Discretion in International Environmental Law

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I. Introduction

Environmental treaties that are well-drafted are more likely to contribute to the solution of environmental problems. One central question that arises in the context of treaty-drafting is: Are some types of norms more *effective* than others?

This paper focuses on so-called "behavioural effectiveness", which describes whether the treaty provisions have an effect on the parties' behaviour. Many different factors may be relevant to the (behavioural) effectiveness of treaty provisions – one factor is

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whether they grant *discretion* to the treaty parties or to international dispute settlement bodies.

This paper analyses why discretionary treaty provisions have an impact on a treaty's effectiveness in changing behaviour. This impact is both positive and negative: On the one hand, discretion can be a very valuable feature of environmental treaties, because environmental problems tend to require flexible responses from decision-makers. Granting discretion in a treaty provides decision-makers with the necessary flexibility to respond to complex or rapidly changing circumstances. Discretionary norms are therefore the right choice when treaty-drafters seek to govern changing and unpredictable situations, as is often the case in environmental law. On the other hand, discretion in treaties may have a negative impact on the behaviour of states as well as on the decisions of international dispute settlement bodies. Section III identifies three reasons for this negative impact of discretionary provisions on a treaty's effectiveness: 1. Discretionary provisions may be read as legally non-binding (Section III.A); 2. They may be drafted as "indirect" obligations (Section III.B); 3. Discretionary provisions are a weaker defence against claims based on other instruments of international law (Section III.C).

Before delving into the analysis of the effectiveness of environmental treaties, this paper introduces different types of discretionary provisions in environmental treaties (Section II). It contrasts provisions granting "*implementing* discretion" (Section II.A) and provisions granting "*interpretative* discretion" (Section II.B).

II. Different Types of Discretionary Provisions in Environmental Treaties

There is no clear-cut definition of the notion "discretion" in international law. Various definitions exist in the literature.[1] At its core, discretion means freedom to decide independently. This freedom can result from norms that explicitly empower the decision-maker to exercise discretion, but it can also be the result of open-ended or vague norms. Consequently, there are also different types of discretionary provisions in environmental treaties. They fulfil a variety of functions and may lead to different problems. Despite their differences, they are all the result of the treaty-drafters' decision to make the application of the norm dependent on the (*ex post*) exercise of discretion by the decision-makers. The opposite approach would be to predetermine the outcome of the decision-making process by drafting very precise treaty provisions. The "decision-makers" may be tshe treaty parties themselves, treaty

[1] Compare, for example, Ulf Linderfalk, 'The Exercise of Discretion in International Law – Why Constraining Criteria Have a Proper Place in the Analysis of Legal Decision-Making' (2019) GYIL 407 (407) and Robert Kolb, 'Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of Discretionary Powers' (2014) Australian YBIL 135 (135).

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bodies[2] or international dispute settlement bodies. The tension between discretion and precise provisions is not unique to international environmental law[3] and the lack of legal predetermination of the decision-making process is not the only way of defining discretion[4]. However, focusing on the lack of legal predetermination as the defining criterion of "discretion" allows for the analysis of two broad categories of discretion in environmental treaties, namely implementing discretion (A) and interpretative discretion (B). Both result in a certain amount of freedom for the decision-maker; this freedom is however not unrestricted but must be exercised in accordance with the treaty provision that grants it.[5]

A. Implementing Discretion

The most prominent type of discretion in environmental treaties is "implementing discretion". Implementing discretion results from provisions that leave it up to the parties how to implement their international obligations. For example, Article 8 lit k of the Convention on Biological Diversity (CBD)[6] obliges the parties to "as far as possible and as appropriate [...] develop and/or maintain necessary legislation [...] for the protection of threatened species." Article 2(4) of the 1994 Protocol to the Convention on transboundary air pollution[7] provides that "the Parties shall make use of the most effective measures for the reduction of sulphur emissions, appropriate in their particular circumstances."

Provisions that grant implementing discretion define a certain environmental objective – such as the protection of threatened species or the reduction of sulphur emissions – and leave the choice of concrete implementing measures to the parties. For example, the CBD only speaks of "necessary legislation" but leaves the content

[2] The term 'treaty bodies' refers to conferences of the parties or scientific bodies within the framework of the convention, etc. For example, see the Ramsar Conference of the Contracting Parties or the World Heritage Committee (more in Section II.A).

[3] "[M]ost of what we call law involves a continuum between generality and precision" says, for example, William Park, 'Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion' (2003) 19(3) Arbitration International 279 (294).

[4] About the relevance of a restricted judicial review, see below Section II.B.

[5] This article understands the concept of discretion as a limited, rather than an unlimited "arbitrary" power. Such an understanding is also in line with the linguistic origins of the word "discretion". Latin *discernere* means to set apart or to determine. PGW Glare, Oxford Latin Dictionary, (Oxford: Clarendon Press 1968) 570: "discerno". This does not suggest absolute decision-making power, but a careful discernment between different decision-making criteria. About discretion as an objective power and what "differs discretion from whimsical choice," see also: Andrea Gattini, 'Judicial Discretion' (2021) *MPEPIL* para 1.

[6] Convention on Biological Diversity, June 5, 1992, 1760 UNTS 79.

[7] Long- Range Transboundary Air Pollution Convention, November 13, 1979, 1302 UNTS 217.

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of this legislation to the parties. The objective to reduce sulphur emissions could be achieved through the reduction of sulphur in fuels, measures that increase energy efficiency, agreements with industry or various other measures.[8]

Implementing discretion gives states broad flexibility to determine how they will reach a certain objective. This can be valuable in environmental treaties, because environmental problems tend to require flexible and tailored solutions. New scientific findings, the changing nature of the problems themselves or changing societal values may require an adaptation of environmental measures to new situations.[9] Treaties use different techniques to deal with rapidly changing circumstances.[10] Granting discretion to the decision-maker is one such technique as it makes possible a response that is tailored to the specific environmental challenges.

For example, Articles 4 and 5 of the World Heritage Convention (WHC)[11] oblige parties to protect and conserve cultural and natural heritage, and to take "effective and active measures" to that end "in so far as possible, and as appropriate for each country." The flexibility inherent in the open-ended formulation of these provisions has enabled the adoption of measures tailored to the challenges that resulted from the outbreak of armed conflict that endangered the natural World Heritage sites in the Democratic Republic of the Congo (DRC). The World Heritage Committee[12] was able to recommend context-sensitive "appropriate" measures to address the situation in the DRC. It called upon the DRC to employ the Congolese army to protect the sites as an "appropriate measure" based on Article 5 WHC.[13] Military support was "appropriate" in this situation, because the conflict took place in the

[8] Daniel Bodansky, 'The Art and Craft of International Environmental Law' (Cambridge: HUP, 2010) 221, 223.

[9] Daniel Bodansky, 'Multilateral Environmental Treaty Making' in Lavanya Rajamani and Jacqueline Peel (eds.) The Oxford Handbook of International Environmental Law (Oxford: OUP, 2021) 402 (418).

