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Contract Interpretation in Investment Treaty Arbitration

A Theory of the Incidental Issue

By

Yuliya Chernykh



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Open access publication became possible due to financing by the Open Access Publishing Fund at the Inland Norway University of Applied Sciences.

The Library of Congress Cataloging-in-Publication Data is available online at https://catalog.loc.gov
LC record available at https://lccn.loc.gov/2021047786

Typeface for the Latin, Greek, and Cyrillic scripts: "Brill". See and download: brill.com/brill-typeface.

ISSN 1874-0502
ISBN 978-90-04-41467-9 (hardback)
ISBN 978-90-04-41470-9 (e-book)

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Foreword

Yuliya Chernykh's book *Contract Interpretation in Investment Treaty Arbitration* deals with an important topic that is seldom devoted attention to. As a matter of fact, many observers may be of the opinion that the title is an oxymoron: investment arbitration does not deal with issues of contract law, so why should investment tribunals interpret contracts? Furthermore, contracts are often written in a clear and exhaustive manner, so why should issues of interpretation arise?

As the book clearly explains, there are situations in which questions of contract law need to be examined by investment tribunals – mainly as preliminary or incidental questions, to determine issues such as contract liability or breach of contract, that in turn are assumed as a basis for the issues of investment law in dispute.

The book also shows that interpretation of contracts is not only a question of clarifying the semantic meaning of ambiguous contract wording – it is a matter of understanding the legal effects of the contract terms, based on the contract wording but also on the principles of the applicable law.

Having ascertained that issues of contract interpretation may be relevant, as incidental questions, also in investment arbitration, the next step is to ascertain under which law these issues shall be considered.

Well-known ambitions of delocalisation and internationalisation have long dominated the scene of investment arbitration – of arbitration *tout court*, but they are particularly visible (and have their origin) in the intersection of the public international dimension and the domestic legal framework typical in investment arbitration. The function of the public international dimension in investment arbitration is to constrain the domestic framework for the purpose of protecting the investor from abuse by the host country. The domestic legal system may be an instrument for such abuse, hence the necessity to internationalize the dispute. It is tempting to disregard the domestic framework completely in the name of internationalisation. In the context of contract interpretation, this temptation may lead to the development of autonomous methods not founded on either of the dimensions.

The analysis carried out in this book gives the instruments to navigate in this area. The discussion is a seldom combination of extensive empirical research (573 awards are examined) and solid doctrinal analysis. The topic is dissected into various components, starting with how contracts actually are interpreted in case law. International law and its rules on treaty interpretation are examined as a possible basis for contract interpretation, but turn out to

be insufficient. The relevance of national law is emphasized, and a thorough overview of the different approaches in different legal families is presented.

The reasoning is solidly founded on sources and analyses of comparative law, private international law, public international law, and investment arbitration case law. Notwithstanding a certain reluctance in case law towards the principle *jura novit curia,* the main thesis is that arbitral tribunals have an inherent power to incidentally interpret contracts under the national law that has been selected according to connecting factors drawn from the private international law.

This book is based on the author's PhD-dissertation, that she successfully defended at the University of Oslo (and I had the pleasure of supervising her work while she was a PhD fellow at our Law Faculty). The evaluation committee was composed of Professor Andrea Bjorklund of McGill University, Counsel Monique Sasson (PhD) of DR Arbitration & Litigation, and Professor Ole Kristian Fauchald of the University of Oslo. I quote from their evaluation report: '*Many people talk about investment arbitration as showcasing the intersection of public and private international law, but few have explored that intersection as thoroughly as this dissertation. We find the dissertation to be a remarkably comprehensive examination of those instances in which investment treaty tribunals interpret contracts in the course of their investment arbitration and how tribunals should proceed with such interpretation*.'

I conclude with another quote from the evaluation report: '*The dissertation, once it is published, will undoubtedly be relied upon not just by investment tribunals but by scholars of both private and public international law*.'

This book is now in the hands of the readers, and I can only congratulate the author and wish the reader an instructive and thought-provoking reading.

Giuditta Cordero-Moss, University of Oslo

Acknowledgements

This book is a result of seven years of work. It started as a PhD thesis at the University of Oslo, continued as a project of a guest researcher at PluriCourts – Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order, and ended up as a monograph further developed and finally completed at the Inland Norway University of Applied Sciences.

The book grew from my practical experience as a counsel and arbitrator in international arbitration and my curiosity about the intersection between public international law and private international law in investment treaty arbitration.

During my PhD years, I was privileged to have Professor Giuditta Cordero-Moss as my principal supervisor and Professor Ivar Alvik as my co-supervisor. I am enormously grateful for all our discussions and all their comments, for the times they agreed with me, and particularly the times they disagreed.

This work has also benefited a lot from the discussions with scholars in various places – at the iCourts and CEVIA at the University of Copenhagen, at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, at Stockholm University, at Amsterdam University, at the University of Edinburgh, at the University of Vienna, at the University of Bergen and the University of Trømso. I was also privileged to test my ideas with experienced practitioners involved in investment treaty arbitration from Austria, France, Poland, Switzerland, Ukraine, UK, and the USA.

Above all, I am grateful to my husband Pavlo, my children Tamara and Roman, and my parents Olha and Sergiy. Without your support, nothing would be possible.

Yuliya Chernykh
Lillehammer, 29 June 2021

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Abbreviations

BGB	the Civil Code of Germany (Bürgerliches Gesetzbuch)
BIT	Bilateral Investment Treaty
CESL	Common European Sale Law
CIETAC	China International Economic and Trade Arbitration Commission
CISG	United Nations Convention on Contracts for the International Sale of Goods
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DCFR	Draft Common Frame of Reference
ECAFE	UN Economic Commission for Asia and the Far East
ECE	UN Economic Commission for Europe
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
FET	fair and equitable treatment
FIDIC	International Federation of Consulting Engineers
FTAs	Free Trade Agreements
HCCH	Hague Conference on Private International Law
IBA	International Bar Association
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIAs	bilateral and multilateral treaties for investment protection
ILC	International Law Commission
IPO	initial public offering
IUSCT	Iran-USA Claims Tribunal
LCIA	London Court of International Arbitration
MCCI	Moscow Chamber of Commerce and Industry
MFN	most-favoured-nation treatment
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Justice
PECL	Principle of European Contract Law
PITAD	PluriCourts Investment Treaty Arbitration Database
SCC	Stockholm Chamber of Commerce
SIAC	Singapore International Arbitration Centre
UNCITRAL	United Nations Commission on International Trade Law

UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
VCLT	Vienna Convention on the Law of Treaties

Introduction

Contracts appear relevant, and often central, regarding a significant number of disputes in investment treaty arbitration. Nevertheless, the way tribunals ascertain their content and integrate it into their decisions is not afforded the same interest as treaty interpretation. While attention to treaty interpretation continues to grow, contract interpretation has only benefited from fragmented studies focused on a limited number of specific contractual provisions. This work aims to unsettle the dominant perspective concentrated on treaty interpretation in investment treaty arbitration. It digs into contract interpretation as a different, yet important, type of legal interpretation with its own object, methods and functions.

The book fills an unfortunate gap in the existing legal scholarship. The gap appears between a plethora of publications on investment contracts in investment treaty arbitration, on the one hand, and numerous publications on contract interpretation in ordinary contractual disputes before national courts and international commercial arbitration, on the other hand. Scholars in the field of investment treaty arbitration indeed frequently make investment contracts or state contracts central components of their academic works.[1] However, contract interpretation does not appear central to their work as an analytically distinct concept and is frequently blended with analysis and reasoning on other contract-related issues. Only a limited fraction of interpretative occasions merit researchers' attention, limiting exposure primarily to interpreting specific contractual provisions such as stabilisation or forum selection clauses.[2] Other contractual provisions of investment contracts, as well as other

1 For instance, Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018); Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011); Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff Publishers 2011).

2 For instance, Thomas Wäelde and George Ndi, *'Stabilizing International Investment Commitments: International Law versus Contract Interpretation'* (1996) 31 Texas International Law Journal 215; Moshe Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law' (2011) 12 Journal of World Investment & Trade 783; Andrea Shemberg, 'From Stabilization Clauses and Human Rights to Principles for Responsible Contracts' in Jansen Calamita and others (eds), *The Future of ICSID and the Place of Investment Treaties in International Law* (British Institute of International and Comparative Law 2013) 61–76; Katja Gehne and Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' (2013) 46 NCCR Working Paper <https://www.wti.org/media/filer_public/c7/83/c783ecf8-11cf-4e3c-88c4-6214f8f7b51e/stab_clauses_final_final.pdf> accessed 20 October 2020; Lorenzo Cotula, 'Reconciling Regulatory Stability and Evolution

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non-investment contractual arrangements that also appear in the context of investment treaty arbitration, remain largely underexplored. In what relates to the second type of publications that address contract interpretation in the ordinary context of contractual disputes, these publications, while helpful in studying contract interpretation from national,[3] comparative[4] or interdisciplinary[5] perspectives, do not deal with public international law settings because

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of Environmental Standards in Investment Contracts: Towards a Rethink of Stabilization Clauses' (2008) 1 (2) Journal of World Energy Law & Business 158; Sam Foster Halabi, 'Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clause' (2011) 31 (2) Northwestern Journal of International Law and Business 261; Klaus Peter Berger, 'Renegotiation and Adaptation in International Investment Contracts: The Role of Contract Drafters and Arbitrators' (2003) 36 Vanderbilt Journal of Transnational Law 1347; S I Strong, 'Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?' (2014) 29(3) ICSID Review 690.

3 For instance, Catherine Mitchell, *Interpretation of Contracts* (2nd edn, Routledge 2018); Boel Flodgren and Eric M Runesson, *Contract Law in Sweden* (Kluwer Law International 2015) 94–101; Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters 2011); Alf Petter Høgberg, 'Tolkningsstiler ved kontraktstolning – en introduksjon' (2006) 41 Jussens Venner 61.

