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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in investment treaty arbitration.

Although 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on investment treaty arbitration have been written, the relentless rate of change in the field rapidly leaves them out of date.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 those developments and the context behind them.

This eighth edition 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.

Barton Legum
Honlet Legum Arbitration
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Chapter 15

TREATY INTERPRETATION IN INVESTMENT TREATY ARBITRATION

Tom Sprange KC, Simon Maynard and Julian Ranetunge[1]

I INTRODUCTION

An arbitral tribunal constituted on the basis of an arbitration agreement in an investment treaty, such as a bilateral investment treaty (BIT) or a multilateral agreement (such as the Energy Charter Treaty (ECT)), 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 treaty interpretation are primarily found in two articles: Article 31, which sets forth the 'General rule of interpretation', and Article 32, which sets forth the

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2 As defined in the Vienna Convention on the Law of Treaties (VCLT), Article 2(1)(a), 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. The VCLT was adopted on 23 May 1969 and entered into force 27 January 1980.

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

5 Esmé Shirlow and 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 SpA and Italstrade SpA v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, Paragraph 75; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, Paragraph 141; *Noble Ventures, Inc v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, Paragraph 50; *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 88; *Churchill Mining and Planet Mining v. Indonesia*, ICSID, Decision on Jurisdiction, 24 February 2014 (*Churchill Mining Plc*), Paragraph 149; *Itisaluna Iraq and others v. Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, Paragraph 61. Other provisions of the VCLT are also said to reflect customary international law. See Shirlow and Gore (referring to Articles 26 and 34 to 36).

'Supplementary means of interpretation'. This chapter addresses each article in turn, and uses relevant and recent case law to draw out their key features to help guide the interpretation of treaties.

II ARTICLE 31

The general rule of interpretation is contained in Article 31. Article 31 contains four sub-articles, and the drafters of the VCLT made clear that there is no hierarchy among them; instead, together, they constitute the general rule (singular, not plural) of interpretation.[7] However, in practice, Article 31(1) is 'by far the most frequently referenced provision' among the various sub-articles.[8]

i Article 31(1)

Article 31(1) states:

> *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) – described as the 'golden rule' of interpretation[9] – contains four elements: good faith, ordinary meaning, context, and object and purpose.[10] These elements are elaborated below:

a 'Good faith', while seldom addressed in case law,[11] has been described to mean interpreting a treaty in a way that is 'obedien[t] to a standard of honesty, loyalty, and fair dealing' in international conduct, that does not result in a 'gross manipulation' of the language of the treaty or that does not make use of an ambiguity in the language to put forward an interpretation that cannot have been the interpretation of the parties.[12]

b The phrase 'ordinary meaning' requires little explanation[13] – essentially, what do parties ordinarily mean when they use those words – although that does not mean its application is straightforward. Some tribunals refer to the dictionary definition of

7 Draft Articles on the Law of Treaties with Commentaries, Yearbook of International Law Commission, 1966, Vol. II (the Draft Articles Commentary), pp. 219–20, Paragraphs 8–9.

8 J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford University Press, 2012, Paragraph 3.11.

9 Jiménez de Aréchaga, 'International Law in the Past Third of a Century', in *Recueil des cours*, Vol. 159, Springer, 1978, p. 43.

10 Draft Articles Commentary, pp. 219-221, Paragraphs 6 and 11–12; Weeramantry, Paragraph 3.11; *Beijing Everyway Traffic & Lighting Tech. Co, Ltd v. The Republic of Ghana (I)*, PCA Case No. 2021-15, Final Award on Jurisdiction (Save as to Costs), 30 January 2023 (*Beijing Everyway Traffic*), Paragraph 149.

11 Weeramantry, Paragraphs 3.21–3.24.

12 Weeramantry, Paragraphs 3.21, 3.26 and 3.29.

13 Tribunals have employed a raft of synonyms for this phrase – including 'natural and fair meaning', 'natural and ordinary meaning', 'plain meaning' and 'normal sense' – although they appear to mean the same thing. See Weeramantry, Paragraph 3.33.

words, an approach that is not without its critics.[14] The 'ordinary' meaning is not the same as the 'literal' meaning,[15] and an ongoing issue is whether the ordinary meaning should be assessed at the time the dispute arose or the text was drafted.[16]

c 'Context' is defined in Article 31(2), discussed below.

d The 'object and purpose' of the treaty serves to shed light on the ordinary meaning of the terms subject to interpretation. 'Object and purpose' is usually interpreted as one phrase, rather than separating object' and 'purpose', and tribunals generally refrain from using it to arrive at a meaning that contradicts the clear meaning of the text.[17]

