The Affinity Effect?

International investment disputes, environmental protection, and the professional background of arbitrators.

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1 Introduction

1.1 Theme and issue
The international investment treaty regime is under a so-called legitimacy crisis. This crisis is much related to how investment treaty disputes are resolved, namely through arbitration. States, NGOs and academics have contended that the arbitration tribunals have a pro-investor bias, a lack of focus on public law, and that the vague standards of protections in investment treaties undermine the host state’s right to regulate within their own interests.

Recent research papers have raised questions regarding the legitimacy of the appointed arbitral tribunals, focusing on whether nationality, gender, or “double hatting” have an influence on their performance in investor-state dispute settlements (ISDS). As a contribution to the ongoing research, the issue raised in this thesis is whether the professional background of arbitrators have an influence on the state’s ability to regulate the environment within their public interests. The thesis is also a contribution to the broader literature regarding the influence of professional background in international adjudication. The thesis will focus on arbitrators with experience and expertise from commercial law on one side, and public international law on the other.

Even though more public international law lawyers have entered the field, commercial arbitrators remain among the ranks of the leading investment treaty arbitrators. The issue is raised in light of the hypothesis that arbitrators with a commercial law background are more likely to view ISDS system and interpret the substantive provisions in a manner that is more favourable to the investor. In particular, commercial law arbitrators have been criticised for lacking a public law perspective when adjudicating investment disputes, neglecting the public interests at stake.

On the other hand, arbitrators with a public international law background are presumed to view the ISDS system and interpret the substantive provisions in a way that is more favourable to the host state. These arbitrators have, however, been criticised for abandoning the

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1 See e.g. Pauwelyn (2015).
2 See e.g. Langford (2018).
3 See e.g. St. John (2017).
4 See e.g. Langford (2017).
5 See e.g. Voeten (2008).
“equality of arms” principle by granting the host state an “illegitimate” amount of deference on the expense of the foreign investor. Authors have also contended that public international lawyers, compared to commercial law arbitrators, lack an understanding of the contractual elements of the investor-state disputes.\(^8\)

If the findings indicate that the professional background of arbitrators have an influence on the state’s right to regulate their own environment, in other words that commercial arbitrators interpret the law in a manner that is more favourable to the investor, the international community would have to investigate how the ISDS regime correlates with our increasingly broader environmental obligations. On the other hand, if the findings indicate that there are no clear evidences to support the hypothesis that the arbitrators with a commercial background more often interpret the rules in favour of the investor, the thesis will be a contribution to nuancing the so-called legitimacy crisis.

**1.2 Background and the legitimacy crisis**

Since the second world war, the world has seen a booming of international investment agreements (IIAs).\(^9\) States saw the need to attract foreign investment to their territory to boost economic growth, while at the same time ensure the protection of their own nationals investing in foreign countries.\(^10\) IIAs were a practical tool, beneficial for both state parties. In their regulation of trans-border investments, states have established more than 3,500 signed bilateral investment treaties (BITs), multilateral investment treaties (MITs) and regional free trade agreements (FTAs).\(^11\) These treaties provide for substantive protections for the investor. Most IIAs include provisions prohibiting expropriation without compensation, granting fair and equitable treatment and national treatment, and most importantly, a right for the foreign investor to bring claims against their host state directly before an arbitral tribunal.\(^12\)

As practice has emerged from the ocean of investment treaties, practitioners, states and scholars have raised concerns regarding the legitimacy of the ISDS system. These concerns relate to a number of aspects within the ISDS regime, among them being allegations that the system is pro-investor,\(^13\) pro-investment,\(^14\) anti-developing state\(^15\) or a combination of all three. Criti-

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\(^8\) Crawford (2017) p.1018.  
\(^9\) Langford (2018) p.3.  
\(^10\) Dolzer (2012) p.4-8.  
\(^12\) I.c.  
\(^13\) See e.g. Van Harten (2012).  
\(^14\) See e.g. Langford (2011).  
\(^15\) See e.g. Behn (2018a).
cism has especially been raised towards the contention that arbitrators favours the property rights of foreign investors over the need of host states to environmentally regulate and legislate in the public interest.\(^\text{16}\)

Practice from case law have shown instances where host states have had legitimate needs to restrict the projects of foreign investors, for example mining projects or chemical production projects, due to their potential harmful environmental consequences. Nevertheless, they have repeatedly lost in investor-state arbitrations, having to pay extensive compensations to the investors. The *Chevron* case\(^\text{17}\) is a good example of this, where Ecuador was held to pay $18 billion to the US investor for denial of justice. As Shill puts it, “[t]hese cases illustrate how deeply decisions of investment treaty tribunals can penetrate into the domestic legal sphere and redefine the relationship between private rights and public interests, locally as well as globally”\(^\text{18}\). The lack of balance between the protection of foreign investors and public interests has resulted in several countries dropping out of the International Centre for the Settlement of Investment Disputes Convention (ICSID) (which provides for the ISDS mechanism),\(^\text{19}\) and others have terminated investment treaties all together.\(^\text{20}\)

In contrast, other authors have contended that the critique is a result from an exaggeration of the arbitrator’s decisional power.\(^\text{21}\) The disagreement in academia has nevertheless resulted in discussions in the UN about developing a multilateral court to handle future investor-state disputes, as replacement to the current investor-state arbitral system.\(^\text{22}\)

### 1.3 Demarcations

In this thesis I will analyse investor-state disputes with an environmental component. The reasons for choosing environmental cases are two folded. First, at the beginning of the progress of this thesis (spring 2019) there were approximately 39 environmental cases within the ISDS regime which were resolved either on jurisdiction or on the merits, a quantity which is both manageable to examine compared to how extensive this master thesis is supposed to be,

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\(^\text{17}\) *Chevron* v. Ecuador.


\(^\text{19}\) Bolivia, Ecuador, and Venezuela have denounced the ICSID Convention in 2007, 2009, and 2012, respectively. See Voon (2016) p.416.

\(^\text{20}\) Bolivia has terminated ten out of a total of twenty-three of its BITs; Ecuador has terminated eleven out of a total of twenty-nine of its BITs.


while at the same time being a sufficient and representative amount to give an answer to the issue being raised. The thesis has thus excluded the environmental cases which were settled, annulled or discontinued, given that these cases would not contribute to answer the question raised in this thesis.

Second, the environmental cases give a good example for what is in the heart of controversy regarding the ISDS regime. The adjudication of investor-state disputes with potential breaches of BITs have challenged a wide range of state regulatory measures, and has been criticised for resulting in states not being able to regulate in correlation with their public policy interests. Domestic regulation for the protection of the environment lies within what is typically considered public policy concerns of the state. Given that international environmental law is putting increasingly broader obligations on states, it is interesting to see whether the investment treaty system poses a threat to these obligations.

Given that “the environment” is such an indefinite term, a clarification of what is considered an “environmental case” in this thesis is needed. Competing approaches to defining an environmental case have been presented in judicial theory and literature, and some definitions are broader than others. One approach is to consider all cases which involves the environment as a theme. This approach, which for example is embraced Berge and Berger, also compromises cases where the challenged measure really does not touch on the legitimacy issue of ISDS and the environment debate, such as measures by the state which is considered to be environmentally hostile. Examples of cases where the state have embraced unfriendly environmental measures could be where states have denied subsidies to a renewable energy project or where states even have refused to implement its own environmental regulations.

Even though the above mentioned definition is well suited to illustrate the breadth and diversity of cases that touch on environmental issues, this thesis will apply a narrower definition which only includes cases that best illustrates the alleged legitimacy crisis at hand in relation to the debate regarding the environment, namely cases where: (1) a domestic environmental measure is under direct challenge by the foreign investor; or (2) the host state argues that at least one of the measures at issue is justified for environmental reasons.

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24 Berge (2019).
26 This definition was presented by Langford and Behn in their article ‘Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration’, p.18.
1.4 Method for research question

In answering the issue presented in this thesis, whether there are indications that arbitrators with a commercial law background tend to interpret the substantive protections more favourable to the investor while arbitrators with a public international law background tend to be more sympathetic for interpretations that favour the state, I will use mixed methods combining statistical analysis and doctrinal analysis of reasoning.

To plausibly give an answer to the question being raised, a quantitative and a qualitative approach are needed. The statistical analysis will give an overview of the general question of whether professional background has an influence on states right to regulate their environment in ISDS, showing the voting of commercial and public international law arbitrators in the environmental cases. The statistical analysis will be presented in chapter 3.

The advantage of a statistical approach is that it gives a clear and unambiguous answer to the question of whether arbitrators, at the end of the day, vote differently depending on their professional background. This analysis will not, however, show whether or not the outcome is influenced by a specific interpretation approach adopted by the arbitrator. For this, a doctrinal analysis is needed. The doctrinal analysis in chapter 5 will investigate whether there is a correlation between professional background and interpretive approaches.

The doctrinal analysis is important for the issue being raised, because the quality of arbitral reasoning, and not just the outcomes of each cases, plays an important role in building the legitimacy of the ISDS system. The analysis of legal interpretation is well suited for a fine-grained perspective to the issue being raised, as it gives opportunity to focus on specific areas in investor-state adjudication which have attracted the most criticism, for example how the interpretation of vague standards of IIAs influence a host state’s regulatory autonomy. The goal of chapter 5 is to find whether or not there is a causation between arbitrator’s professional background and their choice of interpretive approach. A disadvantage to the doctrinal analysis is that it may unknowingly put too much emphasis of certain elements of an award, and neglect other important factors which may not be as visible as the factors that are examined. The statistical analysis is thus an important addition, since its built on hard facts, depending only on the factors that are included in the analysis.

The case law review will be based on eight environmental cases. The cases are chosen based on the constitution of the arbitral tribunal, particularly who the president was. As the president

27 Ranjan (2019) p.98
28 Behn (2018b) p.566
29 I.e.
of the tribunal has the role as the main manager of the dispute\textsuperscript{30} and also writes the majority of the award, his or her professional background becomes particularly interesting in light of the presented issue in this thesis. To investigate whether or not there is a correlation between professional background and preferred doctrinal approach, I have chosen to examine four cases which had a president with a commercial law background, namely \textit{Tecmed v. Mexico, Methanex v. the US, Burlington Resources v. Ecuador} and \textit{Crystallex v. Venezuela}. To compare interpretive approaches, the remaining four cases subject to analysis had a president with a public international law background, namely \textit{Metalclad v. Mexico, MTD Equity v. Chile, Perenco v. Ecuador} and \textit{Bilcon v. Canada}. The analysis will also take into consideration who the wing-arbitrators were, and whether or not they were part of the “power-brokers” list.\textsuperscript{31}

In the doctrinal analysis in chapter 5, I will analyse the tribunal’s interpretation of the expropriation and fair and equitable treatment standards in investment treaties. The thesis will thus be primarily based on international investment treaties, that being bilateral investment treaties, multilateral investment treaties and regional free trade agreements, and jurisprudence from international arbitral tribunals, including practice from other international bodies. The analysis will also be based in the tribunal’s use of the Vienna Convention on the Law of Treaties (VCLT).\textsuperscript{32}

\textsuperscript{30} Langford (2017) p.4.
\textsuperscript{31} Puig (2014) p.415.
\textsuperscript{32} The Vienna Convention on the Law of Treaties, Vienna 23 May 1969 (VCLT).
2 The hybridity of the investment treaty system and arbitral professional background

2.1 Introduction
This chapter will present how and why arbitral background can influence investor-state disputes. In doing so, the chapter will explain the ISDS system and how it opens up for different interpretive approaches, and why an arbitrator’s background might be influential in that context.

In theorising how arbitral background might influence investor-state disputes, it is necessary to recognise the hybrid nature of the ISDS system. Section 2.2 will thus explain the functions of arbitration in investor-state disputes, and section 2.3 will explain how arbitration has resulted in a clash of practitioners with different professional background who has entered the investment treaty systems, both within private and public law. Section 2.4 will then theorise why the professional background of arbitrators might influence investor-state disputes, highlighting the theory of _the affinity effects_ as presented by Diamond.33

2.2 Arbitration in the investment treaty regime
Most investment treaties contain an arbitration clause, giving the foreign investor the right to initiate arbitration proceeding directly against a host state where the investment is located, for alleged breaches of the treaty’s substantive protections.34 Arbitration is an alternative dispute resolution mechanism, where “the parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party to present its case”.35

Historically, the foreign investors had limited opportunities to protect themselves from governmental measures initiated by the host state.36 Foreign investors who were subjected to international breaches by the host state had to either rely on dispute settlement through domestic courts in the host state, or through diplomatic protection through its home state.37 There were many disadvantages to these types of dispute resolutions; there was a fear of lack of impartiality from the domestic courts of the host state against which the investor sought to pursue a}

34 Roberts (2013) p.45.
36 ibid. p. 418
37 The _Barcelona Traction_ case (ICJ Belgium v. Spain) is an example where the home state of the investor (Belgium) sought relief on behalf of the investor against the host state (Spain).
claim, and diplomatic protection was and still is subject to several conditions and limitations, and depends on the political discretion of the home state. Given these difficulties, investor-state arbitration was viewed as an attractive dispute resolution mechanism, giving the foreign investor the opportunity to have the dispute settled by an impartial and independent body.

The arbitration proceedings are largely subjected to the parties’ control. The drafters of the arbitration agreement (through a clause in a treaty or contract, or through a subsequent agreement) can choose between institutional arbitration or ad hoc arbitration. By choosing institutional arbitration, the arbitration procedure is overseen and administered by a specialized institution, which also provides a set of institutional rules to govern the dispute. The International Centre for Settlement of Investment Disputes (ICSID) is an example of these kinds of institutions, specialized in investment disputes. In ad hoc arbitration, the procedure is not conducted under the supervision of an arbitral institution. Instead, the parties choose the procedural rules themselves, or refer to already existing arbitration rules, e.g. the UNCITRAL Arbitration Rules.

