Exposé

Discretion in treaties

Analysing the effects and limits of discretion in environmental-, extradition-, and investment treaties

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Table of Contents

1. Introduction and Research Questions

Discretion in treaties occurs in diverse contexts and in different types of provisions: In provisions which establish the substantive obligations of the parties, in exceptions, or in procedural provisions. The role of discretion is not only shaped by the type of provision, which grants discretion, but also by the diverse structure and purposes of the different areas of international law. In some areas, states act not only as law-makers but also as law appliers – which means that by granting discretion in treaties, they effectively grant discretion to themselves – whereas in other areas, the discretion will eventually be exercised by a third party.[1] This is the case if a body other than the treaty parties interprets and applies the relevant treaty provisions. Discretion enables the decision-maker to weigh different legal interests. The relevant interests that need balancing are manifold and vary from area to area. For example, an investment tribunal may have to exercise discretion in order to decide where to draw the line between states' right to regulate and investment protection[2], whereas a domestic court may be confronted with the decision whether the interest of a requesting state in criminal prosecution or the interests of the prosecuted person deserve priority in a concrete extradition case.[3]

Across different areas of international law, discretion fulfils diverse and valuable functions. In investment arbitration, arbitrators need (procedural) discretion to react to unforeseeable circumstances and tailor procedures to the needs of the particular case.[4] In environmental law, discretion provides the necessary flexibility to react to new scientific approaches[5] and accommodate the great diversity of environmental challenges and different situations of states.[6] However, discretion is a double-edged sword: What is perceived as a valuable function of discretion may – from a different perspective - be considered as a serious disadvantage. To stay with the example of flexibility: "(O)ne treaty interpreter's flexibility is another treaty interpreter's chaos".[7] It is therefore difficult to speak of *advantages/disadvantages* or *positive/negative effects* of discretion, because these are relative notions. However, being aware of their relative character, I would like to discuss what could be perceived as "advantages" and "disadvantages" of discretion from a neutral perspective (taking into account different views and standpoints). Generally, what I mean by "advantage" is that granting discretion strengthens the treaty regime and brings the treaty parties closer to realizing the objectives of the respective treaty.

However, as there is substantial criticism regarding the exercise of (too much) discretion, it is important to also address the problems that discretion may involve. Often the criticism even drowns

[1] D Bodansky, 'Rules vs Standards in International Environmental Law' 98 AM. Soc'y INT'l. L. PROC. 275 (2004) 275, 279.

[2] Especially when the applicable investment treaty provision is open-ended and provides no guidance on the matter.

[3] See for example the Extradition Treaty between France and China (2007), Article 5 "Discretionary grounds for refusal to extradite": "(…) 2. Extradition may also be refused: (…) b) If, on humanitarian grounds, the requested Party considers, taking into account the gravity of the offence and the interests of the requesting Party, that the surrender of the person sought is likely to have exceptionally serious consequences for the latter, in particular on account of his or her age or state of health."

[4] R Bone, 'Who decides – A critical look at procedural discretion' 28(5) Cardozo Law Review (2007) 1961, 1962 and 1987. T Endicott, 'The Value of Vagueness' in Vijay Bhatia et al (eds), *Vagueness in normative texts* (Lang 2005) 43.

[5] K Arabadjieva, 'Vagueness and Discretion in the Scope of the EIA' 29 Journal of Environmental Law (2017) 417.

[6] For example, in the case of the Ramsar Convention, a flexible approach is necessary, as the broad definition of wetlands under Article 1.1 includes several categories of biotopes whose characteristics vary considerably.

[7] M Kinnear 'The continuing development of the fair and equitable treatment standard' in A Bjorklund et al *Investment Treaty Law: Current Issues III.* British Institute of International and Comparative Law (2008) 207, 237.

out the voices which highlight the value of discretion. The problems of discretion – just like the values of discretion - differ from area to area. One problem may for example be that granting discretion could destabilize treaty relations because of the difficulty to determine whether the discretion has been exercised correctly or whether one treaty party (ab-)used its discretion to flout its treaty obligations. This is especially problematic in areas, where reciprocity plays an important role, for example in extradition law.[8] A disadvantage of discretion, which is frequently highlighted in environmental law, is the insufficient effectiveness in changing behaviour.[9] In investment law, on the other hand, authors have often criticised that vague treaty provisions grant too much discretionary power to investment tribunals, which results in unpredictable decisions and negatively affects state's right to regulate in the public interest.[10] In response, there has been a trend in newer investment treaties to clarify the standards of investment protection to constrain investment tribunal's discretion to a greater extent than older treaties.[11] There is an opposite trend in extradition treaties: Newer treaties usually grant more discretion to the decision-maker than older treaties to decide whether to grant an extradition request.[12] My dissertation should make such trends visible and discuss the different effects, problems and functions of discretion in treaties across three areas of international law. The three areas I have chosen are investment law, environmental law and extradition law (see Section 2).

1.a A working definition of Discretion

Discretion is often characterized as the power of a decision-maker to decide between two or more alternatives.[13] The treaty-drafters leave the decision regarding the most appropriate course of action in a concrete case to the decision-maker. The power of the decision-maker may extend to the application of norms (discretion regarding the legal consequences), but also to decisions regarding the *content* of the norms themselves.[14] For example, the vagueness inherent in the phrase "*significant adverse transboundary impact*" (see Article 2(3) Espoo Convention) requires the decision-maker not only to decide whether the activity (in a specific case) has such significant impact, but also to determine the boundaries of what the term "significant" itself means (discretion regarding the normative content of a provision).[15] By having recourse to interpretation methods, the possible meanings of "significant" can be narrowed down. There will however be room left for independent

[8] See W Magnuson, 'The Domestic Politics of International Extradition' 52 Va. J. Int'l L. (2012) 839, 875 ff.

[9] D Bodansky, *The Art and Craft of International Environmental Law* (HUP 2010).

For example, there is a study according to which the "wise use"-concept for unlisted wetlands in the Ramsar Convention had little effect, because the state parties concentrated all their efforts on the listed wetlands, because the obligations are more specific. See D Farrier and L Tucker, 'Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law' 12 Journal of Environmental Law 1 (2000) 21.

[10] C Henckels, 'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP' (2016) 19 Journal of International Economic Law 27.
F Ortino, 'Refining the Content and Role of Investment Rules and Standards' ICSID Review, Vol. 28, No. 1 (2013).
E Sardinha, 'The Right to Regulate' in M Akbaba and G Capurro *International Challenges in Investment Arbitration* (Routledge 2019) 72.

