
COMMENT

PREAMBLES IN TREATY INTERPRETATION

MAX H. HULME†

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† Senior Editor, Volume 164, *University of Pennsylvania Law Review*. J.D. Candidate, 2016, University of Pennsylvania Law School. Master 2 (Droit économique) Candidate, 2016, L'Institut d'études politiques de Paris (Sciences Po). B.A., 2009, Middlebury College. Thank you to my professors at the University of Pennsylvania Law School and in particular to Professor Jean Galbraith, whose guidance and support was invaluable throughout this process; to the *University of Pennsylvania Law Review* staff for their tireless work on this Comment; and to my family and friends for their enduring patience and love over these past three years.

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INTRODUCTION

The treaty today is one of the fundamental building blocks in the global structure of international affairs.¹ Given the astonishing proliferation of this instrument,² it is unsurprising that the increasingly institutionalized practice of international law has led to the standardization of many aspects of treaties, most famously by the Vienna Convention on the Law of Treaties (VCLT).³ The VCLT, recognized today as embodying customary international law,⁴

¹ See Duncan B. Hollis, *Defining Treaties* (“Today, the treaty is *the* dominant instrument through which international law operates.”), in *THE OXFORD GUIDE TO TREATIES* 11, 43 (Duncan B. Hollis ed., 2012); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 *AM. J. INT’L L.* 495, 495 (1970) (describing treaties as “the indispensable element in the conduct of foreign affairs” and “the cement that holds the world community together”).

² For example, a list of just the formal bilateral treaties to which the United States is currently a party spans 325 pages. See U.S. DEP’T OF STATE, *TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2013*, at 1-325 (2013), <http://www.state.gov/documents/organization/218912.pdf> [<https://perma.cc/RPE9-8BNK>]. And in the realm of investment treaties alone, almost 2000 bilateral investment treaties were signed between their invention in the 1960s and the end of the twentieth century. See Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, 8 *J. WORLD INV. & TRADE* 357, 362-63 n.33 (2007) (tracing the history of this type of treaty).

³ See Vienna Convention on the Law of Treaties pmb., Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter VCLT] (“[T]he codification and progressive development of the law of treaties . . . will promote the purposes . . . of international peace and security, the development of friendly relations and the achievement of co-operation among nations”); see also Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 *VA. J. INT’L L.* 431, 437 (2004) (noting that the responsibility of the VCLT’s drafters was “the codification and progressive development of international custom”).

⁴ See, e.g., Sarah Williams, *Introduction to 40 YEARS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES*, at xiii, xvii (Alexander Orakhelashvili & Sarah Williams eds., 2010) (noting that “it now appears that States have elected not to ratify [the VCLT] due to the belief that [it]—or at least some of its provisions—is considered to reflect customary international law” and that “the [International Court of Justice] and other international judicial bodies have held that several of [its provisions] constitute customary international law”); see also *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000) (“The United States recognizes the Vienna Convention as a codification of customary international law.”); *Vienna Convention on the Law of Treaties*, U.S. DEP’T ST., <http://www.state.gov/s/l/treaty/faqs/70139.htm> [<https://perma.cc/QKY4-4M6T>] (last visited Mar. 19, 2016) (explaining that, while the U.S. is not a party to the VCLT, it “considers many of the

focuses on rules governing the various procedural aspects of treaty practice, ranging from the formation of treaties to their termination and—most relevant to this Comment—their interpretation.⁵

Interestingly, the VCLT does not address the *form* of treaties, beyond stipulating that they be “in written form.”⁶ This omission may reflect the fact that the formal, written treaty, as it has developed since its earliest-known origins in antiquity,⁷ has naturally come to adopt a more-or-less standard format. While exceptions may exist, a sampling of treaties from the past two centuries reveals a consistent structure of a preamble, followed by articles, followed in some cases by annexes.⁸ Indeed, the VCLT practically assumes that written treaties will adopt this structure.⁹ Treaties today tend to explicitly label these elements,¹⁰ however even older treaties that do not nevertheless exhibit this same organization.¹¹

In light of treaties’ longstanding structure and the relatively recent emphasis on standardizing and codifying treaty practice, it is surprising that the ubiquitous preamble has received so little attention. Historical evidence suggests that the treaty preamble may be as old as the treaty itself.¹² Yet leading treatises on treaty practice and interpretation rarely devote a lengthy section to—and sometimes contain no index entry for—this seemingly

provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties”).

⁵ See VCLT, *supra* note 3, arts. 6-18 (setting forth the rules governing the signing and ratifying of treaties); *id.* arts. 54-64 (setting forth the rules governing the termination of treaties); *id.* arts. 31-33 (setting forth the rules governing treaty interpretation).

⁶ See *id.* art. 2(a) (“‘Treaty’ means an international agreement concluded between States in written form . . .”). This statement does not preclude international agreements from taking other forms, but rather limits the extent to which such agreements will be governed by the VCLT. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 609-10 (7th ed. 2008).

⁷ See Baron S. A. Korff, *An Introduction to the History of International Law*, 18 AM. J. INT’L L. 246, 249 (1924) (citing, for example, a treaty concluded between the ancient kingdoms of Sumer and Ummah in the fourth millennium B.C.E.).

⁸ For examples of treaties with a clear—though unlabeled—preamble, followed by labeled articles and annexes, see Covenant of the League of Nations; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement]; Treaty on Weights and Measures, May 20, 1875, 20 Stat. 709.

⁹ See VCLT, *supra* note 3, art. 31(2) (referring generally to the treaty’s “text” as “including its preamble and annexes”).

¹⁰ For an example of a treaty with a clearly labeled preamble and articles, see the U.N. Charter.

¹¹ See, e.g., Treaty of Amity, Commerce, and Navigation, Gr. Brit.–U.S., Nov. 19, 1794, 8 Stat. 116 (commencing with a shorter statement of purposes, followed by numbered articles); the Articles of the Treaty of Peace, Oct. 24, 1648, 1 Consol. T.S. 271 [hereinafter Treaty of Westphalia] (commencing with a long statement of the historical events preceding the treaty and the parties’ motivations in arriving at its conclusion).

¹² See PAUL YOU, *LE PRÉAMBULE DES TRAITÉS INTERNATIONAUX* 1 (1941) (noting that the oldest known treaty, concluded between Ramses II and a neighboring power in the thirteenth century B.C., began with a recognizable preamble, as did many treaties from Greek and Roman antiquity).

obligatory element of any treaty.¹³ Meanwhile, the only full-length academic work to focus on the question of treaty preambles and their effects is a French-language doctoral thesis published in 1941, decades before the drafting of the VCLT.¹⁴ Importantly, this inattention does not result from some universal agreement as to preambles' relevance or lack thereof; on the contrary, treaty preambles appear to be a continuing source of confusion and uncertainty, specifically as regards their role in treaty interpretation.¹⁵

Uncertainty is by no means foreign to the endeavor of treaty interpretation and the interpretive approach set forth by the VCLT in general.¹⁶ As with interpretation of other written sources of law, this uncertainty may be a necessary evil arising from the need to give interpreters sufficient leeway to arrive at the best interpretation of the treaty at hand. The absence of firm interpretive rules, which might predetermine or limit the possible meanings of a given text, serves to preserve interpreters' discretion and ability to arrive at the correct outcome.¹⁷ Much has been written about the interpretive approach mandated by the VCLT in its articles 31 and 32, notably about the circumstances in which treaty interpreters may have recourse to extratextual sources such as the *travaux préparatoires*—the drafting

¹³ For example, Richard Gardiner's book *Treaty Interpretation* devotes just two paragraphs to the preamble. See RICHARD K. GARDINER, *TREATY INTERPRETATION* 186-87 (2008). *The Oxford Guide to Treaties* has no index entry for preambles and does not specifically address their role. See THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed., 2012). And *Vienna Convention on the Law of Treaties: A Commentary* devotes one small paragraph to preambles, noting that there "are many examples in international jurisprudence of reference being made to the preamble of a treaty." See Oliver Dörr, *Article 31: General Rule of Interpretation*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 521, 544 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

¹⁴ See generally YOU, *supra* note 12. A more recent and substantially shorter article focusing on treaty preambles was published in *Liber Amicorum Mohammed Bedjaoui*, a collection of essays on a variety of legal subjects published in 1999 in honor of former judge and President of the I.C.J. Mohammed Bedjaoui. Eric Suy, *Le Préambule*, in LIBER AMICORUM MOHAMMED BEDJAOUÏ 253 (Emile Yakpo & Tahar Boumedra eds., 1999). Both You's doctoral thesis and Suy's article are French-language works.

¹⁵ See, e.g., Borzu Sabahi & Kabir Duggal, *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay*, 108 AM. J. INT'L L. 67, 72 (2014) (noting that there is a "question of interpretation concern[ing] the role of preambles in treaty interpretation" and that "many prior tribunals . . . [have] not offer[ed] guidance on the role that preambles should play as an aid in interpretation").

¹⁶ See Panos Merkouris, *Introduction* to TREATY INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 1, 4 (Malgosia Fitzmaurice et al. eds., 2010) [hereinafter TREATY INTERPRETATION] (providing examples of obstacles in treaty interpretation dating back to antiquity and noting that they caused "many problems to the drafters of the VCLT" centuries later).

¹⁷ See BROWNLEE, *supra* note 6, at 631 ("As with statutory interpretation, a choice of a 'rule,' for example of 'effectiveness' or 'restrictive interpretation,' may in a given case involve a preliminary choice of meaning rather than a guide to interpretation."); see also Merkouris, *supra* note 16, at 6 (noting that interpretive problems are inevitable given the "inherent defects of language").

history—of treaties.¹⁸ At the broadest level, however, it is universally agreed that the VCLT enshrines a text-based approach to treaty interpretation.¹⁹ And it is precisely this emphasis on the text that makes any uncertainty concerning the importance of preambles—which the VCLT defines as *part* of that all-important text—a matter of concern for treaty negotiators, parties, and interpreters alike.

The recent debate surrounding the “New START” arms treaty negotiated between the United States and Russia serves as a real and recent example of the uncertainty that surrounds treaty preambles. During the Senate advice and consent hearings on the proposed treaty, significant attention was paid to language in the preamble concerning the relationship between offensive and defensive arms.²⁰ Specifically, a coalition of senators on the Foreign Relations Committee strenuously argued that the preamble language would place the U.S. under a legal obligation to reduce its strategic defense missile capabilities.²¹ Their concern necessarily arose from a view of the preamble as a legally binding part of the treaty capable of creating obligations.²²

Meanwhile, senators and State Department representatives on the other side of the debate took the opposite view, implying and, in some cases, explicitly stating that preamble language could *never* be legally binding. Notably, John Kerry, then-Chairman of the Senate Committee on Foreign Relations, stated bluntly, “Obviously, the preamble is not legally binding.”²³

¹⁸ See generally Julian Davis Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?*, 107 AM. J. INT’L L. 780 (2013) (arguing that the interpretive approach intended by the VCLT has since been misunderstood as viewing *travaux* as a resource of last resort only, whereas the VCLT’s drafters intended *travaux* to play a more important role in treaty interpretation).

¹⁹ The VCLT is explicit on this point. See VCLT, *supra* note 3, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

²⁰ The language at issue read, “Recognizing the existence of the interrelationship between strategic offensive arms and strategic defensive arms, that this interrelationship will become more important as strategic nuclear arms are reduced” S. REP. NO. 111-6, at 38 (2010). Cf. Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Russ.–U.S., Apr. 8, 2010, T.I.A.S. No. 11,205 [hereinafter *New START Treaty*] (including the same language in the final treaty).

²¹ See S. REP. NO. 111-6, at 7 (2010).

²² See, e.g., 156 CONG. REC. S10,377-78 (daily ed. Dec. 16, 2010) (statement of Sen. Kyl) (recounting one senator’s view that modification of the preamble would be required to address his concerns about the treaty and its effects on U.S. missile defense, and that the preamble provides the Russians with a “legal basis for their withdrawal if [the U.S.] improve[s] [its] missile defenses qualitatively”); *id.* at S10,379 (“[I]t appears to me that . . . the Russians have built into this treaty *and into the preamble* the perfect argument for withdrawal” (emphasis added)); see also Press Release, U.S. Senator John Barrasso, Barrasso, Senators Secure Key Ruling to Amend START Preamble (Dec. 15, 2010), <http://www.barrasso.senate.gov/public/index.cfm/2010/12/post-eabe73c2-dc3c-56f7-de4a-7ebd51d36857> [https://perma.cc/V346-U5VD] (“START’s preamble specifically places limits on missile defense”).

²³ *The New START Treaty: Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 268 (2010) (statement of Sen. John Kerry, Chairman, S. Comm. on Foreign Relations).

While it is unclear whether this statement refers to that specific treaty's preamble or to preambles in general,²⁴ others unambiguously expressed an understanding that preambles are powerless to create legal obligations.²⁵ Moreover, in a variation on that argument, the government and its experts—including former Secretary of State Henry Kissinger—suggested that preambles serve primarily diplomatic purposes, such as by permitting concessions to negotiating parties without creating legal obligations.²⁶ And in a final sign of the general level of confusion concerning preambles, the debate revealed a mistake in the official manual of Senate procedure, which erroneously declared that the Senate did not have the power to “amend” preambles at all.²⁷

As this Comment will demonstrate, the New START Treaty debate provides a glimpse of what is a general state of uncertainty surrounding preambles, the roles they should play, and the roles they do in fact play in international law and treaty interpretation. The diverse views espoused by

²⁴ During the Senate hearings, Secretary of State Hillary Clinton made a similarly ambiguous statement: “The treaty’s preamble . . . is simply a statement of fact. It does not constrain our missile defense programs in any way.” *Id.* at 40 (statement of Hillary Clinton, Sec. of State). Her view of the effect of the preamble language is clear, however the basis for her conclusion is less evident. Was she citing the relevant language itself, or the fact that it appears in the preamble?

²⁵ See 156 CONG. REC. S10,267 (daily ed. Dec. 15, 2010) (statement of Sen. Lugar) (“[P]reamble language does not permit rights nor impose obligations, and it cannot be used to create an obligation under the treaty.”).

²⁶ “There are two aspects in which the treaty talks about missile defense. One is in the preamble . . . [and] is not prescriptive In an abstract world, and if I could have written the treaty without a Russian counterpart, I might not have put that in. But, it’s a statement of—it’s a truism. It is not an obligation.” *The New START Treaty: Hearing Before the S. Comm. on Foreign Relations, supra* note 23, at 175-76 (statement of Henry Kissinger); see also *id.* at 164-65 (statement of Sen. John Kerry, Chairman, S. Comm. on Foreign Relations) (“The preamble to the New START Treaty acknowledges the relationship between offensive forces and missile defenses [and] . . . nothing more [W]e’re tipping our hat to Russia’s concerns without giving anything away.”); *id.* at 207-09 (relaying an exchange in which a senior adviser at the U.S. Institute of Peace portrays the preamble language as Russia’s effort to calm its own domestic voices that had expressed concern about U.S. missile defense).

²⁷ Compare FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE: PRECEDENTS AND PRACTICES, S. DOC. NO. 101-28, at 1299 (1992) (“Preambles to treaties are not amendable”), with Josh Rogin, *GOP Wins First Procedural Battle as New START Debate Set to Begin*, THE CABLE (Dec. 14, 2010), http://thecable.foreignpolicy.com/posts/2010/12/14/gop_wins_first_procedural_battle_as_new_start_debate_set_to_begin [https://perma.cc/QA5T-YU92] (noting that the Senate Parliamentarian inquired into the statement in the Senate manual and later confirmed that preambles could, in fact, be amended by the Senate). The use of the term “amend” in this context is confusing, as the Senate cannot negotiate treaty language itself. See U.S. CONST. art. II, § 2 (conferring the “power, by and with the advice and consent of the Senate, to make treaties” to the President). Presumably, “amend” in this context refers to Senate consent conditioned upon a modification of treaty language. Indeed, once the Senate Parliamentarian corrected this ambiguity, one senator attempted—but failed to obtain the necessary votes—to “amend” the controversial language in the New START Treaty. S. REP. NO. 111-6, *supra* note 20, at 80 (noting that Senator Barrasso’s amendment to remove the language at issue from the preamble was rejected).

participants in the New START debate are notable for three reasons: First, they represent both ends of the spectrum of possible views on the question. Second, the individuals expressing those views are in many cases experienced players in the realm of foreign relations.²⁸ And third, while both extremes of the debate can be understood as matters of common sense,²⁹ neither seems to correspond to the approach of the VCLT³⁰ or to the actual conclusions of international tribunals that have wrestled with the question of preambles.³¹ In short, their disagreement begs the question: Do treaty preambles in fact matter?

This Comment argues that the answer must be in the affirmative. Contrary to the propositions on display in the New START debate, there is quite simply no basis for a broad statement that preambles, by their very nature, are legally inconsequential.³² Customary international law, as embodied in the VCLT, supports this conclusion—although it does not provide clear guidance.³³ Nevertheless, in practice, preambles are a frequent subject of discussion among treaty makers, parties to disputes, and adjudicators alike.³⁴ This state of affairs naturally raises an additional query:

²⁸ Alternatively, it could be argued that the objectors were motivated primarily by domestic political fighting rather than by a firm conception of the workings of treaty law. *See, e.g., Barrasso Should Listen to Simpson on Treaty*, CASPER STAR-TRIBUNE (Dec. 17, 2010, 12:00 AM), http://trib.com/news/opinion/editorial/barrasso-should-listen-to-simpson-on-treaty/article_03a97902-9db7-5227-8a51-f72887d78adb.html [<https://perma.cc/F8AR-UB32>] (deeming the objecting senators' actions a "head-long rush to deny the president a foreign policy victory"). However, the participants on both sides of the debate—all members of the Senate Committee on Foreign Relations or invited experts—were hardly inexperienced in treaty issues. For example, former senator Richard Lugar, who stated flatly that preambles could not impose legal obligations, *see supra* note 25, has a long track record on foreign affairs issues and was notably knighted by Queen Elizabeth II for his work on arms treaties. *See Senator Lugar*, LUGAR CTR., <http://www.thelugarcenter.org/about-lugar.html> [<https://perma.cc/7XXB-37AC>] (last visited Mar. 19, 2016) (providing a biography of the former senator). Therefore, the disparity between these broad statements by experts, on the one hand, and the approach mandated in the VCLT and applied by actual tribunals, on the other hand, suggests that confusion, rather than obstinacy, was the major factor in the debate. *See infra* Parts II–III (describing the approaches of the VCLT and specific international tribunals towards preambles).

²⁹ *See infra* Part I (looking to preambles in other legal contexts for clues as to possible inherent limits on their legal effect).

³⁰ *See infra* Part II (discussing the VCLT and its approach to interpretation).

³¹ *See infra* Part III (discussing three contexts in which preambles have been given expansive legal weight by international tribunals).

³² *See infra* Part I (discussing the role and legal effect of preambles generally).

³³ *See infra* Part II (discussing the VCLT's approach to treaty interpretation, and the roles that it affords preambles in both the text-and-context and object-and-purpose analysis it calls for when interpreting treaty terms).

³⁴ The New START Treaty debate illustrates the dispute among treaty makers in the domestic context. *See generally The New START Treaty: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 23 (recording the debate over the New START treaty). But internationally, parties to disputes and adjudicators also commonly wrestle with the question of preambles and their legal effects. *See infra* Parts II–III (examining the treatment of preambles by international law bodies and tribunals).

To what *extent* do treaty preambles matter? This Comment aims to construct an answer to this question.

To that end, Part I establishes the potential range of roles that preambles may perform, drawing on the analogous contexts of preambles to statutes and constitutions in the U.S. and global contexts. Part II identifies the VCLT's article 31 and its definitions of text, context, and object and purpose as a potential source of confusion that situates preambles somewhere in the middle of the spectrum of power. As argued *infra*, the VCLT does so by both mandating (explicitly) that preambles be considered as part of the text of the treaty and by authorizing (implicitly) reference to preambles when analyzing a treaty's object and purpose. Part III examines some of the more intriguing international decisions invoking preambles in the context of the World Trade Organization, the field of international investment arbitration, and the jurisprudence of the International Court of Justice. Finally, Part IV draws upon the bases laid out in the preceding Parts to explore alternate doctrinal approaches and to suggest ways in which parties negotiating or bound by treaties should approach their preambles given the present uncertainty that surrounds them.

I. DEFINING THE PREAMBLE

Before turning to the role of preambles in the specific context of treaties, it is helpful to establish an initial understanding of preambles as legal instruments in general. In everyday parlance, a preamble is simply a preliminary statement that often explains the purpose of that which it introduces.³⁵ In the realm of law, a slightly more specific definition intrinsically links preambles with statements of the motivations and objectives that inform the legal document they introduce.³⁶ Today, preambles appear in a variety of written legal documents, including contracts, statutes, laws, and constitutions. It is noteworthy, however, that while legal definitions of the preamble address their placement and traditional content, they fail to define the extent of—or any limitation on—their legal effect.

