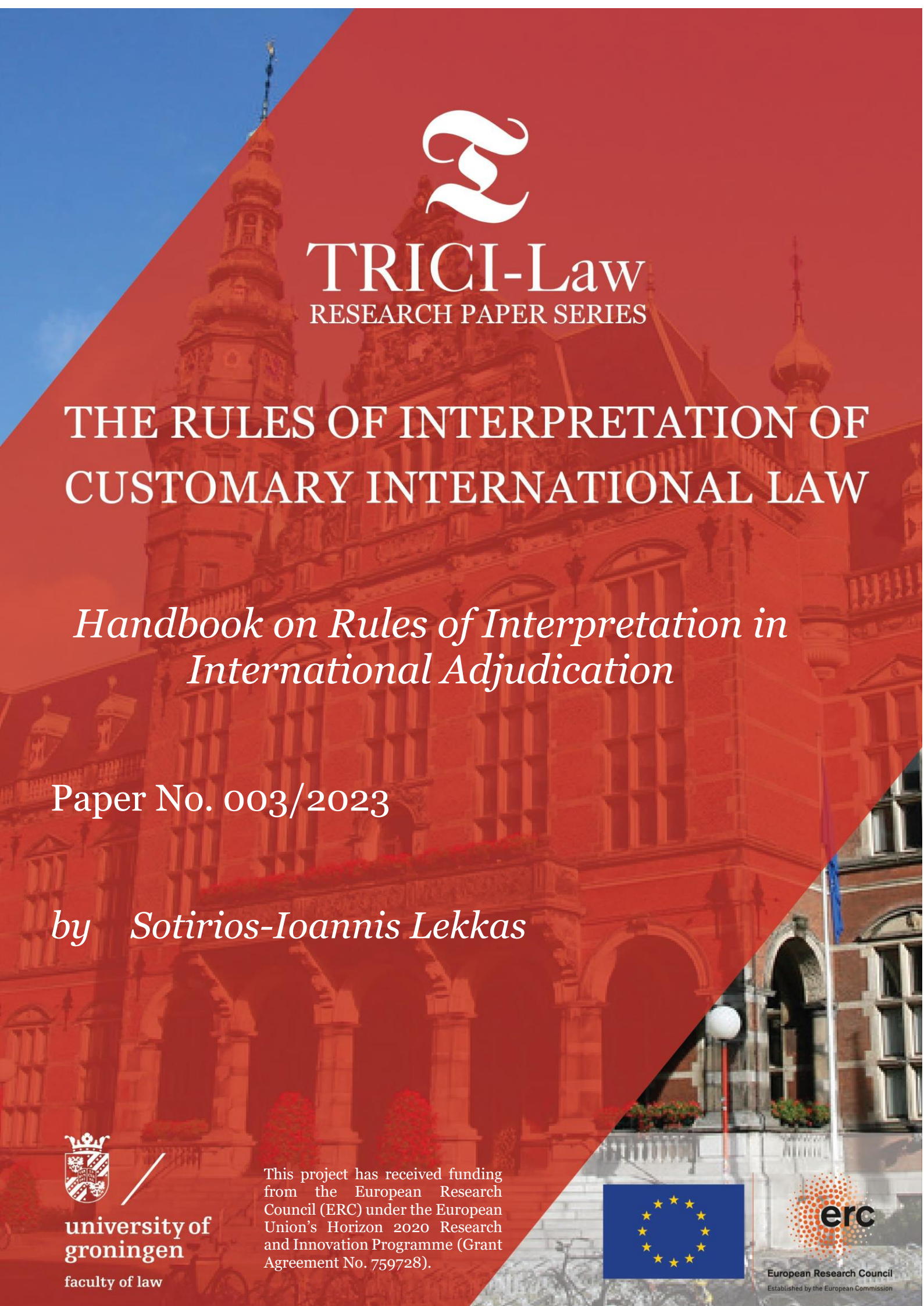

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THE RULES OF INTERPRETATION OF CUSTOMARY INTERNATIONAL LAW

Handbook on Rules of Interpretation in International Adjudication

Paper No. 003/2023

by Sotirios-Ioannis Lekkas

university of groningen
faculty of law

This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 Research and Innovation Programme (Grant Agreement No. 759728).

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Handbook on Rules of Interpretation in International Adjudication

Sotirios-Ioannis Lekkas*

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Chapter 1. Introduction

1. Theme and Purposes of the Study

Interpretation is omnipresent in legal theory and practice. International legal theory and practice does not constitute an exception; in fact, the law and process of interpretation of international law continues to perplex international legal scholars and to spawn new problems in international legal practice.[1] From a theoretical perspective, what elicits the fascination of international lawyers with the process of interpretation is the predominantly decentralised structure of international law compared to domestic systems of law.[2] Unlike domestic legal systems, international law lacks a systematic or official designation of institutions or officials vested with the authority to interpret and apply international law.[3] A variety of actors can raise claims about what international law says including governments, international intergovernmental organisations, international and domestic courts, non-governmental organisations, transnational corporations, or even individual scholars.[4] International courts and tribunals are not always available to resolve interpretative issues when they arise and, even when they are, their interpretative findings co-exist, and occasionally compete, with those of other actors including other ICTs.[5] Against this backdrop, the need arises for a common grammar or syntax to validate claims as to the interpretation of international law.[6]

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[1] For one indicative bibliography see eg Matthias Herdegen, 'Interpretation in International Law' [2020] MPEPIL.

[2] eg Arianna Whelan, 'International Law as a Decentralised System in a World of Shared Challenges' in Jorge E Viñuales, Andrew Clapham, Laurence Boisson de Chazournes, and Mamadou Hébié (eds), *The International Legal Order in the XXIst Century / L'ordre juridique international au XXIeme siècle / El órden jurídico internacional en el siglo XXI – Essays in Honour of Professor Marcelo Gustavo Kohen / Ecrits en l'honneur du Professeur Marcelo Gustavo Kohen / Estudios en honor del Profesor Marcelo Gustavo Kohen* (Brill 2023), 307, 308-310

[3] eg Herbert LA Hart, *The Concept of Law* (2nd edn, OUP 1994) 214.

[4] eg Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 16.

[5] See, eg, more generally, Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'International Court Authority in a Complex World' in Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018) 3, 13-14.

[6] eg, similarly, Gleider Hernández, 'Law's Determinability: Indeterminacy, Interpretative Authority, and the International Legal System' (2022) 69 NILR 191, 210; Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 RdC 20, 204; Martti Koskenniemi, *From Apology to Utopia* (1989, reissue CUP 2006) 583-589.

From a conceptual viewpoint, the Vienna Convention on the Law of Treaties (VCLT) by establishing rules governing the interpretation of treaties reflects certain premises which can have broader implications for interpretation in international law.[7] First, it reinforces that idea that interpretation is, or at least can be, a formal process in the sense that it is governed by legal rules.[8] Second, these rules retain normative autonomy in that they can apply regardless of the specific subject-matter of the rule that constitutes the object of interpretation. Third, rules of interpretation, much like any other rule of international law, are amenable to evolution by being themselves subject to interpretation, modification, or displacement by other rules of interpretation.[9] Fourth, interpretation constitutes a juridical process that must be distinguished from the identification and application of rules of international law. Admittedly, the term 'interpretation' has been occasionally used in international legal scholarship to describe various processes including law-ascertainment and facts determination.[10] However, the present study uses this term solely in its proper context of content-determination.[11] On the one hand, interpretation consists of the determination of the meaning of a legal rule whose existence and legal pedigree has been determined through the process of identification.[12] So, in the context of treaties, the determination that an instrument constitutes a binding agreement under international law and the determination of the content of such binding agreements are not only analytically distinct, but

[7] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), Arts 31-33.

[8] eg Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 5; on nomenclature: Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2011) 12-13.

[9] eg Panos Merkouris, 'Interpreting the Customary Rules of Interpretation' (2017) 19 ICLR 126*ff.*

[10] eg Duncan B Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 78*ff*; Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished', in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 111*ff.*

[11] Similarly, eg, ILA, 'ILA Study Group on the Content and Evolution of the Rules on Interpretation—Final Report' (2020) 79 ILARC 914, 916.

[12] eg Jean d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' (2016) 27 EJIL 1027, 1028-1029.

also governed by different rules.[13] Similarly, interpretation is distinct from revision, amendment, or modification of rules, the two processes having different effects.[14] Whilst interpretation operates retroactively, revision of a rule only has effect for the future.[15] On the other hand, application of a rule is the process of determining the consequences of interpretation in a concrete case.[16] In other words, any application of a rule presupposes its conscious or subconscious interpretation.[17]

Against this background, the present study aims to examine the practice concerning the content and evolution of rules of interpretation across different sources and subject-matters of international law. Whilst the VCLT rules of interpretation are increasingly accepted and relied upon by international courts and tribunals, this does not mean that the law on treaty interpretation is static. Theory and practice continue to deal with vexatious problems, such as the internal relationship between the different elements of the rules of interpretation enshrined in Articles 31-33 VCLT and the external relationship of the VCLT rules with other methods, maxims, or special rules of treaty interpretation. In fact, the law of treaty interpretation is still undergoing a process of refinement and progressive development. Most conspicuously, in 2018, the International Law Commission ('ILC') completed its work on 'Subsequent Agreements and Practice in Relation to the Interpretation of Treaties'.[18] Moreover, the final report of the Study Group of the International Law Association on the 'Content and Evolution of the Rules of Interpretation' is a further attestation to the continuing relevance and dynamism of this area of law.[19] In light of these developments, this study will take stock of the ways in which the law on treaty interpretation has evolved over time.

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[13] *Compare* Art 2(1)(a) VCLT; eg *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 [96]; *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [23]; *with* Arts 31-33 VCLT; eg *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [48].

[14] eg Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 288.

[15] eg Georg Schwarzenberger, 'Myths and Realities of Treaty Interpretation' (1969) 22 CLP 205, 213.

[16] eg ibid 212.

[17] eg James Garner and ors, 'Codification of International Law: Part III–Law of Treaties' (1935) 26 AJIL Supplement 653, 938.

[18] ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission' in ILC, 'Report of the International Law Commission – Seventieth Session' (30 April-1 June and 2 July-10 August 2018) A/73/10 [51].

[19] See above n11.

In parallel, broader developments with respect to the law relating to the sources of international law call for a more careful evaluation of the role of interpretation of international law beyond treaties. In this respect, the International Law Commission (ILC) in light of its constitutional mandate has spearheaded the elaboration, codification and progressive development of the law on sources of international law. Specifically, the ILC has already completed its work on the 'Identification of Customary International Law',[20] whereas its work on 'General Principles of Law' and 'Subsidiary Means for the Determination of Rules of International Law' is still ongoing.[21] It is still an open question whether there is space for the development of rules of interpretation in the context of unwritten international law, namely, customary international law and general principles of law.[22] The ILC's Conclusions on customary international law explicitly distinguished the process of identification of customary rules from the process of determining the content of customary rules whose existence is undisputed, despite remaining largely agnostic as to the practical implications of this distinction.[23] Moreover, the Commission explicitly excluded from the scope of its Conclusions the evolution of rules of customary international law through time.[24] This approach can be contrasted with the ILC's previous work on unilateral acts of states in which it provided explicit guidance on issues of interpretation.[25] It also contradicts ILC's contemporaneous conclusions on peremptory norms of general international law (*jus cogens*) according to which any rule of international law regardless of its source must be interpreted and applied consistently with a peremptory rule of general international law when it appears that there may be a conflict between the two rules.[26] According to the Commission, this interpretative rule that originates from the rule of treaty interpretation

[20] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) II(2) YBILC 122 (CICIL).

[21] ILC, 'Report of the International Law Commission on the work of its seventy-fourth session' (24 April-2 June and from 3 July-4 August 2023) A/78/10 [30]-[41] and [59]-[127].

[22] For discussion see, eg, Panos Merkouris, 'Interpreting Customary International Law: You'll Never Walk Alone' in Panos Merkouris, Jörg Kammerhofer, and Noora Arajärvi (eds), *The Theory, Practice and Interpretation of International Law* (CUP 2022) 347, 348-353.

[23] CICIL, Commentary to Conclusion 1 [4].

[24] CICIL, Commentary to Conclusion 1, para. (5).

[25] ILC, 'Guiding Principles to Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(2) YbILC 161*ff.* (GPUD), Principle 7.

[26] ILC, 'Identification and legal consequences of peremptory norms of general international law (*jus cogens*)' in ILC, 'Report of the International Law Commission on the work of its seventy-third session' (18 April–3 June and 4 July–5 August 2022) A/77/10 [44], Conclusion 20.

'does not apply only in relation to treaties but to the interpretation and application of all other rules of international law'.[27]

In light of these considerations, this study will also zoom in on the under-examined practice of interpretation of binding unilateral acts and unwritten international law. As will shall see, the rule of treaty interpretation can provide a blueprint for understanding the content and configuration of the interpretative process of rules emanating from unilateral acts and unwritten international law. At the same time, rules emanating from these sources also differ in terms of their creation, modification, and termination compared to treaties which might call for divergent considerations or different relative value of certain interpretative elements or materials in the process of their interpretation.[28]

2. Scope and Methodology of the Study

To effect its examination of the content and evolution of rules of interpretation across different sources of international law and disparate subject matters, the present study focuses on the practice of international courts and tribunals (ICTs). Specifically, the present study comprehensively examines and critically evaluates the practice of the International Court of Justice (ICJ) and its predecessor institution, the Permanent Court of International Justice (PCIJ), on the one hand, and the practice of international investment tribunals (IITs), on the other. At the same time, the present study forms part of a broader inquiry into the practice of interpretation of ICTs—including the International Tribunal of the Law of the Sea (ITLOS), the Dispute Settlement Body of the World Trade Organisation (WTO DSB), the International Criminal Court (ICC) and *ad hoc* international criminal tribunals, and regional human rights courts—which have been addressed in the various conferences, workshops and publications of the TRICI-Law project and certain notable points of divergence are highlighted in the accompanying interactive matrix, available on the TRICI-Law website. To better understand these choices of scope and method, it is important to situate this study within the broader framework of the project 'The Rules of Interpretation of Customary International Law' (TRICI-Law) and the specific goals of the working package on the content and evolution of rules of interpretation.

[27] ibid, Commentary to Conclusion 20 [5].

[28] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Merits) (Dissenting Opinion of Judge Charlesworth) 2023 <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf> [11].

To start, the present study focuses on an examination of the interpretative practice of ICTs at the exclusion of domestic courts, extra-judicial practice of states, international organisations, or non-state actors.[29] The term ICT is used in this thesis to describe bodies and procedures with a public international law origin, whose constituent instrument is governed by international law; have the power to issue decisions that are legally binding between the parties; decide cases before them on the basis of law and specifically, international law; and comprise individuals who serve independently in their own professional capacity and do not represent any State.[30] ICTs can play a pivotal role in the elucidation of the process of interpretation in international law, more generally. Although they are only a 'subsidiary means' for the determination of the rules of international law and not a source of law as such,[31] judicial decisions undoubtedly hold a special place within the international legal system. Indeed, as will be shown, the practice of the ICJ and the PCIJ has been the blueprint for the codified rules of treaty interpretation in the VCLT, whereas it features prominently in codification efforts on rules of interpretation relating to rules emanating from other sources.[32]

The present study also singles out for detailed exposition the interpretative practices of the ICJ/PCIJ and the IITs, whereas the interpretative practice of other ICTs have been addressed in the various conferences, workshops and publications of the TRICI-Law project and certain notable points of divergence are highlighted in the accompanying interactive matrix, available on the TRICI-Law website. The study prioritises the comparison between the interpretative practices of the ICJ/PCIJ and IITs for both doctrinal and practical reasons. From a doctrinal perspective, interpretative choices result from the interaction of the interpretative space within which ICTs operate and the interpretative incentives to operate in a specific way

[29] For studies covering these practices see eg, amongst many others, Helmut Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity Convergence* (OUP 2016); Odile Ammann, *Domestic Courts and the Interpretation of International Law: Methods and Reasoning Based on the Swiss Example* (Brill 2020); Janina Barkholdt, 'The Contribution of International Organizations to the Formation, Interpretation and Identification of International Law: Questions Arising from the Work of the International Law Commission' (2021) 18 IOLR 1*ff.*; Ellen Policinski, 'Interpretation in the Fog of War: The Evolution of the ICRC's Methodology' in Sotirios-Ioannis Lekkas, Panos Merkouris, and Nina Mileva (eds), *The Practice of Interpretation in International Law: Unity, Diversity, and Evolution* (CUP forthcoming) (on file with author).

[30] Chiara Giorgetti, 'Introduction' in Chiara Giorgetti (ed), *The Rules, Practice, and Jurisprudence of International Courts and Tribunals* (Brill 2012) 1–3; Cesare Romano, Karen Alter, and Yuval Shany, 'Mapping International Adjudicative Bodies, the Issues, and Players' in Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 5–8.

[31] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Art 38(1)(d) ICJ Statute.

[32] See below Chapter 1, Sections I.1, II.2, III.1.

within that space.[33] In turn, both the interpretative space and incentives of an ICT are determined by factors that ultimately relate to their applicable law, the role and control of the parties to disputes brought before them, and their institutional context.[34] In this respect, the confluence of fundamental institutional, structural, and material differences between these two areas of international adjudication renders this comparison particularly representative for the purposes of demonstrating broader tendencies in the international law of interpretation. From an institutional perspective, the ICJ constitutes the principal judicial organ of the United Nations, whose judges are elected by the UN General Assembly and Security Council in parallel elections.[35] IITs are ad hoc arbitral mechanisms whose members are elected by the parties to each specific investment dispute.[36] Structurally, access to the ICJ is limited to states (or UN organs with respect to advisory proceedings), whereas IITs deal with disputes between states and investors, that is, private actors.[37] The two areas of international adjudication also differ vastly in terms of their material scope: the ICJ can potentially deal with any question of international law, whereas IITs are constituted and can only resolve disputes relating to specific instruments, most notably, international investment agreements (IIAs).[38] No two areas of international adjudication tracked in our research differs on all three aspects, namely, structure, institutional surroundings, and material scope, as the ICJ and IITs do.

In this light, the present study prioritises the comparison between the interpretative practices of the ICJ and IITs to enhance the analytical rigor of this study but also to avoid the risk of unnecessary duplication. Thus, for instance, the institutional setting and constituencies of ITLOS overlap to a significant extent with those of the ICJ.[39] In addition, the jurisdiction of ITLOS is limited for the most part to the UN Convention on the Law of the Sea with respect

[33] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (CUP 2013) 445, 459.

[34] ibid 459-469.

[35] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('UN Charter'), Arts 92 and 96.

[36] eg Christoph Schreuer, 'Investment Disputes' [2013] MPEPIL [22].

[37] Arts 35 and 65 ICJ Statute; eg Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), Art 25.

[38] Art 36(2)(b) and 65(1) ICJ Statute; eg Art 25 ICSID Convention.

[39] ITLOS operates within the broader framework of the United Nations, whilst its judges are elected by the 169 states parties to the United Nations Convention on the Law of the Sea: United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC), Annex VI, Art 4.

to which the ICJ has also concurrently jurisdiction.[40] What is more, it is telling that even the procedural setting and practice of ITLOS mirrors that of the ICJ to the point of mimicry.[41] Similarly, whilst the structural and institutional setting of the WTO DSB differs from that of IITs in that the former involves only states (and the EU) and combine(d) both ad hoc and a permanent institutions, they both operate within the specialised setting of international economic law.[42] It is in this latter respect that the risk of duplication arises. What is more, this study excluded from its remit the interpretative practice of international human rights courts and international criminal courts and tribunals, as this analysis is conducted in detail in other outputs of the TRICI-Law project.[43]

In terms of methodology, the study seeks to codify and critically evaluate the interpretative practice of the ICJ and IITs on the basis of an identification and analysis of clearly discernible tendencies over time. For this purpose, the present study only relies on publicly available decisions.[44] Despite its comprehensive ambitions, the present study does not ascribe to any strict quantification protocol nor does it purport to adduce a quantitative analysis of decisions. With respect to the ICJ, this study deems that a quantitative approach would be inappropriate due to the divergent subject matters of the disputes that have been decided by the Court and the relatively modest number of decisions.[45] With respect to IITs, a quantitative approach would lead to duplication given the existence of multiple recent studies based on quantitative methods that the present study references where appropriate.[46] In this light, the present study

[40] Art 287(1) LOSC.

[41] For a comprehensive study by this author see Sotirios-Ioannis Lekkas and Christopher Staker, 'Annex VI: Articles 20-34' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart/Nomos 2017) 2370-2454.

[42] As to the definition of the term see, eg, Matthias Herdegen, 'International Economic Law' [2020] MPEPIL [1]; more reflective, Andreas F Lowenfeld, *International Economic Law* (2nd edn OUP 2008) 927.

[43] See Marina Fortuna, *Interpretation of Customary International Law in International Courts* (PhD Thesis, University of Groningen 2023) available at: <https://pure.rug.nl/ws/portalfiles/portal/788272453/Complete_thesis.pdf>.

[44] With respect to the ICJ and PCIJ, decisions were drawn from the ICJ website and cross-checked against the Oxford Report on International Law website (https://opil.ouplaw.com/home/ORIL). With respect to IIT decisions, the study has made use of the Oxford Report on International Law website and the italaw website (https://www.italaw.com/).

[45] As of 31 July 2021, the ICJ has rendered 137 Judgments and 28 Advisory Opinions. It has also issued 599 orders out of which only 173 relate to substantive matters: see ICJ, *Annuaire 2020-2021—Yearbook 2020-2021* (ICJ 2023) 2.

[46] eg Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' (2008) 19 EJIL 301*ff.*; Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012); Hai Yen Trinh, *The Interpretation of Investment Treaties* (Brill 2014).

fleshes out discernible tendencies documented or reproduced in multiple decisions capable of sustaining plausible overarching normative conclusions. In other words, the present study relies to both ICTs' identifications of tendencies and quantitative evidence where available.

3. Structure of the Study

The present study aims to draw conclusions for the content and evolution of rules of interpretation across difference sources of international law and different subject-matters. To this end, the study zooms into a granular analysis of the interpretative practice of the ICJ and its predecessor institution, the PCIJ, on the one hand (Chapter 2), and that of IITs, on the other (Chapter 3). Within each chapter the analysis is parsed into three substantive sections mirroring three different sources of international law: treaties, unilateral acts including unilateral acts of international organisations, and unwritten international law, that is, customary international law and general principles of law. As will be shown, the interpretative practices examined show little evidence of divergence on the basis of institutional, structural, or material factors. Yet, a comparative analysis between the interpretation of treaties, unilateral acts, and unwritten international law demonstrates a rapidly evolving relationship of partial convergence and divergence.

Specifically, Chapter 2 starts with a discussion of treaty interpretation within the ICJ/PCIJ (Section I). The analysis begins with a historical institutional account of the gradual consolidation of rules of interpretation within the practice of the PCIJ/ICJ and the consequences of the codification of the rules of treaty interpretation in the practice of the ICJ (Sub-section 1). The entrenchment of the VCLT rules in the practice of the ICJ has enabled a detailed account of the key elements of the treaty interpretation process structured around the elements of the VCLT and their interrelation (Sub-section 2). The same tendency has also complicated the status and currency of certain interpretative elements, which have appeared in the pre-VCLT jurisprudence of the Court, for the present and future practice of the Court (Sub-section 3). The chapter then expands its analysis by discussing the practice of the ICJ relating to the identification and interpretation of unilateral acts of states and the interpretation of unilateral acts of international organisations (Section II). Section III then proceeds to provide an innovative account of the ICJ jurisprudence relating to unwritten international law using the dichotomy of identification and interpretation as an analytical tool (Sub-section 1). Applying this framework, the chapter proceeds to identify the key elements of the interpretative process of rules of the ICJ in relation to rules of unwritten international law.

Chapter 3 then turns to the discussion of the interpretative practice of IITs. Section I focuses on IIT practice of treaty interpretation. Sub-section 1 shows that the consolidation of the VCLT rules in the practice of IITs has been has a less gradual process, albeit with some outstanding findings especially in early decisions. Sub-section 2 uses this finding as a stepping stone to enable a discussion of the key elements of the interpretative practice of IITs on the basis of the key elements of the VCLT rules. Sub-section 3 then turns to practices which do not explicitly fit into the VCLT rules to determine whether competing considerations have emerged in investment practice which is not the case. Section II deals with the far less studied issue of the interpretation of unilateral acts in international investment arbitration. As will be shown, the practice of IITs in this respect draws heavily from the case law of the ICJ which entails the replication of certain ambiguities in the investment context. Section III then turns to the practice of IITs relating to the interpretation of rules of unwritten international law. As will be shown, the distinction between identification and interpretation of unwritten international law also appears implicitly and sometimes explicitly in the practice of IITs. What is more, the practice of IITs also evidences points of convergence and divergence between the rules of interpretation of treaties and those relating to the interpretation of unwritten international law.

In light with its overarching objectives, the present study adduces ample evidence about the content and evolution of rules of interpretation in international law. In the context of treaty interpretation, there is strong evidence to suggest a tendency towards the unification of applicable rules regardless of the subject-matter of the specific treaty. The present study also adduced evidence for a similar trend with respect to rules emanating from other sources of international law. At the same time, the frequency and granularity of interpretative practice of ICTs also evidences that the same rules cannot be applied for the interpretation of rules of international law regardless of their source. Whilst the VCLT rules of treaty interpretation have operated as a blueprint for the key elements of interpretative rules applying to other sources, there these rules diverge in the ways in which these key elements must be determined depending on the source of the rule to be interpreted.

Chapter 2. The Practice of Interpretation of the International Court of Justice

Introduction[1]

The International Court of Justice ('ICJ'), much like its predecessor institution, the Permanent Court of International Justice ('PCIJ'), has a dual function as a permanent judicial institution for the resolution of disputes amongst states and as an advisory facility for the principal political organs of the United Nations.[2] Compared to other international judicial institutions and tribunals, ICJ stands out in several respects. First and foremost, the jurisdictional remit or 'jurisdictional field' of the Court is vast;[3] it encompasses in principle any 'question of international law' that could arise between states or 'any legal question' that falls under the mandate of the principal political organs of the United Nations.[4] Of course, the contentious jurisdiction of the Court to hear cases between states is circumscribed by the principle of consent of the states concerned expressed through joint referral, provisions in treaties, or optional declarations to the compulsory jurisdiction of the Court.[5] Similarly, its applicable law spans, in principle, across the entirety of international law, Article 38(1) ICJ Statute on its applicable law being widely considered as the most authoritative list of the sources of international law.[6] At the same time, its permanent character as the 'principal judicial organ of the United Nations' and the highly formalised and inclusive process for the election of its judges, requiring majorities in

[1] This chapter draws from research conducted within the framework of the International Law Association Study Group on the Content and Evolution of Rules of Interpretation to which the present author contributed with drafting, editing, and researching the Final Report on the International Court of Justice and the Permanent Court of International Justice co-authored by the Rapporteurs of the Study Group, Panos Merkouris and Daniel Peat.

[2] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI ('UN Charter'), Arts 92 and 96.

[3] On terminology see, eg, *Northern Cameroons (Cameroon v. United Kingdom)* (Separate Opinion of Judge Sir Gerald Fitzmaurice) [1963] ICJ Rep 97, 103. Also known as 'foundational jurisdiction' or outer limits/jurisdictional boundaries, Yuval Shany, 'Jurisdiction and Admissibility' in Cesare Romano, Karen Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 779, 782.

[4] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Art 36(2)(b) and 65(1).

[5] See Art 36 ICJ Statute.

[6] eg Malcolm Shaw, *International Law* (9th edn, CUP 2021) 59.

both the UN General Assembly and the Security Council, are also factors that could also bear on the regulation and evolution of the process of interpretation of international legal rules.[7]

The purpose of this study is to codify and critically evaluate the practice of the ICJ relating to international rules of interpretation, whilst making forays, where appropriate, to the practice of its predecessor institution, the PCIJ. The premise of this study is that the practice of the ICJ, due, *inter alia*, to its vast scope of judicial activity and the authoritativeness of its pronouncements, can shed light on the function of rules of interpretation within the framework of sources of international law and the commonalities and differences between the regulation of the process of interpretation across different sources of international law and different subject-matters. From the outset, it could be argued from a conceptual point of view that the interpretative practice of the ICJ is not amenable to reduction into rules as being an instantiation of the discretion (or 'expediency' or *opportunité*) that is a corollary of the vagueness of the legal norm in question.[8] However, as a matter of fact, the practice of the ICJ has constituted the blueprint not only of the VCLT rules on treaty interpretation, but also for the interpretation of unilateral acts *qua* sources of international law and, to a large extent, rules of identification of customary international law and general principles of law.[9] In this light, the innate discretion attached to the judicial function might bear on the content rather than the existence of rules of interpretation and, as such, does not constitute a hindrance for an attempt to scrutinise the content and evolution of rules of interpretation, even if largely modelled after predominantly judicial practice.

In light of these considerations, the present chapter records and compares the ways in which the ICJ interpret treaties, unilateral acts of states, and unwritten international law. It also seeks to identify whether and how its approach to interpretation has involved over time by reference to illustrative examples. As to methodology, the study does not purport to follow any

[7] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (CUP 2013) 445, 459-468.

[8] Mohammed Bedjaoui, 'Expediency in the Decisions of the International Court of Justice' (2000) 71 BYBIL 1, 5 and 12.

[9] See, generally, ILC, 'Guiding Principles Applicable on Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(3) YbILC 161 (hereinafter GPUD); ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in (2018) II(2) YBILC 122 (CICIL); ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc A/CN.4/741.

strict quantitative protocol. Such an approach was deemed unsuitable for the ICJ, as the applicable law, and, as a corollary, its references to rules of interpretation, varies considerably between cases depending on the basis of jurisdiction in each specific case. Instead, the study strives to flesh out discernible tendencies documented or reproduced in multiple decisions capable of sustaining plausible overarching normative conclusions.

The analysis proceeds as follows. Section I tracks the consolidation and evolution of rules of treaty interpretation in the practice of the ICJ. The section starts from an account of the practice of the PCIJ and the ICJ that centred around the normatively ambivalent idea of schools of interpretation which was ruptured by the adoption and gradual consolidation of the VCLT in the interpretative practice of the Court (I.1).[10] The section that follows tracks the entrenchment and clarification of the VCLT rules of treaty interpretation in the practice of the ICJ (I.2), but also discusses interpretative approaches beyond the VCLT that have continued to feature, with diminishing frequency over time, in the practice of the Court (I.3). Section II proceeds to discuss the practice of the Court with respect to the interpretation of unilateral acts of states and acts of international organisations *qua* sources of international law. It fleshes out the key elements of interpretation in contradistinction with the identification of the binding character of these acts. Section III then turns to the more contentious issue of the rules of interpretation of unwritten international law. The section discusses the ambivalent stance of the ICJ with respect to the division between identification and interpretation of rules of unwritten interntional law as distinct juridical operations (III.1). It then proceeds to discuss elements of essentially interpretative reasoning that are not random but actually modelled after the rules of treaty interpretation (III.2) and their configuration within such process of interpretation (III.3). As will be shown, the ICJ practice reflects a tendency to construe the 'generality' of the rule of interpretation reflected in Article 31 VCLT not only in subject-matter terms. Rather, this 'generality' of the rule of interpretation has allowed the Court to use it as a backdrop—or, at least, *tertium comparationis*—for the construction of rules emanating from other sources.

[10] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT').

I. Treaty Interpretation in the Practice of ICJ/PCIJ[11]

1. From Schools of Interpretation to the Vienna Convention on the Law of Treaties

Historically, the interpretative practice ICJ and its predecessor institution, the PCIJ, has been systematised and discussed through the lens of schools of thought or approaches to interpretation, even if none of them has been able to fully capture it. In theoretical terms, the ideas of these schools 'are not necessarily exclusive to one another, and theories of…interpretation can be constructed (and are indeed normally held) compounded of all [of them]'.[12] In practical terms, the interpretative approach of the ICJ and the PCIJ have been influenced occasionally by various factors including the particular rule at issue, the available interpretative materials, the arguments of the parties are factors that, among other considerations, have had an influence on the methods which the Court has employed to determine the content of rules in each case before it. By and large, the ICJ has strived to maintain continuity with the PCIJ and consistency in its interpretative approach. Arguably, the catalysing event has been the gradual consolidation of the VCLT rules into the jurisprudence of the Court. To be sure, the VCLT rules on interpretation did not bring about any radical change, as they largely reflected prior practice of the PCIJ and ICJ.[13] Nonetheless, they became 'the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation' and the *tertium comparationis* for dealing with interpretative questions arising from other instruments.[14]

To a large extent, the doctrinal classification into schools or approaches to interpretation has been a heuristic device for the systematic understanding of interpretative practices of international courts and tribunals in an era when the existence, or even desirability, of rules of treaty interpretation was fiercely debated.[15] With respect to the PCIJ, Judge Manley O. Hudson remarked that '[it] has formulated no rigid rules; its formulations have been in such guarded form as to leave it open to the Court to refuse to apply them, and it would be difficult to say

[11] This section draws from the paper 'The Interpretative Practice of the International Court of Justice' (2022) 26 MPYBUNL 316*ff.* which the present author co-authored together with Panos Merkouris and Daniel Peat.

[12] Gerald G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYBIL 1

[13] cf, eg, the ILC's commentaries to its draft articles on interpretation (Arts 27-29) that contain almost exclusively references to PCIJ and ICJ judgments: ILC, 'Draft articles on the law of treaties with commentaries' (1966) II YbILC 187, 217-226 (fn125-156).

[14] Hugh Thirlway, *The Law and Procedure of the International Court of Justice* vol 2 (OUP 2013) 1234.

[15] See, eg, the account of Oliver Morse, 'Schools of Approach to the Interpretation of Treaties' (1960) 9 Catholic University Law Review 36*ff.*

that all of them have been consistently applied'.[16] Similarly, the PCIJ interpretative practice does not fit squarely into a particular method or approach to interpretation. Hudson observes that 'numerous' judgments and opinions of the PCIJ referred to the 'intentions of the parties' as a guide for interpretation, but he cautioned that this was 'merely … a palliating description of a result which has been arrived at by some other method than ascertainment of intention'.[17] For instance, one of the most categorical pronouncements of the PCIJ was that 'there is no occasion to have regard to preparatory work if the text…is sufficiently clear', even if this 'rule' was not robustly applied in all cases.[18] Conversely, whilst the PCIJ focused on the 'natural', 'literal', 'grammatical', 'ordinary', 'normal', 'logical', or 'reasonable' meaning of the terms of the instrument in question, it was apparent from early on that this did not entail the exclusion of other means of interpretation.[19] Indeed, the PCIJ enunciated that for the determination of the meaning of the terms of an instrument 'the context is the final test'.[20] Similarly, the Permanent Court invoked frequently the 'nature', 'scope', 'object', 'spirit', 'tenor', 'function', 'role', 'aim', 'purpose', 'intention', 'system, 'scheme', 'general plan', and the 'principles' underlying instruments in support of its interpretative findings.[21] In addition, on several occasions, the PCIJ accorded important weight on the legal, political, and social background of the instrument in question.[22] More generally, apart from the PCIJ's explicit reservations with respect to the use of *travaux préparatoires*, 'the jurisprudence of the Court d[id] not establish any rigid time-table for the various steps in the process of interpretation'.[23]

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[16] Manley O Hudson, *The Permanent Court of International Justice, 1920-1942* (Macmillan 1943) 643. This study is still cited as the most accurate and authoritative depiction of the PCIJ's interpretative practice: cf, eg, Richard Gardiner, *Treaty Interpretation* (2nd edn OUP 2015) 65-66.

[17] Hudson (n16) 643-644.

[18] ibid 652-655; see eg *SS Lotus (France v Turkey)* [1927] PCIJ Ser A No 10, 16 (as a principle of treaty interpretation); *Serbian Loans Issued in France and Brazilian Loans Issued in France (France v Kingdom of Serbs, Croats and Slovenes)* [1929] PCIJ Ser A No 20/21, 30 (as a principle of a more general scope).

[19] Hudson (n16) 645-646; see *Factory at Chorzów (Indemnity) (Jurisdiction) (Poland v Germany)* [1927] PCIJ Ser A No 9, 24; *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Border between Turkey and Iraq)* (Advisory Opinion) [1925] PCIJ Ser B No 12, 23; but also *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night* (Advisory Opinion) [1931] PCIJ Ser A/B No 50, 373 and 378 which seems to accord more weight to the text.

[20] *Competence of the International Labour Organization in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) [1925] PCIJ Ser B No 2, 35.

[21] Hudson (n16) 650-652; see eg *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Ser B No 6, 25.

[22] Hudson (n16) 655-657.

[23] Hudson (n16) 651.

The general direction of the ICJ's case law followed closely that of the PCIJ. With respect to the Court's practice prior to the adoption of the VCLT, Sir Gerald Fitzmaurice commented that 'the Court as a whole favours… the textual method, while some of its individual Judges are teleologists'.[24] He further remarked that '[w]ith the exception of those who support the extreme teleological school of thought, no one seriously denies that the *aim* of treaty interpretation is to give effect to the intentions of the parties'.[25] The late Hugh Thirlway, reporting on the Court's interpretative practice until 1989, noticed a tendency 'at least in the case of multilateral treaties, where it has been the "intention" or object of the text of the treaty which has been taken as a starting point'.[26] Yet, useful as these observations might be as *ex post* rationalisations of the Court's interpretative practice until 1991, they were not unanimously shared by doctrine, still less had any decisive influence on the Court itself. For instance, Judge Weeramantry, writing separately in 1991, concluded that 'a hierarchy cannot be established among … [the three principal schools of thought upon treaty interpretation]'.[27]

The key turning point has been undeniably the Court's endorsement of the VCLT rules of interpretation for the first time in *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal),*[28] even if references to the VCLT provisions on interpretation can be found even before its entry into force in 1980 in individual opinions of members of the Court.[29] An important aspect for the consolidation of the VCLT rules of interpretation in the practice of the ICJ has been the affirmation of their status as customary international law. In most cases, the VCLT rules are not applicable *qua* treaty rules, because one or both parties to the dispute are not parties to the VCLT or the treaty in question has been concluded prior to its entry into force.[30] The Court has responded to these situations pragmatically by acknowledging the customary character of the VCLT rules in a piecemeal manner and with increasing degree of confidence

[24] Fitzmaurice (n12) 7.
[25] idem, (1957) 33 BYBIL 203, 204 (emphasis in the original).
[26] Thirlway (n14) 1234.
[27] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* (Dissenting Opinion of Judge Weeramantry) [1991] ICJ Rep 106 [24].
[28] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [48].
[29] eg *Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v Spain) (Second Phase)* (Separate Opinion of Judge Ammoun) [1970] ICJ Rep 286 [11]; *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Separate Opinion of Judge Dillard) [1972] ICJ Rep 92 [90]; *Fisheries Jurisdiction (Germany v Iceland)* (Separate Opinion of Judge De Castro) [1974] ICJ Rep 72 [10]; *Aegean Sea Continental Shelf (Greece v Turkey)* (Dissenting Opinion of Judge de Castro) [1978] ICJ Rep 62 [13].
[30] Arts 4 and 28 VCLT.

over time. So, for instance, in the *Arbitral Award of 31 July 1989*, the Court, after reviewing its own approach to treaty interpretation, concluded cautiously: '[t]hese principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may *in many respects* be considered as a codification of existing customary international law on the point.'[31] For some time after this initial pronouncement, the Court had been explicit in its endorsement of Article 31 VCLT, but less clear with respect to the other rules of interpretation contained in the VCLT.[32] Thus, for example, in *Oil Plaforms*, the Court held that:

> according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, 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. Under Article 32, recourse may be had to supplementary means of interpretation such as the preparatory work and the circumstances in which the treaty was concluded.[33]

The Court's stance became somewhat clearer in the early 2000s. In the *Pulau Sipadan and Litigan*, the Court relied on its previous judgments to find that the VCLT rules of interpretation were applicable 'in accordance with customary international law, reflected in Articles 31 and 32 of that Convention'.[34] Furthermore, in the *LaGrand*, the Court enunciated without further justification that '[i]n the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again reflects customary international law.'[35] It was only in 2016 that the Court openly acknowledged that 'it is well established that Articles 31 to 33

[31] *Arbitral Award of 31 July 1989* (n28) [48] (emphasis added).

