THE INVESTMENT TREATY ARBITRATION REVIEW

SIXTH EDITION

Editor
Barton Legum

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CONTENTS

PREFACE ix
Barton Legum

Part I Jurisdiction

Chapter 1 COVERED INVESTMENT 3
Can Yeğinsu

Chapter 2 COVERED INVESTORS 18
Laura P MacDonald and Sebastian Canon Urrutia

Chapter 3 REQUIREMENTS OF RATIONE PERSONAE IN A GLOBAL ENVIRONMENT 29
Huawei Sun and Xingyu Wan

Chapter 4 RATIONE TEMPORIS OR TEMPORAL SCOPE 42
Barton Legum, Marta Cichomska and Catherine Gilfedder

Part II Admissibility and Procedural Issues

Chapter 5 ADMISSIBILITY 57
Michael Nolan, Elitza Popova-Talty and Kamel Aitelaj

Chapter 6 BIFURCATION IN INVESTMENT TREATY ARBITRATION 67
Marinn Carlson and María Carolina Durán

Chapter 7 OBJECTION OF MANIFEST LACK OF LEGAL MERIT OF CLAIMS: ICSID ARBITRATION RULE 41(5) 79
Alvin Yeo and Koh Swee Yen

Chapter 8 PARALLEL PROCEEDINGS IN THE CONTEXT OF ISD ARBITRATION 96
Junsang Lee, Sungbum Lee and Myung-Ahn Kim

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Chapter 9 PROVISIONAL MEASURES 105
Raëd Fathallah and Marina Weiss

Chapter 10 EVIDENCE AND PROOF 139
Martin Wiebecke

Chapter 11 EVOLUTION OF THE THIRD-PARTY FUNDER 146
Iain C McKenny

Chapter 12 CHALLENGES TO ARBITRATORS UNDER THE ICSID CONVENTION AND RULES 160
Chloe J Carswell and Lucy Winnington-Ingram

Chapter 13 CHALLENGING ARBITRATORS IN INVESTMENT TREATY ARBITRATION 178
Colin Ong QC

Chapter 14 FRAUD AND CORRUPTION 200
Sandra De Vito Bieri and Liv Bahner

Part III Practical and Systematic Issues

Chapter 15 THE ROLE OF PRECEDENT IN INVESTMENT TREATY ARBITRATION 211
Beata Gessel-Kalinowska vel Kalisz and Konrad Czech

Chapter 16 TREATY INTERPRETATION IN INVESTMENT TREATY ARBITRATIONS 219
Tom Sprange QC, Viren Mascarenhas and Julian Ranetunge

Chapter 17 RES JUDICATA 230
Junu Kim, Sejin Kim and Yoo Joung Kang

Chapter 18 SELECTION OF ARBITRATORS IN INVESTMENT ARBITRATION 242
Matthew Buckle

Chapter 19 THE CHOICE OF THE SEAT IN INVESTMENT ARBITRATION 250
Evgeniya Rubinina

Chapter 20 ATTRIBUTION OF ACTS OR OMISSIONS TO THE STATE 272
Oleg Alyoshin, Olha Nosenko and Ivan Yavnych

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Part IV Substantive Protections

Chapter 21 FAIR AND EQUITABLE TREATMENT 283
Andre Yeap SC, Kelvin Poon, Matthew Koh, David Isidore Tan, Daniel Ho and Mark Teo

Chapter 22 EXPROPRIATION 295
Qing Ren, Zheng Xu and Shuang Cheng

Chapter 23 RECENT TRENDS IN MOST FAVOURED NATION CLAUSES IN INTERNATIONAL INVESTMENT AGREEMENTS 304
Farhad Sorabjee, Shanaya Cyrus Irani, Siddhesh S Pradhan and Ananya Verma

Chapter 24 OBSERVANCE OF OBLIGATIONS 312
Anthony Sinclair and Hafsa Zayyan

Chapter 25 LEGAL DEFENCES TO CLAIMS 323
Eun Young Park, Matthew J Christensen, Seokchun Yun and Joonhak Choi

Chapter 26 POLITICAL RISK INSURANCE 330
Rishab Gupta and Niyati Gandhi

Part V Damages

Chapter 27 COMPENSATION FOR EXPROPRIATION 343
Konstantin Christie and Rodica Turtoi