[10] Ibid. Another technique is to segregate the detailed regulatory provisions that are likely to require periodic updating and to put them into an annex that can be amended more easily. Jorge Viñuales also analyses different legal techniques to deal with scientific uncertainty in international environmental law. Jorge Viñuales, 'Legal Techniques for Dealing with Scientific Uncertainty in Environmental Law' (2010) Vand. J. Transnat'l L 437 (439 f, 452 f).

[11] Convention for the Protection of the World Cultural and Natural Heritage, November 16, 1972, 1037 UNTS 151.

[12] The World Heritage Committee is the executive treaty body with decision-making powers for applying the World Heritage Convention.

[13] UNESCO World Heritage Committee, Decision 30 COM 7A.4-7 adopted at thirtieth session on 8–16 July 2006, Doc. WHC-06/30.COM/19, 23 August 2006. Cited in Britta Sjöstedt, 'The Ability of Environmental Treaties to Address Environmental Problems in Post-Conflict' in Stahn et al (eds.) *Environmental Protection and Transitions from Conflict to Peace: Clarifying Norms, Principles, and Practices* (Oxford: OUP, 2017) 73 (81 ff).

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remote areas of national parks, and park rangers who usually patrolled the heritage sites ended up inside the conflict zones. The appropriate measure was therefore to provide enhanced protection and military support for the park rangers (including joint patrols with the army, and even the distribution of weapons among the rangers). The measures proved very effective for the protection of natural heritage in the DRC.[14]

Such a flexible response would not be possible if the relevant provisions left no discretion to the parties. It would not have been possible to adapt the measures to the very unusual circumstances of armed conflict in the aforementioned case. As it is difficult for treaty-drafters to regulate a complex field like environmental law ex ante, specific rules are more likely to be "underinclusive". This means that they do not apply to facts that were beyond the treaty-drafter's ability to anticipate. For this reason, discretionary norms are the right choice when treaty-drafters seek to govern changing and unpredictable situations[15] as is often the case in environmental law.

Many environmental treaties which grant implementing discretion contain phrases that qualify the provisions, so-called "qualifiers". Qualifiers are phrases like "all practical/reasonable measures" / "best practical means at their disposal" / "as far as practicable" / "as far as possible and as appropriate", or phrases like "endeavour to"/"strive to". They are very common in environmental law and many states insist on the inclusion of "qualified" provisions during negotiations instead of opting for clearer and unqualified environmental obligations.[16]

Qualified treaty provisions fulfil a dual function. On the one hand, they express a certain level of protection that depends on the capacities of the respective state. On the other hand, they grant discretion to choose the concrete measures to implement the treaty obligation.

The first function describes the flexible (but objective) level of protection contained in qualified treaty provisions. States must take measures that they can be expected to take according to their ability to perform the respective obligation. Their level of economic development, technical capabilities, resources, social needs and other individual characteristics are relevant in ascertaining whether they have taken

[14] Sjöstedt, 'Environmental Treaties Post Conflict', 73 (77 ff, 81 f).

[15] Daniel Bodansky, 'Rules vs Standards in international environmental law' (2004) American Society of International Law Proceedings' 275 (278).

[16] For example, the Second Revised Draft of the Convention on Migratory Species (CMS) stated that states 'shall', for example, protect habitats of Appendix I species, but many states, including the United States pushed for a change of the text so that it obliged them to "endeavour to" take these protection measures. See Michael Bowman et al, 'The Convention on the Conservation of Migratory Species' in Lyster's International Wildlife Law (Cambridge: CUP, 2010) 535 (549).

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measures that were "possible", "appropriate" or "reasonable". This function is objective – states have no discretion to decide about the level of environmental protection or whether they want to comply with the treaty obligation at all. Whether a state has taken all possible measures must be considered objectively, taking into account the individual characteristics and capacities of the respective state.[17]

The second function of qualified treaty provisions is to provide decision-makers with a choice concerning the concrete implementation measures. Parties have discretion to determine the measures that should be taken in a specific situation and to tailor these measures to the local conditions and challenges. The decision of which measures to take is subjective.[18]

Both obligations of result (obligations that require the realization of a specified result) and due diligence obligations (obligations to make an honest effort towards a specified outcome: see the examples of "qualified" treaty provisions above) can be the source of implementing discretion. The distinction between these two types of obligations relates to the assessment of compliance. To establish a breach in the case of an obligation of result, it merely needs to be demonstrated that the result has not been achieved, whereas in the case of due diligence obligations it is necessary to show that the implementing efforts were not sufficient.[19] These differences regarding the assessment of compliance are (per se) irrelevant for the question whether decision-makers have discretion when implementing the obligation. In both cases, they have discretion concerning the concrete implementing measures provided that the provisions do not predetermine the implementing measures they have to take to comply. What makes a difference, however, is that in case of due diligence obligations, the reviewing authority will take into account the resources, capabilities and other individual characteristics that influence the range of measures that are available to a state, and which may de facto restrict the decision-maker's discretion to choose between different measures.

[17] Daniel Barstow Magraw, 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms' (1990) Colo. J. Internat'l Envtl L 69 (82).

[18] See also Medes Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law' (2021) NILR 121 (144 f, 147, 151), who argues that due diligence obligations in environmental law have two functions: They operate in the "regulation paradigm" and in the "accountability paradigm" at the same time.

[19] Regarding the different meanings of the terms "obligation of conduct" and "obligation of result" in different contexts, see Ibid 128 ff.

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B. Interpretative Discretion

Environmental treaties contain provisions which range from very open-ended and vague to very specific. Specific norms predetermine the decision of the interpreters to a greater extent, whereas norms that are *open-ended* (broadly formulated) or *vague* (which means that there are cases where it is unclear whether the norm applies[20]) shift decision-making power to the interpreter.[21] Including vague and open-ended language can be a conscious decision or the result of a compromise between the treaty drafters to settle on vague language rather than have no agreement at all. For example, Article 3.1 of the Ramsar Convention on Wetlands[22] requires parties "to promote [...] as far as possible the *wise use* of wetlands in their territory," without giving the parties a clue what uses of wetlands are "wise" or "unwise".

Such provisions allow for a wide range of possible interpretations. Applying the interpretation rules in Article 31 of the Vienna Convention is not sufficient for ascertaining meaning in such cases – the interpretation rules guide the interpreters, but do not lead them all the way.[23] The interpretation rules may constrain the element of discretion in interpretation, but there is always a point at which the decision-maker has to make a choice to determine the (concrete) meaning of a vague norm.[24] The more vague or open-ended the wording of a treaty, the greater the scope for the exercise of choice by the interpreters and the more pronounced is their interpretative discretion.[25] Different interpreters may therefore interpret the same treaty provision differently.

The "wise use" obligation in the Ramsar Convention, for example, has been interpreted in various ways. Different states and authors from diverse countries have expressed different understandings of what "wise use" means: They have emphasized the "educational aspect" of wise use[26] or the role of indigenous knowledge in wise

[20] Timothy Endicott, 'Vagueness in Law' (Oxford: OUP, 2000) 31 ff.

[21] See also Tim Staal, 'After agreement: On the authority and legitimacy of environmental post-treaty rules' (2017) 168.

[22] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, February 2, 1971, 996 UNTS 245.

[23] Richard Gardiner, 'Treaty Interpretation' (Oxford: OUP, 2015) 453, 483 f.