Irrespectively of whether the parties choose institutional or ad hoc arbitration, it is normal for the chosen arbitral rules to let the disputing parties choose which person(s) to appoint as arbitrators to settle the dispute. This is considered one of the main benefits of arbitration, as the parties can choose persons with certain knowledge or expertise within the field of conflict. Usually, the disputing parties appoint one arbitrator each, so-called wing arbitrators. The head of the tribunal, the president or the chair, can either be appointed jointly by the disputing parties, jointly by the party appointed arbitrators, or by the specialized institution if institutional arbitration is chosen.

Given the issue raised in this thesis, it is important to underline some of the most important distinctions between so-called commercial arbitration and investor-state arbitration. Commercial arbitration relates to disputes arising out of a private agreement or contract, between private parties (or between a private party and a state acting through its private capacity), and

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43 See e.g. the ICSID Convention art. 37, UNCITRAL Rules art. 7.
the applicable substantive law is usually private law.\textsuperscript{45} Inter-state arbitration, by contrast, relates to disputes between a foreign investor and a host state, and arises out of a treaty initiated between two or several sovereign states.\textsuperscript{46} The dispute often relates to governmental measures by the host state which are motivated by significant political objectives, like the protection of the environment or public health, or local economic interests.\textsuperscript{47} However, investor-state arbitration derives most of its procedural rules from commercial arbitration. This has resulted in several difficulties in the investment treaty regime, which will be further elaborated in the sections below.

2.3 The hybrid nature of investment treaties

By letting foreign investors bring claims directly against a state-party to the agreement, the investment regime is overshadowed by a private character. As Douglas stated, there lies an analytical challenge in analysing the investment-treaty regime by that “it cannot be adequately rationalised either as a forum of public international or private transnational dispute resolution”\textsuperscript{48}

On one hand, the content of investment treaties brings the public international law dimension into the ISDS system. Investment treaties are agreements between sovereign states, and falls as such within the definition of an ‘international convention’ in article 38(1)(a) of the ICJ Statutes.\textsuperscript{49} These treaties are subject to the rules of public international law. On the other hand, the procedural rules in investment arbitration, which is predominantly derived from commercial law, gives the ISDS system a commercial dimension.

These aspects have resulted in the ISDS system being characterised as a hybrid with public international law and commercial law on each side of the spectrum. Due to this hybridity, the ISDS system has been populated by practitioners stemming from different professional backgrounds, resulting in a clash between practitioners from the commercial arbitration regime and those who have practiced public international law in inter-state disputes. As stated by Roberts in her article:

“The unique marriage of public international law as the applicable law with dispute resolution rules resembling those in international commercial arbitration means that the field was historically populated by two very different professional communities:

\textsuperscript{45} Roberts (2012) p.298.
\textsuperscript{46} Roberts (2012) p.298.
\textsuperscript{47} Born (2016) p.418.
\textsuperscript{49} Statute of the International Court of Justice, Annex to Charter of United Nations, San Francisco 26 June 1945.
one from the side of public international law and interstate dispute resolution, and the
other from the side of private law and commercial arbitration”.

The hybrid nature of investment treaties taken together with the diversity of practitioners who
has entered the system explains how the investment treaties, which are in principle a “public
international creature”, may be receiptible for international commercial approaches in the in-
terpretation of these treaties. The next section will explain why professional background of
arbitrators might be influential on interpretive approaches in this context.

2.4 Theorising academic background
General requirements for the appointed arbitrators, as is for court judges, are that they shall be
impartial and independent. However, these principles can never be obtained fully. Appoint-
ed arbitrators will always in some way be affected by their background, past experiences and
choice of expertise. This phenomenon has by Diamond been called the affinity effect, and he
describes it as “the tendency to share the perspective of those who come from a similar back-
ground and have had a similar set of prior experiences”.

In light of the affinity theory, it has been contended that the different actors and practitioners
will understand the underlying system of investor-state arbitration and interpret its protection
standards differently depending on their professional background. Roberts has contended
that arbitrators with a public international law background more often “focus on the inter-state
treaty basis of the system; the intention and wishes of the treaty parties; how the system is
embedded within a broader framework of public international law; and the importance of in-
dividual decisions contributing to a growing body of jurisprudence.” This type of approach
has been characterized as being more state-friendly, by recognizing states as principals in the
creation of international investment law.

Arbitrators with a commercial law background have, by contrast, been contended to highlight
the importance of the contractual relationship between the investor and the states as disputing
parties and drawing on principles of private international law such as the equality of arms and
autonomy of the disputing parties and the significance of commercial expectations. It has

50 Roberts (2013) p.54.
51 See e.g. ICSID Convention article 14(1), UNCITRAL Rules article 6(4), International Bar Association Guide-
lines on Conflicts of Interest in International Arbitration, 2014 (IBA Guidelines), Part I General Standard 1.
55 ibid. p.298.
been argued that this approach shoves the considerations for the states’ need to regulate in the public policy interests more in the background, giving the investor a wider range of protection. Commercial arbitrators have also been contended to be better at managing the arbitration procedure, e.g. the discovery process and dealing with requests for confidentiality orders.\textsuperscript{56} It has also been contended that they are better at engaging with the quantification of damages and supervising the cross-examination of quantum experts.\textsuperscript{57}

This section thus presents a theory that due to the affinity effects, a commercial law arbitrator is more likely to be sympathetic towards the investor, while a public international law arbitrator is more likely to be sympathetic towards the host state. As stated in Roberts’ article, this potential “bias” can work in two ways: (1) Either the arbitrator can find one solution to be right and then find an interpretive approach that will support this result, or (2) the arbitrator can be more sympathetic towards certain doctrines and land on a more or less “objective” result by following these doctrines. This type of “bias” need not be deliberate. It can be a result from a default mechanism within the arbitrator’s subconsciousness, or the arbitrator can consciously advocate particular interpretive approach.\textsuperscript{58}

In extension of this it is important to acknowledge the fact that not everyone coming from the same professional background will share the same approach to interpret a certain issue. One must also acknowledge that arbitrators in several instances have more than one specialisation; their professional background can be dual or plural, e.g. having experiences within both commercial law and public international law.\textsuperscript{59} It is also important to recognize the obvious fact that the choice of arbitrators’ interpretation approach will not only be determined by their professional background. Other external factors such as persuasive arguments from the parties’ lawyers and pressure from civil society might also be factors that influence their interpretation.

However, acknowledging the problems of simplification and stereotyping in generalizations, the influence of the arbitrators’ background when applying a certain doctrine or interpretive approach still have merit. The continuous analysis will examine whether the hypothesis stands on solid ground or if it needs modifications. Do arbitrators go for what they know, or do they manage to disentangle themselves from the so-called affinity effect?

\textsuperscript{56} Crawford (2017) p.1018.
\textsuperscript{57} Crawford (2017) p.1018.
\textsuperscript{58} Roberts (2013) p.49.
\textsuperscript{59} ibid. p.54.
In light of this question, the following chapters will investigate whether there is a conscious or subconscious bias by arbitrators towards one of the disputing parties depending on their professional background. Chapter 3 will through a statistical analysis examine whether there are indications of a pro-investor bias by commercial law arbitrators. Followed by a framework for the doctrinal analysis in chapter 4, the doctrinal analysis in chapter 5 will in light of the affinity theory examine whether there are indications that professional background has an influence on their choice of interpretive approach.
3 Statistical analysis

3.1 Introduction
By statistically examining outcomes, this chapter will analyse whether arbitrators might hold a conscious or subconscious bias towards one of the disputing parties depending on their professional background. The analysis is based on the presumption that commercial law arbitrators will be more sympathetic towards the foreign investor, while the public international law arbitrator will be more sympathetic towards the host state. The purpose of this section is thus to investigate whether there are any indications that professional background might have an influence on arbitrators’ voting.

3.2 Data collection
The sample of cases was the “environmental cases” defined and described in chapter 1 and analysed earlier by Behn and Langford (2017). I have then coded the professional background of the arbitrators. Categorising an arbitrator’s background is challenging as public information is not always fully available, it is not always easy to pigeonhole, and their background can vary over time. However, for the purposes of this thesis, I have read and analysed the current online CVs and bios of all the arbitrators in the sample and recorded their background according to the following schema: commercial law (indicated as 0), public international law, PIL, (indicated as 2) or mixed (indicated as 1). The categorisations are among other factors based on their education, career choices, area of expertise and literal publications.

3.3 Descriptive findings
The analysis has resulted in three interesting findings. The first finding show that the commercial law arbitrators make up for a slight majority of the arbitrators in the environmental cases. Out of the 115 arbitrators that were appointed in the environmental cases, 41 had a commercial law background, while 32 had a public international law background. The remaining 42 arbitrators had a mixed background, both within commercial law and public international law. This finding contributes to nuancing the theory that appointed arbitrators usually come from the same legal background, at least in the environmental related cases.

The diversity of background to the appointed arbitrators is also reflected in most individual cases. A large majority of the tribunals in environmental cases are constituted with arbitrators with professional backgrounds both from commercial law and public international law. The diversity might prevent a unilateral interpretation based on one profession and thus prevents

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60 See Annex I. For the definition of an ‘environmental case’ presented in this thesis, see page 4.
62 See Annex I.
an underlying bias in favour of one or the other party. These findings contribute to strengthen the legitimacy of the investment treaty regime in environmental cases. On the other hand, as will be emphasised in chapters 3.4 and 4, the president of each tribunal has a certain power and influence on the drafting of each award compared to the wing-arbitrators, making his or her professional background particularly relevant for the outcome of each case.

3.4 The affinity theory in practice – do they go for what they know?

The second finding shows that their professional background does not seem to influence their voting: see Table 1. Considering only the arbitrators with a commercial law background, they only voted for a full win for the investor in 13 instances, while voting for dismissing the investors claims in 21 instances. At first glance it would actually seem that they are more likely to rule against the investor, but if the votes for a partial win for the investor is added, there is 21 votes in favour of the investor (voting for a full win and a partial win) and 20 votes in favour of the host state (voting for dismissing the investor’s claims) which indicates that their voting is quite evenly distributed.

### Table 1. Title

<table>
<thead>
<tr>
<th>WinIndex</th>
<th>Commercial</th>
<th>Mixed</th>
<th>PIL</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Investor lose</td>
<td>21</td>
<td>22</td>
<td>16</td>
<td>59</td>
</tr>
<tr>
<td>Partial win</td>
<td>7</td>
<td>10</td>
<td>10</td>
<td>27</td>
</tr>
<tr>
<td>Investor win</td>
<td>13</td>
<td>10</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
<td>42</td>
<td>32</td>
<td>115</td>
</tr>
</tbody>
</table>

The same occurs when only the president’s votes are analysed: see Table 2. The president holds the main responsibility of as case manager and has the most influence on the final decision. An underlying indication of a pro-investor bias with the presidents would as such be of importance, given their powerful role in investor-state adjudication. However, as Table 2 shows, the dataset gives no such indications.

### Table 2. President votes

<table>
<thead>
<tr>
<th>WinIndex</th>
<th>Investor Win</th>
<th>Investor lose</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial</td>
<td>9</td>
<td>11</td>
<td>20</td>
</tr>
</tbody>
</table>

64 I.c.
These results also hold when controlling for a range of other influential factors. I asked Malcolm Langford to run the same regression analysis as was performed in Langford and Behn (2017)\(^{65}\) on the outcome of the cases, but with the addition of the above professional background variable (See Annex II). The control variables were; development status of the respondent, economic sector of investment, the type of claim (specifically expropriation and/or fair and equitable treatment), whether there was an Environmental Impact Assessment, if it was a local government decision/regulation and whether the state had experience from previous arbitration. The analysis did show strong evidence for a correlation between arbitrators with a trade law background and a tendency to vote in favour of states. The finding is interesting and suggest further research. This thesis will however focus on the findings relating to commercial law and public international law backgrounds. In none of the cases, was commercial professional background correlated with outcomes in a statistically significant manner – indeed, there was virtually no discernible difference with arbitrators from a public international law background judging by the coefficient.

The findings are both interesting and reassuring. Based on the affinity theory, the arbitrators with a commercial background are presumed to be more sympathetic towards the investor. However, as the findings show, the commercial arbitrators seem to be as likely to find in favour of the respondent state as they are likely to find in favour of the investor. This may be explained by the fact that they are appointed with arbitrators whom come from a public international law background, and that the public international law arbitrators influence the commercial arbitrators’ point of view. Another theory, which might seem more controversial, is that their professional background has a less influence on the arbitrators’ determination of the case than what has been presumed in theory.

As mentioned in chapter 2, the statistical findings only give an overview of the answer to the issue being raised in this thesis. The issue of this thesis is whether the professional background of arbitrators have an influence on the state’s ability to regulate the environment within their public interests. This is something that cannot be answered by just looking at the constitution of the tribunals and their voting. In addition to this, one must investigate whether there seem to exist an underlying difference in how the ISDS system is understood and interpreted by arbitrators. The doctrinal analysis in chapter 5 will therefore seek to analyse wheth-

\(^{65}\) Behn (2017a)
er or not there is a correlation between the arbitrators’ professional background and their interpretive approach to the substantive protections of the investment treaties.
4 Framework for doctrinal analysis

4.1 Introduction
As indicated by several authors, arbitrators may have different interpretive approaches depending on their professional backgrounds.66 These presumptions are consistent with the above-mentioned affinity effect theory. As emphasised in Roberts articles,67 there is a presumption that arbitrators with a background in public international law are more likely to apply a so-called “public international law approach” while arbitrators with a background in commercial law are more likely to apply a “commercial law approach”.