In purely theoretical terms, two outer bounds can be logically envisioned for preambles' roles. The range of views expressed during the New START Treaty debate serves as a helpful illustration of this spectrum. At one extreme, the preamble could be an ancillary text that exists outside the “four corners”

³⁵ See, e.g., *Preamble*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1424 (3d ed. 1992) (defining a preamble as “[a] preliminary statement, especially the introduction to a formal document that serves to explain its purpose”).

³⁶ See *Preamble*, BLACK'S LAW DICTIONARY 1294-95 (9th ed. 2009) (defining the preamble as “[a]n introductory statement in a constitution, statute, or other document explaining the document's basis and objective; esp., a statutory recital of the inconveniences for which the statute is designed to provide a remedy”).

of the document it introduces with no legal effect whatsoever,³⁷ perhaps because it is viewed as a pure formality.³⁸ For the purposes of this Comment, I refer to this extreme as the “ceremonial extreme.” At the other extreme, a preamble could be an integral part of the text, as capable of providing substantive content—i.e. creating rights and imposing obligations—as are the provisions that follow it: this is the “substantive extreme.”³⁹ Of course, this proposed spectrum is a simplification,⁴⁰ notably at the substantive extreme, where preambles could exert power in various ways: a strong, clear statement of objectives in a preamble endowed with maximal legal power *could*, for example, undermine or invalidate a contrary operative provision or article.⁴¹ For present purposes, however, it suffices to recognize these two extremes and that many possible points of power may exist between them.⁴²

With this theoretical spectrum established, this Part aims to populate this range with data points drawn from practice through a brief investigation of two nontreaty contexts in which preambles’ role is better established. In the United States, well-established precedential rules for interpreting domestic legal texts limit—but do not wholly deprive—preambles of their power in most contexts, perhaps most surprisingly in that of the Constitution. However, in the comparative constitutional context, no such clear rule exists and a greater variety of approaches may be observed. Together, these observations establish that there is no basis for declaring preambles to be legally powerless by their very nature.

³⁷ See, e.g., 156 CONG. REC. S10,267 (daily ed. Dec. 15, 2010) (statement of Sen. Lugar) (“[P]reamble language does not permit rights nor impose obligations, and it cannot be used to create au[sic] obligation under the treaty.”).

³⁸ For example, preambles in the treaty context often use an antiquated, formal style consisting of an introduction of the parties, followed by a series of gerundial phrases that transform the preamble into a single, introductory sentence that terminates with the phrase, “[h]ave agreed as follows.” See, e.g., WTO Agreement, *supra* note 8, pmb1. (consisting of a single sentence beginning with the phrase “The Parties to this Agreement,” followed by a series of gerundial phrases, and terminating with the statement, “Agree as follows: . . .”).

³⁹ See, e.g., Press Release, U.S. Senator John Barrasso, *supra* note 22 (“START’s preamble specifically places limits on missile defense . . .”).

⁴⁰ In the interest of simplicity, this Comment defines a one-dimensional spectrum of legal power; however it is easy to imagine additional axes that could produce a more complex model. Possible examples include the nature of the preambular language (substantive versus formal) or the amount of attention paid to the preamble in the negotiating process.

⁴¹ The question of whether preambles can substantively limit or expand upon later provisions is a major point of uncertainty in the treaty context, notably in the area of investment arbitration. See *infra* Section III.C.

⁴² Former Secretary of State Hillary Clinton’s statement that the New START Treaty preamble has no effect on U.S. missile defense capabilities, if understood as based on the *language* at issue rather than its location in the preamble, represents one such intermediate point on the spectrum. See *The New START Treaty: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 23, at 40.

A. Preambles in U.S. Domestic Interpretation

Preambles in American law are located near—but not fully at—the ceremonial extreme of the theoretical spectrum identified above. As a general rule, the legal power of preambles in U.S. domestic law has been strictly limited by precedent and a dominant view of preambles as external to the documents they introduce. This dismissive approach toward preambles proves consistent across all types of domestic legal instruments, although its strength or particular expression may vary as a function of the particular document being interpreted.

In the areas of statutory and regulatory interpretation, preambles are effectively resources of last resort. This secondary status is the natural consequence of a longstanding interpretive posture that chooses to view them as separate from the actual statutory act to which they are attached.⁴³ Thus, preambles serve only to clarify ambiguous text in the “actual” act, a non-trivial but nevertheless severely limited role.⁴⁴ With the rise of regulatory regimes in the twentieth century, courts translated this approach into the “analogous context”⁴⁵ of regulatory interpretation, establishing an identical rule that requires ambiguity before allowing recourse to regulatory preambles for interpretive purposes.⁴⁶ Thus, while preambles are not devoid of legal weight, courts resist their use as a general matter.

The U.S. Constitution presents a more interesting case for three reasons: its tendency to use ambiguous language,⁴⁷ the level of fame its preamble’s

43 See *Yazoo & Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (“[T]he preamble is no part of the act, and cannot enlarge or confer powers . . .”).

44 See *id.* (“[U]nless [the words of the act] are doubtful or ambiguous, the necessity of resorting to [the preamble] to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up.”); see also *Ass’n of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (“Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.”).

45 *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999).

46 See *El Comite Para el Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) (“[T]he preamble language should not be considered unless the regulation itself is ambiguous.”); *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 39 (D.D.C. 2008) (“[I]solated preamble language is of no moment, for ‘the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.’” (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

47 See, e.g., Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 495 (2009) (noting that even supporters of originalist interpretations of the Constitution “acknowledge that some constitutional provisions are ambiguous”). For example, both the Spending Clause and the Commerce Clause of the original Constitution’s Article I can be—and have been—read in many different ways. See *id.* at 511-19 (discussing the original textual and the Supreme Court’s subsequent understandings of the Spending Clause). Compare *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (requiring a “direct effect” on interstate commerce in order for Congress to regulate under the Commerce Clause), with *Katzenbach v. McClung*, 379 U.S. 294 (1964) (holding unanimously that Congress’s “rational basis” for believing that a given activity has effects, even indirect ones, on interstate commerce is sufficient for Congress to regulate the activity). Ambiguous language

language has achieved,⁴⁸ and the actual irrelevance of the Constitution's preamble in constitutional construction.⁴⁹ Given the application of preambles to remedy ambiguity in the statutory and regulatory contexts, it would be reasonable to presume that the Constitution's at-times ambiguous language would lead to greater reliance on the preamble than in statutory and regulatory analysis. However, the reality proves to be largely to the contrary.

In effect, the preamble to the Constitution has been reduced to a mostly rhetorical role. In *Jacobson v. Massachusetts*, the Supreme Court noted, "Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments."⁵⁰ This holding has been described as a narrow—and correct—observation that the famous paragraph that begins with "We the people . . ." ⁵¹ does not confer rights "by itself."⁵² Yet in practice, the Court's decision has had the more far-reaching effect of forestalling recourse by courts to the preamble even as a purely interpretive tool. This perceived bar applies even when courts must interpret constitutional questions concerning notions explicitly mentioned in the preamble's text.⁵³ The reduction of the

is also prevalent in the Bill of Rights and later constitutional Amendments, whose requirements of "equal protection" and "due process" have been subject to wildly different interpretations and produced strikingly different outcomes. See Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 CARDOZO L. REV. 117, 149-51 (1990) (listing the inconsistent decisions that have arisen from these concepts).

⁴⁸ In 2011, for example, the White House established an online petitioning system entitled "We the People," a clear reference to the preamble. *We the People: Your Voice in Our Government*, WHITE HOUSE, <https://petitions.whitehouse.gov> [<https://perma.cc/A6V9-DD5L>] (last visited Mar. 19, 2016). The preamble to the U.S. Constitution has even been immortalized in song as part of the famous children's educational video series, *Schoolhouse Rock*. See EnemyMindControl, *School House Rock—The Preamble*, YOUTUBE (Oct. 21, 2011), <https://www.youtube.com/watch?v=yHp7sMqPLog> [<https://perma.cc/DNP4-KA29>].

⁴⁹ See generally Handler, *supra* note 47, at 117 (deeming the Constitution's preamble "the most neglected feature of our organic charter," having been "relegated to sheer irrelevance by the courts").

⁵⁰ 197 U.S. 11, 22 (1904).

⁵¹ U.S. CONST. pmbl.

⁵² Handler et al., *supra* note 47, at 122; see also *Jacobson*, 197 U.S. at 22 (suggesting that the nature of the Constitution itself, which acts to expressly delegate powers, prevents the comparatively general preambular language from having substantive effects on that delegation); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (1833) ("The preamble never can be resorted to, to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se . . . Its true office is to expound the nature, and extent, and application of the powers actually conferred by the constitution, and not substantively to create them.")

⁵³ See Handler et al., *supra* note 47, at 122-23 ("The *Jacobson* court's unequivocal rejection of the preamble as a source of rights has effectively discouraged most courts from considering the preamble in any context in which any contentious issues arise concerning liberty, justice or welfare."); see also Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT'L J. CONST. L. 714, 718-21 (2010) (noting that U.S. courts' references to the preamble, while "provid[ing] the preamble with some constitutional weight," do not make it "a decisive factor in constitutional interpretation").

preamble to a rhetorical, rather than interpretive, tool has elicited recent criticism as a missed opportunity to make use of a clear statement of the Framers' intent.⁵⁴ Nevertheless, the preamble's limited force remains a practical reality of U.S. courts' approach to constitutional interpretation today.⁵⁵

From this brief overview, two important initial points may be drawn. First, although the preamble in U.S. constitutional interpretation occupies a place towards the ceremonial extreme of the spectrum of legal power, preambles are not wholly powerless. In other words, even when preambles are viewed as "no part" of the relevant document, cases may still arise where circumstances—such as ambiguity—require that they be given interpretive weight. The constitutional case does not explicitly counter this conclusion, and illustrates a second important point: it is difficult to extricate a preamble's *potential* legal power from its *actual* legal power in its drafted form.⁵⁶ As noted above, even scholars who argue that greater weight should be afforded to the preamble would not refute the Court's holding in *Jacobson*. Rather, the Court's holding was confined merely to an examination of that particular preamble's effects, based on its substantive content in light of the main document's general approach of expressly delegating powers.⁵⁷ In other words, a judicial

⁵⁴ See, e.g., Handler et al., *supra* note 47, at 118 ("As an authoritative recital of the Constitution's purposes and the intent of its framers, the preamble would seem well-suited to playing a useful role in constitutional interpretation . . ."); *id.* at 148-63 (revisiting recent decisions and controversial issues, and evaluating how proper use of the preamble might have aided the Court in reaching a correct outcome).

⁵⁵ The Court recently took a similar approach to the analogous prefatory statement of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Justice Scalia, writing for the majority, effectively relegated the prefatory statement to a merely confirmatory role, announcing early in the opinion, "[W]e will begin our textual analysis with the operative clause . . . [and] will return to the prefatory clause to ensure that our reading of the operative clause is consistent with the announced purpose." *Id.* at 578. This approach permitted the Court to conclude that the prefatory statement's clear reference to a "well regulated Militia" imposed no limit on the right to bear arms established by the subsequent operative clause. See *id.* at 595-600 (analyzing the prefatory clause and its relationship to the operative clause). Justice Stevens, in his dissent, criticized Scalia's disregard for the prefatory statement, arguing that "[s]uch text should not be treated as mere surplusage" and that such an approach "is not how this Court ordinarily reads such texts . . ." *Id.* at 643 (Stevens, J., dissenting). The clear suggestion is that such an interpretation is analytically unsound and makes sense only to achieve a predetermined and sought-after result. See *id.* at 644 ("[T]he Court proceeds to 'find' its preferred reading in what is at best an ambiguous text, and then concludes that its reading is not foreclosed by the preamble.").

⁵⁶ See, e.g., Orgad, *supra* note 53, at 730 ("[T]he legal status of the preamble depends on various criteria: among them is its content."); see also CSABA VARGA, *The Preamble: A Question of Jurisprudence* ("[I]t is not a *sine qua non* condition that the introductory content should be functionally of a secondary nature compared to the parts following it."), in *LAW AND PHILOSOPHY: SELECTED PAPERS IN LEGAL THEORY* 141, 146 (1994).

⁵⁷ See Handler et al., *supra* note 47, at 122 ("[T]hese courts [do not] . . . consider what role the preamble *might* play as an interpretive aid or guide . . ." (emphasis added)); Orgad, *supra* note 53, at 721 ("[W]hile [the preamble] is not an independent source of rights neither is it constitutionally irrelevant."); see also *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1904) (suggesting that the nature of

statement that a specific preamble provides no substantive rights must not be confused for a statement that preambles generally *could not* do so.

B. *Preambles in World Constitutions*

A brief survey of global practices firmly refutes the notion that the legal power of preambles is inherently limited. While a full survey of foreign approaches to preambles in statutory interpretation exceeds the scope of this Comment, it should be noted as a preliminary matter that the general and longstanding approach in common law countries is to approve of the use of preambles in statutory interpretation, although the extent of their legal power continues to be a subject of debate.⁵⁸ More important for the purposes of this Comment, however, is the global constitutional context—which reveals a variety of legal weights given to constitutional preambles, notably including examples falling toward the substantive extreme of the spectrum.

In his recent article, *The Preamble in Constitutional Interpretation*, Liav Orgad establishes a tripartite typology of constitutional preambles based on national practice worldwide. According to Orgad, constitutional preambles can generally be classified, in order of increasing legal power, as ceremonial-symbolic, interpretive, or substantive.⁵⁹ This typology closely corresponds to the theoretical spectrum of legal power identified above.

At the ceremonial extreme lies the “ceremonial-symbolic” preamble, which has no or severely limited legal power.⁶⁰ According to Orgad, Plato was the first to elaborate this concept of a preamble, whose role was primarily to “sell” the relevant law to the people by convincing them of its virtue. These preambles will often “use abstract terms and invoke poetic ideals.”⁶¹ Orgad cites the U.S. Constitution’s preamble as a classic example: “persuasive, symbolic, [it] . . . generally has no legal force.”⁶²

Further distanced from the ceremonial extreme of the theoretical spectrum is the interpretive preamble, which corresponds to the common-law

the Constitution itself, which acts to expressly delegate powers, prevents the comparatively general preambular language from having substantive effects on that delegation).

⁵⁸ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *7 (“If words happen to be still dubious, we may establish their meaning from the *context* . . . Thus the proem, or preamble, is often called in to help the construction of an act of parliament.” (emphasis added)); Anne Winkel, *The Contextual Role of a Preamble in Statutory Interpretation*, 23 MELBOURNE U. L. REV. 184, 184-89 (1999) (noting that preambles in Australian statutory interpretation are agreed to serve both a constructive role, whose “extent . . . will always be dependent on the individual facts of each case,” and a considerably more contentious “contextual” role).

⁵⁹ See Orgad, *supra* note 53, at 715 (identifying the typology).

⁶⁰ *Id.* at 722.

⁶¹ *Id.*

⁶² *Id.*

tradition of statutory preambles.⁶³ Constitutional preambles in this category serve in effect to resolve ambiguities or to aid courts in choosing between multiple possible interpretations, favoring that which best aligns with the language of the preamble.⁶⁴ Despite their origins in common-law traditions of statutory interpretation, these preambles may be found in the constitutions of both common- and civil-law countries, including South Africa, Estonia, and Germany.⁶⁵

Most interesting, however, are the preambles that fall on the substantive extreme of the theoretical spectrum. These “substantive preambles” are “legally binding constitutional clauses” that “serve as independent sources for rights and obligations.”⁶⁶ Under this conception, the preamble in fact occupies a higher hierarchical position than the “constitutional law” set forth in the body of the document: whereas the constitution’s provisions will “govern behavior and set norms,” the preamble “contains . . . ‘fundamental political decisions’” that have the power to govern the terms that follow.⁶⁷

Orgad provides a number of examples of such substantive preambles as proof of what he calls a “growing use of preambles in constitutional interpretation.”⁶⁸ Often, these constitutional preambles have been given substantive legal force by subsequent judicial interpretation. In France, for example, the preamble to the Constitution of the Fifth Republic refers to the “Rights of Man” defined in two earlier documents: the Declaration of 1789 and the preamble to the Constitution of the earlier Fourth Republic.⁶⁹ A 1971 decision by the Conseil constitutionnel, which Orgad deems France’s equivalent of *Marbury v. Madison*, “recognized the preamble’s binding force as an independent legal source of human rights” by granting “constitutional legal status *ex post facto*” to the Constitution *and* the two documents

⁶³ *Id.* at 723.

⁶⁴ *Id.* at 724.

⁶⁵ *See id.* at 724-26 (providing examples of how these three countries have applied their constitutional preambles in aid of interpreting various statutes and treaties).

⁶⁶ *Id.* at 726.

⁶⁷ *See id.* (“Preambles, to a large extent, represent the society’s ‘constitution,’ while ‘constitutional law,’ as specified in the body of the constitution, is only ‘secondary to the fundamental political decisions.’” (quoting CARL SCHMITT, *CONSTITUTIONAL THEORY* 77-79 (Jeffrey Seitzer ed. and trans. 2008))).

⁶⁸ *Id.* at 727.

⁶⁹ *See* 1958 CONST. pmb. (Fr.) (“Le peuple français proclame solennellement son attachement aux Droits de l’homme et aux principes de la souveraineté nationale tels qu’ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946” (The French nation solemnly proclaims her devotion to the Rights of Man and to the principles of national sovereignty as defined in the Declaration of 1789 and supplemented by the preamble of the Constitution of 1946 (author’s translation))). The preamble to the previous Constitution referred, by contrast, to the Declaration of 1789 and to the principles embodied in French laws generally. 1946 CONST. pmb. (Fr.).

referenced in its preamble.⁷⁰ Similarly, in India, the Supreme Court ruled in 1973 not merely that the preamble “is part of the Constitution and enjoys legal force,” but that it “constitute[s] the core of the constitution.”⁷¹ The Court did, however, stipulate that the preamble could not by itself be a source of additional standalone rights.⁷²

Another, seemingly rarer form of substantive preamble draws its substantive power from an explicit grant in the original drafting of the constitution. In Nepal’s 1990 Constitution, the provision providing for legislative enactment or constitutional amendment subjected proposed laws to the condition that they not “prejudic[e] the spirit of the Preamble of this Constitution.”⁷³ In other words, the Nepalese preamble was superior to the Constitution it introduced; it could not be amended and acted as a firm limit on amendments to the remainder of the Constitution. In an additional sign of the importance of the preamble to the Constitution’s drafters, the article establishing the supremacy of the preamble also expressly declared itself immune from amendment.⁷⁴ The only way to supersede a Constitutional preamble imbued with such power, therefore, was effectively to replace the Constitution itself.⁷⁵

Orgad’s work and tripartite typology demonstrate that the full spectrum of possible legal characters of preambles—from purely ceremonial to fully substantive—is represented in the present context of national constitutions.

⁷⁰ Orgad, *supra* note 53, at 727; *see also* Conseil constitutionnel [CC] [Constitutional Court] decision No. 71-44DC, Jul. 16, 1971, Rec. 29 (Fr.) (citing the preamble of the Constitution as the basis for concluding that freedom of association is a fundamental principle of the French Republic).

⁷¹ Orgad, *supra* note 53, at 728; *see also* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶ 124 (India) (noting that the preamble to the Constitution is unlike other preambles, due to its history and content; and ultimately concluding that “the Preamble of our Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble”).

⁷² Orgad, *supra* note 53, at 728. Arguably, this stipulation places the Indian Constitution’s preamble in the interpretive category. *Id.* Orgad recognizes this point, but argues that the frequency and length of citations to the preamble “indicate a more substantive role of the Indian preamble in constitutional interpretation.” *Id.*

⁷³ NEPAL CONST. art. 116(1) (1990); *see also* Orgad, *supra* note 53, at 728 (describing the Nepalese preamble as a “unique example of a substantive preamble”).

⁷⁴ *See* NEPAL CONST. art. 116(1) (1990) (declaring that “this Article shall not be subject to amendment”).

⁷⁵ In fact, the 1990 Nepalese Constitution was replaced by an Interim Constitution in 2007, which does not appear to confer such power upon its preamble, for reasons that are unclear. In general, the Interim Constitution’s articles concerning constitutional amendment contain far less detail in comparison to the 1990 Constitution. *Compare* 2007 CONST. pt. 21 (Nepal) (laying out the mechanism for amendment with no reference to the Preamble), *with* 1990 CONST. art. 116 (Nepal) (citing non-prejudice of the Preamble as a condition precedent for a proper amendment). This may be due to the Constitution’s “temporary” nature. Michelle Higgins, *As Political Unrest Eases, Travel Picks Up*, N.Y. TIMES, (Mar. 4, 2007), http://www.nytimes.com/2007/03/04/travel/04prac.html?_r=0 [perma.cc/J77E-TMVL].