[32] cf *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* [1992] ICJ Rep 351 [373]; *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6 [41]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1995] ICJ Rep 6, [33]; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66 [19].

[33] *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803 [23].

[34] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)* (Merits) [2002] ICJ Rep 625 [37].

[35] *LaGrand (Germany v United States)* (Judgment) (2001) ICJ Rep 466 [101].

of the Convention reflect rules of customary international law'.[36] This goes to show that entrenchment of the VCLT rules on interpretation in the jurisprudence of ICJ was not automatic or spontaneous. Rather, it came about through an incremental process of carefully formulated *dicta* over a long period of time. During that time, states appearing before the Court had the opportunity to challenge or adapt to the uniform framework for treaty interpretation that was effectively constructed by the Court through its adherence to the VCLT rules.

In parallel to the process of identification of their formal status, the elaboration of the VCLT rules of interpretation by the Court was also a gradual process occasionally meandering between different strands of interpretation. The late Hugh Thirlway observed in 2013 that the interpretative practice of the ICJ since 1991 has swung back again 'towards a more textual approach'.[37] To illustrate this point, in the *Arbitral Award of 31 July 1989*, the Court found on the basis of its previous jurisprudence that

> the first duty of a tribunal which is 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 in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words". The rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.[38]

[36] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 3 [35]; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [33]; more recently, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558 [106].

[37] Thirlway (n14) 1234.

[38] *Arbitral Award of 31 July 1989* (n28) [48] citing *Competence of the General Assembly for the Admission of a State to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 8; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 336.

Similarly, in the *Land, Island and Maritime Frontier Dispute* case, the Court referred to 'the basic rule of Article 31 of the Vienna Convention on the Law of Treaties, according to which a treaty shall be interpreted "in accordance with the ordinary meaning to be given to the terms"'.[39] Judge Torres Bernárdez, writing separately, censured this finding in very strong terms:

> For treaty interpretation rules there is no "ordinary meaning" in the absolute or in the abstract. That is why Article 31 of the Vienna Convention refers to "good faith" and to the ordinary meaning "to be given" to the terms of the treaty "in their context and in the light of its object and purpose". … I intend to remain faithful to the rules governing treaty interpretation as codified in the Vienna Convention, whose essential characteristic is that all its interpretative principles and elements form "an integrated whole", including the "ordinary meaning" element.[40]

From then onwards, the Court has avoided references to its own pre-1991 findings or any fragmentary quotation of the VCLT when stating the basic rule of interpretation, but rather reproduces faithfully the formulation of the VCLT.[41] Arguably, this subtle change aimed to dispel any impression of hierarchy between the elements of the basic rule of interpretation as reflected in Article 31(1) VCLT. Whilst the Court has to make certain interpretative choices when the case demands, it has no more of a theoretical predisposition towards one or the other school of interpretation than the VCLT rules.

What becomes apparent from this brief exposition is the mutually reinforcing character of the ICJ interpretative practice with the systematisation of the process of treaty interpretation from disparate approaches to operational rules. This interplay between the practice of the ICJ and the VCLT rules of interpretation is also reflected in the identification and elaboration of the key elements of the interpretative practice of the Court and their interrelationship. At the same time, the Court itself in its almost centennial history, has occasionally referred to interpretative maxims or principles that are not expressly provided in the VCLT rules. This brings to the fore their continuing relevance in the practice of the ICJ and, ultimately, whether they

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[39] *Land, Island and Maritime Frontier Dispute* (n32) [373].

[40] *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras; Nicaragua intervening)* (Separate Opinion of Judge Torres Bernárdez) [1992] ICJ Rep 692 [190]-[191].

[41] eg *Territorial Dispute* (n32) [41]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction) (1995) (n32) [33]; *Oil Platforms* (Preliminary Objections) (n33) [23].

have been subsumed by the VCLT rules. The sections that follow discuss these two issues in turn.

2. Key Elements of Treaty Interpretation in the Practice of ICJ/PCIJ

i. Good faith

Good faith appears most frequently in the interpretative reasoning as the Court, but always as a quote of the general rule of interpretation under Article 31(1) VCLT. The Court has abstained from discussing this element in detail or ascribe to it a distinct role within the interpretative process lied down by this rule.[42] This is not to say that good faith is not an element of the interpretative process as constructed by the Court or that it has no operative value in the Court's reasoning.[43] Rather, this value has never been explicitly spelled out by the Court in its decisions. To illustrate this point, in a recent case, the Court dealt with the interpretation of a provision consisting of three clauses separated by a semicolon.[44] In response, the Court held '[i]nterpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, it is clear [the provision] comprises three distinct obligations'.[45] More generally, the element of good faith appears to have an 'interstitial nature' in the practice of the ICJ relating to treaty interpretation in the sense that it grafts onto, and qualifies the operation of, the other elements of the general rule of interpretation.[46]

In fact, the Court's elusiveness towards in determining the meaning and role of good faith *qua* element of the interpretative process is not a recent trend. In one rare occasion, Judge Schwebel castigated his colleagues for discarding the *travaux préparatoires* of the agreement in question as 'hard to reconcile with the interpretation of a treaty "in good faith" which is the cardinal injunction of the Vienna Convention's rule of interpretation'.[47] Apart from this occasion, the Court's references to good faith relate, most likely, to the issue of performance as an

[42] Gardiner (n16) 168.

[43] cf, eg, Carlos Fernández de Casadevante Romani, *Sovereignty and Interpretation of International Law* (Springer 2007) 131-132 who does not include good faith amongst the ICJ's 'canons' of interpretation.

[44] eg *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Merits) 2023 <https://www.icj-cij.org/sites/default/files/case-related/164/164-20230330-JUD-01-00-EN.pdf> [140].

[45] ibid.

[46] Steven Reinhold, 'Good Faith in International Law' (2013) 2 UCL Journal of Law and Jurisprudence 40, 62.

[47] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) (Dissenting Opinion of Vice-President Schwebel) [1995] ICJ Rep 27, 39.

element of the *pacta sunt servanda* rule rather that the issue of interpretation.[48] Kolb reports on the basis of this earlier findings that good faith as an element of interpretation has three principal meanings: the primacy of the spirit of the treaty over the text and the prohibition of fraud, reasonable interpretation in the sense of the absence of abuse, and reasonable interpretation in the sense of reaching a result that the parties have legitimately envisaged.[49] Be that as it may, the Court often relies on the interpretative argument of the parties to structure its reasoning and it has so far never found directly that certain party adduced an interpretation of a treaty provision that lacks good faith.[50] Arguably, the cautiousness of the Court stems from its *jurisprudence constante* with respect to the distinct issue of the violation of good faith as a principle of performance or an independent principle which 'cannot be presumed'.[51]

ii. Ordinary Meaning

The concept of ordinary meaning has been the most pervasive element of the Court's interpretative reasoning even before the emergence of the VCLT rules of interpretation. Two issues have drawn the attention of the Court in a variety of its decisions. On the one hand, the Court had the occasion to elaborate a methodology for the determination of ordinary meaning of a treaty term especially as it relates to its intertemporal aspects. On the other hand, the Court's practice has not laid down a concrete formula for the position of ordinary meaning amongst the elements of the general rule of interpretation.

In terms of methodology, the Court has rarely explicated how it determines the ordinary meaning of a particular term. For the most part, the Court limits itself to recalling the terms used in a treaty provision followed by a categorical statement about the Court's understanding of the ordinary meaning of these terms.[52] On occasion, the Court may refer to sources other

[48] eg *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Merits) [1926] PCIJ Ser A No 7, 38-41.

[49] Robert Kolb, *La bonne foi en droit international public* (Graduate Institute Publications 2000) MN 225, 230 and 235; along similar lines, Liliana E Popa, 'The Holistic Interpretation of Treaties at the International Court of Justice' (2018) 87 NJIL 249, 289.

[50] Thirlway (n14) 1229-1230.

[51] eg *Certain Iranian Assets* (Merits) (n44) [92]; *Application of the International Convention on the Elimination of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures) 2023 < https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf> [62].

[52] eg *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Jurisdiction) [2020] ICJ Rep 455 [72]; *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) ICJ Rep 292 [92]; *Maritime Dispute (Peru v Chile)* [2014] ICJ Rep 3 [58]-[60].

than the treaty in question to determine the ordinary meaning of a term, but this is clearly the exception than the rule.

In this respect, the Court has relied sporadically on dictionary definitions with variable degree of confidence. For instance, in *Oil Platforms,* the Court resorted to the *Oxford English Dictionary*, *Black's Law Dictionary*, and the *Dictionnaire de la terminologie du droit international* in order to demonstrate that the meaning of the word 'commerce' extended to transactions beyond purchase and sale.[53] In *Aegean Sea Continental Shelf,* the Court referred to a dictionary–the *Robert's Dictionnaire*–to support its finding that the ordinary meaning of the term '*notamment'* was not the narrow understanding of the term proposed by Greece.[54] The Court has generally treated dictionary definitions with caution, because they often comprise multiple meanings that ultimately depend on context. Thus, in *Avena,* the Court 'observe[d] that dictionary definitions, in the various languages of the Vienna Convention, offer diverse meanings of the term 'without delay' (and also of 'immediately'). It is therefore necessary to look elsewhere for an understanding of this term."[55] It thus appears that, in many occasions, the Court has ended up according minimal values to dictionary definitions for the determination of the ordinary meaning of terms.

The Court has been equally cautious even when the term in question relates to a specialised or scientific subject matter. For instance, in *Kasikili/Sedudu Island*, the Court stated that it would 'seek to determine the meaning of the words "main channel" by reference to the most commonly used criteria in international law and practice, to which the Parties have referred.'[56] The Court cited various definitions of the 'main channel' from scientific dictionaries and the approach of an arbitral tribunal to an analogous interpretative issue to demonstrate that various criteria had been used to determine the 'main channel' of a river.[57] Yet, it did not follow either of these definitions, but instead purported to synthesise the parties' views on the ordinary meaning of the term.[58] In the *Whaling* case, the parties disagreed about the meaning of the terms 'scientific research' in the International Whaling Convention and adduced conflicting

[53] *Oil Platforms* (Preliminary Objections) (n33) [45]; for an earlier case see eg *Competence of the International Labour Organization* (n20) 41-45.
[54] *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 [54].
[55] *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12 [48].
[56] *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045 [27].
[57] ibid [30].
[58] ibid [30].

expert testimony on the issue.[59] In the end, the Court accorded little weight to the definitions procured by the experts and found that '[t]heir conclusions as scientists…must be distinguished from the interpretation of the Convention, which is the task of this Court.'[60]

Temporality is another important consideration in the determination of the ordinary meaning of a term. In *US Nationals in Morocco*, the Court found that, in order to interpret the provisions of the treaties in question, it was necessary to take into account the meaning of the relevant words at the time of the conclusion of the treaties.[61] In the *Namibia* Advisory Opinion, whist acknowledging the 'primary necessity' of this approach, the Court considered itself bound to take into account the fact that the concepts encompassed in the treaty in question 'were not static, but by definition evolutionary' and that the parties 'accepted them as such'.[62] More recent judgments of the Court seem to focus on what it has labelled as the 'generic' nature of a term. In the context of treaties, the concept of a 'generic term' was also employed in the *Navigational Rights* case between Costa Rica and Nicaragua in which the Court dealt with the term *commercio*. The Court reasoned that: 'there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.'[63] Indeed, it is notable that the Court based its reasoning on the 'generic character' of the term, rather than finding such confirmation in the manifest intentions of the Parties:

> where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration", the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.[64]

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[59] *Whaling in the Antarctic (Australia v Japan; New Zealand (intervening))* [2014] ICJ Rep 226 [74]-[75].
[60] ibid [82].
[61] *Rights of Nationals of the United States of America in Morocco (France v United States of America)* [1952] ICJ Rep 176, 189.
[62] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [53].
[63] *Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213 [64].
[64] ibid [66] (references omitted).

These ambiguities aside, it is clear that the Court considers ordinary meaning to be an indispensable element of its interpretative process. Indeed, the Court has enunciated on various occasions that 'interpretation must be based *above all* upon the text of the treaty'.[65] This means that 'a first duty of a tribunal which is 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 in the context in which they occur'.[66] Yet, at the same time, ordinary meaning is only the starting point of this process. As the Court has emphasised since early on in its jurisprudence:

> The rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it."[67]

In other words, the ordinary meaning of the terms of the treaty is determinative only if it is confirmed by the other elements of interpretation reflected in Article 31(1) VCLT.[68]

iii. Context

Another element which has played a crucial role in the Court's interpretative reasoning–and that of its predecessor institution, the PCIJ–is context. In fact, the Court's approach with respect to context has inspired and, after its adoption, consolidated the process envisaged in the VCLT rules. Mirroring this process, context operates in the interpretative reasoning of the Court as an 'immediate qualifier of the ordinary meaning of terms used in a treaty and… a modifier to any over-literal approach to interpretation'.[69] As such, it constitutes an inextricable part its interpretative practice.

At its core, the element of context includes the immediate surroundings of a term within a provision. One illustrative example is the *IMCO* Advisory Opinion, in which the Court gave weight to the context in which a particular word was used within the provision itself. In that

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[65] See eg *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (Preliminary Objections) [2021] ICJ Rep 71 [81] (emphasis added); also *Territorial Dispute (Libya v Chad)* (n32) [41].

[66] See eg *Competence of the General Assembly* (n38) 8.

[67] *Arbitral Award of 31 July 1989* (n28) 48 citing *South West Africa* (Preliminary Objections) (n38) 336.

[68] Gardiner (n16) 185.

[69] ibid 197.

case, the Court was called upon to interpret a provision which provided that 'the Maritime Safety Committee shall consist of fourteen members elected by the Assembly from the Members…of which not less shall be the largest ship-owning nations.' Some States contended that the word 'elected' implied free-choice amongst any member States. The Court disagreed, stating that:

> The meaning of the word "elected" in the Article cannot be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the Article. The word obtains its meaning from the context in which it is used.[70]

The Court thus concluded that 'elected' was to be understood as qualified by reference to the phrase 'largest ship-owning nations'.

However, according to the Court's conception, the element of context also envisages the overall structure and configuration of the text of the treaty so that circumstances might call for a synthesis or contrast between treaty provisions. For instance, in the *Bosnia Genocide* case, the issue arose whether the Genocide Convention prohibited states from engaging in acts constituting genocide and ancillary acts of genocide as described in Article III of the Convention. The Court noted that 'such an obligation is not expressly imposed by the actual terms of the Convention'.[71] However, it did establish that such an obligation arose by necessary implication from Article I of the Convention.[72] The Court corroborated this finding by reference to the compromissory clause of the Convention which granted jurisdiction to the Court, *inter alia*, for 'those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III'.[73] Along similar lines, in *Somalia v Kenya*, the Court enunciated that ordinary meaning, context, and object and purpose 'are to be considered as a whole'.[74] It then continued to declare that it could not determine the meaning of the provision at issue without first analysing its context and the object and purpose of the Memorandum of Understanding

[70] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Rep 150, 158.

[71] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 [166].

[72] ibid.

[73] ibid [169].

[74] *Maritime Delimitation in the Indian Ocean (Somalia v Kenya)* (Preliminary Objections) [2017] ICJ Rep 3 [64]; also *Arbitral Award of 3 October 1899* (Jurisdiction) (n52) [71]; *Qatar v UAE* (n65) [78].

(MOU).[75] In this context, it specified that the text of the MOU as a whole…provides the context in which any particular paragraph should be interpreted and gives insight into the object and purpose' of the treaty.[76]

Besides, according to the general rule of interpretation reflected in Article 31 VCLT, the concept of context is not limited to the text of the treaty and the interrelation of its terms and provisions. As a technical term of the law of treaties, 'context' also includes certain interpretative material besides the text of the treaty that form an integral part of the interpretative process. Specifically, Article 31(2) VCLT clarifies that the context of a treaty comprises also agreements and instruments made in connection with the conclusion of the treaty. This is also a key element of the Court's interpretative reasoning when applicable, admittedly infrequently, to the circumstances of the case.

Overall, the Court has taken a liberal approach as to the form of the materials that could potentially qualify as context. Apart from treaties,[77] the Court has been receptive to the argument that maps or even minutes of discussions between the parties could potentially be taken into account under the general rule of interpretation as context.[78] Similarly, the Court has not made any specific pronouncement as to the connection needed between the agreement or instrument and the conclusion of the treaty. For instance, in *Libya v Chad*, the Court was satisfied that an agreement concluded 'at the same time' as the treaty in question could be taken into account as context of that treaty.[79] Rather, faithful to the approach of the VCLT, the Court has required that the relevant material evidences the agreement of the parties.[80] Similarly, in case of instruments originating from some of the parties, the Court needs to establish the acceptance or at least acquiescence of the other parties.[81] Otherwise, such materials can only be taken into account as *travaux préparatoires* or circumstances of the conclusion of the treaty and hence as supplementary means of interpretation.[82]

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[75] *Somalia v Kenya* (Preliminary Objections) (n74) [65].
[76] ibid.
[77] *Territorial Dispute (Libya v Chad)* (n32) [53].
[78] *Pulau Litigan/Sipidan* (n34) [48]; *Peru v Chile* (n52) [65].
[79] *Territorial Dispute (Libya v Chad)* (n32) [53].
[80] *Peru v Chile* (n52) [65].
[81] *Pulau Litigan/Sipidan* (n34) [48].
[82] *Peru v Chile* (n52) [65].

iv. Object and Purpose

Another inextricable component of the Court's interpretative reasoning, in line with the general rule of interpretation, is the object and purpose of the treaty. As to the methodology for its determination, the Court has stated on many occasions that the object and purpose of a treaty may be discerned from the surrounding text of the agreement,[83] including, but not limited to, the title of the treaty and the preamble.[84] This approach reflects the Court's reasoning in its prior judgments. The *Oil Platforms* case provides an illustrative example. In that case, the Court determined that the object and purpose of the 1955 Treaty of Amity, Economic Relations and Consular Relations between the U.S. and Iran was 'not to regulate peaceful and friendly relations between the two States in a general sense [as Iran contended]' but rather by providing specific obligations for the effective implementation of such relations.[85] This object and purpose was induced from both the Preamble and the substantive articles of the Treaty.[86] This also goes to show the close interrelation between the elements of interpretation under the general rules of interpretation reflected in Article 31 VCLT in that such elements 'are to be considered as a whole'.[87]

That said, the concept of object and purpose in the Court's interpretative practice is not necessarily limited to the recitation of specific parts of the treaty in question. On the one hand, the determination of the object and purpose of the treaty might lead the Court to materials beyond the text of the treaty. For instance, in *Qatar v UAE*, the Court referred to UNGA Resolution 1514(XV) in examining the object and purpose of the Convention on the Elimination of Racial Discrimination (CERD).[88] Arguably, the preambular reference in CERD to this Resolution was also relevant in the Court's reasoning.[89] On the other hand, the Court occasionally refers to the object and purpose of a specific provision of a treaty rather than the treaty at

[83] *Somalia v Kenya* (Preliminary Objections) (n74) [65].

[84] *Somalia v Kenya* (Preliminary Objections) (n74) [70]. See also *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Preliminary Objections) [2019] ICJ Rep 7 [57]; *Jadhav (India v Pakistan)* [2019] ICJ Rep 418 [74].

[85] *Oil Platforms* (Preliminary Objections) (n33) [27].

[86] See also *Qatar v UAE* (n65) [84]; *Whaling* (n59) [56]; *Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep 422 [68]; *Pulau Litigan/Sipidan* (n34) [51].

[87] See above n74.

[88] *Qatar v UAE* (n65) [86]; for a similar approach see eg *Reservations to Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23; *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Preliminary Objections) [2022] ICJ Rep 477 [106].

[89] *Qatar v UAE* (n65) [85].

large.[90] Thus, for instance, in *LaGrand*, the Court induced from the terms of Article 41 of its Statute that 'the power [to indicate provisional measures] is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court'.[91] On this basis, it concluded that '[t]he contention that provisional measures indicated under Article 41 might not be binding *would be contrary to the object and purpose of that Article.*'[92]

v. Subsequent Agreements and Subsequent Practice

The interpretative materials laid down in the general rule of interpretation are not limited to the treaty or those connected with its conclusion, but can also be external to the treaty. In the first place, an interpreter is bound to take into account also any subsequent agreements of the parties regarding its interpretation and any subsequent practice in its application establishing the agreement of the parties regarding its interpretation. The Court has had recourse to the subsequent agreement and subsequent practice of the Parties under Article 31(3)(a) and (b) of the Vienna Convention, although it has not explicitly defined those terms.

Overall, the Court has not taken a formalistic approach as to what constitutes subsequent agreement or practice under Article 31(3)(a) and (b) VCLT nor has it drawn a clear line between these two elements of interpretation. In *Kasikili/Sedudu Island*, the Court cited the definitions of subsequent agreement and practice outlined by the ILC in its commentary on the draft Convention on the Law of Treaties and its own jurisprudence prior to the VCLT, both of which are also open-ended as to the issue of form.[93] So, for instance, the Court has readily accepted that subsequent bilateral treaties between the parties can be considered a subsequent agreement relevant to the interpretation of a bilateral treaty.[94] In another instance, in *Whaling*, the Court could not preclude in principle that resolutions adopted within an international organisation–in the event, the International Whaling Commission (IWC)–could be regarded as 'subsequent agreements' for the purposes of interpretation.[95] In any case, the Court has been

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[90] On this point see eg *Arbitral Award of 31 July 1989* (n28) [48]; *Legality of Use of Force (Serbia and Montenegro v Belgium)* (Preliminary Objections) [2004] ICJ Rep 279 [102].

[91] *LaGrand* (n35) [102].

[92] ibid (emphasis added); also eg *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275 [98] (relating to the Rules of Court).

[93] *Kasikili/Sedudu Island* (n56) [49] and [50].

[94] *Territorial Dispute (Libya v Chad)* (n32) [66].

[95] *Whaling* (n59) [83].

equally lax as to what can be considered 'subsequent practice' for the purposes of interpretation. For instance, the Court has taken into account the practice of organs of international organisations for the interpretation of constituent instruments of these organisations.[96] In addition, in *Interim Accord*, the Court accepted that lack of protest could be considered 'subsequent practice' for that purpose.[97] In fact, when it comes to the provisions of a *compromis*, the Court has even accepted that the overlapping submissions of the parties before it in the course of the case could also be considered as subsequent agreement or practice relevant to the interpretation of that *compromis*.[98]

According to the Court, an instrument or a course of conduct qualifies as subsequent agreement or practice for the purposes of Article 31(3)(a) and (b) VCLT only insofar as it manifests an agreement on the part of the Parties regarding the interpretation of the treaty.[99] To illustrate this point, in *Whaling*, the IWC resolutions in question could not be considered under the general rules of interpretation, because they were not adopted unanimously by all states parties to the treaty in question and Japan, which was the respondent in the case, did not assent to them.[100] Similarly, in *Equatorial Guinea v France*, the Court could not accept that evidence adduced by France as to the practice of 14 states in the implementation of the Vienna Convention on Diplomatic Relations (VCDR) would necessarily establish the agreement of the parties within the meaning of Article 31(3)(b) VCLT.[101]

In principle, the Court is bound to take into account the relevant material or conduct to the extent that this material or conduct establishes an agreement or practice under Article 31(3)(a) and (b) of the Vienna Convention. However, material that fall short of a subsequent agreement or practice under the VCLT are not necessarily excluded from the interpretative reasoning of the Court. Rather, the relative value of such materials for the interpretation of a

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[96] *Certain Expenses of the Organization (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 160-161

[97] *Application of the Interim Accord of 13 September 1995 (FYROM v Greece)* (Judgment) [2011] ICJ Rep 644 [99]; similarly *Arbitral Award of 3 October 1899* (Jurisdiction) (n52) [99]; *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* (Merits) 2023 <https://www.icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf> [103]-[106]; *a contrario, Sovereign Rights and Maritime Spaces* (Preliminary Objections) (n36) [46].

[98] *Corfu Channel (Albania v United Kingdom)* (Merits) [1949] ICJ Rep 4, 25 cited with approval in *Kasikili/Sedudu Island* (n56) [50].

[99] See in particular *Kasikili/Sedudu Island* (n56) [63].

[100] *Whaling* (n59) [83].

[101] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Merits) [2020] ICJ Rep 300 [69].

treaty varies depending on the circumstances of the case. For instance, in *Somalia v Kenya*, the Court held that that Kenya's own conduct of engaging in negotiations prior to the issuance of recommendations by the Commission on the Limits of the Continental Shelf demonstrated that 'Kenya did not consider itself bound [under the MOU in question] to wait for those recommendations before engaging in negotiations on maritime delimitation'.[102] The Court did not cite Article 31(3)(b) of the VCLT, nor did it enquire whether an agreement of the Parties underpinned this subsequent practice. Similarly, in *Equatorial Guinea v France*, even though the Court did not accept that evidence as the practice of 14 state sufficed for the purposes of Article 31(3)(b) VCLT, it nonetheless found that these acts constituted 'factors which weigh' into the interpretation of VCDR.[103]

vi. Any Relevant Rules of International Law Applicable in the Relations between the Parties

Possibly the broadest category of interpretative materials encompassed in the general rule of interpretation are 'relevant rules of international law applicable in the relations between the parties' under Article 31(3)(c) of the Vienna Convention. The Court has recognised that this element of interpretation is a part of the customary rule of treaty interpretation.[104] However, it has largely avoided several of the issues arising from the provision of Article 31(3)(c) VCLT, including what exactly qualifies as 'any…rules applicable between the parties' and how to assess whether this rule is 'relevant'. What is more, the Court's practice with respect to this element of interpretation has revealed a latent tension between interpretation of a treaty in line with relevant rules of international law and application of relevant rules of international law in lieu of the treaty.

To start, the Court not been called upon to define exhaustively what kind of interpretative material comprises the phrase 'any…rules applicable between the parties' in Article 31(3)(c) VCLT. At its core, the Court has declared that under this rubric fall binding rules emanating from treaties or 'general international law'.[105] So far, two issues remain unclear in the jurisprudence of the Court. First, the question arises whether the external rule needs to be

[102] *Somalia v Kenya* (Preliminary Objections) (n74) [92].

[103] *Immunities and Criminal Proceedings* (Merits) (n101) [69]; along similar lines, but without any reference to the VCLT, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392 [39]-[42].

[104] eg *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [112].

[105] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [66].

binding on all the parties to the treaty to be taken into account for its interpretation which is particularly relevant to the interpretation of multilateral treaties.[106] The Court has not pronounced yet on the issue because it has relied on Article 31(3)(c) VCLT either to refer to rules of general international law or to interpret bilateral treaties in which case it found sufficient that both parties to that treaty were also parties to the other relevant one.[107] Second, the Court has considered so far under Article 31(3)(c) VCLT only rules emanating from treaties and customary international law and not general principles of law.[108] The generic reference to rules of 'general international law' in *Pulp Mills* suggests that the Court is unlikely to disqualify general principles of law from the remit of Article 31(3)(c) VCLT.[109] Thus, for instance, in *Certain Iranian Assets*, the Court took note of its agnostic stance as to whether the 'clean hands' doctrine 'constituted a general principle of law' in discussing the material scope of the treaty in question, albeit without explicit reference to Article 31(3)(c) VCLT.[110] Arguably, this caveat would have been redundant, had the Court precluded general principles of law from the remit of permissible interpretative material. Perhaps more conspicuously, in *LaGrand*, a 'related reason' for interpreting Article 41 of its Statute as providing for the binding character of provisional measures was a 'principle universally accepted by international tribunals and likewise laid down in many conventions' alluding to the notion of general principles of law.[111]

With respect to the issue of relevance, the *Somalia v Kenya* judgment provides an interesting case study.[112] In the relevant treaty, the paragraph that was at issue was virtually identical to Article 83 of UNCLOS. The Court reasoned that: 'both Somalia and Kenya are parties to UNCLOS, which is expressly mentioned in the MOU. UNCLOS therefore contains …relevant rules [within the meaning of Article 31(3)(c) VCLT].'[113] This passage suggests that other rules of international law might be particularly relevant if express reference is made to them in

[106] eg Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 22-24.

[107] eg *Mutual Assistance in Criminal Matters* (n89) [112-3]; *Somalia v Kenya* (Preliminary Objections) (n74) [89]-[91].

[108] eg *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161 [41]; *Pulp Mills* (n105) [101].

[109] *Pulp Mills* (n105) [66].

[110] *Certain Iranian Assets* (Merits) (n44) [81].

[111] *LaGrand* (n35) [103].

[112] See also *Oil Platforms* (Merits) (n108) [41].

[113] *Somalia v Kenya* (Preliminary Objections) (n74) [89].

the treaty being interpreted. Furthermore, the Court continued to state that: '[i]n line with Article 31, paragraph 3 (c), of the Vienna Convention, *and particularly given the similarity in wording between the sixth paragraph of the MOU and Article 83, paragraph 1, of UNCLOS*, the Court considers that it is reasonable to read the former in light of the latter.'[114] This sentence suggests that a similarity in wording might also constitute a reason why the Court may look to another rule of international law when interpreting a particular provision.

That said, the Court's approach as to relevance seems less exacting and formalistic than these perfunctory considerations might suggest. Indeed, as the Court found in *Certain Iranian Assets*, the mere fact that a provision does not contain a *renvoi* to certain rules of international law does not suffice to exclude these rules from the material scope of the provision at issue.[115] In the event, the issue was whether the rules of general international law on immunity could be considered relevant for the interpretation of the provision of a bilateral treaty at issue on the obligation to afford access to justice for the nationals of states parties. For this purpose, the Court required that the breach of immunity 'would have to be capable of having some impact on compliance' with the provision in question, which it found not to be the case.[116] This implies that the concept of relevance also involves practical considerations of subject-matter proximity.[117]

An upshot of Article 31(3)(c) VCLT is that it invites an interpreter to draw a line between using relevant rules of international law for interpretation and applying these rules on the facts.[118] The general rule of interpretation only encompasses the former operation. This aspect of Article 31(3)(c) of the Vienna Convention has proven particularly contentious, because frequently the Court's jurisdictional scope is limited to a specific treaty containing a compromissory clause. To illustrate this point, in the merits phase of *Oil Platforms*, the Parties disagreed about the relationship between self-defence and Article XX(1)(d) of the Treaty of Amity of 1955, which provided that the Treaty did not 'preclude the application of measures…necessary to fulfil the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security

[114] *Somalia v Kenya* (Preliminary Objections) (n74) [91].
[115] *Certain Iranian Assets* (Preliminary Objections) (n84) [70].
[116] ibid.
[117] see, more generally, Merkouris (n106) 95-101.
[118] Gardiner (n16) 320.

interests.'[119] The question before the Court was whether this provision excluded from the remit of the Treaty all forcible measures or only lawful uses of force. The Court stated that it was obligated to take account of any relevant rules of international law under Article 31(3)(c) VCLT and thus that:

> The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty…The Court is therefore satisfied that its jurisdiction under Article XXI, paragraph 2, of the 1955 Treaty…extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law.[120]

This approach was criticised by Judge Higgins, who was of the view that:

> The Court has…not interpreted Article XX, paragraph 1 (d) by reference to the rules on treaty interpretation. It has rather invoked the concept of treaty interpretation to displace the applicable law. It has replaced the terms of Article XX, paragraph 1 (d), with those of international law on the use of force and all sight of the text of Article XX, paragraph 1 (d), is lost. Emphasizing that "originally" and "in front of the Security Council"…the United States had stated that it had acted in self-defence, the Court essentially finds that "the real case" is about the law of armed attack and self-defence. This is said to be the law by reference to which Article XX, paragraph 1 (d), is to be interpreted, and the actual provisions of Article XX, paragraph 1 (d), are put to one side and not in fact interpreted at all.[121]

[119] *Oil Platforms* (Merits) (n108) [32].
[120] ibid [41].
[121] *Oil Platforms (Islamic Republic of Iran v. United States of America)* (Merits) (Separate Opinion of Judge Higgins) [2003] ICJ Rep 225 [49].

The Court's approach in *Oil Platforms* seems to have been moderated in subsequent judgments. In *Immunities and Criminal Proceedings*, the Court was faced with the interpretation of Article 4(1) of the UN Convention against Transnational Organized Crime (Palermo Convention) pursuant to which 'States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States'. Equatorial Guinea argued that this provision implied an obligation of states parties to respect immunities of states officials in carrying out their obligations under the Convention. In this way, Equatorial Guinea sought to bring within the Court's jurisdiction under the compromissory clause of the Palermo Convention the issue of its Vice-President's immunities in criminal proceedings initiated by French authorities for corruption. The Court held that the provision in question was not merely hortatory, but it established a binding obligation which was dependent upon the other provisions of the Convention.[122] It also conceded that rules of customary international law on state immunity derived from the principle of sovereign equality, but stressed that the terms of the provision referred only to the latter principle.[123] Immunities were not mentioned in the rest of the Convention nor were they relevant to the stated object and purpose of the Convention to promote co-operation in the prevention and suppression of organised crime.[124] After corroborating this conclusion by reference to the *travaux prépararoires* and to similar provisions of other treaties, it concluded that the rules on state immunity were not incorporated to Article 4(1) of the Palermo Convention.[125] Several Judges, dissenting jointly, casted doubt as to the consistency of the Court's reasoning. First, these Judges noted that there was an inconsistency between the Court's affirmation of the binding effect of the provision and its reliance on the rest of the Convention for its interpretation.[126] According to these Judges, the Court should have referred to general international law for the determination of the content of the relevant

[122] ibid.

[123] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292 [93].

[124] ibid [94]-[95].

[125] ibid [99]-[102]; for a similar finding *Certain Iranian Assets* (Preliminary Objections) (n84) [70], [74], and [78]-[79].

[126] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) (Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka) [2018] ICJ Rep 340 [27].

principles, as these principles stemmed from customary international law.[127] Second, the dissenting Judges remarked that the connection between sovereign equality and immunity entailed that a violation of state immunity is also at the same time a violation of sovereign equality.[128]

A parallel reading of the Court's judgment in *Immunities and Criminal Proceedings* and in *Oil Platforms* reveals that the Court is still in the process of drawing a line between interpretation of a treaty in light of relevant external rules and application of such rules in a case.[129] To this external observer, it is difficult to understand how the rules of state immunity were irrelevant for the interpretation of an explicit *renvoi* to the principle of sovereign equality, when the prohibition of the use of force had been read into a reference of an exception clause to 'essential security interests'.[130] As a result, it appears that the Court's approach to Article 31(3)(c) VCLT has evolved to prevent the invocation of Article 31(3)(c) VCLT as a way to circumvent jurisdictional limitations arising from specific instruments. Yet, the exact contours of the distinction remain to be clarified further by the Court.

vii. Supplementary Means of Interpretation

Another important feature of the interpretative practice of the ICJ, in line with the VCLT, is the compartmentalization of the interpretative process into the necessary components of the interpretative reasoning under the general rule of interpretation and the supplementary means of interpretation under Article 32 VCLT, recourse to which is in principle optional.[131] The Court has affirmed on many occasions that it does not need to have recourse to supplementary means of interpretation, once it has reached a conclusion by applying the elements of the general rule of interpretation.[132] The Court has also developed an extensive and variable practice as to the interpretative material that may be used as supplementary means of interpretation.

Indeed, the Court has taken a relatively flexible approach in relation to the supplementary means of interpretation that are permissible under Article 32 of the VCLT. On many occasions, the Court has referred to the *travaux préparatoires* of a treaty as material falling under

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[127] ibid.
[128] ibid [28].
[129] cf *Oil Platforms* (Merits) (n108) [41].
[130] ibid.
[131] See, generally, Art 32 VCLT; eg Oliver Dörr, 'Article 32', in Oliver Dörr and Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (2nd edn, Springer 2018) 617, 617 and 628.
[132] eg *Pulau Litigan/Sipidan* (n34) [53]; *Jadhav* (n84) [76]; *Qatar v UAE* (n65) [89]; *Myanmar Genocide* (Preliminary Objections) (n88) [90].

Article 32 VCLT which includes, first and foremost, the record of negotiations of the treaty in question.[133] However, the practice of the Court affirms that a broad view of the circumstances of the conclusion of the treaty. For instance, in *Somalia v Kenya*, the MOU in question was drafted by Ambassador Longva of Norway in the context of assistance provided by Norway to a number of African coastal States related to their submissions to the Commission on the Limits of the Continental Shelf before the deadline established by States Parties to UNCLOS. In considering the *travaux* of the MOU, the Court also took note of the views expressed by Ambassador Longva in the Pan-African Conference on Maritime Boundary Delimitation and the Continental Shelf and of the fact that Kenya did not discuss these views.[134] Two elements of this reasoning are notable. First, the Court relied on the Kenya's inaction as evidenced by the *travaux* to confirm its interpretation.[135] In this context, the Court stated that 'were [the relevant provision] to have the potentially far-reaching consequences asserted by Kenya, it would in all likelihood have been the subject of some discussion'.[136] Second, the supplementary means of interpretation drawn on by the Court did not emanate from one of the Parties to the MOU. Instead, the Court reasoned that as Norway had drafted the MOU, it was Norway's understanding of the MOU more broadly that was relevant.

In this latter respect, another set of documents that features in the interpretative process of the Court is documents drafted by the International Law Commission ('ILC') that later formed the basis for binding treaties. The ILC had addressed this question during the discussions of a draft provision that would later become Article 32 VCLT with some of its members leaning towards considering the ILC discussions and commentaries as 'preparatory work of a second order'.[137] In *Jadhav*, the Court examined the discussions within the ILC on the topic 'consular intercourse and immunities' under the rubric of *travaux préparatoires* of Article 36 of the Vienna Convention on Consular Relations.[138] Citing explicitly Article 32 VCLT, the

[133] For recent examples of recourse to the *travaux préparatoires* by the Court, see eg *Allegations of Genocide under the Convention on the Prevention and Suppression of the Crime of Genocide (Ukraine v Russian Federation; 32 States intervening)* (Admissibility of Intervention) 2023 < https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf> [80]; *Immunities and Criminal Proceedings* (Preliminary Objections) (n123) [96]-[98]; *Jadhav* (n84) [76]-[86]; *Peru v Chile* (n52) [65].