While, in theory, there is no hierarchy in the application of these four elements,[18] the interpretative exercise revolves around the text of the treaty (i.e., the starting point) rather than a focus on the intentions of the parties[19] or, as the *Methanex v. United States* tribunal put it, the text of the treaty is 'deemed to be the authentic expression of the intentions of the parties'.[20]

A good example of the application of Article 31(1) can be seen in *Murphy v. Ecuado*r. In 1993, Ecuador and the United States concluded a BIT that provided for International Centre for Settlement of Investment Disputes (ICSID) arbitration. On 4 December 2007, Ecuador notified ICSID that it 'will not consent' to submit disputes relating to investments in the oil and gas sector, among others, to ICSID and that any previously expressed will to submit those disputes to ICSID that had yet to be 'perfected' by the consent of the other party was withdrawn with immediate effect.[21] Ecuador purported to convey this notification pursuant to Article 25(4) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which states that a contracting state may 'notify [ICSID] of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of [ICSID]'. On 29 February 2008, nearly three months after Ecuador's notification, the claimant filed an arbitration under the Ecuador–United States BIT in relation to its investment in Ecuador's oil sector.

Ecuador objected to the tribunal's jurisdiction on the basis that, at the time the claimant consented to ICSID arbitration (i.e., 29 February 2008), there was no consent on the part of Ecuador because Ecuador had already notified ICSID (on 4 December 2007) under Article 25(4) that it would not consent to arbitrate the class of disputes in which the claimant's claims fell.[22] The tribunal disagreed. After referring to Article 31(1) of the

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14 Weeramantry, Paragraphs 3.21, 3.26 and 3.41.

15 *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002, Paragraph 136 ('there is a difference between a literal meaning and the ordinary meaning of a legal phrase').

16 Weeramantry, Paragraphs 5.62–5.73.

17 Weeramantry, Paragraphs 3.70 and 3.73.

18 *Aguas del Tunari, SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, Paragraph 91.

19 *Territorial Dispute (Libya v Chad)*, ICJ Reports 6, 1994, p. 22, Paragraph 41; Yearbook of the International Law Commission, 1966, Vol. II, Paragraph 11; *Mercuria Energy Group Limited v. Republic of Poland (II)*, SCC Case No. V 2019/126, Final Award, 29 December 2022, Paragraph 369.

20 *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (*Methanex*), Part II, Chapter B, Paragraph 22, citing the *Yearbook of the International Law Commission*, 1966, Vol. II, p. 223, Paragraph 18.

21 *Murphy Exploration and Production Company International v. Republic of Ecuador I*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, Paragraph 82.

22 ibid., Paragraphs 60 and 61.

VCLT, the tribunal found that the most Ecuador could do under Article 25(4) was to notify ICSID about the class of disputes it would submit to ICSID in the future; it could not use Article 25(4) to unilaterally modify the terms on which it had already consented to ICSID arbitration.[23] If Ecuador wanted to amend or withdraw from the BIT, it had to follow the agreed mechanisms for doing so in the VCLT. 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).[24]

ii Article 31(2)

As explained above, 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 the treaty's object and purpose. Article 31(2) defines the word 'context':[25]

> *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

Article 31(2) says that the preamble of a treaty is part of the 'context' of the terms of the treaty. The preamble is also frequently used to determine a treaty's object and purpose (one of the four elements of Article 31(1), as discussed above).[26] 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.[27] For example, in *Al-Warraq v. Indonesia*, the tribunal referred to the preamble of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (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.[28]

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*:

> *It is certainly true . . . that the DR-CAFTA [Dominican Republic–Central America Free Trade Agreement] Preamble refers to a goal to 'ENSURE a predictable commercial framework for business*

23 ibid., Paragraphs 72–73.

24 ibid., Paragraph 71.

25 *HICEE BV v. The Slovak Republic*, PCA Case No. 2009-11, Partial Award, 23 May 2011 (*HICEE*), Paragraph 116.

26 Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law*, 3rd edn., Oxford University Press, 2022, p. 37, and references in footnote 12 therein.

27 ibid., p. 37.

28 *Hesham Talaat M Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, Paragraphs 549–51.

> *planning and investment[.]' . . . But that observation cannot be the end of the story. Every treaty creates a varied and nuanced balance between extending protections 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.*[29]

Agreements or instruments made by one or more of the parties

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 treaty's conclusion, 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; the document 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.[30]

Tribunals have not always interpreted these provisions consistently with the text of Article 31(2). For instance, 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'.[31] 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).[32] Germany had exchanged its own instrument with the Philippines at the same time.[33] 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'.[34]

On annulment, the ad hoc committee criticised the tribunal's reliance on the Philippine Instrument.[35] 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.[36] That may be true: the Philippine Instrument certainly did not constitute a 'subsequent agreement' for the purposes of VCLT 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'.