[11] Henckels (n 10).

[12] Regarding *concurrent extradition requests*, for example, older treaties granted no discretion to the requested state: Priority had to be given to the first request. Newer extradition treaties on the other hand grant discretion to the authorities of the requested state to decide which extradition request should be given priority (sometimes they stipulate the factors that should be taken into consideration).

[13] See the definitions in A Barak, *Judicial Discretion* (1989); DJ Galligan, *Discretionary Powers* (1990); U Linderfalk, 'The Exercise of Discretion in International Law – Why Constraining Criteria Have a Proper Place in the Analysis of Legal Decision-Making' (2019) 62 GYIL 407.

[14] Compare Barak (n 13).

[15] Arabadjieva (n 5) 424 f.

decision-making regarding the meaning of "significant" in a concrete case. At some point, interpretation is not a mechanical process, but involves choices by the interpreter. This is a broad understanding of discretion, which contradicts the definition of discretion in some domestic legal systems, where discretion only encompasses the "Rechtsfolgenseite".[16]

There are different techniques of granting discretion in treaties. Therefore, there are different "sources" of discretion: Discretion may arise from the absence of rules (Article 44 ICSID Convention: "[i]f any question of procedure arises which is not covered by this Section [about the powers and functions of the tribunal] or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question"), from explicit grants of discretion ("[…] where the law of the Requested State does not provide for jurisdiction over an offence in similar circumstances, the Requested State may, *in its discretion*, refuse extradition on this basis")[17] or from vague provisions. Vagueness is just a different technique of granting discretion: Just like explicit grants of discretion, vague provisions require the decision-maker to make independent considerations regarding the most appropriate decision in a concrete case.[18] My dissertation will examine all these different sources of discretion.

When the law grants discretion to a decision-maker, the degree of scrutiny is usually restricted so as not to undermine the autonomy of the original decision-maker.[19] However, the exercise of discretion is not limitless. Firstly - to avoid breaching the provision, which grants discretion – the decision-maker must exercise her discretion within the confines of the legal provisions, which grant it. This usually requires special considerations for the purpose of the provision.[20] Secondly, the exercise of discretion, which has been granted by a norm of international treaty law, must also be examined for compliance with certain outer limits, which in concrete cases may be circumscribed by concepts such as "*good faith*" or "*abuse of law*".[21] The challenge about the purposes of treaties and concepts such as "good faith" is that they are quite abstract and may lead to conflicting results. To complement these broad concepts and invoke them as standards of guidance for the exercise of discretion, certain considerations ("constraining factors"[22]) have crystallized, on which decision-makers and reviewing authorities rely to define the limits of discretion. There are different "constraining factors" in the various areas of international law. In investment arbitration, for example, tribunals have referred to the principles of "efficient conduct of the proceedings" and "fairness to the disputing parties" to guide the exercise of their *procedural* discretion.[23] In environmental law, states' "duty to cooperate" has been discussed as constraining their discretion in

[16] As soon as one leaves the confines of a national legal system, the concept of discretion turns out to be very blurred and ambiguous. Although similar concepts appear in the legal systems of many countries, there are significant differences. In German administrative law, for example, the term discretion (Ermessen) only refers to the freedom of the decision maker to decide about the "Rechtsfolgen", not freedom regarding the "Tatbestandsseite" of a norm. See A Fritzsche, *Ermessen und institutionelles Gleichgewicht* (Carl Heymanns Verlag 2008).

[17] SADC Protocol on Extradition, Article 3.

[18] C Grabenwarter, 'Ermessen und verwaltungsgerichtliche Kontrolle' in M Holoubek (ed), *Das verwaltungsgerichtliche Verfahren in Steuersachen* (Linde 1999) 319, 323 f.

[19] See for example the statement in *Enron v Argentina*, ICSID ARB/01/3, Decision on the Application for Annulment, 30 July 2010, para 192: "It is not for an annulment committee to second guess how a tribunal exercises its discretion".

[20] Article 44, for example, grants discretion to conduct proceedings effectively. Grabenwarter (n 18) 333.

[21] In Phoenix Action Ltd. v. The Czech Republic, for example, the tribunal said that while Article 25 of the ICSID Convention leaves it to contracting States to fix the conditions that determine the nationality of a corporation for the purposes of its application, this discretion is *not absolute*, but *limited by the object and purpose of the ICSID Convention*. See *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras 82 ff.

[22] Linderfalk (n 13).

[23] "The Tribunal considers that the two principles by which it should be guided in the exercise of its discretion are (a) the efficient conduct of the proceedings and (b) fairness to both disputing parties." *Corn Products v Mexico*, ICSID ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para 19.

environmental matters.[24] The dissertation will attempt to identify and contrast such "constraining" factors across the three areas of international law. Moreover, the extent to which scrutiny is restricted varies significantly from one legal area to another, and from treaty to treaty: For example, discretion in treaties is sometimes accompanied by control mechanisms to oversee the exercise of discretion in practice. This may involve control by an "internal" organ constituted under the treaty or delegate control to an "external", independent body.[25] These oversight mechanisms vary significantly and apply different standards of review. The dissertation will also (briefly) address the influence of different oversight mechanisms on the exercise and control of discretion. The concept of constraining factors is derived from the basic idea that beyond the boundaries defined by the treaty norms, which grant discretion and define an area of autonomy, the decision-maker may not decide completely at her subjective will and for whatever reasons she chooses. Rather, there are certain factors which the decision-maker must take into consideration. Sometimes, these factors are stipulated in the relevant treaty provisions (for example, the SADC Protocol on Extradition provides the guiding factors that a requested state has to take into account when deciding about competing extradition requests, inter alia the relative seriousness of the offences or the nationality of the victims). In other cases, the decision-maker herself has the authority to settle upon the factors according to which she will make her discretionary decision. These factors can for example be deduced directly from the purpose of the relevant treaty (provision), but also from considerations outside of the instrument that grants the discretion (such as consistency or equality). These factors – may they be specified by the treaty provision or developed by the decision-maker herself – operate as "signposts"[26] during the process of discretionary decision-making, and help to ensure the plausibility of a discretionary decision. The factors guiding the decision-making processes may be "objective", legal considerations (for example, a requested state may consider the seriousness of the respective crimes when deciding about competing extradition requests, even if the relevant treaty provision is silent on the matter[27]). However, discretionary decisions may also be undertaken with reference to equity and "subjective" value choices.[28] For the sake of comprehensibility and plausibility, it is therefore important that the decision-maker provides reasons for her decision.