[134] *Somalia v Kenya* (Preliminary Objections) (n74) [103]-[104].

[135] See also *Oil Platforms* (n21) [28-9]; *Qatar v Bahrain* (n21) [41].

[136] *Somalia v Kenya* (Preliminary Objections) (n74) [103].

[137] ILC, 'Summary Record of the 872nd Meeting' (17 June 1966) UN Doc A/CN.4/SR.872 [35] (Rosenne); ILC, 'Summary Record of the 873rd Meeting' (20 June 1966) UN Doc A/CN.4/SR.873 [27] (Tunkin).

[138] *Jadhav* (n25) [77-83].

Court referred to the ILC discussions only to confirm the interpretation reached through the means of Article 31 VCLT.[139] That said, the evidentiary value to be accorded to ILC documents in the process of treaty interpretation has varied and appears to largely depend on the circumstances of each case. For instance, in the *Jurisdictional Immunities* case, the ICJ relied on the ILC's commentary to its Draft Articles on Jurisdictional Immunities of States and their Property according to which the provision at issue did not apply to 'situations of armed conflict'.[140] The Court read this caveat into the UN Convention Jurisdictional Immunities of States and their Property, notwithstanding the fact that the text of the Convention did not provide for such a qualification *expressis verbis*.[141] Arguably, this implied a more than 'supplementary role' for this interpretative material in this context.[142]

In fact, the Court has occasionally relied on materials originating from other international organs in the context of treaty interpretation. Indicatively, in the *Wall Advisory Opinion*, the Court referred to documents originating from the ICRC to support its interpretation of the provisions of the Fourth Geneva Convention.[143] In *Diallo*, the Court referred to the jurisprudence of the Human Rights Committee and its General Comments, as well as the African Commission on Human and Peoples' Rights, and the European Court of Human Rights.[144] With respect to the views of the Human Rights Committee, the Court enunciated that '[a]lthough [it] is in no way obliged…to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.'[145] Likewise, it held that 'when [it] is called upon… to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created…to monitor the sound application of the treaty in question.'[146] The Court's approach was later clarified in *Qatar v UAE*. In that case,

[139] ibid [76].
[140] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99 [69].
[141] ibid.
[142] cf, critically, *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Dissenting Opinion of Judge *ad hoc* Gaja) [2012] ICJ Rep 309 [5].
[143] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [97].
[144] *Ahmadou Sadio Diallo (Guinea v DRC)* (Judgment) [2010] ICJ Rep 639 [66] and [68].
[145] ibid [66].
[146] ibid [67].

the issue at hand was whether the term 'national origin' in Article I(1) of the CERD covered differentiations based on nationality as alleged by Qatar. The Court applied, first, the elements of the general rule of interpretation and then turned to the *travaux préparatoires* of the Convention to confirm its interpretation. Whilst it took note of the views of the CERD Committee, the Court came to the opposite conclusion 'by applying, as it is required to do, the customary rules of treaty interpretation'.[147] In so doing, the Court implied that the relative value of such materials depends on the circumstances of the case and the faithful application of rules of treaty interpretation by the bodies of origin.

The Court has not indicated any limit as to the material which may be taken into account as supplementary means of interpretation. For example, in the *Equatorial Guinea v France* judgment on preliminary objections, the Court consulted the commentary to the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, after which the relevant provision of the 2000 Convention against Transnational Organized Crime at issue in the case at hand was modelled, in order to confirm its interpretation under Article 31 of the VCLT.[148] Although the Court did not frame its reasoning in these terms, this would appear to be an example of recourse to the broader circumstances of conclusion of a treaty as a supplementary means of interpretation under Article 32 VCLT.

3. Elements beyond the Vienna Convention on the Law of Treaties in the Practice of the ICJ/PCIJ

i. Effet utile or Effective Interpretation

Another prominent element of the interpretative reasoning of the Court has been the interpretative principle of effectiveness,[149] or effective interpretation,[150] or *effet utile*,[151] or *ut res magis*

[147] *Qatar v UAE* (n65) [101].

[148] *Immunities and Criminal Proceedings* (Preliminary Objections) (n123) [99]-[101].

[149] eg *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432 [52]; *Interpretation of Peace Treaties (Second Phase)* (Advisory Opinion) [1950] ICJ Rep 221, 229.

[150] eg *Land, Island and Maritime Frontier Dispute* (n32) [375].

[151] eg ibid; *Interim Accord* (n97) [92].

valeat quam pereat.[152] The Court tends to treat these different terms as denoting the same principle,[153] notwithstanding doctrinal divisions.[154] For the most part, the Court has used the principle of effectiveness with caution emphasising its limits without, however, clarifying its precise position within the VCLT rules.

The principle of effectiveness originates in the case law of the PCIJ and the ICJ long before the advent of the VCLT. In the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ stated that 'in case of doubt the clauses of a special agreement by which a dispute is referred to the Court, must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects'.[155] Similarly, in *Corfu* Channel, the ICJ stipulated that '[i]t would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.'[156] More recently, the Court affirmed the 'well-established principle in treaty interpretation that words ought to be given appropriate effect'.[157] Similarly, in a relatively recent iteration, the Court has enunciated that 'in general, the interpretation of a treaty should seek to give effect to every term in that treaty and that no provision should be interpreted in a way that renders it devoid of purport or effect'.[158] This goes to show that the principle is well-established in the jurisprudence of the Court, but also that it has clearly defined limits. To illustrate this point, in a separate opinion, Judge Lachs invited his colleagues to 'lend maximum effect' to the provisions in question in light of their 'raison d'etre'.[159] By contrast, in a formidable decision (albeit for other reasons), the Court stated in unambiguous terms that

[152] eg *Interpretation of Peace Treaties* (n149) 229.

[153] eg ibid

[154] eg Céline Braumann and August Reinisch, 'Effet Utile' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 47, 48-49.

[155] *Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* (Order) [1929] PCIJ Ser A No 22, 13.

[156] *Corfu Channel* (Merits) (n98) 24.

[157] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 [133].

[158] *Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)* (Preliminary Objections) [2016] ICJ Rep 100 [41]; *Sovereign Rights and Maritime Spaces* (Preliminary Objections) (n36) [43].

[159] *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Declaration of Judge Lachs) [1972] ICJ Rep 72, 73-74.

> It may be urged that the Court is entitled to engage in a process of "filling in the gaps", in the application of a teleological principle of interpretation, according to which instruments must be given their maximum effect in order to ensure the achievement of their underlying purposes. The Court need not here enquire into the scope of a principle the exact bearing of which is highly controversial, for it is clear that it can have no application in circumstances in which the Court would have to go beyond what can reasonably be regarded as being a process of interpretation, and would have to engage in a process of rectification or revision.[160]

The Court then proceeded to quote the previously established formula of the principle of effectiveness.[161] It should be noted that the Court has not explicitly relied upon on this previous finding, even though the general direction of its jurisprudence clearly reflects the content of this *dictum*.

Relatedly, a more ambiguous aspect of the jurisprudence of the Court has been the exact place of the principle of effectiveness within the rules of treaty interpretation and, specifically, the process envisaged in Articles 31-33 VCLT. For instance, Judge Torres Bernardez in *Land, Island and Maritime Frontier Dispute* opined that the principle of effectiveness 'in so far as it reflects a true general rule of interpretation, is embodied, as explained by the International Law Commission, in Article 31, paragraph 1, of the Vienna Convention'.[162] More importantly, in *Georgia v Russia*, the Court applied the principle under the heading of the 'ordinary meaning' of the provision in question, but without further elaborating on its connection with the VCLT.[163] In their dissent, several judges criticised the majority, because, according to them, 'the "general rule of interpretation", i.e., "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", is applied in the Judgment in a way that amounts to nothing more than applying the principle of "effectiveness"'.[164] As they noted 'this technique of interpretation is never as all-determinative as the Court would appear to treat it in the present case; it does not suffice by itself'.[165] Nonetheless, they did not 'deny

[160] *South West Africa (Second Phase) (Ethiopia v South Africa; Liberia v South Africa)* [1966] ICJ Rep 6 [91]
[161] ibid.
[162] *Land, Island and Maritime Frontier Dispute* (Separate Opinion of Judge Torres Bernardez) (n40) [205].
[163] cf *Application of the ICERD* (n174) [123]-[141].
[164] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) (Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja) [2011] ICJ Rep 142 [21].
[165] ibid [22].

the relevance, or underestimate the importance, of the principle that the interpreter of a treaty must normally seek to give its terms a meaning which leads them to have practical effect, instead of one which deprives them of any effect (the "principle of effectiveness")'.[166] Observably, however, the dissenting judges did not identify a precise foothold for the principle of effectiveness within the VCLT rules.

One possible countervailing consideration in the application of the principle of effectiveness could be the *ex abundante cautela* maxim, which postulates that—in exceptional circumstances—an interpreter may treat certain words or phrases of a treaty as redundant.[167] In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court found that provisions might be inserted in a treaty out of an 'abundance of caution' and for the 'avoidance of doubt'.[168] This maxim has not been considered by the ICJ in the context of treaty interpretation, whilst, even in the case in question, the Court appeared to rely on the context, the wording, the principle of effectiveness, and the circumstances of the treaty's conclusion to reach this conclusion.[169]

ii. Restrictive Interpretation or In dubio mitius

The principle of restrictive interpretation or *in dubio mitius* constitutes the 'rival principle' to the principle of effectiveness at least before the advent of the VCLT. The principle has been elaborated by the PCIJ in the following terms if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted'.[170] However, even the PCIJ was cautious in its use of the principle stressing that applies 'only in cases where ordinary methods of interpretation have failed'.[171] Thus, in *Territorial Jurisdiction of the International Commission of the River Oder*, the PCIJ found that *in dubio mitius*

> must be employed only with the greatest caution. To rely upon it is not sufficient that the purely grammatical analysis of a text should not lead to definitive results; there are

[166] ibid.
[167] See Alison MacDonald, '*Ex abundante cautela*' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 121, 121.
[168] *Sovereign Rights and Maritime Spaces* (Preliminary Objections) (n36) [43].
[169] ibid.
[170] *Interpretation of Treaty of Lausanne* (n19) 25.
[171] *Polish Postal Service in Danzig* (Advisory Opinion) PCIJ Ser B No 11, 39.

> many other methods of interpretation, in particular reference is properly had to the principles underlying the matters to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States.[172]

It is hard to find any pronouncement of the ICJ ascribing value to *in dubio mitius* as an established principle of interpretation, still less as an element of the rule of the VCLT.[173] In fact, the Court appears to consider *in dubio mitius* in tension with the VCLT rules:

> While it is certainly true that limitations of the sovereignty of a State over its territory are not to be presumed, this does not mean that treaty provisions establishing such limitations, such as those that are in issue in the present case, should for this reason be interpreted *a priori* in a restrictive way. A treaty provision which has the purpose of limiting the sovereign powers of a State must be interpreted like any other provision of a treaty, ie in accordance with the intentions of its authors as reflected by the text of the treaty and the other relevant factors in terms of interpretation.[174]

To a large extent, *in dubio mitius* or restrictive interpretation operates more as a descriptor for interpretative outcome rather than as a means of interpretation.[175] That said, restrictive interpretation has played an ambiguous role in the case law of the Court relating to unilateral acts.[176]

iii. Legal and logical maxims

The ICJ had also sporadically recourse to other considerations beyond the ones explicitly mentioned in the VCLT to determine the precise content of an applicable treaty rule. These considerations include, for the most part, instantiations of general legal ideas of undeterminable origin or descriptors of syllogisms better known with Latin nomenclature such as *contra proferentem*,

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[172] *Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom v Poland)* [1929] PCIJ Ser A No 23, 26. Similarly, *Free Zones of Upper Savoy and the District of Gex (Second Phase) (France/Switzerland)* PCIJ Ser A No 24, 12; *Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* PCIJ Ser A/B No 46, 167; *Phosphates in Morocco (Italy v France)* PCIJ Ser A/B No 74, 23-24.

[173] Panos Merkouris, 'In dubio mitius' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 259, 299.

[174] *Navigational and Related Rights* (n63) [48].

[175] Merkouris in Klingler and ors (n173) 304.

[176] See below section II.

argumentum a contrario, *ejusdem generis* and *a contrario*. As such, the precise footing within the VCLT rules depends largely from the context of the Court's reasoning in each specific case.

The Court's stance with respect to these maxims has been at best non-committal with respect to the maxim *contra proferentem* principle that postulates that ambiguities to be resolved against the party who drafted an instrument.[177] In *Fisheries Jurisdiction*, Spain invoked the maxim as relevant for the interpretation of Canada's optional declaration to the compulsory jurisdiction of the Court.[178] In response, the Court ambiguously stated that '[t]he *contra proferentem* rule may have a sole to play in the interpretation of contractual provisions', but denied its application in the specific context.[179]

In a few instances, the Court has relied on certain maxims, although it is not entirely apparent whether it did so in the application of the VCLT rules. For instance, in an advisory opinion, the Court mentioned the *ejusdem generis* maxim without further clarification to confirm an interpretation reached after the consideration of the *travaux* of the relevant instrument in question.[180] The Court has been somewhat more detailed with its treatment of *a contrario* arguments. In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the Court held that recourse to *a contrario* interpretation

> is only warranted...when it is appropriate in light of the text of all the provisions concerned, their context and the object and purpose of the treaty. Moreover, even where an *a contrario* interpretation is justified, it is important to determine precisely what inference its application requires in any given case.[181]

To illustrate this point, in *Certain Iranian Assets*, Iran argued that measures in violation of immunities of public entities acting *jure imperii* also constituted a violation of in the 1955 Treaty of Amity. It based this contention on an *a contrario* reading of a provision of the Treaty that excluded from immunity public owned enterprises engaged in commercial or

[177] Pierre d'Argent, 'Contra Proferentem' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 241, 241.
[178] *Fisheries Jurisdiction (Spain v Canada)* (n149) [51].
[179] ibid.
[180] *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 166 [50]-[51].
[181] *Sovereign Rights and Maritime Spaces* (Preliminary Objections) (n36) [37].

industrial activities.[182] The Court rejected Iran's contention by reference to its findings in *Alleged Violations*.[183] What both these cases clearly entail is that both the use and impact of these maxims in the process of interpretation is circumscribed by the VCLT rules of interpretation.

II. Interpretation of Unilateral and International Organisations' Acts and Declarations in the Practice of the ICJ

1. Interpretation of Unilateral Declarations Entailing International Obligations

One of the major contributions of the ICJ to the rules pertaining to the identification of international law is undeniably its recognition of unilateral acts and declarations of states as sources of international law capable of entailing international obligations for declaring states.[184] This concept co-exists with but is distinct from the treatment of unilateral acts of states as *facts* which may relied upon as evidence of a rule of international law emanating from another source, or are opposable to them in cases of detrimental reliance under the doctrine of estoppel, or for evidentiary purposes under the doctrines of acquiescence, or, in some contexts, legitimate expectations.[185] However, unlike treaties, there is no agreed upon rule for the interpretation of unilateral acts of states *qua* sources of international law. The idea that unilateral acts of states *qua* sources of international law are subject to rules of interpretation is reflected in the ILC General Principles Applicable on Unilateral Declarations of States Capable of Creating Legal Obligations (GPUD).[186] Relying on the practice of the ICJ as evidence, the ILC proposed the following rule:

> A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In

[182] *Certain Iranian Assets* (Preliminary Objections) (n84) [63].

[183] ibid [64]-[65].

[184] See eg GPUD Commentary to Principle 1 [1]-[2] citing the practice of the ICJ as evidence; *critically*, Hugh Thirlway, *Sources of International Law* (2nd edn, OUP 2019) 51-52 ('The inclusion of unilateral acts in the category of sources of obligation, and thus (in the absence of an attributable underlying source) as a possible source of law, is in fact based essentially on no more than the decisions of the International Court in the two *Nuclear Tests* cases…').

[185] *Obligation to Negotiate Access to the Pacific Ocean* [2018] ICJ Rep 507 [146], [152], [158], and [162]; see especially on the issue of estoppel see eg Eva Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (Brill 2015) 89-93; Przemyslaw Saganek, *Unilateral Acts of States in Public International Law* (Brill 2015) 83-84 (for a codification of different views).

[186] GPUP, Principle 7.

> interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated.[187]

However, despite the ILC's reliance on the ICJ to articulate this rule and ICJ's general receptiveness ICJ toward ILC outputs,[188] the ICJ has abstained from citing this output and close the feedback loop on this specific occasion. This section fleshes out the key approaches of the ICJ with respect to the interpretation of unilateral acts *qua* sources of international obligations. The section will proceed by comparing and contrasting the interpretative approach of the ICJ on optional declarations to its compulsory jurisdiction and reservation to treaties, on the one hand, with the interpretation of other unilateral acts. The section will argue that the latent driver of the discrepancies between approaches is the distinction between identification of the binding character of a unilateral act and interpretation of a binding unilateral act, even though the Court has never spelled out the reasons for these different approaches.

In the first place, the issue of the interpretation of unilateral acts in the case law of the ICJ has arisen more frequently with respect to the interpretation of optional declarations to its compulsory jurisdiction under Article 36(2) ICJ Statute which the Court considers to belong to the *genus* of 'unilateral declarations'.[189] In this context, the ICJ has ambiguously stated that

> [t]he regime relating to the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties…the provisions of that Convention may only apply analogously to the extent compatible with the *sui generis* character of the unilateral acceptance of the Court's jurisdiction.[190]

Apart from this statement, the Court has avoided the formulation of an all-encompassing formula akin to the rule of treaty interpretation or the one proposed by the ILC. In fact, the Court

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[187] ibid.

[188] see GPUD, Commentary to Principle 7 fns 966-972; on the reliance of the Court on ILC's outputs see eg Stephen M Schwebel, 'The Inter-active Influence of the International Court of Justice and the International Cour Commission' in Stephen M Schwebel (ed), *Justice in International Law–Further Selected Writings* (CUP 2011) 66*ff*.

[189] eg *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, 23; *Fisheries Jurisdiction (Spain v Canada)* (n149) [46]; *Somalia v Kenya* (Preliminary Objections) (n74) [115].

[190] *Fisheries Jurisdiction (Spain v Canada)* (n149) [46]; see also *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections) (n92) [30]; *Nicaragua* (Jurisdiction and Admissibility) (n103) [63].

proceeds to declare the interpretative elements applicable to declarations under Article 36(2) ICJ in a piecemeal fashion with some inconsistencies as to order or value that these elements have in the interpretative process.

As to the specific elements of the interpretative process, the Court has on many occasions enunciated that a declaration 'must be interpreted as it stands, having regard to the words actually used'.[191] According to the Court, 'words are to be interpreted according to their natural and ordinary meaning in the context in which they occur'.[192] This does not entail 'a purely grammatical interpretation of the text', but 'the interpretation which is in harmony with a natural and reasonable way of reading the text'.[193] In fact, the Court has on many occasions stressed the interdependence of text and context for the interpretation of optional declarations in unequivocal '[a]ll elements in a declaration…are to be interpreted as a unity, applying the same legal principles of interpretation throughout'.[194] The legal context of the declaration also has a bearing on its interpretation, since '[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it'.[195] The confluence of these considerations are also reflected on the concept of a 'generic term' featured in the *Aegean Sea Continental Shelf* case in relation to the interpretation of a Greek reservation to the 1928 General Act for Pacific Settlement of International Disputes. The Court considered that:

> the nature of the word "status" itself indicates, it was a generic term which in the practice of the time was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question…Once it is established that the expression "the territorial status of Greece" was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises

[191] eg *Anglo-Iranian Oil Co (United Kingdom v Iran)* (Jurisdiction) [1952] ICJ Rep 93, 105; *Fisheries Jurisdiction (Spain v Canada)* (n149) [46]; *Aerial Incident of 10 August 1999 (India v Pakistan)* (Jurisdiction) [2000] ICJ Rep 12 [42]; similarly, *Norwegian Loans* (n189) 27.

[192] *Temple of Preah Vihear* (n193) 32.

[193] eg *Temple of Preah Vihear (Cambodia v Thailand)* (Preliminary Objections) [1961] ICJ Rep 17, 32; also *Anglo-Iranian Oil Co* (n191) 104.

[194] *Somalia v Kenya* (Preliminary Objections) (n74) [118]; *Fisheries Jurisdiction (Spain v Canada)* (n149) [44].

[195] *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142; also *Fisheries Jurisdiction (Spain v Canada)* (n149) [53]-[54].

> that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.[196]

In these respects, it appears that the process of interpretation of declarations under Article 36(2) ICJ Statute has no material differences with the process envisaged in the rule of treaty interpretation.[197]

Where the process of interpretation of optional declarations and the reservations appended to them differs from treaty interpretation is that '[it] is required in the first place…that [the former] should be interpreted in a manner compatible with the effect sought by the reserving State'.[198] This is an obvious corollary of the unilateral nature of these acts as opposed to treaties. Clearly, the *dictum* suggests that the principle of effectiveness is applicable in the case of optional clause declarations, although in a modified form that centers around the intention of the declaring state. So, for instance, in *Fisheries Jurisdiction*, the Court admitted that it had 'not hesitated to place a certain emphasis on the intention of the depositing State'.[199] In this light, the Court declined the applicability of the *contra proferentem* maxim in the case of optional declarations.[200]

The question, however, is how to determine such an intention and, specifically, whether this determination involves a different element or configuration of the interpretative process compared to that of treaty interpretation. According to the Court,

> [t]he intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.[201]

What is particularly ambiguous is whether expressions of views of the declaring state external to the declaration have equal bearing on the interpretation of the declaration or, conversely,

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[196] *Aegean Sea* (n54) [75] and [77] (references omitted).
[197] See also *Temple of Preah Vihear* (Preliminary Objections) (n193) 32 explicitly referring to the general canon of interpretation.
[198] *Fisheries Jurisdiction (Spain v Canada)* (n149) [52]; *Somalia v Kenya* (Preliminary Objections) (n74) [118].
[199] *Fisheries Jurisdiction (Spain v Canada)* (n149) [52]; *Whaling* (n59) [36].
[200] *Fisheries Jurisdiction (Spain v Canada)* (n149) [51].
[201] *Fisheries Jurisdiction (Spain v Canada)* (n149) [49]; *Whaling* (n59) [36].

whether this material should be considered as supplementary analogously to Article 32 VCLT. The Court tends to cite this material, where available, without any explicit qualification, although it has used it so far to confirm an interpretation reached by other means.[202] That said, according to *Temple of Preah Vihear*, the Court hinted that only 'something unreasonable of absurd' would elicit an departure from the 'normal canons of interpretation'.[203] In a somewhat more balanced manner, the ILC, reporting on the findings of the Court on the issue of reservations to optional declarations under Article 36(2) ICJ Statute, stated that 'the text is the primary indicator of intention'.[204] On balance, it appears unlikely that the Court would explicitly reach an interpretation contrary to the text of the declaration by reference only to views expessed outside the declaration.

The Court's jurisprudence with respect to optional declarations under Article 36(2) ICJ Statute and reservations to treaties displays some discrepancies with its findings relating to other unilateral acts that are binding under international law for the declaring state. More famously (or infamously), the Court proclaimed in *Nuclear Tests* that

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations…When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.[205]

In its practice, the Court has elaborated on the process of determination of the declaring state's intention to be bound by its terms. In *Nuclear Tests*, the Court enunciated that '[i]t is from the actual substance of these statements, and from the circumstances attending their making, that

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[202] eg *Fisheries Jurisdiction (Spain v Canada)* (n149) [49]-[50]; *Whaling* (n) [38]; but see, for instance, *Somalia v Kenya* (Preliminary Objections) (n74) [118]-[119] where the Court referred to the principle of effectiveness but focused only on an examination of the text of the declaration.

[203] *Temple of Preah Vihear* (Preliminary Objections) (n193) 32-33.

[204] ILC, 'Guide to Practice on Reservation to Treaties, adopted by the Commission in its sixty-third session' (2011) II(3) YbILC 23*ff* ('GPRT'), Commentary to Guideline 4.2.6 [6].

[205] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 [43]; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457 [46]; for a previous finding of the PCIJ see cf *Legal Status of Eastern Greenland (Denmark v Norway)* [1933] PCIJ Ser A/B No 53, 69-73; and discussion Thirlway, Sources (n184) 51-52; Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann, Christian J Tams, Karin Oellers-Frahm, and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 819, 853-857.

the legal implications of the unilateral act must be deduced.'[206] In subsequent judgments, the Court reiterated this finding in the following terms: 'in order to determine the legal effects of a statement of a person representing the state, one must "examine its actual content as well as the circumstances in which it was made"'.[207] Similarly, in the *Frontier Dispute* case, the Court emphasized that '[i]n order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred.'[208] These pronouncements strongly suggest that the circumstances of occurrence of the unilateral act are as important as their actual substance for the purposes of determining their binding character.[209] As we have seen, the Court had never expressed itself with the same degree of confidence in dealing with the interpretation of optional declarations and reservations. In its particularly striking that the Court has never cited any of the findings relating to optional clause declarations or reservations in the cases relating to the determination of the binding character of other unilateral acts *qua* sources of international law.[210]

What is more, the Court's practice with respect to the determination of the binding character of unilateral acts differs to its interpretation of optional declarations under Article 36(2) in another glaring respect. In particular, the has held that '[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for'.[211] It is particularly striking that the Court has never quoted this finding when faced with the interpretation of optional clause declarations accepting the compulsory jurisdiction of the Court or reservations to treaties. However, despite the Court's reticence, the ILC in its work on unilateral declarations proceeded to generalise this approach by proposing that '[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be

[206] *Nuclear Tests (AF)* (n205) [51]; *Nuclear Tests (NZF)* (n205) [53].

[207] *Obligation to Negotiate Sovereign Access to the Pacific Ocean* (n185) [146] quoting *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 28 [49].

[208] *Frontier Dispute (Burkina Faso v Mali)* [1986] ICJ Rep 554 [40]; similarly, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Merits) [2022] ICJ Rep 266 [229].

[209] eg Paolo Palchetti, 'Evolutionary Interpretation and Unilateral Acts of States and International Organizations' in Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau, and Clément Marquet (eds), *Evolutionary Interpretation and International Law* (Hart 2019) 91, 96-97.

[210] cf *Nuclear Tests (AF)* (n205) [51]; *Nuclear Tests (NZF)* (n205) [53]; *Armed Activities (CR)* (n207) [49]; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12 [229]; *Obligation to Negotiate Sovereign Access to the Pacific Ocean* (n185) [146]-[148]; *Sovereign Rights and Maritime Spaces* (Merits) (n208) [229].

[211] *Nuclear Tests (AF)* (n205) [44]; *Nuclear Tests (NZF)* (n205) [47]; *Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (n210) [229]; *Sovereign Rights and Maritime Spaces* (Merits) (n208) [229].

interpreted in a restrictive manner.'[212] By contrast, in the relevant context of reservation to treaties, the ILC abstained from formulating a guideline to this effect.[213]

The Court's case law is silent on the reasons that elicit these discrepancies. One theorietical reason to explain the disparity in the two approaches is a latent docrtinal distinction between unilateral acts of states based on their subject-matter.[214] In this respect, one particulary prevalent approach classifies unilateral acts into 'autonomous' and 'non-autonomous' depending on whether they acquire independent legal status in international law or they derive their binding character from another rule especially treaties.[215] This approach could explain the practice of the ICJ so far, but fails to provide guidance as to the criteria that guide the determination of whether a unilateral act is connected to another source and thus whether it is autonomous or not.[216] It thus appears more likely that the ICJ uses different criteria because there are different juridical operations at play. On the one hand, one set of criteria apply in the identification of the binding character of unilateral acts which aims to the establishment of the intention of the declaring states to be bound by the act. To this end, the Court stresses that the binding character of a unilateral declaration cannot be presumed entailing a restrictive approach to the text of the declaration.[217] The Court clearly and unreservedly considers all the circumstances surrounding the declaration on par with the text of the declaration, not unlike cases relating to the determination that an instrument constitutes a binding agreement.[218] On the other hand, a different set of criteria apply to the interpretation of a unilateral act whose binding character has already been determined. In this respect, the difference of the Court's approach with respect to optional declarations under Article 36(2) ICJ Statute does not orginate from the special character of these acts, but on the mere fact that the process of identification of their binding character does not arise in practice. In this case, the interpretative process is more analogous to treaty interpretation with some modification to account for the unilateral

[212] GPUD, Principle 7.

[213] GPRT, Guideline 4.2.6.

[214] For an account of the different classifications see eg Kassoti, Juridical (n185) 34-42.

[215] eg Eva Kassoti, 'Interpretation of Unilateral Acts in International Law' (2022) 69 NILR 295, 303; Saganek (n185) 59-67.

[216] For examples of this complication see Chapter 2, Section II on investment tribunals.

[217] See n211; also Christian Eckart, *Promises of States under International Law* (Hart 2012) 212-214.

[218] eg *Aegean Sea* (n54) [96]; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [23]; *sub silentio, Land and Maritime Boundary (Cameroon v. Nigeria; Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303 [258], [262]-[263].

character of these acts, since '[t]o solve differences on interpretation, appeal must be made to a non-subjective standard'.[219] Arguably, this shift of approach is not mere casuistry, but grounded in a common principle

> Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[220]

Therefore, whereas a restrictive approach might be sustainable at the level of identification, there is no evidence that such an approach is applicable in the process of interpretation of unilateral declarations whose bindingness is undisputed.[221]

2. Interpretation of Binding Acts of International Organisations

The question of the interpretation of binding acts of international organisations has arisen less often before the ICJ and its case law centres around the interpretation of UN Security Council Resolutions.[222] In this respect, the Court has stated

> [t]he Court must recall several factors relevant in the interpretation of resolutions of the Security Council. While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account…The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[223]

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[219] Martti Koskenniemi, *From Apology to Utopia* (1989, reissue CUP 2006) 346; also Eckart (n217) 214-218.
[220] *Nuclear Tests (AF)* (n205) [46]; *Nuclear Tests (NZF)* (n205) [49].
[221] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 466.
[222] Palchetti (n209) 97-98.
[223] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 [94].

What is clear from this pronouncement is that the interpretation of Security Council Resolutions is not governed by Article 31 and 32 VCLT.[224] Whilst the VCLT rules of interpretation provide guidance, the overlap cannot be complete because

> Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States.[225]

That said, the Court has not indicated how exactly these considerations bear on the process of interpretation and how exactly this process differs from the rules of treaty interpretation.

For the most part, the practice of the Court affirms that the core elements of interpretation of Security Council Resolutions do not differ from the key elements of Article 31(1) VCLT. As an eminent commentator put it, the interpretation of Security Council Resolution depends, *inter alia*, 'on the ordinary and natural meaning which is to be given to its terms when read in the context of the resolution as a whole and in the light of its object and purpose'.[226] First, a crucial difference relates to what materials external to the resolution must be taken into account given the special characteristics of its author.[227] For the most part, the Court considers under this rubric the prior, contemporaneous, or subsequent resolutions of the Security Council in a way that fuses interpretative materials largely envisaged in Articles 31(2), (3)(a) and (b), and, possibly, 32 VCLT.[228] Second, and relatedly, this discrepancy might also have a bearing on the determination of the 'object and purpose' of a resolution.[229] For instance, in *Kosovo* advisory opinion, the Court also took into account the presentation of the Secretary General before the Security Council on the day the resolution in question was adopted in addition to the

[224] Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20 MPYUNL 1, 14.
[225] *Kosovo AO* (n223) [94].
[226] Wood, Revisited (n224) 15.
[227] Efthymios Papastavridis, 'Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis' (2007) 56 ICLQ 83, 101-102.
[228] eg *Kosovo AO* (n223) [113]-[116]; *Namibia AO* (n62) [115]; for an earlier analogous finding see *Access to German Minority Schools in Upper Silesia* (Advisory Opinion) [1931] PCIJ Ser A/B No 40, 18.
[229] Papastavridis (n227) 102-105.

text of the resolution and its annexes.[230] Third, it has been suggested that an interpreter may not take into account 'any relevant rules of international law' analogously to Article 31(3)(c) VCLT due to the operation of Article 103 UN Charter, although the ICJ has clearly reserved its position on the matter.[231]

Another important question with respect to the interpretation of Security Council resolutions relates to the configuration of the interpretative process and specifically whether there is a distinction between principal and supplementary means of interpretation in a way analogously to Articles 31 and 32 VCLT. Thus, in *Namibia* advisory opinion, the Court held

> The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council.[232]

In *Kosovo* advisory opinion, the Court enunciated that '[w]hen interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances[;] [t]he language used by the resolution may serve as an important indicator in this regard.'[233] That said, the Court has not indicated so far that any distinction between principal and supplementary means of interpretation applies, whereas it is clear that the institutional practice of the Security Council has been considered more than 'supplementary' for the interpretation of resolutions.[234] That said, it is noteworthy that the *Kosovo* advisory opinion did not refer to 'statements by representatives of members of the Security Council made at the time of

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[230] *Kosovo AO* (n223) [95].

[231] Wood, Revisited (n224) 34; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Provisional Measures) [1992] ICJ Rep 3 [39]-[40]; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)* (Provisional Measures) [1992] ICJ Rep 114 [42]-[43].

[232] *Namibia AO* (n62) [114].

[233] *Kosovo AO* (n223) [117].

[234] Wood, Revisited (n224) 34-35.

their adoption' in its reasoning on the interpretation of the relevant resolution, despite announcing them as relevant interpretative materials.[235] The extent to which these statements have the same bearing on the interpretative outcome remains to be clarified in the jurisprudence of the Court.

The practice of the ICJ so far appears far too focused and case-specific to draw overarching conclusions about its interpretative approach towards resolutions of international organisations more generally. On the one hand, the VCLT rules of interpretation appear to exert some normative pull as to the identification of the key elements of the interpretative process. On the other hand, the practice of the Court demonstrates that such rules apply only analogously to the extent that they can accommodate the different authors of these acts. At this stage of development of the Court's practice, the exact contours of this analogy have not fully formed with respect to the precise content of the elements of the interpretative process and its configuration.

III. Interpretation of Unwritten International Law in the Practice of the ICJ

1. Identification and Interpretation of Unwritten International Law

Besides rules emanating from written sources of international law like treaties and binding acts of international organisations, it is trite that the Court may also apply rules of emanating from unwritten sources, customary international law and general principles of law.[236] The purpose of this section is not to comprehensively scrutinise the practice of the ICJ as to the determination of rules of unwritten international law in its entirety; this has been done many times before.[237] Rather, this section seeks to codify to the extent possible the practice of the Court relating to the interpretation of these rules, that is, separate from the identification of these rules.

Just by a way of a short reminder, the identification of customary international law and general principles of law is in principle an empirical inductive process in that it draws general

[235] *Kosovo AO* [94]-[120].

[236] Arts 38(1)(b) and (c) ICJ Statute.

[237] eg, more recently, Guillaume de Floch, 'La coutume dans la jurisprudence de la Cour Internationale de Justice en Droit de la Mer' (2001) 4 Revue Juridique de l'Ouest 535*ff*; Peter Tomka, 'Custom and the International Court of Justice' (2013) 12 LPICT 195*ff*; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417*ff*.; Pellet and Müller, 'Article 38' (n205) 902-931.

conclusions from how relevant actors behave.[238] The identification of a rule of customary international law requires the establishment of 'general practice, accepted as law', whereas that of a general principle of law necessitates a finding of 'recognition by civilized nations'.[239] In this context, it has been maintained in theory that it is impossible to identify a rule of unwritten international law without, at the same time, determining its content.[240] Conversely, rules of unwritten law are not amenable to interpretation, this operation presupposing the existence of a text.[241] Commentators have also proposed that customary international law—and, theoretically, general principles of law—is inherently dynamic constituted by only the sum of all state practice and *opinio juris*—or, theoretically, recognition in domestic legal systems—at any given time.[242] As a corollary, the determination of the content of a rule depends on the very same means as the identification of a rule and requires the establishment of State practice and *opinio juris* or of recognition and transposability, as the case may be.[243]

That said, the idea that both the existence and the determination of the content unwritten international law begins and ends within the confines of a purely inductive examination of evidence is misguided. Of course, the present study does not purport to mount a comprehensive theoretical defence of interpretability of unwritten international law; this has also been done before.[244] However, two points of the ICJ practice are important. First, in several cases before the ICJ, the existence of a rule of unwritten international law was not at all in dispute, but only

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[238] eg Daniel Bodansky, 'Customary (And Not So Customary) International Environmental Law' (1995) IJGLS 105, 109.

[239] Arts 38(b) and (c) ICJ Statute; see, eg, *Continental Shelf (Libya/Malta)* (Judgment) [1985] ICJ Rep 13 [27] ('It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States…'); *Barcelona Traction, Light and Power Company, Limited (New Application: 1962)(Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3 [50] ('rules generally accepted by municipal legal systems'). On the obsolescence of the term 'civilized nations' see, eg, *North Sea Continental Shelf (Federal Republic of Germany/Denmark)* (Separate Opinion of Judge Ammoun) [1969] ICJ Rep 100, 132-135.

[240] eg Maarten Bos, *A Methodology of International Law* (Asser 1984) 109.

[241] eg Tullio Treves, 'Customary International Law' [2006] MPEPIL [2].

[242] eg Massimo Lando, 'Identification as the Process to Determine the Content of Customary International Law' (2022) 42 OJLS 1040, 1048-1049; Katie Johnston, 'Changing custom: identification of state practice and opinio juris in the context of existing customary international law' (*ESIL Reflections*, forthcoming) available at: <https://livrepository.liverpool.ac.uk/3165069/1/KJohnston Changing Custom 23.9.22.pdf>; Maurice Mendelson, 'The Formation of Customary International Law' (1998) 272 Receuil des Cours 161, 192

[243] CICIL, Conclusion 2; ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc A/CN.4/741 [112] and [171].