Unlike Article 31(2)(a), Article 31(2)(b) does not feature the word 'agreement': first, the Philippine Instrument was made 'in connection with the conclusion of the treaty' since it

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29 *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 (*Kappes*), Paragraph 150; *HICEE*, Paragraph 116.

30 Draft Articles Commentary, p. 221, Paragraph 18.

31 *Fraport AG Frankfurt Services Worldwide v. Republic of the Philippines* (*Fraport v. Philippines*), Award, 16 August 2007, p. 129.

32 ibid., Paragraphs 337–43.

33 *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, Paragraph 97.

34 ibid., Award, 16 August 2007, Paragraphs 339, 341–43 and 398.

35 ibid., Decision on Annulment, 23 December 2010, Paragraphs 98–99 and 107.

36 ibid., Paragraphs 96 and 98.

pertained to ratification of the Germany–Philippines BIT; second, Germany 'accepted' that the Philippine Instrument was 'related' to that BIT, not least because it conveyed its own instrument of ratification to the Philippines at the same time.

iii Article 31(3)

Article 31(3) states:

> *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 Federal Trade Commission (FTC). Under Article 1131(2) of the North American Free Trade Agreement (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* that month, the FTC adopted certain 'interpretations of Chapter Eleven [of NAFTA] in order to clarify and reaffirm the meaning of certain of its provisions'.[37] The United States argued that an FTC interpretation was a 'subsequent agreement' for the purposes of Article 31(3)(a) that the tribunal should take into account when interpreting certain provisions of NAFTA.[38] 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 pursuant to the formal requirements of a treaty.[39]

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 (i.e., a BIT between two EU Member States). In March 2018, the Court of Justice of the European Union (CJEU) 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.[40] In January 2019, 22 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'[41] (the *Achmea* declarations).

37 *Methanex*, Part II, Chapter B, Paragraph 12.
38 ibid., Paragraph 19.
39 ibid., Paragraphs 20–21.
40 *Slovak Republic v. Achmea BV*, UNCITRAL, Judgment of the Court (Grand Chamber), 6 March 2018, Paragraphs 56–60.
41 European Commission, 'Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection', 15 January 2019; *GPF GP Sàrl v. Republic of Poland*, SCC Case No. V2014/168, Final Award, 29 April 2020 (*GPF*), Paragraph 349.

In *GPF v. Poland*,[42] the respondent argued that the *Achmea* declarations constituted a 'subsequent agreement' and, therefore, rendered Article 9 of the Poland–Luxembourg BIT, the ISDS provision, inapplicable. The tribunal disagreed, explaining 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'.[43] 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 merely reflected the 'political will' to terminate intra-EU BITs as of 2019.[44] 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.[45]

In *Ekosol v. Italy*, the tribunal reached the same conclusion about the *Achmea* declarations in the context of a case under the ECT.[46] In addition, it pointed out that Article 31(3)(a) requires that the 'subsequent agreement' must be between all the parties to the relevant treaty.[47] The two states who had a 'stake' in the *Ekosol* arbitration could not bilaterally change the terms of the ECT.[48]

Following *Ekosol*, on 2 September 2021, the CJEU held in *Komstroy* that the intra-EU dispute settlement provisions in the ECT are incompatible with EU law;[49] however, this judgment has, so far, made little practical difference to tribunals' reasoning on this issue.[50]

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 that 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.[51]

42 *GPF*, Paragraph 350.

43 ibid., Paragraph 351.

44 ibid., Paragraph 352.

45 ibid., Paragraph 353.

46 *Eskosol SpA 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, Paragraphs 222–24.

47 ibid., Paragraph 220.

48 ibid., Paragraph 221.

49 *Republic of Moldova v. Komstroy LLC*, Case C-741-19, ECLI:EU:C:2021:655, Judgment of the Court (Grand Chamber), 2 September 2021.

50 One tribunal has declined to consider the *Achmea* declarations as a 'subsequent agreement' on the basis that they are non-binding and do not reflect a consensus of all EU Member-States, let alone all ECT Contracting Parties (*RENERGY Sàrl v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022 (*RENERGY*), Paragraph 371). Another has expressed its intention to address this issue at a later stage in proceedings (*Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V 2016/135, Award, 16 June 2022 (*Green Power and SCE*), Paragraph 385).

