

Bungenberg / Griebel / Hobe / Reinisch
International Investment Law

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International Investment Law

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Editors' Foreword

Four years have passed since our first discussion about a *Handbook on International Investment Law* in January 2010. This has been a time of conceptual work, numerous e-mail exchanges with some 90 authors, and correspondence with our publisher.

The main purpose of this handbook – aside from providing basic information – is to strive for more clarity and an attempt to achieve some coherence in this relatively young discipline of international law, a system consisting of arbitral awards and doctrinal interpretations, constituting the most dynamic field of international economic law. After a relatively slow beginning as an integral part of customary international law, international investment law has in the past decade evolved like almost no other field of public international law, especially on the basis of an increasing number of bilateral investment treaties. In this regard, the book approaches the most crucial aspects of international investment law and thereby hopefully provides answers to many questions arising in this field.

We are particularly grateful to the contributors who have anxiously awaited the publication of this work. We owe them not only thanks for their contributions, but also for their patience. We are equally grateful to our assistant editor, Ms Yun-I Kim, for her skilful, meticulous and dedicated management of the entire editorial process. Whoever has edited a book of approximately 2000 pages will appreciate such outstanding commitment. Thanks also go to Mr Christoph Hölken and Ms Katharina Diel-Gligor who supported Ms Kim during parts of the editing process, and to the publisher for their excellent cooperation. Finally, it should also be mentioned that the resources at both the International Investment Law Centre Cologne (IILCC) and at the Department of European, International and Comparative Law of the University of Vienna, provided the necessary basis for such a comprehensive work.

It goes without saying that this first attempt at providing an encompassing overview on existing international investment law is far from perfect. There is an academic responsibility of each author for every article, but also an overall responsibility of the editors who have read each contribution and where necessary, have discussed them with the authors. Therefore, any proposal for improvement of contributions is most welcome and can be directed to the authors as well as to the editors. In any event, we hope that you enjoy reading this handbook!

Cologne, Siegen, and Vienna,
December 2014

Marc Bungenberg

Jörn Griebel

Stephan Hobe

August Reinisch

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August Reinisch

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* This contribution is current as of December 2012.

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A. Introduction

International investment agreements (IIAs), bilateral investment treaties 1
(BITs) as well as multilateral agreements with investment chapters, such as NAFTA, the Energy Charter Treaty, or the like, are treaties; as such they have to be applied and interpreted according to the principles of treaty interpretation codified in the Vienna Convention on the Law of Treaties (Vienna Convention, VCLT).¹ This is in no way special and different from any other treaties and has been confirmed by many investment tribunals.

What is, however, special with IIAs is the fact that their treaty provisions usu- 2
ally display a particularly high degree of generality and vagueness. IIAs consist of a number of abstract concepts, ranging from the definitions of 'investment' or 'investor' to substantive treatment standards like 'fair and equitable treatment'

¹ Vienna Convention on the Law of Treaties, 1155 UNTS 331, (1969) 8 ILM 679. See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *BYIL* 1; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984); Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008).

or ‘full protection and security’, which all require interpretation in order to be applied.

- 3 Also special is the hybrid nature of investment arbitration as a form of enforcement of international treaty obligations, on the one hand, and as direct dispute settlement between private parties and States, on the other hand. This latter aspect clearly points to commercial arbitration paradigms where different rules of interpretation are applied. Although the legal reasoning of some investment treaty tribunals displays a commercial arbitration pedigree also when it comes to interpretation techniques, it is clear that at least officially tribunals tend to adhere to an international treaty interpretation approach.
- 4 This chapter outlines the reliance of investment tribunals on the rules of treaty interpretation, particularly those contained in Articles 31 and 32 of the Vienna Convention. At the same time it will assess to what extent the actual interpretation given to IIAs conforms to such principles. Practice demonstrates that in particular the intent of the IIA parties as well as general international law appear to play a more prominent role than envisaged in the interpretation rules of the Vienna Convention. The chapter will thus also address the specific impact of international law on the interpretation of IIAs which results from the fact that many IIA provisions are closely linked to customary international law concepts and may even expressly be considered relevant for purposes of treaty application and interpretation.
- 5 Finally, the often contradictory outcomes of investment arbitration tribunals, professedly relying on the same interpretation rules, are a matter of concern that must be dealt with. It needs to be analysed to what extent taking into account precedent may help to develop a *jurisprudence constante* leading to a predictable interpretation of IIAs.

B. The Interpretation of IIAs

- 6 There is general agreement among scholars and arbitral tribunals that IIA provisions have to be interpreted according to the rules of interpretation laid down in Articles 31 to 33 of the Vienna Convention.²
- 7 Article 31 of the Vienna Convention provides:
 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:

2 See only *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Ch. B, para. 29 (‘As the Tribunal has observed above and in its Partial Award, NAFTA, as a treaty, is to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which codifies the customary international rules of treaty interpretation.’); *AES Summit Generation Limited and AES-Tisza Erömu Kft v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.5 (‘If interpretation of the ECT is required, the general rules of interpretation of the Vienna Convention, established in its Articles 31 and 32 should be applied.’).

II. The Interpretation of International Investment Agreements

- (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 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.³

Article 32 of the Vienna Convention provides as follows:

8

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.⁴

Finally, Article 33 of the Vienna Convention provides as follows:

9

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

These provisions are regarded as codifying customary international law in the case law of international courts and tribunals.⁵ Sometimes investment tribunals

³ VCLT Art. 31.

⁴ VCLT Art. 32.

⁵ See e.g. *Libya v. Chad*, ICJ Judgment, ICJ Rep. 1994, 19, para. 41 ('(...) in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.');

Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 38 ('[T]he first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by the *Institut de Droit International* in its General Session in 1956, and as codified in Article 31 of the Vienna Convention on the Law of Treaties.');

Salini Costruttori S.p.A. and Italstrade S.p.A. v. Jordan, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 75 ('(...) the interpretation of [a BIT] Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law.');

Tokios Tokelès v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 27 ('(...) we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.');

Mondev Int'l Ltd v. USA, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 43 ('(...) the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties.

expressly apply Articles 31 and 32 of the Vienna Convention as applicable treaty rules.⁶ Jurisprudence has also confirmed that the starting point for any treaty interpretation is the plain wording of the individual provisions of an agreement,⁷ aided by a contextual understanding of the entire agreement⁸ and supported by teleological considerations about the aims of an agreement.⁹ Some tribunals like the one in *Noble Ventures v. Romania* have paraphrased the interpretative maxims of the Vienna Convention by stating that

(...) treaties have to 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 object and purpose of the Treaty, while 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. Reference should also be made to the principle of effectiveness (*effet utile*), which, too plays an important role in interpreting treaties.¹⁰

- 11 It is generally accepted that a textual interpretation does not enjoy primacy over the other elements contained in Article 31 of the Vienna Convention.

These are set out in Articles 31–33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law.’); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50 (‘(...) reference has to be made to Arts. 31 et seq. of the Vienna Convention on the Law of Treaties which reflect the customary international law concerning treaty interpretation.’); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 75 (‘It is not disputed that the interpretation of the ICSID Convention and of the BIT is governed by international law, including the customary principles of interpretation embodied in the Vienna Convention on the Law of Treaties and the general principles of international law.’); *Enron Creditors Recovery Corp., Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, para. 114 (‘(...) the terms of the BIT and the ICSID Convention, which fall to be interpreted in accordance with customary international law rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties.’).

- 6 See e.g. *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 221 (‘The ICSID Convention, the ICSID Arbitration Rules, and the UABIT are silent on the rules for interpreting treaty provisions, and the parties provided little guidance in this regard. However, both Austria and Ukraine are parties to the Vienna Convention on the Law of Treaties (May 23, 1969, 1155 UNTS 331) (“Vienna Convention”), which sets forth general rules of interpretation applicable to “treaties between States.” The Tribunal will accordingly adhere to the interpretive framework set forth in Articles 31 and 32 of the Vienna Convention, (...)’); *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, 23 December 2010, para. 73 (‘(...) The Committee notes that for the proper construction of the BIT, the rules of the Vienna Convention on the Law of Treaties are relevant; they are directly applicable as conventional rules since both Germany and the Philippines had been parties to it at the moment when they concluded the BIT in 1997.’); see also *HICEE B.V. v. Slovakia*, Partial Award, PCA case No. 2009-11, 23 May 2011, para. 115.

7 See *infra*, text and footnotes at II.C. The Ordinary Meaning.

8 See *infra*, text and footnotes at II.D. Contextual Interpretation.

9 See *infra*, text and footnotes at II.E. Object and Purpose.

10 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50; see also *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 429 (‘The Tribunal is required to interpret and apply the treaty in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their proper context, and in light of the treaty’s object and purpose, consistent with Article 31(1) of the *Vienna Convention of the Law of Treaties*.’).

Rather, all aspects enjoy equal relevance. Investment tribunals have captured this approach as a ‘process of progressive encirclement.’¹¹ However, it is clear from the VCLT and accepted by investment tribunals that the supplementary means of interpretation according to VCLT Article 32 are secondary to the elements mentioned in Article 31.¹²

In spite of this general agreement on the use of the rules of treaty interpretation contained in the Vienna Convention, the actual outcomes appear to differ sharply. In fact, the proper meaning of IIA provisions raises highly interesting interpretation questions; they demonstrate that tribunals may come to diverging results, although the actual difference in the specific wording of the treaty clauses they have to apply is often limited. 12

C. The Ordinary Meaning

In response to the old controversy whether treaty interpretation should be primarily guided by the text or by the intention of the parties, it is often asserted that the Vienna Convention favours the textual approach.¹³ The ILC has made clear that the text should be presumed to be the best expression of the parties’ intentions¹⁴ – a view that was echoed in a number of investment cases.¹⁵ Interna- 13

11 *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, para. 91 (‘Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation. [I]t is critical to observe [that] the Vienna Convention does not privilege any one of these three aspects of the interpretation method.’).

12 *Gruslin v. Malaysia*, Award, ICSID Case No. ARB/99/3, 27 November 2000, para. 21.6 (‘The Tribunal has considered the materials from sources ranging from 1960 (Respondent’s Reply, Annex 21) to 2000 (Hearing Book, Tab 17). Its approach is first to consider the terms of proviso (i). If its meaning is found to be clear, the Tribunal will not reduce its reach by reference to general considerations or assumptions derived from extrinsic sources of the sort relied upon by the Respondent in its materials and arguments.’); *Murphy Exploration and Prod. Co. Int’l v. Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, para. 71 (‘Taking into account the general rule on the interpretation of treaties of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, the Tribunal considers that the language of Article 25(4) is clear and unambiguous. It also considers unnecessary to resort to supplementary means of interpretation, in accordance with Article 32 of the Vienna Convention, in order to interpret the ICSID Convention in good faith, within its context and considering its purpose.’).

13 See also Richard Gardiner (n. 1) 144.

14 See the comment of the International Law Commission on Article 31 in International Law Commission, Draft Articles on the Law of Treaties with commentaries, *Yearbook of the International Law Commission*, vol. II (United Nations, 1966) 220 (‘The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.’).

15 *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 78 (‘The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all

tional courts and tribunals, including the ICJ, have often expressed the view that they would take the wording as starting point for interpreting a treaty.¹⁶

- 14 It has become a truism for many investment tribunals to state that the wording of IIAs matters and that they will pay specific attention to the actual language of the provisions applicable in various cases.¹⁷ The pre-eminence of the ordinary wording has also been stressed by investment tribunals. For instance, the NAFTA tribunal in *ADF v. USA* held:

We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph.¹⁸

- 15 Similarly, the annulment committee in the *Sempra* case stated:

According to Article 31(1) of VCLT, the first point of reference for interpretation of a BIT provision is the ‘ordinary meaning’ of the words of the treaty themselves.¹⁹

- 16 Sometimes tribunals emphasise the literal interpretation without even invoking the Vienna Convention. For instance, in the *Thunderbird v. Mexico* case, a NAFTA tribunal introduced its consideration of the investor’s national treatment

treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoires*, or any predilections based on presumed intention.’); *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Ch. B, para. 22 (‘(...) the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties.’); *Berschader v. Russia*, Separate Opinion by Todd Weiler, SCC Case No. 080/2004, Award, 21 April 2006, para. 4 (‘While my colleagues concentrate much of their analysis on identifying the intent of the drafters of the Treaty (...), I focus on the treaty terms themselves as the best evidence of ascertaining such intent.’).