4 Jacques H Herbots, 'Interpretation of Contracts', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 329–347; James Spigelman, 'The Centrality of Contractual Interpretation: A Comparative Perspective' (2015) 81 Arbitration 234; Stefan Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in Andrew Burrow and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 128–152; Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: an Exercise in Comparative Legal Rhetoric' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 77–114; Alberto Luis Zuppi, 'The Parol Evidence Rule: a Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' (2007) 35 Georgia Journal of International and Comparative Law 233; Blake D Morant, 'Contractual Interpretation in the Commercial Context' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspective* (Oxford University Press 2016) 248–271; Ole Lando and others (eds), *Restatement of Nordic Contract Law* (DJØF Forlag 2016) 167–195; Giuditta Cordero-Moss, *Lectures on Comparative Law of Contracts* (2004) 166 Publications Series of the Department of Private Law, University of Oslo; Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011).

5 Law & economics perspective on contract interpretation results in a constantly growing corpus of literature focused on the maximisation of the efficiency of the parties' bargaining through interpretation. See, for instance, Avery Wiener Katz, 'The Economics of Form and Substance in Contract Interpretation' (2004) 104 Columbia Law Review 496; Alan Schwartz and Robert E Scott, 'Contract Interpretation Redux' (2010) 119 Yale Law Journal 926; Alan Schwartz and Robert E Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 Yale Law Journal 541; Eric A Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?' (2003) 112 Yale Law Journal 829; Eric A Posner, 'The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation' (1997) 146 University of Pennsylvania Law Review 533; Lisa Bernstein, 'Merchant Law in a

of the linear, ordinary context of their approach to contract interpretation. Surprisingly, the two types of literature – works on investment contracts in investment treaty arbitration and works on contract interpretation in ordinary contractual disputes – while being one step away from cross-fertilising each other, still remain in relative isolation to one another. As a result, the way treaty-based tribunals in investment treaty arbitration ascertain the content of contractual provisions appears largely uncovered and unassessed. Given that treaty-based tribunals address contracts rather intensively and regularly, the time is ripe to give the interpretation of a broad range of contracts in investment treaty arbitration all the detail and care it deserves.

The research questions asked in this monograph are relatively straightforward:

1. How do treaty-based tribunals interpret contracts?
2. How should treaty-based tribunals interpret contracts?

The simplistic appearance of these questions, nevertheless, shall not mislead in understanding the challenges of the book or its contribution. Contract interpretation raises serious difficulties for the researcher. Firstly, contract interpretation exercised by treaty-based tribunals lacks comprehensive coverage of the available analytical material, nor is it captured by existing databases. A broader

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Modern Economy' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 239; Lisa Bernstein, 'Custom in the Courts' (2015) 110 Northwestern University Law Review 63; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions' (2001) 99 Michigan Law Review 1724; Juliet P Kostritsky, 'Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value' (2011) 2 Elon Law Review 109; Juliet P Kostritsky, 'The Promise Principle and Contract Interpretation' (2012) 45 Suffolk University Law Review 843; Juliet P Kostritsky 'The Plain Meaning vs Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation' (2007) 96 Kentucky Law Journal 43; Peter M Gerhart and Juliet P Kostritsky, 'Efficient Contextualism' (2015) 76 University of Pittsburgh Law Review 509; David Charny, 'The New Formalism in Contract' (1999) 66 University of Chicago Law Review 842; Meredith R Miller 'Contract Law, Party Sophistication and the New Formalism' (2010) 75 Missouri Law Review 493; Adam B Badawi, 'Interpretive Preferences and the Limits of the New Formalism' (2011) 6 Berkeley Business Law Journal 1. For language & law perspective, see Lawrence M Solan, Terri Rosenblatt and Daniel Osherson, 'False Consensus Bias in Contract Interpretation' (2008) 108 Columbia Law Review 1268; Lawrence M Solan, 'Patterns in Language and Law' (2017) 6 International Journal of Language & Law 46; Peter M Tiersma and Lawrence M Solan, *The Oxford Handbook of Language and Law* (Oxford University Press 2012). For a cognitive perspective of contract interpretation, see, for instance, Beverly Horsburgh and Andrew Cappel, 'Cognition and Common Sense in Contract Law' (2016) 16 Touro Law Review 1091; Melvin A Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 Stanford Law Review 211.

analysis of contract interpretation, that would relate to all types of contracts and not necessarily to investment contracts only, and that would cover all possible functions of contracts in investment treaty arbitration, not necessarily and exclusively the functions in the context of the application of jurisdictional or substantive treaty provisions, is still missing. Secondly, determining under which circumstances contracts are interpreted, and when they are not, necessitates much more than just finding the key words' presence, like 'interpret' or 'interpretation', in the text of awards and decisions. Understanding the overall role of a contract and a specific contractual provision for the tribunal's reasoning is unavoidable.

As the *new terrain* for research in investment treaty arbitration – contract interpretation – accordingly, necessitates a workable methodological package. If one were to start with discourse analysis[6] in investment treaty arbitration, one would inevitably be captured in and possibly follow the trajectory addressing investment contracts only. While a focus on investment contracts no doubt contributes substantially to the understanding of contract interpretation in investment treaty arbitration, it certainly provides an incomplete picture. Not only do the tribunals ascertain the content of *investment* contracts in investment treaty arbitration, but also a variety of those which, while being indispensable for tribunals' analysis, do not directly trigger investment protection. The methodological package shall accordingly be able, on the one hand, to identify instances of contract interpretation in numerous arbitral awards and decisions and essentially build an independent database dealing with contract interpretation *anew*, and, on the other hand, to address the tribunals' reasoning through a meticulous understanding of the role of contractual provisions in it.

To free itself from the conventional perspectives on contracts in investment treaty arbitration, the monograph starts with the revealing findings that *empirical* studies can bring.[7] Accordingly, an empirical method opens the

6 Marianne W Jørgensen and Louise J Phillips, *Discourse Analysis as Theory and Method* (Sage Publishing 2002), Stephan W Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22 European Journal of International Law 875.

7 With more data becoming available, as well as more technical tools to approach and systematise it, the method is becoming increasingly attractive. Empirical studies, however, are not new and can be traced back to the 1940s and 1950s. At the time, an *inductive method* or approach became particularly noteworthy, discussed mostly in the context of the legal reasoning of international courts and tribunals – see Georg Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 Harvard Law Review 539; Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 617–662; Ben Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons

investigation by attempting to map a variety of contracts based on the awards under analysis, including contractual provisions, interpretative occasions and interpretative techniques. As the argument develops, the book also relies on empirical methods on other occasions, for example, when approaching the content of international investment agreements (IIAs), the practices of different international courts and tribunals on ascertaining the content of contractual provisions, etc.

For its empirical inquiry, the book employs relatively neutral concepts of a *contract* and *contract interpretation*. A contract appears as a promise or a set of promises between two or more parties. Only traditional contracts through which parties arrange their undertakings on construction, privatisation, settlement, and many others become central to this work. The consent mechanism for treaty jurisdiction, which is occasionally labelled as being *contractual*, falls outside this study's scope.[8] Contract interpretation, in turn, is understood here as ascertaining the content of contractual provisions. Adopting these unrestricted concepts for the empirical part of the study, the work is not only cognisant that the concept of contract interpretation may somewhat differ across jurisdictions;[9] it actively engages with conceptual differences and their implications under national law.

Dealing with contract interpretation as a type of legal interpretation and legal reasoning poses serious challenges for empirical studies. The challenges are primarily associated with the inherent normative character of the object

1953). Some contemporary works also suggest using inductive methods, essentially what here are referred to as empirical methods – see Frédéric G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018) 6–7.

8 A consent of the state to investment treaty arbitration in a public international law instrument – international investment agreement – may be viewed as an offer, whereas the choice of relevant arbitration by a foreign investor may be viewed as acceptance – see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 257–259. For an interpretation of hybrid types of jurisdictional agreements which are based on a state's offer laid out in an IIA and accepted by a foreign investor by submitting a request for arbitration, see also Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 224–253, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 262–264.

9 On the similarities and differences between concepts of contract and contract interpretation in various national laws, see Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 165–197.

of the research.[10] Unlike with gender[11] or double hatting/roles in the proceedings,[12] contract interpretation appears somewhat less 'palpable' and less observable in investment treaty arbitration. This is not to say that legal reasoning has not been addressed empirically before and that the challenges are all new.[13] This is just to highlight contract interpretation as a peculiar kind of legal reasoning in the setting of public international law, which has not been addressed so far and which, if compared with treaty interpretation, poses issues of complexity of somewhat different types. Unlike with treaty interpretation, tribunals do not always openly identify the analytical efforts they direct towards ascertaining the content of contractual provisions as contract interpretation. Nor do tribunals have a single and universally recognised interpretative paradigm for the interpretation of contracts, like the Vienna Convention on the Law of Treaties (VCLT) for treaty interpretation. Contract interpretation analysis often operates in a somewhat reduced and occasional stigmatised capacity when tribunals merge findings on the content of contractual provisions with other conclusions relevant for deciding a treaty claim. In other words, reasoning in relation to contracts in the context of a treaty, in many respects, is *less labelled, less clearly articulated, less structured and less formalised* than treaty interpretation.

To perform an empirical study, the work monitors awards of various kinds. These include final awards on merits, various awards and decisions on

10 Already in 1963 Wilfred Jenks observed that induction and deduction, or in the words used in this book, empirical and normative analysis, were rather inseparable: '*Induction and deduction are complementary logical methods each of which has an important contribution to make to legal reasoning; neither can rightly nor reasonably claim any inherent superiority to the other as a method of legal reasoning. Law develops and progresses by the constant interaction of practice and principle; practice alone remains static and becomes archaic; principles alone remains abstract and becomes illusory; practice and principles together correct each other's limitations and enable law to give practical expression to the ideal of justice.*'– Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 617–662.