Returning to the treaty context, this fact is consequential because it disproves the notion that international law prohibits preambles from possessing or exercising substantive legal power;⁷⁶ rather, far from establishing such a prohibition, international law seems to expressly allow substantive preambles.⁷⁷ Indeed, there is historical evidence of treaties with preambles that include obligations and substantive provisions governing interpretation of the treaties' operative terms.⁷⁸ Such drafting practices are uncommon, however, and the question remains of what role is afforded to preambles by customary international law as codified in the VCLT.

II. THE VCLT: TEXT AND CONTEXT, OBJECT AND PURPOSE

Whereas the preamble in a general and global sense can be demonstrated to be subject to a variety of treatments, the question of the treaty preamble should, in theory if not in practice, benefit from the standardization process that has characterized international law in the past century. Of course, because the basic instrument is the same, the inherent problems observed in domestic contexts in Part II—notably, the difficulty of distinguishing the *actual* legal power of a preamble from its *potential* power—can be expected to persist. Yet, parties involved in negotiating, drafting, and interpreting treaties nevertheless have an additional guide: the Vienna Convention on the Law of Treaties.

This Part will demonstrate that while the VCLT has not substantially clarified preambles' role in treaty interpretation, it leaves ample room for preambles to exert legal power. An analysis of the general interpretive approach

⁷⁶ Article 38 of the I.C.J. Statute enumerates the sources of international law. Statute of the International Court of Justice art. 38 [hereinafter I.C.J. Statute]. Two of the sources refer to the behavior of states: "international custom, as evidence of a general practice accepted as law," *id.* art. 38(1)(b), and "the general principles of law recognized by civilized nations." *Id.* art. 38(1)(c). Therefore, if all states in their domestic laws expressed that preambles cannot have substantive legal effect, such uniform practice could plausibly be deemed to create in international law a prohibition on substantive preambles. As noted, however, such uniform practice is lacking.

⁷⁷ Article 38 of the I.C.J. Statute names "international conventions" as its first source of international law. As preambles form part of the treaties they introduce, this article necessarily includes them as a proper source of international legal rights and obligations. *See infra* note 85 and accompanying text (noting that the VCLT defines preambles as part of a treaty's text).

⁷⁸ You describes different ways in which treaty preambles have been a source of legal obligations and the debates they have engendered. For example, he notes that preambles may incorporate an entire other treaty or legal instrument into the new treaty being introduced, with the preamble thus becoming a source of obligations, albeit indirect ones. *See YOU, supra* note 12, at 42-82. One additional and particularly interesting example can be found in the Martens Clause, language originally included in the preamble of the 1899 Hague Convention regarding the Laws and Customs of War on Land and which has subsequently achieved the status of *jus cogens* by repeated iteration in the preambles of subsequent humanitarian treaties. *See Jurisdictional Immunities of the State (Ger. v. It.)*, Order on Counter-Claims, 2010 I.C.J. Rep. 310, 381-83, ¶¶ 136-139 (July 6) (dissenting opinion of Cançado Trindade, J.) (describing the origins, evolutions, and current status of the Martens Clause).

embodied in the VCLT's articles 31 and 32 suggests at first glance that treaty preambles are afforded relatively important legal weight under text-and-context analysis. In practice, however, additional factors—notably conventions of treaty drafting and the historical association of preambles with object and purpose—result in preambles most often being invoked under object-and-purpose analysis, seemingly in contradiction to the text of article 31. This Part argues that this seeming inconsistency can be reconciled by understanding the VCLT's holistic approach to treaty interpretation. This approach requires focusing on the term in question but also inquiring into text and context and object and purpose. It therefore effectively creates and authorizes a double opportunity for preambles to enter into the interpretive process: once at the text-and-context stage, and again at the object-and-purpose stage.

A. *Articles 31-32 and the Textual Focus*

At the most general level, the VCLT's approach to treaty interpretation in articles 31 and 32 mandates a focus on text.⁷⁹ Such a statement is necessarily an oversimplification, as the International Law Commission (I.L.C.) drafted the VCLT to provide a flexible approach capable of accommodating variation within certain limits.⁸⁰ Nevertheless, textual focus remains the general rule: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty . . ."⁸¹ This emphasis on text is particularly important in the context of preambles because the VCLT defines preambles as part of the text. The VCLT's article 31, entitled "General Rule of Interpretation," reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

⁷⁹ See BROWNLEE, *supra* note 6, at 631 ("The Commission and the Institute of International Law have taken the view that what matters is the intention of the parties *as expressed in the text*, which is the best guide . . .").

⁸⁰ See *id.* (noting that "[j]urists are in general cautious about formulating a code of 'rules of interpretation'" and that "[t]he International Law Commission in its work confined itself to isolating" principles of treaty interpretation that had achieved the status of general acceptance); Mortenson, *supra* note 18, at 822 ("The VCLT text is certainly capable of supporting different interpretive approaches. That was, after all, the point.").

⁸¹ VCLT, *supra* note 3, art. 31(1).

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The VCLT's textual approach thus contemplates and accommodates the reference to multiple aspects of the treaty, some of which it places on equal footing and others in a hierarchy. It does not advance a simple plain-meaning rule;⁸² rather, article 31's "[g]eneral rule" mandates that the ordinary meaning of any term be discovered holistically by examining "the terms of the treaty in their context and in the light of its object and purpose."⁸³ Interpretation of a given term therefore requires that its language be considered in light of these additional factors: the context, and the object and purpose. Meanwhile, the VCLT relegates other resources—which it does not enumerate comprehensively—to secondary status as "[s]upplementary means of interpretation" under article 32.⁸⁴ Preambles, however, fall among the primary interpretive resources of article 31, which stipulates that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the *text, including its preamble* and annexes, [related agreements between parties]."⁸⁵ Thus, the VCLT defines—almost in passing—the preamble as *part* of the text, the main focus of its interpretive approach, and an obligatory factor in the text-and-context analysis.⁸⁶

⁸² See BROWNIE, *supra* note 6, at 633 ("A corollary of the principle of ordinary meaning is the principle of integration: the meaning must emerge in the context of the treaty as a whole . . .").

⁸³ VCLT, *supra* note 3, art. 31(1).

⁸⁴ *Id.* art. 32. Although article 32 remains somewhat vague with its reference to "supplementary means," it does specifically situate *travaux préparatoires* and "the circumstances of [the treaty's] conclusion" among these means.

⁸⁵ *Id.* art. 31(2) (emphasis added).

⁸⁶ Commenting on VCLT article 31, the International Law Commission seemed to agree with this analysis. See *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, at 221, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int'l L. Comm'n 169,

By way of this definition, the VCLT appears to reserve for preambles a relatively high position on the chain of interpretation. After all, the text is the “presumptive object of interpretation”⁸⁷ under the VCLT’s general approach. The potential consequence of including preambles in the text becomes clear when compared, for example, to the U.S. law approach to interpretation of domestic instruments, under which preambles are “no part of the act.”⁸⁸ Whereas this approach means that American courts will have recourse to the preamble only in the limited circumstance where there is ambiguity in the operative provisions of the instrument being interpreted,⁸⁹ the VCLT’s inclusion of preambles in the treaty text arguably provides for more frequent—and influential—interpretations of preambles by tribunals adhering to the VCLT’s approach. This is especially true given the VCLT’s mandate that the text *always* be considered when analyzing the ordinary meaning of a treaty term.

Another point of comparison leading to the same conclusion can be found in the VCLT’s article 32. This article provides for relatively *limited* judicial recourse to other “supplementary means of interpretation,” in particular the *travaux préparatoires*.⁹⁰ While it has been suggested that the VCLT did not intend to establish a strict hierarchy between these factors,⁹¹ tribunals have in effect read such a hierarchy into the VCLT’s articles 31 and 32 as drafted.⁹²

U.N. Doc. A/CN.4/191 [hereinafter “I.L.C. Report”] (“That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment . . .”).

⁸⁷ Mortenson, *supra* note 18, at 785.

⁸⁸ Yazoo & Miss. Valley R.R. Co. v. Thomas, 132 U.S. 174, 188 (1889) (emphasis added). See *supra* Section I.A (providing an overview of the analytical approach in American law to preambles in statutory, regulatory, and constitutional contexts).

⁸⁹ See YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 32 (2008) (explaining that preambles can sometimes help resolve ambiguity in enacted language).

⁹⁰ See VCLT, *supra* note 3, art. 32 (“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”).

⁹¹ See BROWNLIE, *supra* note 6, at 632 (noting that the International Law Commission felt that the separate articles “should operate in conjunction, and would not have the effect of drawing a rigid line between ‘supplementary’ and other means of interpretation”).

⁹² See *generally id.* (noting the International Law Commission’s rejection of a proposal to give *travaux* a greater role and describing the Commission’s view that article 31 and 32 “should operate in conjunction” although “[p]reparatory work [does] not have the same authentic character” as the interpretive resources included in article 31); Criddle, *supra* note 3 (discussing the considerable debate during the VCLT negotiations concerning the use of *travaux* and the proposition that *travaux* be consulted alongside the text, and noting and providing possible explanations for the divergent current practice that has developed). *But see* Panos Merkouris, “Third Party” Considerations and “Corrective Interpretation” in the Interpretive Use of Travaux Préparatoires: Is It Fahrenheit 451 for Preparatory Work? (noting the debate on *travaux* that occurred towards the end of the VCLT’s

Importantly, it is only with reference to these “supplementary means” that the VCLT invokes the circumstance of ambiguity. The placement of ambiguity in article 32 thus confirms that the VCLT envisions a role for preambles that is substantially more prominent from that which they play, for example, in American statutory or constitutional interpretation.⁹³ By situating preambles as part of the text and thus among the first order of interpretive resources, the VCLT clearly creates room for preambles to occupy a place at the substantive extreme of the theoretical spectrum of legal power.⁹⁴

B. Preambles in Practice: Object and Purpose

Despite their status as part of treaty “text” under the VCLT, preambles are more frequently cited as sources or evidence of a treaty’s “object and purpose.” This association of preambles with statements of object and purpose is practically universal, and arises from historical practices and conventions of treaty drafting and interpretation. And the VCLT, by codifying object-and-purpose analysis as a legitimate and mandatory interpretive approach, has implicitly approved the practice of referring to preambles in this context, despite only explicitly mentioning preambles in connection with text-and-context analysis.

Virtually all those who engage in treaty interpretation today accept and employ the object-and-purpose approach to preambles. This practice is perhaps most notable among international tribunals.⁹⁵ Unsurprisingly, given this fact, parties coming before such tribunals also frequently cite preambular language to argue that a treaty’s object and purpose favors their cause.⁹⁶ This

drafting, the ultimate rejection of a “corrective” use of *travaux*, and arguing that *travaux* nevertheless continue to have great importance in interpretation), in TREATY INTERPRETATION, *supra* note 16, at 75.

⁹³ See *supra* Section I.A (demonstrating that in U.S. domestic interpretation, preambles’ role in interpretation is limited to cases of ambiguity in the operative terms of the instrument being interpreted).

⁹⁴ See *supra* Part I.

⁹⁵ See, e.g., Romak SA v. Uzb., Case No. AA280, Award, ¶ 181 (Perm. Ct. Arb. 2009), <http://www.pcacases.com/web/sendAttach/491> [perma.cc/4T5Y-4JDL] (“The [bilateral investment treaty]’s object and purpose is reflected in its preamble”); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 12, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (“An environmental purpose is fundamental to the application of Article XX, and such a purpose cannot be ignored, especially since the preamble to the [WTO Agreement] . . . acknowledges that the rules of trade should be in accordance with the *objective of sustainable development*, and should seek to protect and preserve the environment.” (emphasis added) (citations omitted)).

⁹⁶ See, e.g., Canadian Cattlemen for Fair Trade v. United States, UNCITRAL ad hoc, Award on Jurisdiction, ¶¶ 81-82 (Jan. 28, 2008), <http://www.state.gov/documents/organization/99954.pdf> [<https://perma.cc/8D7A-G9DL>] (noting respondents’ argument that the NAFTA preamble must be

general disposition towards the object-and-purpose approach extends even to the domestic courts of the United States,⁹⁷ which do not necessarily adhere to the VCLT or its interpretive methods when engaging in treaty interpretation.⁹⁸ Finally, international law commentators writing about the VCLT's interpretive regime also exhibit a clear association of preambles with object and purpose.⁹⁹

The prevalence of the object-and-purpose approach to treaty preambles has its basis in time-honored treaty-drafting traditions and interpretive approaches. Perhaps the simplest explanation arises from the general convention in treaty-drafting of using the preamble to state explicitly the object and purpose of the treaty.¹⁰⁰ When a preamble conforms to this convention by including such explicit statements, it becomes a natural first point of reference for any actor seeking to interpret a given treaty term under the VCLT's approach.

Similarly, the object-and-purpose approach may be explained as a continuation of historical interpretive practice, itself affirmed by the VCLT. This historical practice is merely a past instance of the same judicial response

considered in determining NAFTA's object and purpose and their attack on claimant's argument because it did not refer to the NAFTA preamble at all).

⁹⁷ In *Abbott v. Abbott*, the U.S. Supreme Court relied heavily on a treaty preamble for indications of object and purpose, which was a crucial factor in the Court's decision. 560 U.S. 1, 11 (2010); *see also, e.g.*, *United States v. Nai Fook Li*, 206 F.3d 56, 65 (1st Cir. 2000) (using the preamble to the Vienna Convention on Consular Relations as a statement of the object and purpose of the treaty and its subsequent provisions).

⁹⁸ While the Supreme Court has been criticized for its historically "nationalist" approach to treaty interpretation, *Abbott* has been cited as a sign of the Court's realignment with international standards of treaty interpretation as set forth by the VCLT. Compare Criddle, *supra* note 3 (detailing the Supreme Court's nationalist stance on treaty interpretation and arguing for a realignment with internationalist approaches consistent with the VCLT), with Molly K. Madden, Comment, *Abbott v. Abbott: Reviving Good Faith and Rejecting Ambiguity in Treaty Jurisprudence*, 71 MD. L. REV. 575 (2012) (arguing that *Abbott* represents both the Court's shift away from *strict* textual interpretations that risked sanctioning, under domestic law, conduct by the United States that would breach its international obligations, and the Court's return to treaty interpretation canons in line with the VCLT's particular text-based approach). Some lower U.S. courts, by contrast, do explicitly adhere to the VCLT. *See Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) ("[W]e rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties."). *But see* Criddle, *supra* note 3, at 434 & n.16 ("A [2004] Westlaw search finds that Articles 31-33 of the VCLT have been cited only thirteen times by U.S. federal courts and two times by state courts.").

⁹⁹ *See* GARDINER, *supra* note 13, at 186 ("By stating the aims and objectives of a treaty, as preambles often do in general terms, preambles can help in identifying the object and purpose of the treaty."); Dörr, *supra* note 13, at 544 ("The preamble to a treaty, usually consisting of a set of recitals, may assist in determining the object and purpose of a treaty . . .").

¹⁰⁰ *See* GARDINER, *supra* note 13, at 186 (noting that the preamble's most common form is "a set of recitals" that "commonly include motivation, aims and considerations which are stated as having played a part in drawing up the treaty"); *see also, e.g.*, WTO Agreement, *supra* note 8, pmb. (mentioning explicitly the "objective of sustainable development"); VCLT, *supra* note 3, pmb. ("the codification and progressive development of the law of treaties achieved in the present Convention will promote the *purposes* of the United Nations set forth in the Charter" (emphasis added)).

to the aforementioned treaty-drafting conventions. Long before the VCLT was concluded, it was already common practice for treaty drafters to use the preamble to state the circumstances motivating the conclusion of the treaty or the problems it aimed to resolve.¹⁰¹ This usage also corresponded to the general conception of preambles and their legal utility in nontreaty contexts.¹⁰² It was thus natural for tribunals to turn to treaty preambles for statements of object and purpose to guide their interpretive process.¹⁰³

When the I.L.C. drafted the VCLT, its aim was not to reinvent the wheel but rather to codify generally accepted principles in treaty practice and interpretation.¹⁰⁴ Thus, article 31's reference to object and purpose as a mandatory consideration when interpreting treaty terms appears to ratify and extend the longstanding practice of examining the preamble for signs of object and purpose. This ratification is not specific to preambles, as evidenced by the article's sole mention of preambles as part of the treaty text. Rather, it is a ratification of the general object-and-purpose analytical approach, in which preambles have traditionally played a particularly prominent role. In other words, encouraged by the VCLT, tribunals that turn to the preamble for object-and-purpose analysis may simply be engaging in an intuitive

¹⁰¹ See YOU, *supra* note 12, at 30-39 (observing that many treaties' preambles include statements of motivating circumstances, common interests, and objects and purposes that led to the agreement, and providing examples of such treaties mainly from the eighteenth through the early twentieth centuries); see also, e.g., Treaty of Amity, Commerce, and Navigation, *supra* note 11, pmbl. (stating that the United States and Britain entered into the treaty "to produce mutual satisfaction and good understanding: And also to regulate the Commerce and Navigation between Their respective Countries, Territories and People, in such a manner as to render the same reciprocally beneficial and satisfactory"); Treaty of Westphalia, *supra* note 11, pmbl. (describing that "on the one side, and the other, they have form'd Thoughts of an universal Peace. And for this purpose, by a mutual Agreement and Covenant" ambassadors met and the treaty was concluded).

¹⁰² For an example of a definition of preambles in existence long before the VCLT was concluded, see, e.g., *Preamble*, BLACK'S LAW DICTIONARY (2d ed. 1910) (defining the preamble as "a clause at the beginning of a constitution or statute explanatory of the reasons for its enactment and the objects sought to be accomplished").

¹⁰³ See YOU, *supra* note 12, at 34-35 (observing that, decades before the VCLT was drafted, jurists would often have recourse to object and purpose when interpreting treaties, and that tribunals' general practice was to reject any interpretation of a treaty term that would be contrary to an object easily deducible from preambular language); see also, e.g., Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 197 (Aug. 27) (stipulating that any interpretation of the General Act of Algeciras, a 1906 treaty, "must take into account its purposes, which are set forth in the Preamble"); Competence of the International Labour Organization in Regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, Advisory Opinion, 1922 P.C.I.J. (ser. B) No. 2, at 9, 25-27 (Aug. 12) (relying on the comprehensive scope of the preamble to Part XIII of the Treaty of Versailles, and a later reference to the "promotion of the objects set forth in the preamble," to hold that the International Labour Organization could regulate agricultural workers).

¹⁰⁴ See Criddle, *supra* note 3, at 446 (explaining that the I.L.C.'s goal was to "isolate 'the comparatively general principles which appear to constitute general rules for the interpretation of treaties'" (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 624 (2d ed. 1973))).

interpretive practice that has worked in the past, is familiar to them, and reflects general conventions of treaty drafting.

C. *Reconciling the Text-and-Context and Object-and-Purpose Approaches*

The confusing juxtaposition of the VCLT's inclusion of the preamble in text and context and the longstanding practice of employing preambles as evidence of object and purpose raises several questions. Are the text-and-context and object-and-purpose approaches to preambles mutually exclusive, or can they be reconciled? Are they substantially different in their application and the amount of legal weight they afford to preambles? What did the I.L.C. intend by specifically mentioning preambles as part of the text and context of the treaty, as opposed to the object and purpose? Does tribunals' preference for object-and-purpose references to preambles constitute a failure to adhere to the VCLT's approach? Because the VCLT intended to allow sufficient flexibility for treaty interpreters to choose the precise method that best suits the circumstances and document before them,¹⁰⁵ some of these questions may have no definitive answer.¹⁰⁶ Nevertheless, a brief investigation into the drafting of the VCLT and a closer inspection of its structure reveal that these two approaches are not in contradiction, but rather create multiple opportunities for preambles to influence treaty interpretation.

Of the two approaches, the text-and-context treatment of preambles remains the more obscure when compared with the well-established object-and-purpose approach. What did the I.L.C. intend by defining preambles as part of the text and context of a treaty? It is perhaps easiest to approach this question by understanding what this definition *does not* do. Specifically, although the VCLT's general "textual" approach may suggest otherwise,¹⁰⁷ there is no indication that the I.L.C. intended to radically alter the importance of preambles—by, for example, universally imbuing them with substantive legal weight—in defining them as part of the treaty text. On the contrary, it appears that there was little discussion or debate about this element of article 31 during the drafting of the VCLT.¹⁰⁸ The official records

¹⁰⁵ See *supra* note 80 and accompanying text.

¹⁰⁶ See Jean Galbraith, Book Review, 108 AM. J. INT'L L. 859, 861 (2014) (reviewing THE OXFORD GUIDE TO TREATIES (Duncan B. Hollis ed. 2012)) (proposing that the VCLT's general flexibility "makes it both relatively easy for states to comply with the VCLT and relatively difficult to measure how effective the VCLT is in terms of actually changing state behavior" and that, specifically regarding its approach to interpretation, its articles 31 and 32 "leave considerable room for maneuvering").