Section 4.2 will present these different interpretive approaches and what characterises them. In doing so, it will become apparent that the public international law approach contains interpretive elements that might be viewed as more favourable to a host state. Because of this, the section will also present what signals a public international law approach, and how public international rules or principles are used by arbitral tribunals, setting the framework for the doctrinal analysis in chapter 5. As the chosen environmental cases subject to analysis in chapter 5 concerns disputes relating to the expropriation and the fair and equitable treatment standard, this chapter will also give a brief introduction to these standards (section 4.3).

4.2 The public international law approach and the commercial law approach

A commercial arbitration approach in the investment treaty regime has been contended to focus on the contractual nature of the dispute by relying on commercial expectations and emphasising the principles of equality of arms and party autonomy, conceiving the state and the investor as equal disputing parties.68 This approach has been criticized by academics and states for not taking the public nature of investment treaty disputes into consideration.

A public international law approach has, on the other hand, been presumed to view the state parties as the principal subjects in the investor treaty system, emphasising the will and intention of the treaty parties.69 This approach has also been characterised by emphasising the need to accord deference to the state in light of their regulatory autonomy.70 By putting the state

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69 I.c.
70 Roberts (2013) p.55
parties on a certain pedestal in relation to the foreign investor, the approach has been criti-
cised for disrupting the general notion of equality in international adjudication.\textsuperscript{71}

The substantive protections of investment treaties have been characterized as being vague, generally formed and ill-defined.\textsuperscript{72} This results in several, divergent interpretations that all might be accepted as falling within the natural wording of a single provision, making it possible for the different practitioners to interpret the standards in a manner that matches their under-
standing of the system. In light of this, the referral to and application of the interpretive rules of the VCLT has used to identify whether an interpretative approach can be character-
ised as “commercial” or “public international”.

The mere reference to VCLT in investment awards might indicate that the tribunal acknowl-
edges the public nature of the dispute, and as such will rely on rules and principles that are derived from public international law. However, as one sees by analysing investment awards, this is often not the case.

For instance, the tribunals referral to and application of VCLT article 31(1) has often been applied in a manner which can be characterised as “investor friendly”. Article 31(1) of the VCLT states 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 the light of its object and purpose”. Relying on “the ordinary meaning” of a substantive protection has often resulted in an expansion of the intended protection offered by the state in the treaty, due to its vague and ambiguous nature. This has especially been the case in those instances where the tribunal interpret the substantive protections in light of the strict notion of commercial expectations. As example, by relying on the “ordinary meaning” of indirect expropriation and drawing on the investors’ commercial expectations, the Metalclad tribunal applied a “generous, broad and unprecedented definition of expropriation”.\textsuperscript{73} The Metalclad case will be further presented and analysed in chapter 5.

Practice has also shown that interpretations which is done in light of the treaty’s “object and purpose”, often results in an interpretation that favours the investor. Given that only the more recent investment treaties have included protection of the environment in their preamble or in provisions in the treaty, the majority of the investment treaties that exist today only enunciate the purpose of protecting the investor and their investment. As such, a \textit{teleological} interpre-

\textsuperscript{71} Roberts (2013) p.55
\textsuperscript{72} ibid. p.50.
\textsuperscript{73} Sands (2018) p.908 n.414.
tive approach,\textsuperscript{74} will often be favourable to the investor, unless protection of public interests also is announced as an objective of the treaty.

On the other hand, the application of article 31(3) has been presumed to result in interpretations that are more favourable to the state. According to VCLT article 31(3)(a), there shall be taken into account “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”. While a public international law approach focuses on the state parties as masters of the treaty in question, which grants them expansive powers to define and redefine their treaty obligations, a commercial law approach would possibly view such agreements as an illegitimate attempt to amend the host state’s obligations towards the investor without the investors consent.\textsuperscript{75}

The perhaps clearest indications of a public international approach are references to and application of deference and the police power doctrine. The content of the police power doctrine has been subject to discussions,\textsuperscript{76} and there is not a clear distinction between the doctrine and the notion of deference. While tribunals often have derived the police power doctrine from VCLT article 31(3)(c), the notion of deference seem to be a broader, more general principle which somewhat overlaps the more specific scope of the police power doctrine.

The \textit{Methanex} tribunal referred indirectly to the police power doctrine when it stated that “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable …”.\textsuperscript{77} Regarding the notion of deference, the \textit{S.D. Myers} tribunal stated that substantive protections had to be interpreted “in light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own boarders”.\textsuperscript{78}

While the notion of deference is also viewed to lead to interpretations that are more favourable to the state, its content might be too general and vague to give any substantive effect to an interpretation. This becomes apparent when tribunals only refer to the notion of deference, but nevertheless neglect to apply the notion either to interpret the substantive provisions, or apply the principle in the assessment of the facts. As such, a mere reference to deference does not automatically lead the interpretation to be characterised as a public international law ap-

\textsuperscript{74} Ruud (2014) p.88-89.
\textsuperscript{75} Roberts (2013) p.59.
\textsuperscript{76} Ranjan (2019)
\textsuperscript{77} Methanex v. the US, Chapter D, para. 7.
\textsuperscript{78} S.D. Myers v. Canada, para. 321.
approach. The *Bilcon* case might be viewed as an example of this. As the case studies will show, host states have more often been successful where the tribunals have relied on the police power doctrine, as it has a more specific scope of application than the notion of deference.

In conclusion, there are several rules and principles derived from the public international law approach that might lead to interpretations that are favourable to host states. However, their influence on the outcome depends entirely on which degree such rules or principles are applied. As one will see through the case study in chapter 5, the application can vary from being entirely formal by just referring to a rule or a principle, to a more substantive use through extensive articulation, to an actual application of the rule or principle onto the facts of the case.

### 4.3 Protection standards of investment treaties

#### 4.3.1 Expropriation

The prohibition of expropriation without compensation has been viewed as one of the basic and most fundamental protections granted to foreign investors. Since the 19th century, the requirements established through the so-called *Hull-formula* has been generally accepted as conditions for identifying a lawful expropriation.\(^{79}\) These requirements include that the expropriatory measure issued by the host state must have (1) been made for a public purpose, (2) be non-discriminatory, (3) been enacted with due process for the foreign investor, and lastly (4) been followed by a prompt, effective and adequate compensation. These requirements are considered to be a part of international customary law.\(^{80}\)

An intentional taking of property to the benefit of the host state, a *direct* expropriation, are relatively easy to identify and seldom controversial in dispute settlements.\(^{81}\) The difficulties arise when the host state issues a measure which does not lead to any formal transfer of legal title or ownership of the investment, but has this *effect*. As stated by Dolzer and Stevens; “a host state, as is well known, can take a number of measures which have a similar effect of expropriation or nationalization, although they do not *de jure* constitute an act of expropriation; such measures are generally termed ‘indirect’, ‘creeping’, or ‘*de facto*’ expropriation.”\(^{82}\)

In these circumstances the state typically denies the existence of an expropriation and the following obligation to pay compensation.

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\(^{79}\) Dolzer (2012) p.2. These requirements were first articulated in 1936, when the United States Secretary of State Cordell Hull responded to Mexico’s nationalisation of American petroleum companies.

\(^{80}\) Ibid. p.99.


As a consequence, most investment treaties contain a prohibition of “indirect expropriation” or measures which have this effect. As example, NAFTA\textsuperscript{83} article 1110 provides that “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment …”. Tribunals often have difficulties when attempting to categorise a measure as either an “indirect expropriation” or a legitimate, non-compensable regulatory act by the state.\textsuperscript{84} The line to be drawn between the two has not been clearly articulated in practice which results in arbitrators having to rely on the specific facts and circumstances of each case.

4.3.2 Fair and equitable treatment
The fair and equitable treatment (FET) standard has its origin in the United States treaties on friendship, commerce, and navigation (FCN) dating back to the 1950’s, and has been enunciated in numerous IIAs ever since.\textsuperscript{85} For example, NAFTA article 1105 (1) provides that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security”. As stated by McLachlan, “none has proved more elusive, or occasioned as much recent controversy as the guarantee of ‘fair and equitable treatment’”.\textsuperscript{86}

The purpose behind such clauses is to fill gaps which may be left by the more specific standards in order to ensure the level of protection to investors which was intended by the treaty parties.\textsuperscript{87} As such, the FET standard provides a certain floor of what is considered acceptable treatment of investors. The standard has been described as a “non-contingent standard”, meaning that the level of protection is irrespective of how a state may treat its own nationals.\textsuperscript{88}

Practice has shown debates regarding the question of whether the FET standard reflects the minimum standard of treatment as provided in international customary law, or if it is to be considered as an autonomous standard.\textsuperscript{89} For example, NAFTA tribunals accepted the FET standard to reflect international customary law after the Free Trade Commission (FTC) issued its notes on interpretation due to extensive discussions on the matter in previous NAFTA cas-

\textsuperscript{83}North American Free Trade Agreement, the respective capitals 17 December 1992.
\textsuperscript{84}Dolzer (2012) p.102.
\textsuperscript{85}ibid. p.130.
\textsuperscript{86}McLachlan (2017) section 7.01.
\textsuperscript{87}Dolzer (2012) p.132.
\textsuperscript{89}Dolzer (2012) p.134.
es.\textsuperscript{90} However, this question depends on each specific IIA as they must be interpreted individually in accordance with article 31-33 of the VCLT.

\textsuperscript{90} ibid. p.136.
5 Doctrinal analysis

5.1 Introduction

This chapter will analyse the legal interpretation of eight arbitral tribunals. The first four cases, *Tecmed v. Mexico*, *Methanex v. the US*, *Chemetura v. Canada* and *Burlington Resources v. Ecuador*, had an arbitral president with a professional background within commercial law. The four remaining cases, *Metalclad v. Mexico*, *MTD Equity v. Chile*, *Perenco v. Ecuador* and *Bilcon v. Canada*, had an arbitral president with a professional background within public international law. Each analysis will first present the facts of the case and the composition of the arbitral tribunal. The legal arguments of the tribunal will then be presented, followed by the analysis of their legal interpretation. Lastly, there will be some general comments or conclusions about each case.

The analysis will be based on the affinity effect theory, which means there will be a presumption that arbitrators coming from a commercial law background will apply a commercial law approach to a dispute, while an arbitrator coming from a public international law background will apply a public international law approach. The goal of this chapter is to investigate whether there is a difference in legal interpretation between arbitrators with a commercial law background and arbitrators with a public international law background. In doing so, it is important to recognise the important role of the arbitral president, as mentioned in chapter 3. The president holds the main responsibility of case management and has the most influence on the final decision.\(^\text{91}\) Because of this, it is highly relevant to investigate whether his or her professional background have an influence on the content of the award.

However, one must also recognise that some arbitrators have practiced longer than others, and have as such gained a certain level of respect or credibility. In his article, Puig identified 25 individuals who repeatedly gets appointed as arbitrators in investor-state disputes, the so-called power-brokers.\(^\text{92}\) These powerful arbitrators could be more influential in determining the content of the investment award, even if they do not hold the status as president. The following interpretive analysis will take these factors into consideration when predicting what kind of approach the tribunal will apply to the dispute at hand.

\(^{91}\) Langford (2017) p.4.

5.2 Doctrinal analysis of arbitral awards with a commercial law president

5.2.1 Tecmed v. Mexico

5.2.1.1 Facts of the case

Tecmed, a Spanish-owned company placed in Mexico, purchased an existing hazardous waste landfill. Related to this purchase, Tecmed was issued a permit which was necessary for the operation of the landfill. The permit was a renewable one-year permit. The operation permit was breached by Tecmed on various accounts, breaches related to the obligation to transport hazardous wastes. Due to these breaches and increasingly concern from community groups who opposed the operation, the Mexican authority decided not to renew the operation permit and ordered Tecmed to close the facility (the Resolution). Tecmed claimed that these actions amounted to a breach of the expropriation provision in article 5(1) of the Spain-Mexico BIT.

5.2.1.2 The composition of the arbitral tribunal

The Tecmed tribunal was constituted with two commercial law arbitrators and one public international arbitrator. The president of the case, Horacio Grigera Naón, had extensive experience with commercial arbitration, working as Director of the Center on International Commercial Arbitration. Naón is also included in Puig’s power-brokers list. This, in addition to being the president of the case would indicate that Naón was particularly influential in determining the content of the award. Due to the affinity effects, it would be expected that he would apply a commercial law approach to the Tecmed dispute. The claimant-appointed arbitrator, José Fernandez Rozas, had also a professional background within commercial law, leaving the respondent-appointed arbitrator, Carlos Verea, as the only arbitrator with a public international law background. Given that neither of the wing-arbitrators held the status of a power-broker, it would not be expected that they would be able to disrupt the predicted commercial law approach.

5.2.1.3 Arguments of the tribunal

In finding indirect expropriation, the tribunal applied a proportionality test. The tribunal stated that “there must be a reasonable relationship of proportionality between the charge of weight imposed to the foreign investor and the aim sought to be realised by an expropriatory measure”.

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93 Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003.
94 BIT between Spain and Mexico, signed 23 June 1995.
95 https://www.iisd.org/itn/2018/10/18/tecmed-v-mexico/
96 Tecmed v. Mexico, para. 122.
Finding that the measure imposed by the state was disproportionate, the tribunal emphasised two main points. First, the economic effects of the measure were substantial on the investor, and second, that the real objective behind the measure was not the investor’s breaches to the operation permit or environmental reasons more generally, but rather a change in social and political circumstances and pressure from the local community, and that such reasons could not outweigh the burden of the measure imposed on the investor. The tribunal found the measure to be “equivalent to expropriation” as the investor was in effect permanently deprived of the economic value of the investment. The denial of the construction permit was thus a breach of article 5(1) of the Spain-Mexico BIT.