11 Taylor St John, Daniel Behn, Malcolm Langford and Runar Lie, 'Glass Ceilings and Arbitral Dealings: Explaining the Gender Gap in Investment Arbitration,' Gender on the International Bench, PluriCourts-iCourts Workshop, Oslo, 23–24 March 2017.

12 Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law 301.*

13 The work of Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' is among the first and highly cited works that empirically research legal reasoning – see Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301. See also Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211.

bifurcated or trifurcated questions (such as jurisdiction, attribution, liability, damages/compensation and costs), and annulment decisions of the ICSID annulment committees. The analysed awards and decisions are not limited to those issued under the ICSID Arbitration Rules, though they constitute the research material's predominant part. Awards and decisions rendered under other arbitration rules are analysed as well. The focus on awards and decisions means that the parties' submissions are not considered, though their positions on questions of contract interpretation are analysed through the prism of the tribunals' summaries and reasoning in the relevant parts of awards and decisions and as cited in them.[14] The study excludes procedural orders, letters, and directions of tribunals from an empirical investigation.

To assemble empirical material for this research, two databases were primarily used: Investment Treaty Arbitration (ITALAW) and UNCTAD Investment Policy Hub. Operational as of 30 January 2019, the PluriCourts Investment Treaty Arbitration Database (PITAD) announced that it contained more cases than the ITALAW and UNCTAD databases put together at the time. Because of the timeline of this research, the PITAD was not used to form the list of cases for the initial basis of the research. At the same time, this study used some user-friendly features of the PITAD database, for instance, including a function enabling the listing of all cases by the arbitrator, as well as complementing and verifying the information obtained from the ITALAW and UNCTAD databases. In addition to the PITAD, the ICSID database was used to further validate information, primarily in relation to the status of the ICSID cases pending or concluded. Furthermore, case summaries from the Investment Arbitration Reporter,[15] and case reports from Global Arbitration Review and in digests prepared by Richard Happ and Noah Rubins[16] were relied upon to sharpen understanding of the analysed awards and decisions.

The material was processed in four steps.

The first step included identifying all known cases as of 30 January 2019 regardless of whether their status at the time was pending or finalised. A total of 894 cases were identified, a list of which is provided in Annex I.

The second step excluded from the list of 894 known cases those which did not have publicly available awards and those which were in languages other

14 Only an extremely limited number of cases reveal all procedural materials including parties' submissions, such as, for instance, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23.

15 Investment Arbitration Reporter <https://www.iareporter.com/>.

16 Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 1974–2002* (Oxford University Press 2013); Richard Happ and Noah Rubins, *Digest of ICSID Awards and Decisions 2003–2007* (Oxford University Press 2009).

than English and Russian.[17] Altogether, 492 cases listed in Annex II were excluded.

The third step assessed the assembled material of 402 cases (Annex III), or altogether 573 publicly available awards and decisions, covering the elements of contract interpretation. Initially, a textual processor was used to identify areas that contained a textual reference to 'contract', 'agreement' and 'concession'. Thereafter, the results were validated manually leading to the separation of those awards and decisions which contained the tribunal's analytical assessment of the content of the contractual provisions. Instead of looking at whether tribunals labelled their analysis as *interpretation,* it appeared more relevant to assess how tribunals *understood* contracts and *explained* their understanding.[18] When the parties disagree on the content and effect of certain contractual provisions, and provide the content of contractual provisions that is necessary for various aspects of a treaty claim, treaty-based tribunals engage in an interpretative exercise. When there is no apparent disagreement between the parties to a dispute, it is much more difficult to verify whether the tribunals' analytical efforts have been interpretative. Every time, in the absence of disagreement between the parties, that tribunals have had to engage in ascertaining and explaining the content and effect of contractual provisions in their reasoning, such instances have been included in the analysis and have been carefully verified. Some of the data revealed in this analysis appear rather distinct and refined, with clear interpretative questions or interpretative issues being formulated and competing interpretative patterns identified and meticulously addressed. Other interpretative efforts are less distinct, merged into analyses specific to investment treaty arbitration. The extent of the tribunals' analysis as a result has depended on the level of controversy surrounding the contract, the parties' arguments and the relevance and weight of the provision for the decision. The focus on 'understanding' thus exercised allows one to glean a broader spectrum of legal reasoning in relation to contracts and to deal with them meaningfully at the normative stage of analysis. Altogether, 128 cases were separated with elements of contract interpretation and are listed in Annex IV.[19]

17 The excluded awards were in French, Spanish, Czech and Arabic. My knowledge of French permits me to read academic literature and some publications in French are referenced throughout this work. I have decided, however, to limit my analysis of awards to those two languages in which I possess full professional capacity.

18 A comparative method, focused on *function* instead of concepts and definitions, inspired this approach.

19 The list contains both concluded and pending cases. Pending cases are those which have not been finalized either by an award or a decision on termination, discontinuance,

The fourth step analysed the character and legal foundation of contract interpretation, dividing them primarily between those with evidence on the application of national law and those that expressly rely on other considerations in the ascertainment of the content of contractual provisions.

However revealing an empirical study can be, it cannot assist in understanding the normative aspect of contract interpretation. Suppose one would limit one's research to the issue of merely mapping out various perspectives towards contract interpretation on the basis of the tribunals' reasoning. In that case, one could end up with a superficial plurality of approaches. These approaches would include understanding contracts in light of international law, in light of national laws, in light of trade usages and customs, and in light of holistic logical principles, or ultimately understanding them as facts. While being informative, the mapping would not tell what the preferred approach is. What is worse, the mapping may even be misleading because a tribunal's own categorisation or labelling does not necessarily properly reflect the way it addresses the content of the contractual provisions in question. For instance, a tribunal could define ascertaining the content of contractual provisions as being a fact-finding exercise, but do little about evidence, or the tribunal may declare that interpretation is exercised in the light of national law, but do nothing about ascertaining the position under applicable national law of contract interpretation, or tribunals may declare that interpretation is exercised in light of international law, in fact without being able to clarify the specific rules of international law guiding interpretation. Accordingly, interrupting the analysis

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etc. For ICSID proceedings, a case is also considered to be pending if either annulment or resubmission procedures are ongoing. Only 13 cases were pending as of 30 January 2019: *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1; *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6; *UAB E energija* (*Lithuania*) *v. Republic of Latvia*, ICSID Case No. ARB/12/33; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4; *Venezuela Holdings, B.V., et al* (*case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.*) *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/30 and *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL.

at the empirical stage could potentially corrupt the entire picture. The critical question for any legal interpretation of *real competing interpretative explanations* and of the normatively preferred approach would be left untouched.

In view of the described limits of the empirical study, it is essential that the doctrinal analysis complements the work. Such an analysis shall verify a traditional perspective on the role of national law applicable to a contract as a relevant source for its interpretation. By critically assessing whether tribunals understand their task of ascertaining the content of contractual provisions in a justifiable way and whether the methods they use are normatively sustainable, the doctrinal inquiry would identify the competing explanations and the preferred approach to contract interpretation.

The book features an empirical and normative inquiry into contract interpretation because of the two principal methods being used: empirical and doctrinal. While the empirical method assists in answering the first research question on how tribunals interpret contracts in investment treaty arbitration, the doctrinal method helps in explaining how tribunals should interpret contracts in investment treaty arbitration.

In addition to the empirical and doctrinal methods, this work also employs some other methods. It is helpful to name them at the outset as well as enable more engaged reading. Relying on a *comparative* method, the book looks at similar contract interpretation powers exercised by other international courts and tribunals. Comparison is helpful primarily because, similar to investment treaty arbitration, many of these international courts and tribunals also apply public international law, and contract interpretation is exercised in the public international law setting. The book also relies on a *case study* to illustrate and assess peculiar problems associated with the application or non-application of national law to contract interpretation. This part will be of particular interest to practitioners of investment treaty arbitration. Furthermore, implications of an institutional dimension of investment treaty arbitration as a peculiar method of dispute resolution and its role for contract interpretation cannot be fully assessed if, at the very least, elements of *networking* analysis are not employed. With elements of networking analysis, one may see certain correlations between the patterns of interpretative justifications and the identity of the arbitrators involved. While not central to the work, which primarily focuses on how tribunals interpret and how they should interpret, the observations on correlation, when sound, assist in understanding the reasons behind the patterns used and, in and of themselves, strengthen the central argument of the book on the necessity to conceptualise contract interpretation as a type of legal interpretation in investment treaty arbitration and to address its methods for the sake of transparency, predictability, sufficiency and correctness of

reasoning in the decision-making. Finally, the work could not discharge its aim without a *historical* perspective. Historical narratives help to critically revisit the origin and shortcuts of certain theories, like the theory of *internationalisation*, to understand the appearance of certain provisions such as a reference to conflict of laws in Article 42 of the ICSID Convention or a requirement to abide by the wording of contracts in Article 33(3) of the UNCITRAL Arbitration Rules and to explain some contemporary controversies and perspectives.

Having clarified the spectrum of instruments and their correlation with the research questions, what remains to be covered is to provide a road map to the book structure, to list, for the sake of clarity, the allocation of methods across the chapters and to explain the overall contribution that the work aims to make.

The overall work is organized in four parts:

– *Part A* opens up the discussion of contract interpretation in investment treaty arbitration by eliciting the results of a broad empirical study of awards and decisions rendered in 402 cases which were selected out of 894 known arbitration proceedings as of 30 January 2019 (*Chapter 1*);
– *Part B* defines an applicable legal framework for contract interpretation by engaging in a discussion of the role of national law (*Chapter 2*) and verifying the limited capacity of international law in its current shape (*Chapter 3*);
– *Part C* enables the application of national law to contract interpretation in investment treaty arbitration by suggesting a theoretical framework for contract interpretation in investment treaty arbitration. The Part submits that treaty-based tribunals possess an inherent and implied power to interpret contracts (*Chapter 4*) and suggests conceptualising contract interpretation as an incidental issue in investment treaty arbitration (*Chapter 5*);

The allocation of methods used across the chapters are summarised on the next two pages in the table.