[24] See Wolfgang Friedmann, 'Legal Philosophy and Judicial Lawmaking' (1961) *Colum L. R.* 61 821.

[25] Gardiner, 'Treaty' 453.

[26] Ramsar Wetlands in Japan are primarily used for educational activities. The Ministry of Environment in Japan explains wise use in terms of education, tourism and primary industry. Toshihisa Asano, 'International Nature Reserves and Local Inhabitants: The Case of the "Wise Use" of Ramsar Wetlands in Japan' (2014) Japanese Journal of Human Geography 66.

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use,[27] have linked "wise use" to poverty eradication[28] or described it as a balance between the needs of the environment and the needs of the economy.[29] None of these interpretations is wrong, because the term "wise use" was drafted to encompass a wide range of possible understandings.[30] The Ramsar Convention was designed to secure the support of very diverse states by inducing them to rethink the use of wetlands, without precisely prescribing what "wise use" means.[31] For that purpose, the interpretative discretion under Article 3.1 Ramsar Convention is very valuable as it allows states to interpret "wise use" in accordance with their specific needs.

The term "significant impact" in the Espoo Convention on transboundary environmental impact assessment[32] also demonstrates the value of interpretative discretion. It requires parties to "ensure that [...] an environmental impact assessment is undertaken" before authorizing an activity that is "likely to cause a *significant adverse transboundary impact.*" The word "significant" is not defined in the Convention. It is nonetheless of central importance. Although significance is regarded as an "objective standard"[33], it does not provide clear guidance as to the precise point at which a legal obligation to conduct an EIA is triggered.[34] An activity may range from having no impact on the environment and having extreme (catastrophic) impacts on the environment. Before deciding whether a concrete activity has significant impact, decision-makers must determine what the term "significant" itself means.[35] They must decide where to "draw the line" between

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[27] Marsden, 'Wilderness Protection in the Canadian Arctic: Connecting Traditional Ecological Knowledge with Ramsar Wise Use' (2018) Journal of Environmental Law and Practice 157.

[28] Ramsar COP11 DR.13 Rev. 1: "Draft Resolution 11.13, Rev. 1 An Integrated Framework for linking wetland conservation and wise use with poverty eradication."

[29] Yanxia Wang et al, 'Wise Use of Wetlands: Current State of Protection and Utilization of Chinese Wetlands and Recommendations for Improvement' (2008) Environmental Management, 793 (793, 802, 806).

[30] Michael Bowman, 'The Ramsar Convention Comes of Age' (1995) NILR 1, noted that "it is legitimate to speculate whether it would have been possible to frame a treaty obligation in more vague and vacuous terms."

[31] Ibid.
See also the similar arguments of Kalina Arabadjieva with regard to the Environmental Impact Assessment Directive in the EU. Kalina Arabadjieva, 'Vagueness and Discretion in the Scope of the EIA Directive' (2017) JEL 417 (431).

[32] Convention on Environmental Impact Assessment in a Transboundary Context, February 25, 1991, 1989 UNTS 309. It regulates situations where a proposed activity in one state (the origin state) is likely to cause a significant adverse transboundary impact on another state's environment.

[33] Neil Craik, 'The international law of environmental impact assessment: Process, substance and integration' (Cambridge: CUP, 2008) 61.

[34] Arabadjieva, (2017) JEL 417 (417 f).

[35] Ibid 424.

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significant (unacceptable) and insignificant (acceptable) effects of an activity on the environment.[36] This is an exercise of interpretative discretion.

The open-ended formulation of "significant" acknowledges the many ways in which economic activities could affect the environment and that significance may depend on the sensitivity of the environment in different locations. By contrast, a precise, predefined list of activities or thresholds could never encompass all the conceivable ways in which the environment could be affected.[37]

Although the interpretation of open-ended and vague treaty provisions requires independent decision-making by the interpreter, these provisions are described as "objective".[38] The classification of a provision as "objective" means that the international dispute settlement body seized can ascertain the "correct" meaning of the vague or open-ended treaty term (unfettered by the primary decision-makers determination) in case of (judicial) review of the legal determination made by the primary decision-maker.[39] Consequently, dispute settlement bodies reviewing a decision may step into the shoes of the first decision-maker, interpret anew the vague or open-ended provision and determine what the provision means (applying a *de novo* standard of review).[40]

The question is whether one can speak of "discretion" of the first decision-maker if their decision about the interpretation of a treaty provision can be replaced by the reviewing body's independent determination of the meaning of the vague or open-ended term. What speaks against this, is that a restricted judicial review or the absence thereof is sometimes described as the "key notion" of discretion.[41] In some legal systems, the term "discretion" does not encompass the interpretation of "indeterminate" legal terms,[42] because the (ultimate) determination of indeterminate

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[36] Alan Ehrlich and William Ross, 'The significance spectrum and EIA significance determinations' (2015) Impact Assessment and Project Appraisal 87 (93).

[37] Arabadjieva, (2017) JEL 417 (436).

[38] For the term "significant" see Craik, 'Environmental Impact Assessment', 61.

[39] See also Kolb, (2014) Australian YBIL 135 (135).

[40] Compare James Harrison, 'Exceptions in Multilateral Environmental Agreements' in Bartels and Paddeu (eds) 'Exceptions in International Law' (Oxford: OUP, 2020) 328 (343).

[41] See for example Kolb, (2014) Australian YBIL 135 (135).

[42] This is the case in Germany, for example. See Matthias Jestaedt, 'Maßstäbe des Verwaltungshandelns' in Dirk Ehlers and Hermann Pünder, Allgemeines Verwaltungsrecht (Berlin: De Gruyter, 2016) 93 ff. Norms consist of two parts (the legal prerequisites of the norm and the legal consequences). Discretion exists only regarding the legal consequences. The distinction between discretion and legal consequences finds no equivalent in many other domestic legal systems. Other legal systems (English administrative law, for example) have a broader understanding of discretion. Timothy Endicott calls the discretion that *results* from vague legal terms "resultant discretion". See

legal terms is a function of the courts and is therefore distinguished from the (unreviewable) exercise of discretion by administrative authorities.

The strict distinction between the (unreviewable) exercise of (administrative) discretion and the interpretation of indeterminate legal terms in some domestic legal systems is necessary to preserve the function of the judiciary and the division of competences between administrative authorities and the judiciary.[43] The situation in international law, however, is different.

