at 59:

> It should also be kept in mind that, as can be concluded from the text of the Treaty, the main aim of the Treaty is to promote, as far as possible, investments in the two countries concerned. Granting protection under the Treaty to the investments now discussed would be in line with the said purpose.

SGS, *supra* note 102, ¶ 116:

> The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.

Maffezini, *supra* note 59, ¶54:

> Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.

Mytilineos Holdings S.A., *supra* note 102, ¶¶ 99–100:

> 99. According to its Preamble, the BIT purports 'to intensify th[e] economic cooperation to the mutual benefit of both countries on a long term basis'. Both Countries indicated 'as their objective to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party'. It was also expressly recognized that 'the promotion and protection of investments, on the basis of this Agreement, will stimulate the initiative in this field and thereby significantly contribute to the development of economic relations between the Contracting Parties'.
> 100. While examining identical preamble wording in the Philippines-Switzerland BIT, the Tribunal in SGS v. Philippines stated that '[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.' The Tribunal in Tokios v. Ukraine similarly found the same wording in the Preamble of the Ukraine-Lithuania BIT 'as indicative of the treaty's broad scope of investment protection.'

set. Second, there is a problem with picking and choosing the goal of the treaty among the cluster of goals usually envisaged in a treaty. The problem gets more serious if the goals are perceived as conflicting. The last question is how to make a functional link between the goal of a treaty and a particular jurisdictional requirement, i.e., how to transpose an abstract goal to a particular factual situation and the formal requirements of a case. The last question is one of logic, i.e., whether the chosen goal really corresponds to the procedural outcome suggested by a tribunal.

BITs are *per definitionem* quite obscure when it comes to defining states' obligations. This argument indeed works in favor of resorting to the goals of a treaty, but this still may not displace the general and integrated rule of interpretation. The general rule of interpretation incorporates the teleological approach into a single operation of interpretation rather than permitting selective choice of certain interpretative methods. This trend has been detected: "Expediency dictates the selection of the rule of interpretation rather than principle. In the tussle between the two opposing camps, there is a selective use of the techniques of interpretation, indicating an alarming deviation from the norms of interpretation prescribed in international law."[114]

There are other, and different, arguments against frequent reliance on BIT preambles in investment arbitration. Zachary Douglas finds that reliance on the goals formulated in the preamble of a treaty is not the correct approach because a preamble sets policies, whereas provisions of a treaty contain legal rules and standards. Policies and standards are different concepts, because policies describe common goals which exist outside the legal regime that has been clearly established by binding standards.[115] He further concludes:

> An investment treaty tribunal as a judicial forum has no mandate to promote a general policy of "greater economic cooperation" or to "stimulate the flow of private capital and the economic development of the [Contracting] Parties" or "maximize effective utilization of economic resources and improve living standards", to adopt the language of the preamble of the USA Model BIT. The investment treaty tribunal's mandate is nothing more and nothing less than the resolution of a concrete dispute between two or more litigants. A claimant seeks to establish an individuated right to compensation for acts of the host state causing prejudice to its investment, whereas the respondent host state may assert an individuated right to regulate that investment without paying compensation for that prejudice in the circumstances of the particular case. Both litigants maintain that their arguments are consistent with the concepts of "fair and equitable treatment" or "expropriation" found in the treaty. The collective goals that motivated the contracting states to conclude an investment treaty, as articulated in its preamble, cannot be decisive in the tribunal's resolution of the conflicting assertions of individuated rights.[116]

The question also is whether the object and purpose of a treaty serves different functions in multilateral as opposed to bilateral treaties. As highlighted by Mark Villiger, Article 31 "enables

[114] Sornarajah, *supra* note 33, at 149.

[115] *See* Douglas, *supra* note 54, at 83, ¶ 147.

> Tribunals have transformed the policies revealed in the preambles of investment treaties such as the one extracted from the USA Model BIT into principles of law that can shape the substantive application of the investment protection standards. This is wrong as a matter of interpretation and is certainly not supported by Article 31 of the Vienna Convention.

[116] *Id.* at 83–84, ¶ 148.

consideration of the different aims of particular types of treaties."[117] Villiger was relying on the *Nuclear Tests* case where the ICJ made the following observation: "For instance, the intentions of the parties are often emphasised when interpreting bilateral, 'contractual' treaties. By contrast, teleological interpretation has traditionally played a part in the interpretation of constitutions of international organisations (and their implied powers) and other multilateral, 'legislative' conventions."[118] Transposed to the realm of investment treaties which are almost exclusively bilateral, this finding additionally undermines the teleological approach to interpretation.