1.b Finding the appropriate level of discretion

It is difficult to determine the appropriate level of discretion in a treaty. To confront some of the problematic aspects of discretion, treaty-drafters have begun to replace treaty provisions, which grant discretion with provisions, which eliminate or curtail discretion. For that purpose, treaty provisions are redrafted in more specific language to constrain the scope of interpretive discretion[29],

[24] N Craik, 'The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect' 30 *Yearbook of International Environmental Law* 1 (2019) 22.

[25] J Harrison, 'Exceptions in Multilateral Environmental Agreements' in L Bartels and F Paddeu *Exceptions in International Law* (OUP 2020) 345. B Koremenos, 'When, what, and why do states choose to delegate?' Law and Contemporary Problems (Vol. 71, Issue 2).

[26] Galligan (n 13) 39 f.

[27] See for example India-Canada Extradition Treaty (1987), Article 17 simply provides: "If extradition for the same person if for the same offence or for different offences is requested by the contracting State and a third State with which the requested State has an extradition arrangement, the requested State shall determine to which State the person shall be extradited, and shall not be obliged to give preference to the contracting State."

[28] "(E)quity helps the decision-maker select from a range of available options." C Titi 'The Function of Equity in International Law' (2021) 72, 74.
This dissertation will however not deal with equity contra legem and decision-making "ex-aequo-et-bono".

[29] See for example India Model BIT 2016, Article 3 ("Standard of Treatment"): Each Party shall not subject Investments of Investors of the other Party to Measures which constitute: […] (ii) Un-remedied and *egregious violations of due process*; or (iii) *Manifestly abusive* treatment involving continuous, unjustified and outrageous coercion or harassment.

evaluative language is replaced by strict requirements in order to curb subjective assessments[30], and explicit grants of discretion are eliminated in favour of provisions, which contain strict instructions.[31] While the elimination of discretion in treaties may be perceived as a positive development (constraining discretion may make violations of a treaty more apparent, decrease the likelihood of abuse, increase legal certainty etc.), constraining discretion may also have consequences, which are harmful to the application of a treaty and to the achievement of its purpose. For example, when replacing vague treaty provisions with more precise provisions in order to constrain interpretive discretion, the treaty-drafter has to bear in mind that precise provisions also entail a greater risk of being under- or over-inclusive in their scope, whereas less precisely drafted norms permit decision-makers greater scope to take into account a wider range of considerations. In some cases, this may lead to arbitrary results (such as excluding certain situations from the protection of the treaty provision, even if that is contrary to the *ratio* of the treaty).[32] Apart from eliminating discretion, there is also the possibility to guide discretion by complementing vague provisions with additional guidelines: *Guiding criteria* may complement brief, indeterminate procedural provisions and enhance predictability. For example, the *Amendments of the ICSID Arbitration Rules* provide detailed guidance on timing, procedure and factors to be considered when dealing with requests for bifurcation[33] (compared to the previous Arbitration Rules), while maintaining tribunal discretion to consider the specific circumstances of the case.[34] Also, less discretion may not necessarily lead to greater predictability. Provisions, which are elaborately drafted to constrain discretion, may lead to equally unpredictable interpretations. In *Poštová banka and Istrokapital v Hellenic Republic*, for example, the investment tribunal chose a "counter-intuitive" reading of a non-exhaustive list. Instead of adding clarity on the matter of the tribunal's jurisdiction *ratione materiae*, the non-exhaustive list rather led the tribunal to "produce ambiguity by adding another semantically distinct reading of the treaty clause".[35] The appropriate degree of discretion depends on different characteristics of a legal area, such as the institutional structure, the costs of granting discretion (for example, there may be a greater need for predictability in a certain area) and the costs of constraining discretion (such as an increased need for flexibility in a certain area). It is for the treaty-drafter to decide if the costs resulting from discretion are worse than the costs resulting from the elimination of discretion. My dissertation will therefore discuss the trade-off between the costs and benefits of discretion and no discretion in investment law, extradition law and environmental law. It will also address the different consequences of constraining or guiding discretion in these three areas.

1.c Research Questions

I. What are the relative **advantages** of granting discretion in environmental-, investment-, and extradition treaties? What are the relative **disadvantages** of discretion in each of these areas? Under what circumstances will the advantages prevail over the disadvantages (and *vice versa*)?

II. What **options** do treaty-drafters have **to restrict** and **to guide** discretion? What are the relative advantages and disadvantages of these approaches compared to granting discretion?

III. What are the **limits** of discretion (in other words: when is a provision, which grants discretion, breached)? What considerations have been applied to constrain the discretionary powers of decision-makers? Are the considerations, which have so far played a role, different (less or more restrictive) in

[30] See for example the construction, equipment, and design standards for oil tankers set forth in 1973/78 MARPOL, as well as the limits on permissible discharges. (See Bodansky (n 1) 276.)

[31] Discretionary grounds of refusal in extradition treaties may become mandatory grounds of refusal.

[32] Endicott (n 4), Henckels (10) 32.

[33] New Arbitration Rules 42-45.

[34] WP 3, para 115. See the proposed Rules 42(4) and 44(2).

[35] A Kulick, 'From problem to Opportunity: An analytical framework for vagueness and ambiguity in international law' 59 GYIL (2016) 17.
Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID No. ARB/13/8, Award, 9 April 2015, paras 288 ff.

the three different areas?[36] (What control mechanisms are in place in each of the three areas to control the exercise of discretion?)

Explanations:

- The first research question concentrates on the positive and negative *consequences* of discretion - i.e. it focuses on the moment *after* discretion has been granted. This must be differentiated from analysing the reasons that treaty-drafters might have had for granting discretion. To grant discretion may not have been a deliberate choice by treaty-drafters, but the result of disagreement during the drafting process as a temporary solution to postpone the decision about controversial issues to the implementation stage of the treaty. My dissertation will not deal with such practical or political reasons for the existence of discretion in treaties. If – on the other hand – discretion was deliberately incorporated into a treaty to fulfil a certain function, the reasons for discretion and its consequences overlap. What falls within the scope of my dissertation however are advantageous *unintended* consequences of discretion, as well as unforeseen disadvantageous consequences of discretion.
- I am aware of the relative character of the terms "advantages" and "disadvantages". My dissertation will attempt to assume a neutral position and take into account different views regarding the values and problems of discretion.