The book aims at making a difference. Not only does the monograph bring a broad scene of contract interpretation in investment treaty arbitration to the forefront of legal studies, setting its theoretical foundation and treating it systematically, it also attempts to contribute to a variety of contemporary research. This work, in particular, engages with three remarkable discourses in the scholarship of international law. First, the book responds to the increasing empirical turn in international legal scholarship[20] and scholarship on contract

20 Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 American Journal of International Law 1; Yun Chien Chang and Peng-Hsiang Wang, 'The Empirical Foundation of Normative Argument in Legal Reasoning' (2016) University of Chicago Public Law & Legal Theory Paper Series, No. 561

TABLE 1 Summary of research methods

	Part/Chapter	Method	Reason for using a method
I. SETTING THE SCENE			
1.	Overview of contract interpretation in investment treaty arbitration	Empirical	to find out on the basis of awards: – what kind of contracts and contractual provisions tribunals have to interpret; – why tribunals interpret contracts; – how tribunals reflect on their analytical efforts for ascertaining the content of contractual provisions and what kind of patterns of interpretative justification they use.
II. DEFINING A RELEVANT LEGAL FRAME			
2.	National law and contract interpretation	Doctrinal and comparative	to ascertain whether national law defines contract interpretation and whether it governs contract interpretation differently in various jurisdictions.
3.	International law and contract interpretation	Doctrinal	to determine whether international law in its present shape may be viewed as having (interpretative) rules that treaty-based tribunals may rely upon in contract interpretation.
		Empirical	to study the texts of IIAs and model BITs empirically to verify whether these treaties might have some specific rules for contract interpretation.
		Historical	to situate awards in early concession cases in a proper historic context to understand their (fading) role and significance in contemporary international law and critically re-assess the theory of *internationalisation*.

<https://chicagounbound.uchicago.edu/public_law_and_legal_theory/633/> accessed 20 October 2020; Daniel Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015) 46 Georgetown Journal of International Law 363; Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18 Journal of World Investment & Trade 14.

TABLE 1 Summary of research methods (*cont.*)

	Part/Chapter	Method	Reason for using a method
III. ENABLING NATIONAL LAW			
4.	The power of treaty-based tribunals to interpret contracts	Doctrinal	to ascertain whether treaty-based tribunals possess the power to interpret contracts and the effect of this power.
		Comparative	to align treaty-based tribunals with other international courts and tribunals in their power to interpret contracts and to contrast, where appropriate, from approaches practiced by state courts.
5.	Contract interpretation as the incidental issue	Doctrinal	to suggest an analytical legal framework for approaching contract interpretation in investment treaty arbitration; to analyse the application of *jura novit curia* in relation to contract interpretation in investment treaty arbitration.
		Case study method	to demonstrate with selected problems suitability of the incidental issue as an analytical legal framework for approaching contract interpretation in investment treaty arbitration.

law.[21] The monograph bridges empirical research of how treaty-based tribunals understand contracts with a normative argument on how contract interpretation ought to be exercised. Secondly, the work aims to contribute to the outgrown discourse on the legitimacy crisis in investment treaty arbitration[22]

21 Zev J Eigen, 'Empirical Studies of Contract' (2012) 8 Annual Review of Law and Social Science 291; Uri Benoliel, 'The Interpretation of Commercial Contracts: An Empirical Study' (2017) 69 Alabama Law Review 496.

22 See for instance, Michael Waibel and others (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International 2010); Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521; Muthucumaraswamy Sornarajah, 'International Investment Law as Development Law: The Obsolescence

that raises among other things various concerns about the consistency, coherency and ultimate predictability of the tribunals' legal reasoning among central areas for the reform efforts in investment treaty arbitration. While treaty interpretation is a key objective of these concerns, contract interpretation, as an important part of the legal reasoning on jurisdiction and merits in investment treaty arbitration, is equally relevant to this discourse. Thirdly, the work attempts to contribute to the growing recognition of the mutual confluence of private international law and public international law in legal literature.[23] To this end, the book carefully nuances the role of national law for contract interpretation in the context of public international law and its ties to investment treaty arbitration. Apart from its academic contribution, the book intends to inform policymakers and guide practitioners in investment treaty arbitration.

of a Fraudulent System' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016*, vol 7 (Springer 2016) 209. For more sources see a bibliography list prepared by the Academic Forum on ISDS at <https://www.cids.ch/isds-reform-library> accessed 20 October 2020.

23 Lucy Reed, 'Mixed Private and Public International Law Solutions to International Crises' (2003) 306 Recueil des Cours de l'Académie de Droit International 1; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009); Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des Cours de l'Académie de Droit International 49; Julie Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 Virginia Journal of International Law 367; Diego P Fernández Arroyo and Makane Moïse Mbengue, 'Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction' (2018) 56 Columbia Journal of Transnational Law 797.

PART 1

Setting the Scene



CHAPTER 1

Overview of Contract Interpretation in Investment Treaty Arbitration

This chapter summarises empirical observations on contract interpretation in investment treaty arbitration. By focusing on three basic questions of 'what', 'when' and 'how', it provides an overview of interpretative materials, interpretative occasions, applicable procedural frameworks and interpretative patterns.

The chapter opens with the elucidation of *what* kind of contracts and contractual provisions trigger tribunals' interpretative efforts. This is an important starting point for understanding the composition of interpretative material. Because contracts are not, as a rule, reproduced in awards or elsewhere in full,[1] their content is *re-construed* on the basis of the parties' submissions and tribunals' analyses *as presented* in the text of awards. This means that the work largely follows characterisations adopted by treaty-based tribunals.

The chapter further proceeds to clarify the interpretative occasions, or *when* treaty-based tribunals have to ascertain the content of contractual provisions. The focus turns to when contracts become relevant for decisions on jurisdiction and merits in investment treaty arbitration and how this specific perspective may impact the tribunals' assessment of the content of contractual provisions. Before illustrating contract interpretation under each of the interpretative occasions, the chapter gives a brief explanation of their regulation in international investment law. This rather brief departure from a purely empirical summary provides an indispensable context for the proper understanding of the reasons governing why treaty-based tribunals need to ascertain the content of contractual provisions and which questions drive their interpretative efforts.

An overview of the applicable procedural framework under which treaty-based tribunals act when they ascertain the content of contractual provisions follows the part on interpretative occasions. The chapter lists the most used

1 Occasionally, the entire texts of settlement agreements are accessible. For instance, the full texts of the settlement agreement is recorded in the consent award in *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB(AF)/98/1 and subsequently discussed in *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18; a settlement agreement dated 15 June 2014 is publicly available in *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6.

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arbitration rules and, where relevant, seats in cases with elements of contract interpretation. This is an indispensable part for further analysis of tribunals' power to interpret contracts in Chapter 4 and a theoretical framework suggested for contract interpretation in investment treaty arbitration in Chapter 5.

Observations of the patterns which treaty-based tribunals choose for ascertaining the content of contractual provisions conclude the chapter. The book inquires as to whether a classical approach that advocates the role of national law applicable to a contract as a proper framework for contract interpretation in fact informs the efforts of treaty-based tribunals in regard to ascertaining the content of contractual provisions.

1.1 Interpretative Material: Contracts and Contractual Provisions

To give an initial account of interpretative material, one has to characterise it as rather detailed agreements concluded between sophisticated parties[2] and put in writing.[3] Rarely are the contractual texts internally contradictory or ambiguous.[4] On most occasions, treaty-based tribunals need to interpret contracts because of newly appeared circumstances.

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2 What is meant here is that the contracting parties either act in full understanding of contractual terms, or it is reasonable to conclude that they understand all the intricacies of their deal. Sometimes tribunals even emphasise the level of detail of the contracts in question. For instance, in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, the tribunal described the Concession Contract as '*a lengthy and detailed document of 129 pages*' – see *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 98.

3 Treaty-based tribunals are generally hesitant to affirm oral undertakings as part of a contract. See, for instance, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, in which the tribunal did not accept the claimant's affirmation that the state undertook certain obligations orally over the course of negotiations of a settlement agreement – *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 115. See also a critical discussion of oral 'Treuhand agreements' under German law in *Peter Franz Vocklinghaus v. Czech Republic*, Award dated 19 September 2011, para. 155–159.

4 Ambiguities intrinsic to the contractual wording sometimes may occur. By way of illustration, in *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia,* the tribunal expressly noted that certain provisions in Safe Custody/Sale and Purchase of Precious Metal Agreement *'could certainly have been drafted more clearly' – Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability dated 28 April 2011, para. 544.

The above line of description brings no surprise for a dispute resolution mechanism engaging with large-scale investments. What might be less obvious is the fact that only on *some* occasions are the parties to a contract and the parties to a treaty-based dispute absolutely identical.[5] On *most* occasions, the parties to a contract merely retain certain proximity to the parties to a treaty-based dispute. Among them, one can distinguish contracts concluded between a foreign investor as a claimant and a broad range of state-related entities that are not formally respondents in investment treaty arbitration (a ministry or other public authority, a state enterprise, or a state-owned organisation).[6] One can also observe contracts concluded between a claimant and a third party.[7] Occasionally, one comes across contracts concluded between the respondent and companies connected with the claimant.[8] Finally, even contracts concluded between the parties, none of which are formally a party to treaty-based disputes, may also appear as objects to be ascertained in investment treaty arbitration.[9]

While not necessarily between the immediate parties to a treaty-based dispute, the predominant number of ascertained contracts are discussed as being either an *investment contract* or an *investment*.[10] Some of these

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5 For instance, a concession agreement in *CCL v. Republic of Kazakhstan*, SCC Case No.122/2001, Jurisdictional Award dated 1 January 2003, p. 124; a concession agreement in *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability dated 30 July 2010, para. 98; a settlement agreement in *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 33.

6 For instance, *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, para. 1–15; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 November 2010 para. 56–95; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8 Award dated 1 March 2012, p. 2 [*of the electronic file*]; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award dated 25 October 2012, para. 39.