However, even if the preamble is admitted to the litigation zone, not all problems are solved. It is almost a rule that preambles contain more than one goal that presumably motivated states to reach an international legal arrangement. Those goals typically include promoting and protecting foreign investments, but also fostering economic cooperation between the parties, promoting economic development of the host State, or promoting the well-being of the states concerned. Some new model BITs also promote the protection of health, safety, environment, labor rights,[119] sustainable development,[120] and even accountability of all participants in foreign investment processes.[121] The ICSID Convention also sets forth different goals: "Considering the need for international cooperation for economic development, and the role of private international investment therein."[122] Different goals may sometimes seem divergent[123] and mutually competitive; if perceived that way, the tribunal would wish to make a choice and risk another departure from the general rule of interpretation.

On the other hand, different goals are not necessarily mutually exclusive but may only require an integrated approach. A balancing instead of an opting-for approach could well be the choice for tribunals because this approach fosters the legitimacy of teleological approach. In several cases[124] the tribunals labeled their approach as "neutral"[125] or "balanced",[126] which is a better approach to treaty interpretation

[117] Villiger, *supra* note 22, at 427.

[118] *Nuclear Weapons Advisory Opinion*, 1996 ICJ 74 f, ¶ 18 (cited in Villiger, *supra* note 22, at 427-28.

[119] U.S. Model BIT (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

[120] Canada Model BIT (2004), http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

[121] Norway Draft Model BIT (2007), http://investmentpolicyhub.unctad.org/Download/TreatyFile/2873.

[122] ICSID https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf.

[123] *See* Omar E. Garcia-Bolivar, *The Teleology of International Investment Law: The Role of Purpose in the Interpretation of International Investment Agreements*, 5 J. World Inv. & Trade 751 (2005):

> For that reason, the States that enter into IIAs might have different purposes among themselves for doing so. Countries that are primarily capital exporting might be interested in protecting their investors, whereas countries that are primarily capital importing might be interested in maximizing the gains they realize from the foreign investment while their sovereignty is protected.

[124] *See* note 101, *supra*.

[125] HICEE B.V., *supra* note 101, ¶ 116:

> In the Tribunal's view, the wording chosen for the Preamble by the Parties is studiously neutral, and refers more to the goal of the stability of expectations than to any preconception as to the Agreement's coverage and scope. The Tribunal observes that, in general, the purpose of bilateral investment treaties can be taken to be the encouragement of investment, on a mutual and reciprocal basis, while balancing the interests of the investors and of the receiving State in that regard.

This case featured a strong dissent aimed precisely at the "neutral" stance of the tribunal towards teleological interpretation. *See id.*, Dissenting Opinion of Judge Charles N. Brower, ¶ 9.

[126] *Saluka*, *supra* note 101, ¶ 300.

and in line with Article 31 of the VCLT. In *Daimler Chrysler v. Argentina*[127] the majority opted for a balanced approach so as to integrate all goals of the applicable BIT and practically reversed the line of reasoning that has been the mainstream in investment arbitration approach to teleological interpretation:

> As formulated, the States resolved to encourage, protect, and create favorable conditions for investments in order to: a) intensify economic cooperation (an amity objective); b) stimulate private business initiative (an economic growth objective); and c) increase the prosperity of both States (a welfare objective). It is important to note that these latter three points represent the ultimate or outcome-based objectives of the States in concluding the Treaty, for which the encouragement, protection, and creation of favorable conditions for investment serve as the chosen instruments.[128]

Daimler Chrysler reveals a clash of views among arbitrators regarding teleological interpretation. While the majority argued in favor of integrated approach and noted that BITs are entered into to promote foreign investments but only in order to achieve other goals, the third arbitrator dissented with assertion "that allowing investors to choose between different types of international dispute settlement 'options' is inherently more favorable to investors and therefore more conducive to investment promotion than not providing them with options."[129] This clash of paradigms illustrates well how teleological approach tends to shift the power to claimants when objectives are read literally or even selectively. With an integrated and balanced approach, text, context and all carefully interpreted objectives can move reasoning into another direction.