5.2.1.4 Analysis of legal interpretation

In their assessment of whether the Resolution issued by the government of Mexico constituted an act “equivalent to expropriation”, the Tecmed tribunal applied a proportionality test. The tribunal stated that it needed to “consider, in order to determine if they [the governmental actions or measures] are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality”. 97

The tribunal’s application of the proportionality test would indicate that they were more lenient towards showing deference to the host state by applying an approach that takes both the effect and the purpose of the measure into consideration. However, the award indicates that their choice of legal sources in which they build their assessment, was selective, and was done in a somewhat pro-investor manner. A similar assessment of the Tecmed tribunal have been done by other authors, some which has characterised the preformed proportionality analysis as a “stringent standard of review, diverging from the approach of other international and supra-national fora hearing disputes concerning the exercise of public power affecting individual rights and interests”. 98

Given that the tribunal had tasked itself with applying a proportionality test, it was somewhat ironic that the tribunal asserted a disproportional amount of space and emphasis on the effects of the measure. The tribunal’s choice of relevant jurisprudence is interesting, since the tribunal only referred to arbitral awards where the effects of the measure was the only and exclusive criterion when finding indirect expropriation. 99

97 I.c.
99 The tribunal referred to the Tippetts case, the Metalclad case and the Santa Elena case.
Another interesting aspect of the award relates to the tribunals’ appropriation of ECtHR jurisprudence. The general trend in the international human rights regime is that normal regulation does not, as a main rule, result in the obligation to pay compensation to the investor. This is strongly implied by Article 1 of Protocol 1 of the European Convention of Human Rights which states “[t]he proceedings shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

However, the jurisprudence relied on by the Tecmed tribunal indicated otherwise. Through these cases, the tribunal found the degree of deprivation to be of importance,\(^{100}\) and noted that the intention behind the measure was less important than the effects.\(^{101}\) In addition to this, the tribunal seemed to indicate that the investor should be accorded deference, due to the fact that foreign investors would not be able to take part in decision-making which affect them.\(^{102}\) These circumstances indicated that the proportionality test was tipped in favour of the investor from the beginning.

This interpretation seems contradictory to the approach typically applied in the human rights regime, which is known for granting states deference in their pursuit to regulate within their own interests. The notion of granting states a margin of appreciation was expressively acknowledged in the case of James and Others v. The United Kingdom. The ECtHR stated that “[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interests””.\(^{103}\) While the tribunal did refer to this case in their analysis,\(^{104}\) it nevertheless failed to, or chose not to include this element in their interpretation.

In addition to this, the actual proportionality test seemed to emphasise the pressure from the local communities were the true reasons behind the measure, and not the breaches to the operation permit done by the investor. In their assessment of the legitimacy behind the measure, the tribunal stated that the pressure from the community had not “[led] to a serious emergency situation, social crisis or public unrest”, indicating that this was the threshold for a legitimate measure.\(^{105}\) As expressed by Henckels, this statement indicates that the tribunal demanded a

\(^{100}\) Tecmed v. Mexico, para. 115.

\(^{101}\) ibid. para. 116.

\(^{102}\) Tecmed v. Mexico, para. 122.

\(^{103}\) James and Others v. The United Kingdom, para. 46.

\(^{104}\) Tecmed v. Mexico, para. 122.

\(^{105}\) ibid. para. 133.
sort of emergency situation before a measure would be considered legitimate,\textsuperscript{106} and therefore setting an unreasonably high standard for finding legitimacy.

Looking at these circumstances, it seems like the tribunal did not give any actual deference to Mexico regarding their decision not to renew the license permit as they quickly discerned breaches of the operation permit done by the investor as an explanation for the denial and did not examine the reasons why the local community opposed the project, notwithstanding that the tribunal stated as a general matter that “[t]he principle that the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to pay any compensation whatsoever is undisputable” (italics added).\textsuperscript{107}

5.2.1.5 Conclusion

Even though the tribunal relied heavily on jurisprudence from previous arbitral tribunals and human rights courts, and as such applying sources typically used in a public international law approach, the application of these sources was applied in an investor-friendly manner. The case is thus an example that shows that mere referral to public international sources is not sufficient to characterise the approach as public international. One might explain the emphasis on the effects of the measure by the fact that the word “effects” was included in the article 5(1) of the BIT. The investor-friendly interpretation could thus be explained by the arbitrators relying on the natural wording of the article. Even though the tribunal had some general remarks about the police power doctrine, which has been relied upon by future arbitral courts, this statement did not do much for Mexico in this specific case.

The result of the case could also be explained by the professional background of the president. Due to his commercial background, he could have been sympathetic towards the investor and thus consciously or subconsciously applied the public international sources in a manner that was favourable to Tecmed.

5.2.2 Methanex v. The US\textsuperscript{108}

5.2.2.1 Facts of the case

Methanex, a Canadian owned company based in California, operated as one of the worlds largest producers of methanol in the country. After California passed a law banning the use of MTBE, which was a product based on methanol, Methanex initiated arbitration proceedings against the US, alleging that the Californian measure deprived them from a substantial portion

\textsuperscript{106} Henckels (2012) p.232.
\textsuperscript{107} Tecmed v. Mexico, para. 119.
\textsuperscript{108} Methanex Corporation v. United States of America, UNCITRAL, Award, 3 August 2005.
of their investments. Methanex claimed that these actions violated the expropriation provision of NAFTA article 1110. The US claimed the measure was legitimate as the intention behind the measure was to protect human health and the environment. The use of MTBE was found to present “a significant risk to the environment” by contaminating drinking water.\textsuperscript{110}

5.2.2.2 The composition of the arbitral tribunal

The Methanex tribunal was constituted with one commercial law arbitrator, one public international arbitrator, and one arbitrator with a mixed background. V.V. Veeder had a professional background within commercial law, and given that he held the status both as president and as a power-broker, his impression and understanding of the case would presumably be very influential. However, the respondent-appointed arbitrator Michael Reisman, was also considered a power-broker. He had a professional background within public international law, indicating that the interpretive approach could be nuanced by public international rules and principles.

5.2.2.3 Arguments of the tribunal

The tribunal reviewed Methanex’s claims for finding a breach of the expropriation provision. In their opinion, the measure caused a substantial deprivation of their investments, was not intended to serve a public purpose, was discriminatory, and lastly, Methanex had not been compensated.\textsuperscript{111}

The tribunal concluded that the measure by the US did not amount to a direct expropriation or a creeping expropriation.\textsuperscript{112} The question before the tribunal was whether the measure was “tantamount to expropriation”. The tribunal asserted, as a main rule, that a non-discriminatory measure for a public purpose, which is enacted with due process, would not be deemed expropriatory, unless specific representations made by governmental bodies had indicated otherwise.\textsuperscript{113}

The tribunal found that this exception did not apply in this case, as “[n]o such commitments were given to Methanex”,\textsuperscript{114} and Methanex were aware of and even participating in the regulatory process which Methanex condemned.\textsuperscript{115} Further, the tribunal established that the US

\begin{flushleft}
\textsuperscript{109} Methanex v. the US, Part VI, Chapter D, para. 2  
\textsuperscript{110} Methanex v. the US, Part II, Chapter D, para. 14  
\textsuperscript{111} Methanex v. the US, Part VI Chapter D, para. 2.  
\textsuperscript{112} ibid. para. 6.  
\textsuperscript{113} ibid. para. 7.  
\textsuperscript{114} ibid. para. 9.  
\textsuperscript{115} ibid. para. 10. 
\end{flushleft}
ban fulfilled the requirements of being for a public purpose and in accordance with due process, and was such not an expropriatory measure after NAFTA article 1110.\textsuperscript{116}

5.2.2.4 Analysis of legal interpretation

The question before the Methanex tribunal was whether the Californian ban was “tantamount to expropriation”, within the meaning of NAFTA article 1110.\textsuperscript{117} As a basis for their assessment, the tribunal referred to “general international law”, and stated that “a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation”.\textsuperscript{118}

The tribunal’s referral to “general international law” might be interpreted as them applying VCLT article 31(3)(c), drawing on the police power doctrine, even though this was not explicitly mentioned. The tribunal seemed to state that the police power doctrine exempt measures from being compensable, unless “specific commitments had been given”, in other words, unless the investor had legitimate expectations regarding such measures not being initiated. By applying these standards as the threshold for finding indirect expropriation, the Methanex tribunal applied a different approach than the Tecmed tribunal, and distanced itself from the previous Metalclad tribunal, who only relied on the sole effect doctrine in their interpretation of NAFTA article 1110. The Metalclad case will be analysed further below.

As mentioned, the tribunal found that the exception requirement was not fulfilled, making the measure legitimate after the police power doctrine. In what seem to be an obiter dictum, the tribunal stated that Methanex had nevertheless not been deprived of the control of its investment, and as such, Methanex had not “established that the California ban manifested any of the features associated with expropriation”.\textsuperscript{119} Given these statements, it is not clear if the result of the case would have been the same if the measure did substantially deprive the investor of the control of its investment. The fact that the question of substantial deprivation was not included in the actual assessment indicates that the measure would have been legitimate irrespectively of whether it caused a substantial deprivation to the investor.

\begin{flushright}
\begin{footnotesize}
\item\textsuperscript{116} ibid. para. 15.
\item\textsuperscript{117} ibid. para. 6.
\item\textsuperscript{118} ibid. para. 7
\item\textsuperscript{119} ibid. para. 16.
\end{footnotesize}
\end{flushright}
5.2.2.5 Conclusion

Looking back at the extensive commercial law background of the arbitral president, V.V. Veeder, it might seem surprising that the Methanex award granted so much deference to the US, a notion that is typically associated with the public international law approach. The result of this case could be explained by Reisman’s professional background within public international law, as he was considered to be a particular influential arbitrator. Another explanation is that the president himself realised the negative reactions by states and civil society after the Metalclad and Tecmed case, and as such tried to remedy the legitimacy of ISDS by acknowledging the doctrine of police powers.

5.2.3 Chemtura v. Canada\textsuperscript{120}

5.2.3.1 Facts of the case

Chemtura was a US-owned subsidiary company operating with the production of seed treatment products in Canada. One of these products was a lindane-based product which was used as a pesticide on canola and rapeseed. In 1998, concerns related to the potential harmful health and environmental effects of lindane-based products resulted in a special review by the Pest Management Regulatory Agency (PMRA) of Canada, which resulted in the termination of Chemtura’s licenses for pesticides containing lindane. After complaints by Chemtura regarding the first review, PMRA initiated a second review in which it reached similar conclusions. Following this, Chemtura initiated arbitration proceedings against Canada, claiming that the review was unfair and flawed, and that the termination decision contravened with assurances previously given to Chemtura. Chemtura alleged that these actions amounted to a breach of the expropriation provision of NAFTA.\textsuperscript{121}

5.2.3.2 The composition of the arbitral tribunal

The Chemtura tribunal was composed with one arbitrator with a commercial law background, one with a public international law background, and one with a mixed background. Gabrielle Kaufmann-Kohler, who was the president of the case, had extensive experience with commercial law and commercial arbitration. She is also ranked among the top power-brokers. Following the affinity effect theory, it would be expected that the award is characterised by a commercial law approach. However, the respondent appointed wing-arbitrator, James Crawford, had extensive experience with public international law and is also among the top leading arbitrators in the power-brokers list. This could indicate that the expected commercial law

\textsuperscript{120} Chemtura Corporation (formerly Crompton Corporation) v. the Government of Canada, UNCITRAL, Award, 2 August 2010.

\textsuperscript{121} https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/crompton.aspx?lang=eng
approach could be more or less influenced by Crawford and his presumed public international law perspective.

5.2.3.3 Arguments of the tribunal
The tribunal concluded that the decision by the PMRA did not amount to a measure “tantamount to expropriation” within the meaning of NAFTA article 1110. In reaching this conclusion, the tribunal emphasised that the decision of terminating Chemtura’s license for lindane-based pesticides only amounted to a partial economic loss for Chemtura, since this type of pesticides constituted only a small part of their economic activities. Given these circumstances, the tribunal found that measure did not fulfil the “substantially deprived” test, and was as such not an expropriatory measure.

5.2.3.4 Analysis of legal interpretation
After presenting the provision of NAFTA article 1110, the tribunal stated that there is a three-step approach in the assessment of an expropriation claim, an approach which it based on practice from previous NAFTA tribunals. Doing this, the tribunal needed to assess “(i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) have been satisfied”.

The tribunal stated that it did not need to give general statements about the “substantial deprivation” standard, limiting itself to determine the case in light of the existing facts. This has by Fauchald been characterised as a “dispute-orientated” approach, meaning that the tribunal was focused on the specific dispute at hand rather than contributing in building a substantive body of law. This has also been characterised as a trait typical for the commercial law approach.

Concluding that the measure did not amount to a substantial, the tribunal dismissed Chemtura’s expropriation claim. However, the tribunal made an interesting statement in an obiter dictum, stating that “[i]n respect of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers” and that “[a] measure adopted under such circumstances … does not constitute an expropriation”.

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122 Chemtura v. Canada, para. 242.
124 ibid. para. 265.
125 ibid. para. 266.
The tribunal made no direct referral to VCLT article 31(3)(c) in their presentation of the police power doctrine, but referred however to the Saluka case where the tribunal did cite this article where it derived the doctrine from international customary law. The Saluka tribunal also noted that the police power doctrine exempted the obligation to pay compensation even if the measure did amount to a substantial deprivation of the value of the investor’s investment. The Chemtura tribunal thus seemed to align itself with the approach adopted by the Methanex tribunal.

5.2.3.5 Conclusion
In conclusion, the Chemtura tribunal, by relying on the “substantial deprivation” test, found that no expropriation had taken place. The tribunal also stated that “PMRA took measures within its mandate, in a non-discriminatory manner, motivated by increasing awareness of the dangers presented by lindane for human health and the environment”. As such, the tribunal granted Canada a wide margin of appreciation in their right to regulate within their public interests by relying on the police power doctrine, indicating that the commercial law background of the president did not have an influence on the tribunal’s interpretation. In this case, the tribunal went even further than the Methanex tribunal, since it made no references to “representations by the state” as an exception from the police power doctrine, even though Chemtura in this case contended that it had legitimate expectations based on a withdrawal agreement with the PMRA. On the other hand, the degree of deference afforded to Canada might be explained by Crawford’s presence in the tribunal as he had an extensive public international law background.