7 For instance, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, Award dated 16 June 2010, para. 5–28; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 5–28; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award dated 10 December 2014, para. 126.

8 For instance, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010, para. 14.

9 For instance, *Ron Fuchs v. The Republic of Georgia,* ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 77; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award dated 3 March 2010, para. 77.

10 For instance, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8 Award dated 1 March 2012 para. 52 and onward; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction dated 5 March 2008, para.

contracts may have a very strong public law element and, as a result, a lessened levels of party autonomy.[11] There are also investment contracts which are hardly discernible from what is typically referred to as commercial or business contracts, with equal bargaining forces exercised by the parties.[12] Some well-known standard contract forms, which are well used in ordinary business contexts, such as the FIDIC form for construction,[13] may necessitate interpretation in investment treaty arbitration as well.[14] Finally, tribunals

199–203; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award dated 31 March 2011, para. 145–164; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction dated 17 May 2007, para. 46–47, 107–146 (rejecting that the contract for the location and salvage of a British vessel's cargo sank in 1817 and a subsequent contract concerning the auction of potentially recovered items was an investment); Decision on the Application for Annulment dated 16 April 2009, para. 56–82 (annulling award because of a disagreement with the findings that a contract did not constitute an investment).

11 The administrative law element is particularly noticeable in concession agreements and various types of specific licence agreements. See, for instance, a discussion of the role of national administrative law in public contracts in the context of investment treaty arbitration in *Azurix Corp. v. The Argentine Republic* (I), ICSID Case No. ARB/01/12, Award dated 14 July 2006, para. 54, 62, 290; Decision on the Application for Annulment of the Argentine Republic dated 1 September 2009, para. 134 (f). See also *Enron Creditors Recovery Corporation* (*formerly Enron Corporation*) *and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 220.

12 Among classical commercial contracts which were recognised as investment contracts, one can name, for instance, the hedging agreement involving Deutsche Bank AG in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012 para. 12–14. It is acknowledged here that in investment treaty arbitration the word 'commercial' is also used in a somewhat different context to identify a contract which does not bear the features of an *investment* contract in terms of the substantial duration, assumption of investment risk and contribution to the economy of the host state. Subsequent chapters deal with a narrow meaning of investment contract in more detail. This section refers to 'commercial' as a commonly used broad denominator to distinguish a contract concluded in the course of a business activity from consumer contracts and other activities unconnected to business contracts between individuals. It is not uncommon for scholarship to address contract interpretation precisely from the perspective of the interpretation of commercial contracts – see, for instance, Amund Bjøranger Tørum, *Interpretation of Commercial Contracts* (Universitetsforlag 2019); Mattias Hedwall, *Tolkning av Komersiella Avtal* (Juristförlaget 1994).

13 'FIDIC' is an abbreviation for the French name for the International Federation of Consulting Engineers, an organisation created in 1913 which became renowned for its standard contract forms for national and international construction – FIDIC official website <http://fidic.org/history> accessed 25 June 2021.

14 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 14–15.

may also need to interpret contracts that are not investment contracts *per se*.[15]

In terms of the character of contractual undertakings, the contracts that appear in investment treaty arbitration are typically bilateral[16] or synallagmatic contracts, in which each of the parties makes an enforceable promise. Some of these contracts have clear features of *relational* contracts,[17] anticipating not merely an exchange between the parties but rather a *relationship* directed at achieving common goals. These contracts impose an expectation of a particular level of cooperation, communication and trust between the parties at various stages of contract performance, which may be adequately illustrated by construction contracts.[18] These contracts may have rather open-ended provisions on renegotiations and adjustments to keep contractual relations up to the stage of the current development.[19] On their duration, the contracts may be distinguished between merely transactional or singular contracts,[20] contracts of medium duration up to 7 years[21] and significantly long contracts spanning up to dozens of

15 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012, para. 146–153; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016, para. 158–159, 164.

16 Even a donation in *Reinhard Unglaube v. Republic of Costa Rica* was bilateral where a foreign investor donated some land plots whereas the state agreed '*not to build any structures on the donated land and to inform administrative authorities of the Municipality of Santa Cruz and other authorities of its approval of the modified Project plan*' – see *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 51.

17 On relational contracts, see Melvin A Eisenberg, 'Why There Is No Law of Relational Contracts' (1999) 94 (3) Northwestern University Law Review 805.

18 On construction contracts as relational contracts, see Sai On Cheung and others, 'How Relational Are Construction Contracts?' (2006) 132 (1) Journal of Professional Issues in Engineering Education and Practice 48.

19 One may even find a kind of definition for relational contracts in investment treaty arbitration in *AWG Group Ltd. v. The Argentine Republic*, where the tribunal explained an undertaking between the parties to the concession on 'fluid relationship'– *see AWG Group Ltd. v. The Argentine Republic*, Award dated 9 April 2015, para. 43.

20 *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award dated 4 May 2016, para. 158–159.

21 A contract with a five-year duration, renewed automatically if neither party objects in writing to the renewal appears to be mentioned in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, para. 14; a contract of three-year duration – in *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 February 2010, para. 27; a contract of seven-year duration – in *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award, 17 April 2015, para. 37.

years.[22]

In terms of their subject matter and as understood from the description already given, the contracts which treaty-based tribunals have to ascertain are from a rather diverse group[23] that includes (in alphabetical order):

- bareboat charters;[24]
- concession agreements:
  - concession agreement for the operation of the national vehicle registry;[25]
  - concession agreement for the provision of services;[26]
  - concession agreement for water and sewage / water distribution services;[27]
  - concession agreement for the exploration of natural resources;[28]

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22 A concession with a 30-year duration appears in *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability dated 30 July 2010, para. 212; a concession with a 15-year duration with the possibility of prolongation for another 5 years – in *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008, para. 8; a concession of 15-year duration – in *Waste Management, Inc. v. United Mexican States* (*"Number 2"*), Award dated 30 April 2004, para. 46; a concession with a 95-year duration – in *National Grid plc v. The Argentine Republic*, UNCITRAL, Award dated 3 November 2008, para. 54.

23 Some of the mentioned types in the list may also fall into other categories. As identified earlier, the description of the contracts largely follows the wording in the awards.

24 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction dated 8 March 2010, para. 66–88.

25 *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, para. 4–44; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 4–44.

26 Information technology services appeared in *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence dated 22 December 2003, para. 54–63; operation of a (first) mobile telephony network – in *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal dated 16 July 2010, para. 8, 97; services on pre-shipment inspection of imported goods on the basis of which import duties and tax levies were to be calculated – in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, para. 135, 160–161.

27 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, para. 41, 114–119; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, para. 14–15, 322–323.

28 Oil concession appeared in *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits dated 30 March 2010, para. 33, 448–451; oil concession (discussed mostly in the context of the settlement agreement) – in *Chevron Corporation and Texaco Petroleum*

  - concession agreement for the distribution / supply of electricity;[29]
  - concession agreement for construction / construction and operation;[30]
  - concession agreement for the operation of pipelines;[31]
- contract on the provision of an integral service for the implementation of immigration control, personal identification and electoral information;[32]
- construction agreement;[33]
- credit agreement;[34]
- donation of land plots agreement;[35]
- funding agreement (third-party funding);[36]
- electricity purchase agreement[37];

Company v. The Republic of Ecuador (*II*), PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility dated 27 February 2012, para. 3.7–3.12.

29 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated 11 June 2012, para. 50, 943–969; *National Grid plc v. The Argentine Republic*, Award dated 3 November 2008, para. 54–58, 117–124.

30 A concession on construction and operation of a new international passenger airport terminal 1 ("Terminal 3") in Manila appeared in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award dated 10 December 2014, para. 5–10 (the tribunal more extensively referred in the analysis to another contract – pooling agreement; see also below); a concession on construction and operation of a toll highway in Bangkok – in *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. Kingdom of Thailand*, UNCITRAL, Award dated 1 July 2009, para. 2.35–2.40, 7.13–7.19.

31 *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award, 3 March 2010, para. 94–103, 318–322, 331–341; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award, 3 March 2010, para. 94–103, 318–322, 331–341.

32 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated 3 August 2004, para. 23–25, 174–180, Award dated 6 February 2007, para. 128–150.

33 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 13–22, 252–356; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016, para. 4–5, 331–337, 346–354.

34 *Waste Management, Inc. v. United Mexican States* (*"Number 2"*), ICSID Case No. ARB(AF)/00/3, Award dated 30 April 2004, para. 50–51, 102–103, 118–129.

35 *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award dated 16 May 2012, para. 49–59; 170–197; *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award dated 16 May 2012, para. 49–59; 170–197.

36 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1; Decision on Jurisdiction dated 21 December 2012, para. 239–259; Award dated 21 July 2017, para. 224–233.

37 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 March 2018, para. 3.82–3.85.

– farmout agreement;[38]
– joint venture agreement and partnership;[39]
– hedging agreement;[40]
– lease agreement;[41]
– licence agreement;[42]
– loan agreement[43];
– mine operation contract;[44]
– offtake agreement;[45]
– pledge agreement;[46]

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38 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (II), ICSID Case No. ARB/06/11, Award dated 5 October 2012, para. 92, 127–134, 331, 386.

39 *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 318–330; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award dated 3 March 2010, para. 318–330; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, para. 22–27, 263–266; *EDF (Services) Limited v. Republic of Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009, para. 47–64; 245–246; *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction dated 19 September 2008, para. 46–47.

40 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, para. 12–36, 323–347.

41 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award dated 30 March 2015, para. 81, 648; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003 para. 18.23–18.42; *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic* Award dated 13 November 2013, p. 2–3, 26, 37; *Flemingo DutyFree Shop Private Limited v. the Republic of Poland*, Award dated 12 August 2016, para. 60–82, 546–560.