¹⁰⁷ See I.L.C. Report, *supra* note 86, at 220 ("[Article 31] is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties The Institute of International Law adopted this—the textual—approach to treaty interpretation.").

¹⁰⁸ See *generally id.* (providing commentary to the draft of article 31, which at the time was article 27).

of the I.L.C.'s drafting conference note that the fact that "the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment."¹⁰⁹ At one level, therefore, its explicit inclusion as part of the text serves first and foremost to forestall any attempts to exclude the preamble from the interpretive process. Rather, the preamble is a *mandatory* factor in interpretation,¹¹⁰ although the effect of this command will, of course, depend on the content of the particular preamble being examined.¹¹¹ In other words, the text-and-context approach primarily seeks to ensure that preambles will be given the *appropriate* interpretive weight in light of their drafting, which requires that they be examined in the first place.

This point underscores the conclusion that the text-and-context and object-and-purpose approaches are not mutually exclusive, contradictory, or even intended to be in competition. On this note, the VCLT drafting conference records establish what the text of article 31 does not: a preamble may be relevant to *both* the text-and-context and object-and-purpose inquiries. Indeed, immediately before noting the "well settled" status of preambles as "part of the treaty," the records state that "the [Permanent Court of International Justice and the International Court of Justice have] more than once had recourse to the statement of the object and purpose of the treaty *in the preamble* in order to interpret a particular provision."¹¹² These two statements, and their close proximity in the context of a discussion of established practices that the VCLT drafters intended to codify, help to shed light on article 31's vision for preambles in treaty interpretation.

This vision consists of two propositions. First, interpretation of any treaty term *always requires* an examination of the preamble as part of the holistic text-and-context approach. Second, interpretation of a term always requires an inquiry into the object and purpose of the treaty, which itself *may require* an examination of the preamble, but also allows reference to statements of object and purpose in other treaty elements.¹¹³ Article 31's formulation of two

¹⁰⁹ *Id.* at 221.

¹¹⁰ *See id.* (noting that the VCLT intended to codify the consistent practices of the I.C.J. and P.C.I.J., which had established long before that "the context is not merely the article or section of the treaty in which the term [being interpreted] occurs, but the treaty as a whole").

¹¹¹ *See, e.g., YOU, supra* note 12, at 67-81 (providing examples of treaties from the late nineteenth and early twentieth centuries whose preambles' relatively substantive language led to their increased importance in interpretations of those treaties); *Suy, supra* note 14, at 260-61 (positing that while, in general, the presence of a commitment in the preamble often denotes lesser importance, this is not a universal rule and will depend on the treaty in question).

¹¹² I.L.C. Report, *supra* note 86, at 221 (emphasis added).

¹¹³ Some treaties are drafted with separate provisions that explicitly define their object and purpose as such. *See, e.g., TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights* arts. 7-8, Apr. 15, 1994, 1869 U.N.T.S. 299 (setting forth "Objectives" and "Principles" in separate provisions); *see also GARDINER, supra* note 13, at 192 ("One of the commonly mentioned sources of guidance on the object and purpose of a treaty is its preamble. However, in keeping with

different, obligatory inquiries thus serves the VCLT's goal of establishing an interpretive method that is flexible enough for tribunals to give a preamble its proper weight.

Most crucially, the VCLT's dual approach creates ample space for preambles to exert considerable legal force. In keeping with its overall flexibility, the two inquiries taken together do not necessarily limit preambles' potential legal power. The text-and-context inquiry imposes no inherent limit, tying the legal weight of the preamble to the preamble's actual content as drafted. The preamble is part of both the text and the first order of interpretive resources, and therefore any restraints on its power must arise from the drafters' conscious decisions in employing and drafting the legal instrument (or an interpreting body's perceptions of those decisions, based on the preamble's content as drafted). By contrast, the weight that preambles may enjoy in the object-and-purpose inquiry, as Part III examines, is a source of current debate and contention. But because an object-and-purpose approach constitutes—or should constitute—a second pass at the preamble, even a limited conception of the power of object-and-purpose does not, in theory, deprive the preamble of its legal power as an integral part of the treaty.

III. EXPANSIVE PREAMBULAR POWER IN OBJECT-AND-PURPOSE ANALYSIS

In practice, although preambles possess considerable potential power under the VCLT due to their status as part of the text and context of the treaty, their *actual* power will often depend on an interpreting body's approach to the object-and-purpose inquiry. Two factors combine to produce this practical reality. First, experts generally disapprove of the practice of using treaty preambles to make substantive declarations of rights or obligations.¹¹⁴ Thus, although article 31 places no inherent limit on preambles'

the approach of the Vienna rules generally . . . it is the whole text . . . which is to be taken into account Some treaties have provisions in their substantive articles specifically listing the treaty's object and purpose.”).

¹¹⁴ See GARDINER, *supra* note 13, at 186 (“The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty or in annexes.”); see also Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 227 (1957) (noting the I.C.J.'s stance that “the preamble [does] not normally, and strictly ought not, to [sic] contain substantive provisions”). This is not, however, a firm rule. The United Nations Convention on International Multimodal Transport of Goods serves as both an example of an exception—containing multiple detailed obligations in its preamble—and perhaps as evidence of the disapproval of such exceptions, having never entered into force due to having never received the required thirty signatures or ratifications. See pmbl., May 24, 1980, 19 I.L.M. 938 (laying out in the preamble, *inter alia*, the basis for liability of multimodal transport operators, and the obligation to conduct pre- and post-transportation consultation on terms and conditions of service); *id.* art. 36(1) (“This

power, drafters generally do not seek to take full advantage of that power when drafting the preamble.¹¹⁵ Second, tribunals do not always explicitly provide an account of preambles' role in the text-and-context analysis of a treaty term, instead proceeding directly to the object-and-purpose analysis.¹¹⁶

What legal power, then, do tribunals confer upon treaty preambles when employing them in object-and-purpose analysis? It must be noted at the outset that preambles, through their association with object and purpose, become embroiled in what is generally considered to be a messy, unclear area of treaty interpretation.¹¹⁷ Nevertheless, one relatively uncontroversial role for preambles (and statements of object and purpose in general) is to *limit*—but not radically alter—the possible interpretations of a term in question.¹¹⁸ In this

Convention shall enter into force 12 months after the Governments of 30 States have either signed [or ratified it]”); *United Nations Convention on International Multimodal Transport of Goods*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&lang=en [https://perma.cc/4AVJ-R9LF] (last updated Mar. 19, 2016) (listing the thirteen countries that have signed or ratified the treaty).

¹¹⁵ Some have argued that not all treaty preambles are of equal importance, due to varying levels of attention and negotiation involved in drafting them. See GARDINER, *supra* note 13, at 186 (“It should not, however, be assumed that all preambles are of equal value. Some are very carefully negotiated, others cobbled together more or less as an afterthought.”); see also Suy, *supra* note 14, at 255-56 (noting that preambles in bilateral treaties are generally shorter and use standardized language, therefore being less helpful in treaty interpretation than preambles in multilateral treaties, which are longer, more detailed, and subject to more extensive negotiation).

¹¹⁶ For example, the I.C.J.’s decision in *Sovereignty over Pulau Ligitan and Pulau Sipadan*, discussed *infra*, refers to the preamble of the relevant treaty only in its discussion of object and purpose, not in its discussion of text and context. See (*Indon. v. Malay.*), Judgment, 2002 I.C.J. 625, 645-53 ¶¶ 37-52 (Dec. 17) (invoking VCLT article 31 and applying it to the relevant provision of the treaty). Various factors may help explain this and other similar cases, including the arguments put forth by the parties and the tribunal’s view of the specific preambles’ content and its effects. See *supra* note 111 and accompanying text (noting that despite the mandatory requirement to refer to the preamble in text-and-context analysis, the results of this exercise will depend on the preamble’s content). Nevertheless, tribunals in other contexts have similarly invoked preambles only in light of object and purpose. In *CMS Gas*, also discussed *infra*, the ICSID tribunal referred to the preamble only once in its decision and did so to interpret the “objective of the protection envisaged” by the relevant treaty, making no reference to text-and-context analysis. *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), 14 ICSID Rep. 152 (2009). This “preference” for object-and-purpose application of preambles may have historical origins. See *supra* notes 99-103 and accompanying text; see also *Rights of Nationals of the United States of America in Morocco* (*Fr. v. U.S.*), Judgment, 1952 I.C.J. Rep. 176, 197-98 (Aug. 27) (citing, decades before the VCLT was concluded, a preamble to discuss the parties’ “purposes” and “intention[s]”).

¹¹⁷ See GARDINER, *supra* note 13 at 190 & n.155 (“[T]he precise nature, role, and application of the concept of ‘object and purpose’ in the law of treaties present some uncertainty and it has been described . . . as an ‘enigma.’” (citing I. Buffard and K. Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EURO. L. 311 (1998))).

¹¹⁸ See GARDINER, *supra* note 13, at 186 (noting that preambles may “impose interpretive commitments” that exclude otherwise possible interpretations of a treaty term where those interpretations would run counter to such commitments); *id.* at 197-98 (discussing cases in which statements of object and purpose suggesting broad jurisdiction were held *not* to “stretch jurisdiction beyond that specifically conferred” by treaty parties).

sense, preambles may exert a substantial negative or constrictive power on subsequent treaty provisions. More interesting and controversial, however, is the question of preambles' ability to amplify or expand the reach of such provisions¹¹⁹—effectively an expansive or *positive* power. An examination of judgments in the specific contexts of the WTO and investment treaty arbitrations will establish that, in practice, preambles have indeed proven capable of exerting such positive force. And a brief exploration of I.C.J. jurisprudence will demonstrate that the issues and debates concerning preambles are not unique to those two domains, but also exist more generally in public international law.

A. *The WTO and the U.S. Shrimp–Turtle Decision*

The decision of the WTO's Appellate Body in the *U.S. Shrimp–Turtle*¹²⁰ dispute of the 1990s serves as a clear example of an international tribunal giving great weight to a treaty's preamble while employing object-and-purpose analysis. The opinion is notable first because it uses the preamble to justify an expansive reading of a subsequent treaty term, conferring on the preamble a positive legal power. It is additionally interesting because of the broad reach of the decision, which was determined to apply not just to the WTO Agreement and the specific sub-treaty at issue, but to all other agreements falling under the umbrella of the WTO. By way of this extension, the decision effectively amplified the positive power it found within the preamble at issue.

The *U.S. Shrimp–Turtle* dispute involved a challenge to a specific U.S. trade policy as a violation of the GATT 1994 Treaty's general ban on prohibitions or restrictions on foreign imports. The policy in question consisted of a series of regulations enacted by the United States requiring the use of Turtle Excluder Devices by all shrimp vessels operating in certain areas, combined with an import ban on shrimp from countries not meeting requirements including the adoption of similar, turtle-friendly shrimp-harvesting practices.¹²¹ The lower adjudicative body of the WTO, the Dispute Settlement Body (DSB or Panel), issued a panel report concluding that the U.S.'s practices violated article XI of the GATT 1994 treaty¹²² and that the policies did not qualify under the

¹¹⁹ See Suy, *supra* note 14, at 261-62 (“[L]a question sera notamment de savoir si le préambule peut mener à élargir la portée du dispositif.” ([T]he question will notably be whether the preamble can lead to the expansion of the reach of operative provisions. (author's translation))).

¹²⁰ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 12, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998).

¹²¹ See *id.* ¶¶ 1-8 (describing in greater detail the regulations and policies at issue and the procedural history of the dispute).

¹²² See General Agreement on Tariffs and Trade 1994 art. XI, Apr. 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (“No prohibitions or restrictions other than duties, taxes or other charges

exceptions to the Most Favored Nation (MFN) standard contained in GATT article XX.¹²³ The United States appealed the Panel's decision to the Appellate Body on numerous legal grounds; however, the legal question useful for purposes of this Comment concerns the United States' claim that its policies did in fact fall within the scope of the Article XX exceptions allowing it to treat trading partners differently.¹²⁴

Answering this question required the interpretation of the complex treaty regime underlying the WTO, for which a brief outline will be helpful. The WTO Agreement is a general umbrella agreement, which itself includes numerous other agreements in its annexes.¹²⁵ GATT 1994 is one such sub-agreement, which largely serves to integrate the earlier GATT 1947 agreement and its subsequent history into the organizational and legal framework established by the WTO Agreement.¹²⁶ Article XX, therefore, in fact resides in GATT 1947, and sets forth a number of exceptions to the obligations imposed by the agreement.¹²⁷ Article XX consists of an enumerated list of exceptions, introduced by a prefatory statement known as the "*chapeau*," setting out general conditions for the application of those exceptions.¹²⁸ One legal question for the Appellate Body, therefore, was whether the U.S. policies qualified under the exception for trade restrictions

. . . shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.")

¹²³ See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7, WTO Doc. WT/DS58/AB/R (quoting the findings of the initial panel). A Most Favored Nation standard essentially imposes an obligation to treat all other parties—in this context, all other nations party to the WTO Agreement—equally.

¹²⁴ See *id.* ¶ 8 ("[T]he United States notified [the Dispute Settlement Body] of its intention to appeal certain issues of law and legal interpretations developed by the Panel . . ."); *id.* ¶ 10 (describing the U.S. challenge to the Panel's ruling on the question of the scope of article XX).

¹²⁵ See WTO Agreement, *supra* note 8, art. II(2) ("The agreements and associated legal instruments included in Annexes 1, 2 and 3 . . . are integral parts of this Agreement, binding on all Members."); *id.* Annexes 1-3 (listing the separate agreements that, by way of the WTO Agreement's article II(2), form part of that agreement).

¹²⁶ See generally GATT 1994, *supra* note 122.

¹²⁷ See General Agreement on Tariffs and Trade 1947 art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947] (enumerating the exceptions to the stated obligations in the agreement).

¹²⁸ The *chapeau* reads,

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .

Id.

“relating to the conservation of exhaustible natural resources.”¹²⁹ This question in turn required inquiry into whether the policies “constitute[d] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail,” which under the *chapeau* would disqualify practices otherwise qualifying for an exception under article XX.¹³⁰ The Appellate Body’s interpretive approach would lead it to rely heavily on the WTO Agreement preamble for both of these inquiries.

Invoking article 31 of the VCLT, the Appellate Body began by outlining the proper procedure for object-and-purpose analysis. With regards to the Panel Report, it found that the Panel had misapplied object-and-purpose analysis by conducting a top-down approach; the Panel had *started* with the object and purpose of the WTO, using it to inform its analysis of the “unjustifiable” language in Article XX and finding the U.S. policies unjustifiable in terms of the object and purpose.¹³¹ Rather, the Appellate Body explained, object-and-purpose analysis of treaty terms requires a bottom-up approach that, in this case, begins with the *individual exceptions* under Article XX—whose plain language must be analyzed in light of the object and purpose—before turning to the *chapeau*, which likewise must be analyzed in terms of object and purpose.¹³²

The Appellate Body thus first addressed the U.S. argument that sea turtles constitute “exhaustible natural resources” under the exception found in article XX(g). This question had not been addressed by the Panel, whose approach led it to stop after concluding that the U.S. policy conflicted with the *chapeau* and before considering the specific exceptions themselves.¹³³ The Appellate Body began by noting that the plain meaning of “exhaustible” did not exclude “living” species.¹³⁴ It then turned to the preamble, noting that the language in question was over fifty years old and “must be read by a treaty interpreter in light of the contemporary concerns of the community of nations about the protection and conservation of the environment.”¹³⁵ The Appellate Body based this assertion on the “preamble of the *WTO*

¹²⁹ *Id.* art. XX(g).

¹³⁰ See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 111, WTO Doc. WT/DS58/AB/R (generally describing the requirement of equal treatment of countries under the *chapeau*); see also GATT 1947, *supra* note 127, art. XX (detailing the relevant *chapeau* and enumerated exception language).

¹³¹ See *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 114-125, WTO Doc. WT/DS58/AB/R (criticizing and correcting the Panel’s approach to treaty interpretation).

¹³² *Id.* ¶ 114.

¹³³ *Id.* ¶ 127.

¹³⁴ See *id.* ¶ 128 (“One lesson that modern biological sciences teach us is that living species, though in principle, capable of reproduction and, in that sense, ‘renewable’, are in certain circumstances indeed susceptible of depletion, exhaustion and extinction, frequently because of human activities.”).

¹³⁵ *Id.* ¶ 129.

Agreement—which informs not only the GATT 1994, but also the other covered agreements—[and which] explicitly acknowledges ‘the objective of *sustainable development*.’”¹³⁶ Taking this preambular language into account, the Appellate Body held that living creatures can indeed be “exhaustible natural resources.”¹³⁷ As such, the preamble effectively exerted positive legal force by leading the Body to choose an expansive interpretation that, while plausible, arguably diverges from the most obvious plain meaning of the term.

The WTO Agreement preamble also played a prominent role in the Appellate Body’s subsequent interpretation of the *chapeau*. In this inquiry, its first task was to determine whether a policy that restricted foreign imports for the purposes of preserving an environmental resource passed the *chapeau*’s gatekeeping function of barring access to article XX exceptions for “arbitrary or unjustifiable discrimination between countries.”¹³⁸ The Body cited precedent establishing that the *chapeau* itself intended to prevent abuse of the specific exceptions that follow it, meaning that measures claiming protection under article XX exceptions must be “reasonable” with respect to parties’ legal duties and rights under the WTO Agreement generally.¹³⁹

The question presented, therefore, boiled down to whether member state policies restraining trade for environmental reasons were “reasonable” in terms of the rights and obligations of members under the foundational WTO Agreement. In this context, the Body again referred to the Agreement’s preamble, declaring, “As this preambular language reflects the intentions of negotiators of the *WTO Agreement*, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994.”¹⁴⁰ Thus, the preamble’s reference to “optimal use of the world’s resources in accordance with the objective of sustainable development” allowed for the possibility that trade restrictions with environmental objectives were “reasonable” and, therefore, “justifiable” for the purposes of the article XX *chapeau*.¹⁴¹

Notably, the Body offered a supplementary argument in support of its use of the preamble in interpreting the *chapeau*. Specifically, it cited a change in language between the preamble of GATT 1947 and its successor, the WTO Agreement, as proof of “a recognition by WTO negotiators” that enhanced

¹³⁶ *Id.*

¹³⁷ *See id.* ¶ 131 (“[R]ecalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.”).

¹³⁸ *See id.* ¶ 147 (citing WTO Agreement, *supra* note 8).

¹³⁹ *Id.* ¶¶ 150-155.

¹⁴⁰ *Id.* ¶¶ 152-153.

¹⁴¹ *See id.* ¶¶ 156-160 (describing the balancing test imposed by Article XX and its *chapeau*).

free trade should not come at the expense of the environment.¹⁴² Although GATT 1947's preamble was largely preserved in the new WTO Agreement, the older treaty's stated objective of "full use of the resources of the world" was changed to "optimal use of the world's resources in accordance with the objective of sustainable development."¹⁴³ This change in preamble language appears to have been influential in the Appellate Body's reliance on the WTO Agreement's preamble in determining "the rights and obligations of Members under the *WTO Agreement*, generally."¹⁴⁴

The Appellate Body's analytical approach in *U.S. Shrimp–Turtle* serves, therefore, as an example of the potency of object-and-purpose analysis generally and, in addition, of a tribunal giving great weight to a treaty preamble in the context of that analysis. Moreover, the decision is particularly significant not only because it uses the preamble to justify an expansive reading of the plain language of a term, but also because of its broad scope and reach. As one commentator notes, "The WTO Agreement's preamble and its reference to the sustainable development objective informs [sic] not only the appropriate understanding of GATT provisions, but the interpretation of all other agreements annexed to the WTO Agreement."¹⁴⁵

Finally, the decision's use of the preamble is particularly notable in light of the Appellate Body's emphasis on conducting a proper interpretation under article 31 of the VCLT. The Body took great pains to critically deconstruct the lower Panel's analytical approach and to provide a detailed explanation of (what it views as) the correct method of interpretation.¹⁴⁶ Of course, the Body is by no means the ultimate authority on treaty interpretation under the VCLT; but it is an indisputably important authority.¹⁴⁷ In light of its focus on proper interpretive procedure, the Body's detailed analysis combined with its evident willingness to use the WTO Agreement's preamble to great interpretive effect lends credence to the

¹⁴² *Id.* ¶¶ 152-153.

¹⁴³ *See id.* ¶ 152 (comparing GATT 1947, *supra* note 127, *pmb.*, with WTO Agreement, *supra* note 8, *pmb.*).

¹⁴⁴ *Id.* ¶ 155.