In international law, states have the primary role in creating the law, but at the same time, they are usually also the ones who interpret and apply it. Moreover, international law lacks central judicial organs to settle disputes about the interpretation of treaties. This has important consequences for the role of interpretative discretion. In domestic law, the choice between vague and specific norms is mostly a choice about who gives content to the law – either the legislature by formulating a precise rule, or the courts or executive authorities by giving specific content to a vague norm when applying it in a specific case. By contrast, the lack of compulsory dispute settlement in international law means that it is usually the states themselves who create *and* give content to the vague treaty rules. This is described as "auto-interpretation". Whereas some legal regimes have established compulsory dispute settlement procedures (for example investment law), many international legal regimes (such as environmental law) generally do not provide for third-party dispute settlement. Therefore, there is usually also no review of interpretative discretion. This is one reason why states prefer vague and open-ended treaty provisions in treaties: they give them significant power to determine the meaning of their treaty obligations.[44]

Due to the absence of central and compulsory dispute settlement in international environmental law, the interpretation of vague or open-ended provisions by treaty parties is seldom replaced by a reviewing body's interpretation of the same provision. In case there is judicial review of the interpretation of vague or open-ended provisions (which is quite rare in international environmental law), international dispute

Timothy Endicott, Administrative Law (Oxford: OUP, 2011) 237. Moreover, in the international law literature, the freedom that results from vague and open-ended provisions is often described as "interpretative/interpretive discretion". See for example, Wolfgang Alschner, 'Investment Arbitration and State-Driven Reform' (Oxford: OUP, 2022) 219 ff.

[43] "The exercise of a judicial discretion in the interpretation is somewhat different from the exercise of a discretion in the performance of an executive or administrative function. The former is interpretation of a legal rule and the latter is implementation of a legal rule. An element of discretion is involved in interpreting what have been described as 'indeterminate legal concepts'. [...] Ultimately, therefore, it is the judicial function to identify the meaning of indeterminate legal concepts." Douglas Fisher, Legal Reasoning in Environmental Law' (Cheltenham: Edward Elgar, 2013) 32 ff.

[44] Bodansky, (2004) American Society of International Law Proceedings' 275 (277).

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settlement bodies may reduce the degree of scrutiny with regard to the interpretation of such open-ended terms. For example, in the case *Whaling in the Antarctic*, the International Court of Justice declined to ascertain precisely what is meant by the rather open-ended treaty term "scientific research".[45] Although the court dismissed the argument that the applicable treaty, the Whaling Convention, granted the parties unfettered discretion to determine the scope of this term, their discretion was also not entirely undermined by the court's decision. Thus, dispute settlement bodies can also show restraint regarding treaty parties' interpretation of vague or open-ended treaty terms (not only regarding their exercise of explicitly granted discretion, such as implementing discretion). There is therefore no reason to discard the notion of "interpretative discretion" altogether just because the interpretation of the primary decision-maker *may* be replaced by the interpretation of a reviewing body.

To identify a defining criterion or "key notion" of discretion in international law, the importance of auto-interpretation and the general lack of central, compulsory dispute settlement speak in favour of putting the focus on the (ex ante) element of choice in the decision-making process rather than focusing on the absence of ex post judicial review. The element of choice means a certain freedom in the decision-making process that is due to a lack of legal predetermination in the treaties. It may result both from provisions that explicitly grant discretion as well as from vague or open-ended treaty provisions. For the purposes of this paper, the notion of discretion therefore also encompasses the exercise of interpretative discretion, although it may later be subject to judicial review.

III. Discretionary Provisions and their Impact on the Effectiveness of Environmental Treaties

This section deals with the impact of discretionary norms on a treaty's effectiveness. There are different notions of effectiveness. The main question is whether an environmental treaty helps solve the environmental problem (i.e. protects an animal species, combats pollution, etc). In that sense, "effectiveness" means the extent to which a treaty solves the problem it was supposed to address.[46] This so-called

[45] "Nor does the Court consider it necessary to [...] offer a general definition of 'scientific research'." *Whaling in the Antarctic* (Australia v Japan: New Zealand Intervening), Judgment [2014] ICJ Rep 225, para 86. See also: "What is 'scientific research' is a question on which qualified scientists often have a divergence of opinion." (Dissenting Opinion of Judge Owada, para 25). "[A] state does [however] not have an unfettered discretion to decide the meaning of 'scientific research'." (Separate Opinion of Judge Cançado Trindade, para 23).

[46] Sandrine Maljean-Dubois, 'The Effectiveness of Environmental Law' (Cambridge: CUP, 2018) 3.

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"problem-solving effectiveness"[47] is very difficult to measure, because it is hard to assess whether the treaty itself is causal for the solution of an environmental problem. There are many factors that could play a role, including the nature of the problem being addressed, states' political will, or the number and type of states that have ratified the treaty.[48]

Apart from problem-solving effectiveness, the literature also understands effectiveness in terms of norm compliance. Compliance is measured by comparing a behaviour to a legal standard.[49] However, the problem is that non-compliance with vague and discretionary norms is not as apparent as non-compliance with precise norms.[50] Moreover, assessing effectiveness in terms of compliance may also not be very meaningful, because a treaty with very lax provisions[51] may have a very good compliance rate, but does not help solve the environmental problem, because states do not have to change their behaviour very much (or at all) to comply with the treaty.

This section will therefore focus on so-called "behavioural effectiveness", which describes whether the treaty provisions have an effect on the parties' behaviour.[52] It will also consider the effectiveness of discretionary provisions in proceedings before international dispute settlement bodies (i.e. whether discretionary provisions influence the outcome of such proceedings and whether parties can rely on them as a basis for a claim or to defend their measures against claims based on other international instruments). Their effectiveness in dispute settlement may (indirectly) impact states' incentives to change their behaviour on the domestic level.

Treaty provisions differ along many dimensions that may be relevant to their effectiveness;[53] one factor may be the amount of discretion they leave to the decision-makers. On the one hand, discretionary provisions provide decision-makers with the flexibility to react and adapt measures to unforeseen circumstances (see Section II) and may therefore enhance a treaty's effectiveness. On the other hand, discretion may also negatively impact a treaty's effectiveness.

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[47] Ibid 4.

[48] Ronald Mitchell, 'Compliance Theory' in Rajamani and Peel *Environmental Law*, 887 (902).

[49] Ibid 889.

[50] Bodansky, 'Art and Craft', 179.

[51] For example, the whaling quotas in the 1960s were set very high, allowing tens of thousands of whales to be killed. Bodansky, 'Art and Craft', 105.

[52] Maljean, 'Effectiveness' 4.

[53] Bodansky, 'Art and Craft', 102.
Other important factors may be whether they contain formally binding commitments or recommendations, whether there are bodies which monitor the implementation of the provisions, etc. See also Mitchell, 'Compliance Theory' 887, (898 f).

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Discretion may have a negative impact on the behaviour of states directly, as well as on the decisions of international dispute settlement bodies. Decisions of dispute settlement bodies can only contribute to the effectiveness of a treaty if the parties can rely on the treaty's provisions in proceedings, which is not always the case for discretionary provisions.

What are the reasons for the negative impact of discretionary rules on a treaty's effectiveness? This section analyses three possible reasons: 1. Discretionary provisions may be read as legally non-binding; 2. They may be drafted as "indirect" obligations; 3. Discretionary provisions are a weaker defence against claims based on other instruments of international law.