42 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para. 23, 47–52, Award dated 22 May 2007, para. 43, 151–155; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award dated 28 September 2010, para. 67–72, 149–163.

43 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award dated 29 December 2004, para. 30–31, 239–257, 272–278, 303–313; (loan and security agreement) *British Caribbean Bank Limited v. The Government of Belize*, PCA Case No. 2010-18, Award dated 19 December 2014, para. 168–175.

44 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award dated 4 April 2016, para. 18–20, 205, 481–483, 698–700.

45 *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award dated 30 October 2017, para. 2.15, 4.11–4.17, 6.58–6.71, 7.41–7.51.

46 *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award dated 2 March 2015, para. 58–60, 220–221, 368–383.

– pooling agreement (corporate shareholders agree that their shares will be voted as a unit);[47]
– privatisation agreement;[48]
– sale contract;[49]
– service agreement;[50]
– settlement agreement;[51]
– share purchase agreement;[52]
– trust contract;[53]
– usufruct contract;[54]
– and various others.[55]

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47 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* (II), ICSID Case No. ARB/11/12, Award dated 10 December 2014, para. 113–114, 442–468.

48 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 August 2008, para. 84, 113–114; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland,* ICSID Case No. ARB(AF)/11/3, Award dated 24 November 2015, para. 53–55, 75–83, 254–258; *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award dated 2 March 2015, para. 368–383; (a transfer agreement of shareholdings to consortiums in the course of privatisation) *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 87.

49 A sale contract of land in a touristic area in Egypt appeared in *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009, para. 507–510, 528–529, 577–584.

50 A contract on provision of 'know-how' to a wine company appeared in *Luigiterzo Bosca v. Lithuania*, Award dated 17 May 2013, para. 166–178; a rental services contract appeared in *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 August 2017, para. 690–698.

51 *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 114–115; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award dated 9 September 2003, para. 225–244; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated 12 October 2005, para. 198–202.

52 *Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012, para. 180–181.

53 *Empresa Electrica del Ecuador, Inc.* (*EMELEC*) *v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award dated 2 June 2009, para. 53, 86 and onward.

54 *Railroad Development Corporation* (*RDC*) *v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, para. 82–84.

55 For instance, in the consolidated arbitration, *Marion Unglaube v. Republic of Costa Rica and Reinhard Unglaube v. Republic of Costa Rica*, a tribunal, in addition to a donation agreement in exchange for certain undertakings in relation to an investment project, also had to deal with a so-called 'road map agreement' as a specific agreement evidencing undertakings on the part of the state to enable an investment project – see *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award dated 16 May 2012, para. 75–76; 170; 185–191; 250 and *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award dated 16 May 2012, para. 75–76; 170; 185–191; 250. Another

When approaching these contracts, treaty-based tribunals have to ascertain a broad range of contractual provisions. These provisions may be summarised via commonly used categories listed below in alphabetical order:

– choice of law;[56]
– currency adjustment;[57]
– dispute resolution;[58]
– exclusivity;[59]
– force majeure;[60]
– interpretative provisions;[61]

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interesting example represents a contract for the location and salvage of a British vessel's cargo which sank in 1817, and a contract concerning the auction of potentially recovered items in *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10. In the case, the sole arbitrator denied jurisdiction, and the annulment committee subsequently annulled the award, disagreeing with the qualification of the contract on salvage as not being an investment contract – see *Malaysian Historical Salvors, SDN, BHD v. Malaysia, ICSID Case No. ARB/05/10,* Award on Jurisdiction dated 17 May 2007, para. 107–146; Decision on the Application for Annulment dated 16 April 2009, para. 60 and onward.

56 *Daimler Financial Services AG v. The Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012, para. 116–117, 124–125, 133, 146.

57 *National Grid plc v. The Argentine Republic*, UNCITRAL, Award dated 3 November 2007, para. 116–124; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated 11 June 2012, para. 943–969.

58 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 21 November 2000, para. 53–54; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 February 2010, para. 34, 129–138; *TSA Spectrum de Argentina S.A. v. The Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008 para. 56–66. See also Jeffrey M Hertzfeld and Barton Legum, 'Pre-Dispute Waivers of Investment Treaty Arbitration: A Practical Approach' in Kaj Hobér and others (eds), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010) 183; Ole Spiermann, 'Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties' (2004) 20 (2) Arbitration International 179; S I Strong, 'Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?' (2014) 29 (3) ICSID Review 690; Emmanuel Gaillard, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the SGS Cases Considered' in Todd Weiler (ed), *International Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 325–346.

59 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013, para. 551–555.

60 *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award dated 31 August 2018, para. 9.57–9.84.

61 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 108–115.

– limitation of liability or waiver of liability clauses;[62]
– linguistic discrepancy;[63]
– notification;[64]
– penalty;[65]
– preamble;[66]
– price;[67]
– renegotiations;[68]
– stabilisation clauses and economic equilibrium;[69]
– termination clauses;[70]

62 *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award dated 7 June 2012 para. 65–85. See also Inna Uchkunova, 'Where Both Worlds Meet: Contractual Waiver of Liability and the Contract-Treaty Divide' (2012) <http://kluwerarbitrationblog.com/2012/11/08/where-both-worlds-meet-contractual-waiver-of-liability-and-the-contract-treaty-divide/> accessed 25 June 2021.

63 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated 27 September 2017, para. 601–604.

64 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 252–258.

65 *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 August 2008, para. 138–144; *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 August 2017, para. 686–698 (the tribunal ultimately found that the provision was not a penalty clause but rather a sort of liquidated damages).

66 *Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, para. 152–156; *Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/05/9, Award dated 2 June 2009, para. 116; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits dated 30 March 2010, para. 440–442.

67 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Award, 16 December 2003, para. 3.7; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, para 212–218.

68 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award dated 1 July 2004, para. 35; 111–115.

69 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2014, para. 21, 316–335; *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 479–485; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18; Award dated 3 March 2010, para. 479–485; *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 479–485. *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 151, 302.

70 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award, 1 October 2014, para. 516–519; *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015–13, Award, 27 June 2016, para. 251; *Flemingo DutyFree Shop Private Limited v. the Republic of Poland*, Award dated 12 August 2016, para. 538–560.

– tax modification clauses;[71]
– other.[72]

In terms of intensity, some provisions appear with particular frequency. They include various provisions on mutual contractual undertakings between the parties to a contract, provisions on dispute resolution (forum selection clause) in their interrelations with investment treaty arbitration, provisions on stabilisation, economic equilibrium, renegotiations and provisions on contract termination.

1.2 Interpretative Occasions

Contract interpretation purposes, or interpretative occasions, are rather peculiar in investment treaty arbitration. Unlike in contract-based arbitration,[73] contracts do not receive direct enforcement in investment treaty arbitration. What receives enforcement are the *international law obligations* which states undertake in relation to foreign investments in IIAs.[74] On their basis, a foreign investor may attempt to attach international responsibility to a state for violations of treaty provisions ensuring fair and equitable treatment (FET), observance of undertakings (umbrella clause), national treatment, most-favoured-nation treatment (MFN) and other guarantees, along with an undertaking not

71 Tax modification clauses were discussed as to whether they are a sort of stabilisation clause or merely renegotiation clauses in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2014, para. 316–335.

72 A specific provision on the assumed nationality of the parties for the purpose of jurisdiction was addressed in *Caratube International Oil Company LLP and Devincci* Salah *Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 27, 601–610; provisions on specific undertakings of a broadcaster – in *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award dated 17 April 2015, para. 80–96; a specific provision so called 'the participation formula' in contracts on exploration and exploitation of oil and gas fields was addressed in *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 28–34; 105.

73 Contract-based arbitration preceded investment treaty arbitration and continues to flourish throughout its existence. Many contract-based awards in investment disputes between a foreign investor and a state are published at ITALAW <https://www.italaw.com/> accessed 25 June 2021.

74 Appearing first in the 1960–1970s, these treaties have by now substantially multiplied to provide a foundation for a new branch of international investment law and investment treaty arbitration. For a visual illustration of the growth of IIAs over time, see the PITAD database graph at <https://pitad.org/index#static/illustrations> accessed 25 June 2021.

to exercise unlawful expropriation.[75] Tribunals deciding on jurisdiction or assessing the merits of these claims would need to ascertain the content of contractual provisions with which the invoked standards of investment protection may closely engage.

Occasionally, tribunals may need to interpret contracts for other purposes than connected with their protection under international law. Contracts with varying degrees of proximity to investment contracts, such as assignment agreements and share purchase agreements, typically appear in this context. These agreements are viewed less directly in the context of standards of investment protection and are more often ascertained and analysed for deciding on jurisdiction and various questions of procedural character.[76]

The examples below illustrate occasions for contract interpretation in investment treaty arbitration, such as jurisdiction, attribution, expropriation, FET, umbrella clause, national treatment, MFN, and compensation.

1.2.1 *Jurisdiction*

Unlike in contract-based arbitration, jurisdiction of treaty-based tribunals is not based on a single arbitration agreement, but rather on acceptance of an offer to arbitrate in IIAs. The content of the offer and other pre-conditions for instituting the proceedings in investment treaty arbitration vary across treaties.[77] In regard to subject matter jurisdiction (jurisdiction *ratione materiae*), the proper parties to the dispute (jurisdiction *ratione personae*), consent to jurisdiction (jurisdiction *ratione voluntatis*), temporal jurisdiction (jurisdiction *ratione temporis*), and issues of claim admissibility[78] typically cause disagreements in investment treaty arbitration.

Contracts may require interpretation for deciding on jurisdiction *ratione materiae,* jurisdiction *ratione personae,* and jurisdiction *ratione voluntatis.* For

75 For a comprehensive overview of the standards of investment protection, see August Reinisch, *Standards of Investment Protection* (Oxford University Press 2008).

76 Somewhat exceptionally, settlement agreements may also appear in the context of substantive standards of investment treaty protection – see *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18.