- 16 *Competence of the General Assembly for the Admission of a State to the United Nations* (1949–1950), ICJ Advisory Opinion, ICJ Rep. 1950, 8 (‘The first duty of a tribunal which was called upon to interpret and apply the provisions of a treaty [is] to endeavour to give effect to them in their natural and ordinary meaning (...).’); *Libya v. Chad*, ICJ Judgment, ICJ Rep. 1994, 20, para. 41 (‘Interpretation must be based above all upon the text of the treaty.’).

- 17 See e.g. *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 127 (‘From the wording of Article VII of the Argentina-Ecuador BIT, the Tribunal concludes that, in accordance with the interpretation rules of Article 31 of the Vienna Convention, the references made in the text of that Article to “either Contracting Party,” “between the Contracting Parties,” “an investor of one Contracting Party and the other Contracting Party,” and “the other Contracting Party” unquestionably refer to the Contracting Parties of the Argentina–Ecuador BIT.’); *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, para. 297 (‘The “ordinary meaning” of the “fair and equitable treatment” standard can only be defined by terms of almost equal vagueness. In *MTD*, the tribunal stated that: “In their ordinary meaning, the terms “fair” and “equitable” (...) mean “just”, “evenhanded”, “unbiased”, “legitimate”.’ On the basis of such and similar definitions, one cannot say much more than the tribunal did in *S.D. Myers* by stating that an infringement of the standard requires *treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*. (footnote omitted) This is probably as far as one can get by looking at the “ordinary meaning” of the terms of Article 3.1 of the Treaty.’) (footnotes omitted).

- 18 *ADF Group Inc. v. USA*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 147.

- 19 *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, para. 188.

claim by merely stating: ‘In construing Article 1102 of the NAFTA, the Tribunal gives effect to the plain wording of the text.’²⁰

Investment tribunals have also stressed that they would not adopt any interpretation deviating from the clear wording of an IIA, which suggests a certain primacy of the literal interpretation.²¹ A clear example of such an emphasis on the ordinary meaning can be found in the ICSID award of *Saba Fakes v. Turkey* which adopted a minimalist approach towards the interpretation of the notion of ‘investment’ under Article 25 of the ICSID Convention.²² That a literal interpretation can also lead to a more expansive reading of the notion of ‘investment’ is evidenced by the award in *Fraport v. Philippines*.²³

The ‘ordinary meaning’ is regularly invoked in cases where tribunals are called upon to decide on the scope of IIA clauses. For instance, the *Maffezini* tribunal emphasised the wording of the applicable MFN clause²⁴ which referred to treatment ‘in all matters subject to this Agreement.’ However, the tribunal did not simply conclude that this broad wording also covered dispute settlement. Rather, it resorted to the intention of the parties and the object and purpose of

20 *International Thunderbird Gaming Corp. v. Mexico (NAFTA)*, Award, 26 January 2006, para. 175.

21 *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 76, rejecting an implicit ‘effective nationality’ principle for Claimants under the ICSID Convention (‘The Tribunal cannot side with this interpretation of the nationality requirements within the framework of the ICSID Convention, as such interpretation finds no support in the text of the Convention. The language of Article 25(2)(a) of the ICSID Convention is clear and does not require any further clarification. Pursuant to the generally accepted rules of treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties, the Tribunal is precluded from elaborating any interpretation that would run counter to this clear language, in particular any interpretation that would result in establishing additional limitations to the Centre’s jurisdiction where no such limitations were provided by the Contracting Parties.’).

22 *Ibid.*, para. 110 (‘(...) the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of “investment” that embodies specific criteria corresponding to the ordinary meaning of the term “investment”, without doing violence either to the text or the object and purpose of the ICSID Convention. These three criteria derive from the ordinary meaning of the word “investment,” (...); *ibid.*, para. 111 (‘(...) while the preamble refers to the “need for international cooperation for economic development,” it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording.’). See on the ‘investment’ notion under the ICSID Convention text *infra* at (n. 111).

23 *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 340 (‘But while a treaty should be interpreted in the light of its objects and purposes, it would be a violation of all the canons of interpretation to pretend to use its objects and purposes, which are, by their nature, a deduction on the part of the interpreter, to nullify four explicit provisions. Plainly, as indicated by these four provisions, economic transactions undertaken by a national of one of the parties to the BIT had to meet certain legal requirements of the host state in order to qualify as an “investment” and fall under the Treaty.’).

24 Article IV(2) of the Argentina–Spain BIT, *Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain*, 3 July 1991, entry into force 3 March 1993 (1993) 1728 UNTS 298. (‘In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.’).

BITs in order to conclude that dispute settlement was covered by the MFN clause.²⁵ A literal interpretation as primary reason for such a broad reading of an MFN clause can be found in the *Suez* case where the tribunal held that dispute settlement was certainly a ‘matter’ governed by the Argentina–Spain BIT and that the ‘ordinary meaning’ of the term ‘treatment’ included the rights and privileges granted by a contracting State to investors covered by the treaty.²⁶

- 19 Also the NAFTA tribunal in *Methanex v. USA* stressed the importance of the literal interpretation of treaty provisions. It did so in the context of giving meaning to NAFTA’s national treatment clause:

As the Tribunal has observed above and in its Partial Award, NAFTA, as a treaty, is to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which codifies the customary international rules of treaty interpretation. Hence, the Tribunal begins with an inquiry into the plain and natural meaning of the text of Article 1102.²⁷

- 20 On this basis, the *Methanex* tribunal clearly emphasised the ordinary meaning approach over any other interpretation technique:

The issue here is not the relevance of general international law, as the late Sir Robert Jennings proposed on behalf of Methanex, or the theoretical possibility of construing a provision of NAFTA by reference to another treaty of the parties, for example the GATT. International law directs this Tribunal, first and foremost, to the text; here, the text and the drafters’ intentions, which it manifests, show that trade provisions were not to be transported to investment provisions. Accordingly, the Tribunal holds that Article 1102 is to be read on its own terms and not as if the words ‘any like, directly competitive or substitutable goods’ appeared in it.²⁸

- 21 The last sentence in the quoted passage clearly demonstrates the overriding importance of the literal interpretation to the *Methanex* tribunals which is used to reject any inclusion of general international law concepts (any third treaties) in interpreting national treatment.²⁹

- 22 A particular strand of the ordinary meaning or literal interpretation can be identified in a number of investment cases applying a so-called dictionary ap-

25 *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, paras. 53, 54 (‘53. In other treaties the most favored nation clause speaks of “all rights contained in the present Agreement” or, as the basic Argentine–Spain BIT does, “all matters subject to this Agreement”. These treaties do not provide expressly that dispute settlement as such is covered by the clause. Hence, like in the *Ambatielos* Commission of Arbitration it must be established whether the omission was intended by the parties or can reasonably be inferred from the practice followed by the parties in their treatment of foreign investors and their own investors. 54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. (...).’)

26 *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, para. 55.

27 *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Ch. B, para. 29.

28 *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Ch. B, para. 37.

29 See *infra* text at n. 66 and n. 79.

proach³⁰ in order to elucidate the meaning of central standards of treatment like fair and equitable treatment. For instance, in *MTD v. Chile*, an ICSID tribunal, relying on the Concise Oxford Dictionary of Current English, found that “[i]n their ordinary meaning, the terms “fair” and “equitable” used in Article 3(1) of the BIT mean “just”, “even-handed”, “unbiased”, “legitimate”.”³¹ But investment tribunals have also demonstrated awareness that a dictionary approach to interpreting such vague concepts like fair and equitable treatment has inherent limitations.³²

With regard to the interpretation of the fair and equitable treatment standard, investment tribunals like the ICSID panel in *Suez v. Argentina*³³ have also emphasised an ordinary meaning approach in order to reject the equalisation of this standard with the customary international minimum standard prevalent within the NAFTA context.³⁴

Similarly, in expropriation cases tribunals have resorted to the dictionary approach in order to ascertain the meaning of the notion of ‘measures tantamount to expropriation’ which some have argued to constitute a new category of expropriation beyond direct or indirect expropriation.³⁵ Most tribunals, however, rejected this approach and found that ‘measures tantamount to expropriation’ were

30 See also Richard Gardiner (n. 1) 148, for examples of WTO and ICJ decisions relying on dictionaries.

31 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 24 May 2004, para. 113; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 290 (‘In their ordinary meaning, the terms “fair” and “equitable” mean “just”, “even-handed”, “unbiased”, “legitimate”. (...)’). See also *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 430 (‘Several tribunals have attempted to parse the meaning of “fair and equitable”, producing a catalogue of alternative dictionary meanings, including “just”, “even-handed”, unbiased” and legitimate”. (...)’).

32 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 258 (‘An inquiry into the ordinary meaning of the expression “fair and equitable treatment” does not clarify the meaning of the concept. “Fair and equitable treatment” is a term of art, and any effort to decipher the ordinary meaning of the words used only leads to analogous terms of almost equal vagueness.’).

33 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 178 (‘Following accepted principles of treaty interpretation, particularly Article 31(1) of the VCLT which requires that treaty terms be interpreted in accordance with their “ordinary meaning,” the Tribunal concludes that “in accordance with the principles of international law” means just what it says: that the tribunal is to interpret fair and equitable treatment under Article 3 of the Argentina-France BIT in accordance with all relevant sources of international and that it is not limited in its interpretation to the international minimum standard. The ordinary meaning of the words “principles of international law” is “the legal principles derived from all sources of international law.” Authoritative documents employing the term “international law” contain no implication that the term is limited to the international minimum standard and amply support the Tribunal’s interpretation of the term “international law.”’).

34 See *infra* (n. 172).

35 See on this issue Meg Kinnear, Andrea Bjorklund, and John Hannaford, *Investment Disputes Under NAFTA* 1110 – 28a (Kluwer 2009); *Waste Management, Inc. v. Mexico*, Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 144 (‘Evidently the phrase “take a measure tantamount to nationalization or expropriation of such an investment” in Article 1110(1) was intended to add to the meaning of the prohibition, over and above the reference to indirect expropriation.’).

equivalent to ‘indirect expropriation’.³⁶ One of these tribunals in *S.D. Myers v. Canada* specifically invoked the dictionary meaning of ‘tantamount’ in order to arrive at this result.³⁷ This demonstrates that reliance on the same interpretation techniques may lead to diverging results.

- 25 While the majority of investment tribunals stay faithful to literal interpretation techniques and try to arrive at conclusions that at least do not do violence to the text, some tribunals in order to reach a certain result are ready to neglect the ordinary meaning of treaty provisions.
- 26 An example is the tribunal in *Berschader v. Russia*.³⁸ It obviously transgressed the limits of literal interpretation in regard to an MFN clause³⁹ which was similar to the one applicable in *Maffezini*.⁴⁰ The tribunal, however, asserted that ‘[w]ith respect to the construction of expressions such as “all matters” or “all rights” covered by the treaty, it should be noted that (...) not even seemingly clear language like this can be considered to have an unambiguous meaning in the context of an MFN clause.’⁴¹ The tribunal concluded that the ‘expression “all matters covered by the present Treaty” certainly cannot be understood literally.’⁴² Rather, it should be read to relate only to the ‘classical elements of material investment protection, i.e. fair and equitable treatment, non-expropriation and free transfer of funds’ as referred to in the clarification.⁴³ Here one can sense already the relevance of general international law on investment protection for the interpretation of IIAs. The *Berschader* tribunal bluntly concluded

36 *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Interim Award, 26 June 2000, para. 104 (“‘Tantamount’ means nothing more than equivalent. Something that is equivalent so something else cannot logically encompass more.”); *Marvin Feldmann v. Mexico*, ARB(AF)/99/1, 16 December 2002, para. 100 (“Most significantly with regard to this case, Article 1110 deals not only with direct takings, but indirect expropriation and measures “tantamount to expropriation,” which potentially encompass a variety of government regulatory activity that may significantly interfere with an investor’s property rights. The Tribunal deems the scope of both expressions to be functionally equivalent. (...)”).