Chapter 28 PRINCIPLES OF DAMAGES FOR VIOLATIONS OTHER THAN EXPROPRIATION 355
Ruxandra Ciupagea and Boaz Moselle

Chapter 29 OTHER METHODS FOR VALUING LOST PROFITS 364
Gervase MacGregor

Chapter 30 CAUSATION 370
Anthony Theau-Laurent and Edmond Richards

Chapter 31 CONTRIBUTORY FAULT, MITIGATION AND OTHER DEFENCES TO DAMAGES 379
Chris Osborne, Dora Grunwald and Ömer Kama

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Chapter 32 THE DETERMINATION OF FINANCIAL INTERESTS IN INVESTMENT ARBITRATION....390
Mikaël Ouaniche

Chapter 33 COUNTRY RISK PREMIUM....402
Ronnie Barnes and Phillip-George Pryce

Part VI Post-Award Remedies

Chapter 34 ANNULMENT OF INVESTMENT ARBITRATION AWARDS....413
Claudia Benavides Galvis and María Angélica Burgos de la Ossa

Chapter 35 ENFORCEMENT OF AWARDS....423
Tom Sprange QC, Charlene Sun and Erin Collins

Chapter 36 REVISION, INTERPRETATION AND CORRECTION OF AWARDS, AND SUPPLEMENTARY DECISIONS....438
Hamish Lal, Brendan Casey, Tania Iakovenko-Grässer and Léa Defranchi

Part VII Multi-Lateral Treaties

Chapter 37 ENERGY CHARTER TREATY....457
Patricia Nacimiento

Chapter 38 NAFTA AND USMCA: THE NEXT STAGE OF THE SAGA....472
Lisa M Richman

Chapter 39 INVESTOR–STATE ARBITRATION AND THE 'NEXT GENERATION' OF INVESTMENT TREATIES....507
Olasupo Shasore SAN, Orji A Uka and Teni Akeju

Chapter 40 THE COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP....520
Lars Markert and Shimpei Ishido

Part VIII Industries

Chapter 41 EXPERT ROLE IN CAUSATION ANALYSIS FOR ENERGY TRANSITION RELATED ARBITRATION....535
Christopher J Goncalves and Alayna Tria

Chapter 42 INVESTMENT TREATY DISPUTES IN THE LIFE SCIENCES INDUSTRY....543
Gregory K Bell, Justin K Ho and Andrew Tepperman

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Chapter 43 INVESTMENT TREATY ARBITRATION: CONSTRUCTION AND INFRASTRUCTURE PROJECTS....552
Simon Hughes QC

Appendix 1 ABOUT THE AUTHORS....559
Appendix 2 CONTRIBUTORS' CONTACT DETAILS....591

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

Barton Legum
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Part III

Practical and Systematic Issues

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Chapter 16

TREATY INTERPRETATION IN INVESTMENT TREATY ARBITRATIONS

Tom Sprange QC, Viren Mascarenhas and Julian Ranetunge[1]

I INTRODUCTION

An arbitral tribunal constituted on the basis of an agreement to arbitrate in an investment treaty, such as a bilateral investment treaty (BIT) or a multilateral agreement such as the Energy Charter Treaty will need to engage in treaty interpretation to discharge its duty to decide the dispute. When tribunals are called to interpret a 'treaty',[2] they turn to the Vienna Convention on the Law of Treaties 1969 (VCLT).[3] The VCLT is the product of an extensive codification process of the International Law Commission led by distinguished Special Rapporteurs.[4] It has been ratified by 116 states and even some non-ratifying states (such as the United States) recognise that parts of the VCLT reflect customary international law.[5] Equally, tribunals consider certain parts of the VCLT as reflective of customary international law on matters of treaty interpretation.[6]

The VCLT addresses a range of fundamental topics on the law of treaties. The provisions of the VCLT that concern interpretation are housed in Part III ('Observance, Application

1 Tom Sprange QC is the managing partner and Julian Ranetunge is an associate at King & Spalding International LLP and Viren Mascarenhas is a partner at King & Spalding LLP.