77 David A R Williams, 'Jurisdiction and Admissibility' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 865–931.

78 Issues of admissibility are frequently addressed separately from jurisdiction. This work follows the opinion of Veijo Heiskanen that admissibility is not conceptually that distinct from jurisdiction broadly perceived – Veijo Heiskanen, 'Ménage à Trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration' (2014) 29 (1) ICSID Review, 231, 246.

instance, tribunals may need to look deeper into the parties' mutual undertakings and their original intent to decide if a contract in question falls into the category of investment contract or investment.[79] Tribunals may also need to decide on the standing of a claimant because of an alleged claim settlement,[80] the participation of a third-party funder,[81] a share transfer or a claim assignment,[82] etc. When facing a claim based substantially on a contract, treaty-based tribunals may need to make a decision as to whether a forum selection clause in the contract operates as a waiver of treaty jurisdiction and an impediment to jurisdiction *ratione voluntatis*.

The example of *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*[83] illustrates interpretation in the context of *ratione voluntatis*. The dispute arose out of an alleged failure on the part of a state to apply agreed adjustments to the tariff calculation that negatively affected a concession for water distribution and wastewater treatment services in the Argentine Province of Santa Fe. The claimant alleged direct and indirect expropriation, FET violation and other violations of standards of investment protection. Because of the state's objections to jurisdiction, the tribunal had to consider the effect of a forum selection clause on its own jurisdiction. A textual verification of the absence of a waiver to treaty jurisdiction became an important component for the tribunal's decision in affirming jurisdiction. The tribunal, in particular, observed:

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79 *Luigiterzo Bosca v. Lithuania*, PCA Case No. 2011-05, Award dated 17 May 2013, para. 166–178; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 October 2006, para. 325.

80 *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award dated 8 September 2009, para. 44–47.

81 *Ambiente Ufficio S.p.A. and others* (*formerly Giordano Alpi and others*) *v. Argentine Republic*, ICSID Case No. ARB/08/9 Decision on Jurisdiction and Admissibility dated 8 February 2013, para. 273–278.

82 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012, para. 146, 151–153; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 5-28–5-33; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, para. 5-28–5-33; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award dated 16 January 2013, para. 121–169; *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction dated 18 July 2013, para. 272–273.

83 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated 16 May 2006.

> In order to assess the Respondent's jurisdictional objections on this point, one must consider the nature and implications of the dispute settlement clause concluded by APSF[84] and the Province of Santa Fe. *By its terms, the dispute resolution clause covers all controversies arising out of the concession contract. The dispute resolution clause makes no mention of Claimants' rights under the Argentina-France BIT, the Argentina-Spain BIT, or their right to seek recourse in arbitration for violation of those rights.* In the present case, the Claimants, as they rightly point out, do not allege any violation of their rights under the concession contract. Rather, the basis of their claim is that the Respondent has violated the Claimants' rights under the BITs. BIT claims and contractual claims are two different things. …
>
> It follows from the above discussion that, contrary to Argentina's argument, the execution of a dispute resolution clause in the concession agreement *does not mean that the parties have waived ICSID jurisdiction.* Certainly, the execution of a dispute settlement clause, like the one in the Santa Fe concession contract, which makes no reference to the BIT or to the treatment that the BIT guarantees investors, cannot support any inference that such dispute resolution clause is a waiver of the investors' rights under a BIT. The Tribunal concludes that the existence of the dispute resolution clause in the concession contract does not preclude the Claimants from bringing the present action. Consequently, Respondent's fourth objection to the ICSID's and this Tribunal's jurisdiction must fail.[85] [emphasis added]

A closer observation of how tribunals interpret contracts when they decide on jurisdictional issues reveals *textual* preferences. Tribunals primarily look at whether there is a textual confirmation that a certain claim was assigned, or that a claim was conclusively settled, or a share was transferred, or that a third-party funder has assumed the rights of a claimant, or a forum selection clause evidences a waiver of treaty jurisdiction, etc. In deciding on jurisdiction,

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84 APSF, or Aguas Provinciales de Santa Fe S.A., was an original claimant to the dispute. It was a company registered in Argentina that concluded a 30-year concession contract on the control and management of the water distribution and wastewater systems in the 15 urban areas in the Province of Santa Fe. Both other claimants had shares in APSF. The proceedings in relation to APSF were subsequently discontinued for reasons unrelated to a forum selection clause, leaving only two claimants in the proceedings.

85 *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction dated 16 May 2006, para. 43–45.

tribunals integrate their conclusions on the content of contractual provisions into a complex matrix of decision-making based, as described above, on the numerous factors defined by an applicable IIA.

1.2.2 *Attribution*

A state is responsible for the conduct of its organ or an individual if that conduct is *attributable* to it.[86] Findings on attribution cannot be reduced only to observations on factual causality.[87] The rules of attribution as reflected in the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles)[88] shall guide the reasoning.[89] They reflect structural (Article 4), functional (Article 5) and controlling (Article 8) criteria for defining attribution. As there is no requirement on accumulated application of these criteria, satisfaction of one is sufficient for a finding on attribution.

Addressing these criteria, treaty-based tribunals may find some confirmation of attribution in contractual provisions.[90] It may happen that contracts

86 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 112–212; Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 550–583; Simon Olleson, '*Attribution in Investment Treaty Arbitration*' (2016) 31(2) ICSID Review 457, 457–483.

87 James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 113.

88 International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-third Session' (23 April–1 June and 2 July–10 August 2001) A/CN.4/SER.A/2001/Add.1 (Part 2), 26–30, available at <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> accessed 26 September 2021.

89 Despite wide acceptance, the status of the ILC Articles is '*predicated upon a process of integration into practice, which is inherently uncertain.*' – James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 128–129.

90 The Commentary to the ILC Articles explains, for instance: '*It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might be in certain circumstances amount to an internationally wrongful act.*' – International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-third Session' (23 April–1 June and 2 July–10 August 2001) A/CN.4/SER.A/2001/Add.1 (Part 2), available at < https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> accessed 26 September 2021.

reflect on whose behalf a contracting party associated with the state is acting or elucidate motives connected with the exercise of a state function or otherwise point to the state through the rights and obligations of a party associated with a state under a contract. The analysis would be analytically distinct from an inquiry of contractual responsibility.[91] If a state is found to be a party to a contract concluded with a separate entity, it is because of rules of national law applicable to a contract, not because of attribution. If a state is found to be internationally responsible for certain acts in relation to a contract, it is because of the rules of international law on attribution, not because of national law.[92] At the same time, the role of contractual provisions for the purpose of the decision on attribution shall not be overstated. Ascertainment of the content of contractual provisions alone would not suffice to establish attribution as the actual conduct attributable to the state would matter most.[93] Contracts rather play a reconfirming role, albeit occasionally a decisively reconfirming role.

Garanti Koza LLP v. Turkmenistan[94] serves as a good illustration of a case where a tribunal had to ascertain the content of contractual provisions, among many other aspects, of a treaty claim, for a decision to be made on attribution. The contract on the construction of highway bridges between The State concern 'Turkmenavtoyollary' (TAY) and the Turkish contractor (Garanti Koza LLP) appeared central to the dispute. Affirming that acts of non-performance, and the suspension and subsequent termination of the contract were all attributable to the state directly triggering standards of investment protection, the claimant relied on contractual provisions as part of the overall argumentation on attribution. The respondent opposed this, insisting that all attempts to rely on contractual provisions looked more like an attempt to attach responsibility

91 James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 127, 134.

92 Simon Olleson, 'Attribution in Investment Treaty Arbitration' (2016) 31(2) ICSID Review 457, 465; Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 581–582; Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 139–140 (see also fn 210 on page 319 with some critics of *Bosh International Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, Award dated 25 October 2012, para. 246).

93 See, for instance, the reasoning of the tribunal in which the tribunal found that the subject matter of a contract reflecting the state function on maintenance and improvement of the *Suez Canal* was not sufficient for a finding on attribution inasmuch that the actual conduct was not in the exercise of state powers – *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award dated 6 November 2008, para. 169–171.

94 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No ARB/11/20.

to a state as a party to a contract, which was not the case.[95] According to the respondent, the claimant failed entirely to discharge its burden of proof in affirming the attribution. The tribunal took references to contractual provisions in the context of attribution rather seriously. It started by finding the mandate of the state-related contracting party, TAY, and then proceeded to contractual provisions expressly connecting that party with Turkmenistan, before finally concentrating on some discrete obligations under the contract reflecting state functions. Of particular interest is the following part of the tribunal's reasoning, which illustrates how the result of ascertaining the content of contractual provisions 'on the face', or hermeneutically, were relied upon to reconfirm the attribution:

> The connection between the Contract and the Government of Turkmenistan appears on the face of the Contract. TAY is identified in the Contract as "Owner." "Owner" is in turn defined as "State Concern 'Turkmenavtoyollary' acting on behalf of Turkmenistan Government." The Contract also provides that it "is concluded on the basis of Decree of the President of Turkmenistan No. 9429," and that it comes into effect after its registration with the Turkmen Ministry of Economy and Development. *These provisions of the Contract confirm that the acts of TAY in furtherance of the Contract were attributable to Turkmenistan.* Road and bridge construction is in any event a core function of government. An entity empowered by a State to exercise elements of governmental authority is for that purpose acting as an organ of the State.[96] [emphasis added]

Owing to the relative clarity of contractual terms, contract interpretation in *Garanti Koza v. Turkmenistan* became limited to their literal reading. Like assembling a mosaic, the tribunal carefully selected various elements, which together provided a complete picture on attribution: the mandate of a state-related party, approval of a contract, the peculiarity of contractual obligations, etc.

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95 For clarity, the respondent made a rather nuanced observation stressing that the claimant, while not directly affirming the respondent as being a party to a contract, nevertheless based its position on that assumption – *Garanti Koza LLP v. Turkmenistan*, ICSID Case No ARB/11/20, Award dated 19 December 2016, para. 281.