¹⁴⁵ Henning Grosse Ruse-Kahn, *The (Non) Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO* 11 (Max Planck Institute for Intellectual Property & Competition Law, Research Paper No. 11-15, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939859 [<http://perma.cc/BL6S-3QA8>].

¹⁴⁶ *See United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 112-122, WTO Doc. WT/DS58/AB/R (criticizing the Panel's interpretation in detail, noting the origins of its errors, and outlining the correct interpretive approach under VCLT article 31).

¹⁴⁷ The Appellate Body consists of seven members, each "required to be a person of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the covered agreements generally." *Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm [<http://perma.cc/F3CR-CLPD>] (last visited Mar. 19, 2016).

notion that preambles may exert considerable legal force even under an object-and-purpose analysis.

B. *Investment Treaty Preambles and Fair and Equitable Treatment*

The expanding world of investment arbitration is another notable area in which treaty preambles currently play an important—and controversial—role in treaty interpretation. In roughly the past decade, several tribunals deciding disputes arising under bilateral investment treaties (BITs) have relied on language in BIT preambles to read broad, investor-friendly principles into the standard of “fair and equitable treatment” (FET) commonly included in these treaties. These decisions have come arguably at the expense of states’ ability to pursue their own interests and to respond to external and internal circumstances through changes in law. Far from being universally accepted, these rulings have provoked staunch criticism of what is perceived as overreliance on preamble terms during object-and-purpose analysis. Despite the debate concerning the validity of these tribunals’ findings, they nevertheless serve as an example of preambles being used to decisive effect by international tribunals under the auspices of the VCLT’s interpretive approach.

1. From Preambles, Broad Investor-Friendly Rules

This application of preambles occurs during disputes that have arisen from alleged breaches by sovereign host states of commitments they have made to investors by way of treaties concluded with the investors’ home states. States can, of course, breach investor commitments in a variety of ways, including through acts available to any contracting party—such as nonpayment—that may fall outside the scope of treaty obligations. But states can also breach investor commitments through acts uniquely available to sovereign states, which are often the subject of investment treaties.¹⁴⁸ These sovereign-only breaches may occur when a state intentionally targets a specific investor, for example, by expropriating its property, or when a state makes changes to its legislation or regulations that catch investors in the widely cast net of their general application.¹⁴⁹ It is in this latter category of sovereign-only breaches that preambles have played a particularly important role.

¹⁴⁸ See Lise Johnson & Oleksandr Volkov, *Investor–State Contracts, Host-State “Commitments” and the Myth of Stability in International Law*, 24 AM. REV. INT’L ARB. 361, 366–75 (2013) (providing a general overview of the ways in which states can breach contractual commitments made to investors and the consequences for each type of breach).

¹⁴⁹ See *id.* at 363 (“If a measure of general applicability negatively impacts performance of an investor-state contract, the question arises of who should bear the burden of those losses; and the answer to that question has crucial implications for governmental policy design and implementation.”).

Whereas domestic resolution of claims by investors arising from sovereign actions in the absence of an investment treaty traditionally involves a high level of deference to the sovereign actor and its authority, international investment tribunals have used treaty language—notably in preambles—to find rules favoring the investor.¹⁵⁰ These outcomes have not been uniform, and it is important not to overstate the inherently investor-friendly nature of investment arbitration.¹⁵¹ Nevertheless, in the line of decisions in which tribunals have arrived at such rules, states have been held liable for their actions even where the effects on the investor arguably were indirect and resulted from general policy changes traditionally associated with sovereign prerogative.¹⁵² As a result, critics in recent years have questioned the findings of these tribunals, and also the wisdom and validity of the BIT regime in general.¹⁵³

¹⁵⁰ See *id.* at 406-14 (contrasting the longstanding sovereign-friendly policies of U.S. courts in resolving such disputes with the investor-friendly findings in the relatively new context of international investment tribunals).

¹⁵¹ For example, ICSID tribunals either rejected jurisdiction or dismissed all claims in over half of the cases decided in 2014. INT'L CTR. FOR THE SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD—STATISTICS (ISSUE 2015-1) 14 (2015), [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20\(English\)%20\(2\)_Redacted.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf) [<https://perma.cc/E7A6-J7WW>]. Investment arbitration outcomes also depend heavily on the underlying treaties, which influence the extent to which a dispute-specific legal regime is investor-friendly. Tribunals that agree with investor-friendly rules applied in other disputes have declined to apply those same rules in disputes where the relevant treaty texts do not support doing so. See *infra* note 191 and accompanying text. States have also begun to make treaty-based investor protections less broad, often by including language limiting those protections' ability to supersede state legislative and regulatory capacities. See *infra* notes 196-203 and accompanying text. Such changes should presumably produce outcomes more deferential to states. These developments underscore the fact that states, at least in theory, exert considerable control over the extent to which investment arbitration is investor- or state-friendly.

¹⁵² See Johnson & Volkov, *supra* note 148, at 406-14 (describing generally the divergences between U.S. courts' and international investment tribunals' approaches to such issues and noting tribunals' "more lenient view of the requirements necessary to establish and enforce a government promise *not* to exercise sovereign authority in the future"); see also Manuel Pérez-Rocha, *When Corporations Sue Governments*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/opinion/when-corporations-sue-governments.html> [<https://perma.cc/6GFF-AC4E>] ("[C]orporations are increasingly using investment and trade agreements—specifically, the investor-state dispute settlement provisions in them—to bring opportunistic cases in arbitral courts, circumventing decisions states deem in their best interest.").

¹⁵³ See J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 191 (2012) ("Interpretations giving significant weight to the object and purpose of investment treaties have been criticized as favouring investors to the detriment of host States."); Johnson & Volkov, *supra* note 148, at 365 (questioning "whether tribunals' decisions are exceeding maximum thresholds of private protections and restraints on state conduct"); Pérez-Rocha, *supra* note 152 ("The investor-state dispute settlement mechanism is like playing soccer on half the field. Corporations are free to sue, and nations must defend themselves at enormous cost—and the best a government can hope for is a scoreless game."); Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html [<https://perma.cc/PPX4-HL86>] (calling for opposition to

Many of these decisions and the resulting criticism have arisen from tribunals' use of preambles to interpret FET standards. BITs usually contain a provision obliging the signatory states to adhere to FET, but commonly fail to provide an explicit definition of what the FET standard entails.¹⁵⁴ Claims of state violations of the FET standard have frequently been asserted by investors whose activities have suffered due to generally applicable changes in the laws or regulations of the nation in which they operate, for example in Argentina after its financial crisis at the dawn of the twenty-first century.¹⁵⁵ Underlying these claims is a legal theory that FET requires treatment in line with investors' reasonable expectations when initially making their investment, formed in reliance on the legal landscape of the country at that moment in time.¹⁵⁶ Tribunals tasked with adjudicating these claims may find themselves faced with the question of whether FET constrains nations' ability to implement changes to their laws that are generally applicable and respond to events endangering the public welfare, but which in the process negatively affect foreign investments.¹⁵⁷

It is in answering this question that international arbitration tribunals have invoked BIT preambles, imbuing them with decisive and expansive legal weight in the process. The vagueness of the FET standard included in many BITs generally leads tribunals to invoke the VCLT's articles on treaty interpretation

an agreement because of its Investor-State Dispute Settlement clause, which "would undermine U.S. sovereignty" by "allow[ing] foreign companies to challenge U.S. laws . . . without ever stepping foot in a U.S. court").

¹⁵⁴ See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993), 31 I.L.M. 128 [hereinafter U.S.-Arg. BIT] (providing simply that "[i]nvestment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law").

¹⁵⁵ See, e.g., CMS Gas Transmission Co. v. Arg. Republic, ICSID Case No. ARB/01/8, Award, ¶ 88 (May 12, 2005), 14 ICSID Rep. 152 (2009) (describing the claimant's allegation that Argentina "failed to treat [its] investment in accordance with the standard of fair and equitable treatment" of the relevant BIT treaty); *id.* ¶¶ 59-67 (describing the measures taken by Argentina, including the freezing of tariffs and the "corralito . . . drastically limiting the right to withdraw deposits from bank accounts").

¹⁵⁶ See, e.g., *id.* ¶ 267 ("[T]he Claimant asserts that Argentina has breached the fair and equitable treatment standard and has not ensured full protection and security to the investment, particularly insofar as it has profoundly altered the stability and predictability of the investment environment, an assurance that was key to its decision to invest."); Tecnicas Medioambientales Tecmed S.A. v. United Mex. States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154, (May 29, 2003), 10 ICSID Rep. 130 (2004) ("The Arbitral Tribunal considers that [the fair and equitable treatment] provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.").

¹⁵⁷ See, e.g., CMS Gas, ICSID Case No. ARB/01/8, Award, ¶ 273 ("The key issue that the Tribunal has to decide is whether the [legislative] measures adopted in 2000 - 2002 breached the standard of protection afforded by Argentina's undertaking to provide fair and equitable treatment.").

in order to determine its meaning.¹⁵⁸ Because the plain meaning of “fair and equitable treatment” is unhelpful in ascertaining its substance, tribunals most commonly resort to object-and-purpose analysis.¹⁵⁹ This object-and-purpose analysis frequently relies heavily on preamble language to note that the “purpose of BITs is to protect investments and investors.”¹⁶⁰

In a long line of cases, investment tribunals have relied on preamble language to conclude that the stability of a country’s legal regime is part of this object and purpose of promoting and protecting investment.¹⁶¹ Tribunals have emphasized preambles in reaching this conclusion in two ways. First, they usually have based such decisions on language in the preamble that mentions stability in conjunction with FET.¹⁶² The undefined FET provision invariably included in a later substantive provision of the BIT thus becomes, by virtue of the preamble, a commitment to a stable legal regime—at the expense of the host state’s ability to regulate and legislate. Perhaps even more controversially, tribunals have also cited the general purpose stated by most BITs of creating conditions favorable to investors, as support for such broad, investor-friendly interpretations of other clauses.¹⁶³ In this context, preambles exert a clear and expansive legal power.

¹⁵⁸ See ANDREW NEWCOMBE & LLUIS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 110 (2009) (“[International investment tribunals] regularly begin the interpretation process by invoking Articles 31 and 32 of the Vienna Convention . . .”).

¹⁵⁹ See *id.* at 110-13 (citing an example of the obstacle reached by a tribunal attempting a plain-meaning analysis of FET and noting other analytic tools used by tribunals as a result of this obstacle, of which “object and purpose . . . has been the most prevalent”).

¹⁶⁰ *Id.* at 114.

¹⁶¹ See, e.g., *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶ 274 (declaring with certainty that the BIT preamble “makes clear” and leaves “no doubt . . . that a stable legal and business environment is an essential element of fair and equitable treatment”); *Enron Creditors Recovery Corp. v. Arg. Republic*, ICSID Case No. ARB/01/2, Award, ¶¶ 259-283 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> [<http://perma.cc/7ZKZ-G8KG>] (holding that “a key element of fair and equitable treatment is the requirement of a stable framework for the investment,” after “giv[ing] weight to the text of the Treaty’s Preamble, which links the standard to the goal of legal stability”); *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, LCIA Case No. 3467, Final Award, ¶¶ 183-186 (July 1, 2004), 12 ICSID Rep. 101 (2007) (holding, based on language in the preamble mentioning stability and FET, that the “stability of the legal and business framework is thus an essential element of fair and equitable treatment,” that “such requirements were not met by Ecuador,” and that “this is an objective requirement that does not depend on whether the Respondent has proceeded in good faith or not”).

¹⁶² One common formulation in many BIT preambles states that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources.” See, e.g., U.S.–Arg. BIT, *supra* note 154, pmbl. (declaring that FET treatment is desirable to maintain “a stable framework for the investment and maximum effective use of economic reserves”).

¹⁶³ See, e.g., *MTD Equity Sdn Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004), 12 ICSID Rep. 3 (2007) (invoking the preamble’s statement of the signatory nations’ “desire to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,” together with a mention of stability and FET, to

These decisions do not claim to categorically bar nations from exercising their legislative and regulatory powers in every case in which such an exercise would hurt a protected investor's activities. In *CMS Gas*, for example, the tribunal noted that the "essential" nature of "a stable legal and business environment" arising from the preamble did not require nations to freeze their legal regimes—but *did* preclude those regimes being "dispensed with altogether when *specific commitments to the contrary* have been made."¹⁶⁴ Other decisions have adopted a similar approach, protecting "basic" or "reasonable and justified" expectations of investors.¹⁶⁵

Despite these qualifying statements, however, tribunals setting such standards afford the state less regulatory leeway than they suggest. The rules they create may place limits on the sovereignty of host states that surpass the limitations voluntarily accepted by those states when concluding BITs. In effect, tribunals often set a low bar for investors' "reasonable" expectations by allowing both express and implied commitments to create protectable expectations. As one commentator notes of such decisions, "when states contract with foreign investors, the *existence* of the regulatory framework gives rise to an *implied* promise that the investment will not be impacted by subsequent regulatory change."¹⁶⁶ Under such a view, the relevant "conditions" at the time of investment may include the existence of a law itself, even in the absence of a "specific commitment" made expressly by the state to the investor, as suggested in *CMS Gas*.¹⁶⁷ Thus in *Enron*, although there were no "explicit promises that the legal and regulatory regime would remain unchanged,"¹⁶⁸ the tribunal found that "the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime" were sufficient to provide the claimant with "reasonable grounds to rely on such conditions."¹⁶⁹

The role that preambles have played in these arbitral decisions is remarkable. Tribunals have combined broad preamble language concerning the

conclude that "fair and equitable treatment should be understood to be treatment . . . conducive to fostering the promotion of foreign investment").

¹⁶⁴ *CMS Gas*, ICSID Case No. ARB/01/8, Award, ¶ 277 (emphasis added).

¹⁶⁵ *Enron*, ICSID Case No. ARB/01/2, Award, ¶¶ 261-62 (citing *Tecnicas Medioambientales Tecmed S.A. v. United Mex. States*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154, (May 29, 2003), 10 ICSID Rep. 130 (2004)). The *Enron* tribunal set forth a requirement that investors' expectations of stability under fair and equitable treatment provisions be "derived from the conditions that were offered by the State to the investor at the time of the investment," and that the investor actually rely on those expectations. *Id.* ¶ 262.

¹⁶⁶ Johnson & Volkov, *supra* note 148, at 379.

¹⁶⁷ *See id.* at 380 (discussing similar findings by the tribunals in *Enron* and other cases that "the laws and regulations in place at the time when the investor made its investment established a 'guarantee' the government had the obligation under the FET requirement to maintain").

¹⁶⁸ *See id.* at 379-80 (summarizing the *Enron* tribunal's findings).

¹⁶⁹ *Enron*, ICSID Case No. ARB/01/2, Award, ¶¶ 264-67.

objective of facilitating investment with a vague mention of “stability” as somehow linked with FET to transform FET into a potent weapon for investors affected by states’ exercise of general regulatory power. This “new FET-based rule[,] largely based on treaty preambles[,]” constitutes a “significant shift in the scope of actual or potential liability for states.”¹⁷⁰ Moreover, this shift may not be confined to individual cases. Indeed, the tribunal in *LG&E Energy Corp. v. Argentine Republic* went so far as to call this conception of FET, as interpreted in the light of preambular language, “an emerging standard of fair and equitable treatment in international law.”¹⁷¹ And it is unquestionably the preamble that lies at the heart of this “significant shift” and (disputed) “emerging standard.”

2. Criticism of These Rules and the Underlying Treaty Interpretation

Despite the *LG&E* tribunal’s confident assertion, these tribunals’ investor-friendly interpretations, underlying reliance on preambles, and general analysis and approach to VCLT object-and-purpose analysis have not gone unchallenged. Other tribunals, dissenting arbitrators, and commentators have attacked them on a variety of grounds. Most notable is the claim that these decisions deviate from the underlying theory of the VCLT’s analytical approach. Others have taken umbrage at what they call, more specifically, an incorrect use of object and purpose. Indeed, this countercurrent reveals a possible vulnerability in tribunals’ tendency to rely on preambles as a source for statements of the underlying objectives of a treaty as a general matter.

Critics of this line of decisions have called their outcomes implausible at best when viewed in light of the signatory nations’ intentions in concluding investment treaties. As one International Center for the Settlement of Investment Disputes (ICSID) tribunal noted in rejecting the investor-friendly interpretation of FET applied by its sister tribunals,

¹⁷⁰ Johnson & Volkov, *supra* note 148, at 381-82.

¹⁷¹ *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 125 (Oct. 3, 2006), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208 [<https://perma.cc/BU2U-TY5X>]. The argument has been made that investment treaties should be governed by separate interpretive rules appropriate for the “regime in practice” that has arisen out of the thousands of BITs currently in force, which often share language. See Gary Born & Mitchell Moranis, *Should Investment Treaties Have Their Own Rules of Interpretation?*, KLUWER ARB. BLOG (Feb. 3, 2015), <http://kluwerarbitrationblog.com/2015/02/03/should-investment-treaties-have-their-own-rules-of-interpretation> [<http://perma.cc/48SD-4RM5>] (“FET provisions have come to embody a specific set of protections. Why? Tribunals may wish to avoid the absurdity of the same words meaning three thousand different things. The contexts, objects, purposes, and other tools of interpretations, if not identical, can be similar.”). Formal acceptance of such rules could effectively validate the *LG&E* tribunal’s assertion.

[S]ignatories of such treaties do not thereby relinquish their regulatory powers nor limit their responsibility to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties. Such limitations upon a government should not lightly be read into a treaty which does not spell them out clearly nor should they be presumed.¹⁷²

The underlying point is simple but powerful: it is so unusual and unlikely for a state to cede its sovereign authority over its internal affairs that doing so should require an explicit statement to that effect. Thus, these tribunals' analysis has produced an outcome "contrary to [the parties'] intentions."¹⁷³ In this sense, the tribunals have violated the rationale that undergirds the VCLT's textual approach to treaty interpretation, in which the text is the most recent and reliable expression of the signatories' intent.¹⁷⁴ While the VCLT does reject an approach that would focus exclusively on the parties' intent at the expense of the text,¹⁷⁵ here the tribunals arguably have taken the textual focus too far toward the opposite extreme, discounting the parties' intent altogether.¹⁷⁶

Relatedly, criticism has also been leveled at the tribunals' implementation of object-and-purpose analysis, including suggestions that their use of preambles was inappropriate. In one case, a concurring arbitrator who agreed that Argentina had violated its FET obligation filed a separate opinion criticizing the rule linking FET, investor expectations, and stability in legal regimes, calling it "an extremely broad interpretation of the Preamble of some BITs concluded by the United States."¹⁷⁷ Another commentator notes that

¹⁷² Total S.A. v. Arg. Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 115 (Dec. 27, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf> [<https://perma.cc/3UUN-5CBV>].

¹⁷³ NEWCOMBE & PARADELL, *supra* note 158, at 115.

¹⁷⁴ See I.L.C. Report, *supra* note 86, at 220. ("The textual approach . . . commends itself by the fact that, as one authority has put it, '*le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties.*'" ([T]he signed text is, apart from rare exceptions, the only and the most recent expression of the common will of the parties. (author's translation))).

¹⁷⁵ See *id.* ("[T]he starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."); see also Mortenson, *supra* note 18, at 785-88 (discussing the debate about what role parties' intentions should play in treaty interpretation during the drafting of the VCLT).

¹⁷⁶ See, e.g., Zachary Douglas, *Nothing If Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex*, 22 ARB. INT'L 27, 51 (2006) ("Something is wrong with the interpretive approach [whereby references to investment promotion language in the preamble always result in interpretations favorable to the investor] and the idea that [they are] supported by Article 31 of the Vienna Convention of the Law of Treaties is untenable.").

¹⁷⁷ Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg. Republic, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, ¶ 29 (July 30, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0827.pdf> [<http://perma.cc/BAH3-DVP8>].

“the fact that [BITs] commonly contain preambles stating that their purpose is to promote and protect investment should not be conflated with a general preference to protect the interests of the foreign investor over those of the host state.”¹⁷⁸ Implicit in this statement is the argument that “[not] all preambles are of equal value,”¹⁷⁹ an assertion that may be particularly relevant to BITs, which are often drafted from a template and historically have often undergone limited to no substantive negotiation.¹⁸⁰

Seen in light of this drafting history, these problematic interpretations of BITs may not simply be an instance of “overly exuberant use of the object and purpose.”¹⁸¹ Rather, an analysis of these decisions reveals an inherent danger in tribunals’ preference for turning to preambles for signs of object and purpose. One question arising from the common treaty-drafting practice of integrating statements of object and purpose in preambles—which motivated the longstanding historical practice of using preambles in object-and-purpose analyses—is whether this practice encourages judicial assumptions that preambular language serves to state object and purpose where it in fact does not.¹⁸² Investment tribunals that have used BIT preambles to arrive at investor-friendly interpretations of FET have at times referred to the “goal of legal stability” in their analysis.¹⁸³ However, as one tribunal noted, “Stability of the

¹⁷⁸ NEWCOMBE & PARADELL, *supra* note 158, at 115; *see also* Rudolf Dolzer, *Indirect Expropriation: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 73-74 (2002) (“[I]nvestment treaties are meant to benefit both investor and host state and they are based on the recognition of the rights and obligations of both the host state and the investor.”).