2 As defined in Article 2(1)(a) of the VCLT, a 'treaty' means 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

3 For a list of investment arbitration cases that have referred to the VCLT, see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press, 2012), p. 28, n. 1 (Dolzer & Schreuer). The VCLT was adopted on 23 May 1969 and entered into force on 27 January 1980.

4 *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment, 16 April 2009, para. 56.

5 Esmé Shirlow, Kiran Nasir Gore, 'Celebrating 50 Years of the VCLT: An Introduction', Kluwer Arbitration Blog, 2 December 2019.

6 Many tribunals have stated that Articles 31 and 32 reflect customary international law. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, para. 75; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, para. 141; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50; *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 88; *Churchill Mining and Planet Mining v. Indonesia*, ICSID, Decision on Jurisdiction (Churchill Mining Plc), 24 February 2014, para. 149. Other provisions of the VCLT are also said to reflect customary international law. See Esmé Shirlow, Kiran Nasir Gore, 'Celebrating 50 Years of the VCLT: An Introduction', Kluwer Arbitration Blog, 2 December 2019 (referring to Articles 26 and 34–36).

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and Interpretation of Treaties'), Section 3 ('Interpretation of Treaties'), Articles 31 and 32, which are respectively entitled '[g]eneral rule of interpretation' and '[s]upplementary means of interpretation'.

This chapter will address each of the four limbs of Article 31 and Article 32, and use relevant and recent case law to draw out their key features in guiding interpretation of treaties.

II ARTICLE 31

Article 31 is entitled '[g]eneral rule of interpretation'. The drafters of the VCLT made clear that there is no hierarchy among the four sub-articles of Article 31. Instead, together, they constitute the general 'rule' (singular, rather than the plural 'rules') of interpretation.[7]

i Article 31(1)

Article 31(1) states that:

> *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

Article 31(1) contains three separate principles.[8] The first, good faith interpretation, 'flows directly from the rule pacta sunt servanda'.[9] The second is that the text is presumed to be the 'authentic expression of the intentions of the parties'.[10] The third is that the ordinary meaning of a term is to be determined not in the abstract but in light of the treaty's context and object and purpose.[11] The maxim *ut res magis valeat quam pereat* (or the 'principle of effectiveness') is also embodied in Article 31(1), insofar as it reflects a true general rule of interpretation.[12]

A straightforward application of Article 31(1) can be seen in *Murphy International v. Ecuador*. Ecuador objected to the tribunal's jurisdiction over the dispute. It argued that, at the time Murphy International consented to ICSID arbitration, there was no consent on the part of Ecuador. Rather, by the time the claimant consented to arbitration (on 29 February 2008), Ecuador had already notified ICSID on 4 December 2007, pursuant to Article 25(4) of the ICSID Convention,[13] that it would not consent to arbitrate the class of disputes in which the claimant's claims fell.[14]

---

7 Draft Articles on the Law of Treaties with Commentaries, Yearbook of International Law Commission, 1966, vol. II ('Draft Articles Commentary'), pp. 219–220 (paras 8–9).

8 See also *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, para. 16.

9 Draft Articles Commentary, p. 221 (para. 12).

10 id., pp. 220–221 (paras 11–12).

11 id., p. 221 (para. 12).

12 id., p. 219 (para. 6); *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, 31 May 2017, para. 288.

13 Article 25(4), ICSID Convention states: 'Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).'

14 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras 60, 61.

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The tribunal disagreed. After quoting the text of Article 25(4) of the ICSID Convention, and referring to the general rule in Article 31(1) of the VCLT, the tribunal found that an Article 25(4) notification may not unilaterally modify the consent given in the BIT.[15] Article 25(4) states that '[a]ny Contracting State may . . . notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre'. Ecuador's communication, therefore, was nothing more than a 'notification'.[16] Because the language of Article 25(4) was clear and unambiguous, the tribunal saw no need to resort to 'supplemental' means of interpretation (i.e., under Article 32 of the VCLT).[17]

ii Article 31(2)

Article 31(2) defines the word 'context' that is found in Article 31(1).[18] It states that:

> *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 connection with the conclusion of the treaty;*
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*