51 Draft Articles Commentary, pp. 221–22, Paragraph 15.

One recurring issue in 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.[52] 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's and Argentina's – interpretation of the provisions of the BIT.[53]

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'.[54] Once again, the tribunal was not convinced. It explained that Spain's and Argentina's positions in those 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'.[55]

The comments of the tribunals in those cases, particularly in *Telefónica*, sat uneasily with the tribunal in *Kappes v. Guatemala*, which considered the interpretation of Article 10.16.1(a) of the DR-CAFTA, a multilateral treaty between the United States 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 state parties to a particular treaty had expressed a common understanding in their submissions to (separate) arbitral tribunals 'could be compelling evidence of subsequent practice';[56] however, there had not yet been any unanimous expression of views about the scope and implications of Article 10.16.1(a) of the DR-CAFTA, so the tribunal did not rely on prior statements by either state in the interpretation of the DR-CAFTA.

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

Article 31(3)(c) directs tribunals to take into account, 'together with the context . . . any relevant rules of international law applicable in the relations between the parties.' As one tribunal recently explained, Article 31(3)(c) expresses the principle of 'systemic integration' in treaty interpretation: 'treaties are a creation of the international legal system and must thus be interpreted against the background of broader international law rules'.[57] In practice,

52 *Urbaser SA 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, Paragraph 51.

53 ibid., Paragraph 51.

54 *Telefónica SA v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, Paragraph 109.

55 ibid., Paragraph 113.

56 *Kappes*, Paragraph 156.

57 *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 13 March 2023 (*Antonio del Valle Ruiz et al.*), Paragraph 448. See also *Green Power and SCE*, Paragraph 389.

investment arbitration tribunals typically use Article 31(3)(c) to consider the relevance of rules of customary international law[58] – rather than international law as a whole – in interpreting the terms of a treaty.[59]

Attempts to broaden the scope of this provision – to refer to more than just customary international law principles – have been mixed. In *RosInvestCo v. Russia*, a case under the United Kingdom–Russia BIT, the claimant urged the tribunal to consider human rights treaties and treaties concerning the constituent instruments of international organisations.[60] The tribunal rejected the claimant's argument, primarily on the basis that none of the treaties cited (many of which were multilateral) were relevant to the United Kingdom–Russia BIT. It emphasised that the 'rules of international law' referred to in Article 31(3)(c) had to relate to the 'performance of the specific rights and obligations stipulated in the treaty'; any other interpretation would give the tribunal 'a general licence to override the treaty terms'.[61]

More recently, respondent states have tried to argue that Article 31(3)(c) obliges tribunals to consider EU law when interpreting the ECT.[62] Once again, results have been mixed: most tribunals have refused to consider EU law at all;[63] others have agreed to '[take it] into account' (as Article 31(3)(c) provides) but refused to use it to override the clear terms of the ECT; [64] and at least one tribunal considered EU law decisive in its interpretation of the ECT. [65] The discussion tends to turn on the specific relevant rule of EU law, whether that rule applies in relations between all the parties to the ECT and whether considering that rule would lead to a 'harmonious' interpretation, given that the European Commission and several EU Member States argue that EU law invalidates a provision in the ECT.[66]

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58 See, e.g., *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, Paragraph 208; *Antonio del Valle Ruiz et al.*, Paragraph 449 (applying the customary international law rules on dual nationality where the bilateral investment treaty failed to specify whether an investor who is a national of both the home and the host states is entitled to bring claims under the treaty); *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, Paragraph 332 (finding that a state's police powers and its right to regulate under customary international law constitute 'relevant rules of international law').

59 A classic example of the use of this provision is the *Oil Platforms* case, where the International Court of Justice used it to consider the entirety of international law relating to the use of force in interpreting a provision of an economic and commercial treaty – an approach that was criticised by Judge Rosalyn Higgins (Case Concerning Oil Platforms, *Islamic Republic of Iran v. United States of America*, International Court of Justice, Separate Opinion of Judge Rosalyn Higgins, 6 November 2003, Paragraph 46.

60 *RosInvestCo UK Ltd v. The Russian Federation*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007, Paragraph 39.

61 ibid.

62 See, e.g., *Green Power and SCE*, Paragraph 398.

63 *Vattenfall AB and others v. Federal Republic of Germany (II)*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 (*Vattenfall*), Paragraphs 151–65; *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, ICSID Case No. ARB/13/32, Award, 5 July 2022, Paragraphs 469 and 486; *Sevilla Beheer BV and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022 (*Sevilla Beheer and others*), Paragraph 652; *AS PNB Banka, Alexander Guselnikov, Grigory Guselnikov and others (formerly AS Norvik Banka) v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision on the Intra-EU Objection, 14 July 2021, Paragraphs 562–63.