¹⁷⁹ GARDINER, *supra* note 13, at 186.

¹⁸⁰ *See* Lauge N. Skovgaard Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality* 45 (June 2011) (unpublished Ph.D dissertation, London School of Economics and Political Science), http://etheses.lse.ac.uk/141/1/Poulsen_Sacrificing_sovereignty_by_chance.pdf [<https://perma.cc/UP4K-2Z7J>] (noting that of roughly 3000 signed BITs, “most closely follow the original European models with few adjustments, and the vast majority thereby use remarkably similar terms with often identical provisions”); *id.* at 236-49 (describing the experience of countries that initially entered into BITs as “photo-opportunity” agreements without understanding the implications of their terms); *see also* Newcombe, *supra* note 2, at 364 & n.43 (“[T]he general approach and content of [BITs] are remarkably similar. Convergence in treaty language has been promoted through the adoption by states of model agreements . . . [M]any BITs are based substantially on the 1967 OECD model.”).

¹⁸¹ WEERAMANTRY, *supra* note 153, at 192.

¹⁸² *See supra* Section II.A (describing the relevant treaty-drafting conventions and the interpretive approaches that have arisen and gained widespread acceptance as a result).

¹⁸³ *See, e.g.*, *Enron Creditors Recovery Corp. v. Arg. Republic*, ICSID Case No. ARB/01/2, Award, ¶ 259 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> [<http://perma.cc/7ZKZ-G8KG>] (emphasis added) (invoking VCLT article 31 and giving “weight to the text of the Treaty’s Preamble, which links the standard [of FET] to the goal of legal stability” (emphasis added)); *see also, e.g.*, *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005), 14 ICSID Rep. 152 (2009) (asserting that the preamble establishes that a “principal objective of the protection envisaged is that [FET] is desirable ‘to maintain a stable framework for investments and maximum effective use of economic resources’” and concluding that “a stable legal and business environment is an essential element of fair and equitable treatment”).

legal framework for investments is mentioned in the Preamble of the BIT [but is] not a legal obligation in itself . . . nor can it be properly defined as an *object* of the Treaty.”¹⁸⁴ Although both tribunals interpreted the same treaty, one found legal stability to be among the treaty’s goals, while the other viewed it as a mere consideration mentioned in the preamble. An examination of that particular treaty supports the latter interpretation.¹⁸⁵

While treaty preambles often announce the treaty’s object and purpose, their content is by no means limited to such statements.¹⁸⁶ Distinguishing between statements of object and purpose, reaffirmations of shared values, and other content frequently included in preambles is undoubtedly a difficult task. But an assumption that preamble language is inherently indicative of a treaty’s object and purpose is incorrect. As the critics of this assumption would argue, such a mistake may lead tribunals to confer too much power on a particular preamble term.¹⁸⁷

3. Signs of Preambular Power

Irrespective of the controversy they have engendered, these decisions by international investment tribunals demonstrate how preambles may exert a strong influence over adjudicative bodies that apply the VCLT’s interpretative approach to discern the rights and obligations established by treaties. These interpretations are notable because, while they do not go so far as to “create a[n] obligation under the treaty”¹⁸⁸ out of the preamble alone, they nevertheless bring preambles remarkably close to the substantive extreme of the spectrum of legal power. Three observations support this conclusion: (1) tribunals have formulated different FET standards depending on the BITs and the preamble language before them; (2) even commentators skeptical of this body of decisions have admitted that blame may belong with

¹⁸⁴ Cont’l Cas. Co. v. Arg. Republic, ICSID Case No. ARB/03/9, Award, ¶ 258 (Sept. 5, 2008) (emphasis added), <http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf> [<https://perma.cc/D354-BAXH>].

¹⁸⁵ The relevant treaty preamble does not mention any “goals,” but merely reads, “Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources” See U.S.–Arg. BIT, *supra* note 154, pmb1.

¹⁸⁶ See *supra* Introduction (providing an overview of preambles and their content generally).

¹⁸⁷ It has been argued, for example, that the broad investor-friendly rules discussed in this Section may ultimately *undermine* the object and purpose of these treaties in the aggregate, despite these rules being justified with reference to a specific treaty’s clear objective of promoting investment. See WEERAMANTRY, *supra* note 153, at 192–93 (“The long-term promotion of investment is likely to be better ensured by a well-balanced regime than by one which goes so far that it provokes a swing of the pendulum in the other direction.”).

¹⁸⁸ 156 CONG. REC. S10,267 (daily ed. Dec. 15, 2010) (statement of Sen. Lugar). See *supra* Introduction (outlining the disparate views on the potential legal effects of the New START Treaty preamble).

the negotiating states; and (3) states have attempted to change the language in their BIT preambles in response to these decisions.

Contrary to the *LG&E* tribunal's assertion that the investor-friendly interpretation of FET constituted an emergent standard in international law,¹⁸⁹ other tribunals have declined to see it as such, with preambles again playing a determinative role. The investor-friendly decisions described *supra* largely concerned treaties that had in common a reference to stability and FET in their preambles, notably the U.S. Model BIT of the time.¹⁹⁰ However, tribunals interpreting other BITs that lacked this preambular language have reached different conclusions. In *Total S.A.*, for example, the tribunal referred to the other decisions with approval, but then noted that the "absence [of the relevant language in the France–Argentina BIT being considered] indicates, at a minimum, that stability of the legal domestic framework was not envisaged as a specific element of the domestic legal regime that the Contracting Parties undertook to grant to their respective investors."¹⁹¹ Preamble language was, therefore, still the deciding factor in the tribunal's analysis and application of a different FET standard. Even those critical of this analytical reliance on preambles have stressed that an inevitable consequence of this approach is that the investor-friendly FET standard is necessarily preamble-dependent, and that it thus cannot become a general rule.¹⁹²

189 *LG&E Energy Corp. v. Arg. Republic*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 125 (Oct. 3, 2006), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208 [<https://perma.cc/BU2U-TY5X>].

190 *Enron, LG&E*, and *CMS Gas* each concerned the U.S.–Argentina BIT. See *Enron Creditors Recovery Corp. v. Arg. Republic*, ICSID Case No. ARB/01/2, Award, ¶ 4 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> [<http://perma.cc/7ZKZ-G8KG>]; *LG&E*, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 3, 7; *CMS Gas Transmission Co. v. Arg. Republic*, ICSID Case No. ARB/01/8, Award, ¶ 4 (May 12, 2005), 14 ICSID Rep. 152 (2009). *Occidental* concerned the U.S.–Ecuador BIT. See *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, LCIA Case No. 3467, Final Award, ¶¶ 5-6 (July 1, 2004), 12 ICSID Rep. 101 (2007). The two treaties contain almost identical language in their preambles. Compare Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, U.S.–Ecuador, pmbl., Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993) ("Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources . . ."), with U.S.–Arg. BIT, *supra* note 154, pmbl. ("Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources . . .").

191 *Total S.A. v. Arg. Republic*, ICSID Case No. ARB/04/1, Decision on Liability, ¶¶ 116-117 (Dec. 27, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf> [<https://perma.cc/3UUN-5CBV>]; see also Agreement on the Reciprocal Promotion and Protection of Investments (with related letter), pmbl., Fr.–Arg., July 3, 1991, 1728 U.N.T.S. 297 (omitting any mention of legal stability in the preamble).

192 See *Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg. Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, ¶¶ 29-31 (July 30, 2010), <http://www.italaw.com/sites/default/files/case-documents/ita0827.pdf> [<http://perma.cc/BAH3-DVP8>] (arguing

A second point of support for the legal weight exercised by preambles in these investor-friendly decisions lies in admissions of commentators who, while skeptical of the decisions in light of the respondent nations' intentions, note that those nations may themselves be to blame. Andrew Newcombe, who expresses sympathy for the argument that a statement of purpose to protect investment is not a sufficient basis for broad, investor-friendly interpretations, nevertheless concludes that there is little *legal* basis for denying such a reading arising from object-and-purpose analysis.¹⁹³ Instead, he argues that the fault lies with the carelessness of negotiating states:

[I]t is clear that many [BITs] have been drafted in narrow, uni-dimensional terms, with treaty preambles hailing the need to enhance economic cooperation and create a favourable investment climate, and often little else in the way of broader policy objectives. Thus, at the end of the day, pro-investor interpretations on the basis of the object and purpose of [BITs] would seem to be defensible readings. Critics must admit, as has been noted, that for their concerns the blame lies with governments which have negotiated treaties.¹⁹⁴

Others have similarly argued that it was unwise for nations to enter into treaties with broad language and uncertain effects and obligations, without negotiating to ensure that they retained the ability to regulate in their own internal interest.¹⁹⁵

Indeed, empirical evidence suggests that nations have accepted the practical reality of preambles' legal power in the investment treaty context, changing their approaches to treaty drafting in response to these tribunals' decisions. Over the past decade, states have begun to integrate language that incorporates concerns other than the protection of investment into their

that "the interpretation is limited to the BITs whose preamble contains terms such as those that support the findings of those tribunals" and that, otherwise, an obligation that a state not exercise its legislative power "cannot be presumed").

¹⁹³ See NEWCOMBE & PARADELL, *supra* note 158, at 115-16 (arguing that an interpretation that automatically rules in favor of investors due to BITs' overall objective of promoting investment may be inappropriate, but that a "more balanced approach" to interpretation may produce the same outcomes).

¹⁹⁴ *Id.* at 116 (footnotes omitted).

¹⁹⁵ See Poulsen, *supra* note 180, at 236-49 (describing nations' experience with BITs and how their approaches changed after their first experience with an investor dispute under the treaties); see also Prabhash Ranjan, *The 'Object and Purpose' of Indian Investment Agreements: Failing to Balance Investment Protection and Regulatory Power* ("[A]rguments have been made that countries need to draft [BITs] in order to clarify the meaning of vague and open ended terms like fair and equitable treatment, have developmental goals in the preamble, and to have more clarity about rights of competing stakeholders." (internal citations omitted)), in *FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA* 192, 193 (Vivienne Bath & Luke Nottage eds., 2011).

BITs.¹⁹⁶ Common examples include references to labor, social, or environmental concerns.¹⁹⁷ Many member nations of the Organization of Economic Cooperation and Development (“OECD”) now include treaty language specifically protecting their right to regulate in these areas.¹⁹⁸ While some drafters include such language both in the preamble and later substantive provisions, others importantly confine these changes to the preamble alone.¹⁹⁹ In either case, “[t]hese texts do not attempt to establish clear hierarchies of norms, but instead affirm that investment and other norms coexist harmoniously.”²⁰⁰ For example, Finland’s model BIT now includes language affirming signatories’ “[agreement] that these objectives can be achieved without relaxing health, safety and environmental measures of general application.”²⁰¹ Significantly, the United States’ 2012 Model BIT similarly provides that parties “[d]esir[e] to achieve these objectives [to promote investment] in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”²⁰² This trend may also extend to multilateral treaties such as the Trans-Pacific Partnership, whose draft preamble “recogni[zes the state parties’] right to regulate” and thus seeks to “preserve the[ir] flexibility . . . to set legislative and regulatory priorities” in a variety of areas.²⁰³

Among the factors driving the inclusion of such language is the simple fact that nations are “learning from experience” and working to “lower the risks that arbitration under the agreements will be used in ways that were not intended by the parties to the agreements.”²⁰⁴ In other words, if preambles have become a source of problems due to the legal power tribunals have afforded them, nations can respond—and have begun to do so—by harnessing the same, newly evident legal power of preambles to implement solutions.

¹⁹⁶ See Ranjan, *supra* note 195, at 193 (“[S]ome countries have amended their model [BITs] to make investment protection standards more precise . . . [and some] new [BITs] now contain provisions aimed at balancing investment protection with the host state’s regulatory power.” (internal citations omitted)).

¹⁹⁷ See generally Kathryn Gordon, *Environmental, Labor and Anti-Corruption Texts in International Investment Agreements: A Large Sample Survey* (Org. Econ. Cooperation & Dev., Working Paper No. 2008/1, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719089 [<http://perma.cc/YM44-9YP9>] (discussing recent trends in BIT drafting).

¹⁹⁸ See *id.* at 6-8 (listing seventeen countries or regional organizations that included such language in their recent BITs or multilateral investment treaties).

¹⁹⁹ *Id.* at 4-5.

²⁰⁰ *Id.* at 4.

²⁰¹ *Id.* at 5.

²⁰² See 2012 *U.S. Model Bilateral Investment Treaty*, DEP’T OF STATE, <http://www.state.gov/documents/organization/188371.pdf> [<https://perma.cc/HH6J-86BF>] (last visited Mar. 19, 2016).

²⁰³ *Trans-Pacific Partnership Final Text Preamble*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf> [<https://perma.cc/WKR9-H467>] (last visited Mar. 19, 2016).

²⁰⁴ *Id.* at 13.

C. Preambles in I.C.J. Opinions

The contexts of the WTO and international investment treaties discussed *supra* are particularly salient examples of preambles' applications in treaty interpretation both because of the relatively narrow focus of tribunals working in those domains and because of the particular approaches that those tribunals have taken towards treaty preambles and interpretation, which now form part of their jurisprudence. Conversely, it is relatively difficult to discern patterns in the usage of preambles in the more general realm of public international law, given the vast variety of actors, interpretive bodies, and subject matters that make up this category.²⁰⁵

This diversity, combined with the interpretive flexibility afforded by the VCLT, inevitably means that there will be no single or even dominant approach. For instance, while the I.C.J. will refer to treaty preambles—albeit in an inconsistent manner, as discussed *infra*—the U.N.'s Human Rights Committee (HRC), in its jurisprudence on the International Covenant on Civil and Political Rights (ICCPR), does not appear inclined to rely on the ICCPR preamble in its opinions.²⁰⁶ By contrast, claimants have in certain instances made arguments citing the ICCPR's preamble before the HRC.²⁰⁷ A full investigation of the approaches of the diverse adjudicative bodies operating in the realm of public international law exceeds the scope of this Comment, which instead focuses on the jurisprudence of the I.C.J.—sometimes called the “World Court.”²⁰⁸ Even from this relatively limited set of opinions,²⁰⁹ two familiar conclusions can be drawn: first, considerable

²⁰⁵ Public international law addresses issues as diverse as human rights, humanitarian law, environmental law, state sovereignty, national borders, and the law of the sea, to name just a few examples. Each area may have multiple adjudicative bodies capable of interpreting the relevant law—whether in an advisory or legally binding nature—which may in turn differ between national parties or regions.

²⁰⁶ The author searched the U.N. Office of the High Commissioner of Human Rights jurisprudence database and found no references to the ICCPR preamble by the HRC for substantive interpretive purposes. *Jurisprudence*, U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://juris.ohchr.org> [<http://perma.cc/2YXN-DJJK>] (last visited Mar. 19, 2016) (in “keyword” box, search “ICCPR Preamble”).

²⁰⁷ See, e.g., *Riley v. Can.*, Communication No. 1048/2002, U.N. H.R.C., CCPR/C/74/D/1038/2002 (Apr. 15, 2002), http://ccprcentre.org/doc/2013/05/CCPR_C_74_D_1048_2002.pdf [<https://perma.cc/CH8W-C6KA>] (providing an example of an individual complainant citing the ICCPR preamble as proof of standing—an assertion ultimately rejected by the HCR without reference to the preamble).

²⁰⁸ BROWNLEE, *supra* note 6, at 707.

²⁰⁹ As of 2005, only 104 disputes had been filed with the I.C.J. since its inception in 1945, with only seventy-six cases culminating in votes on substantive questions. Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 604-05 (2005). Since 2005, an additional twenty-eight disputes have been referred to the I.C.J. See *List of Cases Referred to the Court Since 1946 by Date of Introduction*, INT'L CT. JUST., <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> [<https://perma.cc/2DUF-3MJE>] (last visited Mar. 19, 2016).

differences in opinion exist regarding the proper interpretive weight and legal power of treaty preambles; and second, treaty preambles are fully capable of occupying a place on the substantive extreme of the spectrum of legal power.

It is not particularly difficult to identify I.C.J. decisions in which treaty preambles have exercised significant influence over the Court's interpretation of treaties. Perhaps the first—and certainly the most frequently cited—example is the 1952 decision in *Nationals of the United States of America in Morocco*, in which the I.C.J. rejected the U.S. interpretations of the Madrid Convention and the Act of Algeciras, which would have allowed the U.S. indefinite consular jurisdiction over its nationals in Morocco.²¹⁰ In rejecting this argument, the I.C.J. relied on preamble language emphasizing the importance of Morocco's sovereign powers and economic equality, noting that “the interpretation of the provisions of the Act must take into account its purposes, which are set forth in the Preamble.”²¹¹ Because the U.S. interpretation would have given the United States “rights enjoyable for an unlimited period . . . and incapable of being terminated or modified by Morocco,” the I.C.J. found such a reading irreconcilable with the preambular statement of the treaty's object and purpose.²¹²

More recently, the I.C.J.'s opinion in the *Territorial and Maritime Dispute* between Nicaragua and Colombia presents another—and a particularly fascinating—example of the Court giving preambular language great legal weight.²¹³ In that case, Nicaragua sought the Court's definition of a continental shelf boundary that would equally divide the overlapping entitlements of the two countries.²¹⁴ The Court rejected Nicaragua's request, citing article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), which set forth certain procedural and informational requirements with which Nicaragua had not complied.²¹⁵ But while Nicaragua was a party to UNCLOS at the time, Colombia was not. This fact raised a question of whether Nicaragua's obligations under the treaty applied. The Court held that they did, citing the UNCLOS preamble, its purpose of establishing “a legal order for the seas and oceans” and its statement that “problems of ocean space . . . need to be considered as a whole.”²¹⁶ Based

²¹⁰ *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, Judgment, 1952 I.C.J. Rep. 176, 196-98 (Aug. 27).

²¹¹ *Id.* at 197.

²¹² *Id.* at 198.

²¹³ Judgment, 2012 I.C.J. Rep. 624 (Nov. 19).

²¹⁴ *Id.* at 664, ¶ 106.

²¹⁵ *Id.* at 668-70, ¶¶ 126-131; see also United Nations Convention on the Law of the Sea art. 76, Dec. 10, 1982, 1833 U.N.T.S. 397 (requiring a coastal state seeking a delimitation of its continental shelf to submit to the Commission on the Limits of the Continental Shelf information on measurements of the shelf).

²¹⁶ *Id.* at 669 ¶ 126.

solely on this language, Colombia's non-party status did "not relieve Nicaragua of its obligations" under the treaty.²¹⁷ This result is surprising, as it appears to go against the general principle of international law embodied in the VCLT's article 34, which states that a "treaty does not create either obligations or rights for a third State without its consent."²¹⁸ Indeed, in a separate opinion Judge Thomas Mensah stated his disapproval of the Court's reliance on the UNCLOS preamble to reach such an unusual conclusion about the nature of treaty and the legal obligations it imposes.²¹⁹

Such disagreements about the role of preambles in treaty interpretation are hardly anomalies in the I.C.J.'s jurisprudence, being evident both within and between decisions that address the question. Two example cases, each also concerning border disputes, help illustrate these inconsistencies. In the first, *Arbitral Award of 31 July 1989*, the Court was tasked with resolving a dispute between Guinea-Bissau and Senegal concerning an arbitral award made by a tribunal pursuant to an arbitration agreement between the two countries.²²⁰ That agreement, concluded between two sovereign states, constituted a treaty according to the Court, and thus was to be interpreted using the "general rules of international law governing the interpretation of treaties," notably those contained in the VCLT.²²¹

The countries had submitted two questions to the initial arbitral tribunal: the first concerned the validity of a 1960 treaty concerning the two countries' maritime boundaries, while the second requested that the tribunal delimit those boundaries *if the 1960 treaty were found invalid under the first question*.²²² The arbitral tribunal had answered the first question by declaring the 1960 treaty valid with regards to the territorial sea, the contiguous zone and the continental shelf; and considering this an affirmative answer to the first question, it did not address the second question.²²³

Before the I.C.J., Guinea-Bissau argued that this outcome was in error because the dispute with Senegal also concerned legal concepts of maritime spaces that had not existed at the time of the 1960 agreement, such as exclusive economic zones and fishery zones.²²⁴ Thus, according to Guinea-Bissau, because the tribunal concluded that the 1960 agreement did

²¹⁷ *Id.*

²¹⁸ VCLT, *supra* note 3, art. 34; *see also* BROWNLIE, *supra* note 6, at 627 (describing the maxim *pacta tertiis nec nocent nec prosunt* as a "fundamental principle," noting its embodiment in the VCLT, and describing two recognized exceptions—neither of which appears to apply here).