[244] eg Merkouris (n106) 231-301; Albert Bleckmann, 'Zur Rechtstellung und Auslegung von Völkergewohnheitsrecht' (1977) 37 ZaöRV 504*ff.*; Orakhelashvili (n221) 496-510; Denis Alland, 'L'interprétation du droit international public' (2013) 362 RdC 47, 74-88; Orfeas Chasapis Tassinis, 'Customary International Law: Interpretation from Beginning to End' (2020) 31 EJIL 235*ff*; Nina Mileva, *A Theory of Interpretation of Customary International Law* (PhD Thesis, University of Groningen, 2023).

its content.[245] Second, and more conspicuously, there is a tendency of the ICJ to use occasionally broad rules or principles of international law to effect a determination of an applicable rule in cases where there is little or conflicting evidence.[246] So, with respect to the identification of customary international law, the ILC has concluded that 'the two-elements approach does not preclude an element of deduction as an aid' particularly 'when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law or when concluding that possible rules of international law form part of an "indivisible regime"'.[247] More emphatically, the current special rapporteur on general principles of law has opined that 'deduction is…the main criterion to establish the existence of a legal principle that has a general scope'.[248] The terminology of deduction within the framework of identification of rules of unwritten international law—or, more vaguely, between 'traditional' and 'modern' custom—are too imprecise to capture the essence of the processes at play.[249] It artificially implies the absence of an intermediate step between identification of a rule of customary international law or general principle of law and its application.[250] More importantly, the characterisation of this line of reasoning as mere deduction has been explicitly resisted by a chamber of the Court in unambiguous terms requiring that the existence of customary rules must be 'tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas'.[251]

This section draws from the practice of the ICJ to make a heuristic argument that these considerations provide only a partial view of the Court's methodology. As will be shown, the

[245] CICIL Commentary to Conclusion 1 [4]; also *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)* [2022] ICJ Rep 614 [102].
[246] eg Talmon (n237) 421-423; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 182 ('new situation'); *Libya/Malta* (n239) [44] ('practice, however interpreted, falls short of proving the existence of a rule').
[247] CICIL Commentary to Art 2 CICIL [5].
[248] ILC, Second Report (n9) [168].
[249] eg Talmon (n237) 423-427; Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 HLR 539*ff.*; Wilfred Jenks, *The Prospects of International Adjudication* (Stevens and Sons 1964) 617-662; Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757*ff.*
[250] cf, eg, Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 34-36; Matthias Herdegen, 'Interpretation in International Law' [2020] MPEPIL [63].
[251] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* [1984] ICJ Rep 246 [111].

identification of a rule of unwritten international law involves often the formulation of a normative proposition whose legal pedigree is tested against evidence of State practice and *opinio juris* or of recognition and transposability, as the case might be. This is the process of identification that focuses on law-ascertainment. Yet, this process constitutes more often than not just a starting point. The ICJ proceeds to interpret the normative proposition it has identified as the rule of unwritten international law. This constitutes interpretation proper as content-determination.[252]

The Court has never explicitly spelled out a hard and fast distinction between identification and interpretation of unwritten international law, still less enunciated in a comprehensive manner what are the means of the process of interpretation of unwritten international law in a way akin to treaty interpretation. In fact, in *Nicaragua*, the Court rather cryptically stated that '[r]ules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation'.[253] The section that follows will flesh out these methods of interpretation juxtaposing, where appropriate, with the use of similar means within the process of identification. It will argue that its practice so far strongly implies that an interpretative process analogous to the one of treaty interpretation is at play as part of the determination of the content of rules of unwritten international law, but also will discuss any potential differences between treaty interpretation and the interpretation of unwritten international law.

2. Interpretation of Unwritten International Law in the Practice of International Investment Tribunals

i. Textuality of Unwritten International Law and Textual Interpretation

Paradoxically, one of the principal and frequent means of interpretation of unwritten international law in the practice of the ICJ is an inquiry of the 'ordinary meaning of the terms' of a text. As will be shown, the textuality of unwritten international law is an upshot of the Court's approach toward the identification of unwritten international law on the basis of an inductive

[252] See, eg, Jean d'Aspremont, 'The International Court of Justice, the Whales, and the Blurring of the Lines between Sources and Interpretation' (2016) 27 EJIL 1027, 1028-1029; for different and somewhat confusing terminology of 'existential' interpretation intended to denote the assessment of evidence in the process of identification see, eg, Duncan B Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 78*ff*.

[253] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 16 [178]; in almost identical terms: Robert Y Jennings, 'The Progressive Development of International Law and its Codification' (1947) 24 BYBIL 301, 305.

examination of evidence to test the pedigree of a stated legal proposition. Once the pedigree of this proposition is tested and verified, the Court proceeds to resolve ambiguities on the basis of interpretation though the application of known interpretative means, *inter alia*, the ordinary meaning of the terms of such proposition.

To start, although the identification of rules of unwritten international law hinges upon an 'inductive' examination of evidence, this does not mean that it takes place in a total vacuum.[254] Indeed, to effect an inductive analysis, a normative proposition is necessary which is often informed by the arguments of the parties or even rules and principles of international law.[255] Thus, for instance, the ICJ in *Jurisdictional Immunities*, the ICJ observed that '[s]tates generally proceed on the basis that there is a right to immunity under international law' which also derived from the principle of sovereign equality of states as reflected in the UN Charter.[256] This enabled the Court to focus its analysis on testing whether evidence of state practice and *opinio juris* supported the exceptions to states immunity claimed by Italy.[257] This approach becomes more evident in the case of 'codified' rules.[258] Specifically, the Court has on many occasions relied upon treaties, resolutions of international organisations, and ILC outputs to formulate this proposition.[259] Still, in principle, it is the conduct of states in relation to these instruments that has probative value for the determination of unwritten international law.[260] Thus, with respect to treaties, the Court has occasionally examined circumstantial evidence such as the *travaux préparatoires*, reservations, and the practice of non-parties, particularly those which are specially affected, to determine whether a treaty provision reflects a rule of unwritten international law or at the very least whether such rule is opposable against a party in a specific dispute.[261] The Court has taken into account similar considerations with respect to

[254] Schwarzenberger (n249) 563-566; CICIL Commentary to Conclusion 2 [5]; ILC, Second Report (n9) [11].

[255] eg Katie Johnston, 'The Nature and Context of Rules and the Identification of Customary International Law' (2021) 32 EJIL 1167, 1176-1181.

[256] *Jurisdictional Immunities of the State* (n140) [56]-[57].

[257] ibid [80]-[108]; similarly, eg, *Lotus* (n18) 18-19; *Asylum (Colombia/Peru)* [1950] ICJ Rep 266, 278-277; *Rights of Nationals* (n61) 199-201.

[258] eg Tomka (n237) 202.

[259] CICIL, Conclusions 11 and 12 and General Commentary to Part VI [2]; also, Tomka (n237) 203.

[260] CICIL, Commentary to Conclusion 11 [2], Commentary to Conclusion 12 [4], General Commentary to Part VI [2].

[261] eg *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)* [1969] ICJ Rep 3 [89]; *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) [1974] ICJ Rep 3 [52]; *Fisheries Jurisdiction (Germany v Iceland)* (Merits) [1974] ICJ Rep 175 [44]; *Nicaragua* (Merits) (n253) [184].

resolutions of international organisations and, especially, resolutions of the UN General Assembly.[262] According to the Court,

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule. [263]

Along similar lines, ILC outputs are not as such binding.[264] Whether a specific normative proposition contained in an ILC output reflects unwritten international law depends, in the first place, on the evidence the ILC adduces for its existence and, in the final analysis, upon its subsequent reception by states.[265] More generally, the process of identification very often does not proceed 'by distilling a rule from instances of practice by pure induction, but rather considering whether instances of practice support the written rule'.[266] This is so notwithstanding the fact that the Court has omitted on several occasions this part of the reasoning giving the impression of merely asserting that certain normative proposition has the status of unwritten international law.[267]

The overlooked point is that such process of identification of a rule of unwritten international law is often just a part of the Court's reasoning on the determination of this rule. To be sure, there are several cases in which the Court proceeds to apply the written instantiation

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[262] eg *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Merits) [2005] ICJ Rep 168 [244].

[263] eg *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1997] ICJ Rep 226 [70]; *Legal Consequences from the Separation of the Chagos Archipelago to Mauritius* (Advisory Opinion) [2019] ICJ Rep 95 [151].

[264] eg David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857, 858.

[265] eg *North Sea Continental Shelf* (n261) [62] and [85]; *Silala* (n245) [111].

[266] Tomka (n237) 206.

[267] Talmon (n237) 434-440; eg, *compare Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (n210) [295] *with Territorial and Maritime Dispute (Nicaragua v Colombia)* [2007] ICJ Rep 624 [26].

of the rule of unwritten international law to the facts of the case without further explanation.[268] Cases like these could be construed as evidence that there is no intermediate step between identification of rules of unwritten international law and its application.[269] However, they could also be construed as instantiation of its analogous practice to apply treaty terms whose ordinary meaning it deems sufficiently clear.[270] In this respect, the practice of the Court suggests that the identification of a text as an articulation of a rule of unwritten international law enables it to construe the formally unwritten rule in accordance with the ordinary meaning of the terms used in its textual articulation.[271] To illustrate this point, in *Gabčikovo-Nagymaros*, the Court, after declaring the customary character of the defence of necessity, found that 'the existence of a state of necessity must be evaluated in the light of the criteria laid down by the [then] Article 33 of the Draft Articles on the International Responsibility of States' recording the parties' agreement to that effect.[272] It then proceeded to construe the criterion of 'essential interest…within the meaning given to that expression in Article 33'.[273] More conspicuously, the Court reasoned

> [t]he word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility".[274]

From the traditional viewpoint on the determination of unwritten international law, this literal and grammatical construction of the customary defence of necessity appears at first untenable, if not plainly absurd. In the event, the Court treated the ILC draft article as materially identical

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[268] eg *Difference Relating to Immunity from Legal Process of Special Rapporteur of the Commission of Human Rights* (Advisory Opinion) [1999] ICJ Rep 62 [62]; *Wall* AO (n143) [140]; *Armed Activities (CO)* (Merits) (n262) [160]; *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* (Compensation) [2012] ICJ Rep 324 [13].

[269] See n250 and text.

[270] See n38 and text.

[271] For the theoretical point, see eg Bleckmann (n244) 525-526; Orakhelashvili (n221) 498.

[272] *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 [50]-[51].

[273] ibid [53].

[274] ibid [54].

to the rule of unwritten international law and deemed that the determination of the ordinary meaning of its terms would lead to a determination of the content of that rule. Conversely, in *Barcelona Traction*, the Court could not establish that the expression 'interests' used in treaties conclusively reflected the content of customary international law. It then declared that 'for the purpose of interpreting the general rule of international law concerning diplomatic protection, which is its task, it has no need to determine the meaning of the term interests'.[275] This *dictum* strongly implies not only that the interpretation of unwritten international law is at play, but also that this process necessitates an inquiry into the ordinary meaning of terms where appropriate.

The Court has not laid out a methodology for determining the ordinary meaning of terms in this context. Besides, as has been shown, the Court has adopted for the most part a context-specific approach to the determination of ordinary meaning of terms even with respect to the interpretation of treaties or unilateral acts for that matter.[276] When it comes to the interpretation of rules of unwritten international law reflected in treaties or acts of international organisations, the Court has on occasion drawn inferences from the terms used in that instrument.[277] With respect to ILC outputs, the Court has also on occasion referred to ILC's commentary in a way that alludes to an ordinary meaning investigation. So, for instance, in *Bosnia Genocide*, the Court stated that '[t]he expression "State organ", as used in customary international law and in Article 4 of the ILC Articles, applies to one or other of the individual or collective entities which make up the organi[s]ation of the State and act on its behalf'.[278] That said, the Court has not deemed necessary to justify its departure from such materials in cases where it has formed its own view on the ordinary meaning of the terms of the rule of unwritten international law. So, in *Construction of a Road*, the Court considered that the ILC's views as to the definition of 'significant' in the context of the customary obligation to prevent significant transboundary harm was unfounded and proceeded to apply the term as requiring 'a sort of

[275] *Barcelona Traction* (n239) [54].
[276] See Section I.2.ii and II.
[277] eg *Nicaragua* (Merits) (n253) [205] and [220].
[278] Similarly, eg *Bosnia Genocide* (Merits) (n71) [388] citing ARSIWA Commentary to Art 4 [1]; similarly, *Gabčikovo-Nagymaros* (n272) [53].

critical level in terms of its detrimental effects'.[279] The fact that these instruments only constitute reflections of unwritten rules militate for additional weight to be put on the 'ordinary meaning' of terms. Arguably, the countervailing concept of a 'special meaning' to Article 31(4) VCLT cannot apply analogously in the case of interpretation of unwritten international law because the authors of these texts do not necessarily coincide with the personal scope of the rule. As a corollary, the determination of their intention is less relevant in the context of interpretation of unwritten international law as opposed to treaty interpretation, still less compared to the process of identification of such rules where it is crucial for the establishment of *opinio juris* or generality/transposability.[280]

To sum up, the practice of the ICJ provides evidence that the affirmation of a certain normative proposition as a reflection of unwritten international law entails the treatment of the text of that proposition as an authoritative statement of the rule. This allows the Court to approach formally unwritten international law through a textual lens akin to 'ordinary meaning' interpretation in the context of treaties. The question that further arises is whether other elements of its interpretative process with respect to treaties also feature in its jurisprudence with respect to the interpretation of unwritten international law and what is the bearing of these considerations to the interpretative outcome.

ii. Context and Object and Purpose as Means for the Interpretation of Unwritten International Law

Apart from a textual approach, the Court also employs other means for the interpretation of the content of the rules of unwritten international law, once the process of identification is completed. These means have been construed by commentators variably as different types of identification through deduction,[281] although, as will be shown, a more systematic view suggests that they correspond largely to the elements of the rules of interpretation applicable to treaties or unilateral acts.[282] Of course, the consideration of the process of interpretation of unwritten

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[279] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* [2015] ICJ Rep 665 [190] and [192].

[280] See, similarly, Merkouris (n106) 267.

[281] See, eg, Talmon (n237) 423-427; Massimo Lando, 'The Limits of Deduction in the Identification of Custom' [2023] Asian Journal of International Law <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/limits-of-deduction-in-the-identification-of-customary-international-law/6BF054F72D1DCC1DA760DA6EDADFD5E6> 10-16.

[282] See, eg, Bleckmann (n244) 525; Orakhelashvili (n221) 498; Merkouris (n106) 263-267.

international law against the backdrop of the rules of treaty interpretation does not mean that these rules have been used by the Court without modification.[283] One problematic aspect in respect to the interpretation of unwritten international law is the definition of the key elements of 'context' and 'object and purpose' of the rule of unwritten international law whose interpretation is sought. Another question is also the relative value of these elements in the interpretative process of unwritten international law. The Court has approached these issues so far on a case-by-case basis avoiding any overarching statements of principle.

From a theoretical perspective, the extrapolation of the role of 'context' in the process of interpretation of unwritten international law is complicated by the problem of individuation of these rules.[284] As we have seen, in the rules of treaty interpretation, 'context' consists of certain interpretative materials defined largely on the basis of their proximity to the treaty terms whose interpretation is sought.[285] In principle, a finding that a written normative proposition reflects a rule of unwritten international law allows the consideration of the immediate and broader context of that normative proposition in determining its content. For instance, in *Bosnia Genocide*, the Court affirmed that the provision of the ILC Articles on State Responsibility relating to the attribution of conduct of private persons under the instructions, direction, or control of the state reflected customary international law.[286] Yet, a purely inductive analysis brought to the fore a conflict between its own previous pronouncements on the notion of control and findings of other courts applying a laxer test.[287] To resolve the impasse the Court referred to the context of the rule consisting of 'the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf'.[288] In this case, the Court had conclusively

[283] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Merits) (Dissenting Opinion of Judge Charlesworth) 2023 <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-07-en.pdf> [11].

[284] See, eg, Chasapis Tassinis (n244) 262.

[285] Art 31(2) and, in a non-technical sense, (3)(a)-(c) VCLT; see Sections I.3.iii-v.

[286] *Bosnia Genocide* (Merits) (n71) [398]

[287] *Nicaragua* (Merits) (n253) [115]; see, notably, *Maffezzini v Spain* (Decision on Jurisdiction of 25 January 2000) ICSID Case No ARB/97/7 [77]-[82]; *Tadić* (Judgment) IT-94-1-A, AC (15 July 1999) [117]-[120]; ARSIWA Commentary to Art 8 [5].

[288] *Bosnia Genocide* (Merits) (n253) [406]; see Art 1 ARSIWA.

decided the status of both rules as customary international law; it merely relied on the general rule as context from the interpretation of the more special one.[289]

That said, the interpretative materials that can be taken into account in the context of treaty interpretation as context do not necessarily coincide with those that constitute the 'context' of the rule of unwritten international law for the purposes of its interpretation. To illustrate this point, in a recent case, the Court was called upon to decide whether a state's entitlement to outer continental shelf under customary international law can extend within 200 nautical miles from another state's baselines.[290] The Court declared that customary international law as reflected in Article 76(1) LOSC lays down two criteria to determine a state's entitlement to continental shelf, namely, the 200-nautical-miles criterion and the geological criterion which results to an entitlement to outer continental shelf.[291] To determine the content of the latter criterion, the Court took note of the fact that the substantive and procedural conditions for determining the outer limits of the continental shelf laid down in Articles 76(4)-(9) LOSC 'were the result of a compromise'.[292] The Court also emphasised the obligation of the coastal state to make contribution to the International Seabed Authority in respect to the exploitation of the outer continental shelf.[293] According to the Court, 'such a payment would not serve the purpose of this provision in a situation where the extended continental shelf of one State extended within 200 nautical miles from the baselines of another State.'[294] From the perspective of treaty interpretation, the Court's approach constitutes a straightforward instantiation of the general rule of treaty interpretation.[295] Yet, from the perspective of the interpretation of unwritten international law, it is questionable whether 'context' can comprise treaty rules whose customary status has not been conclusively affirmed.[296] In any case, the Court's approach strongly suggests that the qualification of certain interpretative materials as 'context' for the interpretation

[289] cf, on this point, n247 and text.

[290] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Merits) 2023 <https://www.icj-cij.org/sites/default/files/case-related/154/154-20230713-jud-01-00-en.pdf> [54].

[291] ibid [75].

[292] ibid [76]

[293] ibid.

[294] ibid.

[295] See above Section I.2.iii.

[296] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast* (Merits) (SO Charlesworth) (n283) [15].

of a rule of unwritten international law hinges, at least partly, on the determination that they form together an 'indivisible régime'.[297]

As becomes apparent, the interpretation of a rule of unwritten international law in its 'context' bears conceptual and structural similarities with the element of treaty interpretation reflected in Article 31(3)(c) VCLT and, indeed, commentators label this element as 'systemic' interpretation.[298] In retrospect, the findings of the ICJ in *Corfu Channel* can also be understood in this light. In that case, the Court was called upon to determine whether Albania had a duty to notify foreign ships about the existence of mines in its territorial sea. The Court found that the explicit provision of the Hague Convention VIII on the duty to notify the existence of minefields in times of war was inapplicable in the case, despite being binding upon the parties to the dispute.[299] However, it found that 'certain general and well-recognized principles' were applicable in the case, most notably, 'elementary considerations of humanity, even more exacting in times of peace than in war; the principle of the freedom of maritime communication; and every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states'.[300] In methodological terms, it is possible to argue that the Court interpreted these principles in light of the provision of the Hague Convention VIII.[301] More generally, the notion of 'relevance' seems to have equal, if not more prevalent, bearing on the determination of rules that can be considered as 'context' of the rule of unwritten international law whose interpretation is sought.[302]

That said, the Court has not limited itself only to the consideration of 'context'. In interpreting a rule of unwritten international law whose status is undisputed, the ICJ has also referred or alluded to the 'object and purpose' of that rule.[303] For instance, in *Burkina Faso/Mali*, the Court proceeded to declare that *uti possidetis*

[297] cf CICIL Commentary to Art 2 CICIL [5].
[298] See, eg, Bleckmann (n244) 525; Orakhelashvili (n221) 498; Merkouris (n106) 263-267.
[299] *Corfu Channel* (Merits) (n98) 22.
[300] ibid.
[301] along similar lines, *Ahmadou Sadio Diallo (Guinea v DRC)* (Preliminary Objections) [2007] ICJ Rep 582 [39].
[302] cf nn 112-117 and text.
[303] eg Bleckmann (n244) 528; Orakhelashvili (n221) 498; Merkouris (n106) 269-270.

> [i]t is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.[304]

In the context of the case, the Court invoked the purpose of the principle to affirm its general applicability, although this finding could be considered *obiter*.[305] What remained obscure in the reasoning of the Court is how it determined the object and purpose of the *uti possidetis* principle.[306] A tentative indication in this respect are pronouncements of the Court with respect to the award of interest in cases of pecuniary awards. In this context, the Court has indicated that 'in the practice of international courts and tribunals…interest may be awarded if full reparation for injury…so requires'.[307] This allowed the Court to concluded that 'interest is not an autonomous form of reparation, nor a necessary part of compensation'.[308] More systematically, in *Arrest Warrant*, the Court enunciated in categorical terms that 'in international law it is firmly established that… certain holders of high-ranking office in a State, such as…Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal'.[309] It then went on to state that '[i]n customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.'[310] In the event, the Court determined the object and purpose by reference to the preambles and the provisions of the Vienna Convention on Diplomatic and Consular Relations, as well as a provision of the Convention of Special Missions, and then went on to interpret the customary rule in light of this object and purpose, notwithstanding the absence of conclusive evidence about the scope of immunities of foreign ministers.[311] This juridical operation bears striking similarities with

[304] *Frontier Dispute* (n208) [20].
[305] ibid; for a similar pronouncement, see, eg *Fisheries (United Kingdom v Norway)* [1951] ICJ Rep 116, 133.
[306] Lando, Identification (n242) 1055.
[307] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* (Compensation) [2018] ICJ Rep 15 [151]; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Reparations) [2022] ICJ Rep 13 [401].
[308] ibid.
[309] *Arrest Warrant of 11 April 2001 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 [51]; see, along similar lines, *Bosnia Genocide* (Merits) (n253) [392].
[310] ibid [53].
[311] ibid; cf also the findings of the Court in *Corfu Channel* (Merits) (n98) 22.

the interpretation of treaty terms in light of the object and purpose of the treaty.[312] To effect such an approach, the Court relies on a broader normative proposition whose status has already determined.[313] However, it may also rely on more general considerations, extracted from evidence such as preambles or final acts, which may lack individually 'a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[314]

What emerges from this analysis is that the Court often resolves ambiguities about the content of unwritten international law not by reference to evidence of state practice and *opinio juris*, but by the employment of interpretative means akin to the process of treaty interpretation. At the same time, as the recent *Nicaragua v Colombia* judgment attests, there is an increasing awareness of, and controversy about, the methodological questions relating to the interpretation of unwritten international law as separate from its identification. In the current stage of its case law, the Court has not clearly spelled out the ways in which these key elements of 'context' and 'object and purpose' can be defined in the context of interpretation of unwritten international law. What is more, the Court's methodological ambiguity as to the interpretation of unwritten international law is also reflected on the fact that, much like the PCIJ with respect to the interpretation of treaties, it has not 'establish[ed] any rigid timetable for the various steps in the process of interpretation'.[315] At this incipient stage, the approach of the Court is still fragmented as to whether certain materials constitute 'supplementary' means of interpretation of unwritten international law.[316]

Interim Conclusion

It is trite that the ICJ holds an illustrious role in the international legal profession that is bolstered by its unique institutional role as the principle judicial organ of the United Nations, not least broader *desiderata* about the capacity of the legal profession to shape reality on the global level. As a corollary, the ICJ's authority to make determinations about the existence and content of rule of international law is virtually unparalleled by any other judicial institution. Interpretation of international law constitutes the eminent domain of judicial institutions with the ICJ being the *primus* even *inter* formally *pares*. Still, at the very least, the practice of the ICJ

[312] See above Section I.2.iv.

[313] cf CICIL Commentary to Art 2 CICIL [5].

[314] *North Sea Continental Shelf* (n261) [72]; for such an approach see eg *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)* (Separate Opinion of Judge Tanaka) [1969] ICJ Rep 172, 181.

[315] Hudson (n16) 651.

[316] See nn279-280 and text.

is highly instructive as to how claims to authority take an international legal form and how this process gradually turns into structural limitations.

Indeed, the practice of the ICJ and its predecessor institution, the PCIJ, attest to the formal and normative character of the juridical operation of interpretation of international law. The formality and normativity of interpretation is, of course, evident in the interpretation of treaties where the combined practice of the PCIJ and the ICJ constituted the unambiguous backdrop for the development of operative rules of interpretation. In this context, the subsequent acclamation of the rules of treaty interpretation in the practice of the ICJ have rendered them an indispensable part of the international legal argument and decision-making alike. At the same time, the formal and normative character of the rules of treaty interpretation does not mean that the process of treaty interpretation is formulaic. Indeed, as we have seen, the practice of the ICJ attests to the composite character of this operation that calls for the combined consideration of equally significant elements. At the same time, the normativity of the operation becomes apparent in the affirmation of the Court's practice that certain means are only 'supplementary' in the process of treaty interpretation. Yet, as we have seen, this is only a category of interpretative means; the assessment of the value of interpretative materials also depends on the content of such materials and its proximity or relevance to the treaty in question.

The present study has also traced in the practice of the ICJ a parallel tendency towards the consolidation of a formal and normative approach towards the interpretation of binding unilateral acts of states and international organisations, as well as rules of unwritten international law. At the same time, the Court has been reticent so far to clearly articulate the rules that govern this process of interpretation. One complicating factor in this respect has been the reticence of the Court to clearly delimit the process of identification of a rule of international law from its interpretation in a manner analogous to the law of treaties. As has been shown, this distinction is latent in its jurisprudence relating to unilateral acts and only suggested in the context of unwritten international law. Another complicating factor is that the rules of treaty interpretation cannot be transposed unaltered to rules emanating from these sources, that is, without taking into account the differences in their creation, modification, and extinction. On the one hand, as we have seen, the Court has readily endorsed an approach to interpretation reflecting largely the key elements of 'ordinary meaning', 'context', 'object and purpose', and 'circumstances of formation'. On the other hand, these elements comprise different interpretative materials depending on the source of the rule to be interpreted.

The formal and normative character of the process of interpretation in the Court's jurisprudence is also reflected in the ways in which rules of interpretation operate as limitations to the Court's reasoning and occasionally as standards that enable dialogue between its members. In the context of treaty interpretation, the consolidation of the VCLT rules of interpretation has certainly reaffirmed the importance of a textual approach to treaty interpretation, but also exposed the limitations of literalism or grammaticism in this process.[317] Along similar lines, in the context of unilateral acts, the subsequent practice of the Court seem to be perplexed by its non-committal finding as to the determination of 'the intention of being bound' and, particularly, the methodological directive that 'the intention is to be ascertained by interpretation of the act'.[318] To be sure, the *dictum* in its context is methodologically sound insofar as it suggests that the evaluation of the binding character of a unilateral act involves the use of interpretative means in a manner akin to interpretation. Nonetheless, it creates unnecessary confusion between identification of the binding character or a unilateral act and the interpretation of this act whose most conspicuous instantiation is the ostensible applicability of the rule of restrictive interpretation to binding acts.[319] At the same time, the piecemeal approach of the interpretation of Article 36(2) ICJ Statute declarations has led to distortions in other fields where the process of identification rather than interpretation is at play.[320] This ambiguity is amplified in the context of unwritten international law. In this context, the Court's reticence to acknowledge specifically when it engages into interpretation instead of identification of unwritten international law has led to inconsistencies. Most notably, the Court's ambivalence led to the misunderstanding of 'deduction' as an element of identification of unwritten international law,[321] as well as spawned more technical issues of interpretation like the construction of 'context' in *Nicaragua v Colombia*.[322]

[317] eg *Land, Island and Maritime Frontier Dispute* (n32) [373] and nn37-41 and text; *ICERD (Georgia v Russia)* (n157) [133] and nn164-166 and text.
[318] *Nuclear Tests (AF)* (n205) [44]; *Nuclear Tests (NZF)* (n205) [47].
[319] eg Kassoti, Interpretation (n215) 322.
[320] See Chapter 2 Section II.
[321] CICIL Commentary to Art 2 CICIL [5].
[322] See nn 290-297 and text.

Chapter 3. The Practice of Interpretation of International Investment Tribunals

Introduction

International investment tribunals (IITs) are constituted for the settlement of a dispute between a State and a national of another State arising out of an investment which the parties have consented to submit to arbitration.[1] Compared to other areas of international dispute settlement, IITs comprise certain peculiar institutional and substantive features, such as, the innately *ad hoc* character of arbitration, the access of private individuals and corporations as parties, the wide variety and mostly bilateral or less often plurilateral character of instruments forming the basis of investment claims, their open-ended formulations, and the multi-layered procedural setting of post-award review and enforcement.[2] None of these features is unique individually; what perhaps sets IITs apart from other international dispute settlement mechanisms is the combination of these features.[3] These considerations lie in the background of this inquiry to the extent that they could potentially have a bearing on the regulation and evolution of the process of interpretation of international legal rules in the specific context of international investment arbitration.[4]

The purpose of this study is to codify and critically evaluate the practice of IITs relating to international rules of interpretation. In numerical terms, international investment arbitration constitutes one of the most active areas of international dispute settlement compared to other areas of international law.[5] Apart from contracts that elude the scope of this inquiry,[6] IITs are predominantly called upon to interpret and apply rules stemming from bilateral investment treaties (BITs) or plurilateral treaties relating to the protection of international investments—

[1] eg Christoph Schreuer, 'Investment Disputes' [2013] MPEPIL [1].

[2] Hai Yen Trinh, *The Interpretation of Investment Treaties* (Brill 2014) 16-29.

[3] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis' (2008) 19 EJIL 301, 313.

[4] Joost Pauwelyn and Manfred Elsig, 'The Politics of Treaty Interpretation' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations – The State of the Art* (CUP 2013) 445, 459-468.

[5] UNCTAD reports 1257 cases as of 31 December 2022.

[6] For a detailed study, see eg Yuliya Chernikh, *Contract Interpretation in Investment Treaty Arbitration* (Brill 2022).

or, collectively, international investment agreements (IIAs).[7] This renders IITs some of the most frequent users, and potentially developers, of rules of treaty interpretation.[8]

What is more, within their limited mandates, IITs are very often called upon to apply directly or indirectly rules of international law stemming from sources other than treaties. To be sure, the law applicable to investment proceedings is a procedural issue whose regulation rests in the first place with the autonomy of the parties.[9] However, it is not uncommon for relevant procedural rules or IIAs to provide residually for the application of 'applicable rules of international law' in the absence of an agreement or when the tribunal determines such law to be appropriate.[10] Besides, even when the rules of international law external to the IIA are not deemed directly applicable to a specific issue, a tribunal might decide to take them into account as relevant rules for the interpretation of the applicable IIA.[11] In either case, the IIT proceeds to determine or assumes the status and content of this relevant rule by necessary implication. In this context, an IIT might have to determine whether a unilateral act or declaration of a state produces binding effects or whether a rule of unwritten international law, ie customary international law or general principle of law, exists. To do so, an IIT will rely—explicitly or implicitly—on relevant rules of identification of binding unilateral acts or declarations or

[7] Julian Arato and Andreas Kulick, 'Final Report on Investment Tribunals: 29 November-13 December 2020, Kyoto' in ILA Study Group on the Content and Evolution of the Rules of Interpretation, 'Final Report: 29 November-13 December 2020, Kyoto' <https://www.ila-hq.org/en/documents/ila-final-report-with-annexes>.

[8] See, more generally, Frederic G Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill 2015) 14-15.

[9] eg Christoph Schreuer and ors, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 557; David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 112.

[10] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 288; eg Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), Art 42(1); United Nations Commission on International Trade Law (UNCITRAL), 'Arbitration Rules of the United Nations Commission on International Trade Law' (15 December 1976) UN Doc A/31/98, 31st Session Supp No 17, Art 35(1) (UNCITRAL Rules); International Chamber of Commerce (ICC), '2021 Arbitration Rules and 2014 Mediation Rules' (*ICC*, November 2020) Art 21(1) <https://iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf> accessed 10 May 2021; Arbitration Institute of the Stockholm Chamber of Commerce (SCC), '2017 Arbitration Rules' (*SCC*, 1 January 2020) art 27(1) <https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf> accessed 10 May 2021; North American Free Trade Agreement (NAFTA) (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289, Art 1131(1) as maintained by Art 14.D.9; Agreement Between the United States of America, the United Mexican States, and Canada (adopted 10 December 2019, entered into force 1 July 2020); The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95, Art 26(6).

[11] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT'), Arts 31(3)(c); eg *Al Tamimi v Oman* (Award of 3 November 2015) ICSID Case No ARB/11/33 [321]-[323]; *Windstream v Canada* (Award of 27 September 2016) PCA Case No 2013-22 [233].

unwritten international law, respectively.[12] More importantly, IITs are often requested to resolve disputes about the content of unilateral act or declarations or rules of unwritten international law whose binding status is not in dispute by the parties. To the extent that IITs proceed to this further step and carry it out on the basis of what they consider binding rules of international law, their practice is important as particular instantiations of existing or nascent rules of interpretation of binding unilateral acts or declarations and unwritten international law.

The premise of this study is that the practice of IITs, as frequent users of rules of interpretation, can elucidate the role of interpretation within the framework of sources of international law and the commonalities and differences between the regulation of the process of interpretation across different sources of international law and different subject-matters. That said, quite commonly, the engagement of IITs with general international law or the law of interpretation, in particular, has been paralleled to 'a drowning man…grab[bing] a stick in the sea in the hope of having certainty'.[13] Particularly, commentators relegate the value of rules of treaty interpretation—and, by implication, of other rules of international law interpretation—in giving guidance to IITs based on the assumption that reference to these rules may offer support to multiple interpretative outcomes.[14] From a methodological perspective, this study proceeds from the assumption that these claims pertain to the content rather than the existence of rules of interpretation and, as such, do not constitute a hindrance for an attempt to scrutinise the content and evolution of these rules. This is more so considering that the particular procedural setting of IITs. Apart from the overarching motivation of international judges to dispel any impression of bias or arbitrariness,[15] IITs have a stronger incentive to ground the reasoning of their decisions on any applicable rules of interpretation on order to pre-empt the annulment

[12] See, generally, ILC, 'Guiding Principles Applicable on Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(3) YbILC 161 (hereinafter GPUD); ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in (2018) II(2) YBILC 122 (hereinafter CICIL); ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc A/CN.4/741.

[13] See, *mutatis mutandis*, James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 ICSID Rev 127, 128; also Matthew Weiniger, 'Jurisdiction Challenges in BIT Arbitrations – Do You Read a BIT by Reading a BIT or by Reading into a BIT?' in Loukas Mistelis and Julian DM Dew (eds), *Pervasive Problems in International Arbitration* (Kluwer 2006) 235, at 254.

[14] eg Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 84.

[15] cf, on the general point, Catherine Kessedjian, 'Le tiers impartial et indépendant en droit international: Juge, arbitre, médiateur, conciliateur – Cours général de droit international' (2019) 403 RdC 56, 504.

of the award or to prevent any domestic obstacles in the implementation of their decision.[16] In this respect, there is, for instance, practice of annulment committees considering that the disregard for any applicable rules of interpretation may amount to an annullable error.[17] More generally, an inquiry into the content of the rules of interpretation is logically and doctrinally necessary before proceeding into an assessment about the 'disciplining' or other function of these rules.[18]

In light of these considerations, the present chapter records and compares the ways in which IITs proceed to interpret treaties, unilateral acts of states, and unwritten international law. It also seeks to identify whether and how their approach to interpretation has involved over time by reference to illustrative examples of IIT practice. As to methodology, the study does not purport to follow any strict quantitative protocol. Mindful of the fact that IITs do not constitute a singular and homogenous judicial body, the study strives to flesh out discernible tendencies documented or reproduced in multiple decisions capable of sustaining plausible overarching normative conclusions. The analysis proceeds as follows. Section I focuses on the IIT practice of treaty interpretation. The section starts with an account of the gradual entrenchment of the rules of interpretation reflected in Articles 31-33 VCLT within the practice of IITs (I.1), followed by a report on the ways in which the key elements of the VCLT rules of interpretation are applied in IIT practice relating to IIAs (I.2). The section further assesses whether and to what extent the primacy of VCLT rules has been challenged in practice either by the use of rules and maxims that are external to the VCLT including special rules specific to international investment law or the specific IIA in question (I.3). Section II further considers the ways in which IITs have engaged with the law relating to unilateral acts and declarations of states capable of creating international obligations. The section focuses on the justifications employed by IITs for relying on a unilateral act or declaration, as well as the means for the determination of their content. Section III expands the area of inquiry to the identification and interpretation of unwritten international law. On the one hand, IIAs proceed to identify rules of unwritten international law by performing or alluding to an inductive examination of evidence

[16] Art 52 ICSID Convention; on available proceedings see, eg, Freya Baetens, 'Keeping the Status Quo or Embarking on a New Course? Setting Aside, Refusal of Enforcement, Annulment and Appeal' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017) 103, 105-13.

[17] See below nn47-57 and 324-335 with text.

[18] On this point, see eg Daniel Peat, 'Disciplining Rules? Compliance, the Rules of Interpretation, and the Evaluative Dimension of Articles 31 and 32 of the VCLT' (2022) 69 NILR 221*ff*.

of state practice and opinio juris or recognition and transposability, as the case might be. However, more often than not, this inductive examination is merely a stepping stone for a further deductive analysis of the content of a rule that takes place in a way that mirrors key elements of the rules of treaty interpretation. The chapter argues that the practice of IITs demonstrates a tendency towards increasing formality and uniformity on the issue of interpretation, despite—or perhaps because of—their institutional and substantive peculiarities. This tendency is not limited to the issue of treaty interpretation. In parallel, there is an emerging pattern of increasing formality and uniformity on the issue of the interpretation of applicable rules stemming from other sources. This process mirrors to a considerable extent the rules of treaty interpretation with some important differences which are explained in more detail.

I. Treaty Interpretation in the Practice of International Investment Tribunals

1. International Investment Tribunals and the Vienna Convention on the Law of Treaties

The streamlining of the process of treaty interpretation in the context of investment arbitration has been a gradual development, despite the overwhelming majority of recorded decisions based on IIAs postdating the entry into force of the VCLT by almost a decade. Tellingly, one detailed study reports that, in the period between 1990 and 2011, 171 out of 258 (66%) recorded awards made direct or indirect reference to Articles 31 and 32 VCLT with 87 decisions (33%) avoiding any reference to these provisions.[19] Another quantitative study concluded in 2012 traces citations of the VCLT rules of interpretation in 132 out of 228 awards (58%).[20] A more recent study identifies 331 awards citing directly the VCLT provisions of interpretation.[21] Their discrepancies notwithstanding, all these studies corroborate that the rules of interpretation as reflected in the VCLT constitute an integral part of IIT practice from a relatively early stage and their use has consistently increased over time. However, the ways in which IITs have made use of the VCLT provisions on treaty interpretation in their reasoning differs amongst deci-

[19] Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 220.

[20] Trinh (n2) 38. Along similar lines, a non-exhaustive search on italaw for the purposes of this study yielded 207 decisions refering explicitly to the VCLT rules of interpretation after 2011.

[21] Esme Shirlow, 'Appendix: Applications of the VCLT in Investor-State Arbitration with Accompanying Table Recording References to the VCLT in Over 350 Different Procedural Orders, Decisions and Awards of Investor-State Arbitral Tribunals' in Esme Shirlow and Kiran N Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 481, 526-603.

sions: from the casual and sometimes selective citation of the VCLT text to the extensive consideration of their elements and their interrelationship.[22] That is to say, whilst the VCLT rules of treaty interpretation are widely considered nowadays the 'only game in town' in international investment arbitration,[23] this development came about through a gradual process over time. Even though the degree of specificity and fidelity to the VCLT provisions remains variable amongst decisions, their role and impact on IIT practice, especially in their dialogue amongst each other and with other judicial institutions, has constantly increased over time.