64 See, e.g., *Sevilla Beheer and others*, Paragraph 652; *RENERGY*, Paragraphs 369–70.

65 *Green Power and SCE*, Paragraph 398.

66 *Vattenfall*, Paragraphs 151–65.

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 for a situation in which, 'notwithstanding the apparent meaning of a term in its context, the parties intended it to have a special meaning'.[67] There is little investment arbitration case law on this provision at present.[68] It was unsuccessfully invoked in *Canfor v. United States*, in which 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).[69]

III ARTICLE 32

Article 32 states that:

> *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 a means of interpretation that is 'supplementary' to the '[g]eneral rule of interpretation' set forth in Article 31. As the drafters explained, the principal distinction between Articles 31 and 32 is the degree to which they accurately reflect the parties' agreement:

> *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.*[70]

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67 Draft Articles Commentary, p. 222, Paragraph 17; ibid. The party invoking the special meaning has the burden of proof.

68 Tribunals tend to reject its application on the basis of a lack of any evidence that the drafters of the relevant treaty intended that a 'special meaning' be attached to the words in issue. See, e.g., *Infinito Gold Ltd v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, Paragraph 340; *Beijing Shougang Mining Investment Company Ltd, China Heilongjiang International Economic & Technical Cooperative Corp, and Qinhuangdaoshi Qinlong International Industrial Co Ltd v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017, Paragraph 413; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada (I)*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, Paragraph 294.

69 *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), Paragraph 111.

70 Draft Articles Commentary, p. 220, Paragraph 10.

i Threshold issue – recourse to supplementary means of interpretation

A threshold issue arises with regard 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 to:

a confirm the meaning resulting from the application of Article 31;

b determine the meaning when the application of Article 31 leaves the meaning ambiguous or obscure; or

c determine the meaning when the application of Article 31 leads to a 'manifestly absurd or reasonable' result.[71]

There should generally be no need to resort to supplementary means of interpretation if the ordinary meaning of words is clear and makes sense in the context.[72] The drafters of the VCLT stopped short of prohibiting recourse to supplementary means in such situations, stating it would be 'unrealistic and inappropriate' to do so.[73] 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.[74]

ii Resort to supplementary means

In *Austrian Airlines v. Slovakia*, the tribunal resorted to supplementary means to interpret Article 8 of the Austria–Slovakia BIT,[75] which concerned the scope of the dispute resolution clause. Article 8 stated that:

> *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.*[76]

71 This interpretation of Article 32 was adopted in, e.g., *Churchill Mining Plc*, Paragraph 151, and *HICEE*, Paragraph 118. Not all tribunals interpret Article 32 in this way; some confine it to a confirmatory role. For example, in *Noble Ventures v. Romania*, the tribunal said that 'recourse may be had to supplementary 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' (*Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, Paragraph 50).

72 Draft Articles Commentary, p. 222, Paragraph 18. See, e.g., *Hulley Enterprises Limited (Cyprus) v. Russia*, PCA Case No. 2005-03/AA226, Judgment of Hague District Court, 20 April 2016, Paragraph 5.22; *Beijing Everyway Traffic*, Paragraph 256.

73 Draft Articles Commentary, p. 223, Paragraph 18.

74 Dolzer, Kriebaum and Schreuer, p. 40. As the ad hoc committee explained in *Malaysian Historical Salvors v. Malaysia*, 'courts 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' (*Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Decision on Annulment, 16 April 2009, Paragraph 57).

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

76 ibid., Paragraph 92.

Article 4 of that BIT stated:

> *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.[77] The 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.[78]

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.[79]

Finally, although 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. The tribunal in *HICEE v. Slovakia* explained that it may refer to 'all available material that [the tribunal] 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'.[80]

IV CONCLUSION

For investment treaty tribunals, Articles 31 and 32 of the VCLT are important in the interpretation of BITs and multilateral agreements. As Dolzer, Kriebaum and Schreuer explain: '[m]ost tribunals, when interpreting treaties, start by invoking Article 31 of the [VCLT].'[81] As this chapter has shown, although 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.

77 ibid., Paragraphs 95–97.
78 ibid., Paragraphs 100–01.
79 ibid., Paragraphs 105–08.
80 *HICEE*, Paragraphs 117 and 121.
81 Dolzer, Kriebaum and Schreuer, p. 36.