²¹⁹ *See* Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, 764-65, ¶ 8 (Nov. 19) (declaration of Mensah, J.).

²²⁰ Judgment, 1991 I.C.J. Rep. 53 (Nov. 12).

²²¹ *Id.* at 69, ¶ 48.

²²² *Id.* at 58, ¶ 14.

²²³ *Id.* at 66, ¶ 38.

²²⁴ *Id.* at 73, ¶ 58.

not define these newer boundaries that were also part of the overall dispute, the tribunal should have addressed the second question.²²⁵ In support of this argument, it cited the Preamble to the arbitration agreement, which stated the agreement's purpose as being "to reach a settlement of [the nations'] dispute as soon as possible."²²⁶ In short, Guinea-Bissau claimed that the tribunal had failed to achieve the object and purpose of the treaty by not resolving the entire dispute between the two nations.

The Court rejected this argument, holding that the "general terms" of the Preamble did not outweigh the language and structure of the questions posed by the arbitration agreement.²²⁷ In effect, this outcome prevented the agreement from accomplishing its stated object and purpose, a fact recognized by the Court, which "observe[d] that [the] result is due to the wording of [the questions posed in] . . . the Arbitration Agreement."²²⁸ Other judges echoed this sentiment in separate opinions, effectively identifying as the primary problem the poor drafting of the arbitration agreement, which posed unambiguous questions that did not reflect the actual dispute between the two nations.²²⁹ In the eyes of the Court, the preamble's general reference to the nations' overall dispute could not alter the clear language of the agreement's provisions.

At first, this outcome may appear related to—or required by—the particular considerations involved in asking the Court to interpret an arbitration agreement already interpreted by the competent tribunal. In the context of such a request, the Court clearly considered it crucial to determine precisely and to respect the consent given by the state parties to the agreement.²³⁰ It also stressed that its review of the arbitral tribunal's

²²⁵ *Id.*

²²⁶ *Id.* at 58, ¶ 14, 71, ¶ 52.

²²⁷ *Id.* at 72, ¶ 56.

²²⁸ *Id.* at 74, ¶ 66.

²²⁹ *See id.* at 87, ¶ 13 (separate opinion of Oda, J.) ("In view of the real issue in dispute between the two States, it is obvious that the Agreement was drafted in an inappropriate manner."); *id.* at 102 (separate opinion of Ni, J.) (declaring that the "clear and unambiguous language" cannot be changed by language in the Preamble).

²³⁰ The Court emphasized this fact in its opinion:

[W]hen States sign an arbitration agreement, they are concluding an agreement with a very specific object and purpose: to entrust an arbitration tribunal with the task of settling a dispute in accordance with the terms agreed by the parties, who define in the agreement the jurisdiction of the tribunal and determine its limits. In the performance of the task entrusted to it, *the tribunal must conform to the terms by which the Parties have defined this task.*

Id. at 70, ¶ 49 (emphasis added) (citations omitted). The Court then examined the specific consent given by the arbitration agreement in detail, concluding that "although the two States had expressed in general terms in the Preamble of the Arbitration Agreement their desire to reach a settlement of their dispute, their consent thereto had only been given in the terms laid down by Article 2." *Id.* at 72, ¶ 56.

determination of its own competence and mandate must be circumscribed; otherwise, the Court risked acting as a court of appeal, which was not its role. Its task was therefore not to determine whether a more plausible reading of the arbitration agreement existed, but rather to determine whether the arbitral tribunal's own reading was permitted by the text of the agreement.²³¹

But regardless of the potentially limited review required by the circumstance of interpreting an arbitration agreement, the Court's decision ultimately depended on its interpretation of the agreement and its vision of the relationship between its preamble and subsequent provisions. And indeed, the Court's decision and approach to interpreting the arbitration agreement and its preamble were not matters of universal agreement among the members of the Court. Two judges argued strenuously, in dissenting opinions, that the preamble to the agreement made "transparently clear that the object of the instrument was the settlement of the entire boundary question."²³² One dissenting judge cited I.C.J. precedent, including *U.S. Nationals in Morocco*, and argued that the preamble should not have been disregarded as it was key to interpreting the agreement.²³³ The other dissenter arrived at a similar conclusion, focusing not on the legal role of preambles specifically, but rather on the importance of object and purpose in interpreting treaties. More precisely, the second judge argued that plain-language readings of provisions cannot be accepted when they are clearly in conflict with the treaty's object and purpose, as reflected in the preamble in this case.²³⁴

231 The Court noted at the outset that its mission was not

to enquire whether or not the Arbitration Agreement could, with regard to the Tribunal's competence, be interpreted in a number of ways, and if so to consider which would have been preferable. By proceeding in that way the Court would be treating the request as an appeal and not as a *recours en nullité*.

Id. at 69, ¶ 47.

232 *Id.* at 142 (dissenting opinion of Weeramantry, J.); *see also id.* at 176 (dissenting opinion of Thierry, J.) (citing the preamble, calling it "perfectly clear" in establishing the resolution of the nations' dispute as the object of the treaty, and using these conclusions to interpret the questions posed in the arbitration agreement as requiring that a "single line" be used to delimit *all* maritime boundaries subject to dispute).

233 *Id.* at 146 (dissenting opinion of Weeramantry, J.) ("The entire document was instinct with this meaning from its very Preamble."); *see also id.* ("The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though it does not contain substantive provisions." (citing *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, 196 (Aug. 27))).

234 *See id.* at 183-85 (dissenting opinion of Thierry, J.) (arguing that, where plain meaning interpretation of a treaty provision produces a result inconsistent with a treaty's object and purpose, reliance on the plain meaning alone is inappropriate (citing *Interpretation of the Convention of 1919 concerning Employment of Women During the Night*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 50, at 373 (Nov. 15); *Polish Postal Service in Danzig*, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16))).

A decade later, in *Sovereignty over Pulau Ligitan and Pulau Sipadan*,²³⁵ the Court relied on a strict textual interpretation of the preamble to determine whether a border-establishing treaty from 1891 included two outlying islands near Borneo. The 1891 treaty had been concluded between the Netherlands and Great Britain to resolve overlapping claims in the area.²³⁶ Indonesia and Malaysia came to dispute the ownership of the islands in the decades following their independence and eventually submitted the question to the I.C.J.²³⁷ Indonesia claimed sovereignty over the islands based largely on the 1891 treaty and the dividing line established by article IV of the treaty.²³⁸ Malaysia challenged this reading of the treaty, which it regarded as seeking to establish British and Dutch territories solely on the island of Borneo.²³⁹ The Court, relying on the object and purpose “as shown by the preamble” to the treaty, agreed with Malaysia and held that the treaty did not apply to outlying islands.²⁴⁰ Specifically, it pointed to the preambular statement that the parties were “desirous of defining the boundaries between the Dutch possessions *in* the Island of Borneo and the States *in that island* which are under British protection.”²⁴¹ The implication is that the literal reading of the preamble text determined the interpretation of the subsequent provision.

Once again, however, this interpretation was the subject of disagreement in the Court, with one judge making an argument that echoed the dissents in the dispute between Guinea-Bissau and Senegal. Citing the same preambular language as the majority, he argued that the preamble, informed by a close reading of history, indicated a “largesse of purpose [between the parties. The Netherlands and Great Britain] wanted to solve, once and for all, the problems that could arise between adjacent imperial Powers.”²⁴² Thus, it was improbable that the two nations would leave the two nearby islands out of the treaty, “[f]or it *was* closure the parties wanted. It was the object and purpose of their agreement.”²⁴³ The majority’s literal reading and focus on the singular mention of “the island of Borneo” was, seen in this light, mistaken and illogical.²⁴⁴

²³⁵ (Indon. v. Malay.), Judgment, 2002 I.C.J. 625, 645-53 ¶¶ 37-52 (Dec. 17).

²³⁶ *Id.* at 640, ¶ 23, 644-45 ¶ 36.

²³⁷ *Id.* at 642, ¶ 31.

²³⁸ *Id.* at 643-44, ¶¶ 34, 36.

²³⁹ *Id.* at 644, ¶ 35.

²⁴⁰ *Id.* at 652, ¶ 51.

²⁴¹ *Id.*

²⁴² *Id.* at 699, ¶ 27 (separate opinion of Franck, J.).

²⁴³ *Id.*

²⁴⁴ *See id.* at 701, ¶ 33 (“That the Convention, in its preamble, speaks of ‘the island of Borneo’ does not, to me, demonstrate, *a contrario*, that a treaty dealing with ‘Borneo’ intended to exclude these minute islands situated a short distance (56.7 miles, in the case of Ligitan, the more distant of the two) east of Sebatik.”).

While this divergence in opinion between the Court and its dissenting judge ultimately boils down to a question of interpretation of the preamble itself, the decisive weight that both opinions give to the preamble contradicts the Court's analysis in the dispute between Guinea-Bissau and Senegal. In that case, the Court dismissed the preamble as powerless to control the literal meaning of the (poorly drafted) treaty provision that followed. In the dispute between Indonesia and Malaysia, the Court in some ways took the opposite approach, using a literal reading of the preamble to ultimately control the meaning of the provision in question.²⁴⁵ As noted *supra*, it is difficult to fully reconcile this divergence by citing the limited review exercised by the Court in interpreting the arbitration agreement between Guinea-Bissau and Senegal.²⁴⁶ The exercise of limited review in that case nevertheless required interpreting the treaty, with judges arriving at opposing interpretations based on their view of its preamble's role and effects.²⁴⁷ And these disagreements—both within and between the decisions in these two disputes—thus suggest the absence of a clear normative vision of preambles' proper role.

Indeed, given the complex factual nature of these disputes and of textual and object-and-purpose analysis, it is difficult to draw firm conclusions about the roles that preambles have played in the jurisprudence of the I.C.J. more generally. Nevertheless, from the cases illustrated above, three clear observations can be drawn. First, the I.C.J. has neither escaped nor resolved the disagreement surrounding the proper role of treaty preambles in treaty interpretation. Second, treaty interpretations that imbue preambles with great legal weight are not solely phenomena confined to the relatively limited areas of WTO and investment treaty jurisprudence, but arise in the more general arena of public international law as well. And third, it is difficult for tribunals—and for those reading their opinions—to maintain a clear vision of what exactly informs their reliance (or lack thereof) on preambles when complex facts, object-and-purpose analysis, and treaty drafting of varying quality enter the interpretive fray.

IV. ALTERNATIVE AND PRACTICAL APPROACHES

If one thing is clear from the uses of and approaches to treaty preambles described in the preceding Parts, it is that these texts cannot be summarily dismissed as mere ceremonial introductions of no legal consequence. This

²⁴⁵ The Court also marshaled other evidence, such as subsequent agreements that “define[d] the course of the boundary line more exactly,” in favor of its conclusions. *Id.* at 659, ¶ 70. Nevertheless, the starting point for its conclusion was its reading of the preamble.

²⁴⁶ See *supra* notes 230–231 and accompanying text.

²⁴⁷ See *supra* notes 232–234 and accompanying text.

conclusion is unavoidable as a matter of both doctrine and practice.²⁴⁸ Yet it is also evident that the interpretive practices surrounding treaty preambles are marked by confusion and disagreement. Two questions naturally arise from this state of affairs. First, is the approach to preambles established by the VCLT correct, or would a different approach have helped stem the debate? And second, what are the implications for states and negotiators faced with the present reality of treaty preambles? In response to the first question, this Part argues that the VCLT does indeed take the correct position on preambles as a normative matter, with confusion arising largely from the judicial application of that stance, complicated by problems inherent to treaty drafting, textual interpretation and object-and-purpose analysis. This Part then addresses the second question by exploring options and approaches for nations and negotiators to harness or control treaty preambles, given the practical state of confusion and disagreement that surrounds them.

A. *The VCLT Approach and Alternatives*

Should the VCLT have adopted another position on preambles? To answer this question in the affirmative, one might first cite the confusion evident in the range of usages of and interpretive stances towards this ubiquitous treaty element, discussed *supra*. One might then attribute this confusion to the VCLT and to its negotiators, who apparently did not belabor the question of preambles during the VCLT drafting conventions.²⁴⁹ But a brief examination of alternative approaches in light of the specific factors that contribute to this confusion suggests that the VCLT is correct in defining the preamble as part of the text and therefore as an important and necessary element of the VCLT's holistic textual approach to interpreting treaties.²⁵⁰

One obvious alternative approach would have been to somehow emphasize the importance of the preamble, underscoring its potential to carry legal weight and to substantively affect the rights and obligations arising under the treaty. A stronger such statement contained in the VCLT would, presumably, have resolved interpreters' doubts about affording too much weight to preamble language, to the extent that such doubts arose from that language's location in the preamble. But such an approach poses its own problems. First, it runs counter to the VCLT drafters' intent to provide a flexible structure for interpretation capable of accommodating a variety of

²⁴⁸ See *supra* Parts II–III.

²⁴⁹ See *supra* notes 107–108 and accompanying text (noting the conclusory statement contained in the VCLT *travaux* which asserts, “That the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment . . .”).

²⁵⁰ See *supra* Section II.A.

approaches within reason.²⁵¹ Second, it risks going too far and transforming the preamble and its language into a controlling power governing the subsequent provisions of the treaty in *every* case, a result that would unarguably and considerably deviate from the history of treaty practice that the VCLT intended to codify. Moreover, article 31 of the VCLT in its present form already expresses, if read correctly, a simple yet explicit statement of the preamble's importance by defining it as part of the treaty's text, which is the "presumptive object of interpretation"²⁵² as the "presum[ptively] . . . authentic expression of the intentions of the parties."²⁵³

Conversely, another approach to resolving confusion would have been to move in the opposite direction, explicitly diminishing the importance of the preamble. One possible variation of this approach would have been to situate the preamble among the "supplementary means of interpretation" established by article 32—the *travaux préparatoires* and circumstances surrounding the treaty's conclusion—which are only to be referred to in order to confirm the meaning arrived at first by means of article 31, in the case of ambiguous or obscure meaning, or when the interpretation "leads to a result which is manifestly absurd or unreasonable."²⁵⁴ A more extreme variation would have been to do away with the preamble entirely as an interpretive resource by relegating it to a purely ceremonial and formal function. Both approaches, however, would be in distinct tension with the formal structure and process underlying treaties. Preambles, like the terms they introduce, are the product of negotiation and drafting.²⁵⁵ As formal expressions of the signatories' intent, preambles are natural objects of textual interpretation, unlike the *travaux préparatoires* or surrounding circumstances of the treaty, whose role beyond confirming interpretations derived by way of article 31 is limited to circumstances of ambiguity or unreasonableness. Simply put, preambles exist well within the four corners of their treaties. There is therefore no formal,

²⁵¹ See *supra* note 80 and accompanying text.

²⁵² Mortenson, *supra* note 18, at 785.

²⁵³ I.L.C. Report, *supra* note 86, at 220.

²⁵⁴ VCLT, *supra* note 3, art. 32.

²⁵⁵ Bilateral investment treaties constitute one possible and interesting exception to this general statement, due to nations' use of standard base treaties that, somewhat akin to form contracts in contract law, ostensibly raise issues of parties' consent to their terms. But the context of a negotiation and agreement concluded between two states differs considerably from the context of take-it-or-leave-it contracts proposed to consumers en masse. This difference may explain why commentators—while sympathetic to nations who did not fully realize the implications of the terms of the treaty they were concluding—believe nations that entered into such treaties should be bound by the resulting obligations. Compare Poulsen, *supra* note 180, at 236-49 (describing the experience of countries that initially entered into BITs as "photo-opportunity" agreements without understanding the implications of their terms), with NEWCOMBE & PARADELL, *supra* note 158, at 116 ("Critics must admit, as has been noted, that for their concerns the blame lies with governments which have negotiated treaties." (citation omitted)).

procedural, or historical basis for functionally expelling them from the documents they introduce. Such an approach—like an approach elevating preambles to a superior status—would break strongly with the history and practice of treaty negotiation, drafting and interpretation, and is thus undesirable even if it might have the benefit of reducing disagreement about the roles a given preamble should play in interpreting an agreement.

The VCLT's treatment of preambles thus appears correct as both a descriptive and normative matter, situating the preamble as an element of the text that must be considered when interpreting the agreement. Whether adjudicators correctly apply this approach is, of course, another question, complicated by the additional factor of how to interpret a specific treaty's text, which is unavoidably a potential source of disagreement. Also adding to the complication is object-and-purpose analysis, which has been referred to as an "enigma."²⁵⁶ As noted in multiple instances *supra*, it can be difficult to discern the relative influence exerted on a given interpretation by a treaty preamble's actual language versus its very status as a preamble, particularly when the interpretation minimizes the effect of the relevant language.²⁵⁷ Likewise, object-and-purpose analysis, for example when influenced by the widespread practice of using treaty preambles to state the object and purpose of a treaty, can produce questionable conclusions.²⁵⁸ Both aspects contribute to the practical uncertainty that nations should consider when negotiating, drafting, or citing to treaties and their preambles.

B. Implications for States and Negotiators

The practical uncertainty surrounding, and potential power of, preambles create both opportunities and pitfalls for nations engaged in treaty negotiation and drafting. Nations with more resources, experience, and a better understanding of treaty law may have an upper hand when it comes to using preambles to their advantage, while nations that do not may be at a disadvantage.²⁵⁹ This Section briefly sets forth various approaches to treaty preambles that actors should consider when faced with the task of drafting a treaty and its preamble.

First and foremost, nations should be aware of preambles' potential and their uncertain effect, taking into account the nature of the treaty and the

²⁵⁶ See generally Buffard & Zemanek, *supra* note 117 (exploring whether the "object and purpose" of a treaty can be determined objectively).

²⁵⁷ See, e.g., *supra* note 24 and accompanying text (recounting former Secretary of State Hillary Clinton's statement dismissing the controversial language contained in the New START Treaty).

²⁵⁸ See *supra* notes 181–187 and accompanying text (suggesting that tribunals may mistakenly construe preambular language as statements of object and purpose when that was not the drafters' intent).

²⁵⁹ See generally, e.g., Poulsen, *supra* note 180 (describing developing nations' experiences when first taking part in the explosion of BITs).

identities of its potential future interpreters. Second, nations can attempt to harness the power of preambles collaboratively or for their own benefit. Thirdly (and alternatively), nations can rein in the uncertainty by preemptively addressing issues of textual and object-and-purposes analysis. Finally, nations embroiled in treaty disputes can attempt to invoke and exploit preambles in their favor.

1. Recognizing the Preamble's Importance in the Context of the Treaty

Nations engaged in negotiating and drafting must not only realize that treaty preambles are potentially powerful parts of the text, but also that it would be wise to consider the nature of the treaty at hand and the interpretive jurisdiction it confers. As an initial point, it would be a clear error for a nation to discount the preamble and its language outright, given the demonstrable instances of preambles exerting decisive legal weight. But the practical consequences of a preamble's potential power may change as a function of *who* is in a position to interpret it, under the terms of the treaty and the treaty's provision (or lack thereof) for jurisdiction over disputes by an international tribunal. Many treaties contain a provision granting jurisdiction over disputes arising from the treaty to a non-domestic adjudicative body.²⁶⁰ In the case of the I.C.J., jurisdiction over a dispute may also be accomplished by mutual consent, which can take a variety of forms: states can provide general consent by acceding to the I.C.J. Statute's Optional Protocol, or they can submit a specific dispute to the jurisdiction of the Court, as in the case of Guinea-Bissau and Senegal in *Arbitral Award of 31 July 1989*.²⁶¹ Absent one of these equivalent mechanisms, however, the principle of state sovereignty prevents an external, international tribunal from taking jurisdiction over

²⁶⁰ See BROWNIE, *supra* note 6, at 713-14 (discussing such provisions granting jurisdiction to the I.C.J.); see also I.C.J. Statute, *supra* note 76, art. 36(1) ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.").