37 *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award, 13 November 2000, para. 285 (“(...) The primary meaning of the word “tantamount” given by the Oxford English Dictionary is “equivalent”. Both words require a tribunal to look at the substance of what has occurred and not only at form. A tribunal should not be deterred by technical or facial considerations from reaching a conclusion that an expropriation or conduct tantamount to an expropriation has occurred. It must look at the real interests involved and the purpose and effect of the government measure.”).

38 *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006.

39 Article 2 of the Belgium/Luxembourg–USSR BIT, *Belgium/Luxembourg–USSR Agreement concerning the Promotion and the Reciprocal Protection of Investments*, 9 February 1989, (1990) 29 ILM 299 (“Each Contracting Party guarantees that the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty, and in particular in articles 4, 5 and 6, with the exception of benefits provided by one Contracting Party to investors of a third country on the basis – of its participation in a customs union or other international economic organisations, or – of an agreement to avoid double taxation and other taxation issues.”).

40 See *supra* (n. 24).

41 *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, para. 184.

42 *Berschader v. Russia*, para. 192.

43 *Berschader v. Russia*, para. 193.

(...) that the expression ‘all matters covered by the present Treaty’ does not really mean that the MFN provision extends to all matters covered by the Treaty. Therefore, the ‘ordinary meaning’ of that expression is of no assistance in the instant case, and the expression as such does not warrant the conclusion that the parties intended the MFN provision to extend to the dispute resolution clause.⁴⁴

In other words, the tribunal’s majority openly rejected a literal interpretation 27 in favour of following the presumed intent of the parties. Such an approach opens the Pandora box of substituting the treaty-makers’ will, manifested in the objective wording of a treaty, by the presumed and often subjectively re-constructed view of the interpreters’ opinion of such original intentions.⁴⁵

D. Contextual Interpretation

A contextual interpretation of treaty provisions is clearly mandated by VCLT 28 Article 31 calling for an interpretation of the ‘terms in their context.’⁴⁶ The immediate context of a treaty expression is determined by grammar and syntax of a sentence.⁴⁷ The VCLT makes clear, however, that context specifically relates to the entire text as well as the preamble and annexes of a treaty.⁴⁸ Investment tribunals regularly stress the importance of context for their interpretation tasks.⁴⁹ However, they do not restrain their considerations to the context of the specific BIT they are interpreting. Rather, they also look at other BITs⁵⁰ and even general international law in order to arrive at a contextual interpretation of IIA provisions.⁵¹

1. Context within International Investment Agreements

Investment tribunals often determine the meaning of provisions by reference 29 to their location within a specific BIT.⁵²

44 *Berschader v. Russia*, para. 194.

45 See *infra* text at (n. 169).

46 See *supra* text at (n. 3).

47 Cf. Richard Gardiner (n. 1) 178.

48 VCLT Art. 31(2).

49 See e.g. *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 339 (‘(...) Article 31 of the Vienna Convention on the Law of Treaties enjoins interpretation of particular provisions in their context, *i.e.* with reference to the rest of the treaty and in the light of its objects and purposes. The fact that there are three explicit references in the total of 16 provisions in the Treaty and Protocol plus an additional reference in the Instrument of Ratification, which selected only four items in the treaty deemed so important to the Philippines as to require additional recitation, indicates the significance of this condition. (...)’).

50 See *infra*, text starting at II.D.2.

51 See *infra*, text starting at II.D.3.

52 See e.g. *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, para. 298 (‘The immediate “context” in which the “fair and equitable” language of Article 3.1 is used relates to the level of treatment to be accorded by each of the Contracting Parties to the investments of investors of the other Contracting Party. The broader “context” in which the terms of Article 3.1 must be seen includes the other provisions of the Treaty. In the preamble of the Treaty, the Contracting Parties *recognize[d] that agreement upon the treat-*

30 For instance, for the purpose of interpreting MFN clauses, tribunals have frequently looked at the context of such clauses and the relationship to other clauses in an IIA which might shed light on their proper interpretation. One recurrent line of argument, particularly of those tribunals which were willing to allow the extension of MFN clauses to procedural or even jurisdictional provisions in third country IIAs, relates to the implications of certain exceptions to MFN treatment as they are often expressly foreseen in IIAs. At a minimum, many IIAs provide that MFN treatment does not cover benefits granted as a result of preferential trade agreements like customs unions and free trade agreements. *E contrario* or on the basis of the principle of *expressio unius est exclusio alterius*, – which is often seen as a rule of logic and not of treaty interpretation⁵³ – tribunals have argued that other exceptions should not be read into the text. Thus, where an MFN clause is wide enough to cover procedural or jurisdictional issues, the lack of any express exception in these fields could be interpreted as a clear indication that they are included. This reasoning was adopted by the tribunal in *National Grid*, stating that

(...) the MFN clause does not expressly refer to dispute resolution or for that matter to any other standard of treatment provided for specifically in the Treaty. On the other hand, dispute resolution is not included among the exceptions to the application of the clause. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*.⁵⁴

31 The same reasoning was emphasised in the *RosInvest* case where the tribunal specifically noted that the UK–USSR BIT exempted preferential trade and tax agreements from the application of its MFN clause⁵⁵ and concluded that

(...) it can certainly not be presumed that the Parties ‘forgot’ arbitration when drafting and agreeing on Article 7. Had the Parties intended that the MFN clauses should also not apply to arbitration, it would indeed have been easy to add a subsection (c) to that effect in Article 7. The fact that this was not done, in the view of the Tribunal, is further confirmation that the MFN-clauses in Article 3 are also applicable to submissions to arbitration in other Treaties.⁵⁶

ment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable. The preamble thus links the “fair and equitable treatment” standard directly to the stimulation of foreign investments and to the economic development of both Contracting Parties.’); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Peru*, ICSID Case No. ARB/03/4 (previously *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Peru*), Decision on Annulment, 5 September 2007, para. 80 (‘Having regard to the main rule in Article 31(1) of the Vienna Convention, the *Ad hoc* Committee finds that the second sentence of Article 2 of the BIT must be read in its context, i.e. together with the first sentence of the same Article which provides that the BIT shall apply to investments made both before and after the entry into force of the BIT.’).

53 Christoph Schreuer, ‘Diversity and Harmonization of Treaty Interpretation in Investment Arbitration’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill, 2010) 129, 134.

54 *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 82.

55 Art. 7 UK–USSR BIT, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Protection of Investments*, 8 April 1989, (1999) 1670 UNTS 27.

56 *RosInvestCo UK Ltd. v. Russia*, SCC Case No. Arb. V079/2005, Decision on Jurisdiction, October 2007, para. 135.

It thus followed the argument proposed by claimant who had urged the tribunal to apply ‘the principle of *expressio unius est exclusio alterius* (...).’⁵⁷ 32

But the principle of *expressio unius est exclusio alterius* was adhered to by investment tribunals also in other contexts. For instance, the tribunal in *Tokios Tokelès v. Ukraine*, expressly relied on it for the correct interpretation of the definition of an ‘investor’.⁵⁸ The tribunal in *Waste Management v. Mexico* implicitly relied upon this principle by arguing that NAFTA does not exclude the protection of indirect investors.⁵⁹ 33

Also the *ejusdem generis* principle, equally prominent in the MFN debate, can be seen as a form of contextual interpretation.⁶⁰ It is often regarded to mean that ‘general words following or perhaps preceding special words are limited to the genus indicated by the special words.’⁶¹ Investment tribunals have largely accepted that under the ‘principle *ejusdem generis* the most favored nation clause can only operate in respect of the same matter and cannot be extended to matters different from those envisaged by the basic treaty.’⁶² The contentious issue was, however, whether BIT matters were limited to substantive matters (or material aspects of the treatment granted to investors) or extended also to procedural or jurisdictional questions.⁶³ While the *Maffezini* progeny of cases found 34

57 *RosInvestCo UK Ltd. v. Russia* (n. 56), para. 99 (‘Applying the principle of *expressio unius est exclusio alterius*, Claimant therefore interprets Article 7 to the effect that all matters within the scope of the IPPA not expressly excluded from Article 3 are included.’).

58 *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 30 (‘Under the well established presumption *expressio unius est exclusio alterius*, the state of incorporation, not the nationality of the controlling shareholders or *siège social*, thus defines “investors” of Lithuania under Article 1(2)(b) of the BIT.’).

59 *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3 (NAFTA), Award, 30 April 2004, para. 85 (‘Where a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury. No such restrictions appear in the text. It is not disputed that at the time the actions said to amount to a breach of NAFTA occurred, Acaverde was an enterprise owned or controlled indirectly by the Claimant, an investor of the United States. The nationality of any intermediate holding companies is irrelevant to the present claim. Thus the first of the Respondent’s arguments must be rejected.’).

60 See, however, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer, 2009) 112, who regard the *ejusdem generis* principle as a principle of textual interpretation. In fact, it may relate to both.

61 Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 2003) 604.

62 *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 41.

63 See Stephen Fietta, ‘Most Favoured Nation Treatment and Dispute Resolution under Bilateral Investment Treaties: A Turning Point?’ (2005) 8 Int’l Arb. L. Rev. 131–138; Dana H. Freyer and David Herlihy, ‘Most Favoured-Nation Treatment and Dispute Settlement in Investment Arbitration: Just how Favoured is “Most Favoured”?’ (2005) 20(1) ICSID Rev.–FILJ 58–83; Emmanuel Gaillard, ‘Establishing Jurisdiction through a Most-Favored-Nation Clause’ (2005) 233 NYLJ 1, 3; Kaj Hobér, ‘MFN Clauses and Dispute Resolution in Investment Treaties: Have we reached the end of the road?’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford Univer-

that procedural issues of protecting investors would fall under the *ejusdem generis* principle,⁶⁴ *Plama* and other investment tribunals considered only substantive protection to be covered.⁶⁵

2. The Contextual Relevance of Other International Investment Agreements

- 35 When ascertaining the proper meaning of IIA clauses via contextual considerations, tribunals often take a comparative approach by looking at the wording of other IIAs concluded by one of the parties with third States or between third States. To what extent reliance on such ‘external’ context is justified raises complex legal issues.⁶⁶ As a matter of empirical fact, investment tribunals like international courts and tribunals in general quite often take into account the formulation of third country treaties in order to confirm or to contrast the interpretation of the treaty rules they have to apply.
- 36 The area of interpreting the content of key substantive investment standards, such as fair and equitable treatment or full protection and security,⁶⁷ is a particu-

city Press, 2009) 31–41; Yannick Radi, ‘The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the Trojan Horse’ (2007) 18 EJIL 757–774; August Reinisch, ‘How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?’ (2011) 2 J. Int’l Disp. Settlement 115–174; Noah Rubins, ‘MFN Clauses, Procedural Rights, and a Return to the Treaty Text’ in Todd J. Grierson Weiler (ed), *Investment Treaty Arbitration and International Law*, vol. 1 (JurisNet, 2008) 213–230; Guido S. Tawil, ‘Most Favoured Nation Clauses and Jurisdictional Clauses in Investment Treaty Arbitration’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 9–30; Scott Vesel, ‘Clearing a Path through a Tangled Jurisprudence: Most-Favoured-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties’ (2007) 32 Yale J. Int’l L. 125–190.