2. Selection of Primary Sources and Methodology

The research questions are interested in the role of discretion in treaties from a general perspective. Therefore, the selection of primary sources has to be *diverse* in order to analyse the various functions, consequences and problems of discretion across different areas of international law. Thus, I decided to concentrate on three areas: Investment treaties, environmental treaties and extradition treaties. These three areas were chosen because of their diverse objectives and because of their different "institutional structures": Discretion in international law is not necessarily equivalent to state discretion. When a high degree of discretion comes together with a high degree of delegation, it leads to the opposite: The body that interprets and applies the treaty provisions is granted wide discretion.[37] For this reason, investment treaties and the exercise of discretion by investment tribunals, who exercise the interpretive power, are an exciting research object. In extradition law, the question *who* exercises discretion depends on the allocation of powers within the domestic system – with potentially far-reaching consequences (for example, shifting the discretionary power to decide about extradition requests from the executive branch to the judiciary).[38] In environmental law, states often grant significant discretion to themselves, as there is no third-party to determine the content of the norm.[39] There may be "environmental post-treaty instruments" (resolutions, guidelines etc.), which are produced in plenary treaty meetings (CITES Conference of the Parties etc.), which turn very vague and open-ended treaty provisions into more specific rules and thereby make implementation of the treaty possible. The extent to which these post-treaty instruments effectively constrain discretion is however very divergent.[40]

Within the three areas, it was important that the treaties are reasonably comparable so that the advantages and disadvantages of discretion and reduced discretion can be contrasted in a

[36] Depending on the principle that is applied, the discretion will be more or less restricted. For example, the discretion won't be restricted very much, if, for example, the controlling authority only prohibits "bad faith", but doesn't make any positive requirements regarding the exercise of discretion.

[37] A Roberts, 'Power and Persuasion in Investment Treaty Arbitration' 104 AJIL 2 (2010) 179, 190.

[38] Magnuson (n 8) 876 ff.

[39] Bodansky (n 9).

[40] T Staal, *After agreement: On the authority and legitimacy of environmental post-treaty rules* (2017).

meaningful manner. Neither investment treaties nor extradition treaties pose any problems in this regard as their content is similar. There are however so many different types of environmental treaties, which fulfil many different purposes (from the prevention of pollution to the protection of a certain species) that I could not put them into a single category. Therefore, I decided to analyse the role of discretion in treaties, which are aimed at the *conservation* and *protection* of different species, habitats and resources.

For the selection of the concrete treaty provisions, on the other hand, it was important that the chosen provisions *diverge* sufficiently in different respects: The chosen provisions should reflect diversity regarding the techniques of granting discretion (vague provisions vs explicit grants of discretion etc.) and reflect diversity regarding the different purposes discretion fulfils (solving coordination problems, enabling the integration of different treaty obligations etc.) and reflect diversity regarding the disadvantages of discretion (difficulty of ascertaining a breach, risk of unpredictable decision-making etc.). As my dissertation deals with questions regarding the appropriate level of discretion, it was important that the selected treaty provisions are aimed at regulating comparable issues, but contain different levels of discretion. To ensure a comprehensive analysis of the role of discretion, this sample should include treaty provisions, which determine the *primary obligations* of the treaty parties (for example provisions, which determine the level of protection for a certain environmental area, investment protection provisions, or which define the obligation to extradite), *exceptions* and *procedural provisions*. The sample should encompass about 50 treaty provisions for each area. As the level of discretion changes at a different pace in the three selected areas, the time period for the selection of treaty provisions must be quite flexible. While in investment law, there is enough diversity regarding the level of discretion in treaty provisions from the last 5-10 years, the sample of extradition treaties will encompass a much longer timeframe (about 50 years).

Finally, my dissertation is not only concerned with the treaty provisions, which grant discretion, but also with the exercise of discretion. Therefore, the primary sources will also encompass different examples of exercise of discretion - such as decisions by investment tribunals, domestic court cases (especially in the area of extradition law) or "post-treaty rules" in environmental law (which are not a mere "clarification" of treaty provisions, because they often do not derive pre-existing meaning from the treaty provisions; the drafters of post-treaty rule rather exercise discretion in order to add content to otherwise almost meaningless treaty provisions). Regarding the control of discretion, I will take a broad approach. I will consult decisions by international courts and tribunals (see for example some aspects of the ICJ's Whaling Case[41], about the review of discretionary powers) as well as domestic court decisions. However, there are also other ways, in which a measure of (indirect) control over discretionary decisions may be exercised. In the investment context, for example, states which are dissatisfied with the exercise of discretion by investment tribunals may issue a statement and threaten to leave the ICSID system; in the context of extradition law, states also issue declarations, in which they declare their disapproval when they are of the opinion that the requested state has overstepped its discretion to deny an extradition request.[42] These statements and declarations may also have a disciplinary effect on decision-makers.

[41] *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening) (Judgment) [2014] ICJ Rep 226, paras 61 ff.

[42] S Talmon, The U.S. accuses Germany of Breach of Treaty: the refusal to extradite Adem Yilmaz, German Practice in International Law, 2019.

The following table provides an overview and gives a few examples of primary sources.

Investment Law

Treaty Provisions

The provisions here should encompass a mixture of **1.** very vague provisions, which leave *unfettered discretion* to investment tribunals, **2.** provisions, which provide tribunals with *some guidance* on how to exercise discretion as well as **3.** provisions, which *restrict* tribunal's discretion to a significant extent.
I will focus on indirect expropriation and FET provisions (for primary obligations), security exceptions and/or general exception clauses, and the 2006 and the 2022 ICSID Arbitration Rules (for procedural discretion).

Examples (FET Standard):

1. *Unfettered Discretion:* Australia-Uruguay BIT, Article 2 ("Promotion and Protection of Investments")
1. […]
2. Each Party shall ensure fair and equitable treatment in its own territory to investments.

2. *Some Guidance:* CETA, Art 8.10 ("Treatment of investors")
1. […]
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:
(a) denial of justice in criminal, civil or administrative proceedings; fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;(c) manifest arbitrariness;(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;(e) abusive treatment of investors, such as coercion, duress and harassment; or(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.3. […]

4. When applying the above fair and equitable treatment obligation, the Tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.

3. *Restricted Discretion:* India Model BIT 2016, Article 3 ("Standard of Treatment"):

Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:
[…]
(ii) Un-remedied and *egregious violations of due process*; or
(iii) *Manifestly abusive* treatment involving continuous, unjustified and outrageous coercion or harassment.