The teleological approach within investment arbitration does carry pitfalls every step of the way. For example, once goals have been chosen and relied upon, the next question is whether these goals can be pursued and achieved within arbitral proceedings. Is it possible to argue that economic cooperation will be fostered by any arbitral award? A general goal of economic cooperation seems quite distant from the case that is to be solved, and it is difficult to sustain the idea that the roots of successful and reciprocal economic cooperation lie in litigation. Because some of the tribunals have used the teleological method to justify an extensive approach to interpretation, which has meant the extension of obligations of the respondent state, it is hard to imagine that this kind of reasoning would motivate further economic cooperation. Some even argue against the functional connection between IIAs and economic development in the first place.[130]

A similar argument can be put forward against the functional value of other goals such as the promotion and protection of foreign investments. In other words, is it possible to use this fairly ambiguous and declaratory statement to create the presumption in favor of investor's claims? There are tribunals that have favored such an approach:

> The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended "to create and maintain favourable conditions for investments by investors of one

[127]Daimler Chrysler Services AG, *supra* note 101.
[128]*Id.*, ¶ 256.
[129]*Id.*, ¶ 259.
[130]Sornarajah, *supra* note 33, at 44.

> Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.[131]

Such an approach undoubtedly favors investors as potential claimants.[132] This approach is troublesome not only because it is difficult to square a general policy of investment protection with the concept of arbitral procedure, but also because there is no clear functional connection between substantive treaty protection and the veracity of an individual claim that a breach occurred. Such interpretation becomes value-based and tends to depart from the original intention of the parties: "Finally, if a tribunal's guiding star is the underlying objective of the treaty, interpretation can take account of a broader interpretative community, beyond the original state parties as such, and rapidly becomes value-based, e.g. in favour of the protection of human rights, of investors or of free trade."[133] This conclusion describes well the risks of a purposive approach in investment arbitration and proves Sir Ian Sinclair right about the "risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties."[134] The voices of criticism within the investment arena come from arbitrators as well. For example, George Abi-Saab referred to expansive teleological interpretation as "Spiritism,"[135] whereas Jan Paulsson termed it as a "full sway of imagination."[136]

The cases discussed here tend to show that the choice of the interpretative technique can be quite relevant, if not pivotal, for the development of arguments and success of the claimant's case.[137]

Conclusion

The study of teleological choices and interpretation methods employed within the investment arena lends support to the conclusion that investment tribunals rely quite often on the goal of "promotion and protection of investments" when assessing the content of standards of investors' protection envisaged in BITs. Such an approach necessarily emphasizes the role of a preamble, given that the goals and purpose of a treaty are usually spelled out in the treaty's introduction. Article 31 of the Vienna Convention on the Law of Treaties requires an integrated approach to interpretation: text, context and purpose should be equally considered. Investment cases which have revolved around teleological interpretation illustrate the departure from this general rule and on many occasions have demonstrated a very close connection

[131]SGS, *supra* note 102, ¶ 116.

[132]"In the context of investment treaty disputes, an appeal to the preambular policies in the interpretation of the treaty's provisions has tended towards the adoption of the claimant's litigational position based upon nothing more than the status of the claimant as an investor." Douglas, *supra* note 54, at 84, ¶ 149.

[133]Joost Pauwelyn & Manfred Elsig, *The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals*, (2011), http://ssrn.com/abstract=1938618 (last visited on September 17, 2016).

[134]Sir Ian Sinclair, The Vienna Convention on the Law of Treaties 130 (2d ed. 1984), *cited in Plama Consortium Ltd., supra* note 100, ¶ 193.

[135]Abaclat, *supra* note 102, ¶ 157 (Dissenting Opinion of Georges Abi-Saab to Decision on Jurisdiction and Admissibility).

[136]"Next, some observations of a teleological nature. Even if contrary to my belief ICSID arbitrators had full sway to exercise their imagination in this respect, the circumstances of this case do not lead to the conclusions defended in the Decision." Hrvatska Elektroprivreda d.d. v. Rep. of Slovn., ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, ¶ 52 (June 12, 2009) (Individual Opinion of Jan Paulsson).

[137]*See* Schreuer, *Diversity and Harmonization*, *supra* note 32, at 132 ("Among the principles contained in Article 31 VCLT an interpretation that looks at the treaty's object and purpose is particularly popular. In the context of BITs this often leads to an interpretation that is favourable to investors.").

between resort to "promotion and protection of investments" as an interpretative technique and a pro-investor outcome for a case. These cases equally show the unreliability of *telos* in a treaty: purposes may be different, even conflicting, and their clear meaning can easily escape interpreters. Despite a growing number of cases where the purpose of a treaty comes to the forefront of legal reasoning, the functional correlation between the purpose of a treaty and the claim still remains unclear. The most prudent approach that has recently been featured by investment tribunals is the one that equally assesses different goals of the BIT without compromising the clear intention of the parties expressed in the treaty's text. Such an approach is more balanced and preserves the integrated method of interpretation as mandated by Article 31 of the VCLT.