- 64 *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 56 (‘From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle.’); *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 120 (‘Access to [special dispute settlement mechanisms] is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through an MFN clause.’); see also *Gas Natural SDG, S.A. v. Argentina*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction, 17 June 2005; *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005; *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006.
- 65 *Plama Consortium Ltd v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Salini Costruttori SpA and Italstrade SpA v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004; *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15, Award, 22 June 2006.
- 66 See Martins Paparinskis, ‘Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules’ in Ole Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing, 2012) 87–116.

larly clear example of tribunals heavily relying on the interpretation of similar clauses contained in third party treaties in the gradual elaboration of a *jurisprudence constante* or *de facto* case law.⁶⁸ Strictly speaking the third country BITs and their interpretation in investment awards is beyond the direct context of interpretation. However, like general (customary) international law on point⁶⁹ it is often relied upon for interpretive purposes. In addition, some NAFTA tribunals have looked at third country BITs in order to elucidate the meaning of a fair and equitable treatment clause.⁷⁰

A comparative approach is also often used in the field of interpreting the scope of MFN clauses. For instance in the case of *Salini v. Jordan*, the tribunal distinguished the MFN clause it had to apply from the one applicable in *Maffezini*⁷¹ in order to explain why it rejected the idea that it would encompass dispute settlement. It found that ‘Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage “all rights or all matters covered by the agreement”.’⁷² Thus, it held that its jurisdiction could not be based on another BIT via the applicable MFN clause. 37

The case of *National Grid* provides another example of a decision concerning an MFN clause where a tribunal, *inter alia*, looked at BITs of the contracting parties with third States in order to interpret the MFN clause of the Argentina–UK BIT: while not exclusively relying on it, the tribunal noted that the UK had subsequently expressed its intention to extend MFN clauses in BITs to dispute settlement provisions and that Argentina subsequently dispensed with the requirement of proceedings before domestic courts prior to the submission of an investment claim.⁷³ 38

67 See Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007); August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008).

68 See *infra* (n. 187).

69 See *infra* text at II.D.3.

70 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in the Merits of Phase 2, 10 April 2001, para. 115. See also *infra* text at n. 166.

71 The *Maffezini* tribunal itself compared the MFN clause of the applicable Argentina–Spain BIT with other Spanish BITs in order to support its broad interpretation. *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 60 (‘The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of “all matters subject to this Agreement” in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that “this treatment” shall be subject to the clause, which is of course a narrower formulation.’).

72 *Salini Costruttori SpA and Italstrade SpA v. Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004, para. 118.

73 Argentina–UK BIT, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and the Protection of Investments*, 11 December 1990, (2000) 1765 UNTS 34. See *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 91.

39 Also in the context of emergency or non-precluded measures clauses,⁷⁴ third country BITs were sometimes relied upon in order to interpret the precise meaning of such clauses. In *CMS v. Argentina*⁷⁵ an ICSID tribunal had to decide whether the emergency clause of the applicable Argentina–US BIT⁷⁶ was self-judging or not. It came to a negative answer by comparing the clause’s language with that of differently worded provisions in the GATT and other US BITs, like the Russia–US BIT which contain language referring to measures adopted by a party ‘which it considers necessary’.⁷⁷ In the absence of comparable language in the Argentina–US BIT it concluded that its emergency clause was not self-judging.⁷⁸

3. General International Law as Relevant Context

40 According to VCLT Article 31(3)(c), ‘[t]here shall be taken into account, together with the context (...) any relevant rules of international law applicable in the relations between the parties.’

41 This provision, which has been termed the ‘most ambivalent’ one of the interpretation rules of the VCLT⁷⁹ and was rarely invoked initially,⁸⁰ has received much attention in WTO law lately,⁸¹ in particular in the aftermath of WTO Ap-

74 See William Burke-White and Andreas von Staden, ‘Investment Protection in Extraordinary Times: Interpreting Non-Precluded Measures Provisions’ (2007) 48 *Virginia J. Int’l L.* 307–410.

75 *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005.

76 Article XI of the Argentina–US BIT, *Treaty between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991, (1992) 31 *ILM* 124 (‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.’).

77 Russia–US BIT, *Treaty Concerning the Encouragement and Reciprocal Protection of Investment*, 17 June 1992, (1992) 31 *ILM* 794. See *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 370 (‘The Tribunal is convinced that when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly. The examples of the GATT and bilateral investment treaty provisions offered above are eloquent examples of this approach. The first does not preclude measures adopted by a party “which it considers necessary” for the protection of its security interests. So too, the U.S.–Russia treaty expressly confirms in a Protocol that the non-precluded measures clause is self-judging.’).

78 *CMS Gas Transmission Company v. Argentina* (n. 75) para. 373.

79 Thomas Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 724, 769.

80 Richard Gardiner (n. 1) 265.

81 See Joost Pauwelyn, ‘Role of Public International Law in the WTO Law’ (2001) 95 *AJIL* 535, 539; Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009) Chapter 9, 355–378; José E. Alvarez, ‘The Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication’ in Merit E. Janow, Victoria Donaldson and Alan Yanovich (eds), *The WTO: Governance, Dispute Settlement & Developing Countries* (Juris Publishing, Inc., 2008) 611, 622; Martins Paporiskis, ‘Equivalent Prima-

pellate Body decisions declaring that WTO cannot be read in ‘clinical isolation’ of general international law.⁸² But also in investment law recent developments have led to a more intense debate of this interpretative guideline.⁸³ The potential of integrating general international law, mainly in the form of custom, as a means to mitigate the dangers of fragmentation stemming from a proliferation of treaty regimes was recognised by the ILC Study Group on Fragmentation.⁸⁴ According to the Study Group’s Conclusions, customary international law and general principles of law are of particular relevance to the interpretation of a treaty under VCLT Article 31(3)(c), where the treaty rule is unclear or open-textured,⁸⁵ the treaty terms have a recognised meaning in customary law,⁸⁶ and where the parties presumptively intended to refer to customary law for questions that were not resolved in the treaty in express terms.⁸⁷

Investment tribunals often generally assert that they interpret IIA provisions in accordance with customary international law.⁸⁸ In some cases, investment tribunals have even expressly referred to WTO jurisprudence in order to advocate a systemic integration of general international law by declaring that also investment law (treaties) cannot be interpreted in isolation of general international law.⁸⁹ 42

In some core areas of investment law, like in the field of expropriation, tribunals may rely on general international law in order to interpret undefined IIA provisions that have a recognised meaning. With regard to expropriation clauses, IIAs usually contain detailed rules on the conditions under which a contracting 43

ry Rules and Differential Secondary Rules: Countermeasures in WTO and Investment Protection Law’ in Tomer Brode and Yuval Shany (eds), *Multi-Sourced Equivalent Norms* (Hart Publishing, 2010) 259–288.

82 Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 18 (‘The General Agreement is not to be read in clinical isolation from public international law.’).

83 Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 57 ICLQ 361–401; Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279–320; Martins Paporiskis, ‘Investment Protection Law and Systemic Integration of Treaty and Custom’ (2010) SIEL Online Proceedings, Working Paper 2010/21, available at <http://www.ssrn.com/link/SIEL-2010-Barcelona-Conference.html>; Christoph Schreuer (n. 53) 129–151.

84 Conclusions of the Study Group of the ILC, ‘Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law’ in ILC Yearbook, *General Assembly Official Records, Sixty-first session, Supplement No. 10 (A/61/10)* (United Nations, 2006) 407–423, 414.

85 *Ibid.*, para. 20(a).

86 *Ibid.*, para. 20(b).

87 *Ibid.*, para. 20(c).

88 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 233 (‘The Tribunal will apply the provisions of the UABIT and interpret the UABIT in a manner consistent with customary international law.’).

89 *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April, 2009, para. 78 (After citing the WTO *Gasoline* case, supra note 82, the tribunal held: ‘It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles.’).

party may lawfully expropriate.⁹⁰ However, they normally do not define what measures constitute an expropriation. Thus, investment tribunals rely quite extensively on customary international law in order to specify what is meant by the notion of expropriation.⁹¹

44 Traditionally, many tribunals have broadly interpreted the notion of indirect expropriation as any wealth deprivation of a significant effect on the investor.⁹² More recently, tribunals in *Methanex*⁹³ and *Saluka*⁹⁴ have expressly relied on general international law in order to adopt a more restrictive understanding of what constitutes ‘indirect expropriation’.

45 According to the NAFTA tribunal in *Methanex*,

(...) as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.⁹⁵

46 In a similar way the UNCITRAL tribunal in the *Saluka* case, relying on *Methanex*, invoked customary international law in order to reason that the police powers doctrine would limit the broad scope of indirect expropriations. The tribunal was of the opinion that

90 See contribution of Ursula Kriebaum, ‘Expropriation’, ch. 8.VIII., 959–1030.

91 See, in detail, Anne Hoffmann, ‘Indirect Expropriation’ in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press, 2008) 151–170; Rudolf Dolzer, ‘Indirect Expropriations: New Developments?’ (2002) 11 NYU Env. L. J. 64–93; Yves L. Fortier and Stephen L. Drymer, ‘Indirect Expropriation in the Law of International Investment: I know It When I See It, or *Caveat Investor*’ (2004) 19 ICSID Rev.–FILJ 293–327; Rosalyn Higgins, ‘The Taking of Foreign Property by the State’ (1982-III) 176 RC 259–392; Andreas Lowenfeld, *International Economic Law* (Oxford University Press, 2002) 392; Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’ (2005) 20 ICSID Rev.–FILJ 1–57; August Reinisch, ‘Expropriation’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 407–458; Catherine Yannaca-Small, ‘“Indirect Expropriation” and the “Right to Regulate” in International Investment Law’, in OECD (ed), *International Investment Law. A Changing Landscape* (OECD, 2005) 43–72, available at <http://www.oecd.org/dataoecd/11/53/40077899.pdf>; UNCTAD, *Taking of Property* (UNCTAD, 2000), available at <http://www.unctad.org/en/docs/psiteiid15.en.pdf>.

92 See, e.g., *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103 (‘Thus, expropriation (...) includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State.’); *CME v. Czech Republic*, Partial Award, 13 September 2001, para. 604 (‘*De facto* expropriations or indirect expropriations, i.e. measures that do not involve an overt taking but that effectively neutralize the benefit of the property of the foreign owner, are subject to expropriation claims.’).

93 *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005.

94 *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006.

95 *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part IV, Ch. D, para. 7.

(...) the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.⁹⁶

This ‘importation’ of customary international law concepts into treaty interpretation was received with mixed feelings and unleashed a considerable amount of controversy among scholars as to the content of the alleged customary international law exception.⁹⁷ 47

However, the underlying treaty interpretation principle cannot be really questioned. Customary international law is part of the ‘relevant rules of international law applicable in the relations between the parties’. It may thus be relied upon as additional criterion for interpretation in the sense of Article 31(3)(c) of the Vienna Convention. The reliance on customary international law arguably containing more precise definitions of the notions of indirect expropriation left undefined in the applicable IIAs, the NAFTA in *Methanex* and the Czech Republic–Netherlands BIT in *Saluka*, may be regarded as a legitimate device of treaty interpretation.⁹⁸ The *Methanex/Saluka* jurisprudence had an interesting impact beyond interpretation. Recently, some IIAs have even started to incorporate this jurisprudence in order to circumscribe more closely what would amount to (indirect) expropriation.⁹⁹ 48

96 *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, para. 262.