The text, including its preamble and annexes

In practice, a treaty's object and purpose is among the 'primary guides' for interpretation, and it is often derived from the preamble of the treaty.[19] The preambles of investment treaties tend to highlight the positive role of foreign investment and the link between an investor-friendly climate and the flow of foreign investment.[20] For example, in *Al-Warraq v. Indonesia*, the tribunal referred to the preamble of the OIC Agreement – which speaks of a 'favourable climate for investment' – when it found that the most-favoured-nation provision in the OIC Agreement allowed a party to import the fair and equitable treatment standard from another BIT.[21]

More recently, tribunals have questioned the utility of referring to the preamble of a BIT given the general terms in which they tend to be couched. As the tribunal explained in *Kappes v. Guatemala*:[22]

> *It is certainly true . . . that the DR-CAFTA Preamble refers to a goal to "ENSURE a predictable commercial framework for business planning and investment[.]" . . . But that observation cannot be the end of the story. Every treaty creates a varied and nuanced balance between extending protections*

15 id., paras 64, 71–73.
16 id., para. 73.
17 id., para. 71.
18 See *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 116.
19 Dolzer & Schreuer, p. 29, and references in footnote 9 therein.
20 id., p. 29.
21 *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras 549–551.
22 *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections, 13 March 2020, para. 150. See also *HICEE B.V. v. The Slovak Republic,* PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 116.

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> *and limiting or conditioning those protections. It would be too facile to simply advert to the general notion of investor protection as a catch-all tool (or a proverbial finger-on-the-scale) to resolve all disputed issues regarding the extent, limits or conditions on protections.*

Agreements or instruments made by some of all of the parties

As excerpted above, there are two other building blocks of the 'context' in which words are to be interpreted: an agreement relating to the treaty made by both parties in connection with the conclusion of the treaty, and an instrument made by one party and accepted by the other parties as an instrument related to the treaty. The guiding rationale here is that a 'unilateral' document does not form part of the context; it must have been made in connection with the conclusion of the treaty and the other parties must have accepted it in relation to the treaty.[23]

Tribunals have not always interpreted these provisions consistently. In *Fraport v. Philippines*, the tribunal had to determine whether an investment needed to be made in accordance with the host state's laws to qualify for substantive protection. Article 1(1) of the Germany-Philippines BIT provided that 'investment' shall mean 'any kind of asset *accepted in accordance with the respective laws and regulations of either Contracting State*'.[24] In interpreting the word 'investment', the tribunal relied on, among other things, the terms of an 'Instrument of Ratification' that the Philippines had exchanged with Germany three months after the conclusion of the BIT (the Philippine Instrument).[25] Germany had exchanged its own instrument with the Philippines at the same time.[26] The tribunal relied on certain wording in the Philippine Instrument to support its conclusion that Article 1(1) 'explicitly and reiteratedly required that an investment . . . had to be in accordance with the host state's law'.[27]

On annulment, the ad hoc committee criticised the tribunal's reliance on the Philippine Instrument.[28] It explained that the Philippine Instrument was a 'unilateral act' by which the Philippines had expressed its consent to be bound by the treaty; it was not an interpretative declaration intimated to Germany for its acceptance.[29] That may be true: the Philippine Instrument certainly did not constitute a 'subsequent agreement' for the purposes of Article 31(2)(a). However, it does appear to fall within Article 31(2)(b), which refers to an 'any instrument which was made by one or more parties *in connection with the conclusion of the treaty* and *accepted by the other parties as an instrument related to the treaty*'.[30] First, the Philippine Instrument was made 'in connection with the conclusion of the treaty' since it pertained to ratification of the Germany–Philippines BIT. Second, Germany 'accepted' that the Philippine Instrument was 'related' to that BIT, not least of all because it conveyed its own instrument of ratification to the Philippines at the same time. Notably, unlike Article 31(2)(a), Article 31(2)(b) does not feature the word 'agreement'.

23 Draft Articles Commentary, p. 221 (para. 18).

24 *Fraport v. Philippines*, Award, 16 August 2007, p. 129 (emphasis added).

25 id., paras 337–343.

26 *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, para. 97.

27 *Fraport v. Philippines*, Award, 16 August 2007, paras 339, 341–343, 398.

28 *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, paras 98–99, 107.

29 id., paras 96, 98.