A. Discretionary Provisions May Be Read as Legally Non-binding

The first reason why discretionary provisions may have a negative impact on a treaty's effectiveness is that they might be read as non-binding provisions.[54] Both treaty parties as well as dispute settlement bodies may understand discretionary treaty provisions this way. This perceived lack of obligation at the international level may lead to a failure to implement the obligation at the domestic level.[55]

1. Treaty Parties

Open-ended and qualified treaty provisions could be understood as granting states broad discretion to decide on either the level of environmental protection that is comfortable for them or even whether they want to take any implementation measures at all. States that understand discretionary provisions as optional might have less incentive to implement the treaty. Consequently, they would see no need to change their behaviour to comply with the treaty.[56]

For example, an argument that was brought forward in favour of the United States ratifying the Convention on Biological Diversity[57] was that the text of the Convention clearly leaves wide discretion in all matters regarding implementation at the national

[54] One must generally distinguish between the legal bindingness of the instrument as such (its legal status) and the legal character of each provision (whether the single provisions are mandatory or non-mandatory). See Bodansky, 'Multilateral', 402 (414).

[55] About the weak national implementation of the open-ended Ramsar Convention in New Zealand: Pip Wallace, 'The Reduced Effect of International Conservation Agreements: A New Zealand Case Study' (2015) JEL 489 (495).
See also Ramsar Global Wetlands Outlook 2021, which states that "more implementation is urgently needed in many countries" with regard to improving the deteriorated state of wetlands.

[56] The more flexible the treaty commitment, the lower its "sovereignty and compliance costs." Bodansky, 'Art and Craft', 177.

[57] The United States has signed, but not ratified the Convention.

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level. It was therefore argued that the United States would retain "full sovereignty" anyway when becoming party to the Convention, as it provides so much discretion and flexibility based upon national circumstances that no new legislation would be necessary for the United States to implement it (there is "no plausible current scenario where the United States [...] would be forced to take an action or refrain from an action because of the treaty itself"[58]). This suggests that the implementing discretion in the CBD (see Section II.A) – *how* to achieve certain environmental objectives – is read as granting discretion regarding *whether* to take any implementation measures at all. This understanding facilitates the argument that a state already meets the obligations under a treaty and that there is no need to change its behaviour to comply with the treaty.[59]

In summary, states that (mis)read treaty provisions granting implementing discretion as provisions granting discretion whether to take any implementation measures at all, may consider themselves in compliance with the treaty even if they decide to take no implementation measures. Since they see no need to change their behaviour to comply with the treaty, they have less incentive to take implementation steps on the domestic level. In terms of "behavioural effectiveness", the treaty is thus not effective.

2. Dispute Settlement Bodies

Open-ended formulations and qualified language might also prevent treaty provisions from having an influence on the outcome of the proceedings before international dispute settlement bodies. This may indirectly impact states' incentives to take implementation measures at the domestic level: If dispute settlement bodies can find no violations of discretionary provisions, parties might have less incentive to take implementation measures at the domestic level.

In *Certain Activities/Construction of a Road*, Nicaragua argued that Costa Rica's failure to carry out an environmental impact assessment before building a road along the border area breached Articles 14.1 lit a-c of the Convention on Biological Diversity (CBD).[60] Article 14.1 lit a of the CBD reads: "Each Contracting Party, as far as possible and as appropriate, shall: (a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have

[58] William Snape, 'Joining the Convention on Biological Diversity: A Legal and Scientific Overview of why the United States must wake up' (2010) *Sustainable Development Law & Policy* 6, 14.

[59] David Farrier and Linda Tucker, 'Beyond a Walk in the Park: The Impact of International Nature Conservation Law on Private Land in Australia' (1998) MelbULRev, 565 (565).

[60] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Memorial of Nicaragua, para 5.71 ff.

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significant adverse effects on biological diversity." The International Court of Justice (ICJ) held that this provision "does not create an obligation to carry out an environmental impact assessment before undertaking an activity that may have significant effects on biological diversity."[61] Therefore, Nicaragua could not rely on that provision to argue that Costa Rica had violated Article 14 CBD by failing to conduct an environmental impact assessment for its road project.[62]

The Court did not provide an explanation for this finding. One explanation might be that the qualified language in Article 14 CBD prevented the Court from regarding Article 14 as legally binding.[63] Stuart Harrop and Diana Pritchard, for example, argue that even if the provisions are expressed in clearly obligatory language ("shall"), they are "diluted" because of the use of qualifying phrases such as "as far as possible" and "as appropriate". Thus, the text of treaties containing qualified language like the CBD "is fundamentally flawed in that its textual qualifications seriously compromise its obligations."[64]

Emphasis has also been put on the term "(as) appropriate". In *Aerial Herbicide Spraying*, Ecuador sought to rely on Article 14 CBD to support its argument that Colombia should have carried out an environmental impact assessment before starting an aerial herbicide spraying programme. Ecuador argued that an environmental impact assessment would have been both "possible and appropriate" in the circumstances of the present dispute.[65] Colombia (the respondent) argued that the qualifier introduces "a degree of discretion inconsistent with a formal notion of bindingness."[66] The reason for that, according to Neil Craik, is that the determination of "appropriateness" is oriented towards a *subjective determination* of the states. Therefore, states have a degree of discretion in terms of *whether* to implement the requirement to conduct an EIA in connection with biological diversity.[67]

However, this discretion is not unlimited. The term "as appropriate", which is a very common qualifier in the CBD and many other environmental treaties, grants

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[61] *Construction of a Road*, Judgment, [2015] ICJ Rep 665, para 164.

[62] Sandrine Maljean-Dubois and Elisa Morgera, 'International Biodiversity Litigation' in Futhazar et al (eds.), *Biodiversity Litigation* (Oxford: OUP, 2022) 331 (343 f).

[63] Ibid.

[64] Stuart Harrop and Diana Pritchard, 'A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory' (2011) *Global Environmental Change* 474 (476).

[65] *Aerial Herbicide Spraying (Ecuador v Colombia)* (ICJ), Memorial of Ecuador, para 8.41 ff, 8.51.

[66] *Aerial Spraying*, Counter-Memorial of Colombia, para 8.71.
See also Craik, 'Environmental Impact Assessment', 88.

[67] Ibid, 98 ff.

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discretion to the parties to tailor the concrete implementing measures to the specific circumstances of the case (see Section II.A). Article 8 lit a CBD is another typical example. It provides that the parties "shall, as far as possible and as appropriate establish a system of protected areas." States are free to decide about the specific form of protected areas on the basis of what is appropriate in their concrete situation (i.e. for a specific ecosystem, for a specific species). In some circumstances it may indeed be appropriate to take no measures at all under Article 8 lit a CBD. For example, it may not be "appropriate" to establish a protected area when it would not help to preserve a specific species – for example if an animal species is very mobile, a static protective area would not contribute very much to its protection.[68] In that case, the parties are not obliged to implement Article 8 CBD; they have discretion *not* to establish a protected area.[69]

Thus, it is only when it is not "appropriate" that states may choose to *not* carry out an obligation like Article 8 or Article 14 CBD at all. If, on the contrary, it is both possible and appropriate, states are under a legal duty to establish a protected area or introduce procedures requiring an EIA.[70] The qualifiers in the treaty provision do not render the provision's obligation optional. According to the treaty, a party must determine the concrete implementation measures according to its capacities and the requirements of the situation. If, therefore, the implementation measures are clearly below what might be expected from a specific state under the specific circumstances, it would violate its obligation.[71]

To sum up, terms like "possible" and "appropriate" do not render provisions that are otherwise formulated in legally binding terms ("shall" or "will") optional or non-binding. Such an interpretation would render meaningless the legally-binding language in the provisions.[72] Of course, qualified treaty provisions do not provide any concrete guidance as to how high the level of protection should be – this has to be assessed according to what is "possible" for the state (see Section II.A). Furthermore, they also do not provide for the exact measures that a state must take – the state must

[68] Wallace, (2015) JEL 489 (492). About the suitability of protective areas for different bird species in New Zealand.