Exercise and Control of Discretion

Decisions by investment tribunals and by annulment committees, in which the exercise of discretion has played a role.

See for example:

1. Exercise of (substantive) discretion by an investment tribunal and the values of broad standard-like provisions:
"[t]he determination of whether there has been a 'substantial deprivation' is a fact-sensitive exercise to be conducted in the light of the circumstances of each case. […] One important feature of fact-sensitive assessments is that they cannot be conducted on the basis of rigid binary rules. It would make little sense to state a percentage or a threshold that would have to be met for a deprivation to be 'substantial' as such modus operandi may not always be appropriate."
(Chemtura Corporation v Canada, NAFTA/UNCITRAL, Award (2 August 2010) para 249.)

2. Exercise of Procedural Discretion and broad Guiding Principles:
In *Corn Products* the question arose how the tribunal should exercise its discretion to suspend the proceedings: "The Tribunal considers that the two principles by which it should *be guided in the exercise of its discretion* are (a) the efficient conduct of the proceedings and (b) fairness to both disputing parties." (*Corn Products v Mexico*, ICSID ARB(AF)/04/01, Decision on Responsibility, 15 January 2008, para 19.)

3. The concept of abuse of rights as a limit to the exercise of discretion: In *Phoenix Action*, the tribunal said that while Article 25 of the ICSID Convention leaves it to contracting States to fix the conditions that determine the nationality of a corporation for the purposes of its application, this discretion is *not absolute*, but *limited by the object and purpose of the ICSID Convention*. "[E]very right includes an implied clause that it must not be abused". "There is nothing like a total discretion". (See Phoenix Action Ltd v The Czech Republic, ICSID Case No ARB/06/5, Award (2009) paras 82, 113)

Environmental Law

Treaty Provisions

I. Discretion in the Protection Standards of environmental treaties aimed at the *conservation* and *protection* of different species, habitats and resources.

Examples:

Ramsar Convention, Art 3(1): The Contracting Parties shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and *as far as possible* the *wise use* of wetlands in their territory.

CITES, Article II(1): Appendix I shall include all *species threatened with extinction* which are or may be affected by trade.
(-> This provision provides no clue as to *which species* will actually be listed, or *which criteria* will be used for the listing decisions. Under what conditions is a species sufficiently threatened to be listed? Many compositions of the list are possible, as well as many different sets of listing criteria, which would all be "legally right".[43])

II. Exceptions, which leave a lot of discretion to the decision-makers, in particular self-judging exceptions.

Examples:

[43] See Staal (n 40) 79.

Ramsar Convention, Art 2(5): Any Contracting Party shall have the right […] because of its *urgent national interests*, to delete or restrict the boundaries of wetlands already included by it in the List.

ICRW, Art VIII(1): Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales *for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit*, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.

Exercise and Control of Discretion

I. Post Treaty Rules (by the Conference of Contracting Parties) as an Exercise of discretion.

Examples:

Various Resolutions on the Wise Use Concept (see for example, Resolution 5.6, Resolution VII.21, Resolution VII.15 etc.)

Several COP Resolutions regarding the *Listing Criteria* for listing species on and deleting species from Appendices I and also Appendix II.

Resolution VIII.20 ("*General guidance for interpreting 'urgent national interests' under Article 2.5 of the Convention*", which confirms that "the determination of "urgent national interests" lies solely with the Contracting Party", but provides a number of key considerations for parties to be borne in mind when considering delisting.)

II. Judicial Control of the interpretive discretion of treaty parties.

Examples:

The ICJ's *Whaling in the Antarctic Case* concerned the invocation by Japan of the exception for scientific whaling. In its decision, the court referred to *reasonableness* as the appropriate ground of review. The court determined that there was no sufficient relationship between the measure and its objectives.[44]

Extradition Law

Treaty Provisions

I. Provisions in extradition treaties, which demonstrate the different degree of discretion regarding the obligation to extradite [examination of treaty provisions, which define the obligation to extradite, together with exceptions, exceptions to exceptions, and provisions, which allow the consideration of domestic law to influence the decision whether to extradite] and provisions, which determine the degree of discretion regarding concurrent extradition requests.
Examples:

No discretion regarding competing extradition requests:
Inter-American Convention on Extradition, Article 14: "[…] If the requests are for *different*

[44] See Harrison (n 25) 343. Whaling (n 41) 61 ff.

offenses, preference shall be given to the State seeking the individual for the offense punishable by the *most severe penalty*, in accordance with the laws of the requested State. If the requests involve different offenses that the requested State considers to be of equal gravity, preference shall be *determined by the order in which the requests are received*."

Discretion to decide about competing extradition requests:
European Convention on Extradition, Article 17: "If extradition is requested concurrently by more than one State, either for the same offence or for different offences*, the requested Party shall make its decision having regard to all the circumstances* and especially the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality of the person claimed and the possibility of subsequent extradition to another State."

II. Discretionary vs Obligatory Grounds for Refusal

Examples:

Lithuania-India Extradition Treaty, Article 8: "If under the law of the Requesting State the Person sought is liable to the offence for which his/her extradition is requested […] extradition *may* be refused […]". [Death penalty as a discretionary ground for refusal.]

France-China Extradition Treaty, Article 3(b) ("Mandatory Grounds for refusal to extradite"): "Extradition *shall* not be granted […]If the offence for which extradition is requested carries the death penalty under the law of the requesting Party, unless that Party gives such assurance as the requested Party considers sufficient that the death penalty will not be imposed or, if imposed, will not be executed." [Death penalty must lead to an obligatory refusal to extradite, no discretion.]

Exercise and Control of Discretion

I. Discretionary decision-making by domestic authorities and courts about extradition requests.

Examples:

In *Adamov v Federal Office of Justice,* the requested state Switzerland received two competing extradition requests for Evgeny Adamov. The Schweizer Bundesgericht weighed different factors before granting priority to the Russian request. Important factors were Adamov's Russian nationality, his immunity as a former minister, the place in which the crime was committed, the date of the requests etc.[45]

In the *Chang* Case, one the other hand, there was only one relevant factor, which determined the discretionary decision about competing extradition requests: The immunity of the requested person.[46] (See *Chang v Minister of Justice and Correctional Services and Others*; *Forum de Monitoria do Orcamento v Chang and Others* (22157/2019; 24217/2019) [2019] ZAGPJHC 482 (1 November 2019).)
II. State Reactions to a refused extradition request (statements about an alleged breach of a discretionary treaty provision) and judicial control of discretionary extradition decisions.
Examples:

[45] *Evgeny Adamov gegen Bundesamt für Justiz* (Verwaltungsgerichtsbeschwerde) Schweizer Bundesgericht, 22 Dezember 2005.