30 Emphasis added.

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iii Article 31(3)

Article 31(3) states that:

> *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.*

Subsequent agreement between the parties – Article 31(3)(a)

The tribunal in *Methanex* had little difficulty applying this provision to a Note of Interpretation issued by the NAFTA Federal Trade Commission (the FTC). Under Article 1131(2) NAFTA, an interpretation by the FTC of a NAFTA provision is binding on a NAFTA tribunal. On 31 July 2001, shortly after the end of an oral hearing in *Methanex* in July 2001, the FTC adopted certain 'interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions'.[31] The US argued that an FTC Interpretation was a 'subsequent agreement' for the purposes of Article 31(3)(a), which the tribunal ought to take into account when interpreting certain provisions of NAFTA.[32] The tribunal readily accepted that the FTC Interpretation was properly characterised as a 'subsequent agreement', and added that such an agreement need not be concluded with the same formal requirements of a treaty.[33]

More recently, tribunals have had to grapple with Article 31(3)(a) in the context of declarations made by EU Member States about the compatibility with EU law of investor–state dispute settlement (ISDS) clauses in intra-EU BITs (that is, a BIT between two EU Member States). In March 2018, the Court of Justice of the European Union published its preliminary ruling in *Slovak Republic v. Achmea BV*, in which it held that the ISDS provision in Article 8 of the Netherlands–Slovakia BIT was incompatible with EU law. Several months later, in January 2019, 23 EU Member States issued declarations on the legal consequences of the *Achmea* decision, affirming that 'all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable'[34] (the Achmea Declarations).

In *GPF v. Poland*,[35] the respondent argued that the Achmea Declarations constituted a 'subsequent agreement' and thus rendered Article 9 of the Poland–Luxembourg BIT, the ISDS provision, inapplicable. The tribunal disagreed. Citing to a commentary on an earlier draft of the VCLT, it explained that a 'subsequent agreement' for the purposes of Article 31(3)(a) had to relate to 'understandings reached by States during negotiations of a relevant treaty'.[36] The Achmea Declarations did not reflect such an understanding: at the time the BIT was concluded, the states themselves did not indicate any concern about the incompatibility between Article 9 of the BIT and EU law. Instead, the Achmea Declarations

31 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award, 3 August 2005, para. 12.
32 id., para. 19.
33 id., paras 20–21.
34 *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020, para. 349.
35 id., para. 350.
36 id., para. 351.

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merely reflected the 'political will' to terminate intra-EU BITs as of 2019.[37] Further, the tribunal noted that the title of the Achmea Declarations themselves – 'Declaration . . . on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union' – suggested that the EU Member States sought to explain the legal consequences of the *Achmea* decision, rather than interpret the dispute settlement clauses in intra-EU investment treaties.[38]

In *Ekosol v. Italy*, the tribunal reached the same conclusion about the Achmea Declarations in the context of a case under the Energy Charter Treaty.[39] In addition, the tribunal pointed out that Article 31(3)(a) requires that the 'subsequent agreement' must be between all the parties to the relevant treaty.[40] The two states who had a 'stake' in the *Ekosol* arbitration could not bilaterally change the terms of the ECT.[41] As the tribunal put it:[42]

> *VCLT Article 31(3)(a) is not . . . a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used.*

Subsequent practice in the application of the treaty – Article 31(3)(b)

According to Article 31(3)(b), a tribunal shall also take into account any 'subsequent practice' in the application of the treaty which establishes the agreement of the parties regarding its interpretation. This provision is informed by the idea that subsequent practice in the application of a treaty constitutes objective evidence of the parties' understanding of the treaty's meaning.[43]

One recurring issue in the case law is whether a position taken by a state in previous arbitrations constitutes a 'subsequent practice' for the purpose of Article 31(3)(b). In *Urbaser v. Argentina*, which concerned the Spain–Argentina BIT, Argentina referred to a position taken by Spain in the *Maffezini* case.[44] That was not enough to constitute 'subsequent practice': it only showed what Spain's counsel argued in a particular arbitration; it did not, without more, represent Spain's – let alone Spain and Argentina's – interpretation of the provisions of the BIT.[45] In *Telefónica v. Argentina*, Argentina took its argument a step further. It pointed to the 'parallel' and 'similar' positions taken by Spain in *Maffezini* and by Argentina in *Siemens* and *Gas Natural* on the interpretation of Article IV.2 of the Spain–Argentina BIT as indicative of 'subsequent acts carried out by the parties'.[46] Once again, the tribunal was not convinced.