5.2.4 Burlington Resources v. Ecuador

5.2.4.1 Facts of the case
Burlington Resources Inc. (Burlington) was a US owned company investing in several oil production facilities in Ecuador. After a substantial rise in oil prices, Ecuador adopted “Law 42” in 2006 which imposed a 50% tax on “extraordinary profits”, so-called “windfall profits” on oil production companies. One year later, Ecuador raised the tax to 99%. Burlington requested the excessive tax to be “absorbed” by a state-owned oil production company, called PetroEcuador, claiming that this type of tax fell within the tax absorption clauses contained in their production-sharing contract (PSC).

Ecuador and PetroEcuador ignored Burlington’s request for absorption. After paying the windfall taxes for a few years, Burlington stopped paying in 2009. As consequence for Bur-

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126 Saluka Investments B.V. v. Czech Republic, para. 262.
127 Chemtura v. Canada, para. 266.
128 Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/05, Award, 14 December 2012.
lington’s refusal to pay further taxes, Ecuador seized and auctioned off Burlington’s oil production shares, and later took possession of their production facilities, followed by a decree which annulled their production-sharing contract with Burlington. Following these incidents, Burlington initiated arbitration proceedings against Ecuador, claiming that their actions amounted to a breach of the expropriation provision in the US-Ecuador BIT.\textsuperscript{129}

Burlington invoked several separate circumstances which it claimed were expropriatory measures by Ecuador. Due to the comprehensively of this case, this analysis will only focus on the windfall tax measures initiated by Ecuador and the tribunal’s legal assessment of these measures.

5.2.4.2 The composition of the arbitral tribunal

The Burlington tribunal was composed with one commercial arbitrator, one public international arbitrator, and one arbitrator with a mixed background. Gabrielle Kaufmann-Kohler was once again the president. As mentioned in the Chemtura case, this would indicate that she would apply a commercial law approach to the dispute, given her extensive background and experience within commercial law and commercial arbitration. However, looking back at the Chemtura case, the tribunal applied an approach which gave a great range of deference to the host state, something that is not easily reconciled with a commercial law approach. The Chemtura case gives an indication that Kaufmann-Kohler is, as Roberts described it, “bilingual in public international law and commercial arbitration”.\textsuperscript{130} It will thus be interesting to see if Kaufmann-Kohler in this case also applied principles from the public international law regime, or if the will fall back at her commercial law expertise and derive rules and principles from there.

Brigitte Stern, who was appointed by the responding state, is also among the most influential arbitrators in the world, ranking at the top of the power-brokers list.\textsuperscript{131} Stern, on the other hand, had long experience and expertise within public international law, which might influence the award in a public international law manner. The respondent-appointed arbitrator, Francisco Orrego Vicuña, had a mixed professional background, indicating he would not affect the interpretation in any distinct direction.

5.2.4.3 Arguments of the tribunal

In their assessment of whether the windfall taxes and PetroEcuador’s subsequent failure to absorb its effects were measures “tantamount to expropriation”, the tribunal stated on a gen-

\textsuperscript{129} https://www.iisd.org/itn/2018/10/18/burlington-v-ecuador/
\textsuperscript{130} Roberts (2012) p.298.
\textsuperscript{131} Puig (2014) p.415.
eral basis that “general taxation is the result of a State’s permissible exercise of regulatory powers. It is not an expropriation”.\textsuperscript{132} Based on customary international law, the tribunal drew two exceptions to this “main rule” which was that a tax measure could be expropriatory if it was found to be confiscatory or discriminatory.\textsuperscript{133} In any event, the measure had to result in a “substantial deprivation” of the value of the investment.\textsuperscript{134} The tribunal found that even though Ecuador had breached the obligations under the PSCs, the windfall tax measures were not expropriatory since they did not amount to a substantial deprivation of the value of Burlington’s investment.\textsuperscript{135}

5.2.4.4 Analysis of legal interpretation

The tribunal’s assessment of the windfall taxes imposed by Ecuador on Burlington were separated into one legal assessment of the expropriation standard,\textsuperscript{136} then an application of this standard on the facts of the case.\textsuperscript{137} This type of legal reasoning has by Fauchald been characterised as being “legislator-orientated”,\textsuperscript{138} an approach typical for the public international law regime.

As a general basis for their assessment, the tribunal stated that “[t]axation is an essential prerogative of State sovereignty” and that “general taxation is the result of a State’s permissible exercise of regulatory powers. It is not an expropriation”.\textsuperscript{139} As such, the tribunal acknowledged that there are certain police powers by the state that will not infringe their obligations under international law.

However, the tribunal stated that there are limitations to the state’s taxation powers, and that these limitations can either follow from the treaty itself, or international customary law.\textsuperscript{140} As the treaty did not give any answer regarding the relationship between taxation and expropriation, the tribunal referred to the interpretive rules of VCLT article 31(3)(c), stating that it would apply customary law when establishing these limitations.\textsuperscript{141} As mentioned earlier in this thesis, referral to VCLT article 31(3)(c) has normally indicated an interpretation that is favourable to the state.

\textsuperscript{132} ibid. para. 391.
\textsuperscript{133} ibid. para. 393.
\textsuperscript{134} ibid. paras. 395, 402.
\textsuperscript{135} ibid. paras. 430, 456, 457.
\textsuperscript{136} ibid. paras. 391-404.
\textsuperscript{137} ibid. paras. 405-457.
\textsuperscript{139} Burlington Resources v. Ecuador, para. 391.
\textsuperscript{140} ibid. para. 392.
\textsuperscript{141} ibid. para. 392.
Drawing on international customary law, the tribunal found two exceptions to the state’s taxation powers; “[t]axes may not be discriminatory and they may not be confiscatory”. However, a breach of a state’s taxation power does not automatically lead to a breach of the expropriation provision. As stated by the tribunal, the relevant line of inquiry is whether the measure has the effect of substantially depriving the investor of the value of its investment.

Referring to several previous arbitral awards which applied the “sole effect test” to the question whether there had been a substantially deprivation, the tribunal added some general remarks to this test. It stated that loss of control of the investment is not decisive, nor must the investment “as a whole” have been expropriated. What is relevant, in the tribunal’s view, is whether “the capacity to earn a commercial return” is intact or not. However, a loss of benefits or expectations were not sufficient, “[i]t must be shown that the investment’s continuing capacity to generate return has been virtually extinguished”.

The tribunal made a brief statement regarding the intent behind the tax measure. Relying on the Tippetts case, the tribunal stated that intent “plays a secondary role relative to the effect test”. It seems that the tribunal was also under the assumption that intent only could be used in support of finding expropriation if the intent of the measure was expropriatory. This interpretation stands at odds with the solutions brought by the Methanex and Chemtura tribunals, which concluded that measures taken in accordance with a state’s police powers for a public purpose, in a non-discriminatory manner and with due process are not expropriatory even if the measures amounts to a substantial deprivation if the investors investment.

Even though the tribunal almost exclusively relied on the effects and not the intent behind the measure, the tribunal did put a high threshold for finding a measure to “substantially deprive” the investor of the value of its investment. The tribunal concluded by finding that there was no expropriation since the taxation measure only affected a portion of Burlington’s profits.

5.2.4.5 Conclusion

Even though the Burlington tribunal payed less attention to the intention behind the measure and more on the effects, an interpretation which has been characterised as being investor-friendly, the tribunal sat a high threshold for finding the measure to fulfil the “substantially deprived” test. As noted by some authors, a tribunal can also show deference towards the state by applying a high threshold to the substantially deprivation test. For example, Ranjan noted

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142 ibid. para. 393.
143 ibid. para. 399.
144 ibid. para. 401.
in his article that “[t]his test will ensure that an adverse effect on foreign investment will not constitute expropriation, unless that effects results in a “substantial deprivation” of foreign investment. This high threshold gives the host state ample space of regulatory measures for the public purpose without worrying about expropriation”.145

The tribunal made also a general statement that taxation, as a main rule, is not an expropriatory measure, making an indirect reference to the police power doctrine, which states that certain measures by the host state are not deemed expropriatory.

5.3 Doctrinal analysis of arbitral awards with a public international law president
5.3.1 Metalclad v. Mexico146

5.3.1.1 Facts of the case
In 1993 Metalclad, a US owned corporation operating through its Mexican subsidiary, bought the Mexican company COTERIN and its projects. After working on the project for several months, the municipality of Guadalcazar notified to Metalclad that it had been operating without a construction permit. Metalclad applied for the permit and continued working on the project. However, the municipality denied the construction permit due to the potential adverse environmental effects of the landfill.

In addition to the denial, the governor of the state San Luis Potosi issued an Ecological Decree declaring that 188,758 hectares within the municipality, which included the landfill, where to be considered as a protected natural area. This resulted in a complete closing of the landfill. The Metalclad initiated arbitration before ICSID, claiming that the state’s actions amounted to an illegal expropriation in breach of article 1110 of NAFTA.147

5.3.1.2 The composition of the arbitral tribunal
The Metalclad tribunal was composed with one arbitrator with a public international law background, and two arbitrators who had experience both from public international law and commercial law. The public international arbitrator, Elihu Lauterpacht, who was the president of the case, had a distinguished career with international law. Based on the affinity theory, his professional experience and expertise would indicate that the Metalclad award is characterised by traits stemming from a public international law approach. Given that the wing arbitrators had a mixed professional background and that neither of them was included in the power-

146 Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
147 Sands (2018) p.906-907
*brokers* list, one would not presume that they would influence the president to diverge from the public international law approach in any considerable manner.

### 5.3.1.3 Arguments of the tribunal

The tribunal ruled that Metalclad’s investment had been indirectly expropriated on two separate grounds. First, the tribunal relied heavily on the principle of transparency and the investor’s reasonable expectations. Drawing on these principles, the tribunal condemned the government’s “passive approach” in relation to the municipality’s denial of the construction permit, a permit the federal government itself earlier had approved and endorsed, actions which Metalclad had relied on.\(^{148}\) In extension of this, the tribunal also stated that the absence of clear rules and procedures, and a timely decision by the municipality when deciding upon the construction permit, including the fact that Metalclad had no possibility to engage in the decision-making process were circumstances which indicated that the actions amounted to measures tantamount to indirect expropriation.

Second, the tribunal stated that the municipality had acted outside its authority when it denied the construction permit on environmental grounds.\(^{149}\) This decision fell within the jurisdiction of the federal government. The tribunal concluded that this, taken together with the breach of Metalclad’s reasonable expectations, amounted to an indirect expropriation.\(^{150}\)

### 5.3.1.4 Analysis of legal interpretation

Before the actual assessment of the expropriation provision, the tribunal presented the “applicable law”.\(^{151}\) It stated that both the VCLT and the NAFTA itself provides rules of interpretation, and that the tribunal “must decide the issues in accordance with NAFTA and applicable rules of international law”.\(^{152}\) The tribunal especially highlighted the importance of interpreting the treaty in light of its object and purpose, a rule which is established both in VCLT article 31(1) and NAFTA article 102(2). In addition to this, the tribunal referred to VCLT article 31(3)(a) regarding the relevance of subsequent agreements, and article 31(3)(c) which refers to “any relevant rules of international law applicable in the relation between the parties”.\(^{153}\) Article 31(3) was however not applied in the actual assessment of the facts.

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\(^{148}\) Metalclad v. Mexico, para. 104.

\(^{149}\) ibid. para. 106.

\(^{150}\) ibid. para. 107.

\(^{151}\) ibid. Chapter VI.

\(^{152}\) ibid. para. 70.

\(^{153}\) VCLT art. 31(2)(a), 31(3).
An interesting aspect of the *Metalclad* award is the tribunal’s use of the treaty’s object and purpose. In their assessment of the fair and equitable treatment and the expropriation standard, the tribunal seemed to rely heavily on the objective to “increase substantially investment opportunities in the territories of the Parties” as stated in NAFTA article 102(1)(c), and the objective to “[ensure] a predictable commercial framework for business planning and investment” as found in the Preamble. Finding these objectives to be essential, the tribunal concluded that the lack of transparency offered by the Mexican government regarding the requirements for acquiring a municipal construction permit amounted to a breach of the fair and equitable treatment standard, a conclusion which infected the interpretation of the expropriation provision.

Relying on the object and purpose of an investment treaty often results in an interpretation that is favourable for the investor, since these objectives most often only refer to the protection of the investor and its investment. However, the NAFTA must be viewed as an exception to this, since its preamble also emphasises the need to “[undertake] each of the preceding in a manner consistent with environmental protection and conservation”, “[promote] sustainable development” and “[strengthen] the development and enforcement of environmental laws and regulation”. The *Metalclad* tribunal made no reference to these environmental objectives.

The tribunal thus had an opportunity to use the object and purpose of the NAFTA in a manner which would have granted Mexico more deference in their right to regulate the environment. However, the tribunal chose not to do so. This “cherry picking” of objectives indicates that the tribunal gave little deference to Mexico’s environmental obligations.

In the question of whether or not Metalclad’s investment had been indirectly expropriated, the tribunal relied only on the “sole effect test”, in other words whether or not the investor had been substantially deprived of the value of their investment. Even though NAFTA article 1110 itself does not mention the word “effect”, it seems like the tribunal based their effect test on an interpretation of the “ordinary meaning” of the provision. It stated that “expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State”, an interpreta-
tion which has been used as reference by later tribunals in their assessment of indirect expropriation.