97 See Thomas Wälde and Abba Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law’ (2001) 50 ICLQ 811–848; Vaughan Lowe, ‘Regulation or Expropriation?’ (2002) 55 Current Legal Problems 447–466; Andrew Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’ (2005) 20 ICSID Rev.–FILJ 1–57; Ursula Kriebaum, ‘Regulatory Takings: Balancing the Interests of the Investor and the State’ (2007) 8(5) JWIT 717–744; August Reinisch, ‘Enteignung und Fair and Equitable Treatment’ in Christian Tietje (ed), *International Investment Protection and Arbitration – Theoretical and Practical Perspectives* (Berliner Wissenschafts-Verlag, 2008) 119–138.

98 *Czech Republic–Netherlands BIT, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic*, 29 April 1991, (2004) 2242 UNTS 224.

99 See, e.g., 2004 Canadian Model–BIT, *Canadian Model Foreign Investment Promotion and Protection Agreement*, Annex B 13(1) on the clarification of indirect expropriation (‘The Parties confirm their shared understanding that:

- a) Indirect expropriation results from a measure or series of measures of a Party that have an effect equivalent to direct expropriation without formal transfer of title or outright seizure;
- b) The determination of whether a measure or series of measures of a Party constitute an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:
 - i) the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures of a Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
 - ii) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations; and
 - iii) the character of the measure or series of measures;
- c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.’)

49 That customary international law may be used as a guide to interpreting IIA provisions can also be seen in a number of the Argentinean necessity cases.¹⁰⁰ While some tribunals directly applied Article 25 of the ILC Articles on State Responsibility¹⁰¹ as an expression of customary international law on state of necessity, a number of others relied on this provision in order to interpret the applicable treaty clause.¹⁰² The extent of such reliance proved controversial in the annulment of the *Sempra* award. Initially, an ICSID tribunal had relied on Article 25 in order to interpret the applicable non-precluded measures clause of Article XI of the Argentina–US BIT.¹⁰³ According to the tribunal, the BIT clause was

100 See contribution of Christina Binder, ‘Circumstances Precluding Wrongfulness’, ch. 5.IV., 442–480; José Alvarez and Kathryn Khamsi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’ (2008–2009) YB Int’l Inv. L. & Pol’y 379–478; Andrea K. Bjorklund, ‘Emergency Exceptions: State of Necessity and *Force Majeure*’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 495–523; Andrea K. Bjorklund, ‘Economic Security Defenses in International Investment Law’ (2008–2009) YB Int’l Inv. L. & Pol’y 479–503; Tarcisio Gazzini, ‘Necessity in International Investment Law: Some Critical Remarks on *CMS v. Argentina*’ (2008) 26 JENRL 450–470; Charles Leben, ‘L’Etat de nécessité dans le droit international de l’investissement’ (2005) 349 Gazette de Palais 47–52; August Reinisch, ‘Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases?’ (2007) 8 JWIT 191–214; Stephan W. Schill, ‘International Investment Law and the Host State’s Power to Handle Economic Crises’ (2007) 24(3) J. Int’l Arb. 265–286; Michael Waibel, ‘Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*’ (2007) 20 Leiden J. Int’l L. 637–648.

101 ILC Articles on State Responsibility, Article 25 (‘1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.’), Draft Articles on Responsibility of States for Internationally Wrongful Acts, in: Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, 43, UN Doc. A/56/10 (2001).

102 See on this problem Jürgen T. Kurtz, ‘ICSID Annulment Committee Rules on the Relationship between Customary and Treaty Exceptions on Necessity in Situations of Financial Crisis’ (11) 30 ASIL Insight, available at <http://www.asil.org/insights/volume/11/issue/30/icsid-annulment-committee-rules-relationship-between-customary-and>; Isabelle Buffard, ‘Anmerkungen zum Verhältnis zwischen allgemeinem Völkerrecht und besonderen Vertragsbestimmungen bzw. vertraglichen Subsystemen im Hinblick auf die Nichterfüllung völkerrechtlicher Vertragspflichten’ in Stephan Wittich, August Reinisch and Andrea Gattini (eds), *Kosovo – Staatsschulden – Notstand – EU-Reformvertrag – Humanitätsrecht, Beiträge zum 33. Österreichischen Völkerrechtstag 2008 in Conegliano* (Peter Lang, 2009) 97–118; Christina Binder, ‘Nichterfüllung völkerrechtlicher Vertragspflichten wegen Notstands – Der Notstand im Völkergewohnheitsrecht und in besonderen Vertragsbestimmungen’ in *ibid.*, 119–151; Christina Binder, ‘Changed Circumstances in International Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis’ in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law in the 21st Century* (Oxford University Press, 2009) 608–630.

103 Article XI of the Argentina–US BIT (n. 76) (‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of

‘inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined.’¹⁰⁴ The tribunal then proceeded to apply the detailed preconditions of the necessity defence under Article 25 because it thought that such preconditions were also relevant for the invocation of Article XI of the BIT which failed to include comparable provisions.¹⁰⁵ The annulment committee, however, found that this amounted not only to a misinterpretation of Article XI of the BIT, but constituted an annulable failure to apply the applicable law.¹⁰⁶ While the committee in principle accepted that ‘it may be appropriate to look to customary law as a guide to the interpretation of terms used in the BIT’¹⁰⁷ it found that the two provisions were too different in wording and function¹⁰⁸ in order to allow for the State responsibility norm to serve as a guide to interpret the BIT provision.¹⁰⁹ This divergence of opinion demonstrates that it will often be difficult to decide whether the parties intended to refer to customary law for questions that were not resolved in the treaty in express terms.¹¹⁰

its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential interests.’)

- 104 *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 376; similarly, *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 334.
- 105 *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, para. 378 (‘It is no doubt correct to conclude that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law. The problem here, however, is that the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law. As concluded above, such requirements and conditions have not been fully met in this case. (...) Nor does the Tribunal believe that because Article XI did not make an express reference to customary law, this source of rights and obligations becomes inapplicable. International law is not a fragmented body of law as far as basic principles are concerned and necessity is no doubt one such basic principle.’)
- 106 *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, para. 208.
- 107 *Ibid.*, para. 197.
- 108 Already the *CMS* annulment committee severely criticised this approach, *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 September 2007, para. 129 (‘The Committee observes first that there is some analogy in the language used in Article XI of the BIT and in Article 25 of the ILC’s Articles on State Responsibility. (...) However Article XI specifies the conditions under which the Treaty may be applied, whereas Article 25 is drafted in a negative way: it excludes the application of the state of necessity on the merits, unless certain stringent conditions are met. Moreover, Article XI is a threshold requirement: if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations.’). The *Sempra* committee equally noted that the treaty clause had to be applied first and Article 25 would become relevant only where the BIT had been violated. *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, para. 200.
- 109 *Sempra Energy International v. Argentina* (n. 106) para. 199 (‘It is apparent from this comparison that Article 25 does not offer a guide to *interpretation* of the terms used in Article XI. The most that can be said is that certain words or expressions are the same or similar.’).

50 Another highly controversial example of systemic integration can be seen in the attempt of some investment tribunals to integrate further requirements into the highly undetermined notion of ‘investment’ as a jurisdictional requirement under the ICSID Convention.¹¹¹ In practice, ICSID tribunals have adhered to the so-called *Salini* test¹¹² according to which an ‘investment’ displays the following typical features: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State’s development.¹¹³ Some have disagreed over the question whether these elements should be regarded as jurisdictional requirements¹¹⁴ or merely as typical indicative features.¹¹⁵ While most ICSID tribunals appear to follow the latter approach, the panel in *Phoenix v. Czech Republic*¹¹⁶ adopted a systemic interpretation approach in order to hold that in addition to the above-mentioned *Salini* criteria other elements are constitutive of an investment.¹¹⁷ These additional requirements usually result from specific BIT provisions, so-called ‘in accordance with domestic law’ clauses¹¹⁸ and from the general principle of *bona fides*. In the view of the *Phoenix* tribunal, however, it should be regarded as an implicit, general requirement under general principles of law.¹¹⁹

110 See *supra* text at n. 87.

111 Article 25(1) of the ICSID Convention does not define the jurisdictional requirement of an ‘investment’ (‘The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.’) See contribution of Jan Asmus Bischoff and Richard Happ, ‘The Notion of Investment’, ch. 6.II.A., 495–544.

112 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.

113 See also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) 128, 129.

114 See *Patrick Mitchell v. Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

115 *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

116 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

117 *Ibid.*, para. 114 (‘1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.’).

118 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) 65; Christina Knahr, ‘Investments “in accordance with host state law”’ (2007) 4 TDM 1–28; see also contribution of Katharina Diel-Gligor and Rudolf Hennecke, ‘Investment in Accordance with the Law’, ch. 6.II.D., 566–576.

119 *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 100 (‘The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host State or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of international protection is to protect legal and *bona fide* investments.’).

The tribunal expressly arrived at this result by resorting to a systemic interpretation after first looking at the ordinary meaning of the treaty text and its object and purpose.¹²⁰ That such an integrative approach may conflict with a strictly literal interpretation of the ‘investment’ notion was stressed by the tribunal in *Saba Fakes v. Turkey*.¹²¹

The interpretation of IIA provisions in light of general international law according to Article 31(3)(c) of the Vienna Convention is sometimes difficult to distinguish from a direct application of customary international law and general principles of law.¹²² It is clearly accepted that in situations where certain issues, in particular State responsibility principles like attribution, preclusion of wrongfulness and others, are not addressed in IIAs, general international law (custom and general principles) is applicable.¹²³ Sometimes applicable law clauses in BITs even expressly provide for this.¹²⁴ The lack of a clear bright line between application and interpretation is particularly evident in some of the necessity cases dealing with the relationship between interpreting the BIT non-precluded measures clauses and the customary international law rules on necessity like in the *Sempra* case.¹²⁵

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120 *Ibid.*, para. 80 (‘In order to perform this interpretation, the Tribunal will first analyse the ordinary meaning of the notion of investment under the ICSID Convention, and will then ascertain which investments are protected in view of their object and purpose, before looking at the BIT definition. Finally, in order to complete the determination of protected investments under the international arbitration mechanism, the Tribunal will interpret these two international agreements in the light of the general principles of international law.’).

121 *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 112 (‘(...) the principles of good faith and legality cannot be incorporated into the definition of Article 25(1) of the ICSID Convention without doing violence to the language of the ICSID Convention: an investment might be “legal” or “illegal,” made in “good faith” or not, it nonetheless remains an investment. The expressions “legal investment” or “investment made in good faith” are not pleonasm, and the expressions “illegal investment” or “investment made in bad faith” are not oxymorons.’). See also *supra* (n. 22).

122 See Tarcisio Gazzini, ‘The Role of Customary International Law in the Field of Foreign Investment’ (2007) 8 JWIT 691–715.

123 See contribution of James Crawford and Simon Olleson, ‘The Application of Rules on State Responsibility’, ch. 5.III., 411–441.