The 1990 *AAPL* award, one of the earliest state-investor arbitrations based on an IIA, constitutes a significant starting point in the discussion of the interpretative practice of IITs.[24] Faced with a dispute as to the interpretation of an 1980 IIA between the UK and Sri Lanka (a non-party to the VCLT), the tribunal proclaimed that it would 'indicate what constitutes the true construction' of the applicable IIA 'in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by l'Institut de Droit International in its General Session in 1956, and as codified in Article 31 of the [VCLT]'.[25] After affirming that, as a basic rule, treaty interpretation is governed by international law,[26] the tribunal proceeded to identify six rules of interpretation:

> (A) 'it is not allowed to interpret what has no need of interpretation';
>
> (B) 'we ought not to deviate from the common use of language, unless we have very strong reasons for it';
>
> (C) '[i]n cases where the linguistic interpretation of a given text seems inadequate or the wording thereof is ambiguous, there should be recourse to the integral context of the Treaty';
>
> (D) '[i]n addition to the "integral context", "object and intent", "spirit", "objectives", "comprehensive construction of the treaty as a whole", recourse to the rules and principles of international law has to be considered a necessary factor providing guidance within the process of treaty interpretation';

[22] Trinh (n2) 39-41.

[23] Martins Paparinskis, 'The Interpretation of Treaties and Investment Arbitration: Introductory Reflections' in Esme Shirlow and Kiran N. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 25, 26.

[24] eg ibid 27; Arato and Kulick (n7).

[25] *Asian Agricultural Products Ltd (AAPL) v Sri Lanka* (Final Award of 27 June 1990) ICSID Case No ARB/87/3 [38].

[26] ibid [39].

(E) 'a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning';

(F) '[i]t is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration…the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation'.[27]

The *AAPL* pronouncement bears partial similarity with the reserved approach of the ICJ to the VCLT rules of interpretation in the *Arbitral Award* judgment, which it predates only by almost a year.[28] On the one hand, the *AAPL* award constitutes a significant landmark, as it affirmed the applicability and mandatory character of the VCLT rule of interpretation in a judicial landscape where references to the VCLT rules of interpretation remained somewhat sparse and fragmented.[29] On the other hand, the *AAPL* tribunal started with a cautious statement about the pedigree of Article 31 VCLT as a codification of customary international law and proceeded to elaborate on an interpretative process that puts emphasis on the ordinary meaning of the terms of a treaty above all other elements of the VCLT rule of interpretation.[30] In this way, the *AAPL* tribunal not only remained agnostic as to the status of the rules expressed in Articles 32 and 33 VCLT, but also casted doubt on the status and interaction of the other elements of interpretation explicitly mentioned in Article 31 VCLT.[31]

That said, for the most part, subsequent tribunals affirmed the applicability of the VCLT provisions qua treaty rules or qua reflections of customary international law less equivocally, albeit in a piecemeal fashion and with a variable degree of sophistication.[32] The extent of IITs' reliance on the VCLT varies considerably encompassing general references to the applicability

[27] ibid [40].

[28] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart 2016) 59.

[29] see eg Weeramantry (n19) 220.

[30] See above Chapter 2, Section I.1; eg *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [48]; also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) (Judgment)* [1992] ICJ Rep 351 [373] and *Land, Island and Maritime Frontier Dispute (Judgment) (Separate Opinion of Judge Torres Bernárdez)* [1992] ICJ Rep 629 [190]–[191].

[31] Weeramantry (n19) 155-156.

[32] eg Trinh (n2) 38-39.

of VCLT rules of interpretation,[33] the piecemeal application of Article 31 VCLT,[34] the combined application of the rules reflected in Articles 31 and 32 VCLT,[35] and comprehensive references to the rules reflected in Article 31-33 VCLT.[36] Besides, even when IITs did not refer to the VCLT directly or did so only partially, their legal findings very closely mirror the VCLT rules and their interpretative reasoning often emulated the process militated by these rules.[37] The findings of the *AAPL* tribunal have very rarely been cited, still less relied upon, by subsequent tribunals at best as supplementary considerations of an ancillary import.[38] In other words, in the vast majority of cases, the imperfect or partial reference to the VCLT rules of interpretation is not meant to signify a departure from the binding character of rules of interpretation, the process envisaged in the VCLT rules, or a commitment to a particular approach to interpretation along the lines implied by the *AAPL* award.[39]

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[33] eg *Fedax NV v Venezuela* (Decision on Jurisdiction of 11 July 1997) ICSID Case No ARB/96/3 [20]-[21]; *Loewen Group Inc and Raymond L Loewen v United States of America* (Decision on Jurisdiction of 5 January 2001) ICSID Case No ARB(AF)/98/3 [51]; *Sempra Energy International v Argentina* (Decision on Jurisdiction 11 May 2005) ICSID Case No ARB/02/16 [141]; *Pac Rim Cayman LLC v El Salvador* (Decision on Jurisdiction of 1 June 2012) ICSID Case No ARB/09/12 [4.5]; *Bank Melli and Bank Saderat v Bahrain* (Award of 9 November 2021) PCA Case No 2017-25 [10].

[34] eg *Mafezzini v Spain* (Decision on Jurisdiction of 25 January 2000) ICSID Case No ARB/97/7 [27]; *Waste Management Inc v United Mexican States* (Award of 2 June 2000) ICSID Case No ARB(AF)/98/2 [9]; *Eureko v Poland* (Partial Award of 19 August 2005) *ad hoc* Arbitration [247]; *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006) UNCITRAL [296]; *Joseph C Lemire v Ukraine* (Decision on Annulment of 8 July 2013) ICSID Case No ARB/06/18 [177].

[35] eg *Ethyl Corporation v Canada* (Award on Jurisdiction of 24 June 1998) UNCITRAL [51]-[52]; *Pope and Talbot v Canada* (Interim Award of 26 June 2000) UNCITRAL [66]-[68]; *Canfor Corp v United States of America* (Decision on Preliminary Question of 6 June 2006) UNCITRAL [177]; *HICEE BV v Slovak Republic* (Partial Award of 23 May 2011) PCA Case No 2009-11 [115].

[36] eg *Mondev International Ltd v United States of America* (Award of 11 October 2002) ICSID Case No ARB(AF)/99/2 [43]; *Salini Costruttori SpA and Italstrade SpA v Jordan* (Decision on Jurisdiction of 9 November 2004) ICSID Case No ARB/02/13 [75]; *BIVAC BV v Paraguay* (Decision on Jurisdiction of 29 May 2009) ICSID Case No ARB/07/9 [59]; *Hochtief AG v Argentina* (Award of 21 December 2016) ICSID Case No ARB/07/31 [26].

[37] Trinh (n2) 43.

[38] Gazzini (n28) 59; Weeramantry (n19) 156; eg *Wintershall AG v Argentina* (Award of 8 December 2008) ICSID Case No ARB/04/14 [165]; *Alpha Projektholding GmbH v Ukraine* (Award of 10 November 2010) ICSID Case No ARB/07/16 [223]; *Churchill Mining Plc v Indonesia* (Decision on Jurisdiction of 24 February 2014) ICSID Case Nos ARB/12/14 and 12/40 [195]; *Jürgen Wirtgen and ors v Czech Republic* (Final Award of 11 October 2017) PCA Case No 2014-03 [231]; *Fernando Fraiz Trapote v Venezuela* (Final Award of 31 January 2022) PCA Case No 2019-11 [251].

[39] eg *IBM World Trade Corp v Ecuador* (Award on Jurisdiction of 22 December 2003) ICSID Case No ARB/02/10 [44]; *Sergei Paushok and ors v Mongolia* (Decision on Jurisdiction and Liability of 28 April 2011) UNCITRAL [250*ff.*]; *White Industries Australia Ltd v India* (Final Award of 30 November 2011) UNCITRAL [7.3.2]; similarly, Shirlow (n21) 528.

In this respect, the interpretative practice of IITs is not amenable to the wholesale classification into a specific school of interpretation.[40] As a general tendency, IITs rarely deal with issues of interpretation in such abstract terms and, even when individual IITs rarely do so, these decisions do not converge into a clearly identifiable pattern.[41] To illustrate this point, on one end of the spectrum, one IIT proclaimed, *inter alia*, that 'the rule of interpretation stipulated in Article 31 VCLT adopts the textual criterion' and even asserted in categorical terms that 'when a treaty is sufficiently clear, there is no recourse to any additional "rule of interpretation"'.[42] On the other end of the spectrum, some commentators point to certain decisions starting from the discussion of the record of negotiations before proceeding to the text of the treaty as evidence of a 'subjective' approach.[43] Still, in another award, one tribunal laid out the theoretical underpinnings of its approach in more balanced terms:

> 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…[T]he Vienna Convention does not privilege any one of these three aspects of the interpretation method… Article 32 serves to emphasize the centrality of Article 31: "that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."[44]

[40] On schools of interpretation see eg Gerald G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 BYBIL 1, 1.

[41] For attempts to classify awards see eg Fauchald (n3) 315-317; Charles N Brower, David Bray and Pem Chhoden Tshering, 'Competing Theories of Treaty Interpretation and the Divided Application by Investor-State Tribunals of Articles 31 and 32 of the VCLT' in Esme Shirlow and Kiran N Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 109, 121-125.

[42] *Serafín García Armas and Karina García Gruber v Venezuela* (Decision on Jurisdiction of 15 December 2014) PCA Case No 2013-3 [160]-[161] (translation of the author from the Spanish original).

[43] Fauchald (n3) 317 and Gazzini (n28) 58-59 discussing *Inceysa Vallisoletana SL v El Salvador* (Award of 2 August 2006) ICSID Case No ARB/03/26 [175*ff.*]; see also eg *Fedax* (Jurisdiction) (n33) [21].

[44] *Aguas de Tunari v Bolivia* (Decision on Jurisdiction of 21 October 2005) ICSID Case No ARB/02/3 [91]-[92] citing ILC, 'Draft Articles on the Law of the Treaties with Commentaries' (1966) II YbILC 187, 223[18]; in very similar terms, *Vladislav Kim and ors v Uzbekistan* (Decision on Jurisdiction of 8 March 2017) ICSID Case No ARB/13/6 [388].

Whilst IITs are rarely as explicit as the *Aguas de Tunari* tribunal, this approach is arguably implicit in their practice to quote VCLT without ascribing to any particular school of interpretation. To be sure, there are IIT decisions that favour or disregard certain means of interpretation in their interpretative reasoning in a way that makes them vulnerable to criticisms as to the sound application of the VCLT rules.[45] However, it is unlikely that these instances evidence any theoretical animosity towards the binding character and content of the VCLT rules on account of the appropriateness of a specific school of thought for IIAs or international investment arbitration more generally.[46]

Quite the contrary, one observable trend in international investment arbitration is the gradual entrenchment of the VCLT rules of interpretation as the prevalent standard that enables and streamlines dialogue and critique between IITs. One conspicuous instantiation of this trend is the increasingly nuanced role of the VCLT rules in the context of annulment review under Article 52 of the ICSID Convention. As a reminder, annulment proceedings under the ICSID Convention are not equivalent to appellate proceedings.[47] Committees can set aside awards only on the basis of limited and strictly construed bases amongst which manifest excess of powers and failure to state the reasons of the decision could relate conceivably to issues of interpretation.[48] With respect to manifest excess of powers, annulment committees draw a distinction between failure to apply the proper law, that constitutes an annullable error, and an error in the application of the law, that cannot result in annulment.[49] However, a misapplication or misinterpretation of the applicable law may be so gross or egregious so as to amount to failure to apply the proper law.[50] Similarly, a failure to state reasons may only amount to an annullable error if: 'first, the failure to state reasons…leave[s] the decision on a particular point essentially lacking in any expressed rationale; and second, that point [is] itself necessary to the tribunal's decision.'[51]

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[45] See figures in Trinh (n2) 106 and 263*ff.*

[46] As in the case of *Armas* (Jurisdiction) (n42) [154]-[158].

[47] eg *Amco Asia Corporation and ors v Indonesia* (Decision on Annulment of 16 May 1986) ICSID Case No ARB/81/1 [23]; *Klöckner v Cameroon* (Decision on Annulment of 3 May 1985) ICSID Case No ARB/81/2 [3].

[48] Art 52(1)(b) and (e) ICSID Convention; Maximilian Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law* (Kluwer 2016) 186.

[49] eg *Amco* (Annulment) (n47) [23]; *Klöckner* (Annulment) (n47) [60].

[50] eg *Soufraki v United Arab Emirates* (Decision on Annulment of 5 June 2007) ICSID Case No ARB/02/7 [86].

[51] eg *Compañia de Aguas del Aconquija SA and Vivendi Universal v Argentina* (Decision on Annulment of 3 July 2002) ICSID Case No ARB/97/3 [65].

Annulment committees have discussed the role of the VCLT rules of interpretation in this context and refined their approach considerably over time. Most notably, in *Lucchetti*, the annulment committee considered whether the tribunal applied 'the rules codified in Article 31 and subsequent Articles of the Vienna Convention… or whether there was a failure in this regard amounting to an excess of powers'.[52] In the event, the committee concluded that the award 'd[id] not reflect all relevant aspects of treaty interpretation according to the Vienna Convention'.[53] However, this did not amount pursuant to the committee to an annullable error, because it could not establish that 'the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation.'[54] Similarly, although the tribunal 'd[id] not give a full picture of the various elements which should be taken into account for treaty interpretation under the Vienna Convention', this did not amount to an annullable failure to state reasons as it did 'refer to various standards adopted in international case-law and doctrine and set out the elements which the Tribunal found conclusive'.[55] In short, misapplication of the VCLT rules of interpretation does not amount to an annullable error, but disregard of these rules may result to annulment.[56] It is noteworthy that annulment committees after *Lucchetti* tend to assess awards against this standard and often reconstruct or fill the gaps of the reasoning of the tribunal in accordance with the VCLT rules of interpretation as part of this exercise.[57]

Another less conspicuous instantiation of this trend is the role of the VCLT rules on interpretation in enabling judicial dialogue between IITs and other judicial institutions. Thus, for instance, one IIT reasoned its departure from the decision of the Court of Justice of the EU

[52] *Industria Nacional de Alimentos (Luccetti) v Perú* (Decision on Annulment of 5 September 2007) ICSID Case No ARB/03/4 [113].
[53] ibid [116].
[54] ibid.
[55] ibid [129].
[56] eg *MCI Power Group LC and New Turbine v Ecuador* (Decision on Annulment of 19 October 2009) ICSID Case No ARB/03/6 [54].
[57] See eg *Alapli Elektrik BV v Turkey* (Decision on Annulment of 10 July 2014) ICSID Case No ARB/08/13 [219] and [246]; *Daimler Financial Services AG v Argentina* (Decision on Annulment of 7 January 2015) ICSID Case No ARB/05/1 [192]-[196]; *Tza Yap Shum v Perú* (Decision on Annulment of 12 February 2015) ICSID Case No ARB/07/6 [98]-[99]; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (Decision on Annulment of 14 July 2015) ICSID Case No ARB/10/1 [125] and [136]-[138]; *Fabrica de Vidrios los Andes CA and Owens-Illinois de Venezuela CA v Venezuela* (Decision on Annulment of 22 November 2019) ICSID Case No ARB/12/21 [109]-[110]; *Global Telecom SAE v Canada* (Decision on Annulment of 30 September 2022) ICSID Case No ARB/16/16 [125], [180], and [319]; *Watkins Holdings Sarl v Spain* (Decision on Annulment of 21 February 2023) ICSID Case No ARB/15/44 [92].

in *Achmea* because '[CJEU] abjures reliance on the customary international law principles of treaty interpretation as codified in the VCLT [that] represents the correct method of interpretation of the BIT as a matter of international law'.[58] One the same issue, another IIT justified a similar approach on the basis that '[t]he CJEU made no effort to conduct an interpretive exercise under the VCLT—as would be required under public international law— […] in order to justify its decision.'[59] In this way, the VCLT rules of interpretation afford the *tertium comparationis* to ground challenges to the findings of other international courts and tribunals.[60]

What emerges from this brief exposition is that the proliferation of the VCLT rules of interpretation within the practice of IITs has not been a spontaneous and formulaic process. On the one hand, whilst IITs have extensively used the rules of interpretation reflected in Articles 31-33 VCLT, their entrenchment into an unrivalled standard for treaty interpretation in international investment arbitration has been an incremental process. On the other hand, the mere number and diversity amongst IITs fosters a wide variety of approaches to the application of VCLT rules as pertaining to the construction of the key elements of the interpretative process and their interrelationship. It also opens up some space to explore interpretative rules of principles beyond the explicit confines of these rules. To obtain a more lucid image, it is therefore necessary to look closer to the application of specific elements of the rules of treaty interpretation by IITs, as well as to inquire into IIT use of interpretative considerations external to the VCLT.

2. Key Elements of Treaty Interpretation in the Practice of International Investment Tribunals

i. Good faith

Good faith is an aspect of the process of treaty interpretation explicitly reflected in Article 31 VCLT whose meaning and role has eluded the practice of ICTs.[61] Much like other ICTs, IITs rarely ascribe to good faith any specific or autonomous role in their interpretative reasoning, that is, in any other way than an as part of a quote of the VCLT rule of interpretation.[62] In

[58] *PNB Banka and ors v Latvia* (Decision on Intra-EU Objection of 14 May 2021) ICSID Case No ARB/17/47 [505]; see C-284/16, *Achmea BV v Slovak Republic* [2018] ECLI:EU:C:2018:158.

[59] *Infracapital F1 Sarl and ors v Spain* (Decision on Reconsideration of 1 February 2022) ICSID Case No ARB/16/18 [111].

[60] eg *Silver Ridge Power BV v Italy* (Award of 26 Feburary 2021) ICSID Case No ARB/15/37 [221].

[61] Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 168; Chapter 2, Section I.2.i.

[62] Weeramantry (n19) 46; Trinh (n2) 45.

fact, even all-encompassing methodological pronouncements like that of the *Aguas de Tunari* tribunal do not explicitly point to any particular role for good faith in the process of treaty interpretation.[63] This section focuses on the very few occasions in which IITs expanded to some extent on the concept of good faith as an element of their interpretative process. Yet, these findings need to be treated with caution considering their exceptional character in the otherwise vast interpretative practice of IITs compared to other ICTs.

As a general tendency, separate references to good faith as an element of treaty interpretation tend to be somewhat generic and affirmatory without any meaningful explication of its content or operation within the overall process. In fact, in certain cases, IITs tend to blur the lines between good faith as an element of the VCLT rule of interpretation and as a broader principle of international law.[64] For instance, in *Canfor*, the tribunal pronounced that '[g]ood faith is a basic principle of treaty interpretation…[and] also a basic principle in the performance of treaties' and then proceeded to apply it in the specific case without further explanation of its content.[65] But even when the IIT clearly refers to good faith *qua* element of the interpretative rule, its content and operation remains elusive. For instance, in *Hrvatska Elektroprivreda*, the tribunal enunciated that 'VCLT Article 31 mandates that treaties be interpreted "in good faith" [and] [t]hat is the core principle about which all else revolves.'[66] Yet, in applying this principle, the tribunal limited itself to the determination that the tribunal's interpretation 'does no violence, either to the Agreement's language or in its result.'[67]

By contrast, certain tribunals have attempted to define good faith in the context of treaty interpretation, albeit with mixed results. One line of tribunals have attempted to define the concept of good faith as the general tenor of the interpreter's approach, but also 'the premise that the consent of the parties was manifested in writing and given in good faith and, therefore, at the time they manifested their consent, the parties did so with the sincere intent

[63] See above nn 44 and below 101 with text.

[64] *Devas v India* (Decision on Jurisdiction and Merits of 25 July 2016) PCA Case No 2013-09 [467]; *Eskosol SpA in liquidazione v Italy* (Decision on Jurisdiction of 7 May 2019) ICSID Case No ARB/15/50 [118]; *Carlos Esteban Sastre and ors v United Mexican States* (Award on Jurisdiction of 21 November 2022) ICSID Case No UNCT/20/2 [253]-[254].

[65] *Canfor* (Preliminary) (n35) [182] and [304].

[66] *Hrvatska Elektroprivreda DD v Slovenia* (Decision on Treaty Interpretation Issue of 12 June 2009) ICSID Case No ARB/05/24 [191].

[67] ibid.

for it to produce all of its effects under the circumstances agreed upon by them.'[68] By contrast, other IITs have deduced the meaning of this element *a contrario* from the juxtaposition of '*bona fides*, as opposed to the absence of *mala fides*, or a principle providing for the rejection of an interpretation that is abusive or that may result in the abuse of rights.'[69] What is more, good faith interpretation positively 'requires elements of reasonableness that go beyond the mere verbal or purely literal analysis.'[70] In another less straightforward or uncontroversial finding, an IIT proclaimed that '*pacta sunt servanda* and good faith require that the terms of [a] treaty have a single consistent meaning', although again the context of the statement leaves some ambiguity as to whether it is meant to explicate good faith as an element of the VCLT rule or as a broader principle.[71]

The relative paucity of IIT decisions discussing good faith as an element of the VCLT may be attributed to an inclination to avoid explicit reliance on this principle as a decisive element of the interpretative process.[72] This, in turn, may be in part because of the subjective associations of the concept of good faith in contradistinction with the other elements of the rule of interpretation, especially text and context.[73] In any case, this trend does not deviate from the prevalent practice in international adjudication nor does it evidence a subject-specific challenge to the position of good faith as an inextricable part of the interpretative process in line with the VCLT rules of interpretation in which, after all, no element is autonomous or individually decisive.

ii. Ordinary Meaning

[68] *Inceysa* (Award) (n43) [181]; also, eg, *Iberdola Energía SA v Guatemala* (Award of 17 August 2012) ICSID Case No ARB/09/5 [300].

[69] *Poštová banka, a.s. and Istrokapital SE v Hellenic Republic* (Award of 9 April 2015) ICSID Case No ARB/13/8 [284]; in a similar vein see eg *Plama v Bulgaria* (Decision on Jurisdiction of 8 February 2005) ICSID Case No ARB/03/24 [147]; *Canfor* (Preliminary) (n35) [304] (albeit *sub silentio*); *Phoenix Action Ltd v Czech Republic* (Award of 15 April 2009) ICSID Case No ARB/06/5 [107]; *Achmea BV v Slovakia* (Final Award of 7 December 2012) PCA Case No 2008-13 [168] and [170]; *Voltaic Network GmbH v Czech Republic* (Award of 15 May 2019) PCA Case No 2014-20 [266].

[70] *Poštová* (Award) (n69) [284]; also *Sergei Viktorovic Pugachev v Russian Federation* (Award on Jurisdiction of 18 June 2020) UNCITRAL [377].

[71] *Vattenfall AB and ors v Germany* (Decision on the Achmea Issue of 31 August 2018) ICSID Case No ARB/12/12 [156]; similarly, eg *Sunreserve Luxco Holdings SARL v Italy* (Final Award of 25 March 2020) SCC Arbitration V 2016/32 [391].

[72] See n61.

[73] Gardiner (n61) 168; see also *Hrvatska* (Decision) (n66) (Individual Opinion of Jan Paulson) [47].

An examination of the ordinary meaning of the terms of applicable treaties is certainly a pervasive feature of IITs interpretative practice.[74] Yet, despite its prevalence, IITs rarely attempt to define the concept in the abstract or spell out the methodology for the establishment of ordinary meaning of treaty terms. Along similar lines, the place of ordinary meaning amongst the elements of the general rule of interpretation reflected in Article 31 VCLT varies considerably amongst IIT decisions. The section that follows records discernible points of convergence and divergence amongst IITs as to these two points in turn. As will become apparent from the account that follows, IIT practice remains moored to the VCLT and, as such, closely resembles the practice of other ICTs.

IIT practice relating to the establishment of the ordinary meaning of treaty terms does not correspond to a singular understanding of the concept nor does it fit into a clearly discernible methodology. Paradoxically, IITs have used a wide-ranging variety of terms to describe the concept of 'ordinary meaning' including 'natural and fair meaning', 'natural and ordinary meaning', 'natural and obvious sense', 'normal sense', 'ordinary or grammatical meaning', 'plain language', 'plain meaning', 'plain wording', 'plain and natural meaning', 'common use' and '*usus loquendi*'.[75] Nonetheless, there is no indication that these terminological differences reflect deeper divisions amongst tribunals about the concept of 'ordinary meaning' or the methodology for its establishment.[76]

In fact, most IITs do not adhere to any strictly identifiable method. In most cases, IITs proceed to assess the 'ordinary meaning' of a treaty term without any lengthy analysis or on the basis of a brief semantic or grammatical analysis of the text.[77] Occasionally, IITs might also refer to sources external to the treaty in question in order to determine the ordinary meaning of a treaty term. Most notably, it is not uncommon for IITs to have recourse to dictionary

[74] eg Trinh (n2) 106 suggests that 61% of the decisions engage in such an analysis.

[75] Weeramantry (n19) 49-50 with references.

[76] ibid 50.

[77] eg *Vladimir and Moïse Berschader v Russian Federation* (Award of 21 April 2006) SCC Arbitration V 080/2004 [152]-[153]; *Suez and ors v Argentina* (Decision on Jurisdiction of 16 May 2006) ICSID Case No ARB/03/17 [55]; *Telenor Mobile Communications AS v Hungary* (Award of 13 September 2006) ICSID Case No ARB/04/15 [92]; *Veteran Petroleum Ltd v Russian Federation* (Decision on Jurisdiction of 30 November 2009) PCA Case No AA 228 [262].

definitions of specific treaty terms, although the relative value accorded to these materials varies significantly from case to case.[78] For instance, some tribunals use dictionaries to positively establish the ordinary meaning of a term or reject an interpretation of a term adduced by one of the parties.[79] Other tribunals use dictionary definitions as a starting point to lay out a range of possibilities which they further narrow down by the use of other means of interpretation.[80] Less conspicuously, some IITs have also resorted to the awards of ICTs or even the text of other treaties in the course of a determination of the 'ordinary meaning' of a treaty term.[81] To illustrate this point, one IIT relied on the VCLT to find that the term 'third state' found in the applicable IIA 'has a well recognised ordinary meaning in treaty law'.[82] Another tribunal deemed the pronouncements of the ICJ in the *ELSI* case the 'most authoritative interpretation' of the word 'arbitrary' in the applicable IIA provision compared to dictionary definitions.[83] Other IITs have referred to IIAs concluded between third parties to delimit the scope of possibilities for the 'ordinary meaning' of a treaty term.[84] On the one hand, it appears incongruous to ascribe increased value to general or legal dictionaries for the determination of the ordinary meaning of a treaty term, but deny such value to treaties or judicial decisions that might seem at first equally, if not more, credible resources.[85] On the other hand, from a methodological

[78] eg Weeramantry (n19) 54; Andreas Kulick and Panos Merkouris, 'Article 31: General Rule of Interpretation' in in A Kulick and M Waibel (eds), *Commentary on General International Law in International Investment Law* (OUP 2024) MN 14

[79] eg *SD Myers v Canada* (Partial Award of 13 November 2000) UNCITRAL [285]; *Tokios Tokelés v Ukraine* (Decision on Jurisdiction of 29 April 2004) ICSID Case No ARB/02/18 [28] and [75]; *MTD v Chile* (Award of 25 May 2004) ICSID Case No ARB/01/7 [113]; *Saluka* (Partial) (n34) [463] and [297] citing also *MTD* Award (n79) [113]; *Tza Yap Shum v Perú* (Decision on Jurisdiction of 19 June 2009) ICSID Case No ARB/07/6 [151]; *Alasdair Ross Anderson and ors v Costa Rica* (Award of 19 May 2010) ICSID Case No ARB(AF)/07/3 [49] and [57].

[80] eg *Methanex v United States of America* (Partial Award on Jurisdiction of 7 August 2002) UNCITRAL [135]; *Aguas de Tunari* (Jurisdiction) (n44) [227]-[231].

[81] eg Gazzini (n28) 300-301; Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28 EJIL 669, 686-686.

[82] *Libanco Holdings Co Ltd v Turkey* (Award of 2 September 2011) ICSID Case No ARB/06/8 [553] citing, *inter alia*, Arts 34-37 VCLT.

[83] *Siemens AG v Argentina* (Award of 6 February 2007) ICSID Case No ARB/02/8 [318] citing *Elettronica Sicula SpA (United States of America v Italy)* [1989] ICJ Rep 15 [128].

[84] eg *Tenaris SA and ors v Venezuela* (Award of 29 January 2016) ICSID Case No ARB/11/26 [144].

[85] Gazzini (n28) 301.

perspective, reliance on such materials approximates to a large extent *in pari materiae* interpretation that falls more naturally under the purview of Articles 31(2) and (3) or even 32 VCLT.[86]

Another issue that has arisen in the context of international investment arbitration is the temporal dimension of the 'ordinary meaning' of a term, albeit IITs findings on this issue are somewhat sparse and unsystematic.[87] In *Wintershall*, the tribunal enunciated that the text of the applicable IIA has to be interpreted 'in light of the [VCLT], as well as the principle of contemporanity [*sic*]…viz. that the terms of the treaty have to be interpreted according to the meaning they possessed (and in the circumstances prevailing), at the time the treaty was concluded.'[88] Along similar lines, in *RosInvest*, the tribunal held that 'it cannot be justified under Articles 31 and 32 VCLT that later developments can be found to change the ordinary and unambiguous meaning of a treaty provision' of the applicable IIA.[89] In this case, the tribunal tried to distinguish bilateral treaties from the 'special cases' of human rights treaties and constitutive treaties of international organisations with respect to which the parties intended a certain degree of evolutionary adaptation in light of changing social and institutional needs.[90] By contrast, in *Al-Warraq*, the tribunal considered that the 'the language' of the IIA provision in question 'can and should be interpreted from a contemporary perspective', since 'the subject matter of the clause is the generic and undefined term "disputes"'.[91] In a similar vein, another tribunal dealing with an issue of interpretation of the ICSID Convention cited with approval the findings of the ICJ that 'where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty

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[86] Paula F Henin, '*In Pari Materiae* Interpretation in Treaty Law' in Joseph Klingler, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 211, 213.

[87] Gazzini (n28) 108; Epaminontas E Triantafilou, 'Contemporaneity and Evolutive Interpretation under the Vienna Convention on the Law of Treaties' (2017) 32 ICSID Review 138, 157-158; Julian Wyatt, 'Signs of a Subjective Approach to Treaty Interpretation in Investment Arbitration: A Justified Divergence from the VCLT?' in Esme Shirlow and Kiran N Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 89, 105.

[88] *Wintershall* (Award) (n38) [129]; similarly, *ICS Inspection and Control Services v Argentina* (Award on Jurisdiction of 10 February 2012) PCA Case No 2010-9 [289].

[89] *RosInvest v Russian Federation* (Award on Jurisdiction of 1 October 2007) SCC Arbitration V 079/2005 [121].

[90] ibid [39] and [121].

[91] *Hesham Talaat M Al-Warraq v Indonesia* (Award on Preliminary Objections of 21 June 2012) UNCITRAL [81]-[82]; similarly, *Garanti Koza LLP v Turkmenistan* (Decision on Jurisdiction of 3 July 2013) ICSID Case No ARB/11/20 [57].

has been entered into for a very long period or is "of continuing duration", must be presumed, as a general rule, to have intended those terms to have an evolving meaning.'[92] One would expect that the latter approach would have gradually attained prominence in the practice of IITs, IIAs being notoriously replete of generic terms, such as 'investment' or 'treatment'.[93] One possible explanation for the sparsity of decisions discussing in detail the issue of temporality would be the limited duration of IIA, especially BITs.[94] So, whilst the presumption with respect to generic terms might be pertinent for certain treaties, like the ICSID Convention, its relevance for IIAs is arguably more limited.

These divisions amongst IITs might appear excessively technical or formalistic at first. However, they are arguably symptomatic of the complex function of 'ordinary meaning' within the process of treaty interpretation. As has been shown, earlier IITs in particular have put emphasis on the literal, semantic, or grammatic interpretation of a treaty, an extreme instantiation of this trend being reasonings approximating *in claris not fit interpretatio*.[95] Viewed from this perspective, the technical difficulties arising in establishing the 'ordinary meaning' of a treaty term in the abstract is revealing of the interdependence of all the elements of Art 31 VCLT in the process of treaty interpretation.[96] On the one hand, IITs tend to accept the presumption in favour of the text as the authentic expression of the intention of the parties.[97] This entails not only that the ordinary meaning of the terms of the treaty is the starting point of interpretation,[98] but also that the presumed intentions of the parties cannot overwrite the language of the treaty.[99]

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[92] *Transban Investments Corp v Venezuela* (Award of 22 November 2017) ICSID Case No ARB/12/24 [91] citing *Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 243 [66].

[93] Gazzini (n28) 110-124.

[94] eg Joachim Pohl, 'Temporal validity of international investment agreements: a large sample survey of treaty provisions' (2013) OECD Working Papers on International Investment No 2013/4 <https://www.oecd-ilibrary.org/docserver/5k3tsjsl5fvh-en.pdf?expires=1698860165&id=id&accname=guest&checksum=D6ED344502BFBE4AB37B2E288B371009> reporting that over 93.5% of IIAs set at least an initial duration.

[95] eg *AAPL* (n25) [40]; *Armas* (Jurisdiction) (n42) [160]-[161].

[96] Gazzini (n28) 83.

[97] Weeramantry (n19) 49

[98] eg *Libanco* (n82) [553]; *Ping An v Belgium* (Awad of 30 April 2015) ICSID Case No ARB/12/29 [165]; more generally, Oliver Dörr, 'Article 31', in Oliver Dörr and Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (2nd edn, Springer 2018) 560, 580.

[99] eg *Wintershall* (Award) (n38) [88]; *Fraport AG v Philippines* (Awards of 16 August 2007) ICSID Case No ARB/03/25 [340]; *Stabil LLC and ors v Russian Federation* (Decision on Jurisdiction of 26 June 2017) PCA Case No 2015-35 [138].

On the other hand, the ordinary meaning of a term cannot be equated with its literal meaning.[100] As one IIT aptly noted (with a subtle hint of irony),

> The standard set out in Article 31(1) of the Vienna Convention…can by no stretch of the imagination be read as imposing a sort of lexicographical literalism. When the Article talks in terms of the ordinary meaning "to be given to" the terms of the treaty it is clear just on the face of it (without even resorting to the preparatory work of the International Law Commission which makes this explicit) that there can in a given case be more than one 'ordinary meaning', and the question for the interpreter is to decide which among them was intended by the negotiators, and for that purpose he must be guided by context (in its widest sense) and object and purpose, and also by the additional and where appropriate the supplementary means enumerated in Article 31(3) and (4) and Article 32.[101]

In short, the inquiry of the 'ordinary meaning' of the terms of the treaty through a literal, semantic, or grammatical analysis is an inextricable part, but still only a part, of the process of treaty interpretation.

A particular corollary of the equivalence of the elements of treaty interpretation is that the special meaning of a treaty term would prevail over its ordinary meaning, if the parties so intended.[102] The intention of the parties to vest a term with a special meaning would in most cases be explicit in the treaty, but, in theory, it might also be deduced from the other means of treaty interpretation of Article 31 VCLT.[103] That said, IIT practice attests to the fact that there is a strong presumption in favour of the ordinary meaning of treaty terms rendering a finding of a special meaning the exception. In practical terms, IITs impose the burden of proof on the party invoking a special meaning and this is accompanied by a high standard of proof.[104] Arguably, for this reason, the use of Article 31(4) VCLT remains extremely rare in international investment arbitration.[105]

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[100] Kulick and Merkouris (n78) MN 13; see eg *Renta 4 SVSA v Russian Federation* (Award of Preliminary Objections of 20 March 2009) SCC Arbitration V 024/2007 [26].

[101] *Giovanni Alemani and ors v Argentina* (Decision on Jurisdiction of 17 November 2014) ICSID Case No ARB/07/8 [270].

[102] Art 31(4) VCLT.

[103] Kulick and Merkouris (n78) MN 70.

[104] eg *Parkerings v Lithuania* (Award of 11 September 2007) ICSID Case No. ARB/05/8 [277]; *Infinito Gold v Costa Rica* (Award of 3 June 2021) ICSID Case No ARB/14/5 [340].

[105] Weeramantry (n19) 95.

iii. Context

Another pervasive element of the interpretative reasoning of IITs in line with the general rule of interpretation is context.[106] Yet, whilst IITs purport to ascribe explicitly or implicitly to the letter of Article 31(1) and (2) VCLT, there are issues that have divided IITs pertaining to the notion of 'context' and its relative value for the outcome the interpretative process.[107] The section that follows fleshes out issues of convergence and divergence amongst IITs and evaluates the extent to which IIT practice diverges from the VCLT and the prevailing trends in international adjudication.

As a general tendency, IITs tend to ascribe implicitly or explicitly to the general configuration of Article 31(2) VCLT which organises interpretative materials on the basis of their proximity to the treaty term or phrase whose interpretation is sought.[108] Although, IITs rarely expand on issues of principle, a discernible number of recent decisions proclaim in almost identical terms that, at its core, '[t]he relevant "context" for construing the provisions of a treaty can include the words and sentences found in close proximity to that passage, including definitional terms, as well as other provisions of the same treaty which help illuminate its object and purpose.'[109] Along similar lines, some IITs have also considered as 'context' the preamble of, or annexes to, the treaty whose interpretation is sought.[110] Tribunals have occasionally labelled such an approach as the 'method of systematic interpretation' denoting that 'the terms in a treaty should not be analy[s]ed in an isolated manner, but understood in their context'.[111] Nomenclature aside, the role of contextual considerations to the interpretative outcome unsurprisingly varies from decision to decision. Certain instantiations include a presumption that a treaty term has the same meaning in the entirety of the treaty unless otherwise indicated and, *a*

[106] eg Trinh (n2) 106 stating that 57% of decisions engage in such analysis.

[107] eg Kulick and Merkouris (n78) MN 21.

[108] See eg Fauchald (n3) 320; Gazzini (n28) 145.

[109] eg *Eskosol* (Jurisdiction) (n64) [80]; *Nissan Motor Co Ltd v India* (Decision on Jurisdiction of 29 April 2019) PCA Case No 2017-37 [209]; *Addiko Bank AG and DD v Croatia* (Decision on Jurisdiction of 12 June 2020) ICSID Case No ARB/17/37 [198]; *Daniel V Kappes and ors v Guatemala* (Decision on Jurisdiction of 13 March 2020) ICSID Case No ARB/18/43 [123]; *Komaskavia Airport Invest Ltd v Moldova* (Final Award of 3 August 2022) SCC Case 2020/074 [143]; *Rasia FZE and Joseph K Borkowski v Armenia* (Award of 20 January 2023) ICSID Case No ARB/18/28 [361].

[110] eg *Iberdola* (Award) (n68) [307]; *Glencore International AG and CI Prodeco SA v Colombia* (Award of 27 August 2019) ICSID Case No ARB/16/6 [1005].