37 id., para. 352.

38 id., para. 353.

39 *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Respondent Request for Immediate Termination and Respondent Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, 7 May 2019, paras 222–224.

40 id., para. 220.

41 id., para. 221.

42 id., para. 223.

43 Draft Articles Commentary, pp. 221–222 (para. 15).

44 *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 51.

45 id., para. 51.

46 *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 109.

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It explained that Spain's and Argentina's positions in the above-mentioned cases did not amount to their 'application' of the BIT, and their statements were not directed towards each other, and so could not be an 'agreement'.[47]

Yet, the comments of the tribunals in these cases, particularly in *Telefónica*, sat uneasily with the tribunal in *Kappes v. Guatemala*. In that case, the tribunal considered the interpretation of Article 10.16.1(a) DR-CAFTA, a multilateral treaty between the US and several states, largely in Central America. It drew attention to the fact that Article 31(3)(b) refers to 'any' subsequent practice in the application of the treaty, and explained that a demonstration that all states parties to a particular treaty had expressed a common understanding in their submissions to (separate) arbitral tribunals 'could be compelling evidence of subsequent practice'.[48] However, there had not yet been any unanimous expression of views about the scope and implications of Article 10.16.1(a) DR-CAFTA, and so the tribunal did not rely on prior statements by either state in the interpretation of DR-CAFTA.

Relevant rules of international law – Article 31(3)(c)

Finally, Article 31(3)(c) directs tribunals to take into account 'any relevant rules of international law applicable in the relations between the parties'.

The interpretation of this provision in international law is unsettled. In the *Oil Platforms* case, three Iranian oil platforms and a US Navy warship were destroyed when the ship struck a mine in international waters. Among other things, Iran claimed that the US had violated Article XX of the Treaty of Amity. The International Court of Justice decided that it should take into account the entirety of the international law relating to the use of force in interpreting this provision.[49] In her Separate Opinion, Judge Rosalyn Higgins criticised such a reading of Article 31(3)(c) on the basis that it ignored the limited 'context' which, there, was that of an economic and commercial treaty.[50]

Investment arbitration tribunals appear to have adhered to a narrower understanding of this provision, preferring to take into account any relevant rules of 'customary international law'[51] rather than international law as a whole. Further, attempts to broaden the scope of this provision have been unsuccessful. In *RosInvestCo v. Russia*, the claimant urged the tribunal to adopt a 'dynamic' approach to the interpretation of the 1989 UK–USSR BIT, one that would have given 'full weight' to the events that post-dated the conclusion of the BIT, notably, the 'dissolution of the USSR, the emergence of the Russian Federation . . . and the radically different economic, trading and investment policies adopted by the Russian Federation'.[52] To support its argument, the claimant referred to cases that related to human rights treaties and treaties concerning the constituent instruments of international organisations.[53]

47 id., para. 113.

48 *Daniel W. Kappes and Kappes, Cassiday & Associates v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent Preliminary Objections, 13 March 2020, para. 156.

49 Case Concerning Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment of 6 November 2003, para. 41.

50 Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Separate Opinion of Judge Rosalyn Higgins, 6 November 2003, para. 46.

51 See, e.g., Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 208.

52 *RosInvestCo UK Ltd. v. Russia*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007, para. 39.

53 ibid.

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The tribunal rejected the claimant's argument. It distinguished the cases on which the claimant relied on the basis that they related to multilateral treaties that naturally called for such a 'dynamic' approach. First, human rights treaties represented the very archetype of treaty instruments in which the contracting parties must have intended that the underlying principles should be understood and applied 'in the light of developing social attitudes'.[54] Second, international organisations had to confront ever-changing problems and circumstances, and so a degree of evolutionary adaptation was the 'only realistic approach' to realising the underlying purposes of the organisation as laid down in its constituent instrument.[55]

Here, the tribunal explained, the BIT was a matter of specific consent by two parties, the UK and the USSR. The reference in Article 31(3)(c) VCLT to relevant rules of international law that are 'applicable in the relations between the parties' must:[56]