[69] See also Ingvild Ulrikke Jakobsen, 'Marine Protected Areas in International Law' (Leiden: Brill, 2016) 159 ff, 166 ff.

[70] Ibid 147 f.

[71] Establishing "paper parks" would for example be insufficient to fulfil Article 8 CBD. "Paper parks" are legally established protection areas without any protection activities to prevent biodiversity loss.

[72] "[...] a legal text should be interpreted in such a way that a reason and a meaning can be attributed *to every word in the text*." *Anglo-Iranian Oil Company Case (United Kingdom v Iran)*, Judgment [1952] ICJ Rep 93, 105.

University of Vienna Law Review, Vol. 7 No 1 (2023), pp. 38-67, https://doi.org/10.25365/vlr-2023-7-1-38.

choose the "appropriate" measures. The qualifiers "possible" and "appropriate" therefore constrain the parties' discretion under the Convention. States cannot choose to *not* implement a provision such as Article 8 or 14 CBD without at first considering whether taking measures would indeed be impossible or inappropriate.[73] Thus, discretionary provisions are not *per se* less effective. They are rendered less effective if they are (mis)read as merely optional provisions, because this may prevent them from having an influence on the outcome of the proceedings before international dispute settlement bodies.

If the discretion in provisions like Article 14 CBD is not inconsistent with legal bindingness (contrary to Colombia's argument), what could then be the reason for the ICJ's decision that Article 14 does not create an obligation to carry out an EIA? Another explanation for the limited impact of Article 14.1 lit a CBD on the proceedings lies not in the qualifier, but in the fact that it does not provide for a *direct obligation* to conduct an environmental impact assessment (see below Section III.B). Article 14.1 lit a CBD merely provides for the introduction of "*appropriate procedures* requiring environmental impact assessment." Thus, if a state has such procedures (i.e. domestic legislation that requires authorities to consider the impact of proposed projects on biodiversity[74]) in place, it has fulfilled its obligation. It contains no requirement to conduct an impact assessment for a concrete project.[75]

B. Discretionary Provisions May Be Drafted as Indirect Obligations

Another reason why it may be difficult to rely on discretionary provisions before dispute settlement bodies is that it is harder to argue that the failure to take a *specific* measure is in breach of a norm which grants parties a wide choice on how to achieve a certain result. This is particularly the case if the provisions are formulated as "indirect obligations".

A dispute settlement body may find that because a provision leaves parties a wide choice, the applicant has not shown that the failure to take a specific measure has breached the obligation.[76] The *Santoña Marshes* case concerned the failure of Spain to take certain specific measures – namely the classification of a special protection area – under the directive on the conservation of wild birds. Spain argued that the

[73] Compare also Jakobsen, 'Marine Protected Areas', 153.

[74] See Craik, 'Environmental Impact Assessment', 100.

[75] See also *Construction of a Road*, Counter-Memorial of Costa-Rica, para 5.30 f.

[76] See also *Greenpeace E.V. and others vs Germany* (ECtHR, 12 May 2009) concerning the authorities' refusal to take specific measures (in this case, equipment with a particular filter) to curb respirable dust emission of diesel vehicles.

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directive merely imposed an "obligation to achieve a result, namely to secure the conservation of wild birds," while the Commission argued that according to the directive "specific measures must be taken to conserve the habitats of wild birds."[77] While the obligation to "secure conservation" implied further discretion on how to achieve this result (meaning that this obligation might therefore not be invoked to demand specific action), the obligation to "take measures to conserve habitats" was a specific obligation. It was therefore found that it could be directly invoked.[78]

Some treaty provisions however contain "interposed" phrases that explicitly provide the parties with the authority to (indirectly) achieve the respective environmental objective through the conclusion of further agreements or the establishment of domestic regimes. These phrases not only emphasize the party's discretion on how to achieve the objective, they also make it harder to invoke the provision before an international dispute settlement body. The reason why it is hard to rely on such provisions is not their discretionary nature *per se*, but their formulation, which makes it difficult to demand specific action in an individual case.

The *Certain Activities/Construction of a Road Case* includes the obligation in Article 14.1 lit a CBD to "[i]ntroduce appropriate procedures requiring environmental impact assessment." The claimant Nicaragua argued that although this provision merely provides for the introduction of *procedures* requiring impact assessment, it implies the obligation to also apply it in a *specific case* (for a particular project).[79] The ICJ, however, came to the conclusion that Article 14 CBD did not create such a direct obligation (see above).

The question whether a treaty provision contains a direct obligation also arose in arbitral proceedings between Ireland and the UK concerning access to information on effects of nuclear reprocessing on the marine environment. The case involved the interpretation of Article 9.1 of the OSPAR Convention,[80] which states that "the Contracting Parties shall *ensure that their competent authorities are required to* make available the information [...] to any natural or legal person." The question was whether Article 9.1 merely requires the parties to establish an internal regime that must make information available or whether it imposes a direct obligation on the parties to make the information available. The majority decided that Article 9.1 must

[77] CJEU Case C-355/90, *Commission v Spain*, 2 August 1993, ECLI:EU:C:1993:331, paras 13 ff.

[78] See also Fisher, 'Legal Reasoning', 273 ff.

[79] *Construction of a Road*, Memorial of Nicaragua, para 5.72.

[80] Convention for the Protection of the Marine Environment of the North- East Atlantic, September 22, 1992, 2354 UNTS 67.

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be read as directly requiring parties to disclose the information.[81] Arbitrator Michael Reisman, in his separate declaration, however argued that this understanding of the provision would require the deletion of the critical phrase "ensure that their competent authorities are required to." The provision would then read: "The Contracting Parties shall make available the information to any natural or legal person."[82] According to Reisman, this is not what Article 9.1 says: Article 9.1 requires parties to adjust their domestic law, but the choice of means to respond to information requests is left to the respective state. It allows a certain "margin of discretion" as to its implementation.[83] A state breaches that provision only if its domestic regime for information requests is not compatible with Article 9.1.[84] This excludes a direct international obligation to make particular information available in a specific case.

To sum up, discretionary provisions frequently contain phrases that provide the parties with the authority to achieve the respective environmental objective indirectly through the conclusion of further agreements or the establishment of domestic regimes. This makes it difficult to demand specific action in an individual case. Thus, it is not the discretionary nature of a provision as such, but the indirect formulation of a provision that may prevent discretionary treaty provisions from being effective in proceedings before international dispute settlement bodies.

C. Discretionary Provisions Are a Weaker "Defence"

Discretionary provisions may be difficult to rely on when they are invoked as a defence against claims based on other instruments of international law. This is the case, for example, in the context of trade or investment disputes.