This interpretation has been criticised by states and academia for applying a “generous, broad and unprecedented definition of expropriation”. The award has also been criticised for not taking the intent behind the measure into consideration. On the contrary, the tribunal expressively stated that “[t]he Tribunal need not decide or consider the motivation or intent of adopting the Ecological Decree”.

5.3.1.5 Conclusion

As mentioned earlier in this thesis, arbitrators with a public international law background are presumed to interpret the law in a manner which grants the host state a certain level of deference in their right to regulate within their public interests. Even with the reference to VCLT article 31(3), which often has been used by tribunals as a gateway to the rules of police powers doctrine in international customary law, and the preamble of NAFTA itself which also states that environmental considerations are a legitimate and relevant concern in the assessment, the tribunal seemed nevertheless to only apply arguments that favoured the investor. The Metalclad case thus seem to contradict the theory that public international arbitrators will be more sympathetic towards the host state’s right to regulate within their public interests.

5.3.2 MTD Equity v. Chile

5.3.2.1 Facts of the case

MTD Equity (MTD), a Malaysian-owned company operating in Chile, wished to invest in the development of a satellite city in the Chilean municipality of Pirque in an area which was marked for agriculture purposes, which meant that this area had to be rezoned for MTD’s construction purposes. The Chilean Government had previously given assurances that the land would be rezoned promptly, and the Foreign Investment Commission (FIC) had approved the investment by signing a contract with MTD, but had not given any assurances regarding a possible rezoning.

After MTD had invested US$17 million in the land, it became clear to MTD that a Chilean governmental agency responsible for rezoning refused to rezone the land because a rezoning would be inconsistent with Chile’s urban development and environmental policies. Due to these circumstances, MTD initiated arbitration proceedings against Chile, claiming that they

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157 Metalclad v. Mexico, para. 111.
had breached the fair and equitable treatment standard and expropriation provision of the Chile-Malaysia BIT.\textsuperscript{159,160}

5.3.2.2 The composition of the arbitral tribunal

The \textit{MTD Equity} tribunal was constituted with one public international arbitrator, and two arbitrators with a mixed professional background. The president of the arbitral tribunal, Andrés Rigo Suerda, had worked in several public international bodies and has as such a public international law background. He was not included in the \textit{power-brokers} list, but was included in “Top 25 by Appointments” list by Langford, Behn and Lie,\textsuperscript{161} indicating that he would have a certain level of respect in the arbitral community.

The wing-arbitrators, Marc Lalonde and Rodrigo Oreamuno Blanco, had both a mixed professional background. Lalonde was however considered a \textit{power-broker}, which suggests that he might be more influential. As such, his partial experience within commercial law could influence the content of this award by drawing on commercial rules and principles.

5.3.2.3 Arguments of the tribunal

It is worth noting that the Chile-Malaysia BIT itself did not contain a fair and equitable treatment clause. However, by relying on the most favourable nation-clause, Chile was able to apply on the fair and equitable treatment provision provided in the BIT between Malaysia and Croatia.\textsuperscript{162,163} The tribunal laid down two possible grounds for finding a breach of the fair and equitable treatment standard. The first was based on a breach of the Foreign Investment Contract between the government of Chile and MTD Equity. The second was based on a breach of MTD Equity’s legitimate expectations.

Regarding the first ground, the tribunal stated that Chile had not breached the BIT on account of breach of the Foreign Investment Contract. This was because the Chilean Government had acted in accordance with its own laws, and had as such not breached the Foreign Investment Contract.\textsuperscript{164} However, the tribunal found that Chile had breached the BIT by approving the investment for that particular location through the Foreign Investment Contract, even though

\textsuperscript{159} BIT between Chile and Malaysia, signed 11 November 1992.
\textsuperscript{160} \url{https://www.biicl.org/files/3915_2004_mtd_v_chile.pdf}
\textsuperscript{161} Langford (2017) p.10.
\textsuperscript{162} BIT between Croatia and Malaysia, signed 16 December 1994.
\textsuperscript{163} MTD Equity v. Chile, paras. 103-104.
\textsuperscript{164} ibid. para. 188.
it did so knowingly that the project was against Governmental policy. This in itself amounted to a breach of the obligation grant the foreign investor fair and equitable treatment.\textsuperscript{165}

5.3.2.4 Analysis of legal interpretation

The tribunal started its assessment by referring to a statement by Judge Schwebel. He stated that the fair and equitable treatment standard is “a broad and widely-accepted standard encompassing such fundamental standards as good faith, due process, nondiscrimination, and proportionality”.\textsuperscript{166} As such, the tribunal acknowledged the wide scope of the fair and equitable treatment standard.

The tribunal based its interpretation of the FET standard on the interpretive rules followed by VCLT, especially article 31(1) which states that a treaty shall be interpreted in accordance with the ‘ordinary meaning’ of the term and in light of the treaty’s ‘object and purpose’. Illustrating the vagueness of the substantive protections of BITs, the tribunal referred to mere synonyms when trying to find the ‘ordinary meaning’ of the FET standard. Stating that the treatment had to be “just”, “even-handed”, “unbiased” and “legitimate” which are equally vague terms and does little in contributing to finding the meaning of the FET standard. Looking at the treaty’s object and purpose, which was to “create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party”, the tribunal applied an interpretation favourable to the investor.

Lastly, the tribunal referred to the Tecmed tribunal’s interpretation of the FET standard, and stated that it demands “treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment”.\textsuperscript{167} Thus, the tribunal relied on a rather strict interpretation of the FET standard, giving it a content that resembles the principle of promissory estoppel in contract law.\textsuperscript{168} By using this interpretation as standard for the applicable facts of the case, the tribunal found that the conclusion of the Foreign Investment Contract led to MTD Equity having legitimate expectations about the project not being against Governmental policies. By breaching these “basic expectations”, MTD Equity was not afforded fair and equitable treatment after the Croatia-Malaysian BIT.

5.3.2.5 Conclusion

By referring to and applying the interpretive rules of VCLT, the tribunal applied a public international law approach to the dispute. However, since the BIT at hand did not mention the

\textsuperscript{165} ibid. para. 189.  
\textsuperscript{166} ibid. para. 109.  
\textsuperscript{167} ibid. para. 114  
\textsuperscript{168} Roberts (2013) p.66.
protection of the environment or similar objectives in the preamble, the tribunal relied on the objectives expressively established in the BIT which was to provide favourable conditions to the investor and its investment. Thus, the public international law approach led to an interpretation that was favourable to the investor in this case.

Instead of applying the *Tecmed* award, which has been criticised for applying a strict standard for legitimate expectations, the tribunal could have relied on the statements made by the Saluka tribunal, which had a more nuanced interpretation of the FET standard. The Saluka tribunal stated that “[a] foreign investor whose interests are protected under the Treaty is entitled to expect that the [host state] will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions)”. Nevertheless, the facts the *MTD Equity v. Chile* case indicates that the tribunal would have reached the same conclusion even if they did apply a more balanced interpretation of the FET standard, given that the representations done by the government of Chile might also have amounted to a breach after the Saluka interpretation.

Given that the president of the tribunal had a public international law background, it would be expected, due to the affinity effects, that he would be more lenient towards interpretations that granted Chile more deference. The choice of this strict interpretation could be explained by the professional background of the two wing-arbitrators, who both had experience within commercial arbitration and was considered as particularly influential arbitrators.

### 5.3.3 Perenco v. Ecuador

#### 5.3.3.1 Facts of the case

The case of Perenco v. Ecuador had the same factual background as *Burlington v. Ecuador*, since Perenco Ecuador Ltd. (Perenco), a French owned-company, was part of the same consortium as Burlington Resources, and was as such subject to the same windfall taxes initiated by Ecuador. The events of the case progressed in the same manner as in the *Burlington v. Ecuador case*, with Perenco refusing to pay windfall taxes, followed by a seizure and actioning of Perenco’s oil production shares, seizure of their production facilities, and lastly a ministerial decree with annulled the production-sharing contract between Perenco and Ecuador. As with the *Burlington* case, Perenco initiated arbitration proceedings against Ecuador, claiming that their actions amounted to an illegitimate expropriation in breach of the France-Ecuador BIT.

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169 Saluka v. Czech Republic, para. 309.
170 Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6, Award, 12 September 2014.
171 BIT between France and Ecuador, signed 7 September 1994.
172 [https://www.iisd.org/itn/2018/10/18/burlington-v-ecuador/]
5.3.3.2 Composition of the tribunal

The Perenco tribunal was constituted with one arbitrator with a professional background within public international law, and two arbitrators with a mixed professional background. Peter Tomka was the president of the case and had experience and expertise within public international law. By virtue of being president, one would therefore expect the award to be influenced by a public international law approach.

Neither Tomka nor the claimant-appointed arbitrator, Neil Kaplan, was part of the ‘power brokers’ list. The arbitrator appointed by the respondent, Christopher Thomas, had on the other hand this status and may thus have had a more influential role in the award. Even though Thomas had extensive experience within public international law, he had also practiced as an arbitrator in numerous commercial arbitrations. As such, Thomas could bring doctrines from the commercial law approach into the Perenco-Ecuador dispute.

5.3.3.3 Arguments of the tribunal

The Perenco tribunal, as the Burlington tribunal, applied the “substantially deprived” test in their assessment of whether the windfall taxation amounted to an indirect expropriation. Contrary to the Burlington tribunal, which only relied on whether the effects of the measure had substantially deprived the investor of the value of its investment, the Perenco tribunal had a threefold reasoning for finding the windfall taxes not to be an expropriatory measure.\footnote{Perenco v. Ecuador, para. 680.}

First, the tribunal based itself on several previous arbitral awards, finding the degree of control left to the investor as a relevant argument in the substantial deprivation test. The tribunal stated that “Perenco continued to operate the Blocks and there was no impairment of any rights of ownership or control”.\footnote{ibid. para. 681.} This argument indicated that there had not been a substantial deprivation.

Second, the tribunal found that even with a windfall tax at 99%, Perenco still managed to keep its business going. It did not “bring its operation to a halt or … effectively neutralise the investment or render it as it has ceased to exist”.\footnote{ibid. para. 685.} This was also an indication that there was no substantial deprivation. Third, Perenco continued to negotiate with Ecuador in pursuit of finding a “mutually satisfactory adjustment of their relationship”, which in the tribunal’s view indicated that the windfall tax did not bring the investment to an end.\footnote{ibid. para. 686.} Due to these circum-
stances, the tribunal found that the windfall taxes did not amount to a substantial deprivation of Perenco’s investment, and thus did not amount to an indirect expropriation.\(^\text{177}\)

5.3.3.4 Analysis of legal interpretation

Even though both the Burlington tribunal and the Perenco tribunal applied the “substantial deprivation” test, they did so in a different manner. While the Burlington tribunal relied solely on the economic effects of the measure, whether its capacity to generate return had been “virtually extinguished”, the Perenco tribunal relied more on whether Perenco remained in control of the investment and whether they were able to keep the business going despite constraints imposed by the windfall tax decree. In contrast, the Burlington tribunal stated that “[t]he loss of viability does not necessarily imply a loss of management or control. What matters is the capacity to earn a commercial return”.\(^\text{178}\)

The Perenco tribunal applied a higher threshold for finding the investment being “substantially deprived”, an interpretation that is more favourable to the host state. Comparing to the Burlington case which had the same factual background, it is interesting to see that the Perenco tribunal sat the threshold higher for finding a substantial deprivation than what the Burlington tribunal did. Perhaps this could be explained by the different professional backgrounds of the respective presidents.

5.3.3.5 Conclusion

In short, the Perenco-Ecuador case gives indications that a president with a public international law background will grant host states a wider range of deference than a president from a commercial law background, as the case was in Burlington Resources v. Ecuador. Thus, the Perenco and Burlington cases contributes in supporting the hypothesis that there is a difference in interpretive approaches depending on professional background.

5.3.4 Bilcon v. Canada\(^\text{179}\)

5.3.4.1 Facts of the case

Bilcon was an American company who sought to invest in the development and operation a quarry in the Canadian province of Nova Scotia. As a requirement for the approval of their project and further blasting operations, Bilcon had to carry out an extensive environmental impact assessment (EIA) which it spent a lot of money and resources on. After the Government of Canada and Nova Scotia realized the public concerns and potentially adverse envi-

\(^{177}\) ibid. para. 690.

\(^{178}\) Burlington Resources v. Ecuador, para. 397.

ronmental impacts of the project, the governments demanded a Joint Review Panel (JPR) to take over the environmental impact assessment. Based on JRP’s assessment, which stated that the project had extensive effects on ‘community core values’, the governments of Canada and Nova Scotia rejected the project.

Following this rejection, Bilcon initiated arbitral proceedings against Canada, claiming that the environmental assessment done by the JRP of their project was arbitrary, discriminatory and unfair, and thus constituted a breach of the fair and equitable treatment standard in NAFTA article 1105.180

5.3.4.2 Construction of the arbitral tribunal
The tribunal in the Bilcon case was constituted with arbitrators who all had a public international law background. Neither of them was part of the so-called ‘power brokers’ list. Two of them practiced as professors at Universities, teaching international law, while the third had served as a judge at the International Court of Justice and been a member of CESCR. Given this uniform background and based on the affinity effects, one would presume that the tribunal would apply a public international law approach in their interpretation of the fair and equitable treatment standard.

5.3.4.3 Arguments of the tribunal
After an extensive assessment of the fair and equitable treatment standard, the tribunal found that EIA taken by the JPR had breached the fair and equitable treatment standard on two separate grounds. First, Bilcon had established legitimate expectations regarding their investment due to assurances given by government officials and based on the existing federal and provincial law which seemed to support Bilcon’s investment and further EIA. These expectations were breached when Bilcon’s permit was denied even though federal government repeatedly had encouraged the project.181 Their expectations were also breached when the JRP applied an unprecedented procedure in their assessment of the project, putting extensive weight on “community core values”, a consideration which undermined the assessment of whether the project actually had environmental harmful consequences.182

Second, the tribunal stated that the JRP’s review was arbitrary by creating a new standard of assessment. The fact that there was no legal authority for the JRP to do so, and that there was not given any fair notice to Bilcon regarding this new standard, amounted to arbitrary conduct.