[46] (Waibel, Antrittsvorlesung Schriftfassung.)

"We are outraged at the Czech Republic's extradition of Russian citizen Nikulin […] to the United States […] We are *disappointed that instead of taking legal norms into account*, the Czech Republic has made a decision seeking to once again *show loyalty to its ally*, which has been declared an absolute priority recently […]." (Statement, Russian Foreign Ministry in the Extradition Case concerning Yevgeniy Nikulin).

Comparative Analysis

To answer the research questions, my dissertation will employ a comparative approach – it will systematize and compare treaty provisions within an area to discover and discuss trends regarding discretion in older and newer treaties. Moreover, it will also compare the functions and problems of discretion across the three areas to draw conclusions about the multifaceted role that discretion plays in international law. Each of the three main Chapters (1. Discretion in primary obligations, 2. Discretion in Exceptions, 3. Discretion in Procedural Provisions; see below "*Contents*") will therefore contain a concluding sub-section with comparative observations.

Theoretical Foundation

The first chapter of my dissertation will provide the theoretical foundation for the following more specific and more practice-oriented chapters. It will take insights from the literature on the "rules" and "standards" dichotomy[47], principal-agent theory[48], philosophical texts and general legal theory about discretion[49], and also texts, which deal with the role of discretion in domestic law.[50] The aim of this chapter is to discuss at a more general level the recurring consequences and problems of discretion, to deal with the "institutional" dimension of discretion (*who* exercises discretion, what mechanisms are in place to control the exercise of discretion; internal vs. external delegation of discretion etc.) and develop a working definition of discretion, which will be the basis for later chapters.

Doctrinal Analysis of Case Law

In order to answer the research questions about the advantages and disadvantages of discretion as well as the limits of discretion, my dissertation will also include a doctrinal analysis of international and domestic cases, in which the exercise of discretion has played a role. It will be an analysis of different approaches to discretionary decision-making across different areas of international law, different jurisdictions and different bodies. It is an attempt to inquire into the considerations, which have influenced different decision-makers in their decision-making processes and into the problems that have surfaced during these decision-making processes. The analysis of the reviewing authorities' decisions will attempt to identify the "constraining factors", on which they rely to determine whether the decision-maker has exceeded her discretion.

[47] T Endicott '*Vagueness in Law*' (2001); Endicott (n 4); L Kaplow, 'Rules Versus Standards: An Economic Analysis' 42 Duke LJ 557 (1992–93) 557.

[48] M Thatcher and A Stone Sweet 'The Politics of Delegation' (2003).

[49] Galligan (n 13) KC Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); HLA Hart, 'Discretion' *Harvard Law Review* (1956).

[50] Grabenwarter (n 18).

3. Preliminary Contents

4. Comparative Analysis

IV. Discretion and Exceptions

1. Self-judging Exceptions across international treaties

1.a. Self-judging security exceptions in investment treaties

1.b. Self-judging exceptions in environmental treaties

1.c. Extradition Treaties: Discretionary exceptions vs obligatory exceptions

1.d. Comparative Analysis

2. Specifying the Content of Exceptions

2.a. Specifying the Content of General Exceptions in Investment Treaties

2.b. Specifying the Content of Exceptions in Environmental Treaties via "Post Treaty Rules"

2.c. Specifying the Content of Exceptions in Extradition Treaties

2.d. Comparative Analysis

V. Discretion and Procedural Provisions

1. Procedural Discretion in Investment Arbitration

1.a. Guiding and Constraining the Exercise of Procedural Discretion: The ICSID Arbitration Rules 2022

1.b. The Limits of Procedural Discretion in Investment Arbitration

2. Discretion and Procedural Obligations in Environmental Law

2.a. Reporting Obligations, Notification Obligations, and Environmental Impact Assessments and Discretion

2.b. The role of procedural oversight mechanisms in MEAs

3. ??Discretion in Extradition Procedures??

4. Comparative Analysis

Primary Treaty Obligations

This chapter will be divided into three sub-sections, which will separately deal with the advantages and disadvantages of discretion, and its limits in each of the three areas.
The sub-section about *investment law* will focus on tribunal's discretion regarding the FET standard and the prohibition of indirect expropriation (because of their importance in investment dispute settlement). At first, this sub-section will seek to grasp the recent treaty practice to redefine these treaty provisions and show that treaty-drafters have a variety of options to redefine these provisions and need to decide about the degree of discretion that should be left to the tribunal.[51] The different approaches to refine investment protection standards range from the inclusion of an exhaustive or non-exhaustive list of measures that constitute a breach of FET or indirect expropriation (the elements contained in these lists are not always the same), emphasizing the importance of specified public welfare objectives[52], or excluding such provisions from the treaty completely[53], etc. The sub-section will discuss the consequences of these different approaches for the discretion of the tribunal, as well as the positive and negative implications for the state and for the investor. For reduced discretion may not only benefit state's regulatory freedom – just like host states, investors also seek clarity and predictability in the investment protection provisions.[54] The sub-chapter will address concerns related to the "overbroad" discretion, and whether they are justified. Concerns related to reduced discretion will be addressed in the same manner.[55]

Just like obligations to protect foreign investments, environmental treaties also vary considerably in how much discretion they grant to states (for example, regarding the choice of implementation methods). At one end of the spectrum, some treaties set forth quite specific obligations that leave little discretion. For example, the UN Fish Stocks Agreement defines a state's implementation responsibilities in considerable detail.[56] On the other end of the spectrum, there is also a multitude of extremely vague treaty obligations (consider for example Article 3(1) Ramsar Convention on the Wise Use of Wetlands). Each approach has its own advantages and disadvantages.[57] Because of extremely broad formulations in environmental treaties, implementation would sometimes be almost inconceivable without further guidance, because treaty parties would constantly disagree over the meaning of provisions.[58] The sub-chapter will therefore also deal with environmental post-

[51] UNCTAD, 122.

[52] See for example Annex I 3.b. of the Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the reciprocal promotion and protection of investments (2019), which highlights the importance of "*real estate price stabilization* (through, for example, measures to improve the housing conditions for low-income households)".

[53] Brazil - India Investment Cooperation and Facilitation Treaty (2020), 6(3) "For greater certainty, this Treaty *only covers direct expropriation*, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure."

[54] See Ortino (n 10) 158.