[111] eg *Ambiente Ufficio SA v Argentina* (Decision on Jurisdiction of 8 February 2013) ICSID Case No ARB/08/9 [457]; also *Alejandro Diego Díaz Gaspar v Costa Rica* (Award of 29 June 2022) ICSID Case No ARB/19/13 [494].

contrario, that the use of different terms is intended to denote difference in meaning.[112] More generally, in IIT practice, 'context' operates as an immediate qualifier to the literal and piecemeal construction of treaty terms,[113] but also as a textual foothold for the determination of object and purpose.[114] And, in this sense, IITs have referred to 'context' almost invariably as an inextricable part of the process of interpretation, much like other ICTs.[115]

What is more, IITs accept that the 'context' of the treaty is not limited to the text of the treaty, but also extends to materials external to the treaty, namely, any 'agreement' and 'instrument' under Article 31(2) VCLT. However, the volume and sophistication of IIT engagement with this provision has increased observably over time, although this development also relates to the availability of such materials depending on each case.[116] At a basic level, IIT practice suggests that the rule of interpretation does not lay down a requirement of form or denomination in line with the practice of other ICTs.[117] For instance, IITs have considered in this context formal agreements,[118] as well as joint statements as evidenced by a press release.[119] One element that has been discussed amongst IITs is the requirement that the agreement or instrument must be made 'in connection with the conclusion of the treaty'.[120] As one tribunal has held 'there is a temporal requirement to this provision of the VCLT'.[121] To illustrate this point, IITs have accepted as 'context' for the purposes of treaty interpretation treaties or statements concluded on the same day as the IIA in question under the rubric of 'agreement'.[122] They have also considered unilateral acts contemporaneous with the conclusion of the treaty, such as the

[112] Gazzini (n28) 149-150; Trinh (n2) 51; eg *ADF v US* (Award of 9 January 2003) ICSID Case No ARB(AF)/00/1 [154]; *Mobil Investments Canada Inc and Murphy Oil Corp v Canada* (Decision on Liability and Quantum of 22 May 2012) ICSID Case No ARB(AF)/07/4 [219]-[221].

[113] eg *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (Award of 2 July 2013) ICSID Case No ARB/10/1 [5.2.6] ('Treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text'); *Komaskavia* (n109) [256] ('[A]ny VCLT interpretation must rest not on construction of a treaty provision in isolation, but rather on the interpretation of the provision in the context of surrounding or otherwise relevant treaty provisions').

[114] eg Gazzini (n28) 148; Kulick and Merkouris (n78) MN 18.

[115] eg Fauchald (n3) 320; Weeramantry (n19) 59-60; see also above Chapter 2, Section I.2.iii.

[116] see Trinh (n2) 51 recording only one decision.

[117] eg Gazzini (n28) 151; see also above Chapter 2, Section I.2.iii.

[118] eg *Romak SA v Uzbekistan* (Award of 26 November 2009) PCA Case No AA280 [182].

[119] eg *Yaung Chi Oo Trading PTE Ltd v Myanmar* (Award of 31 March 2003) ASEAN ID Case No ARB/01/1 [74].

[120] Art 31(2)(a) and (b) VCLT

[121] *ESPF Beteiligungs GmbH and ors v Italy* (Award of 14 September 2022) ICSID Case No ARB/16/5 [322].

[122] eg *Romak* (Award) (n118) [182]; *Hrvatska* (Decision) (n66) [182].

instrument of ratification or declarations under explicit provisions of the IIA in question, as qualifying 'instrument'.[123] Conversely, IITs have opposed the consideration of materials subsequent to the conclusion of the treaty in question under Article 31(2) VCLT.[124] What is more, one IIT rejected the claim that the ICSID Convention constituted 'context' of the applicable IIA concluded in the 1990s implying that remoteness in temporal terms may also play a role.[125] More importantly, another element for the qualification as 'context' is that the interpretative material constitutes an 'agreement…between all the parties' or an instrument 'accepted by' them.[126] Whilst this element has been sparsely discussed in investment arbitration due to the bilateral character of most IIAs, certain IITs were called upon to further explicate the rule in the context of plurilateral IIAs. Specifically, in cases brought between EU members under the ECT, certain IITs denied the consideration of instruments enacted within the EU as 'context', because, among other reasons, they could not establish the acceptance of all ECT parties, that is, including non-EU member states parties.[127] In any case, the determination of acceptance by all the parties is ultimately a question of fact.[128] So, for instance, one tribunal denied the characterisation of certain internal documents submitted to the Legislative Assembly of Costa Rica as instruments under Article 31(2)(b) VCLT because 'there was no evidence that Canada accepted [them] as relating to the BIT'.[129]

Whilst the contextual analysis of IITs reported so far does not deviate from the approach of other ICTs and the letter of VCLT, certain IITs have taken an even more expansive approach as to the interpretative materials that can qualify as 'context'.[130] To illustrate this point, in *Conoco Phillips*, the tribunal took into account the text of the Netherlands model BIT, treaties

[123] eg *Fraport AG v Philippines* (Award of 10 December 2014) ICSID Case No ARB/11/12 [327] (instrument of ratification); *Landesbank Baden-Württemberg and others v Spain* (Decision on the Intra-EU Jurisdictional Objection of 25 February 2019) ICSID Case No ARB/15/45 [129] (declaration under explicit provision of the IIA).

[124] eg *ESPF* (Award) (n121) [322]; *Eskosol* (Jurisdiction) (n64) [219]; *AMF Aircraftleasing Meier & Fischer GmbH & Co v Czech Republic* (Award of 11 May 2020) PCA Case No 2017-15 [335].

[125] *Rompetrol Group NV v Romania* (Decision on Jurisdiction of 18 April 2008) ICSID Case No ARB/06/3 [106].

[126] eg Dörr, Article 31 (n98) 590.

[127] eg *InfraRed Environmental Infrastructure GP Ltd and ors v Spain* (Award of 2 August 2019) ICSID Case No ARB/14/12 [267]; *Sevilla Beheer BV and others v Spain* (Decision on Jurisdiction, Liability and Principles of Quantum of 11 February 2022) ICSID Case No ARB/16/27 [670].

[128] eg Dörr, Article 31 (n98) 588; Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Nijhoff 2009) 430.

[129] *Infinito Gold* (n104) [198]; see also eg *HICEE* (Partial Award) (n35) [134].

[130] eg Gazzini (n28) 300-301; Kulick and Merkouris (n78) MN 21; Mitchell and Munro (n81) 687.

concluded between the Netherlands and third parties, as well as the model BITs of third states and IIAs between third parties, as 'broader context' for the interpretation of a provision of the Netherlands-Venezuela BIT.[131] This approach has been explicitly criticised by one tribunal that held in unequivocal terms that 'the prior treaty making practice of two States does not fit within the "context" outlined in Article 31(2) of the VCLT'.[132] As other IITs have remarked, relying on the wording of treaties with different treaty partners without independent verification by the deciding IIT amounts to a misapplication of the VCLT rules of interpretation.[133] The practice of IITs to accord lesser value to materials external to the treaty in question, apart from the ones explicitly mentioned in Article 31(2) and (3) VCLT, seems more in line with the overall tenor of the VCLT rules and ICT practice.[134]

It emerges from this short exposition that IITs understanding of the interpretative element of 'context' conforms to a large extent with the VCLT and the practice of other ICTs, especially the ICJ. On the one hand, the core notion of 'context', comprising elements of the text of the entire treaty, constitutes an indispensable step in the interpretative process of IITs. In the same vein, IITs construe the notion of instruments and agreements under Article 31(2) VCLT in line with the letter of the VCLT and the practice of other ICTs, despite such materials being less frequently available in investment arbitration due to the bilateral character of most IIAs. On the other hand, there is IIT practice diverging from the letter of Article 31(2) VCLT as to the delimitation of the outer limit of the notion of 'context'. However, there are important reasons to doubt that IITs have carved out a more expansive understanding of the concept of 'context' for the purposes of investment arbitration more generally. First, even when IITs have taken a more expansive approach, they have not reasoned this approach as a deviation to the VCLT nor have they cited any countervailing considerations that are specific to the content or configuration of international investment agreements or arbitration. Second, as explained, not only the number of these decisions is limited, but also other IITs have treated them as breaches of the general rule of interpretation.

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[131] *Conoco Phillips Petrozuata BV and ors v Venezuela* (Decision on Jurisdiction and the Merits of 3 September 2013) ICSID Case No ARB/07/30 [310]-[311] and [313]; along similar lines, eg *ADC v Hungary* (Award of 2 October 2006) ICSID Case No ARB/03/16 [359]; *Abaclat and ors v Argentina* (Decision on Jurisdiction and Admissibility of 4 August 2011) ICSID Case No ARB/07/5 [345].

[132] *Nova Scotia Power Inc v Venezuela* (Award of 30 April 2014) ICSID Case No ARB(AF)/11/1) [83] (fn137); also, *a contrario*, *Plama* (Jurisdiction) (n69) [195].

[133] eg *RosInvest* (Jurisdiction) (n89) [49]; *Rompetrol* (Jurisdiction) (n125) [107]-[108].

[134] See eg above nn 80 and 84.

iv. Object and Purpose

'Object and purpose' constitutes another element of the general rule of interpretation as reflected in Article 31(1) VCLT that has featured prominently in the interpretative practice of IITs, although slightly less so in quantitative terms than 'ordinary meaning' or 'context'.[135] IITs have expanded upon the methodology for the determination of 'object and purpose', the level at which this analysis takes place, as well as the place of this analysis within the interpretative process. For the most part, it is hard to observe any meaningful divergence between IITs or between IITs and other ICTs as to these matters of principle. Discrepancies in the interpretative outcomes between IITs, when they occur, tend to originate from the disparate application of these shared considerations to the case at hand.

In line with the practice of other ICTs, IITs treat the concept of 'object and purpose' as a singular element, despite minor discrepancies in nomenclature.[136] From a conceptual perspective, the incorporation of 'object and purpose' as an inextricable part of the general rule of interpretation instils a degree of teleology into the process of treaty interpretation.[137] Still, 'it is the object the purpose as expressed *in the treaty* and not the extratextual subjectivities of the parties'.[138] In methodological terms, the inquiry into the object and purpose of a treaty centres around its entire text including its preamble and title.[139]An obvious starting point for this inquiry are IIA provisions laying down explicitly the purpose or objectives of the IIA where available.[140] IITs have also referred to the preamble to the treaty in question as a useful point of reference, although empirical studies suggest that this is not a predominant tendency.[141] Another point of reference for the determination of a treaty's 'object and purpose' have been materials falling under the definition of 'context' in Article 31(2) VCLT.[142] To illustrate this point,

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[135] eg Fauchald (n3) 322 reports 48 out of 98 decisions; Trinh (n2) 261*ff.* reports 81 decisions out of 180 selected cases.

[136] See Weeramantry (n19) 70-71.

[137] eg ibid (n19) 67; Gazzini (n28) 163; Kulick and Merkouris (n78) MN 24.

[138] W Michael Reisman and Mahnoush H Arsanjani, 'Interpreting Treaties for the Benefit of Third Parties: The "*Salvors* Doctrine" and the Use of Legislative History in Investment Treaties' (2010) 104 AJIL 597, 599.

[139] eg Gazzini (n28) 157-158; Kulick and Merkouris (n78) MN 25.

[140] eg Art 2 ECT; *Liman Caspian Oil BV and NCL Dutch Investment BV v Kazakhstan* (Award of 22 June 2010) ICSID Case No ARB/07/14 [225]; *Masdar Solar v Spain* (Award of 16 May 2018) ICSID Case No ARB/14/1 [468].

[141] eg Weeramantry (n19) 71; Fauchald (n3) 322; eg *Aguas de Tunari* (Jurisdiction) (n44) [241].

[142] Gazzini (n28) 159; Weeramantry (n19) 72; eg *Vacuum Salt Product Ltd v Ghana* (Award of 16 February 1994) ICSID Case No ARB/92/1 [39].

several IITs have used ECT's *renvoi* to the European Energy Charter as a stepping stone to refer to this instrument, most commonly, in the context of an examination of the ECT's object and purpose.[143]

As in the case of other ICTs, IIT practice is ambivalent as to whether the object of inquiry is the 'object and purpose' of the treaty or the provision of in question.[144] In principle, the VCLT mandates the interpretation of a treaty 'in light with *its* object and purpose', thus obligating the interpreter to take into account the object and purpose of the treaty as a whole.[145] Nonetheless, the interpretative exercise in practice inevitably focuses on a specific provision or even phrase.[146] What is more, in certain cases, the terms of a provision might lay down or imply a specific 'object and purpose' for the concrete course of action prescribed or proscribed by that provision.[147] To illustrate this point, ICSID Convention stipulates that 'the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken *to preserve the respective rights of either party*'.[148] Several IITs have held that the formulation of the provision calls for a teleological interpretation that takes into account the provision's stated purpose of preserving the rights of the parties.[149] This approach mirrors the findings of the ICJ with respect to the similarly phrased provision of Article 41 ICJ Statute which is commonly cited by IITs dealing with this matter.[150]

IIT practice also varies as to the relative value they accord to the 'object and purpose' element in reaching an interpretative outcome. As a general tendency, IITs tend to be cautious with respect to the treatment of this element in a way that gives the appearance that 'object and

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[143] eg *Antin Infrastructure Services Luxembourg Sárl and Antin Energia Thermosolar BV v Spain* (Award of 15 June 2018) ICSID Case No ARB/13/31 [521]-[522]; *Belenergia SA v Italy* (Award of 6 August 2019) ICSID Case No ARB/15/20 [298].

[144] eg Weeramantry (n19) 73; Gazzini (n28) 161-162.

[145] eg Kulick and Merkouris (n78) MN 24; Villiger (n128) 427.

[146] Dörr, Article 31 (n98) 585.

[147] eg *ADF* (Award) (n112) [145]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Pakistan* (Decision on Jurisdiction of 14 November 2005) ICSID Case No ARB/03/29 [96] and [98].

[148] Art 47 ICSID Convention (emphasis added).

[149] Gazzini (n28) 181-185; eg *City Oriente Ltd v Ecuador* (Decision on Provisional Measures of 19 November 2007) ICSID Case No ARB/06/21 [52]; *Victor Pey Casado and Fundación Presidente Allende v Chile* (Decision on Provisional Measures of 3 Feburary 2002) ICSID Case No ARB/98/2 [19]-[20].

[150] cf *LaGrand (Germany v United States of America)* Judgment [2001] ICJ Rep 466 [102]; eg *Perenco Ecuador Ltd v Ecuador and Empresa Estatal de Petróleos del Ecuador (Petroecuador)* (Decision on Provisional Measures of 8 May 2009) ICSID Case No ARB/08/6 [69].

purpose' is subaltern to the other elements of the general rule of treaty interpretation.[151] Such caution is not limited to the tribunals that have explicitly favoured a literal approach.[152] Empirical surveys suggest that IITs often eschew an inquiry into the 'object and purpose' even without further explanation.[153] One reason for this circumspection can be the often open-ended, if not contradictory, formulations of the objectives of IIAs, especially in their preambles, that set out a variety of objects and purposes and require the prolongation of the interpretative exercise without necessarily providing any additional certainty.[154] In this respect, a discernible number of IIT awards have invoked the 'object and purpose' of IIAs consisting of preambular references to the creation and maintenance of favourable conditions for investments by investors of the two parties as the basis of an expansive interpretation of investment protection standards.[155] However, as one tribunal has eloquently held: 'the purpose of [the IIA] can be taken to be the encouragement of investment, on a mutual and reciprocal basis, while balancing the interests of the investors and of the receiving State in that regard; in and of itself, however, that says nothing about where the balance has been drawn in the particular treaty in question.'[156] Besides, as several IITs have remarked, treaty preambles 'cannot add substantive requirements to the provisions of the Treaty'.[157] That said, these observable tendencies cannot be taken as evidence for a theoretical predisposition of IITs against this specific element of treaty interpretation in contrast to the letter of the VCLT. Ultimately, the relative value that each element has to the outcome of the interpretative process is co-dependent upon the degree of certainty it may

[151] Weeramantry (n19) 75; Fauchald (n3) 323.

[152] See above section I.1.

[153] See above n135.

[154] eg Gazzini (n28) 159-160.

[155] Weeramantry (n19) 73-75; Elizabeth Sheargold, 'The VCLT Rules on Interpretation and the Triangular Nature of Investment Treaties: State Control Versus Investor Rights' in Esme Shirlow and Kiran N Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (Kluwer 2022) 152, 157-159 eg *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction of 29 January 2004) ICSID Case No ARB/02/6 [116]; *Telefónica SA v Argentina* (Decision on Jurisdiction of 25 May 2006) ICSID Case No ARB/03/20 [77]; *Kardassopoulos and Fuchs v Georgia* (Award of 3 March 2010) ICSID Case Nos ARB/05/18 and ARB/07/15 [432]-[433].

[156] eg *HICEE* (Partial Award) (n35) [161]; similarly, *Saluka* (Partial) (n34) [300]; *Plama* (Jurisdiction) (n69).

[157] *Société Générale v Dominican Republic* (Award on Jurisdiction of 19 September 2008) LCIA Case No UN 7927 [32]; similarly, eg, *İçkale İnşaat Limited Şirketi v Turkmenistan* (Award of 8 March 2016) ICSID Case No ARB/10/24 [337]; *Continental Casualty Co v Argentina* (Award of 5 September 2008) ICSID Case No ARB/03/9 [258].

adduce.[158] This, in turn, is an instantiation, rather than an exception, of the interdependence of the elements of the general rule of interpretation.

v. Subsequent Agreements and Subsequent Practice

The use of the interpretative materials laid down in Article 31(3)(a) and (b) VCLT has been a sporadic phenomenon in international investment arbitration at least until recently. Consecutive empirical studies up until 2012 have reported that the role of these materials for the practice of IITs has been 'rare' or 'insignificant' centred mostly around the idiosyncratic provisions of NAFTA.[159] The proliferation of IIA provisions encompassing processes for joint interpretation by the states parties constitutes a more recent phenomenon.[160] Against this background, the issue of the application of Articles 31(3)(a) and (b) VCLT in the context of investment arbitration has attracted increased attention. IITs have had opportunities to decide issues relating to the conduct that qualifies as subsequent agreement and subsequent practice of the parties under Article 31(3)(a) and (b) VCLT, as well as to the impact of these materials on the interpretative outcome. A particularly salient issue for the operation of Article 31(3)(a) and (b) VCLT in the practice of IITs has been the impact of the so-called 'triangular' character of IIAs that lay down protections for investors who are technically third parties with respect to the treaty.[161] The section that follows discusses these issues in turn.

To start, IIT practice tends to follow the distinction between a 'subsequent agreement' under Article 31(3)(a) VCLT and 'subsequent practice' under Article 31(3)(b) VCLT, although they have avoided overarching definitions. For IITs, a 'subsequent agreement' under Article 31(3)(a) VCLT consists of materials embodying the joint conduct of all the parties to the treaty after its conclusion.[162] Whilst an IITs has noted that such agreements do not need to take the

[158] see, eg, *Longreef AVV v Venezuela* (Decision on Jurisdiction of 12 Feburary 2014) ICSID Case No ARB/11/5 [194]-[196].

[159] Fauchald (n3) 332; Trinh (n2) 54-55; see Art 1131(2) NAFTA.

[160] eg Eleni Methymaki and Antonios Tzanakopoulos, 'Master of Puppets? Reassertion of Control through Joint Treaty Interpretation' in Andreas Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017) 155, 162.

[161] For nomenclature see eg Anthea Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights' (2015) 56 HJIL 353, 353.

[162] Sheargold (n155) 160; more generally, ILC, 'Conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the Commission' in ILC, 'Report of the International Law Commission – Seventieth Session' (30 April-1 June and 2 July-10 August 2018) A/73/10 [51] ('ILC Conclusions on Subsequent Agreements and Practice'), Conclusion 4 and Commentary [4] and [5].

form of a treaty as a matter of principle,[163] IIT practice relates almost exclusively to joint written instruments.[164] More crucially, the instrument must constitute a common act of all the parties to the treaty.[165] Accordingly, several tribunals denied the characterisation of a declaration of EU member states as a 'subsequent agreement' relevant to the interpretation of the ECT under Article 31(3)(a) VCLT, because it did not originate from all the parties to that treaty.[166] In addition, the general rule of interpretation envisages only an agreement 'regarding the interpretation of the treaty or the application of its provisions'.[167] On this ground, other IITs have resisted the consideration of the aforementioned declaration of EU member states under Article 31(3)(a) VCLT, because it did not relate to the specific IIA in question in each specific case.[168]

The approach of IITs has been less consistent with respect to conduct that can qualify as 'subsequent practice' under Article 31(3)(b) VCLT. In principle, unlike a 'subsequent agreement', 'subsequent practice' may comprise disparate conduct of the parties 'in the application of the treaty' including actions, omissions, or even silence as long as it 'establishes the agreement of the parties regarding its interpretation'.[169] One question that has arisen before several IITs relates to form, in particular, whether submissions to arbitral tribunals by the parties to the IIA can qualify as 'subsequent practice' under Article 31(3)(b) VCLT.[170] IITs have been mostly receptive to concurring submissions adduced by non-disputing states parties in ongoing proceedings.[171] However, curiously, IITs are divided as to the consideration under this rubric of coinciding submissions of the IIA parties as respondents to parallel proceedings relating to the

[163] eg *Methanex v United States of America* (Final Award of 3 August 2005) UNCITRAL [20].

[164] Sheargold (n155) 160.

[165] *Aguas de Tunari* (Jurisdiction) (n44) [251]; more generally, Commentary to Conclusion 4 [12] ILC Conclusions on Subsequent Agreements and Practice; but see *contra Caratube International Oil Co LLP v Kazakhstan* (Award of 5 June 2012) ICSID Case No ARB/08/12 [333] ('In Article VI(8) of the BIT, Kazakhstan and the United States exercise their discretion, as parties to the ICSID Convention, to agree on the Convention's interpretation or application in a particular area of their bilateral relations.')

[166] eg *Eskosol* (Jurisdiction) (n64) [220]; *InfraRed* (Award) (n127) [267]; *Silver Ridge* (n60) [223].

[167] Art 31(3)(a) VCLT; Commentary to Conclusion 4 [13] ILC Conclusions on Subsequent Agreements and Practice.

[168] eg *Eskosol* (Jurisdiction) (n64) [219]; *GPF GP v Poland* (Final Award of 20 April 2020) SCC Arbitration V 2014/168 [353]; *Muszynianka spółka z ograniczoną odpowiedzialnością v Slovakia* (Award of 7 October 2020) PCA Case No 2017-08 [221].

[169] Art 31(3)(b) VCLT; Commentary to Conclusion 4 [17] ILC Conclusions on Subsequent Agreements and Practice.

[170] Sheargold (n155) 167; Kulick and Merkouris (n78) MN 43.

[171] eg *Mobil and Murphy* (Liability and Quantum) (n112) [291]-[292] and [295]; *Canadian Cattlemen for Fair Trade v United States of America* (Award on Jurisdiction of 28 January 2008) UNCITRAL [188]-[189]; *Astrida Benita Carrizosa v Colombia* (Award of 19 April 2021) ICSID Case No ARB/18/5 [203].

same IIA.[172] Even though in principle the context of certain conduct can have a bearing on its evidentiary value to 'establish the agreement of the parties',[173] the specific context of participation in proceedings as a defendant cannot automatically disqualify such conduct from being considered as 'practice' as per Article 31(3)(b) VCLT.[174] At any rate, even though not every party needs to engage individually in the practice with positive actions, IITs require that the relevant practice needs to evidence the agreement of all the parties to the treaty.[175] Notably, for this reason, several IITs did not consider a declaration by 22 EU member states as relevant practice for the interpretation of the ECT.[176] In addition, IITs consider such practice only relevant if it occurs 'in the application' of the treaty in question excluding on this ground indicatively, submissions of parties in proceedings relating to different treaties[177] or statements that do not address the IIA in question.[178]

IITs have had the opportunity to discuss extensively the role and relative weight of subsequent agreements and practice under Article 31(3)(a) and (b) VCLT among three axes. First, one complicating issue has been broader difficulties in distinguishing between authentic interpretation of a treaty and its modification or amendment.[179] IITs accept that the interpretative elements in Article 31(3)(a) and (b) VCLT constitute authentic interpretation of the treaty in question and, as such, it is obligatory for the tribunal to take them into account for the interpretation of the treaty.[180] At the same time, several IITs have found that subsequent agreements

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[172] *Contrast*, eg, *Telefónica* (Jurisdiction) (n155) [112]-[113]; *Gas Natural v Argentina* (Decision on Jurisdiction of 17 June 2005) ICSID Case No ARB/03/10 [47] (at fn12); *Urbaser SA v Argentina* (Award of 8 December 2006) ICSID Case No ARB/07/26 [51]; *Suez and ors v Argentina* (Decision on Annulment of 5 May 2017) ICSID Case No ARB/03/19 [258]; *with Kappes* (Jurisdiction) (n109) [156]; *Clayton and Bilcon v Canada* (Decision on Jurisdiction and Liability of 17 March 2005) PCA Case No 2009-04 [376]-[379].

[173] eg Sheargold (n155) 167-168.

[174] eg Kulick and Merkouris (n78) MN 43; Gazzini (n28) 204-205.

[175] eg *PV Investors v Spain* (Preliminary Award on Jurisdiction of 13 October 2014) PCA Case No 2012-14 [194].

[176] eg *RWE Innogy GmbH and RWE Innogy Aersa SAU v Spain* (Decision on Jurisdiction, Liability, and Certain Issues of Quantum of 30 December 2019) ICSID Case No ARB/14/34 [372]; *Hydro Energy 1 Sárl and Hydroxana Sweden SA v Spain* (Decision on Jurisdiction, Liability, and Directions on Quantum of 9 March 2020) ICSID Case No ARB/15/42 [502] (15); *Mercuria Energy Group Ltd v Poland* (Award of 29 December 2022) SCC Case No V 2019/126 [409]; also *Eskosol* (Jurisdiction) (n64) [220]; *InfraRed* (Award) (n127) [267]; *Silver Ridge* (n60) [223].

[177] eg *El Paso Energy International Co v Argentina* (Award of 31 October 2011) ICSID Case No ARB/03/15 [603].

[178] eg *PV* (n175) [194].

[179] Conclusion 7(3) ILC Conclusions on Subsequent Agreements and Practice.

[180] Gazzini (n28) 189; eg *HICEE* (Partial Award) (n35) [134].

and practice 'cannot be used as a means for modifying or escaping the Treaty's terms' or 'modify treaty obligations'.[181] How these general considerations can affect the relative weight of interpretative agreements and practice for the interpretative outcome has been a divisive issue amongst IITs. Specifically, several IITs have set aside a joint interpretation adduced by the states parties to the relevant IIA on the ground that subsequent agreements and practice 'cannot prevail over the ordinary meaning of the text of the treaty'.[182] Nonetheless, as has been shown, the ordinary meaning of terms cannot be conflated with their literal meaning,[183] whilst the VCLT and IITs recognise the (theoretical at least) possibility that the parties can attach a special meaning to the terms of a treaty.[184] Thus, whilst it is true that Art 31(3) VCLT only enjoins interpreters to 'take into account' these interpretative elements,[185] they should have in principle no less weight than all the other interpretative means laid down in the general rule of interpretation.

Second, what adds another layer of complexity in international investment arbitration is the proliferation of IIAs that not only provide for a procedure by which the parties can adopt interpretations, but also render these interpretations binding upon IITs constituted under them.[186] Paradigmatic in this regard are cases concerning the NAFTA Free Trade Commission (FTC) Interpretation Note on Article 1105(1) NAFTA, which stated that the reference to 'treatment in accordance with international law' did not exceed what is required by customary international law.[187] Especially a few earlier IITs have taken the more draconian view that the FTC Note constituted an impermissible amendment or a permissible informal modification,

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[181] *Benita* (n171) [203]; also eg *Magyar Farming Company Ltd and ors v Hungary* (Award of the Tribunal of 13 November 2019) ICSID Case No ARB/17/27 [196]; *AMF* (n124) [337]; *Eskosol* (Jurisdiction) (n64) [223]; *Muszynianka* (n168) [223]-[224]; *GPF* (n168) [354].

[182] eg *Strabag SE and ors v Poland* (Partial Award on Jurisdiction of 2 March 2020) ICSID Case No ADHOC/15/1 [8.126]; *sub silentio*, *EcoOro Minerals Corp v Colombia* (Decision on Jurisdiction, Liability, and Questions of Quantum of 9 September 2021) ICSID Case No ARB/16/41 [836].

[183] See above n95-101 and text.

[184] Art 31(4) VCLT; eg, *a contrario*, *Infinito Gold* (Award) (n129) [340].

[185] eg *Renco Group Inc v Peru* (Decision on Preliminary Objections of 30 June 2020) PCA Case No 2019-46 [234]; *Mercuria* (n176) [408].

[186] Art 1131(2) NAFTA; eg Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA) (adopted 5 August 2004, 1 January 2009) <https://ustr.gov/trade -agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> Art 10.22(3) and 19.1(3); ASEAN-Australia-New Zealand Free Trade Agreement (adopted 27 February 2009, entered into force 1 January 2010) 2672 UNTS 3 (AANZFTA), Art 27(2) and (3).

[187] Art 1105(1) NAFTA; NAFTA FTC, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001) available at: <www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>; Gazzini (n28) 187; Kulick and Merkouris (n78) MN 48.

although these findings were mostly *obiter*.[188] At any rate, as we have seen, the latter view seems dated considering the entrenchment of the presumption against amendment in IIT practice.[189] More decisions on the matter converge into construing the Note as a means of interpretation, most notably, in light of the characterization given to it by the parties.[190] However, they remain divided as to whether it should be considered a 'subsequent agreement' under Article 31(3)(a) VCLT or a *sui generis* interpretative instrument that is conclusively binding as *per* Article 1131(2) NAFTA.[191] Theoretically, this distinction could have a bearing on the direction of cases by implying the preclusion of certain interpretative materials, for instance, 'relevant rules of international law' stemming from other sources.[192] However, in practice, this division was more apparent than real considering that both Article 1105(1) NAFTA and the FTC Note allowed IITs ample interpretative space with respect to the content of customary international law.[193]

Third, another issue that has divided IITs has been the bearing of the discrepancy between the interstate character of IIAs and the explicit beneficiaries of IIA obligations on the intertemporal effects of an interpretation under Article 31(3)(a) and (b) VCLT.[194] In principle, one of the distinguishing features between interpretation and amendment or modification as juridical operations are their different intertemporal effects: interpretation by definition relates to the meaning of the treaty provision from the time of its conclusion, whereas amendment has in principle effect only for the future.[195] Yet, the distinction becomes fuzzier considering that states are free in principle to amend or modify a treaty with retroactive effect; there is at best a

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[188] *Pope and Talbot Inc v Canada* (Award on Damages of 31 May 2002) UNCITRAL [46]-[47]; *Methanex* (Final Award) (n163) [21]; see Georg Nolte, 'Second Report on Subsequent Agreements and Practice in relation to the Interpretation of Treaties' (2014) II(1) YbILC 111, 146 [150].

[189] See n181; also Kulick and Merkouris (n78) MN 48.

[190] eg *ADF* (Award) (n112) [177]; *Methanex* (Final Award) (n163) [14]; *Mondev* (Award) (n36) [120]; *Mercer International Ltd v Canada* (Award of 6 March 2017) ICSID Case No ARB(AF)/12/3 [7.56]

[191] See, eg, Nolte (n188) 146 [150]; *compare*, eg, *Methanex* (Final Award) (n163) [23]; *Eli Lilly and Co v Canada* (Final Award of 16 March 2017) Case No UNCT/14/2 [106]-[107] (mentioning Art 31(3)(a) VCLT); *with*, eg, *Windstream Energy LLC v Canada* (Award of 27 September 2016) UNCITRAL [348]; *Lone Pine Resource Inc v Canada* (Final Award of 21 November 2022) UNCITRAL [587] (no mention of the VCLT).

[192] eg Charles H Brower II, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2006) 46 VJIL 347, 358-363.

[193] Methymaki and Tzanakopoulos (n160) 168; see also below Section III.

[194] eg Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 212.

[195] eg Methymaki and Tzanakopoulos (n160) 177.

presumption against retroactivity.[196] In IIT practice, the issue has been discussed somewhat tangentially with respect to joint interpretations adduced whilst the proceedings were pending.[197] To illustrate this point, two ISCID tribunals have relegated the value of these interpretative materials with the reasoning that

> even if an interpretation was shared today by the Parties to the Treaty, it would still not result in a change of its terms. States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries.[198]

By contrast, the *Pope and Talbot* tribunal considered itself bound by the aforementioned NAFTA FTC Note in light of the unambiguous provision of Article 1131(2) NAFTA, notwithstanding its finding that it could be construed as an amendment.[199] What is more, more recent IIAs explicitly lay down the power of the states parties to endow their joint interpretative declarations with retroactive binding effect.[200] Thus, on balance, the specific configuration of IIA obligations seems to have played a marginal role with respect to this intertemporal dimension of Article 31(3)(a) and (b).

The analysis so far has shown that IIT practice does not demonstrate any significant departure from the approach of VCLT and other ICTs with respect to the notion and evaluation of subsequent agreements and practice as elements of the process of treaty interpretation. IITs appear to take a more narrow view of the notion of 'subsequent agreements' under Article 31(3)(a) VCLT compared to other ICTs, but this approach is tempered by their non-formulaic approach towards 'subsequent practice' under Article 31(3)(b) VCLT. At the same time, IITs tend not to overstate potential theoretical differences relating to the beneficiaries of IIAs or treat IIAs as special cases to discard commonly agreed interpretations of the states parties. As

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[196] eg Roberts (n194) 213.

[197] eg Sheargold (n155) 165-166.

[198] *Enron Corp Ponderosa Assets LP v Argentina* (Award of 22 May 2007) ICSID Case No ARB/01/3 [337]; *Sempra Energy v Argentina* (Award of 28 September 2007) ICSID Case No ARB/02/16 [385]; similarly, *Eskosol* (Jurisdiction) (n64) [226].

[199] *Pope and Talbot* (Damages) (n83) [47].

[200] Gazzini (n28) 199-200; eg Art 8.31(3), Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (adopted 30 October 2017, not yet into force, but provisional application since 21 September 2017) available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22017A0114%2801%29>.

shown, for the most part, IITs frame these issues against the background of the general distinction between interpretation and amendment or modification, accepting, in this respect, a presumption against amendment. Even though IITs pronouncements as to criteria for the implementation of the distinction vary, they all converge into framing the issue as one of general international law on interpretation than a special case.

vi. Other Relevant Rules of International Law

IITs have also been consistent in their endorsement of Article 31(3)(c) VCLT–occasionally referred to in IIT practice as the principle of systemic integration—[201] as another integral part of their interpretative process with one quantitative study reporting its appearance in a quarter of the reported cases.[202] In the main, IITs have had the opportunity to deal with a variety of issues arising from Article 31(3)(c) VCLT and its counterpart in customary international law including what qualifies as an 'applicable rule', how to determine whether these rules are 'relevant', and which states encompasses the reference to the 'parties'.[203] In so doing, IITs have been inevitably called upon to draw explicitly or implicitly a line between ascribing proper value to the interpretative element of Article 31(3)(c) VCLT and upholding the restrictions imposed by their material jurisdiction or applicable law.[204] As a general tendency, IIT findings demonstrate a considerable degree of uniformity amongst each other and with the findings of other ICTs. However, as has become apparent, the sheer volume of IIT practice provides a fertile ground for outliers.

In the main, IITs consider the reference of the general rule of interpretation to 'applicable rules' as a formal requirement.[205] Thus, 'applicable rules' encompass only binding rules

[201] eg *Al-Warraq* (Preliminary Objections) (n91) [203]; *Tulip v Turkey* (Decision on Annulment of 30 December 2015) ICSID Case No ARB/11/28 [87] and [90] often citing Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention' (2005) 54 ICLQ 279.

[202] Trinh (n2) 61; see, however, Weeramantry (n19) 95 characterising the use of the provision as 'rare'.

[203] See Kulick and Merkouris (n78) MN 53; Arato and Kulick (n7).

[204] See eg Gazzini (n28) 221.

[205] See eg Trinh (n2) 55; Kulick and Merkouris (n78) MN 54.

originating from the formal sources of international law, namely, treaties,[206] customary international law,[207] and general principles of law[208]. Conversely, this characterisation does not include non-binding instruments or international case law, although IITs, much like other ICTs, commonly use them variably as means to determine 'applicable rules' of unwritten international law or to interpret 'applicable' treaty provisions.[209] Interestingly, one IIT held that the 'for any rule of international law to be applicable under Article 31(3)(c) VCLT, it is also imperative that such rule be a clearly determinable rule.'[210] For the tribunal, '[t]he need for such clarity is implicitly reflected in the primacy of the text of the treaty…as per the general rule in Article 31(1) VCLT.'[211] Similarly, another IIT pronounced that '"[a]pplicable in the relations between the parties" must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty'.[212] One plausible reading of these findings is that the characterisation of 'applicable rules' under Article 31(3)(c) VCLT requires not only a determination of their binding character, but also the individuation of these rules. So, for instance, in *Sunreserve*, the tribunal could not proceed with the wholesale characterisation of EU law as 'applicable rules' for the interpretation of the ECT.[213] In any case, the consideration of the criterion of relevance can have plausibly similar effects to the interpretative exercise.