> *[B]e taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.*

iv Article 31(4)

Article 31(4) states that:

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

This sub-article caters to a situation in which, 'notwithstanding the apparent meaning of a term in its context, the parties intended it to have a special meaning'.[57] The party invoking the special meaning has the burden of proof.[58] There is little investment arbitration case law on this provision at present. It was unsuccessfully invoked in *Canfor v. United States*, where the tribunal held that a letter from a trade official of one NAFTA Party to a private company that addressed the interpretation of an intergovernmental agreement with another NAFTA Party was not evidence that a 'special meaning' had been given to a term for the purposes of Article 31(4).[59]

III ARTICLE 32

Article 32 states that:

54 ibid.

55 ibid.

56 *RosInvestCo UK Ltd. v. Russia*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007, para. 39.

57 Draft Articles Commentary, p. 222 (para. 17).

58 Draft Articles Commentary, p. 222 (para. 17).

59 *Canfor Corporation and others v. United States of America*, UNCITRAL, Joint Order of the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007, para. 111.

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> *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.*

Article 32 is entitled '[s]upplementary means of interpretation'. It is a means of interpretation that is 'supplementary' to the '[g]eneral rule of interpretation' set forth in Article 31. The drafters explained that the principal distinction between Article 31 and 32 is the degree to which the various means of interpretation contained therein accurately reflect the parties' agreement:[60]

> *The elements of interpretation in article [31] all relate to the agreement between the parties at the time when or after it received authentic expression in the text. Ex hypothesi this is not the case with preparatory work [i.e. Article 32] which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text. Moreover, it is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation.*

i Threshold issue – recourse to supplemental means of interpretation

A threshold issue arises as to when a tribunal may have recourse to 'supplementary means of interpretation'. Perhaps because of the word 'or', a textual reading of Article 32 suggests that supplementary means may be considered in three circumstances, namely:

a to confirm the meaning resulting from the application of Article 31;
b to determine the meaning when the application of Article 31 leaves the meaning ambiguous or obscure; or
c to determine the meaning when the application of Article 31 leads to a 'manifestly absurd or reasonable' result.[61]

Not all tribunals interpret Article 32 in this way. Some tribunals confine Article 32 to a confirmatory role. For example, in *Noble Ventures v. Romania*, the tribunal said:[62]

> *[R]ecourse may be had to supplement means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to confirm the meaning resulting from the application of the aforementioned methods of interpretation.*

60 Draft Articles Commentary, p. 220 (para. 10).

61 This interpretation of Article 32 was adopted in, e.g., *Churchill Mining and Planet Mining v. Indonesia*, ICSID, Decision on Jurisdiction (Churchill Mining Plc), 24 February 2014, para. 151; *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, para. 118.

62 *Noble Ventures v. Romania*, Award, 12 October 2005, para. 50.

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On either reading, there should generally be no need to resort to supplemental means of interpretation if the ordinary meaning of words is clear and makes sense in the context.[63] The drafters of the VCLT stopped short of prohibiting recourse to supplementary means in such situations:[64] the Commission felt that it would be 'unrealistic and inappropriate' to state that no recourse whatever may be had to extrinsic means of interpretation.

Whatever the theoretical importance of this threshold issue, in practice, resort to 'supplementary means' like the travaux préparatoires seems to be determined primarily by their availability.[65] In *Malaysian Historical Salvors v. Malaysia*, the ad hoc committee explained:[66]

> *[C]ourts and tribunals interpreting treaties regularly review the travaux préparatoires whenever they are brought to their attention; it is mythological to pretend that they do so only when they first conclude that the term requiring interpretation is ambiguous or obscure.*

ii Resort to supplemental means

In *Austrian Airlines v. Slovakia*, the tribunal resorted to 'supplemental means' to interpret Article 8 of the Austria–Slovakia BIT[67] which concerned the scope of the dispute resolution clause. Article 8 stated (in relevant part) as follows:

> *Any disputes arising out of an investment, between a Contracting Party and an investor of the other Contracting Party, concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement . . . [shall be decided by] arbitral proceedings in accordance with the UNCITRAL-Arbitration Rules.*[68]