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180 https://www.iisd.org/itn/2018/10/18/clayton-bilcon-v-canada/
181 Bilcon v. Canada, para. 589.
182 ibid. para. 590.
by the government.\textsuperscript{183} Due to these circumstances, the tribunal found a breach of the fair and equitable treatment standard after NAFTA article 1110.

5.3.4.4 \textit{Analysis of legal interpretation}

The tribunal’s assessment of the FET standard was based on previous arbitral awards, especially the \textit{Waste Management} case, and the interpretive rules of VCLT.\textsuperscript{184} Regarding the interpretive notes issued by the Free Trade Commission of NAFTA, the tribunal stated that it was not only necessary to take them “into account” as VCLT article 31(3)(a) states, but to apply them as binding and conclusive interpretations. This solution was based on the \textit{lex specialis} rule in NAFTA article 1131(2) which provides that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section”. This interpretation shows that the tribunal acknowledged the state parties as the main principals of the agreement, giving them the right to amend their own treaty obligations. This issue was not disputed in the Bilcon case, but shows that there has been an evolution over time regarding the legitimacy of subsequent interpretive agreements in investor-state adjudication.

The FTC notes provided that the FET standard is identical to the minimum standard of treatment as provided in international customary law. The disagreement between the disputing parties concerned the content of this minimum standard.\textsuperscript{185} Even though the minimum standard had evolved from the strict interpretation established in the \textit{Neer} case into granting investors greater protection,\textsuperscript{186} the tribunal stated that “[t]he imprudent exercise of discretion or even outright mistakes [by a host state] do not, as a rule, lead to a breach of the minimum standard”,\textsuperscript{187} and that one must take into consideration that the host state may have more familiarity to the factual and legal complexities of a situation.\textsuperscript{188} The tribunal found that there had to be struck a balance between the foreign investor’s right to protection and the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own boarders” as stated in the \textit{S.D. Myers} case.\textsuperscript{189}

By emphasising the need to accord deference to the host state, the tribunal acted in a manner pursuant to the public international law approach. However, the tribunal’s actual application

\begin{footnotesize}
\begin{enumerate}[\textsuperscript{183}]
\item ibid. para. 591.
\item ibid. paras. 427-430.
\item Bilcon v. Canada, para. 433.
\item ibid. paras. 434-435.
\item ibid. para. 437.
\item ibid. para. 439.
\item ibid. para. 440.
\end{enumerate}
\end{footnotesize}
of deference, or the lack thereof, has been criticised in judicial theory. The tribunal made extensive assessments of the facts of the case, emphasising the representations made by the Canadian government and the legitimate expectations established by Bilcon. The tribunal did not, however, balance these circumstances against the public policy concerns at stake or the objective to ensure the protection of the environment, even though they had accepted these considerations as both relevant and important in their earlier interpretation of the FET standard. Instead, the tribunal seemed to discerned the relevance of the reasons which the JRP relied its rejection on.

The tribunal did, on the other hand, make an extensive obiter dictum statement about the importance of not letting investor-state treaty provisions to be “used as obstacles to the maintenance and implementation of high standards of protection of environmental integrity”\textsuperscript{190} and that “economic development and environmental integrity can not only be reconciled, but can be mutually reinforcing”.\textsuperscript{191} It is thus apparent that the tribunal was aware of the need to afford states deference in their pursuit to protect the environment. Looking back at these statements, it is even stranger that the tribunal applied such a low threshold for finding arbitrariness and concluding with a breach of the FET standard.

5.3.4.5 Conclusion
The Bilcon case shows that a presumably balanced interpretation of the protection standards in BITs does not necessarily remedy the legitimacy crisis in ISDS. As mentioned, the Bilcon tribunal seemed to afford Canada a high degree of deference in their right to regulate the environment through their interpretation of the FET standard, an interpretation that was in accordance with the public international law approach, which was expected due to the tribunals public international law background. However, a lenient interpretation is not any consolation to the state when this interpretation is not applied to the facts of the case.

\textsuperscript{190} ibid. para. 595.
\textsuperscript{191} ibid. para. 597.


6 Conclusive remarks

The issue raised in this thesis was built on the hypothesis that the professional background of arbitrators will have an influence on outcomes and legal interpretation, and in extension of this, an influence on states ability to regulate their environment within their own interests. Judicial theory predicts arbitrators coming from a commercial law background to put more emphasis on the contractual nature of the dispute, the equality of arms between the disputing parties and commercial expectations, and arbitrators coming from a public international law background emphasising the state parties as principals of the ISDS regime and according deference to host states in their pursuit to regulate the environment within their interests.

The analysis of legal interpretation performed in this thesis, however, does not contribute much in supporting this hypothesis. The analysis indicates that commercial law arbitrators are as likely to apply a “public international law” approach to their interpretation as public international law arbitrators, an answer which correlates with the statistical findings in chapter 3. For example, both the Methanex tribunal and the Chemtura tribunal made strong references to the police power doctrine, even indicating that this doctrine is the “main rule” and that exceptions to this has to prove that the investor has relied on “representations by governmental agencies” in addition to the measure having the effect of “substantially deprive” the investor of their investment. Of all the analysed cases, the Methane and Chemtura case goes furthest in giving deference to the host state, even though the presidents of these cases both had strong background within commercial law and commercial arbitration.

The analysis of the Metalclad and Bilcon cases also contributes in disproving the hypothesis. Both of these cases drew heavily on arguments which favoured the investor, so much that they even have been criticised by scholars and civil society for being bias towards the investor’s interests, seemingly neglecting the public interests at stake. Both of these cases had presidents with a public international law background.

The analysis also shows that the referral to, and interpretation of public international sources and principles, e.g. the notion of state deference, does not necessarily lead to a result that is more favourable to the host state. The Tecmed and Bilcon cases are examples of this. While both of them made general and broad statements about state deference and the police power doctrine in their legal interpretation of the expropriation and fair and equitable treatment standard, these principles were not applied in the factual assessment, resulting in an unbalanced assessment of the interests at stake.

192 See Tecmed v. Mexico, para. 119 and Bilcon v. Canada, para. 440.

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The only cases that supported the hypothesis of a bias based on the affinity effects were the Burlington Resources and Perenco cases. These cases illustrated that Perenco tribunal with the public international president interpreted the expropriation provision in a stricter manner, emphasising that the degree of control,\textsuperscript{193} the capability to keep the business going,\textsuperscript{194} and whether the parties were still negotiating\textsuperscript{195} as determinative aspects in the assessment of whether the investment was “substantially deprived”. As such, they used a higher threshold than the Burlington tribunal, which only emphasised the question of whether the investor remained in capacity to earn a commercial return in the assessment of whether the investment was “substantially deprived”.\textsuperscript{196}

In conclusion, both the statistical analysis and the legal analysis of interpretation indicates that professional background of arbitrators does not influence the host states’ ability to regulate their environment within their own public interests. In light of the so-called legitimacy crisis which has overshadowed the international treaty regime over the recent years, this conclusion is a positive contribution in nuancing the legitimacy of the arbitrators participating in the system, at least when it comes to the environmental cases. In other words, this thesis has not found arbitrators coming from different professional backgrounds to hold a conscious or subconscious “bias” towards one or the other disputing party.

However, the analysed cases still show a divergence in the level of deference which is accorded to host states, irrespectively of the arbitrators’ professional background. Further research is suggested in the pursuit of finding an explanation of this divergence, especially in regard of a possible correlation between trade law background and outcomes that favours the state. A permanent court as a replacement to the existing ad hoc arbitration system could, however, contribute to remedy this divergence and help improve predictability and accountability, consistency and coherence in investor-state jurisprudence.\textsuperscript{197}

\textsuperscript{193} Perenco v. Ecuador, para. 681
\textsuperscript{194} ibid. para. 685.
\textsuperscript{195} ibid. para. 686.
\textsuperscript{196} Burlington Resources v. Ecuador, para. 397.
\textsuperscript{197} \url{https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-5-preventing-and-resolving-investment-related-disputes/5-5-3-replacing-existing-investor-state-arbitration-system-with-a-permanent-court/}
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**International cases**

**Chemtura v. Canada** Chemtura Corporation (formerly Crompton Corporation) v. the Government of Canada, UNCITRAL, Award, 2 August 2010.

**Chevron v. Ecuador (Chevron I)** Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, PCA Case No. 34877, Award on damages, 31 August 2011.

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**European Convention of Human Rights**

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BIT between Chile and Malaysia, signed 11 November 1992.

**NAFTA**

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Annex I
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<td></td>
<td>Laccetti v. Peru</td>
<td>Bernardo Creemades</td>
<td>0</td>
<td>0</td>
<td></td>
<td>0 Partner at own private law firm</td>
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<td>13 November 2000</td>
<td>Maffezini v. Spain</td>
<td>Francisco Orrego Vicuña</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1 Transferred PIL into investment arbitration. Also worked with commercial arbitration</td>
</tr>
<tr>
<td></td>
<td>Maffezini v. Spain</td>
<td>Maurice Wolf</td>
<td>1</td>
<td>0</td>
<td></td>
<td>1 Worked within public law and private law, working as a professor</td>
</tr>
<tr>
<td></td>
<td>Maffezini v. Spain</td>
<td>Thomas Buergenthal</td>
<td>2</td>
<td>0</td>
<td></td>
<td>1 Previous ICC Judge and Human Rights exprt</td>
</tr>
<tr>
<td>11 December 2013</td>
<td>McKenzie v. Vietnam</td>
<td>Neil Kaplan</td>
<td>1</td>
<td>1</td>
<td></td>
<td>0 Mainly within commercial law, but also acted as a judge and involved with ISDS. Review Panel of WTO in Hong Kong</td>
</tr>
</tbody>
</table>
Public and Private international law

30 August 2000
McKenzie v. Vietnam
Campbell McLachlen 1 0
John Gonanda 1 0
0 Public and Private international law
0 Worked within public and private law

3 August 2005
Metalclad v. Mexico
José Luis Siqueiros 1 0
Metalclad v. Mexico
Elihu Lauterpacht 2 1
Metalclad v. Mexico
Benjamin Civiletti 1 0
0 Worked in the Mexican government but specialized in private international law
0 Professor and specialized in international law
2 Public and Private international law

25 May 2004
MTD Equity v. Chile
Ricardo Oreamuno 1 0
MTD Equity v. Chile
Marc Lalonde 1 0
1 Professor in commercial law, worked with the government and the UN
1 Background within public law, and represented Canada in trade disputes, but specialized in commercial arbitration

27 August 2015
Novera v. Bulgaria (NA)
Yves Fortier 1 0
Novera v. Bulgaria (NA)
David Caron 2 0
Novera v. Bulgaria (NA)
John Townsend 0 1
2 Public international law and commercial arbitration
2 Specialized in public international law and international trade
0 Commercial arbitration expertise

11 September 2007
Parkerings v. Lithuania
Marc Lalonde 1 0
0 Background within public law, and represented Canada in trade disputes, but specialized in commercial arbitration
10 Specialized in commercial arbitration and partner in LK

28 April 2011
Paushok v. Mongolia
Marc Lalonde 1 1
Paushok v. Mongolia
Brigitte Stern 2 0
1 Background within public law, and represented Canada in trade disputes, but specialized in commercial arbitration
0 Mostly within public international law. Has WTO expertise.

12 September 2014
Perenco v. Ecuador
Christopher Thomas 1 0
Perenco v. Ecuador
Peter Tomsa 2 1
2 Worked in the Canadian Government, with trade law disputes and commercial arbitration
2 Public international law

16 September 2015
Quiborax v. Bolivia
Marc Lalonde 2 0
Quiborax v. Bolivia
Brigitte Stern 2 0
Quiborax v. Bolivia
Gabrielle Kaufmann-Kohler 0 1
2 Background within public law, and represented Canada in trade disputes, but specialized in commercial arbitration
2 Mostly within public international law. Has WTO expertise.
2 President at ICCA, International Council for Commercial Arbitration

9 January 2015
Renée Levy & Gremcitel v. Peru
Raúl Vinueza 0 1
Renée Levy & Gremcitel v. Peru
Eduardo Zuleta 1 0
0 University of Buenos Aires, Professor (1984 - present)
0 Expert within public and private international law
0 President at ICCA, International Council for Commercial Arbitration

15 July 2016
Renco v. Peru (Renco I)
Francisco Orrego Vicuña 1 0
Renco v. Peru (Renco I)
Michael Moser 0 1
0 Transferred PI into investment arbitration. Also worked with commercial arbitration
0 Private international law and commercial arbitration

13 November 2000
SD Myers v. Canada
Bryan Schwartz 2 0
SD Myers v. Canada
Edward Chaisson 0 0
1 Professor of International Business and Trade Law
1 Expertise within commercial law and commercial arbitration

16 October 1995
Saar Papier v. Poland (Saar Papier I)
Georg Ahrens 0 0
Saar Papier v. Poland (Saar Papier I)
Tadeusz Szumski 0 0
0 Commercial arbitration
0 Commercial arbitration

29 May 2003
Tecmed v. Mexico
Carlos Bernal Verea 2 0
Tecmed v. Mexico
Horacio Grigera Naon 0 1
Tecmed v. Mexico
José Carlos Fernandez Rojas 0 0
1 Professor of Public International Law at ITAM
1 Specialized in commercial arbitration
1 Private international law and commercial arbitration

16 May 2012
Unglaube v. Costa Rica (Unglaube I)
Bernard Cremaudes 0 0
Unglaube v. Costa Rica (Unglaube I)
Franklin Berman 2 0
1 Partner at own private law firm
0 Expert within public international law and trade law
1 Private law and commercial arbitration and public law?