In this latter respect, IITs rarely reason their determination as to the relevance or non-relevance of an external rule the purposes of this element of the VCLT rule.[214] Even when IITs exceptionally do so, they have not made use of any consistent or systematic standards to assess the relevance of an external rule of international law for the interpretation of a treaty under Article 31(3)(c) VCLT. In theory, the reference of the rule of interpretation to 'relevant' rules

[206] eg *Al-Warraq* (Preliminary Objections) (n91) [203]; *Urbaser* (Award) (n172) [1197]-1198] and [1204]-[1210].
[207] eg *Fraiz* (n38) [342].
[208] eg *Renco* (n185) [235]; *Eiser Infrastructure Ltd and Energía Solar Luxembourg SárL v Spain* (Decision on Annulment of 11 June 2020) ICSID Case No ARB/13/36 [177]; *Bank Melli* (n33) [371].
[209] Kulick and Merkouris (n78) MN 57; Arato and Kulick (n7); see eg *Antonio del Valle Ruiz and ors v Spain* (Award of 13 March 2023) PCA Case No 2019-17 [457]-[462]; *Urbaser* (Award) (n172) [1197]-[1198].
[210] *Sunreserve* (n71) [394].
[211] ibid.
[212] *RosInvest* (Jurisdiction) (n89) [39].
[213] *Sunreserve* (n71) [394].
[214] Panos Merkouris, 'Principle of Systemic Integration' [2020] MPEiPro [34]; see, eg, *Magyar Farming* (n181) [344].

invites a multi-layered assessment on how the treaty rule in question and the external rule are close or proximate in terms of text, subject-matter, time, or participation.[215] Nonetheless, IITs tend to understand 'relevance' mostly in terms of subject-matter.[216] Quite broadly, a tribunal held that the external rule needed to be 'sufficiently comparable' to the treaty rule in question in order to qualify as 'relevant' for its interpretation.[217] In the event, the tribunal relied on the fact that the time bar for claims under the IIA was 'similar to' or had 'strong structural similarities' with the general rule on the exhaustion of local remedies in order to read a futility exception into the IIA provision.[218] In most cases, IITs inquire into a more concrete textual foothold to establish the relevance of the external rule, even though they would not go as far as requiring an explicit *renvoi*.[219] Notably, several IITs have interpreted treaty terms in the absence of a specific definition in the IIA in accordance with general international law upholding a broader presumption in favour of construing treaty provisions in harmony with international law.[220]

Another requirement of Article 31(3)(c) VCLT, that has been confirmed in IIT practice, is that any external rules 'are applicable as between the States parties to the treaty to be interpreted'.[221] The application of this requirement is straightforward when the external rule is one of customary international law or a general principle of law, but has led to inconsistencies with respect to rules emanating from treaty regimes.[222] For instance, certain IITs have resorted to rules emanating from BITs concluded between the respondent state and a third state to interpret the provisions of a BIT, albeit without specific reference to Article 31(3)(c) VCLT.[223] As one tribunal has held, '[t]here is nothing in the Vienna Convention that would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the

[215] Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill 2015) 84.
[216] Gazzini (n28) 217.
[217] *Ambiente Ufficio* (Jurisdiction) (n111) [601].
[218] ibid [602]-[603].
[219] Notably, IITs did not rely on Art 31(3)(c) VCLT in discussing Art 1105 NAFTA see above n187 and text and cf Trinh (n2) 57.
[220] eg *Raimundo J Santamaria Davis v Venezuela* (Decision on Jurisdiction of 26 July 2023) PCA Case No 2020-56 [426]; *Michael and Lisa Ballantine v Dominican Republic* (Final Award of 3 September 2019) PCA Case 2016-17 [541]; *Fraiz* (n38) [355]; *Valle Ruiz* (n209) [460]-[461]; *Urbaser* (Award) (n172) [1200].
[221] eg *Tulip* (Annulment) (n201) [87].
[222] eg *South American Silver Ltd v Bolivia* (Award of 22 November 2018) PCA 2013-15 [217].
[223] See n84 and text.

provisions of other treaties concluded with other partner States.'[224] Along similar lines, a NAFTA tribunal found that an instrument could not fall under Article 31(3)(c) VCLT as it did not emanate from all the parties to NAFTA.[225] IITs seem less consistent when it comes to the interpretation of IIAs with broader participation, like the ECT. For instance, in *Vattenfall*, the tribunal resisted the consideration of EU law as relevant for the interpretation of the ECT, because '[i]t would create one set of obligations applicable in at least some "intra-EU" disputes and another set of different obligations applicable to other disputes.'[226] At the same time, tribunals dealing with the very same issue have avoided this reasoning with one tribunal affirming that 'as a matter of principle, EU law can be taken into account for the purposes of interpreting Article 26 of the ECT by virtue of Article 31(3)(c) VCLT as "rules of international law applicable in the relations between the parties"'.[227]

As a general tendency, IITs accept that Article 31(3)(c) VCLT lays down a mandatory and inextricable part of the interpretative process on par with all the other elements of the general rule of interpretation.[228] However, at the same time, IITs acknowledge that this element co-exists alongside the parties' power to agree upon a *lex specialis*.[229] Thus, IITs tend to accept that relevant rules of international law cannot displace the text of the treaty whose interpretation is sought.[230] The practice of IITs cannot be reduced to a singular formula as to how to balance these contradictory considerations. IITs will readily accept the consideration of external rules to confirm an interpretation reached with other means.[231] Less consistently, IITs have been more receptive of external rules of general international law in cases of treaty silence as to the

[224] *Rompetrol* (Jurisdiction) (n125) [106].
[225] *B-Mex LLC v United Mexican States* (Partial Award of 19 July 2019) ICSID Case No ARB(AF)/16/3 [204].
[226] *Vattenfall* (n71) [158].
[227] *Sevilla Beheer* (n127) [652].
[228] eg *Fraiz* (n38) [341]; *Santamaria* (n220) [419].
[229] eg *Pugachev* (n70) [384]; *Armas* (Jurisdiction) (n42) [692].
[230] eg *KT Asia v Kazakhstan* (Award of 17 October 2013) ICSID Case No ARB/09/8 [129]; *Landesbank Baden-Württemberg v Spain* (Decision on the Intra-EU Jurisdictional Objection of 25 February 2019) ICSID Case No ARB/15/45 [164]; *9REN Holding Sárl v Spain* (Award of 31 May 2019) ICSID Case No ARB/15/15 [146]; *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* (Decision on Jurisdiction, Liability and Partial Decision on Quantum of 19 February 2019) ICSID Case No ARB/15/20 [139]; *RENERGY Sárl v Spain* (Award of 6 May 2022) ICSID Case No ARB/14/18 [369].
[231] eg *Orascom TMT Investments Sárl v Algeria* (Award of 31 May 2017) ICSID Case No ARB/12/35 [293];

meaning of specific terms,[232] but more dismissive of reading into a treaty additional requirements or exceptions,[233] although certain decisions stand out.[234]

vii. Supplementary Means of Interpretation

One of the major normative inputs of the VCLT rules of interpretation is the classification into primary means of interpretation under Article 31, which are obligatory and necessary elements of treaty interpretation, and supplementary means of interpretation under Article 32 which are in principle only optional.[235] Much like other ICTs, IITs have affirmed that they do not need to have recourse to the supplementary means of Article 32 VCLT, when they have reached a conclusion on the basis of the means laid down in Article 31 VCLT.[236] Apart from that, IIT practice varies considerably as to the circumstances that call for the consideration of supplementary means of interpretation, as well as to what interpretative materials qualify as such means.

To start, virtually all IITs ascribe to the VCLT methodology that limits the use of 'supplementary means' to confirming the meaning reached through the use of Article 31 VCLT or to deriving meaning when these means lead to obscure, ambiguous, absurd or manifestly unreasonable outcomes.[237] At the same time, IIT practice suggests that the characterisation of the interpretative means of Article 32 VCLT as 'supplementary' does not entail a specific position or order in the interpretative reasoning.[238] For instance, several IITs have examined the preparatory works of the treaty in question, which are explicitly labelled as 'supplementary means' in Article 32, before explicitly exhausting the interpretative means of Article 31 VCLT.[239] More generally, whilst ascribing to Article 32 VCLT, IITs tend not to construe the rule of

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[232] See eg n220.

[233] eg *İçkale* (n157) 260-261; *KT Asia* (n230) [128].

[234] eg *Ambiente Ufficio* (Jurisdiction) (n111) [601]; *B-Mex* (n225) [204].

[235] Art 32 VCLT; see eg Oliver Dörr, 'Article 32', in Oliver Dörr and Kirsten Schmalenbach (eds), *The Vienna Convention on the Law of Treaties – A Commentary* (2nd edn, Springer 2018) 617, 617 and 628.

[236] eg *Sempra* (Jurisdiction) (n33) [142] *Continental Casualty v Argentina* (Decision on Annulment of 23 October 2009) ICSID Case No ARB/03/9 [28]

[237] Esmé Shirlow and Michael Waibel, 'A Sliding Scale Approach to Travaux in Treaty Interpretation: The Case of Investment Treaties' [2021] BYBIL <https://doi.org/10.1093/bybil/brab001> 43.

[238] Gazzini (n28) 247.

[239] Shirlow and Waibel (n237) 38; Weeramantry (n19) 101; eg *Inceysa* (Award) (n43) [192]; *Ambiente Ufficio* (Jurisdiction) (n111) [445]-[447].

interpretation as precluding recourse to supplementary means and 'in practice, it is always possible to have recourse to them'.[240] Rather, the key function of Article 32 VCLT consists of imposing limits as to how these means can affect the interpretative outcome. In stark contrast, one IIT held that the latitude afforded by Article 32 VCLT to have recourse to supplementary means in order to 'confirm an interpretation already obtained via the elements listed in Article 31…carries the implication that said supplementary means may equally be used to invalidate that interpretation.'[241] On its face, this statement is a *contradictio in terminis* and, arguably, originates from the conflation of the means of treaty interpretation under Article 31(2) and (4) VCLT with the supplementary means of interpretation under Article 32 VCLT.[242] Another dimension is possibly the increased sophistication and familiarisation of IITs with the VCLT rules. Indeed, in the vast majority of recent cases, the characterisation of certain interpretative materials as 'supplementary means' entails their use only in support of an interpretation reached through Article 31 VCLT or in the cases of failure to reach such a result set out in Article 32 VCLT.[243]

Along similar lines, the practice of IITs is rather permissive with respect to the materials to which they can resort to under Article 32 VCLT. Quite commonly, IITs refer to the preparatory works of a treaty as 'supplementary means' of treaty interpretation.[244] In the same vein, they might also refer to the circumstances of the conclusion of the BIT, which 'include the process relating to the negotiation, conclusion and signing of the BIT … as well as events leading up to its ratification'.[245] However, IITs are not limited to the materials that are explicitly mentioned in Article 32 VCLT suggesting that 'the category of admissible supplementary means is not a closed one'.[246] In this respect, some IITs have also considered under the rubric

[240] *El Paso* (Award) (n177) [607]; *Yukos Universal Ltd v Russian Federation* (Interim Award on Jurisdiction of 30 November 2009) PCA Case No AA 227 [268]

[241] *El Paso* (Award) (n177) [605]; cited with (tentative) approval by Shirlow and Waibel (n237) 39; Gazzini (n28) 250.

[242] See *El Paso* (Award) (n177) [605] citing explicitly Article 31(4) VCLT; also nn102-105 and 116-129 and text.

[243] eg *HICEE* (Partial Award) (n35) [118]-[119]; *Rasia* (n109) [361]; *Westmoreland and Mining Holdings LLC v Canada* (Final Award of 31 January 2022) ICSID Case No UNCT/20/3 [147]; *Asia Phos Ltd and Norwest Chemicas Pte v China* (Award of 16 February 2023) ICSID Case No ADM/21/1 [178]; *ESPF Beteiligungs GmbH and ors v Italy* (Decision on Annulment of 31 July 2023) ICSID Case No ARB/16/5 [236]; *Glencore Finance Ltd v Bolivia* (Award of 8 September 2023) PCA Case No 2016-39 [530].

[244] eg Shirlow and Waibel (n237) 28 record 80 decisions.

[245] eg *Kılıç* (Award) (n113) [6.18].

[246] eg *HICEE* (Partial Award) (n35) [117].

of Article 32 VCLT the comparative treaty practice of the states parties to the IIA in question,[247] whilst other IITs have expressed doubts as to their qualification as supplementary means due to their tenuous link to the intentions of the parties of the treaty in question.[248] Perhaps more tenuously, certain tribunals have also included in the category of supplementary means judicial decisions and scholarly writings.[249] However, this reasoning conflates the category of 'subsidiary means for the determination of law' under Article 38(1)(d) ICJ Statute with the rules of treaty interpretation which require some link to the treaty in question.[250]

What emerges from the analysis in this section and the preceding ones is the unrivalled entrenchment of the VCLT rules of interpretation in the interpretative reasoning of IITs, despite their wide diversity in terms of composition and their specific subject matter. As we have seen, IITs not only frame their interpretative reasoning using the VCLT rules as a scaffold, but exhibit a considerable degree of uniformity in how they construe the key elements of the process prescribed in this rule. What is more, despite occasional divergences amongst decisions, it is hard to identify an element of the interpretative process within the VCLT that applies differently in the practice of IITs on the grounds of the specific subject-matter or actors involved in investment arbitration. The section that follows discusses whether this tendency is offset by the use of interpretative methods, rules, or principles that are external to the VCLT.

3. Elements beyond the Vienna Convention on the Law of Treaties in the Practice of International Investment Tribunals

i. Effet utile or Effective Interpretation

The principle of effectiveness or effective interpretation, also known as *effet utile* or *ut res magis valeat quam pereat*, has featured quite prominently in the interpretative reasoning of several IITs under its various denominations and iterations.[251] As is the case with other ICTs, the principle of effectiveness has taken different forms in the practice of IITs. Along similar lines, the practice of IITs varies as to whether this principle emanates from the general rule of

[247] eg *Churchill Mining* (Jurisdiction) (n38) [195]; *Valle Ruiz* (n209) [326]; Mitchell and Munro (n81) 690-695.

[248] eg *Mobil and Murphy* (Liability and Quantum) (n112) [228]-[230]; more strongly, *Rompetrol* (Jurisdiction) (n125) [107]-[108].

[249] *Churchill Mining* (Jurisdiction) (n38) [180]; *Canadian Cattlemen* (Jurisdiction) (n171) [50]; *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (I)* (Interim Award of 1 December 2008) PCA Case No 2007-02 [121]; *Caratube International Oil Co LLP v Kazakhstan* (Decision on Provisional Measures of 31 July 2009) ICSID Case No ARB/08/12 [71].

[250] eg Gazzini (n28) 266.

[251] eg Weeramantry (n19) 144; Fauchald (n3) 318. The present chapter uses predominantly the term 'principle of effectiveness' or 'effective interpretation' interchangeable as also encompassing the other terms.

interpretation or is a rule of interpretation external to the VCLT. As will be shown in this brief section, there is an increased tendency to associate the principle of effectiveness with different elements of the general rule of interpretation. Conversely, and in light of this tendency, IITs tend to frame divisions on the exact content of the principle of effectiveness as an instantiation of ascribing proper weight to the different elements of the VCLT rule.

To start, IITs have recourse to the principle of effectiveness under its various denominations often without offering an explicit definition.[252] For the most part, findings can be broadly classified into two variations.[253] On the one hand, one prominent iteration of the principle in IIT practice states that 'a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning'.[254] At its core, the principle entails that 'words must be interpreted in a way that ascribes meaning and produces effects.'[255] So, for instance, in *CSOB,* the tribunal could not accept that the phrase 'each Party shall give notice to the other Party of the completion of the constitutional formalities' in the provision relating to the IIA's entry into force had no bearing on its entry into force.[256] Similarly, the principle of effectiveness entails that 'each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless'.[257] To illustrate this point, several IITs have denied that a MFN clause could set aside explicit restrictions to the jurisdiction of arbitral tribunals stipulated in the IIA.[258] Crucially, as one tribunal has enunciated, '[the] principle does not require that a maximum effect

[252] eg *Continental Casualty* (Award) (n157) [258]; *El Paso* (Award) (n177) [372]; *Mobil Exploration and Development Argentina Inc and ors v Argentina* (Decision on Jurisdiction and Liability of 10 April 2013) ICSID Case No ARB/04/16 [950]-[954].

[253] cf also the tri-partite distinction in Céline Braumann and August Reinisch, 'Effet Utile' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 47*ff*.

[254] *AAPL* (n25) [40]; also eg *Alpha* (n38) [223]; *Wintershall* (n38) [165]; *Orascom* (n231) [288].

[255] *WCV World Capital Ventures Ltd and Channel Crossings Ltd v Czech Republic* (Second Interim Award of Intra-EU Objection of 29 September 2020) PCA Case No 2016-12 [414]; *Tenaris* (n84) [151].

[256] *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v The Slovak Republic* (Decision of the Tribunal on Objections to Jurisdiction of 24 May 1999) ICSID Case No ARB/97/4 ('*CSOB*') [39].

[257] *Eureko* (n34) [248]; also eg *Conoco* (Jurisdiction) (n131) [309]; *Alverley Investments Ltd and Germen Properties v Romania* (Award of 16 March 2022) ICSID Case No ARB/18/30 [221]

[258] eg *Salini Costruttori SpA. and Italstrade SpA* (Decision on Jurisdiction of 9 November 2004) ICSID Case No ARB/02/13 [95]; *SGS Société Générale de Surveillance SA v Philippines* (Decision on Jurisdiction of 29 January 2004) ICSID Case No ARB/02/6 [115].

be given to a text[;] [i]t only excludes interpretations meaningless, when a meaningful interpretation is possible.'[259]

On the other hand, a series of tribunals tend to underscore the teleological associations of the principle of effectiveness sometimes at the expense of the explicit provisions of the treaty.[260] In one notable instance, the tribunal held

> In this connection, it seems significant to the majority of the Tribunal that it is in the nature of an MFN clause to be used to displace a treaty provision deemed less favorable in favor of another clause, from another treaty, deemed more favorable. The MFN clause itself would be deprived of *effet utile* if it could never be used to override another provision of the treaty.[261]

Along similar lines, several IITs have cited the object and purpose of IIAs and the principle of effectiveness as a ground to resolve uncertainties in favour of investors.[262] Occasionally, IIAs have adduced a more comprehensive definition of the principle of effectiveness that accounts for its teleological associations. Thus, in *Murphy*, the tribunal held that

> the principle of *effet utile* mandates not just that treaty terms be given weight and effect, but also that they be accorded "their fullest weight and effect consistent with the normal sense of the words and with other parts of the text and in such a way that a reason and meaning can be attributed to every part of the text."[263]

According to the tribunal, the principle mandates that 'the selection of a better meaning among other plausible meanings for the treaty terms must be correct'.[264]

In most cases, IITs tend to reason their recourse to the principle of effectiveness by reference to the VCLT with or without the caveat that the principle is not explicitly codified in

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[259] *CEMEX Caracas Investments and CEMEX Caracas Investments II v Venezuela* (Decision on Jurisdiction of 30 December 2010) ICSID Case No ARB/08/15 [114].
[260] Braumann and Reinisch (n253) 59; Gazzini (n28) 169.
[261] *Garanti Koza* (Jurisdiction) (n91) [54].
[262] See above n155.
[263] *Murphy Exploration and Production Co Int v Ecuador* (Partial Award on Jurisdiction of 13 November 2013) UNCITRAL [180] citing Richard Gardiner, *Treaty Interpretation* (1st edn, OUP 2008) 64; *Sanum Investments Ltd v Laos* (Award on Jurisdiction of 13 December 2013) PCA Case No 2013-13 [333]; similarly, *Beijing Urban Construction Group v Yemen* (Decision on Jurisdiction of 31 May 2017) ICSID Case No ARB/14/30 [72].
[264] *Murphy* (n263) [180].

these rules.[265] Specifically, IITs tend to draw a connection between the principle of effective interpretation and the general rule of interpretation laid down in the VCLT, although they differ as to the precise element of the rule which the principle is grafted onto. For instance, some IITs pronounced that Article 31(1) VCLT comprises the principle of effectiveness without further explanation.[266] Another tribunal characterized the principle as 'a logical consequence of the fundamental rule that a treaty must be interpreted in good faith and in accordance with the ordinary meaning of its terms.'[267] Still, another tribunal observed that the principle is 'normally linked to the object and purpose of the treaty and to the principle of good faith.'[268] In fact, in *Murphy*, the very same decision accepted that 'from a literal standpoint alone, the *effet utile* principle dictates a textual interpretation' and, indeed, discussed the principle under the rubric of ordinary meaning.[269] Yet, it also found that the facts of the case called for 'a broader application of the *effet utile* principle in conjunction with an analysis of the object and purpose'. [270] This goes to show that the different conceptions of the principle of effectiveness emanate from the construction of the rule of interpretation and the interdependence of its elements in the process of reaching an interpretative outcome.

To conclude, the principle of effectiveness is affirmed in the practice of IITs, but, most frequently, as an instantiation of the general rule of treaty interpretation. Specifically, the core notion of the principle of effectiveness that relies on the text of the treaty and the interrelation of its terms and provisions is commonly accepted by international investment tribunals. At the same time, not unlike other ICTs, IITs also have taken a broader approach of the principle of effectiveness that is also grounded conceivably on the general rule of treaty interpretation to the extent that it relates to the object and purpose of the treaty. As has been show, this approach has been vocally resisted by other IITs. In any event, this division is by no means limited to international investment arbitration, but reflects a broader ambivalence about the content of the general rule of interpretation in international adjudication.

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[265] Some remain agnostic eg *Glencore and Prodeco* (Award) (n110) [1014]-[1020].

[266] eg *Dawoot Rawat v Mauritius* (Award on Jurisdiction of 6 April 2008) PCA Case No 2016-20 [104]; *Zaza Okuashvili v Georgia* (Partial Final Award on Jurisdiction and Admissibility of 31 August 2022) SCC Case V 2019/058 [176].

[267] *WCV* (n255) [416].

[268] *Orascom* (n231) [288]; also eg *Urbaser SA and ors v Argentina* (Decision on Jurisdiction of 19 December 2012) ICSID Case No ARB/07/26 [52]; Gazzini (n28)170; Weeramantry (n19) 146.

[269] *Murphy* (n263) [179].

[270] ibid [182].

ii. Restrictive Interpretation or In dubio mitius

The principle of restrictive interpretation or *in dubio mitius* is in a way the 'rival principle' of effective interpretation or *effet utile*.[271] However, unlike that principle, restrictive interpretation has featured sporadically in early IIT decisions and its currency has dwindled virtually to nought in more recent practice. Specifically, an early tribunal held that '[t]he 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*.'[272] In the event, the tribunal reasoned its finding by requiring that the 'umbrella clause' under consideration 'would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant'.[273] Apart from this finding, references to this principle tend to relate to the outcome rather than the means of the interpretative process, notwithstanding ambiguities in the formulation of the reasoning. Thus, for instance, two tribunals held 'any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose[;] [a]ccordingly, a restrictive interpretation of any such alternative is mandatory.'[274] For the most part, even when the parties refer to the principle of restrictive interpretation, IITs tend to reject the contention summarily or even *sub silentio*.[275]

Undeniably, the virtual extinction of the principle of restrictive interpretation as an autonomous interpretative norm is a consequence of the unrivalled entrenchment of the VCLT rules in the practice of IITs. As one tribunal has held in unequivocal terms '[a]ny general rule of restrictive treaty interpretation is plainly in conflict with the VCLT and customary international law.'[276] Along similar lines, one tribunal rejected emphatically that 'the mere characterization of a treaty term as an "exception" requires an interpretation different from other treaty terms', holding instead that 'all terms of a treaty are subject to the ordinary rules of treaty interpretation'.[277] What is more, faced with arguments about the idiosyncrasies of specific IIA

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[271] Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYBIL 48, 55.

[272] *SGS Société Général de Surveillance v Pakistan* (Decision on Jurisdiction of ICSID Case No ARB/01/13 [171]

[273] ibid.

[274] *Enron* (Award) (n198) [331]; *Sempra* (Award) (n198) [373]

[275] Panos Merkouris, 'In dubio mitius' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 259, 288.

[276] *ICS* (Jurisdiction) (n88) [282].

[277] *Mesa Power LLC v Canada* (Award of 26 March 2016) PCA Case No 2012-17 [405].

provisions, IITs have almost consistently upheld that the principle of restrictive interpretation does not find application in relation to the interpretation of jurisdictional clauses or the standards of annulment under the ICSID Convention by the operation of the VCLT rules of interpretation or its customary counterparts.[278]

iii. Legal and logical maxims

Much like other ICTs, IITs have had occasionally recourse to other means not explicitly mentioned in the VCLT rules to determine the precise contours of an applicable rule. Notions such as *contra proferentem*, *ejusdem generis*, *a contrario* and *inclusio unius est exclusio alterius* have occasionally featured in studies pertaining to the interpretative practice of IITs.[279] The catergorisation of these means as pertaining to the juridical process of interpretation or, conceivably, other processes, such as resolution of norm conflict or application of a rule, is not always clear cut. What is more, the relative value of these means within the reasoning of each IIT varies depending on the IIA in question, the means in question, and its aptness for the case at hand. This section is limited to a short discussion that aims to examine whether IITs reason such recourse to specificities relating to the context of investment arbitration, such as the actors involved or its specific-subject matter.

To start, the 'triangular' structure of IIAs could theoretically call into application the *contra proferentem* maxim which postulates that when a text is ambiguous it must be construed against the party who drafted it.[280] Yet, despite its occasional appearance in investors' pleadings, no IIT has applied it to a case to justify a specific interpretation of a treaty.[281] For the most part, IITs reject these arguments *sub silentio*, but rarely two reasons have been adduced. First, an IIT might refer to the negotiating history of the IIA to show that the respondent state cannot be considered the sole drafter of the treaty in question, thus rendering the *contra proferentem*

[278] On jurisdiction see, eg, *Mondev* (Award) (n36) [43]; *Daimler Financial Services AG v Argentina* (Award of 22 August 2012) ICSID Case No ARB/05/1 [171]-[172]; *National Gas SAE v Egypt* (Award of 3 April 2014) ICSID Case No ARB/11/7 [119]; *PV* (n175) [95]; *PNG Sustainable Development Program Ltd v Papua New Guinea* (Award of 5 May 2015) ICSID Case No ARB/13/33 [257]; *Okuashvili* (n266) [195]. On annuclment see, eg, *Soufraki* (Annulment) (n50) [23]; *EDF International SA and ors v Argentina* (Decision on Annulment of 5 February 2016) ICSID Case No ARB/03/23 [66]; *Glencore International AG and CI Prodeco SA v Colombia* (Decision on Annulment of 22 September 2021) ICSID Case No ARB/16/6 [215]

[279] eg Weeramantry (n19) 148-151.

[280] Pierre d'Argent, 'Contra Proferentem' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 241, 241.

[281] ibid 253.

maxim inapt.[282] Second, in a dispute relating to a contract, the IIT denied the application of the *contra proferentem* maxim due to a lack of ambiguity suggesting that the maxim would have a subsidiary nature in any case.[283]

By contrast, IITs have been far more receptive to arguments based on the *ejusdem generis* and *exclusio unius est inclusion alterius* maxims, albeit with some ambivalence as to whether these maxims constitute autonomous interpretative principles, special interpretative rules, or instantiations of grammatical interpretation in line with the general rule of treaty interpretation. A significant strand of decisions has used the *ejusdem generis* principle to discuss the scope of the MFN clause in IIAs referring to the ILC work on MFN clauses which stated that:

> Article 9. Scope of rights under a most-favoured-nation clause
> 1. Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.
> 2. The beneficiary State acquires the rights under paragraph 1 only in respect of persons or things which are specified in the clause or implied from its subject-matter.
> Article 10. Acquisition of rights under a most-favoured-nation clause
> 1. Under a most-favoured-nation clause the beneficiary State acquires the right to most-favoured-nation treatment only if the granting State extends to a third State treatment within the limits of the subject-matter of the clause.[284]

The ILC clarified 'the rule sometimes referred to as the *ejusdem generis* rule [that] is generally recogni[s]ed',[285] but later works of the ILC on the issue are unclear as to whether they consider this an autonomous rule of interpretation or a specific application of the general rule of interpretation.[286] In practice, the application of the *ejusdem generis* principle with respect to MFN clauses has yielded divergent results especially as it relates to the use of the MFN clause in one

[282] *CSOB* (Jurisdiction) (n256) [51].

[283] *Ruby Roz Agricol v Kazakhstan* (Award on Jurisdiction of 1 August 2013) UNCITRAL [187]; see also *Nagel v Czech Republic* (Award of 9 September 2003) SCC Case No 049/2002 [172]-[173] finding the principle applicable against the investor as the drafter of the contract.

[284] ILC, 'Draft Articles on most-favoured-nation clauses with commentaries' (1978) II(2) YBILC 16, 27.

[285] ibid 28.

[286] ILC, 'Final Report of the Study Group on the Most-Favoured-Nation Clause' (2015) II(2) YBILC 91, 110; see eg *Christian and Antoine Doutremepuich v Mauritius* (Award on Jurisdiction of 23 August 2019) PCA Case No 2018-37 [200]-[204].

IIA by the investor to benefit from dispute settlements proceedings of another IIA.[287] In the same context, IITs have occasionally used the *exclusio unius est inclusion alterius* especially when the IIA in question includes a list of exceptions in the MFN clause that do not include dispute settlement.[288] Apart from this specific context, IITs tend to frame the use of the two maxims as part of the interpretative process of Article 31 or 32 VCLT without specifying more concretely the element of that process.[289]

II. Interpretation of Unilateral Acts and Declarations in the Practice of International Investment Arbitration

IIAs are not the only source of law that IITs interpret, apply, or, more generally, use in their practice. States seeking to attract foreign investment engage in manifold outreach strategies either at a national level by enacting legislation or even through diplomatic and consular channels or the media.[290] Depending on the dispute, an IIT may be called upon to scrutinize such conduct as a fact which can amount in the totality of the case in combination with subsequent conduct to a violation of the applicable IIA including the fair and equitable treatment or the protection of undertakings standards.[291] Along similar lines, an IIT may examine the opposability of a state representation as a fact in cases of detrimental reliance on the part of an investor through the lens of estoppel (*venire contra factum proprium*).[292] The question that further arises is whether unilateral acts or declarations of states can constitute more than mere facts, but rather whether they can generate applicable rules of international law.[293] In the practice of IITs, these cases arise less often and relate mostly to the effects that the domestic laws of the host state

[287] Freya Baetens, 'Ejusdem generis' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 133, 149-155.

[288] Joseph Klingler, 'Expressio Unius Est Exclusio Alterius' in Joseph Klingler, Yuri Parkhomenko, and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention: Canons and Other Principles of Interpretation in Public International Law* (Kluwer 2019) 73, 81-82.

[289] eg *LSF-KEB Holdings SCA and ors v Korea* (Award of 30 August 2022) ICSID Case No ARB/12/37 [289] (ejusdem generis - ordinary meaning); *Belenergia* (n143) [304]-[306] (expression unius - Art 31-33 VCLT).

[290] W Michael Reisman and Mahnoush H Arsanjani, 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 ICSID Rev 328, 329.

[291] eg Caroline Henckels, 'Legitimate Expectations and the Rule of Law in International Investment Law' in Stephan Schill and August Reinisch (eds), *Investment Protection Standards and the Rule of Law* (OUP 2023) 43, 52.

[292] For the distinction, see *Obligation to Negotiate Access to the Pacific Ocean* [2018] ICJ Rep 507 [146] and [158].

[293] Reisman and Arsanjani (n290) 329.

can have as an expression of state consent to international investment arbitration or as an alternative legal basis for the foundation of an investment claim *qua* unilateral acts of states capable of creating international obligations.[294] The present section lays out the ways in which IITs justify their reliance or non-reliance on such acts as sources of international law, but also how they determine their content.[295] As will be shown, at this incipient stage of their practice, the the establishment of the binding status of a unilateral act on the international plane *qua* source of international law is often eschewed, if not conflated, with the interpretation of such act after its binding status has been determined.

To start, the approach of IITs with respect to the consideration of domestic provisions as unilateral acts in the sense of sources of international obligations is far from uniform or formulaic. It is noteworthy that even IITs dealing with the same domestic provisions have come to vastly different conclusions.[296] Equally, the justifications adduced by IITs in order to rely on a domestic provision *qua* unilateral act entailing international obligations or not differ considerably. On the one end of the spectrum, in *Sevilla Beheer*, the tribunal categorically pronounced that the 'doctrine has no application to statements made vis-à-vis private parties in a domestic context'.[297] By reference to the ILC GPUD, the tribunal required that unilateral behaviour must be 'on the international plane' or 'with the intent to produce obligations under international laws'.[298] According to the tribunal, these requirements were not met by domestic legislation on subsidies for renewable energy which applied equally to domestic and foreign investors.[299] On the other end of the spectrum, a discernible number of IITs have accepted that domestic provisions of foreign investment laws encompassing referral to international investment arbitration are binding on the state *qua* unilateral acts capable of creating international

[294] Moïse Makane Mbengue, 'National Legislation and Unilateral Acts of States' in Eric de Brabandere and Tarcizio Gazzini (eds), *International Investment Law. The Sources of Rights and Obligations* (Brill 2012) 183, 185-186.

[295] The section will not deal with the theoretical question whether there is a difference between sources of international law and sources of international obligations and the two notions are used interchangeably: along these lines, ibid 199.

[296] *Compare Bay.War.e. Renewable Energy GmbH and Bay.War.e. Asset Holding GmbH v Spain* (Award of 25 January 2021) ICSID Case No. ARB/15/16 [447]-[449]; *Sevilla Beheer* (n127) [953-54] *with Cube* (n230) [275]-[284]; *Mathias Kruck and ors v Spain* (Decision on Jurisdiction, Liability and Principles of Quantum of 14 September 2022) ICSID Case No ARB/15/23 [199].

[297] *Sevilla Beheer* (n127) [447].

[298] ibid [448]; *Bay.War.e.* (n296) [953]

[299] *Sevilla Beheer* (n127) [449]; *Bay.War.e.* (n296) [954].

obligations.[300] A pivotal point in the reasoning of these tribunals lies in the finding that such unilateral acts of consent to international arbitration do not exist in vacuo, but have been expressed against the backdrop of the ICSID Convention or an applicable IIA.[301]

Undeniably, the applicable rules for the interpretation of unilateral acts constitute a highly contentious point for IITs.[302] In *CSOB*, the tribunal found that 'unilateral assumption of …obligations is "not lightly to be presumed..." and requires "a very consistent course of conduct."'[303] This echoes the findings of the ICJ in the *Nuclear Tests* case: '[w]hen States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for'.[304] Parallels can also be drawn with the views of the International Law Commission ('ILC') that opined that '[i]n the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner.'[305] Yet, the majority of IITs have diverged implicity or explicity from this approach. The *SPS* award (rendered long before the conclusion of ILC's work on the matter) based its rejection of a restrictive approach to interpretation on the subject matter of the dispute and, specifically, the fact that there is no presumption for or against the jurisdiction of ICSID under the relevant convention.[306]

Since then, the approach of IITs on the matter has evolved with an increasing degree of sophistication. The essence of this approach comprises a typology of unilateral acts for the purposes of determining the applicable rules of interpretation. So, for instance, in *Mobil*, the tribunal distinguished between '(i) acts formulated in the framework and on the basis of a treaty, (ii) and other acts formulated by States in the exercise of their freedom to act on the

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[300] eg *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (Decision on Jurisdiction of 14 April 1988) ICSID Case No ARB/84/3 ('*SPP*') [61-2]; *Mobil Corporation and ors v Venezuela* (Decision on Jurisdiction of 10 June 2010) ICSID Case No ARB/07/27 [76*ff.*]; *CEMEX* (n259) [71*ff.*]; *Pac Rim* (Jurisdiction) (n33) [5.29*ff*]; *Tidewater Investment SRL and Tidewater Caribe CA v Bolivarian Republic of Venezuela* (Decision on Jurisdiction of 8 February 2013) ICSID Case No ARB/10/5 ('*Tidewater*') [79*ff.*]; *Conoco* (Jurisdiction) (n131) [227*ff.*]; *PV* (n175) [331*ff.*]; *PNG* (n278) [250*ff.*].

[301] eg *SPP* (n300) [61]; *Mobil v Venezuela* (Jurisdiction) (n300) [85]; *CEMEX* (n259) [79]; *Pac Rim* (Jurisdiction) (n33) [5.33]; *Tidewater* (n300) [89]; *PNG* (n278) [264] (relating to the ICSID Convention); *PV* (n175) [331] (relating to ECT).

[302] See also David D Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law' in MH Arsanjani, J Cogan, R Sloane, and S Wiessner (eds), *Looking to the Future – Essays on International Law in Honor of W. Michael Reisman* (Brill 2011) 649, 655.

[303] *CSOB* (Jurisdiction) (n256) [46].

[304] *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253 [44]; *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457 [47].

[305] Principle 7, ILC, 'Guiding Principles Applicable on Unilateral Declarations of States Capable of Creating Legal Obligations' (2006) II(3) YbILC 161.

[306] *SPP* (n300) [62].

international plane.'[307] According to the tribunal, a restrictive interpretation was appropriate only for the latter.[308] By contrast, the interpretation of a unilateral act that arises in the context of a multilateral treaty does not elicit similar considerations, because '[i]n that situation, the treaty itself provides the legal framework within which the effect of the statement is to be determined'.[309] To support this approach, tribunals tend to refer to the jurisdiction of the ICJ that takes an observably different approach with respect to declarations under Article 36(2) of its Statute compared to the determination of the effect of other unilateral acts.[310]

According to IITs, the rules of interpretation applicable to unilateral acts constituting consent to international investment arbitration differ from the rules of interpretation applicable to other unilateral acts.[311] They also differ in principle to rules of treaty interpretation under the VCLT, although IITs often admit that rules of treaty interpretation are 'applied analogously to the extent compatible with their *sui generis* character'.[312] As to the means of interpretation of these unilateral acts, the IITs follow closely the findings of the ICJ: 'the intention of a … State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served'.[313] What distinguishes the interpretation of treaties from that of unilateral acts expressing consent to international investment arbitration is their ultimate goal. Several tribunals have cited the ICJ's pronouncement that optional declarations, and by implication consent to arbitration, 'should be interpreted in a manner compatible with the effect sought by the reserving State'.[314] Yet, the means to achieve that goal is not fundamentally different from treaty interpretation: 'weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was

[307] *Mobil v Venezuela* (Jurisdiction) (n300) [87]; also *CEMEX* (n259) [81]; *Tidewater* (n300) [89]; *Pac Rim* (Jurisdiction) (n33) [5.34].
[308] *Mobil v Venezuela* (Jurisdiction) (n300) [89]; also *CEMEX* (n259) [82]; *Tidewater* (n300) [89].
[309] *Tidewater* (n300) [90].
[310] *SPP* (n300) [61]; *Mobil v Venezuela* (Jurisdiction) (n300) [92]; *CEMEX* (n259) [84]; *Tidewater* (n300) [93]; *PV* (n175) [333].
[311] eg *Mobil v Venezuela* (Jurisdiction) (n300) [92]; *Tidewater* (n300) [96]; *PV* (n175) [333].
[312] eg *Mobil v Venezuela* (Jurisdiction) (n300) [92]; *CEMEX* (n259) [85]; *Tidewater* (n300) [96].
[313] eg *Tidewater* (n300) [97].
[314] *CEMEX* (n259) [85]; *SPP* (n300) [62]; eg *Fisheries Jurisdiction (Spain v Canada)* [1998] ICJ Rep 432 [52].

formulated'.[315] So, the actual substance of the declaration or reservation seems to take priority.[316] However, one difference, according to some IITs, is that the principle of effectiveness (or effet utile) is unavailable in the case of these acts, although this view is not unanimously accepted.[317]

What emerges from this analysis is that IITs are increasingly aware that the consideration of unilateral acts of states *qua* sources of international law calls for a multilayered approach that involves also the employment of interpretative means. At the same time, the practice of IITs seems to still be in an incipient stage without being amenable to clear cut generalisations. One issue that IITs seem increasingly aware of is that the determination of the effect of a unilateral act under international law (ie identification) and the determination of its precise content *qua* source of international obligations (ie interpretation) are two distinct juridical operations. What appears particularly problematic in the practice of IITs is a delineation where one operation ends and where the other starts. While these juridical operations involve overlapping considerations, each consideration has differing effects depending on the juridical operation at play. Notably, the circumstances in which a unilateral declaration or act is formulated or adopted have the same evidentiary value as its text for the determination of whether a unilateral act is intended to have effects on the international place. What is more, this determination is ultimately to be guided by a presumption against the binding effect of a unilateral declaration. By contrast, this presumption does not apply in cases where the effect of a unilateral declaration is not at issue. Instead, the determination of the content of a unilateral declaration—ie its interpretation properly so called—mirrors largely the process of treaty interpretation. Accordingly, the text of the unilateral act should take precedence over the circumstances of its conclusion, whilst there is space for the application of the principle of effectiveness as accepted in the context of treaty interpretation.