Article 4 stated in relevant part:

> *The investor shall have the right to have the legitimacy of the expropriation reviewed by the competent authorities of the Contracting Party which prompted the expropriation.*
>
> *The investor shall have the right to have the amount of the compensation and the conditions of payment reviewed either by the competent authorities of the Contracting Party which prompted the expropriation or by an arbitral tribunal according to Article 8 of this Agreement.*

The tribunal began by discerning the ordinary meaning of the words used in Articles 8 and 4. It concluded that access to arbitration was intended to be limited to the 'amount and conditions of the indemnity, as opposed to the . . . lawfulness' of expropriation.[69] The

63 Draft Articles Commentary, p. 222 (para. 18). See, e.g., *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Judgment of Hague District Court, 20 April 2016, para. 5.22.

64 Draft Articles Commentary, p. 223 (para. 18).

65 Dolzer & Schreuer, p. 31.

66 *Malaysian Historical Salvors v. Malaysia*, Decision on Annulment, 16 April 2009, para. 57.

67 *Austrian Airlines v. Slovak Republic*, UNCITRAL, Award, 20 October 2009.

68 id., para. 92 (emphasis added).

69 id., paras 95–97.

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claimant argued that this reading was inconsistent with the object and purpose of the BIT – which was the protection of foreign investors – because it enabled the local courts of the host state to unilaterally avoid arbitration if they denied a claim for expropriation.[70]

The tribunal was unmoved, on the basis that Articles 4 and 8 were clear on the allocation of responsibility between the local courts and any arbitral tribunal. It then referred to the travaux préparatoires to confirm its understanding. It reviewed the negotiating history and earlier drafts of the BIT and found that the wording in Article 8 was the result of a process by which the scope of disputes subject to arbitration was purposefully restricted.[71]

Finally, while Article 32 identifies 'preparatory work' and the 'circumstances of [the treaty's] conclusion' as two examples of 'supplementary means' of interpretation, it is clear from the way it was drafted that there may be other kinds of 'supplementary means'. As the *HICEE v. Slovakia* tribunal put it, 'the category of admissible supplementary means is not a closed one'.[72] In that case, the tribunal suggested that the 'other supplementary means' that it may refer to included 'all available material that it finds to be relevant, significant, and at the same time reliably instructive as to the meaning and intention behind the words used in the Agreement'.[73]

IV CONCLUSION

For investment treaty tribunals, Articles 31 and 32 of the VCLT play an important role in the interpretation of BITs and multilateral agreements. As Dolzer & Schreuer explain, '[m]ost tribunals start by invoking Article 31 of the Vienna Convention on the Law of Treaties (VCLT) when interpreting treaties'.[74] As this article has shown, while tribunals strive to faithfully apply the terms of Articles 31 and 32 of the VCLT, the challenge for tribunals remains the correct and consistent application of the VCLT in interpreting those treaties.

70 id., paras 100–101.

71 id., paras 105–108.

72 *HICEE B.V. v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011, paras 117, 121.

73 id.1, para. 121.

74 Dolzer & Schreuer, p. 28.

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Appendix 1

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Tom Sprange QC is the managing partner of the London Office of King & Spalding. He provides advocacy and strategic advice in significant, high-value and complex disputes. A partner in our trial and global disputes practice, Tom acts in a wide range of disputes under local, private and public international law. He is described by his peers as: 'a unique coming together of legal insight, commercial nous and practical living/implementation', 'a superb advocate', 'class act', 'remarkable', a 'super lawyer', 'a real star', 'fantastic', 'a very sharp legal mind', 'an excellent advocacy choice across dispute resolution forums', 'a sharp intellect' who praise 'the precision, energy and tenacity he projects in front of tribunals and judges' and describe him as an 'A-star advocate, he just walks in and understands everything', and highlight his 'great cross-examination skills'. Tom frequently appears in the Chancery and Queens Bench divisions of the High Court and the Court of Appeal in England and in the DIFC in a broad array of disputes. Tom has acted as counsel in more than 200 international arbitrations in the leading arbitration institutes, including the International Chamber of Commerce, London Court of International Arbitration, American Arbitration Association, Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes. He also regularly sits as an arbitrator.

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