124 See e.g. NAFTA Article 1131(1) (‘A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.’); ECT Article 26(6) (‘A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.’); ICSID Convention Article 42(1) (‘The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’). See also Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 113) 575 *et seq.*

125 See *supra* text at (n. 100).

E. Object and Purpose

52 A ‘teleological’ approach to ascertain the meaning of treaty provisions has been widely used in treaty interpretation practice.¹²⁶ Article 31(1) of the Vienna Convention explicitly makes ‘object and purpose’¹²⁷ of a treaty one of the relevant interpretation criteria. It is thus not surprising that investment tribunals regularly refer to the ‘object and purpose’ of IIAs¹²⁸ – which they often find expressed in their preambles.¹²⁹ A specifically articulate expression of this approach can be found in the *Siemens v. Argentina* decision in which an ICSID tribunal considered

(...) that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States

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- 126 *IBM World Trade Corporation v. Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction, 22 December 2003, para. 44 (‘The interpretation of international treaties does not only submit itself to principles such as the parties’ intention, literalism according to the natural and ordinary meaning, good faith, interpretation according to the context, practical application by the parties or by the international organizations, interpretation based on the preparatory works, restrictive and effective interpretations (in accordance with the nature of the matters the treaty deals with), but it shall also take into account the specific purposes of the treaty (teleological interpretation).’).
- 127 With regard to this highly problematic concept, it has been stated that ‘object’ may relate primarily to the content of a rule itself, while ‘purpose’ refers to the aim pursued by a rule. Cf. Isabelle Buffard and Karl Zemanek, ‘The “Object and Purpose” of a Treaty: An Enigma?’ (1998) 3 *Austrian Rev. Eur. & Int’l L.* 311, 326.
- 128 *Occidental Exploration and Production Company v. Ecuador*, Award, LCIA Case No. UN 3467, 1 July 2004, para. 183; *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/8, 3 August 2004, para. 81; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, para. 259.
- 129 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.4 (‘As to the object and purpose of the BIT, the Tribunal notes the parties’ wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development. In interpreting the BIT, we are thus mindful of these objectives. (...)’); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, Award, ICSID Case No. ARB/01/7, 24 May 2004, para. 113 (‘(...) As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire “to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party”, and the recognition of “the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties”. (...)’); *LG&E Energy Corp v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 26 September 2006, para. 124 (‘In considering the context within which Argentina and the United States included the fair and equitable treatment standard, and its object and purpose, the Tribunal observes in the Preamble of the Treaty that the two countries agreed 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.”’); *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, para. 299 (‘The “object and purpose” of the Treaty may be discerned from its title and preamble.’).

in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.¹³⁰

Related to such a teleological approach is the question whether, as a matter of principle, IIAs should be interpreted in a pro-investor or pro-State fashion. While some tribunals appear to lean towards one¹³¹ and others towards the other approach,¹³² the more useful view is to recognise that effective investment protection is in the long-term interest of host States¹³³ and thus avoids prioritising one over the other. Thus, investment tribunals have insisted that IIAs should be interpreted ‘neither liberally nor restrictively’¹³⁴ and applied this approach, for instance, to the question of agreements to arbitrate under the jurisdictional provisions of BITs¹³⁵ or to the grounds for annulment under the ICSID Convention.¹³⁶

130 *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No. ARB/02/8, 3 August 2004, para. 81.

131 See, for instance with regard to an expansive interpretation of umbrella clauses: *SGS Société Générale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, para. 116 (‘The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.’); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 52 (‘The object and purpose rule also supports such an interpretation. While it is not *permissible, as is* too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified. Considering, as pointed out above, that any other interpretation would deprive Art. II (2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness, also applied by other Tribunals in interpreting BIT provisions (see *SGS v. Philippines*, para. 116 and *Salini v. Jordan*, para. 95).’).

132 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 55 (‘Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law. In consequence, as with any other exception to established general rules of law, the identification of a provision as an “umbrella clause” can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms (...)’); it has been noted that this ‘avowed predilection’ for a restrictive approach was not actually reflected in the tribunal’s decision. See Rudolf Dolzer and Christoph Schreuer (n. 118) 33. See also (n. 131).

133 See *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para.23 (‘(...) the Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.’).

134 *Siemens AG v. Argentina*, Decision on Jurisdiction, ICSID Case No ARB/02/8, 3 August 2004, para. 81 (‘(...) the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention.’).

135 *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 43 (‘There is no principle of either extensive or restrictive interpretation of jurisdictional provision in treaties.’); *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 14 (‘[A] convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*.’); *Methanex v. USA*, UNCITRAL (NAFTA), Award on Jurisdiction, 7 August 2002, paras. 103, 105 (‘The USA contends that a doctrine of restrictive interpretation should be applied in in-

- 54 Investment tribunals have repeatedly stressed that object and purpose of a treaty provision are of primary relevance for the interpretation of IIAs.¹³⁷
- 55 Reliance on IIA preamble language for the purpose of interpreting IIA provisions has played an important role in the context of fair and equitable treatment clauses. A number of tribunals have relied on IIA preambles in order to ascertain the content of such treaty clauses.¹³⁸ But tribunals and commentators¹³⁹ have

vestor-state disputes. In other words, wherever there is any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty. (...) ‘The Tribunal rejects the contention of the USA for reasons which can be stated briefly, given that the point did not greatly influence our decision in this Award. (...) We accept that the NAFTA Parties intended that the provisions of Chapter 11, particularly Article 1101(1) NAFTA, should be interpreted in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief.’)

- 136 *Klöckner Industrie-Anlagen GmbH and others v. Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, p. 3 (‘(...) application of the paragraph Article 52(1) of the Convention demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention.’); *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, para. 75 (‘As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied.’).
- 137 See e.g. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 96 (‘Pursuant to the general principles of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties (...) this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision.’); *Lauder v. Czech Republic*, UNCITRAL Award, 3 September 2001, para. 292; *MTD v. Chile*, Award, 25 May 2004, paras. 104, 105; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, para. 81; *Aguas del Tunari S.A. v. Bolivia*, Decision on Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, paras. 153, 240–241; *Continental Casualty Company v. Argentina*, Decision on Jurisdiction, 22 February 2006, para. 80.
- 138 See e.g., *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 264 (‘Words used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state “that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment (...)”. The FET standard is thus closely tied to the notion of legitimate expectations – actions or omissions by Ukraine are contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment.’); *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 116 (‘In various disputes between U.S. investors and Argentina under that BIT, tribunals have relied on the explicit mention in its preamble of the desirability of maintaining a stable framework for investments in order to attract foreign investment as a basis for finding that the lack of such stability and related predictability, on which the investor had relied, had resulted in a breach of the fair and equitable treatment standard. This reference is justified because, although such a statement in a preamble does not create independent legal obligations, it is a tool for the interpretation of the treaty since it sheds light on its purpose.’).
- 139 Lars Markert, ‘International Investment Law and Treaty Interpretation – Problems, Particularities and Possible Trends’, in Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Nomos, 2011) 53, 55.

also cautioned against excessive reliance on preambles in order to interpret fair and equitable treatment. Instead, tribunals like the UNCITRAL panel in *Saluka* have insisted on a ‘balanced approach’ in assessing the impact of preambular language.¹⁴⁰

The ‘object and purpose’ of IIAs was also particularly relevant in cases where tribunals had to interpret the scope of dispute settlement and the reach of MFN clauses. In a number of cases, arbitral tribunals have relied on ‘object and purpose’ and stressed that effective investor-State dispute settlement is a crucial aspect of investment protection.¹⁴¹ This has led to calls for an extensive interpretation of MFN clauses to include also dispute settlement.¹⁴² For instance, in *Telefónica v. Argentina*¹⁴³ an ICSID tribunal held that

[a]n MFN clause is aimed at ensuring equality of treatment to the beneficiaries in respect of its subject matter at the most advantageous level. In respect of trade in goods, establishment, services and investments, the purpose of an MFN clause has been described as that of guaranteeing equal competitive conditions to businessmen of the countries concerned in the contracting States’ territories. Specifically as to foreign investors, it appears correct to state that ‘the basic purpose of MFN is to guarantee equality of competitive opportunities for foreign investors in the host state’.¹⁴⁴

Other tribunals have cautioned against such a strong emphasis on ‘object and purpose’ and rejected reliance on the purpose of IIAs to effectively protect for-

140 *Saluka Investments BV (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, paras. 299, 300 (‘The “object and purpose” of the Treaty may be discerned from its title and preamble. These read: (...) This is a more subtle and balanced statement of the Treaty’s aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.’).

141 See e.g. *Emilio Agustín Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, para. 54 (‘(...) dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce.’); *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 49 (‘(...) assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.’); *Eastern Sugar BV v. Czech Republic*, Partial award and Partial Dissenting Opinion, SCC Case No. 088/2004, 27 March 2007, para. 165 (‘From the point of view of the promotion and protection of investments, the arbitration clause is in practice the most essential provision of Bilateral Investment Treaties.’); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 (pending); *AWG Group Ltd. v. Argentina*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, para. 59 (‘From the point of view of the promotion and protection of investments, the stated purposes of both the Argentina-Spain BIT and the Argentina-U.K. BIT, dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon.’).

142 See e.g. Stephan W. Schill, *The Multilateralization of International Investment Law* (Cambridge University Press, 2009) 180.

143 *Telefónica SA v. Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006.

144 *Ibid.*, para. 98.

eign investors as an interpretative tool to justify reliance on MFN clauses in order to establish access to investor-State arbitration.¹⁴⁵

- 58 Investment tribunals have also linked the teleological interpretation to the traditional maxim of *effet utile* or *ut res magis valeat quam pereat* according to which a treaty provision should be interpreted so as to be most effective or at least to ensure that it is interpreted as meaningful rather than meaningless.¹⁴⁶ A number of tribunals that had to interpret umbrella clauses¹⁴⁷ relied on this principle in order to reject a limiting interpretation which might leave such a clause meaningless.¹⁴⁸
- 59 Traditionally, preambles of IIAs have been rather short, mostly referring to the ‘promotion’ and ‘protection’ of investments, the ‘stimulation of investment flows’, ‘favourable conditions for investments’, a ‘stable framework for investments’ or the like. Only recently, IIA practice has led to the inclusion of broader and more diverse aims in the preambles of IIAs which may be important for interpretation purposes. Many post-2000 Model BITs as well as IIAs based on such models contain lengthy preambles, including economic as well as non-economic objectives.¹⁴⁹ Among these newer items, aspects like ‘international development efforts’, ‘respect for human rights’, ‘the protection of health, safety, and

145 *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, para. 193 (‘The object and purpose of the Bulgaria-Cyprus BIT are: “the creation of favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party.” (Preamble) (...) Such statements are as such undeniable in their generality, but they are legally insufficient to conclude that the Contracting Parties to the Bulgaria-Cyprus BIT intended to cover by the MFN provision agreements to arbitrate in other treaties to which Bulgaria (and Cyprus for that matter) is a Contracting Party. Here, the Tribunal is mindful of Sir Ian Sinclair’s warning of the “risk that the placing of undue emphasis on the ‘object and purpose’ of a treaty will encourage teleological methods of interpretation [which], in some of its more extreme forms, will even deny the relevance of the intentions of the parties”.’).

146 Richard Gardiner (n. 1) 148; see also *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990, para. 40; *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, para. 248 (‘(...) It is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless.’); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 223 (‘(...) the Tribunal will employ generally accepted rules of interpretation, such as the ones neatly summarized by the AAPL tribunal: (i) the tribunal should not interpret that which has no need of interpretation; (ii) effect should be given to every provision of an agreement; and (iii) a provision must be interpreted so as to give it meaning rather than so as to deprive it of meaning.’); *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, paras. 107, 114 (‘The Tribunal recalls that, as recognized by the International Court of Justice, “the principle of effectiveness has an important role in the law of treaties.” (...) In this respect one must recall that this principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible. (...)’).

147 See contribution of Anthony Sinclair, ‘Umbrella Clause’, ch. 8.VII., 887–958.

148 *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, paras. 248–260; *SGS Société Générale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, para. 116; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 52. See also (n. 131).

the environment, and the promotion of internationally recognised labour standards', 'corporate social responsibility', 'the fight against corruption', and 'sustainable development' can be found.¹⁵⁰

Gradually, this may lead to new interpretation options available to investment tribunals basing their decisions, *inter alia*, on such broad, multi-purpose preambles. 60

F. Intent of the Parties – Negotiating History

The intention of treaty parties is not an express guideline for treaty interpretation pursuant to Articles 31 and 32 of the Vienna Convention. In fact, the only reference to intent can be found in Article 31(4) clarifying that '[a] special meaning shall be given to a term if it is established that the parties so intended.' However, it is widely accepted that the intention of the treaty parties is a relevant aspect of interpretation. Thus, it is not surprising that international courts and tribunals often inquire into the intention of the parties in order to ascertain the content of specific treaty provisions. This is also true for investment tribunals.¹⁵¹ 61

149 See International Investment Agreements: A Survey of Environmental, Labour and Anti-corruption Issues, in OECD (ed), *International Investment Law. Understanding Concepts and Tracking Innovations* (OECD, 2008) 135.