[315] GPUD, Principle 7.
[316] eg *CEMEX* (n259) [90]; *Tidewater* (n300) [102]; GPUD, Commentary to Principle 7 [3].
[317] eg *CEMEX* (n259) [110]-[113] *contra PNG* (n278) [267-8].

III. Interpretation of Unwritten International Law in the Practice of International Investment Arbitration

1. Identification and Interpretation of Unwritten International Law

The practice of IITs with respect the interpretation of unwritten international law is obscured by the theoretical confusion surrounding the distinction between identification and interpretation of customary international law and general principles of law. In the case of treaties, the determination whether a text or statement has the formal hallmark of a treaty entailing binding obligations, on the one hand, and the determination of the meaning of a binding treaty provision, on the other, clearly involves different considerations so much so that it is possible to speak of two distinct juridical operations governed by different rules.[318] In the case of unwritten international law, the mainstream approach envisages a process of determination based on an inductive examination of state practice and *opinio iuris* or recognition and transposability, as the case might be. In this context, it has been maintained in theory that it is impossible to identify a rule of unwritten international law without, at the same time, determining its content.[319] Conversely, rules of unwritten law are not amenable to interpretation, this operation presupposing the existence of a text.[320]

This confusion has seeped into the practice of IITs as exemplified in the findings of the *Glamis* tribunal. In discussing the relationship between the FET clause under NAFTA and the international minimum standard under customary international law, the tribunal held that

> the task of seeking the meaning of "fair and equitable treatment" by way of treaty interpretation is fundamentally different from the task of ascertaining the content of custom. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so, namely the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but also questions of fact, where custom is found in the practice of States regarded as legally required by them. The

[318] *Compare* Art 2(1)(a)VCLT; eg *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3 [96]; *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)* (Jurisdiction and Admissibility) [1994] ICJ Rep 112 [23]; *with* Arts 31-33 VCLT; eg *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [48].
[319] Maarten Bos, *A Methodology of International Law* (Asser 1984) 109.
[320] Tullio Treves, 'Customary International Law' [2006] MPEPIL [2].

> content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.[321]

However, in so doing, the tribunal seems to overlook the fact that the determination of unwritten international law is not limited to induction. In fact, with respect to the identification of customary international law, the ILC has concluded that 'the two-elements approach does not preclude an element of deduction as an aid' particularly 'when considering possible rules of customary international law that operate against the backdrop of rules framed in more general terms that themselves derive from and reflect a general practice accepted as law or when concluding that possible rules of international law form part of an "indivisible regime"'.[322] More perplexingly, the current special rapporteur on general principles of law has opined that 'deduction is…the main criterion to establish the existence of a legal principle that has a general scope'.[323] Whilst the terminology of deduction within the framework of identification of rules of unwritten international law is imprecise, it is undeniable that an intermediate step is often involved in the space between the identification of a rule of unwritten international law and its application to the facts. This step mirrors a process that shares many commonalities with treaty interpretation.

As a matter of practice, several IITs have explicitly characterised this juridical operation as interpretation distinguishing it from the issue of identification. Most notably, in *Enron*, the annulment committee reviewed an award discussing whether measures were the only way to address a situation of necessity and whether the state contributed to that crisis.[324] According to the committee, the 'only way' and 'non-contribution' requirements spelled out in Articles 25(1)(a) and 25(2)(b) ARSIWA, respectively, were 'capable of more than one interpretation'.[325] The committee held that the tribunal 'was necessarily required, either expressly or *sub silentio*, to decide or assume the correct interpretation in order to apply the provision to the

[321] *Glamis Gold Ltd v US* (Award of 9 June 2009) UNCITRAL [20].

[322] ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (2018) II(2) YBILC 122 ('CICIL'), Commentary to Art 2 [5].

[323] ILC, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (9 April 2020) UN Doc A/CN.4/741 [168].

[324] *Enron v Argentina* (Decision on Annulment of 30 July 2010) ICSID Case No ARB/01/3 [369-92].

[325] ibid [369] and [386]; ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries' (2001) II(2) YBILC 31 (ARSIWA), Art 25.

facts of the case'.[326] It, thus, concluded that the tribunal committed an annullable error by not laying down its own interpretation of these requirements.[327] Inversely, in *EDF*, the annulment committee admitted as a matter of principle that the 'the concept of "only means" is open to more than one interpretation'.[328] It held that '[i]n the light of the principle that necessity is an exceptional plea which must be strictly applied (a principle expressly stated in paragraph 1171 of the Award), … "only" means "only"; it is not enough if another lawful means is more expensive or less convenient'.[329] Although the committee held that failure to elaborate on the issue of interpretation did not constitute an annullable error, it nonetheless recognised the application of a principle or rule of interpretation to the customary rule of necessity according to which 'exceptions to general principles are to be interpreted restrictively'.[330] Similarly, in *Suez* annulment decision, the crucial issue was whether the tribunal failed to apply the proper law, in the event, Article 25 ARSIWA on the state of necessity. The committee conceded as a matter of principle that the 'only way' and 'non-contribution' requirements appearing in Article 25 ARSIWA 'are indeed susceptible to a certain degree of interpretation'.[331]

In fact, what appears to be controversial is not whether unwritten international law can be interpreted, but whether the misapplication of the rules of its interpretation can lead to the annulment of a decision or not. For instance, in *Suez*, the committee echoed other annulment decisions that distinguished between 'disregarding the proper law', which constituted an annullable error, from 'misapplication of the proper law', which did not.[332] In the case of applicable treaty provisions, annulment committees also occasionally examine whether tribunals disregarded any applicable rules of interpretation, despite allowing them ample deference as to the application of such rules in the specific case.[333] The *Suez* case raises the question whether

[326] *Enron* (Annulment) (n324) [386].

[327] ibid [377] and [386].

[328] *EDF v Argentina* (Annulment) (n278) [335]; similarly, *Suez* (Annulment) (n172) [290].

[329] *EDF v Argentina* (Annulment) (n278) [335].

[330] On this principle: *Aegean Sea Continental Shelf (Greece v Turkey)* (Separate Opinion of Judge de Castro) [1978] ICJ Rep 62 [17] citing Max Habicht, *Analysis of the Treaties in Post-War Treaties for the Pacific Settlement of International Disputes* Part II (HUP 1931) 1000; see also Alexia Solomou, 'Exceptions to a Rule Must be Narrowly Construed' in J Klinger, Y Parkhomenko, and C Salonidis (eds), *Between the Lines of the Vienna Convention?* (Kluwer 2019) 359 ff.

[331] *Suez* (Annulment) (n172) [290].

[332] Schreuer and ors (n9) 959-64; see, eg, *Teinver v Argentina* (Decision on Annulment of 29 May 2019) ICSID Case No ARB/09/1 [60].

[333] cf, most notably, *Luccetti* (Annulment) (n52) [113] and [116].

and how this distinction can be applied with respect to applicable rules of unwritten international law, such as those under the law of State responsibility. In this respect, as has been shown, the *Enron* annulment decision clearly suggests that a tribunal must pay some regard, either explicitly or *sub silentio*, to the principles upon which it bases its determination of the content of the applicable rules of unwritten international law.[334] What is more, the *EDF* committee traced back the interpretative principle applied by the tribunal, despite finding that this was beyond the scope of annulment review.[335] By contrast, whilst acknowledging a distinction between identification of applicable rules of unwritten law and their interpretation, the *Suez* committee relied exclusively on the parties' stance in the underlying proceedings to decide whether an issue of interpretation was 'outcome-determinative'. In this way, it remained entirely agnostic as to the existence of rules or principles of interpretation of unwritten international law.

What emerges so far is that there is a clear tendency in the practice of IITs to distinguish between identification and interpretation of rules of unwritten international law. The section that follows tries to flesh out distinguishable elements that comprise the interpretative reasoning of IITs. The analysis is structured largely on the key interpretative elements with respect to treaties. Unwritten international law, of course, differs from treaties because it lacks the written form. However, as will be shown, IITs often determine that certain written proposition found in judicial decisions or the works of the ILC reflects the formally unwritten rule and proceed to further concretise the content of the formally unwritten rule using this proposition as an object of interpretation. To do so, they employ means that largely correspond to the ones of treaty interpretation.

2. Interpretation of Unwritten International Law in the Practice of International Investment Tribunals

i. Textual Approach to the Interpretation of Unwritten International Law

One prevalent tendency in the interpretative practice of IITs in relation to unwritten law is paradoxically the textual approach. To establish a baseline about how the textuality of unwritten international law comes into play, the section that follows relies heavily on the practice of IITs relating to the ILC Articles on International Responsibility for Internationally Wrongful

[334] See text accompanying nn324-327.
[335] See text accompanying nn328-330.

Acts which constitute a pervasive theme in international investment arbitration. The section then proceeds to briefly consider the further implications of this approach as evidenced from IIT engagement with other rules of unwritten international law.

To start, IITs, much like other ICTs, refer to written sources to identify the core content of rules of unwritten international law constitute, most notably, international judicial and arbitral decisions and ILC outputs which constitute in principle 'subsidiary means for the determination of rules of law'.[336] However, notably, when it comes to ARSIWA, investment tribunals never refer to this categorisation explicitly (but for one singular exception).[337] Some of them might use ARSIWA as such *sub silentio* by merely citing them to support a determination that certain normative proposition found in judicial pronouncements or other sources reflects a rule of international law.[338] In this context, it is possible to argue still that IITs have used the written material as secondary evidence in the determination of unwritten international law.

However, in many cases, the ways in which tribunals engage with a written material in the process of determination of applicable rules of unwritten international law goes beyond such indirect reliance. Thus, for instance, many IITs quote Article 4 ARSIWA as a representation of applicable law and continue to determine whether a person or an entity is a State organ or not by reference to the domestic law of the relevant State.[339] Similarly, IITs have applied, as if they were binding rules, a variety of provisions of ARSIWA including those on attribution

[336] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, Art 38(1).

[337] *Merrill & Ring v Canada* (Award of 31 March 2010) ICSID Administered Case No UNCT/07/1 [203].

[338] See, eg *LESI v Algeria* (Award of 10 January 2005) ICSID Case No ARB/03/08 [19(ii)] (non-attribution of conduct of private individuals); *Claimant v Slovakia* (Award of 5 March 2011) ad hoc Arbitration [197]; *Pac Rim v El Salvador* (Award of 14 October 2016) ICSID Case No ARB/09/12 [5.62] (non-opposability of domestic law as justification for non-performance of an international obligation); *Olin v Libya* (Final Award of 25 May 2018) ICC Case No 20355/MCP [472]-[474] (principle of full reparation); *Achmea* (Award) (n69) [334] (award of interest).

[339] eg *ADF* (Award) (n112) [166]; *Oostergetel v Slovakia* (Final Award of 23 April 2012) UNCITRAL [151] and [155]; *Bosh v Ukraine* (Award of 25 October 2012) ICSID Case No ARB/08/11 [16]; *Levi v Peru* (Award of 26 February 2014) ICSID Case No ARB/10/17 [157-8]; *Awdi v Romania* (Award of 2 March 2015) ICSID Case No ARB/10/13 [323]; *Infinito Gold v Costa Rica* (Decision on Jurisdiction of 4 December 2017) ICSID Case No ARB/14/5 [198]; *Casinos Austria v Argentina* (Decision on Jurisdiction of 29 June 2018) ICSID Case No ARB/14/32 [288].

of conduct,[340] on the time of the breach,[341] on circumstances precluding wrongfulness,[342] and on reparation[343]. In the same vein, IITs often refer to judicial decisions to further concertise the meaning of the applicable rule of unwritten international law. To illustrate this point, in the *Jan de Nul* award on the merits, the tribunal considered Article 8 ARSIWA under which conduct is attributable to the state 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[344] After characterising ARSIWA 'a statement of customary international law', it proceeded to further clarify the meaning of the provision.[345] The tribunal held that '[i]nternational jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the "effective control" test', citing in support the findings of the ICJ in *Nicaragua*.[346] Subsequent awards reproduce the *Jan de Nul* formula more or less *verbatim*,[347] even though the 'general control' prong of the test does not feature explicitly in the text of Article 8 ARSIWA, its Commentary, or the pronouncements of the ICJ after *Nicaragua*.[348]

Admittedly, whenever IITs proceed in such a way, it is difficult to discern which precise juridical operation is at play, identification or interpretation, but two alternatives are conceivable from an analytical perspective. On the one hand, the lack of any separate analysis on the

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[340] eg *Masdar Solar* (Award) (n140) [168]-[169] (ARSIWA arts 4, 5 & 8); *Kardassopulos v Georgia* (Decision on Jurisdiction of 6 July 2007) ICSID Case No ARB/05/18 [190] (ARSIWA art 7); *Cengiz v Libya* (Final Award of 7 November 2018) ICC Case No 21537/ZF/AYZ [424]-[425] (ARSIWA art 10); *Clayton and Bilcon* (Jurisdiction and Liability) (n172) [321-2] (ARSIWA art 11).

[341] eg *Mondev* (Award) (n36) [58] (ARSIWA (n 1) art 14(1)); *El Paso* (Award) (n177) [515] (ARSIWA art 15).

[342] eg *Sempra* (Award) (n198) [246] (ARSIWA art 23); *Pezold v Zimbabwe* (Award of 28 July 2015) ICSID Case No ARB/10/15 [657] (ARSIWA arts 25(2)(b) & 26).

[343] eg *Serafín García Armas and Karina García Gruber* (Final Award of 26 April 2019) PCA Case No 2013-3 [476-7] (ARSIWA art 31); *Innogy* (Jurisdiction, Liability and Quantum) (n176) [685] (ARSIWA art 35); *ADM v Mexico* [281] (ARSIWA art 36).

[344] ARSIWA art 8.

[345] *Jan de Nul v Egypt* (Award of 6 November 2008) ICSID Case No ARB/04/13 [156] and [172].

[346] ibid [173] citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 16 [113] and [115].

[347] eg, *Hamester v Ghana* (Award of 18 June 2010) ICSID Case No ARB/07/24 [179]; *White Industries* (n39) [8.1.7] and [8.1.10-7]; *Almås v Poland* (Award of 27 June 2016) PCA Case No 2015-13 [268-72]; *Gavrilović v Croatia* (Award of 26 July 2018) ICSID Case No ARB/12/39 [828].

[348] ARSIWA Commentary to Art 8 [1]-[2] and [7]; see, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [400].

content of the applicable rule is suggestive of the absence of an intermediate step between identification of a rule of customary international law or general principle of law and its application.[349] Similarly, the reliance on judicial pronouncements can be construed as an extension of the determination of State practice/*opinio juris* or recognition/transposability, as the case may be, albeit implicitly and on the basis of secondary evidence.[350] After all, ILC outputs and judicial decisions constitute 'subsidiary means' for the determination of applicable rules.[351] On the other hand, these IITs not even purport to identify the rule of unwritten international law under consideration; in most cases this constitutes an entirely separate step of the reasoning. In this respect, the conciseness of analysis can also be construed as an emanation of a textual approach towards unwritten international in a way that parallels known approaches of treaty interpretation. In other words, the tribunals' line of reasoning consists conceivably of the application of the terms of a provision whose source of legal validity (CIL or general principle of law) has already been determined, because they deem its ordinary meaning sufficiently clear.[352]

That a process of interpretation is at play is also evident by cases in which an IIT employs a literal, grammatic, or syntactic approach to the written iteration of the formally unwritten rule in order to establish its content. To illustrate this point, in *Tulip*, the tribunal accepted that 'the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State'.[353] It then focused on the text of the provision and decided '[p]lainly, the words "instructions", "direction" and "control" are to be read disjunctively'.[354] The fact that a State agency owned the majority share of the company in question entailed that the company was under the control of the Turkish State in the sense that Turkey was capable of exercising a degree of control to implement governmental policies.[355] Nonetheless, the tribunal held that the phrase 'in carrying out that conduct' in Article 8 ARSIWA as explained in the ILC Commentary meant that the State must 'us[e] its ownership interest in or control of a corporation in order to achieve a particular result'.[356] In the subsequent annulment

[349] Anastasios Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 JIDS 31, 34-6.
[350] CICIL Conclusion 13; Vázquez-Bermúdez (n323) [181].
[351] ICJ Statute, art 38(1)(d).
[352] See eg nn95-101.
[353] *Tulip v Turkey* (Award of 10 March 2014) ICSID Case No ARB/11/28 [281].
[354] ibid [303].
[355] ibid [307-8].
[356] ibid [306] citing ARSIWA Commentary to Art 8 [6].

decision in *Tulip*, the committee clarified that 'the tribunal, in *interpreting* Article 8, took into account the ILC Commentary' and upheld the analysis of the tribunal finding that '[it] correctly *interpreted* Article 8'.[357] Although IITs are rarely as explicit as the *Tulip* committee in laying down their methodological steps, such textualist approach is most common in cases involving ARSIWA.[358] Therefore, there is evidence to suggest that such 'textualist' approach constitutes essentially an interpretative operation.

In fact, the nature of the juridical operation at play becomes apparent when IITs use the decisions of other IITs to concretise the content of unwritten international law. So, for instance in *El Paso,* Argentina argued that the tribunal exceeded its powers by relying on case law to determine the applicable standard of reparation under the law on State responsibility, despite judicial decisions' lack of binding status beyond the confines of a specific case.[359] The annulment committee dismissed this claim on the basis that '[a]rbitral tribunals must resort to different methods of interpretation to decide the dispute' before them and, in the event, the tribunal relied on previous case law only 'to be helped in its interpretation'.[360]

The implications of such textual approach to the interpretation of unwritten international law become more apparent in cases involving other rules of unwritten international law apart from the ones codified in ARSIWA. As discussed, several tribunals complied with the aforementioned 2001 NAFTA FTC Interpretative that limited the scope of the NAFTA provisions on 'fair and equitable treatment' and 'full protection and security' to the customary international law standard. Nonetheless, many tribunals held that customary international law is not frozen in time.[361] So, for instance, in *Pope and Talbot*, the IIT cited with approval ICJ's finding that '[a]rbitrariness…is a wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety'. It then went on to discuss the applicable rule of customary international law in the following terms: 'the concept of "due process" perforce makes the formulation more dynamic and responsive to evolving and more rigorous standards

[357] *Tulip* (Annulment) (n201) [187-8] (emphasis added).
[358] eg *Pezold* (n342) [448]; *Electrabel v Hungary* (Decision on Jurisdiction and Liability of 30 November 2012) ICSID Case No ARB/07/19 [7.109] and [7.113]; *Saint-Gobain v Venezuela* (Decision on Liability and Quantum of 30 December 2016) ICSID Case No ARB/12/13 [450].
[359] cf, explicitly, *El Paso v Argentina* (Decision on Annulment of 22 September 2014) ICSID Case No ARB/03/15 [214].
[360] ibid [216].
[361] *Merrill and Ring* (n337) [103].

for evaluating what governments do to people and companies.'[362] Along similar lines, in *Mondev*, the tribunal held that:

> [i]t is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to *what those terms—had they been current at the time—might have meant* in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[363]

These findings mirror to a considerable extent approaches in the context of treaty interpretation that accord terms an evolutive meaning.[364] Having narrowed down the core content of the applicable rule of customary international law by reference to a written source through the process of identification, these tribunals have interpreted the rule in an evolutive manner.[365]

To sum up, IITs practice supports that the affirmation of a certain normative proposition as a reflection of unwritten international law entails the treatment of the text of that proposition as an authoritative statement of the rule. An immediate implication of this practice is the approach of formally unwritten international law through a textual lens akin to 'ordinary meaning' interpretation in the context of treaties. What is more, an additional implication of this approach is that the written iteration of the rule is also amenable to an evolutionary interpretation so as to determine its evolving content. As a corollary, IITs tend to structure the analysis of the evolution of unwritten international law on the basis of its specific terms, rather than vague references to fluctuating state practice and *opinio juris*.

ii. Good faith, Context, and Object and Purpose in the Interpretation of Unwritten International Law

IITs are not limited to this textual approach when determining the content of rules of unwritten international law. Rather, after identifying a rule of unwritten international law, they proceed to further concretise its content by reference to its context, object and purpose, and good faith.

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[362] *Pope and Talbot* (Damages) (n83) [64].
[363] *Mondev* (Award) (n36) [116]; also eg *ADF* (Award) (n112) [180].
[364] See above nn87-94.
[365] Similarly, Gerardo Vidigal, 'Evolutionary Interpretation and International Law' (2020) 24 JIEL 203, 215-216.

As will be shown, IIT approach as to the determination of the context and object and purpose of a specific rule of unwritten international law mirrors closely the respective operation of treaty interpretation, as it has related so far to codified rules. Along similar lines, IITs approach to the configuration of the interpretative process and the relative value of these interpretative elements does not seem to detract considerably from the process of treaty interpretation, subject, of course, to the availability of interpretative material.

To start, after affirming the pedigree of an instrument as reflecting rules of unwritten international law, they occasionally also employ interpretative means that pertain to the 'the spirit, purpose and context of the clause or instrument in which the words are contained'.[366] The award on jurisdiction in *ST-AD* is telling as to this general point. In this case, the tribunal enunciated that 'every rule … of international law must be interpreted in good faith'.[367] Applying this rule of interpretation to the requirement of exhaustion of local remedies under customary international law,[368] the tribunal found that '[t]his rule is interpreted to mean that applicants are only required to exhaust domestic remedies that are available and effective'.[369] In this case, the tribunal not only identified the means for the interpretation of the rule of unwritten international law, but also explicitly stated that such interpretation was mandated by a relevant rule.

Along similar lines, other IITs focus on the 'context' of the rule of unwritten international law. The tribunal's approach in *Devas* relating to the attribution of conduct of a State-owned company to India provides a very illustrative example. In this case, the tribunal noted that the text of Article 8 ARSIWA only mentioned 'persons or group of persons', but made no reference to 'entities' like, for instance, Article 5 ARSIWA establishing also a rule of attribution of conduct.[370] Nonetheless, the tribunal considered that 'it is generally recognized in modern legal systems that "person" includes not only a natural person but also a legal person' and that several IIAs included corporations in their definition of 'persons'.[371] In methodological terms, the tribunal referred to other rules of international law, which it deemed relevant for the

[366] cf *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Rep 53 [48]; *South West Africa (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 336.
[367] *ST-AD v Bulgaria* (Decision on Jurisdiction of 18 July 2013) PCA Case No 2011-06 [364].
[368] ibid citing, among other sources, ARSIWA (n 1) art 44(b).
[369] ibid [365].
[370] *Devas* (Jurisdiction) (n64) [278].
[371] ibid [278]-[279].

interpretation of the rule reflected in ARSIWA, in a way akin to the context of a treaty.[372] Furthermore, the tribunal remarked that 'it would make no sense to impose a restrictive interpretation that would allow a State to circumvent the rules of attribution by sending its direction or instruction to a corporate entity rather than a physical person or group of physical persons'.[373] Instead, it opted for a different interpretation noting that even in the case of corporations the instructions or direction would be received and acted upon by natural persons (ie the directors and agents of the corporation).[374] From a doctrinal viewpoint, the tribunal chose out of two available interpretations the one that gave full effect to Article 8 ARSIWA in what appears to be a straightforward application of the interpretative principle of effectiveness (*ut res magis valeat quam pereat* or *effet utile*).[375]

Moreover, several tribunals often proceed to construct provisions of ARSIWA on the basis of broader considerations, which they deem as cross-cutting. For instance, several tribunals invoke the stability of international obligations as a stepping stone for a restrictive interpretation of the customary defence of necessity.[376] Another set of illustrative decisions declare that the purpose of an award of interest under Article 38 ARSIWA is to 'ensure full reparation' and proceed to award compound interest.[377] This is so notwithstanding the fact that Article 38 ARSIWA is silent on the matter and the ILC Commentary clearly favours the award of simple interest.[378] These findings seem to evoke the object and purpose or the *ratio* of ARSIWA or of specific provisions in order to determine the meaning of the applicable rule in a way that parallels known approaches to treaty interpretation.[379] The common thread that binds all these

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[372] cf VCLT, art 31(3)(c); for a similar approach see: *Sempra* (Award) (n198) [353] ('[Article 25(2)(b) ARSIWA] is of course the expression of a general principle of law devised to prevent a party from taking legal advantage of its own fault').

[373] *Devas* (Jurisdiction) (n64) [280].

[374] ibid.

[375] cf, eg, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 [133]; *Free Zones of Upper Savoy and the District of Gex (France/Switzerland)* (Order) [1929] PCIJ Ser A No 22, 13.

[376] eg *AWG v Argentina* (Decision on Liability of 30 July 2010) UNCITRAL [249]; *EDF v Argentina* (Award) [1171].

[377] eg *Quiborax v Bolivia* (Award of 16 September 2015) ICSID Case No ARB/06/2 [514] and [520]-[524]; *Crystallex v Venezuela* (Award of 4 April 2016) ICSID Case No ARB(AF)/11/2 [932] and [935]; *Hrvatska Elektropriveda v Slovenia* (Award of 17 December 2017) ICSID Case No ARB/05/24 [539]-[540]; *Teinver v Argentina* (n332) [1120-[1121] and [1125]; on a similar approach in relation to the rules of attribution: *F-W Oil Interests v Trinidad and Tobago* (Award of 3 March 2006) ICSID Case No ARB/01/14 [200].

[378] ARSIWA Commentary to Art 38 [8].

[379] See section I.3.i.

pronouncements together is the blending of a literal reading of ARSIWA with contextual or teleological considerations that mirrors the process dictated by the rules of treaty interpretation.

A last point that merits discussion under this rubric is the entanglement of this process of interpretation of unwritten international law with the determination of identification of general principles of law emanating from within international law. According to the ILC, the provisions of ARSIWA relating to the content of state responsibility are 'without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.'[380] Nonetheless, investment tribunals commonly apply the rules on reparation reflected in ARSIWA, even if this involves an element of interpretation as an intermediate step.[381] Notably, in *Quiborax*, the issue arose whether investment tribunals can issue a declaratory award as a form of reparation. The tribunal referred to Articles 34 and 37 ARSIWA and enunciated that ARSIWA 'restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes'.[382] It specified that 'the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair.'[383] In this respect, it cautioned that 'some types of satisfaction as a remedy *are not transposable* to investor-State disputes'.[384] In particular, it held that 'the type of satisfaction which is meant to redress harm caused to the dignity, honor and prestige of a State, is not applicable in investor-State disputes.'[385] The tribunal concluded thus that '[t]he fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 [ARSIWA], if appropriate'.[386] In practical terms, the tribunal essentially engaged in the interpretation of Article 37 ARSIWA as a rule of customary international law referring expressly to its wording and its object and purpose to discern its content rather than apply it by analogy.

[380] Art 33(2) ARSIWA; also Commentary to Art 28 ARSIWA [3].
[381] eg *Vestey v Venezuela* (Award of 15 April 2016) ICSID Case No ARB/06/4 [323]; on attribution, see *Jan de Nul* (Award) (n345) [156] (emphasis added); also, in the exact same terms, *Masdar Solar* (Award) (n140) [167].
[382] *Quiborax* (n377) [555].
[383] ibid.
[384] ibid [555] (emphasis added).
[385] ibid [559].
[386] ibid [560].

This brief analysis has adduced evidence to show that the practice of IITs also considers context and object and purpose as inextricable and essential elements of the interpretative process of a rule of customary international law. To a certain extent, IIT practice does not evidence a specific methodology for the determination of the context or object and purpose of a rule of unwritten international law that concretise further how to determine the 'backdrop of general rules' or an 'indivisible regime'. They do, however, indicate an openness to consider the systemic relations between rules of unwritten international law.

iii. Supplementary Means of Interpretation of Unwritten International Law

IIT practice has not reached yet a level of sophistication that clearly demonstrates a clearly rendered distinction between principal and supplementary means of interpretation of customary international law. Unlike the evident fact of the conclusions of treaties, the determination of the time of crystallisation of rules of unwritten international law is an issue that IITs mostly avoid to pronounce upon. That said, an interesting tendency relates to the consideration of evidence relating to the circumstances of adoption of the instrument containing the written iteration of the rule of unwritten international law. Whilst such materials are the sole focus of the process of identification of unwritten international law *qua* evidence of state practice and *opinio juris* (or conceivably, recognition and transposability), their value seems diminished in the process of interpretation of such rules.

Again, the practice of ARSIWA provides a representative case study. References to the discussions within the ILC leading up to the adoption of ARSIWA are not particularly frequent in investment decisions. In some cases, tribunals rely on the record of discussions in order to determine whether the silence of ARSIWA also implies a determination by the ILC that certain concept or proposition does not form part of international law.[387] Thus, in *Alghanim*, the investor invoked the distinction between 'obligations of conduct' (ie those that prescribe or proscribe a specific conduct) and 'obligations of result' (ie those that require the achievement of a specific result irrespective of the conduct adopted) that appeared in previous drafts of ARSIWA.[388] The tribunal took note of the critical stance of the last Special Rapporteur and the deletion of

[387] eg *Loewen Group Inc and Raymond L Loewen v United States of America (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3* (Award of 26 June 2003) ICSID Case No ARB(AF)/98/3 [149] (exhaustion of local remedies as a substantive defence); *Salini v Argentina* (Decision on Jurisdiction of 23 February 2018) ICSID Case No ARB/15/39 [85] (doctrine of extinctive prescription).

[388] *Alghanim v Jordan* (Award of 14 December 2017) ICSID Case No ARB/13/38 [302].

the distinction from the final draft of ARSIWA and concluded that the distinction did not form part of customary international law.[389] In this case, the views expressed by the ILC in adopting its final output were accorded almost decisive weight.

However, tribunals very rarely rely on the discussions leading up ARSIWA as a means to interpret a provision of ARSIWA. For instance, in the *LG&E* decision, the tribunal started from the determination that Article 25 ARSIWA reflects the standard of necessity in international law.[390] It, then, proceeded to discuss each of the elements of Article 25 ARSIWA referring exclusively to the opinions of the ILC Special Rapporteurs and other individual members of the ILC.[391] However, no other IIT dealing with the defence of necessity has ever conducted such research for this purpose.[392] From a methodological perspective, it is possible to maintain that these tribunals merely examine all available secondary evidence without endorsing any firm distinction between identification and determination of the content of the applicable rule. Nonetheless, the discrepancies as to the relative value that these materials have in each process are not easily explicable under the mainstream view on the identification of customary international law or general principles of law. Rather, these tribunals seem to resort to the record of discussions of the ILC more as an interpretative aid in a way that parallels the use of *travaux préparatoires* in the context of treaty interpretation.

This brief section has examined whether it is possible to identify, analogously to the process of treaty interpretation, a distinction between principal and supplementary means in the interpretative practice of IITs. In this respect, IIT practice is too fragmentary and sporadic to support such a distinction, still less to allow the classification of interpretative means of unwritten international law along those lines.

Interim Conclusion

IITs are not a monolith. Judges, actors, treaties, rules, and even venues of international investment arbitration differ. However, this chapter has adduced evidence to show that they, nonetheless, speak the same language when it comes to explain their interpretative reasoning. As

[389] ibid.
[390] *LG&E v Argentina* (Decision on Liability of 3 October 2006) ICSID Case No ARB/02/1 [245].
[391] ibid [249-59].
[392] See eg n376.

has become apparent, the rules of treaty interpretation have only served to streamline the process of interpretation in IIT practice, but also as a model for the interpretation of rules emanating from unilateral acts of states and unwritten international law.

The particularities usually associated to international investment arbitration do not translate to a diversity of rules of interpretation or a lapse into interpretative fuzziness. Quite the contrary, IITs pay heed to the rules of treaty interpretation, even if they might diverge significantly in the application of these rules. When it comes to issues of principle, the practice of IITs converges with the practice of other ICTs, and especially the ICJ, to an almost overlapping extent. Indeed, divergences tend to be minor, limited to specific decisions, or offset by other elements of the VCLT rules of interpretation. For instance, the rather strict approach of IITs with respect to the definition of 'subsequent agreements' under Article 31(3)(a) VCLT is balanced by the laxer approach to the identification of 'subsequent practice' under Article 31(3)(b) VCLT.

As we have also seen, the practice of IITs with respect to the interpretation of unilateral acts and rules of unwritten international law is still in an incipient stage. With respect to unilateral acts, IITs seem to reflect a heuristic distinction based on the observation of the practice of the ICJ. As a result, the contours between the identification of binding unilateral acts and their interpretation are still murky in the investment arbitration context. At the same time, surprisingly, IITs have developed an extensive practice of interpretation of unwritten international law in a way that mirrors the key elements of the interpretative process of treaty interpretation. Whilst the process of interpretation of unwritten international law has reached an impressive degree of sophistication compared to other ICTs, they have not provided a comprehensive and coherent formula about certain key aspect of the process, especially the determination of what constitutes 'context' and 'object and purpose' of a rule of unwritten international and the relative value of interpretative means.

The present study has also traced certain tendencies which could be characterised as 'divergent' compared to the general grain of IIT practice or the general law of interpretation to which usually ICTs refer to including IITs. In the context of treaty interpretation, several IITs seem to conflate the emphasis of the VCLT rules of interpretation on text and object and purpose with literalism or, conversely, teleology.[393] In the context of unilateral acts, the conflation

[393] eg *AAPL* (n25) [40]; *Armas* (Jurisdiction) (n42) [160]-[161]; n 155 and text.

between the identification of the binding character of a unilateral act and its interpretation has led certain IIT to completely eschew the process of identification and apply *qua* unilateral acts a provisions of domestic law.[394] This methodological confusion has also had certain limited effect on the interpretation of unwritten international law with certain tribunals erroneously treating the intention of the authors of non-binding instruments as a relevant consideration for the interpretation of customary international law or general principles of law.[395]

[394] eg *Cube* (n230) [275]-[284]; *Kruck* (Jurisdiction, Liability and Principles of Quantum) (n296) [199].
[395] eg *LG&E* (Liability) (n390) [245].

Chapter 4. Conclusion

The present study has adduced evidence from the practice of ICT that support the formal and normative character of interpretation in international law. In other words, the interpretation of international law in the practice of ICT is a process that is governed by rules of international law which apply regardless of the specific subject-matter of the rule whose interpretation is sought or the circumstances of the specific case. What is more, the present study has argued that rules of interpretation in international law share significant commonalities, but also differ to an extent depending on the sources of the rule to be interpreted.

Specifically, the comparative analysis of the practice of the PCIJ/ICJ and IITs process of treaty interpretation militate in favour of a formal and normative approach to interpretation that is firmly grounded on the rules of interpretation laid down in the VCLT. In turn, the general applicability of the VCLT rules of interpretation has been overwhelmingly upheld regardless of the subject matter of the treaty whose interpretation is sought. In this process, the ordinary meaning of the terms of the treaty, their context, the treaty's object and purpose, subsequent agreements and practice of the parties to the treaty, and other relevant rules of international law applicable in the relations between the parties are to be considered as a whole in a process of progressive encirclement. Conversely, circumstantial evidence about the intention of the parties, including the circumstance of its conclusion or unilateral practice of some of the parties, only feature in this process subsidiarily as supplementary means of interpretation. At the same time, the applicability of elements or maxims of treaty interpretation not explicitly mentioned in the VCLT rules hinges in practice on the establishment of a foothold within the VCLT formula. In this respect, the practice of the two areas of international adjudication converges completely, so much so that any divergence from this configuration can be construed as an outlier, if not misinterpretation of the treaty in question.

Along similar lines, the comparative analysis of the interpretative practice of the PCIJ/ICJ and IITs overlaps to a significant extent with respect to the interpretation of unilateral acts. In this respect, the ambivalence of the ICJ with respect to the applicable rules of interpretation has spilled over to the practice of IITs with mixed results. The ICJ's has insistently distinguished between the rules of interpretation that apply to optional declarations to its compulsory jurisdiction from those applying to other unilateral acts entailing international obligations. IITs have transposed this distinction to the context of acceptance of jurisdiction under the

ICSID Convention even by means of a domestic provision, although the two contexts are not comparable. The present study has theorised that the practice of ICJ and IITs ultimately conflates two separate processes of law-determination: identification of binding unilateral acts and their interpretation. On the one hand, the identification of the binding character of a unilateral act hinges on the establishment of the intention of the declaring state to be bound by the act. To establish this intention, the content of the act is as determinative as the circumstances surrounding its adoption, whereas a presumption exists against the binding character of the act. By contrast, there is no rule in favour of restrictive interpretation, once the binding character of the act has been established. Indeed, the process of interpretation must be governed by a rule analogous to that of treaty interpretation, where context and object and purpose are determined in an adapted way to account for the unilateral character of the act.

Unlike the interpretation of treaties and unilateral acts, the interpretative rules applicable with respect to unwritten international law have not been fully articulated in the practice of the ICJ or IITs. Practice remains somewhat ambivalent and fragmented, although IIT practice seems to have attained a higher degree of clarity and systematisation compared to that of the ICJ. Indeed, it is clear that the determination of rules of unwritten international law in both areas of international adjudication is not limited to an inductive evaluation of evidence of state practice and opinio juris or recognition and transposability. In most cases, this identification of rules of unwritten international law by induction is followed by a deductive process of interpretation that seeks to clarify the content of the rule. In turn, this process of deduction is not based on random preconceived ideas, but largely mirrors the element of treaty interpretation, that is, the ordinary meaning of the terms of the rule, its context, and its object and purpose. In the course of this process, as we have seen, the determination of the context and object and purpose of a rule of unwritten international law is not limited to a specific instrument and its surroundings, but takes place more on the basis of the systemic relations between rules of unwritten international law in a manner akin to the element reflected in Article 31(3)(c) VCLT. In the same vein, at this stage of development of rules of interpretation of unwritten international law, there are only sparse *indicia* rather than firm evidence of a distinction between principal and supplementary means of interpretation.

These tendencies are not limited to the practice of the ICJ or IITs, but rather extend to diverse fields of international adjudication, as has been in detail discussed in the various publications of the TRICI-Law project. Indeed, the VCLT rules have become the almost unrivalled

blueprint for treaty interpretation in diverse fields of international adjudication.[1] Similarly, the rules of treaty interpretation have operated as a blueprint, but also as *tertium comparationis*, for the interpretation of rules stemming from other sources of international law including unilateral acts and unwritten international law.[2] In this latter respect, it is expected that the increased awareness of the significance of interpretation as a process distinct from the identification of a rule and the continuing engagement with the process of interpretation will add necessary clarity and granularity to the law relating to the interpretation of rules emanating from these sources.

[1] eg Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 379; Valérie Boré Eveno, 'Final Report on ITLOS' in ILA Study Group on the Content and Evolution of the Rules of Interpretation, 'Final Report: 29 November-13 December 2020, Kyoto' <https://www.ila-hq.org/en/documents/ila-final-report-with-annexes>; Stewart Manley , Pardis Moslemzadeh Tehrani and Rajah Rasiah, 'Mapping Interpretation by the International Criminal Court' (2023) 36 LJIL 771*ff*.

[2] With respect to the practice of human rights courts and bodies, as well as the ICC and *ad hoc* international criminal tribunals see Marina Fortuna, *Interpretation of Customary International Law in International Courts* (PhD Thesis, University of Groningen 2023) available at: <https://pure.rug.nl/ws/portalfiles/portal/788272453/Complete_thesis.pdf>.

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