[55] Authors have noted that the redrafting of investment standards "creates new uncertainties, rather than reducing them" and "shift[s] the focus away from traditional European BITs approaches to certain topics which have not led to major discussions in the arbitral case law". See U. Kriebaum, 'FET and Expropriation in the (Invisible) EU Model BIT', Journal of World Investment & Trade, 15 (2014), 482.
Also, broad discretion has certain benefits in investment law. For example, broad protection standards have a lower risk of under-inclusiveness, which serves the more immediate object of investment treaties to ensure a high level of protection of foreign investments. (Ortino (n 10) 154.)

[56] Bodansky (n 9).

[57] There is a study according to which the "wise use"-concept for unlisted wetlands in the Ramsar Convention has little effect at all as the state parties concentrate all their efforts on the listed wetlands, because the obligations are more specific. On the other hand, granting discretion can be a tool to accommodate new scientific and legal approaches to environmental problems. See Farrier (n 9).

[58] Staal (n 40) 67 f.

treaty rules, which are necessary to make implementation possible and which are themselves an exercise of discretion: Open-ended terms in Conventions allow for a very wide range of interpretations without contradicting the Convention. Consider, Article II(1) CITES "Appendix I shall include all *species threatened with extinction* which are or may be affected by trade." – there are many possible criteria to determine whether a species is "threatened with extinction". The Conference of the parties – in its discretion - has to choose the criteria, which will have a significant impact on which species will receive protection.[59] The sub-chapter will therefore also deal with post-treaty rules and their potential for guiding and restricting state discretion.

The amount of discretion that states reserve for themselves in the decision whether to extradite is an important consideration in the context of extradition. Just like the other two sub-chapters, this sub-chapter will attempt to depict discretion's multiple facets. The sub-chapter opens with a systematization of extradition treaties and a description of the extent to which they constrain the requested state's discretion to extradite. It will thereby inquire after the factors that influence the degree of discretion in extradition treaties[60] (such as the degree of similarity between the treaty parties' human rights standards). The sub-chapter looks into how the discretion to decide about extradition requests was exercised in the requested states and attempts to grasp the point at which the refusal to extradite breaches the obligation to extradite.
The findings from the three sub-sections will then be compared in a concluding sub-section.

Discretion and Exceptions

This chapter takes a different approach than the previous chapter. Instead of looking into the role of discretion separately, it will in a first step compare *self-judging* exceptions across investment treaties, extradition treaties and environmental treaties. For that purpose, it will also discuss and compare cases from the three areas, in which self-judging exceptions have played a role.[61] A second sub-section will then examine the consequences of specific and broadly-phrased exception clauses, and their respective effects[62], as well as various means through which states have sought to control the exercise of broad exceptions.[63]

[59] Staal (n 40) 84.

[60] M Murchison, Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry, 43 Stan. J. INT'l L. 295 (2007) 297.

[61] For example *Continental Casualty v Argentina*, ICSID Case No ARB/ 03/ 9, 5 September 2008, Award, paras 182 ff; ICJ Whaling Case (n 41) (at the outset, Japan appeared to adopt this position, arguing that Article VIII served to shelter a state's decision to grant a special permit from any form of review. However, subsequently, Japan appeared to concede that Article VIII could not be considered a completely self- judging exception; See Harrison (n 25) 342); See also Talmon (n 42) about the Yilmaz-Case.

[62] Some extradition treaties contain very broad exceptions to the obligation to extradite. See for example Article 23 of the Turkey-Russia Extradition Treaty (2017): "Extradition shall not be granted, if (…) the Requested Party considers that the extradition of the person would impair its sovereignty, security, public order or other essential interests." Other extradition treaties contain however very specific exceptions, which are also specified by exceptions to the exceptions.

[63] For example, under the Bern Convention on the Conservation of European Wildlife and Natural Habitats (2011), parties are required to report every two years on their reliance on exceptions related to the picking of wild flora or the killing or capture of wild fauna. The Convention specifies the details that must be contained in such reports and the standing committee has adopted guidance on what is meant by key terms in the exception in order to ensure that states do not abuse their rights. Whilst the guidance still leaves some room for discretion for states when invoking exceptions, it nevertheless emphasizes that the justification must be "objective and verifiable" and the standing committee proactively considers reports from the parties to ensure compliance. (Harrison (n 25) 340 f.)

Discretion and Procedural Provisions

Strict procedural obligations are often regarded as a counterweight to broad substantive discretion. This chapter will therefore deal with procedural discretion (in a very broad sense) across the three areas.

The first sub-section will explore procedural discretion in investment arbitration. It will *inter alia* compare the 2006 ICSID Arbitration Rules with the amended 2022 Arbitration Rules. Moreover, it will deal with the limits of tribunals' procedural discretion (limits resulting from basic procedural guarantees) and address guiding factors, which have been developed in case law. This sub-chapter will show how even slight differences between formulations can already affect the way tribunals exercise their procedural discretion.

Environmental treaties, which contain very general obligations, usually contain much more detailed procedural provisions about notification, reporting obligations etc. Procedural solutions, combined with generally formulated substantive obligations, are a common tool in environmental law, because they do not prejudice states substantive policy choices.[64] Sometimes, however, state parties still enjoy broad discretion regarding the procedural steps (for example regarding time limits)[65], whereas other treaties impose stricter procedural obligations. An example is provided by the International Convention on the Regulation of Whaling (ICRW). In order to issue special permits to carry out whaling "for purposes of scientific research", state parties are required to "provide the Secretary to the International Whaling Commission with proposed scientific permits *before they are issued* and in sufficient time to allow the Scientific Committee to review and comment on them" (the nature of the information that should be provided to the scientific committee for review is also specified).[66]

There will again be a concluding sub-chapter, which presents the conclusions that can be drawn from the role of procedural discretion across the three areas.

4. State of Research (Secondary Literature about Discretion in International Law)

Even though there are publications, which deal with the topic of discretion comprehensively[67], there is little discussion of the role of discretion in treaties. Some "scattered" contributions deal with the consequences of vagueness and discretion in specific treaties.

Many publications however approach the topic from a very abstract and theoretical angle.[68] A few "zoom into" the consequences and problems of the exercise of discretion in a concrete case or take a very specific perspective.[69] My contribution should take an intermediary position and look at the implications of discretion from a perspective, which is neither too abstract and general nor too entangled with a specific issue that arises in the context of discretion. My dissertation seeks to discuss the consequences of discretion in a way, which is comparative (i.e. which analyses the role of discretion across different treaties) and which connects legal theory with practical example.