150 See, e.g., Uruguay–US BIT, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, 4 November 2005, available at http://www.unctad.org/sections/dite/iia/docs/bits/US_Uruguay.pdf; see also Canada–Peru BIT, *Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments*, 14 November 2006, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Canada-Peru10nov06-en.pdf>. See also Andrew Newcombe, 'Sustainable Development and Investment Treaty Law' (2007) 8 *JWIT* 357, 399.

151 See e.g. *Amco Asia Corporation and others v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 14 ('[A] convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly* or *liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties.');

Berschader v. Russia, SCC Case No. 080/2004, Award, 21 April 2006, para. 175 ('Firstly, the tribunal must express its firm view that the fundamental issue in determining whether or not an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty. (...) Ultimately, that question can only be answered by a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.');

Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.4 ('(...) the Tribunal notes the parties' wish, as stated in the preamble, for the Treaty to create favourable conditions for French investments in Argentina, and vice versa, and their conviction that the protection and promotion of such investments is expected to encourage technology and capital transfers between both countries and to promote their economic development.');

Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 277 ('The standard of "fair and equitable treatment" has been interpreted broadly by Tribunals and, as a result, a difference of interpretation between the terms "fair" and "reasonable" is insignificant. The Claimant did not show any evidence which could demonstrate that, when signing the BIT, the Republic of Lithuania and the Kingdom of Norway intended to give a different

- 62 As has already been mentioned, ideally, the wording of a treaty is seen as the best expression of what the parties really intended.¹⁵² Whether this is always true may be open to doubt, although the idea as such has been affirmed in investment arbitration practice.
- 63 Tribunals often attempt to uncover the intention of treaty parties by having recourse to the *travaux préparatoires* of a treaty. Though mentioned in Article 32 of the Vienna Convention only as supplementary means of interpretation¹⁵³ – which means that the *travaux* can only be relied upon in order to confirm a meaning found through the principal interpretation techniques laid down in Article 31¹⁵⁴ or if they leave the meaning ambiguous or obscure or lead to a manifestly absurd or unreasonable result¹⁵⁵ – establishing the (re-)constructed will of the parties is frequently the avowed task of arbitration tribunals.¹⁵⁶ Since States often do not specifically negotiate individual treaty provisions, but rather rely on templates taken from national model BITs such emphasis on their presumed intention to be unearthed by studying the *travaux* may be overly optimistic.¹⁵⁷
- 64 Further, other than with the ICSID Convention¹⁵⁸ or various multilateral investment agreements,¹⁵⁹ the negotiating history of BITs is often insufficiently

protection to their investors than the protection granted by the “*fair and equitable*” standard.’).

152 See *supra* text at (n. 15).

153 See *supra* text at (n. 4).

154 See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 50 (‘(...) 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.’); less clear: *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 7.6.5 (‘Although Article 32 provides for the use of historical interpretation, the Tribunal notes that such use is only as a complementary method of interpretation.’).

155 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Interim Award, 26 June 2000, para. 68 (‘Article 32 of the Vienna Convention permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning resulting from the application of Article 31 or to discern that meaning when the application of Article 31 leaves the meaning ambiguous or obscure or leads to a manifestly absurd or unreasonable result.’); *Enron Creditors Recovery Corp., Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Annulment, 30 July 2010, para. 122 (‘As to Article 32 of the Vienna Convention, the Committee does not consider the relevant provisions of the BIT or Articles of the ICSID Convention to be ambiguous or obscure. However, Argentina in effect argues that the interpretation referred to above leads to a result which is manifestly absurd or unreasonable.’).

156 *Plama Consortium Limited v. Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, paras. 189–195; *Pope & Talbot Inc v. Canada*, UNCITRAL (NAFTA), Award on the Merits of Phase 2, 10 April 2001, paras. 39–41; *Mondev v. US*, ICSID Case No. ARB (AF)/99/2, Award, 11 October 2002, para. 111.

157 See Thomas Wälde, ‘Interpreting Investment Treaties: Experiences and Examples’ in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 724, 750 (‘What these features do is to place a question mark over the use of *travaux* under Article 32 VCLT, but also over too much reliance on established interpretation maxims such as ‘*e contrario*’ or the principle of effectiveness of each element of the text. These assume a degree of perfection and information with the drafters that did not exist.’).

documented,¹⁶⁰ which poses practical difficulties to parties and tribunals to rely on *travaux*.¹⁶¹

Many cases fail to explain the legal basis of their underlying presumptions and, in particular, why a presumption should work in one direction and not in the opposite. Possibly this is a result of the interpretation principle *in dubio mitius* according to which, in case of doubt, States must be presumed to incur fewer and less onerous rather than more far-reaching obligations.¹⁶² However, the validity of such a principle as a guideline for interpretation is controversial¹⁶³ and was rejected in a number of cases.¹⁶⁴

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- 158 See ICSID, *History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Washington DC, 1968). See also the reliance of tribunals on these *travaux* as evidenced in Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (n. 113) which contains short notes on the drafting history of the ICSID Convention in almost all articles commented.
- 159 Initially, the *travaux* of the NAFTA were apparently not available publicly nor produced by the State parties upon request of arbitral panels. Cf. *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in Respect of Damages, 31 May 2002, paras. 28 et seq. The negotiating history of NAFTA has been made available in due course; it can now be found at <http://naftaclaims.com/commission.htm>. See also Meg Kinnear, Andrea Bjorklund and John Hanford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11, 2007 Update* (Kluwer Law International, 2007).
- 160 Rudolf Dolzer and Christoph Schreuer (n. 118) 33.
- 161 *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 274 ('This sparse negotiating history thus offers little additional insight into the meaning of the aspects of the BIT at issue, neither particularly confirming nor contradicting the Tribunal's interpretation.');
- 162 See *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 177 ('(...). The appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.'). See also Gus van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) 132.
- 163 See Thomas Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 741. See also *Mondov v. US*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, para. 43 ('There is no principle of either extensive or restrictive interpretation of jurisdictional provision in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties.').
- 164 See *Methanex v. USA*, UNCITRAL (NAFTA), Award on Jurisdiction, 7 August 2002, where a NAFTA tribunal rejected the host State's suggestion that 'a doctrine of restrictive interpretation should be applied in investor-state disputes' according to which 'any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty.' *Ibid.*, para. 103. The *Methanex* tribunal, however, stressed that Chapter 11 of NAFTA 'should be interpreted in good faith in accordance with their ordinary meaning (in accordance with Article 31(1) of the Vienna Convention), without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief.' *Ibid.*, para. 105. See also *Aguas del Tunari v. Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 91 ('(...) the Vienna Convention does not men-

- 66 In order to ascertain the intention of treaty drafters, investment tribunals sometimes also refer to other IIAs,¹⁶⁵ which also implies that third party IIAs may be relevant ‘context’ for their interpretation.¹⁶⁶
- 67 The reasoning of the UNCITRAL tribunal in *National Grid* displays a proper cautionary approach to elucidating an intention of the parties from the contextual relevance of third party BITs for the interpretation of an MFN clause. When examining the dispute settlement clause of the applicable BIT between Argentina and the UK, the tribunal also looked at a number of subsequent UK BITs. While finding that this may indicate an intention on the part of the UK to extend MFN clauses to dispute settlement, it held that the lack of a similar practice on the part of Argentina prevented it from deriving a common intent of the parties.¹⁶⁷
- 68 An example demonstrating the relevance of the intention of the parties and the *travaux*, not of an IIA, but of the ICSID Convention can be seen in the challenge decision in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*.¹⁶⁸ In this case the outcome of a strictly literal interpretation was cor-

tion the canon that treaties are to be construed narrowly, a canon that presumes States can not have intended to restrict their range of action.’)

165 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in the Merits of Phase 2, 10 April 2001, para. 115 (‘(...) there are very strong reasons for interpreting the language of Article 1105 consistently with the language of BITs. First, there is the basic unlikelihood that the Parties to NAFTA would have intended to curb the scope of Article 1105 *vis a vis* one another when they (...) had granted broader rights to countries that cannot be considered to share the close relationships with the NAFTA parties that those Parties share with one another.’)

166 See *supra* text at (n. 66).

167 *National Grid plc v. Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 85 (‘Since 1991, the MFN clause in the UK model investment treaty has included a third paragraph stating that: “*For the avoidance of doubt*”, the MFN clause extends to Articles 1 to 11 of the treaty and, hence, to dispute resolution matters. The implication in the wording of this additional paragraph is that, all along, this was the UK’s understanding of the meaning of the MFN clause in previously concluded investment treaties. On the other hand, after the decision on jurisdiction in *Siemens*, the Argentine Republic and Panama exchanged diplomatic notes with an “interpretative declaration” of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention. The Tribunal has not been furnished with any evidence that at any point in time an interpretation of such nature was considered by either party to the Treaty. Neither has the Tribunal received any evidence that the Argentine Republic adopted similar interpretations of the MFN clause incorporated in the more than 50 bilateral investment treaties concluded with other States parties. While it is possible to conclude from the UK investment treaty practice contemporaneous with the conclusion of the Treaty that the UK understood the MFN clause to extend to dispute resolution, no definite conclusion can be reached regarding the Argentine Republic’s position at that time. Therefore, the review of the treaty practice of the State parties to the Treaty with regard to their common intent is inconclusive. (...)’)

168 *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001. In this decision, the other two members of an *ad hoc* committee applied the rules of arbitrator disqualification to the disqualification of an annulment committee member, though this was strictly speaking not permitted by the wording of the Convention. The deciding members found that this was not ‘inconsistent with the Convention, having regard to its object and

rected, not only because the outcome would have been contrary to object and purpose, but also because – in the tribunal’s view – the parties could not have intended it.

Since the intention of the parties – in particular in the absence of *travaux* – may not always be easy to ascertain, commentators and tribunals have warned against excessive construction or reconstruction of presumed intent.¹⁶⁹ 69

G. Interpretative Statements concerning International Investment Agreement Provisions

Beyond the usual rules of treaty interpretation under the Vienna Convention IIAs may be subject to a number of specific interpretation devices. A peculiar feature is an express IIA authorisation given to a treaty body to adopt binding interpretations of IIA provisions. Some BITs provide for this,¹⁷⁰ but the most prominent example is NAFTA which empowers the multilateral Free Trade Commission to adopt binding NAFTA interpretations.¹⁷¹ 70

So far this power has been rarely exercised. The first and most important use of it occurred in 2001 when the Commission adopted an interpretation of the concepts of FET and FPS contained in NAFTA Article 1105,¹⁷² which addressed the interpretative divergence of opinions of whether the two standards corresponded to the customary international law minimum standard or were indepen- 71

purpose.’ *Ibid.*, para. 10. They concluded: ‘As to the object and purpose of the Convention, there is no difficulty. *Ad hoc* Committees have an important function to perform in relation to awards (in substitution for proceedings in national courts), and their members must be, and appear to be, independent and impartial. No other procedure exists under the Convention, expressly or impliedly, for deciding on proposals for disqualification. The only question then is whether it is literally inconsistent with the terms of the Convention, given that Chapter V is not applied by Article 52 to annulment, for the Rules to step in and make equivalent provision. Admittedly, the catalogue of provisions incorporated by reference in Article 52 (4) appears a considered one. The provisions incorporated are not only concerned with the powers of Committees. They apply to a range of questions, including the status of decisions made. On the other hand the matter of disqualification might simply have been overlooked, and other aspects of Chapter V are clearly apt to be applied to *ad hoc* Committees.’ *Ibid.*, para. 11.

169 *Wintershall v. Argentina*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 88 (‘There is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty’s “true purpose”.’).