States are bound to a variety of treaties from different areas of international law. These treaties protect different interests and may therefore contain obligations that are hard to reconcile (for example, economic versus environmental interests). Relying on the protection standards in investment treaties, investors may bring claims against states and argue that states' environmental measures interfere with their obligations under investment treaties. Sometimes, however, domestic environmental measures are linked to the implementation of environmental treaties. In that case, the

[81] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)* (PCA) (2003), Award, paras 129 ff.

[82] Ibid, Separate Declaration of Michael Reisman, para 5.

[83] Ibid paras 6 ff, 18.

[84] Ibid paras 19 f.

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investment tribunal is confronted with a tension between international investment law and international environmental law.

States might argue that the respective investment protection standard (such as "fair and equitable treatment") was not breached, because state organs have taken the contested measures (for example, the withdrawal of a mining licence in an environmentally sensitive area) to comply with their environmental obligations, and not to discriminate against the investor. Thus, states may invoke their environmental obligations to prevent their domestic measures from being considered a breach of investment protection standards.[85]

Investment tribunals might, however, not be persuaded that the state was indeed confronted with conflicting international obligations. For a true conflict to exist, it has been argued (quite narrowly) that the treaty provisions must impose mutually exclusive obligations: There is a conflict when simultaneous compliance with two or more treaty obligations is impossible.[86] By contrast, there is no true conflict if it is possible to comply with the obligations of one instrument by refraining from exercising discretion accorded by the other[87] or by exercising discretion in a certain way.

Environmental treaties frequently provide for implementing discretion or broad interpretative discretion. If, for a true conflict to exist, an environmental norm must *require* a State to adopt a certain conduct that is in conflict with the investment treaty, the environmental norm must be (relatively) *precise*. Sometimes environmental treaties indeed clearly command the adoption of a certain conduct and leave little discretion to the parties. Article III.2 Convention on International Trade in Endangered Species (CITES),[88] for example, provides that "the export of any specimen included in Appendix I shall require the prior grant and presentation of an export permit. An export shall only be granted when the following conditions have been met." In this case, it is clear that the state must require permits for exportation of species under CITES. If a state enacts regulations requiring such permits, the

[85] Jorge Viñuales, 'The 'Dormant Environmental Clause' (2012) Graduate Institute of Geneva Working Paper, 1 (1 ff).

[86] See Gabrielle Marceau, 'Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO agreement and MEAs and other treaties' (2001) JWT, 1081 (1084).

[87] Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) BYIL 401 (425 ff).

[88] Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 2, 1973, 993 UNTS 243.

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regulations can clearly be regarded as the implementation of an international environmental obligation.[89]

If, however, an environmental treaty grants discretion, it is not easy to argue before an investment tribunal that a specific environmental measure, which negatively affected an investor, was *required* under international environmental law. The investor could counter this argument by pointing out that the state had a choice regarding the implementation measures. For example, while Article 2 Ramsar Convention provides for the designation of one or more suitable wetland(s) for inclusion in the list of wetlands of international importance, states have considerable discretion in the selection of areas as protected wetlands as well as in the specific measures to be adopted for their protection. The investment case *Empresa Lucchetti v Peru*[90] concerned the construction of a pasta factory near a wetland protected under the Ramsar Convention. Jorge Viñuales argues that states have discretion under Art 2 Ramsar Convention. Thus, if a state chooses an area near the business location owned by the foreign investor – and consequently adopts environmental regulations which restrict the activities of the investor – it is more difficult for the state to argue that these environmental measures were *required* by international environmental law.[91]

Similarly, in *SPP v Egypt*, the investor argued that the Egypt was not required by the World Heritage Convention to cancel their investment project in order to protect antiquities at the investment site. It could have taken different measures to achieve compliance with Article 5 of the Convention. Moreover, the WHC generally leaves the choice as to which (cultural or natural) sites should be protected to the states – it is not imposed externally (see Article 3 WHC: "It is for each State Party to this Convention to identify and delineate the different properties situated on its territory [which are considered as natural or cultural heritage]"). According to the tribunal in *SPP vs Egypt*, the protection required by the World Heritage Convention could therefore not have been relevant at the time of Egypt's measures, because the state chose to nominate the site for inclusion in the World Heritage List only after the

[89] See also Jorge Viñuales, 'Foreign Investment and the Environment in International Law: An Ambiguous Relationship' (2010) Graduate Institute of Geneva Working Paper 1 (35 f).

[90] *Empresa Lucchetti S.A. and Lucchetti Peru S.A. v. Republic of Peru, ICSID Case No. ARB/03/4,* Decision of 7 February 2005. However, the tribunal found that it lacked jurisdiction over the dispute and there was no decision on the merits.

[91] Viñuales (2010) Graduate Institute of Geneva Working Paper 1 (36 ff).

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cancellation of the investment project. The international obligation to protect the site thus only arose after the states' decision to cancel the investment.[92]

To summarize, host states may find it difficult to invoke an environmental agreement, which *requires* the environmental measure it has taken. Many environmental provisions grant discretion and therefore do not require the adoption of specific measures. This may reduce their effectiveness as defence arguments against investment claims.

As a state may have multiple options to achieve an environmental objective, another question arises: To what extent must a state exercise its discretion under an environmental treaty *in accordance* with the applicable investment treaty?

In *Eskosol vs Italy*, a similar question was discussed with regard to EU-law. The tribunal held that if the respondent state had argued as a defence that it was required to take the challenged measures by another obligation under international law (in this case, EU law), it would have to take into account whether the state "had any legal discretion to act otherwise in accordance with its other international obligations."[93] Similarly, in *Electrabel vs Hungary*, the investor also argued that the respondent state had discretion under EU law, but that the state did not exercise that discretion in conformity with its obligations towards the investor under the applicable investment treaty. Thus, "[t]he key issue is whether Hungary breached the ECT when exercising the discretion afforded to it by EU law."[94]

As environmental treaties only provide for a certain environmental objective and leave how to achieve this objective up to the states, states may have a choice between multiple (equally effective) environmental measures. In that case – and in accordance with the reasoning in *Eskosol* and *Electrabel* – states must choose the environmental measure which is the most compatible with the investment treaty.[95]

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[92] *Southern Pacific Properties (Middle East) Limited (SPP) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, paras 153 f.

[93] *Eskosol S.P.A. v Italian Republic, ICSID Case No. ARB/15/50,* Decision on Italy's Request for Immediate Termination, 7 May 2019, para 123.

[94] *Electrabel S.A. v Republic of Hungary, ICSID Case No. ARB/07/19,* Decision on Jurisdiction, 30 November 2012, para 4.168.

[95] Compare also S.*D. Myers Inc. v. Canada, NAFTA Arbitration* (UNCITRAL Rules), Partial Award, 13 November 2000, paras 215. The tribunal held that "it should not be presumed that CANADA would have been able to use [the Basel Convention on the transboundary movements of hazardous wastes] to justify the breach of a specific NAFTA provision because ... where a party has a choice among equally effective and reasonably available alternatives for complying ... with a Basel Convention obligation, it is obliged to choose the alternative that is [...] least inconsistent ... with the NAFTA."