²⁶¹ See Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT'L L. 309, 335 (2013) (observing that 34% of states have provided such general consent by acceding to the I.C.J.'s Optional Protocol, which is a much higher participation rate than in all other treaties that give states an option to submit disputes arising under that treaty to I.C.J. jurisdiction); see also *Arbitral Award of 31 July 1989*, Judgment, 1991 I.C.J. Rep. 53, 55, ¶ 1 (Nov. 12) (recognizing, as a preliminary matter, the mutual declarations by which Senegal and Guinea-Bissau accepted the jurisdiction of the I.C.J. over their dispute); BROWNIE, *supra* note 6, at 716 (describing generally jurisdiction by consent as provided by article 36(2) of the I.C.J. Statute).

disputes arising from a treaty.²⁶² Instead, competence to interpret remains solely with the states party to the treaty.²⁶³

The presence or absence of such provisions may be relevant to the amount of attention parties to a treaty should devote to its preamble. As a technical legal matter, the absence or presence of jurisdiction-conferring provisions has no effect on the legal obligations and rights arising from the treaty. But as a practical matter, the possibility of an external adjudicator interpreting the treaty is potentially consequential. Interpretation by a tribunal subjects the treaty and its parties to the diverse and unpredictable spectrum of approaches to preambles in treaty interpretation and, moreover, may do so in a legally binding way. By contrast, disputes over preamble language in treaties that do not stand to be interpreted by third-party adjudicatory bodies are likely to have diplomatic, but not necessarily enforceable legal consequences. This observation does not stand for the proposition that such consequences are not important; diplomatic issues of reciprocity and global reputation provide strong incentives for nations to limit their own interpretations and conduct with respect to treaty obligations.²⁶⁴ Rather, it merely serves to recognize that nations may be more willing to use preambles for concessions or other diplomatic purposes when assured that subsequent disputes over treaty interpretation and their resolution will remain firmly in the realm of diplomacy.²⁶⁵ Conversely, the possibility of outside interpretation should

²⁶² See, e.g., Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework and Analysis*, 3 J. INT'L DISP. SETTLEMENT 247, 248 (2012) (“[T]he law of international litigation is still governed by the founding principle that ‘no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.’” (quoting *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23))).

²⁶³ See BROWNLIE, *supra* note 6, at 630 (“Obviously the parties have competence to interpret a treaty, but . . . [t]he treaty itself may confer competence on an *ad hoc* tribunal or the International Court.”).

²⁶⁴ See, e.g., *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 5-7 (2011) (statement of Patrick F. Kennedy, Under Secretary for Management, U.S. Department of State) (arguing for the urgent passing of the Consular Notification Compliance Act in order to ensure compliance with the Vienna Convention on Consular Relations as necessary to ensure reciprocal treatment of citizens, to avoid “jeopardiz[ing] . . . collaboration in many areas,” and as “essential to [the United States’] leading position as a Nation that respects the rule of law”).

²⁶⁵ The New START Treaty serves as a potential example of this difference. The treaty does not confer jurisdiction on any international body, although it does create a Bilateral Consultative Commission to oversee the controls outlined in the treaty and “resolve questions relating to compliance.” See New START Treaty, *supra* note 20, art. XII (establishing the Bilateral Consultative Commission “[t]o promote the objectives and implementation of the provisions of this Treaty”); *id.*, Protocol, pt. 6, §§ I-II (establishing the authority and composition of the Commission, which is made up of representatives of both state parties and is thus arguably a diplomatic body). The impossibility of interpretations external to the United States and Russia may provide an additional explanation for statements made in the Senate ratification hearings asserting that the controversial missile-defense language in the preamble imposed no legal obligations.

motivate states to pay close attention to the preamble and what goes into it, as its potential to exert substantive legal power combined with the unruly nature of object-and-purpose analysis can have far-reaching consequences.

2. Harnessing the Preamble

Given their legal potential and the uncertainty surrounding their interpretation, preambles naturally present negotiators and drafters with opportunities to harness the power of the preamble by injecting secondary considerations or imposing limitations on the subsequent provisions of the treaties. Drafters and negotiators have long used preambles for this purpose in both cooperative and self-serving ways. On the cooperative end, nations have been known to make use of the preamble when unable to agree on the exact form that a desired substantive obligation should take.²⁶⁶ In a variation on that theme, preambles may afford an opportunity for the party on one side of the negotiating table to include a consideration that the other party would not accept as a separate provision. For the party on the other side, integration of such a consideration in the preamble thus represents a chance to make a concession.²⁶⁷ Where such an exchange occurs between nations having an equal understanding of its nature and implications, it is more or less cooperative.

But where nations are not equally sophisticated, are endowed with unequal resources, or have unequal power at the bargaining table, such exchanges or unilateral suggestions of language for inclusion in the preamble may provide an opportunistic party with a possible upper hand. Arguably, the history of BITs and the investor-friendly rights regime, to which developing nations found themselves subjected through those treaties despite their probable lack of intent to enter into such obligations, reflects a similar pattern.²⁶⁸ The critical responses to the broad investor-friendly interpretations of the FET language included in BIT preambles, however, cast doubt on whether developed nations could realistically have expected such investor-friendly interpretations *ex ante* when including the relevant

²⁶⁶ See Suy, *supra* note 14, at 260 (“Il peut arriver que, n’ayant pas pu se mettre d’accord sur la formulation précise de leurs engagements, les parties aux négociations aient trouvé une formule moins contraignante et l’aient insérée dans le préambule—celui-ci ayant, dans leur optique, une valeur moins contraignante . . .” (It could be that, having been unable to agree on the precise formulation of their undertakings, the parties to the negotiations settle on less restrictive language to be inserted into the preamble, which, in their view, has less binding effect . . . (author’s translation))).

²⁶⁷ John Kerry alluded to this tactic in the context of the New START Treaty, saying that the language in question allowed the U.S. to “tip[] [its] hat . . . without giving anything away.” See *supra* note 26 and accompanying text.

²⁶⁸ See Poulsen, *supra* note 180, at 148 (positing that many developing nations entered into BITs because they were eager to attract foreign capital without understanding the obligations they were accepting, pushed by more developed countries who told them such agreements were “crucial” to doing so).

language in their preambles.²⁶⁹ Still, whether those nations sought such investor-friendly interpretations prospectively or retrospectively, the fact that these interpretations were given underscores the possibility for savvy negotiators to include favorable language in preambles in the hopes that it will go initially unnoticed and then eventually be interpreted in their favor.

This door can swing both ways. Indeed, nations fooled by inattention to a preamble may “learn[] from [their] experience” and seek to harness the preamble for their own purposes.²⁷⁰ In the aftermath of the investor-friendly BIT interpretations, nations began taking this approach by including references to their regulatory abilities in areas such as the environment and labor.²⁷¹ Andrew Newcombe, in an article calling for the BIT regime to promote sustainable development, notes with approval that the “new generation of [BITs] has started on this path by drafting preambles that reflect sustainable development concerns.”²⁷² In the BIT context more generally, inclusion of such language in preambles could serve not only to preserve nations’ abilities to enact generally applicable legislation for their own interests, but also to remedy the often-criticized “asymmetry of obligations” imposed by BIT regimes.²⁷³ This fix could ostensibly go beyond preserving nations’ abilities to regulate, through language indicating that protection of investments is conditioned on those investments’ compliance with certain basic values.

No matter the circumstances and intent behind such attempts to harness treaty preambles’ power, such efforts effectively remain a gamble. The uncertainty arising from the elements of textual interpretation and object-and-purposes analysis that come with the territory of treaty preambles mean that the effects will be hard to predict, depending both on the actual drafting and implementation of those efforts and the disposition of the tribunal tasked with interpreting them. But nations would be wise to pay close attention—whether offensively, defensively, or cooperatively—to such opportunities when negotiating and drafting treaties.

²⁶⁹ See *supra* subsection III.B.2 (describing the criticism engendered by investor-friendly interpretations of preambular references with regard to the FET standard).

²⁷⁰ See Gordon, *supra* note 197, at 13 (characterizing recent alterations to BIT preamble language as motivated by a desire to “lower the risks that arbitration under the agreements will be used in ways that were not intended by the parties to the agreements”).

²⁷¹ See *supra* subsection III.B.3.

²⁷² Newcombe, *supra* note 2, at 407.

²⁷³ See *id.* at 365-66 (describing this asymmetry in terms of the fact that BITs “impose obligations on host states with respect to investments and investors . . . [but impose] no corresponding international obligations . . . on foreign investors in the operation of investments . . . to ensure [they] comply with standards of conduct in their operations abroad”).

3. Taming the Preamble

Conversely, in certain situations parties may have a shared interest in controlling the preamble and precluding the possibility of undesired interpretations of its language and legal effect. Such an interest may arise when the parties perceive the treaty as being particularly critical, as in the case of the U.N. Charter following the end of World War II.

Efforts to tame the preamble should presumably strike at the two sources of uncertainty in preambular interpretation: textual interpretation and object-and-purpose analysis. Several paths exist to reduce the range of possible interpretations arising from textual analysis. One approach that may seem ideal, but which is likely difficult to realize in practice, is to focus on quality drafting through textual precision and harmonization of preamble terms with the subsequent articles. In other words, this path would attempt to avoid the poor drafting noted by the I.C.J. in *Arbitral Award of 31 July 1989* and the consequence of the tribunal being unable to arrive at what, it was suggested, was the proper result, due to limits imposed by the textual terms of the treaty.²⁷⁴ Alternatively, drafters could focus on the numbered articles of the treaty, reducing the amount of content in the preamble in an effort to avoid any misinterpretations. Taken to the extreme, negotiators could dispense with the preamble altogether, breaking with tradition and shifting any absolutely necessary content to the treaty's operative provisions, although such an approach may risk reproducing the very problem it intends to solve.²⁷⁵

Another approach would have treaty drafters attempt to take the reins of the unruly object-and-purpose analysis. The tendency of treaty interpreters to direct their gaze to the preamble when conducting object-and-purpose analysis presents a problem for treaty drafters because preambles traditionally also contain language that does not reflect object and purpose. Arguably, this is true of the references to "stability" that produced the investor-friendly FET standards in the BIT context.²⁷⁶ One solution, therefore, is to expressly state or restate the object and purpose of the treaty in order to preclude mere considerations or motivating factors mentioned in the preamble from being elevated to statements of object and purpose when they are not so intended.

The U.N. Charter effectively takes this approach, diverting the interpreter's focus from the preamble by intentionally repeating its language

²⁷⁴ See *supra* notes 228–229 and accompanying text (noting the Court's dissatisfaction with the drafting of the arbitral agreement as expressed by the majority opinion and by two judges in separate concurring opinions).

²⁷⁵ Interpreters' response to a novel form of treaty might ultimately reproduce the uncertainty that the new form intended to address. Moreover, moving content to the substantive provisions arguably brings this issue full circle because of the relative agreement about the importance of a treaty's operative provisions to its interpretation.

²⁷⁶ See *supra* subsection III.B.2.

in later provisions. The Charter's preamble underwent a fascinating transformation during negotiations, evolving first from a non-existent to a purely ceremonial text, before eventually becoming an element of the treaty that was perceived to have a "legal validity" equal to all other provisions of the treaty.²⁷⁷ In practice, however, its actual application in terms of setting forth the object and purpose of the Charter has been limited, largely because the Charter also includes explicit "Purposes" and "Principles" provisions that reiterate and expand upon the preamble's language.²⁷⁸ Indeed, decades after the Charter was concluded, certain participants in its drafting noted the institutional preference to rely primarily on the mentions of human rights in the Charter's first and fifty-fifth articles, as opposed to in its preamble.²⁷⁹ This preference is also evident in the early, unsuccessful attempts of U.S. courts to invoke the human rights language of the Charter for civil rights purposes.²⁸⁰

In both contexts, it is the repetitive—or intentionally redundant—nature of the preamble's and operative provisions' language that enables such an approach. The Charter's drafters recognized the preamble to have equal legal weight to other parts of the treaty text. But by repeating and expanding upon its statements of object and purpose in later provisions, they lifted from it the burden of doing heavy legal work. This approach of intentional redundancy

²⁷⁷ Compare Christof Heyns, *The Preamble of the United Nations Charter: The Contribution of Jan Smuts*, 7 AFR. J. INT'L & COMP. L. 329, 334 (1995) (recounting that originally no preamble was envisioned for the U.N. Charter, but that a preamble project was commenced after Jan Smuts successfully argued for "an entirely new first Chapter, which would state our human faith in the ideas for which we had fought and which we considered basic"), with LELAND M. GOODRICH, EDVARD HAMBRO & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 20 (3d rev. ed. 1969) (recalling that the preamble was considered "a customary part of a treaty" but also one that "serves the purpose of defining in general terms the purposes which the parties have in view"), and Katarina Månsson, *Reviving the Spirit of San Francisco: The Lost Proposals on Human Rights, Justice and International Law to the UN Charter*, 76 NORDIC J. INT'L L. 217, 224 (2007) (observing that, by the final draft of the Charter, "[i]t was indeed stressed that there were no grounds for supposing that the Preamble has less legal validity" than the other provisions of the treaty).

²⁷⁸ See GOODRICH, HAMBRO & SIMONS, *supra* note 277, at 21 ("[I]n the discussions and decisions of United Nations organs relatively little use has been made of [the preamble] . . . [A]ll that one can say with some certainty is that the preamble reinforces, without being essential to, the propositions being advanced."). Compare U.N. Charter pmb. (mentioning its "ends" and "principles"), with *id.* ch. 1, art. 1 (expanding on the "purposes" mentioned in the preamble), and *id.* ch. 1, art. 2 (setting forth the "principles" underlying the Charter).

²⁷⁹ See GOODRICH ET AL., *supra* note 277, at 21 (making this observation slightly over two decades after the Charter was created and entered into force).

²⁸⁰ See, e.g., *Fujii v. State*, 217 P.2d 481 (Cal. Dist. Ct. App. 1950) (providing an example of a domestic court invoking the U.N. Charter for human rights purposes and, after briefly citing the Preamble's general reference to human rights, focusing on the more detailed language of articles 1, 2, 55 and 56), *rev'd on other grounds*, 38 Cal. 2d 718 (1952); see also *Oyama v. California*, 332 U.S. 633, 649-50 & n.4 (1948) (Black, J., concurring) (citing the U.N. Charter, and specifically article 55, as an "additional reason[]" why a Californian law discriminating against Japanese persons was invalid).

is one that could be replicated by treaty drafters today to tame the object-and-purpose analysis mandated by the VCLT.

4. Invoking the Preamble in Disputes

Beyond the negotiation and drafting process, the recent instances of tribunals giving preambles expansive weight in their object-and-purpose analysis in the WTO and BIT contexts naturally invites nations to invoke preambles in their favor in future international disputes. For example, although the line of decisions in the investment treaty context discussed *supra* in Part III slants heavily in favor of investors, there is no reason that preambles could not be made to work in nations' favor as well. The recent trend of including in BIT preambles additional norms that coexist alongside the promotion of investment indicates that states have recognized this fact. The act of relying on such language in the case of a treaty dispute constitutes the other half of this equation, following through with the groundwork laid in the preamble.

The case of *Philip Morris Brands Sàrl v. Oriental Republic of Uruguay* currently before an ICSID tribunal presents an example of a nation trying to do just that. The dispute, brought under the Swiss–Uruguayan BIT, concerns claims by Philip Morris's Swiss subsidiary against Uruguay in response to its labelling and plain-packaging ordinances designed to discourage smoking.²⁸¹ Philip Morris claims that the ordinances violated Uruguay's obligations under the BIT by limiting its right to use its trademarks and causing substantial losses and a reduction in value to its investment in that country.²⁸² For its part, Uruguay argued that ICSID had no jurisdiction over the dispute, relying in part on language in the BIT's preamble as a sign of the treaty's object and purpose.²⁸³ Specifically, the nation claimed that Philip Morris's activities were not an investment under either the ICSID Convention or the BIT, citing language in the preambles of both to inform the object and purpose of each: Uruguay referred, first, to “the need for international cooperation and economic development” in the ICSID Convention's preamble, and then to the “economic development process” and “substantial[] contribut[ions] to the development of the country” in the BIT's preamble.²⁸⁴ Because Philip

²⁸¹ Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 1-10 (July 2, 2013) <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf> [<https://perma.cc/6R9P-UWGGK>].

²⁸² *Id.* ¶¶ 7-9.

²⁸³ *Id.* ¶¶ 176-180.

²⁸⁴ *Id.* ¶ 179; *see also* International Convention for the Settlement of Investment Disputes between States and Nationals of Other States, pmbl., Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Accord entre la Confédération suisse et la République

Morris's economic contributions were far outstripped by the costs of their adverse effects on public health, the company's "interests and activities [were] not investments" under either the ICSID Convention or the relevant BIT.²⁸⁵

The analogy to the FET standard that was the subject of the disputes discussed *supra* is clear. Like FET, "investment" is a term left undefined by the ICSID Convention, although the Swiss–Uruguayan BIT does provide a broad asset- and category-based definition.²⁸⁶ And like the investors in those earlier cases, here Uruguay pointed to preamble language suggestive of object and purpose to further define a term used in the provisions of the BIT in a way favorable to its position. But the tribunal rejected Uruguay's argument, finding that that the language Uruguay cited could "reasonably be understood in different ways" and was "too general to permit the drawing of definitive conclusions"²⁸⁷

Uruguay's attempt, while unsuccessful, serves as an example of efforts that if continued might lead tribunals to clarify or rethink the role of preambles in treaty interpretation. It has been argued that the tribunal's determination was correct and unsurprising, given that "most preambles are drafted in a general manner and are therefore susceptible to varied interpretations"²⁸⁸ Yet commentators also lamented the fact that, "like many prior tribunals, this one did not offer guidance on the role that preambles should play as an aid in interpretation."²⁸⁹ Seen in light of both of the investor-friendly FET standards that were drawn from preambles and the facts and relevant preamble language in *Philip Morris*, Uruguay's argument was not unreasonable. Indeed, while the tribunal may not have provided the desired guidance on the question of treaty preambles generally, its conclusion did not necessarily reject the argument outright as implausible. Rather, it arguably acknowledged that too much uncertainty existed about the cited preambles and their language to make the argument decisive. As time unfolds, it will be interesting to see how tribunals react to arguments invoking the language of more recent BITs that integrate stronger statements of additional considerations other than investment protection into their preambles. Their responses may provide an additional and useful data point for understanding the relative influences on tribunals of textual interpretation, object-and-purpose analysis, and preambles themselves.

orientale de l'Uruguay concernant la promotion et la protection réciproques des investissements, Switz.–Uru., pmb., Oct. 7, 1988, 1976 U.N.T.S. 389 [hereinafter Switz.–Uru. BIT].

²⁸⁵ *Philip Morris*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶ 182.

²⁸⁶ ICSID Convention, *supra* note 284, art. 25(1) (conferring jurisdiction only over disputes involving an "investment"); Switz.–Uru. BIT, *supra* note 284, art. 1(2) (defining investments to include "toutes les catégories d'avoirs" and providing a non-exhaustive list of categories included in the definition).

²⁸⁷ *Id.* ¶ 201.

²⁸⁸ Sabahi & Duggal, *supra* note 15, at 72.

²⁸⁹ *Id.*

CONCLUSION

The preamble occupies an uncertain position in treaty practice, pulled in multiple directions by the forces of doctrine and practice. On one hand, the preamble is unquestionably a part of the treaty it introduces, being both subject to and the product of negotiations between state parties and existing within the four corners of the treaty text. As a matter of logic, it seems inherently important as the statement that sets the stage for all that follows. On the other hand, evidence suggests a not-uncommon perception of preambles as standing apart, subjugated to the treaty's later provisions whether because of its historical origins, its often ceremonial structure and language, or the influence of domestic approaches to the preamble that serve to check its legal power in other contexts. In practice, this perception may influence the approaches not only of parties tasked with interpreting treaties, but also of those who negotiate them and draft them. But the preamble's association with object and purpose swings the pendulum the other way, with longstanding practice making the preamble the *de facto* and go-to source for these statements sought by interpreters and often used to decisive effect.

The primary argument of this Comment is that the VCLT has placed no limits on preambles' legal power. In crafting their treaties, nations may have their reasons for not entrusting the preamble with substantive provisions—tradition, notions of propriety, and uncertainty foremost among them—but there exists no firm rule to prevent them from doing so. Rather, the VCLT provides the preamble with two routes in which to exert its influence: first, as an integral part of the holistic textual analysis of the treaty, and second, as the standard repository for statements of object and purpose.

The examples cited by this Comment make clear that, in the half-century of practice applying the VCLT's interpretive doctrine, important instances of tribunals deeming preambles to possess substantial legal and interpretive weight have arisen, particularly in the recent contexts of the WTO and international investment disputes. Whether these outcomes constitute exceptional cases, are a function of the specific treaties at issue, or denote a trend of increasing receptiveness to preambular power remains unclear. The variety of responses to preambles visible across tribunals and fields of international law underscores the difficulty in isolating and defining concrete approaches to these instruments, which sit at the confluence of issues arising from treaty drafting and negotiation, textual interpretation and object-and-purpose analysis.

This uncertainty warrants an increased attention to and focus on preambles by participants in and observers of treaty practice alike. For legal scholars, it presents an intriguing puzzle worthy of further study with consequential doctrinal and normative implications. For treaty interpreters,

it provides an opportunity and impetus to reevaluate their preconceived notions of preambles in light of the specific texts before them. And most importantly and presently, for nations entering into treaties, it provides a strong motive to carefully consider the opportunities and perils that the preamble may present and to recognize the possible approaches they might adopt toward preambles moving forward.

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