[64] M Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 73, 73 f.

[65] The London Dumping Convention (1972) includes a provision requiring that "[dumping under the permitted exceptional circumstances] . . . shall *be reported forthwith* to the [International Maritime] Organization". The treaty is silent on the timing of such a report, however. The term "forthwith' could be interpreted in various ways, but the treaty parties have accepted that the party may have some discretion and the reporting may take place either before the dumping occurs or afterwards, depending on the urgency of the situation. See Harrison (n 25) 339.

[66] Harrison (n 25) 341.

[67] A Bleckmann, *Ermessensfehlerlehre* (1997). S Jovanović, *Restriction des compétences discrétionnaires des Etats en droit international* (1988).

[68] Linderfalk (n 13); Kulick (n 35); Jovanovich (n 67); Bleckmann (n 67).

[69] See for example R Kolb, 'Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of Discretionary Powers' , 32 Aust. YBIL 135 (2014) or Craik (n 24).

Publications, which have inspired this approach are for example Kalina Arabadjieva's text about "*Vagueness and Discretion in the Scope of the EIA Directive*"[70] (which examines the role of discretion in the EIA Directive through the lens of Timothy Endicott's theory on "vagueness" in law), Christine Bell's book "*On the Law of Peace*" (which contains a section about the "relative merits" of "constructive ambiguity" in peace treaties, which provides the necessary flexibility to prevent conflicts from resurging[71]) or a contribution called "*Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*", written by Federico Ortino[72] (which combines some theoretical insights from the dichotomy of rules and standards with an assessment of the need for a refinement in the content of investment protection norms).
Moreover, there are many publications, which touch upon the topic of discretion[73] and explore "all around" it, but do not put discretion at the centre of the analysis. My contribution should put discretion in the centre in order to better grasp this very elusive and also controversial concept and explore its significance in international law.

There is definitely no shortage of helpful literature, which will help me to build the theoretical framework about the role of discretion at the beginning of my dissertation. I may draw on insights from the literature about "rules" and "standards"[74], principal-agent theory[75], philosophical texts and general legal theory about discretion[76], as well as literature about the role of discretion in domestic law.[77] The challenge regarding these texts is to avoid applying considerations from domestic law to international law, where this is not appropriate. There are also theoretical publications about the role of discretion in international law – these publications do however not focus on discretion *in treaties*.[78]

There is also a significant amount of literature dealing with vagueness vs specificity in investment treaties. These contributions investigate how states, through formulations of substantive investment protection standards have sought to reassert control over investment law,[79] and contrast unqualified investment protection standards (which leave much room for expansive, case-by-case interpretations) with investment protection provisions, which contain more substantive content to restrict the scope of the provisions [See E de Brabandere, 'States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation']. These contributions are aimed at revealing trends in new treaties, which have not been explicitly addressed before in previous treaties [E Sardinha, '*The Right to Regulate'*], and often put states' *right to regulate* at the centre of research to ask about the potential for treaty parties to frame the substantive obligations in new investment treaties in a manner that is more supportive of regulatory autonomy than earlier treaties [See C Henckels, *'Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP'*]. Contributions in this field also question whether new formulations in investment treaties provide *greater certainty* [F Ortino, '*Defining Indirect Expropriation: The Transatlantic Trade and Investment Partnership and the (Elusive)*

[70] Arabadjieva (n 5).
[71] C Bell, *On the Law of Peace* (OUP 2008) 166 ff.
[72] Ortino (n 10).
[73] Staal (n 40).
[74] Endicott (n 4) Endicott Economic Analysis
[75] Thatcher (n 48).
[76] Galligan (n 13) KC Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); HLA Hart, 'Discretion' *Harvard Law Review* (1956).
[77] Grabenwarter (n 18).
[78] Bleckmann (n 67).
[79] E de Brabandere, 'States' Reassertion of Control over International Investment Law: (Re)Defining 'Fair and Equitable Treatment' and 'Indirect Expropriation' ' in *Reassertion of Control over the Investment Treaty Regime* 285 ff.

Search for 'Greater Certainty'] or propose methods to refine the content of investment standards [See F Ortino, '*Refining the Content and Role of Investment Rules and Standards'*].

Few contributions address the role of discretion in extradition treaties: William Magnuson's text about the "*Domestic Politics of International Extradition*" examines the structure of extradition treaties and discusses the motivation of states to incorporate a certain level of discretion and flexibility into the treaties. In this context, he specifically focuses on the issue of "compliance uncertainty", which describes situations where states are unsure which actions count as compliance with the treaty. There are a few publications about the exercise of discretion in extradition proceedings, which are focused on the allocation of discretionary powers within a state, not on the role of discretion in treaties: Matthew Murchison's article "*Extradition's Paradox: Duty, Discretion, and Rights in the World of Non-Inquiry*", for example, deals with the human rights of the requested person and the allocation of discretionary powers in the USA to balance the political interests with the interests of the requested person before deciding about the extradition request. Cherif Bassiouni's book "*International Extradition: United States Law and Practice*[6] also contains a section about executive discretion in extradition proceedings.

In the area of environmental law, Daniel Bodansky's article "*Rules vs. Standards in International Environmental Law*" and his book "*The Art and Craft of International Environmental Law*" discuss the degree of precision in environmental treaty provisions and provide examples for both rules and standards in environmental treaties. His contributions analyse the factors that are relevant in the choice between rules and standards, their respective effects as well as the evolution from rules to standards. Nicolas de Sadeeler, in "*Environmental Principles*", discusses discretion in the context of principles of environmental law. Neil Craik ("*The Duty to Cooperate in International Environmental Law: Constraining State Discretion through Due Respect*") approaches the issue of discretion in environmental law from the fundamental assumption that state discretion is not a law-free zone and that the exercise of discretion is itself subject to legal requirements – states must take the interests of other states into account when they exercise discretion. A duty to cooperate structures state discretion and operates as an overarching duty that applies to the exercise of discretion across a range of state decisions regarding the environment. There are also contributions, which discuss the effects of discretion in a specific environmental provisions: Kalina Arabadjieva's article "*Vagueness and Discretion in the Scope of the EIA Directive*", for example, discusses the value of discretion in Article 2(1) of the EU Environmental Impact Assessment Directive, whereas Ornella Ferrajolo in "*State Obligations and Non-Compliance in the Ramsar System*" addresses discretion with regard to the effectiveness of the Ramsar Convention.

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