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To sum up, another reason why it may be difficult to rely on environmental provisions that grant discretion is that investment tribunals may find that the discretion must be exercised in accordance with investment law. Under this approach, the discretion to implement environmental obligations is *de facto* constrained by the boundaries set by investment treaties. This may have a negative impact on the effectiveness of environmental treaties as it may reduce the range of measures a state may take to fulfil the respective environmental objective.

This does not appear to be a very balanced approach, because the obligations in investment treaties are just as vague and open-ended as those in environmental agreements (for example, the obligation to provide "fair and equitable treatment"). But unlike investment law, environmental agreements have no compulsory dispute settlement system for developing and refining the content of open-ended clauses. Instead, environmental norms are applied by dispute settlement bodies often specialized in other areas of international law.[96] If investment tribunals are required to link specific state measures to environmental treaties, they might therefore view international environmental obligations of states "through the lens" of international investment protection rather than in their own right.[97] That makes it difficult for states to rely on environmental obligations in investment disputes.

However, there has been a certain shift in more recent case law in which investment tribunals have sought a more balanced approach to the environmental issues raised in investment disputes and take better account of states' environmental obligations. When interpreting vague investment protection standards, tribunals may adopt – within the limits of their own interpretative discretion – an approach which more strongly considers whether the state has taken the contested measures pursuant to its international environmental obligations.[98] In *David Aven v Costa Rica*, for example, the tribunal held that Costa Rica's actions to protect wetlands in an investment area in accordance with the Ramsar Convention and the CBD were neither arbitrary nor in breach of the Fair and Equitable obligation, because the host state had acted in accordance with international environmental law.[99]

[96] Viñuales, (2012) Graduate Institute of Geneva Working Paper, 1 (30 f).

[97] See also Kate Miles, 'Investment' in Rajamani and Peel, *Environmental Law* 768 (774) regarding earlier case law involving conflicts between investment and environmental law.

[98] Ibid 774 ff.

[99] *David Aven et al v Republic of Costa Rica, ICSID Case No UNCT/ 15/ 3*, Award, 18 September 2018) paras 423, 708.

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IV. Conclusion

It is difficult to regulate a complex field like international environmental law: there is a risk that treaty provisions do not apply to facts that are beyond the treaty drafters' ability to anticipate. Precise treaty provisions risk being "underinclusive", especially if they are supposed to govern changing and unpredictable situations. Discretionary norms may counter that risk by giving treaty parties sufficient flexibility to tailor their implementation measures to changing local conditions and specific environmental challenges. To describe the values of discretionary treaty provisions in international environmental law, this paper relied on a broad notion of discretion that encompasses "implementing discretion" as well as the discretion that is inherent in interpreting vague or open-ended treaty terms ("interpretative discretion", see Section II.B). Treaty-drafters use open-ended and vague treaty terms, because they allow states to interpret them in accordance with their differing needs. Section II.B explained why it is appropriate to adopt such a broad understanding of "discretion" in international environmental law. Whereas some domestic legal systems rely on a distinction between discretion and indeterminate legal terms to channel the judicial review of administrative decision-making, a broad understanding of discretion that encompasses the interpretation of indeterminate legal terms is more in line with the characteristics of international law, such as the importance of auto-interpretation or the general lack of central, compulsory dispute settlement. To arrive at a broad notion of discretion, this paper focused on the (ex ante) element of choice in the decision-making process as the "defining criterion" of discretion in international law. Freedom in the decision-making process results from a lack of legal predetermination in the treaties and is a more suitable criterion to define discretion in international law than the absence of ex post judicial review.

Making the application of a norm dependent on the (*ex post*) exercise of discretion is an important technique to deal with complex and changing situations and the diverse needs of states. However, discretionary provisions also come at a price: they may decrease treaties' "behavioural effectiveness". The term "behavioural effectiveness" describes whether the treaty makes the parties change their behaviour. Discretionary provisions may directly impact parties' efforts to implement the treaty on the domestic level. Moreover, they may also influence the outcome of proceedings before international dispute settlement bodies: whether parties can successfully rely on treaty provisions as a basis for their claims (or to defend themselves against claims based on other international instruments) may depend on whether these provisions grant discretion. A lack of effectiveness of discretionary treaty provisions in dispute settlement may then (indirectly and negatively) impact states' incentives to change their behaviour on the domestic level. Section III analysed three reasons why

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discretionary treaty provisions may have a negative impact on a treaty's behavioural effectiveness.

The first reason why discretionary provisions may decrease treaties' behavioural effectiveness is that implementing discretion – discretion regarding *how* to achieve a certain objective – is sometimes understood as discretion as to *whether* to take any implementation measures at all. States that (mis)read discretionary provisions this way may consider themselves in compliance with the treaty even if they decide to take no implementation measures at all. Since they see no need to change their behaviour to comply with the treaty, they have less incentive to take implementation steps on the domestic level. Particularly treaty provisions that contain qualified language (for example, the terms "as possible" or "as appropriate") have been understood as merely optional provisions, even though they are otherwise formulated in legally binding terms (see Section III.A).

The second reason for the negative impact of discretionary provisions on treaties' effectiveness is that these provisions frequently contain "interposed" phrases that provide the parties with the authority to achieve the respective environmental objective by concluding further agreements or by the establishment of domestic regimes. These phrases emphasize the party's discretion on how to achieve the environmental objective, and also make it harder to invoke the provision before an international dispute settlement body, because their indirect formulation makes it difficult to demand specific action in an individual case. Thus, the reason why it is harder to rely on such provisions is not their discretionary nature *per se*, but their indirect formulation that may prevent them from being effective in proceedings before international dispute settlement bodies (Section III.B).

The third reason is that the discretionary character of environmental treaty provisions may make it more difficult to rely on them as a defence against claims based on other instruments of international law. Section III.C demonstrated this problem using investment arbitration as an example. As many environmental provisions grant discretion, they do not require the adoption of specific measures by treaty parties. This may reduce their effectiveness as defence arguments against investment claims as it might be difficult for a state to argue that a specific environmental measure, which negatively affected an investor, was *required* by an environmental treaty if that treaty grants discretion. The investor could counter this argument by pointing out that the state had a choice regarding the implementation measures. Moreover, investment tribunals may find that the state should have exercised its discretion granted by an environmental treaty in accordance with its investment law obligations. Under this approach, the discretion to implement environmental obligations is *de facto* constrained by the boundaries set by investment treaties. This may have a negative

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impact on the effectiveness of environmental treaties as it may reduce the range of measures a state can take to fulfil the respective environmental objective.

The concept of discretion deserves attention in international law. While discretion is perceived as a complex and controversial legal concept in many domestic legal orders, this is even more the case in international law where different understandings of discretion (influenced by domestic legal theories) collide. Researching the consequences of discretion should therefore not be confined to domestic (administrative) law. This paper has hopefully shown that granting discretion in treaties can be a valuable technique for treaty-drafters, but also causes certain complications. The positive and negative consequences of discretion in treaties may depend on the characteristics and structure of the respective treaty and area of international law. Exploring the values and problems of discretion in international environmental law has led to this paper's focus on the *effectiveness* of environmental treaties. Inquiring about the values of problems of discretion in another area of international law might lead to a very different focus depending on the type of treaty under consideration.

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