16 May 2012
Unglaube v. Costa Rica (Unglaube II)
Bernard Cremaudes 0 0
Unglaube v. Costa Rica (Unglaube II)
Franklin Berman 2 0
0 Expert within public international law and trade law
0 Private law and commercial arbitration and public law?

3 July 2002
Vivendi v. Argentina (Vivendi A)
Francisco Rerez 2 1
Vivendi v. Argentina (Vivendi A)
Thomas Buergenthal 2 0
0 Previous ICIJ and ICIJ judge
0 Commercial arbitration and private law

20 August 2007
Vivendi v. Argentina (Vivendi B)
Gabrielle Kaufmann-Kohler 0 0
2 President at ICCA, International Council for Commercial Arbitration
<table>
<thead>
<tr>
<th>Case</th>
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<th>Pro</th>
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<td>Vivendi v. Argentina (Vivendi B)</td>
<td>Carlos Bernal Verea</td>
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<td>2 Professor of Public International Law at ITAM</td>
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<tr>
<td>Vivendi v. Argentina (Vivendi B)</td>
<td>William Rowley</td>
<td>1</td>
<td>1</td>
<td>2 Commercial law and public international law</td>
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Annex II

Logistic regression analysis was carried out on the following bivariate and multivariate models. Controls were added separately in each model due to overexplanation in a full multivariate model. P-scores were not less than 0.10 in any of the models. For professional background, human rights law and trade law background was also included. The only background variable which evinced any strong correlation was trade law background, with a tendency for these arbitrators to vote with states in the sample.
import excel "C:\Users\malcolm\Dropbox\14 Investment\Investment Arbitration Databases\Environment and Back"
2. do "C:\Users\malcolm\Dropbox\14 Investment\Investment Arbitration Databases\Environment and Back"
3. recode WinIndex (2=1), gen(AnyWin)
   (29 differences between WinIndex and AnyWin)
4. recode Level (2=0), gen (Level_Local)
   (15 differences between Level_Local and Level_Local)
5. logit AnyWin Background Human_Rights Trade_Law

Iteration 0:  log likelihood = -79.672791
Iteration 1:  log likelihood = -79.327129
Iteration 2:  log likelihood = -79.327126

Logistic regression
Number of obs = 115
LR chi2(3) = 0.69
Prob > chi2 = 0.8752
Pseudo R2 = 0.0043

Log likelihood = -79.327126

| AnyWin       | Coef.    | Std. Err. |      z   |      P>|z|   | [95% Conf. Interval] |
|--------------|----------|-----------|----------|----------------|----------------------|
| Background   | -0.03617| 0.2503018 | -0.14    | 0.889         | -0.5424399 to 0.4700844 |
| Human_Rights | 0.143922| 0.7891056 | 0.18     | 0.855         | -1.402692 to 1.690545  |
| Trade_Law    | 0.368076| 0.4474308 | 0.82     | 0.411         | -0.5088723 to 1.245024 |
| _cons        | -1.121546| 0.2940845 | -0.41    | 0.679         | -0.6980497 to 0.4547404 |

6. logit AnyWin Background

Iteration 0:  log likelihood = -79.672791
Iteration 1:  log likelihood = -79.668738
Iteration 2:  log likelihood = -79.668738

Logistic regression
Number of obs = 115
LR chi2(1) = 0.01
Prob > chi2 = 0.9283
Pseudo R2 = 0.0001

Log likelihood = -79.668738

| AnyWin       | Coef.    | Std. Err. |      z   |      P>|z|   | [95% Conf. Interval] |
|--------------|----------|-----------|----------|----------------|----------------------|
| Background   | 0.021183| 0.235506  | 0.09     | 0.928         | -0.4400076 to 0.4823749 |
| _cons        | -0.071752| 0.2861556 | -0.25    | 0.802         | -0.6325698 to 0.4891394 |
### 7. logit AnyWin Human_Rights

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Logistic regression

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<th></th>
<th>Number of obs</th>
<th>LR chi2(1)</th>
<th>Prob &gt; chi2</th>
<th>Pseudo R2</th>
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<td>0.9390</td>
<td>0.0000</td>
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</table>

Log likelihood = -79.669864

| AnyWin    | Coef. | Std. Err. | z     | P>|z|     | [95% Conf. Interval] |
|-----------|-------|-----------|-------|--------|----------------------|
| Human_Rights | .0560895 | .7330843 | 0.08  | 0.9390 | -1.380729 to 1.492908 |
| _cons     | -.0560895 | .1934233 | -0.29 | 0.772  | -.4351922 to .3230133 |

### 8. logit AnyWin Trade_Law

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Logistic regression

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</table>

Log likelihood = -79.347003

| AnyWin    | Coef. | Std. Err. | z     | P>|z|     | [95% Conf. Interval] |
|-----------|-------|-----------|-------|--------|----------------------|
| Trade_Law | .3474013 | .4314652 | 0.81  | 0.421  | -1.4982849 to .1393058 |
| _cons     | -.1397619 | .2161923 | -0.65 | 0.518  | -.5634912 to .2039673 |

### 9. logit AnyWin Background Human_Rights Trade_Law FET

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Logistic regression

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<td>0.0000</td>
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Log likelihood = -35.877387

| AnyWin    | Coef. | Std. Err. | z     | P>|z|     | [95% Conf. Interval] |
|-----------|-------|-----------|-------|--------|----------------------|
| Background| -.4971243 | .434682  | -0.94 | 0.349  | -1.359005 to .4448369 |
| Human_Rights | -.2358702 | 1.490788  | -0.16 | 0.874  | -3.15776 to 2.68602  |
| Trade_Law | .8536796  | .684613  | 1.25  | 0.212  | -.4881372 to 2.195496 |
| FET       | 4.764977  | .833081  | 5.72  | 0.000  | 3.132168 to 6.397786 |
| _cons     | -6.201821 | 1.065692 | -5.82 | 0.000  | -8.290539 to -4.113103 |

### 10. logit AnyWin Background Human_Rights Trade_Law EXP

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Logistic regression

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<th>Prob &gt; chi2</th>
<th>Pseudo R2</th>
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<td>0.1921</td>
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Log likelihood = -62.591508

| AnyWin    | Coef. | Std. Err. | z     | P>|z|     | [95% Conf. Interval] |
|-----------|-------|-----------|-------|--------|----------------------|
| Background| -62.591508 | -62.591508 | -5.82 | 0.000  | -8.290539 to -4.113103 |
### 11. logit AnyWin Background Human_Rights Trade_Law Water

| AnyWin     | Coef.  | Std. Err. | z     | P>|z|  | [95% Conf. Interval] |
|------------|--------|-----------|-------|------|----------------------|
| Background | 0.0600085 | 0.301666 | 0.22 | 0.823 | -0.5271278 to 0.6471449 |
| Human_Rights | 0.2292097 | 0.2224171 | 0.32 | 0.749 | -1.512695 to 2.051142 |
| Trade_Law  | 0.2448791 | 0.5094647 | 0.52 | 0.603 | -0.7336534 to 1.223412 |
| EXP        | 2.157821 | 0.486701 | 4.45 | 0.000 | 1.207885 to 3.107757 |
| _cons      | -2.861375 | 0.8527212 | -4.13 | 0.000 | -4.219084 to -1.503666 |

Logistic regression

- Number of obs = 115
- LR chi2(4) = 0.15
- Prob > chi2 = 0.0862
- Pseudo R2 = 0.0511

### 12. logit AnyWin Background Human_Rights Trade_Law Extractive

| AnyWin     | Coef.  | Std. Err. | z     | P>|z|  | [95% Conf. Interval] |
|------------|--------|-----------|-------|------|----------------------|
| Background | -0.0877803 | 0.2682073 | -0.33 | 0.743 | -0.6134569 to 0.3478963 |
| Human_Rights | 0.499398 | 0.8196068 | 0.55 | 0.583 | -1.15646 to 2.05634 |
| Trade_Law  | 0.7921199 | 0.4821897 | 1.64 | 0.100 | -0.1528625 to 1.737186 |
| Extractive | 1.263355 | 0.4767663 | 2.65 | 0.008 | 0.3289101 to 2.19786 |
| _cons      | -0.5312687 | 0.3410935 | -1.56 | 0.119 | -1.1199 to 0.019 |

Logistic regression

- Number of obs = 112
- LR chi2(4) = 3.56
- Prob > chi2 = 0.4534
- Pseudo R2 = 0.0236

### 13. logit AnyWin Background Human_Rights Trade_Law EIA

| AnyWin     | Coef.  | Std. Err. | z     | P>|z|  | [95% Conf. Interval] |
|------------|--------|-----------|-------|------|----------------------|
| Background | -0.0364828 | 0.2679448 | -0.14 | 0.892 | -0.5616449 to 0.4886793 |
| Human_Rights | 0.2153145 | 0.8062723 | 0.27 | 0.789 | -1.36495 to 1.795579 |
| Trade_Law  | 0.2667602 | 0.4732603 | 0.56 | 0.573 | -0.6608128 to 1.194333 |
| Extractive | 0.6473182 | 0.405691 | 1.60 | 0.111 | -0.1478257 to 1.444242 |
| _cons      | -1.4200312 | 0.337142 | -4.25 | 0.000 | -2.080810 to -0.7607552 |

Logistic regression

- Number of obs = 112
- LR chi2(4) = 1.26
- Prob > chi2 = 0.8676
- Pseudo R2 = 0.0082

Log likelihood = -76.840002
| AnyWin          | Coef.  | Std. Err. | z     | P>|z| | [95% Conf. Interval] |
|----------------|--------|-----------|-------|------|---------------------|
| Background     | -0.0693696 | 0.2643198 | -0.26 | 0.793 | -0.587427 to 0.4406877 |
| Human_Rights   | 0.2899132 | 0.7998635 | 0.36  | 0.717 | -1.27779 to 1.857617 |
| Trade_Law      | 0.4803813 | 0.4537831 | 1.06  | 0.290 | -0.4090273 to 1.36978 |
| HIA            | -0.1596015 | 0.3870706 | -0.41 | 0.680 | -0.9182446 to 0.5990429 |
| _cons          | -0.099772 | 0.3612683 | -0.28 | 0.783 | -0.8074449 to 0.608701 |

14. logit AnyWin Background Human_Rights Trade_Law Level_Local1

Iteration 0:  log likelihood = -77.471693
Iteration 1:  log likelihood = -76.894264
Iteration 2:  log likelihood = -76.894241
Iteration 3:  log likelihood = -76.894241

Logistic regression

Number of obs = 112
LR chi2(4)    = 1.15
Prob > chi2   = 0.8055
Pseudo R2     = 0.0075

| AnyWin          | Coef.  | Std. Err. | z     | P>|z| | [95% Conf. Interval] |
|----------------|--------|-----------|-------|------|---------------------|
| Background     | -0.0642493 | 0.2649095 | -0.24 | 0.808 | -0.5834624 to 0.4549637 |
| Human_Rights   | 0.272073  | 0.7998681 | 0.34  | 0.733 | -1.293912 to 1.838058 |
| Trade_Law      | 0.4385495 | 0.4642166 | 0.94  | 0.345 | -0.4712984 to 1.348397 |
| Level_Local1   | -0.1525926 | 0.5076654 | -0.25 | 0.804 | -1.120932 to 0.8690792 |
| _cons          | -0.1581039 | 0.315379  | -0.50 | 0.616 | -0.7762354 to 0.4600276 |

15. logit AnyWin Background Human_Rights Trade_Law Specific_Learning

Iteration 0:  log likelihood = -77.471693
Iteration 1:  log likelihood = -75.02508
Iteration 2:  log likelihood = -75.021061
Iteration 3:  log likelihood = -75.021061

Logistic regression

Number of obs = 112
LR chi2(4)    = 4.90
Prob > chi2   = 0.2976
Pseudo R2     = 0.0316

| AnyWin          | Coef.  | Std. Err. | z     | P>|z| | [95% Conf. Interval] |
|----------------|--------|-----------|-------|------|---------------------|
| Background     | -0.0200061 | 0.2700173 | -0.07 | 0.941 | -0.5492303 to 0.5092181 |
| Human_Rights   | 0.2823798 | 0.80507   | 0.35  | 0.726 | -1.295528 to 1.860288 |
| Trade_Law      | 0.4380337 | 0.4613928 | 0.95  | 0.342 | -0.4658076 to 1.341955 |
| Specific_Learning | 0.648695 | 0.3406139 | 1.90  | 0.057 | -0.018896 to 1.316286 |
| _cons          | -0.7875771 | 0.4412144 | -1.79 | 0.074 | -1.652341 to 0.0771871 |

16. logit AnyWin Background Human_Rights Trade_Law OECD

Iteration 0:  log likelihood = -79.672791
Iteration 1:  log likelihood = -78.976701
Iteration 2:  log likelihood = -78.97665
Iteration 3:  log likelihood = -78.97665

Logistic regression

Number of obs = 115
LR chi2(4)    = 1.39
Prob > chi2   = 0.8455
Pseudo R2     = 0.0087
| AnyWin     | Coef.   | Std. Err. | z      | P>|z|  | [95% Conf. Interval] |
|------------|---------|-----------|--------|------|---------------------|
| Background | -0.0102766 | 0.2607902 | -0.04  | 0.969 | -0.521416 to 0.5008629 |
| Human_Rights | .1176794  | 0.7923845 | 0.15   | 0.882 | -1.435366 to 1.670725 |
| Trade_Law  | .295193   | 0.4566124 | 0.65   | 0.518 | -0.599751 to 1.190137 |
| OECD       | -0.3370081 | 0.403483  | -0.84  | 0.404 | -1.12782 to 0.453804  |
| _cons      | -.008754  | 0.3238269 | -0.03  | 0.978 | -0.643443 to 0.6259351 |

end of do-file