170 See, e.g., Article 30(3) of the 2004 US Model BIT, *Treaty between the Government of the United States of America and the Government of [Country] concerning the encouragement and reciprocal protection of investment*, released 5 February 2004 (‘A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.’).

171 NAFTA Art. 2001(2) (‘The Commission shall: (a) supervise the implementation of this Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application; (...) (e) consider any other matter that may affect the operation of this Agreement.’); NAFTA Art. 1131(2) (‘An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.’).

dent treaty standards that went beyond that.¹⁷³ The Commission came to the following conclusion:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.¹⁷⁴

72 Most NAFTA tribunals have accepted this interpretation.¹⁷⁵ However, the award of the NAFTA tribunal in *Pope & Talbot*¹⁷⁶ demonstrates some of the inherent problems of giving treaty bodies such wide ranging powers. In fact the interpretation of the Commission squarely contradicted the tribunal's early views in its award on the merits, espousing an 'additive interpretation' of the NAFTA's FET standard according to which Article 1105 goes beyond the international minimum standard.¹⁷⁷ In its final award, the *Pope & Talbot*¹⁷⁸ tribunal thus did not simply accept the Commission's interpretation as such. Rather, it first ascertained whether the Commission had not exceeded its powers by effectively amending the text of NAFTA Article 1105, instead of merely interpreting it.¹⁷⁹ Without clearly deciding this issue the tribunal concluded that its finding of a breach of NAFTA Article 1105 could also be sustained under the Commission's interpretation.¹⁸⁰

172 NAFTA Art. 1105 ('Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.').

173 See contributions of Andrea K. Bjorklund, 'NAFTA's Contributions to Investor-State Dispute Settlement', ch. 4.III.B., 261–282, and Marc Jacob and Stephan Schill, 'Fair and Equitable Treatment', ch. 8.I., 700–763.

174 NAFTA Free Trade Commission, *Clarifications Related to NAFTA Chapter 11*, Decision of 31 July 2001, available at <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>.

175 *Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2, ICSID Additional Facility Award, 11 October 2002, para. 122; *United Parcel Service of America Inc. v. Canada*, Decision on Jurisdiction, 22 November 2002, para. 97; *ADF Group Inc. v. USA*, Case No. ARB(AF)/00/1, ICSID Additional Facility Award, 9 January 2003, para. 199; *Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Award, 26 June 2003, paras. 125–127; *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 90–91; *Methanex v. USA*, UNCITRAL (NAFTA), Final Award, 3 August 2005, Part II, Ch. H, para. 23.

176 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in Respect of Damages, 31 May 2002.

177 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in the Merits of Phase 2, 10 April 2001, para. 117.

178 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in Respect of Damages, 31 May 2002.

179 *Ibid.*, para. 16. See also August Reinisch, 'Verfahrensrechtliche Aspekte der Rechtskontrolle von Organen der Staatengemeinschaft' in Rainer Hofmann, August Reinisch, Thomas Pfeiffer, Stefan Oeter and Astrid Stadler, *Die Rechtskontrolle von Organen der Staatengemeinschaft, Berichte der Deutschen Gesellschaft für Völkerrecht* (C.F. Müller, 2007) 43–92, 51.

180 *Pope & Talbot v. Canada*, UNCITRAL (NAFTA), Award in Respect of Damages, 31 May 2002, para. 69.

On a more general level, the *Pope & Talbot* episode demonstrates the inherently problematic aspects of shifting part of the interpretation powers from an independent tribunal to a treaty body composed of representatives of the contracting parties. This power, especially when activated during pending proceedings, may in effect be used to the detriment of investors¹⁸¹ and be thus incompatible with due process guarantees.¹⁸² 73

H. The Impact of the Hybrid Nature of Investment Arbitration on the Interpretation of International Investment Agreements

In addition to the VCLT rules, which are formally applicable to the interpretation of IIAs, a number of other factors appear to play a role in the actual interpretation practice of investment tribunals. One of these immeasurable aspects stems from the hybrid nature of investment arbitration as a mixture between commercial arbitration and inter-State dispute settlement.¹⁸³ It appears to result primarily from the practical fact that the individual actors in investment arbitration often have a different legal background that may often unconsciously influence their approach to interpretation problems. 74

The persons involved in investment arbitration, arbitrators but also counsel and experts, largely come from two different groups: arbitration practitioners, often with a clear commercial arbitration background, and public international law specialists, often from academia or the public service.¹⁸⁴ While the latter are usually ‘socialised’ in the tradition of treaty interpretation according to the VCLT rules, the former may bring a different legal background and education which is likely to influence their interpretation approach. 75

Commercial arbitrators are likely to base their legal reasoning on the canons of interpretation they normally apply in commercial cases which is usually a specific domestic law. Since current investment arbitration is largely dominated by practitioners with an Anglo-American legal education the rules of strict statutory interpretation leading to a preference for a more literal interpretation over teleological considerations is likely to impact investment decisions. It is also probable that commercial lawyers in general have less enthusiasm for systemic integration and the relevance of public international law than the circle of international law professors and government lawyers. Rather, they often emphasise a fact-specific reasoning focusing on their professed goal to provide an efficient 76

181 *Ibid.*, para. 21, referring to ‘an opinion by Sir Robert Jennings in which he describes the Interpretation as “amending the treaty to curtail investor protection.”’

182 Rudolf Dolzer and Christoph Schreuer (n. 118) 35.

183 See Zachary Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) 74 BYIL 151–290.

184 Gabriele Kaufmann-Kohler, ‘Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties’ in Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer, 2006) 257–276.

dispute resolution without much concern about the doctrinal implications of their decisions.¹⁸⁵

- 77 An example of this approach can be seen in the SCC award in *Eastern Sugar v. Czech Republic*.¹⁸⁶ The tribunal's finding of a breach of the fair and equitable treatment standard is preceded by a long and detailed, very fact-specific account of the measures affecting the investor. However, the actual reason why the measures adopted as a result of the host State's accession to the EU amounted to a violation of this standard was not analysed in detail. Also any reference to treaty interpretation techniques is missing in the award.

I. The Special Role of Precedent for the Interpretation of International Investment Agreements

- 78 The fact that most investment arbitration cases, as opposed to awards in traditional commercial arbitration, have been made public has contributed to another element of interpretative force: precedent. Although not part of the canon of interpretation, one can see that investment tribunals often rely on other tribunals' reasoning in order to interpret the meaning of IIA provisions.¹⁸⁷
- 79 While it is clear that investment arbitration, like dispute settlement in other fields of international law,¹⁸⁸ does not follow a system of formal binding precedent (*stare decisis*) adhered to by Common Law jurisdictions, tribunals often take guidance from previous decisions and awards and are starting to build a *de facto* case law or *jurisprudence constante*.¹⁸⁹

185 Thomas Wälde, 'Interpreting Investment Treaties: Experiences and Examples' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 724, 725.

186 *Eastern Sugar BV v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007.

187 See Gabriele Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 *Arb. Int'l* 357–378; Andrea K. Bjorklund, 'Investment Treaty Arbitral Decisions as *Jurisprudence Constante*' in Colin B. Picker, Isabella D. Bunn and Douglas W. Arner (eds), *International Economic Law: State and Future of the Discipline* (Hart Publishing, 2008) 265–280; August Reinisch, 'The Role of Precedent in ICSID Arbitration' (2008) *Austrian Arb. YB* 495–510; Christoph Schreuer and Matthew Weiniger, 'A Doctrine of Precedent?' in Peter Muchlinski, Federico Ortino, Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 1188–1206; Andrés Rigo Sureda, 'Precedent in Investment Treaty Arbitration' in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press, 2009) 830–842; Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2007) 30 *Fordham Int'l L. J.* 1014–1049; Catherine Kessedjian, 'To Give or Not to Give Precedential Value to Investment Arbitration Awards?' in Catherine A. Rogers and Roger P. Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 43–68.

188 Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge University Press, 1996); Robert Y. Jennings, 'The Judiciary, International and National, and the Development of International Law' (1996) 45 *ICLQ* 1, 9; Raj Bhala, 'The Precedent Setters: De facto stare decisis in WTO Adjudication' (1999) 9 *J. Transnat'l L. & Pol'y* 1–151.

189 *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 97 ('It must be initially for the control mechan-

Thus, investment tribunals have repeatedly stressed that they are not legally bound by precedent,¹⁹⁰ but that they are willing to take previous decisions into account in order to interpret applicable rules. For instance, the *ad hoc* Committee in *Amco v. Indonesia*, after rejecting the precedential value of ICJ and other ICSID decisions,¹⁹¹ held that

(...) the absence (...) of a rule of *stare decisis* in the ICSID arbitration system does not prevent this *ad hoc* Committee from sharing the interpretation given to Article 52(1)(e) by the *Klöckner ad hoc* Committee.¹⁹²

Similarly, other investment tribunals have stressed the value of ‘precedents’, not as binding rules, but as aid to interpretation.¹⁹³ Often, investment tribunals justify their regard for ‘precedents’ as persuasive by the quest for certainty and predictability in investment arbitration.¹⁹⁴

A particularly clear example of reliance on prior case law as a guide to interpreting the BIT standard of fair and equitable treatment can be found in the *Suez* decision on liability where an ICSID tribunal stressed that it looked at investment law ‘precedent’ as a subsidiary means for the determination of international law in the sense of ICJ Statute Article 38(1)(d).¹⁹⁵

isms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.’); *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 33 (‘(...) the institutional dimension of the control mechanisms provided for under the ICSID Convention might well be a factor, in the longer term, for contributing to the development of a common legal opinion or *jurisprudence constante*, to resolve some difficult legal issues discussed in many cases, inasmuch as these issues share the same substantial features.’).

190 *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 23 (‘There is so far no rule of precedent in general international law; nor is there any within the specific ICSID system for the settlement of disputes between one State party to the Convention and the National of another State Party.’).

191 *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, para. 44, 1 ICSID Reports 509, 521 (‘Neither the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the *Klöckner ad hoc* Committee are binding on this *ad hoc* Committee.’).

192 *Ibid.*

193 *LETCO v. Liberia*, Award, 31 March 1986, 2 ICSID Reports 346, 352 (Though an ICSID tribunal is ‘not bound by the precedents established by other ICSID Tribunals, it is nonetheless instructive to consider their interpretations.’); *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 107 (The tribunal ‘sought guidance in the decisions of several earlier NAFTA Chapter 11 tribunals that have interpreted Article 1110.’).

194 See, e.g. *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, para. 67 (‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.’).

J. Conclusion

83 An analysis of investment cases demonstrates a strong self-professed adherence to the interpretation principles contained in the Vienna Convention by tribunals. A closer view reveals, however, an *à la carte* approach followed by many tribunals whereby they appear to be willing to rely on any legitimate interpretation technique which supports a particular outcome without necessarily adhering to the principled approach of the Vienna Convention. It is clear that for the sake of predictability a stricter reliance on the interpretation rules of the Vienna Convention would be in the interest of all users of the system of investment arbitration.

195 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 189 (“In interpreting this vague, flexible, basic, and widely used treaty term, this Tribunal has the benefit of decisions by prior tribunals that have struggled strenuously, knowledgeably, and sometimes painfully, to interpret the words “fair and equitable” in a wide variety of factual situations and investment relationships. Many of these cases arose out of Argentina’s economic crisis of 2001–2003. Although this tribunal is not bound by such prior decisions, they do constitute “a subsidiary means for the determination of the rules of [international] law.” Moreover, considerations of basic justice would lead tribunals to be guided by the basic judicial principle that ‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones. In addition, a recognized goal of international investment law is to establish a predictable, stable legal framework for investments, a factor that justifies tribunals in giving due regard to previous decisions on similar issues. Thus, absent compelling reasons to the contrary, a tribunal should always consider heavily solutions established in a series of consistent cases.”).