96 Ibid para. 335.

1.2.3 *Expropriation*

Contracts naturally appear central for a decision on their expropriation. Under customary international law, it has long been recognised that contractual rights may become an object of expropriation.[97] In international investment law, this understanding has become even more readily accepted because contracts receive a clear form of materialisation and are regularly recognised as being part of investments.

This does not mean that findings on contract expropriation have a low threshold. There is a strong view that only contracts marked by property features and capable of alienation or assignment could become an object of expropriation in the first place.[98] Furthermore, not any contractual breach amounts to expropriation, but those exercised as *jure imperii* and leading to substantial deprivation.[99] Finally, other conditions for deciding on the unlawfulness of expropriation also have to be met. Overall, investment treaty arbitration does not alter the basic principle recognising that states have a right to expropriate and that expropriation becomes illegal only if conducted for reasons beyond those in

97 For a brief historical overview of cases on expropriation under international law in the period prior to investment treaty arbitration, see Christopher F Dugan, *Investor-State Arbitration* (Oxford University Press 2011) 430–438; for cases on expropriation of contractual rights in the practice of the Iran-USA Claims Tribunal, see George H Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996) 188–196; Charles N Brower and Jason D Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers 1998) 417–427, 634–635; Rosalyn Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1988) 176 Recueil des Cours de l'Académie de Droit International 271–273; 298–321. For more discussion on protection accorded to state contracts as property under customary international law, see Chapter 3.

98 The distinction that only property rights based on a contract can be expropriated has found particular clarification in *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, para. 159–169 and *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award dated 17 April 2015, para. 146–158; *Waste Management v. Mexico*, Award of 30 April 2004, para. 174–175. See also, Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 408–409, Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 439–441.

99 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 162–171; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn Oxford University Press 2012) 128–129.

the public interest and in violation of due process without prompt, adequate and effective compensation.[100]

That a decision on expropriation is necessarily a fact-finding and context-dependent exercise[101] does not exclude contract interpretation. Allegations of *regulatory expropriation* of contractual rights may require ascertaining the availability of any assurances for stabilisation, economic equilibrium in the contract or other undertakings pertaining to the economic rationale of a contract, their content and implication.[102] *Expropriatory cancellation* of a contract may require a close look at the parties' mutual undertakings and the precise operation of a termination clause in the contract.[103] Above all, the gravity of state interferences with various contractual rights, necessary for findings on expropriations of contractual rights, cannot be properly assessed without clarity of what the contract provides for in its entirety.

In somewhat more distinct forms, contract interpretation appears in relation to claims for expropriatory cancellation, where the question as to whether a state has terminated a contract contractually has to be answered. For instance, in *Vigotop Limited v. Hungary,* the tribunal had to establish whether a certain breach fell into those that justified termination under the concession contract. The tribunal observed:

> The failure to establish the Concession Company within the same territory as the certified Project site does not qualify as a breach of Clause 9.3 in conjunction with Clause 7.1.2, but as a breach of Clause 7.1.2 only.

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100 Only the wording of IIAs on certain conditions for legitimate expropriation may somewhat differ; see, for instance, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 377–385.

101 Because of the rejection of the claim of expropriation on factual/evidentiary grounds, the tribunal may not have a chance of contract interpretation. For instance, in *İçkale İnşaat Limited Şirketi v. Turkmenistan*, the tribunals denied a claim of expropriation emphasising a failure to prove that the contracts were terminated by a state or through state interference – see *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award dated 8 March 2016, para. 350–355.

102 *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (II), ICSID Case No. ARB/07/22, Award dated 23 September 2010, para. 9.3.25; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006, para. 314–322.

103 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 148, 193, 457, 473, 516–518; *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award dated 7 February 2011, para. 126; *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, para. 141–142.

> However, such breach is not included within the grounds for termination listed in Clause 15.2.1, which has been invoked by Respondent in its Termination Letter. Thus, the Contract itself does not provide for termination on this basis.[104]

Overall, because of the focus on substantial deprivation of contractual rights, the interpretation exercised in the context of expropriation tends towards textualism. Tribunals do not as a rule engage in considering the implications of peculiar provisions but concentrate on the core of contractual arrangements.

1.2.4 *Fair and Equitable Treatment*

The necessity for contract interpretation may arise more often and at full intensity when treaty-based tribunals consider the FET violations.[105] The standard is extremely prolific in terms of being one of the most frequently[106] and most successfully[107] invoked in investment arbitration. FET protects against arbitrary and non-transparent conduct, denial of justice and violation of due process, failure to provide a stable legal environment and various state conducts in bad faith. Its wide-ranging nature has led some authors to conclude that FET is '*the broadest*

104 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 518.

105 For an overview of FET, see Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Development' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 111–130, Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) Journal of World Investment & Trade 357; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 130–160; UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012) 17–35; Kenneth J Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43(2) New York University Journal of International Law and Politics 43; Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 296–336; Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 101–138, 254–277.

106 According to the UNCTAD Investment Policy Hub, violation of FET was claimed in 460 cases – see <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 30 January 2019; Christoph Schreuer names FET as '*the most promising standard of protection from the investor's perspective*'. He further suggests that non-invocation of FET, if such a standard is available under applicable IIAs, may even be considered a form of '*malpractice*' – see Christoph Schreuer, 'Introduction: Interrelationship of Standards' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 2.

107 According to UNCTAD Investment Policy Hub, violation of FET was found in 121 cases, which is the most frequently found violation of IIAs – see <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 30 January 2019.

and most prominent standard in investment treaties',[108] while for others the standards '*grant considerable discretion to tribunals to review the 'fairness' and 'equity' of government actions in light of all of the facts and circumstances of the case*'.[109]

At the same time, FET is not open to undue stretching. The debate is still ongoing in scholarly works and in the practice of investment treaty arbitration as to whether to keep attempting to understand FET in IIAs, within the minimum standard of protection under customary international law, or to permit a larger scope of protection independent from the minimum standard of protection.[110] There is also an increasing understanding that despite the overlap, FET shall not be used merely as a loose substitute for expropriation that was discussed above, or as an umbrella clause to be addressed in the subsequent section. As a standard of investment protection, FET may protect the same values, but necessitates somewhat different requirements, which, depending on the context of a specific case, may be easier or more difficult to achieve.[111] Furthermore, while certainly reflecting the general principle of good faith,[112] the principle does not operate as a proxy for deciding a dispute *ex aequo et bono.*

Following a suggestion by Campbell McLachlan, Laurence Shore and Matthew Weiniger, it may be somewhat easier to understand FET through the three dimensions of the state function – judicial, legislative and executive.[113] In the context of judicial function, the standard would respond to denials of justice, undue delays and serious deficiencies of due process. In the context of legislative function, the standard would respond primarily to violations of the legitimate expectations of regulatory stability. In the context of executive function, the standard would protect due process in administrative decision-making as well as its substantive fairness, proportionally and in response to legitimate expectations.

Unsurprisingly, contracts receive protection under FET against a broad variety of state interferences ranging from non-compliance with contractual

108 Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2014) 12(1) Santa Clara J.Int'l L. 7, 10.

109 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 476.

110 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 134–139.

111 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 255–270.

112 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 156–159.

113 Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 296.

undertakings of varying gravity to judicial interference and legislative changes undermining the regulatory stability of a contract or otherwise negatively affecting it. What precisely receives protection appears to be *legitimate expectations* of a foreign investor. According to some, the concept of legitimate expectations originates from domestic administrative law.[114] For others, it has evolved from a simple interpretative tool to a self-standing concept dominating in FET[115] and observable in other substantive standards of investment protection.[116] Apart or in addition to contracts, legitimate expectations may be based on other sources of state assurances which may include informal representations and general legal frameworks.

Contracts appearing as a source of legitimate expectations do not cause much disagreement, in principle.[117] More controversy appears when a discussion turns to concrete assessment. Not every contractual undertaking automatically reaches the level of protectable legitimate expectations and

114 Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) ICSID Review 93–8, 121.

115 Thomas Wälde emphasised the evolution of legitimate expectations in the NAFTA context from '*a subsidiary interpretative principle to reinforce a particular interpretative approach chosen*' to '*a self-standing subcategory and independent basis for a claim*'; see Separate Opinion of Thomas Wälde in *International Thunderbird Gaming Corporation v. The United Mexican States*, para 37. For a critical observation that FET shall not be reduced to just one element of legitimate expectations, see Kenneth J Vandevelde, 'A Unified Theory of Fair and Equitable Treatment' 43(2) New York University Journal of International Law and Politics 43, 67.

116 For a view on the broader reach of legitimate expectations that is also inherent in other standards and provisions of international investment law like expropriation, umbrella clauses and compensation, see Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart 2011) 159–237. Some BITs contain express references to legitimate or reasonable expectations as part of another standard of investment protection, namely that of indirect expropriation. Examples include the Canada Model BIT 2004, the Norwegian Model BIT 2015 (draft) and the USA Model BIT 2012. The FET of these Model BITs does not have a textual reference to legitimate expectations. For a minority position which denies the place of legitimate expectations in the FET standard, see Judge Nikken's separate opinion in *AWG Group v. Argentina,* Separate Opinion of Arbitrator Pedro Nikken, para. 2–7.

117 As Michele Potestà explains '*the contracts engender expectations which have to be placed at the highest level of protection – contracts usually reflect the carefully negotiated balance achieved by the opposing parties and could be said to crystallize the parties' expectations*' - see Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28(1) ICSID Review 88, 103. Christoph Schreuer and Rudolf Dolzer also emphasise the relevance of contractual arrangements for the application of FET: '[c]*ontractual agreements are the classical instrument in most, if not all, legal systems for the creation of legal stability and predictability*' – see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2012) 152.

triggers FET in case of non-compliance.[118] Divergent practices may be found in which tribunals considered an undertaking to pay under a contract as triggering legitimate expectations protectable under FET in one context, like in *SGS v. Paraguay,*[119] or not, such as in *Biwater Gauff v. Tanzania*.[120] Under these circumstances, any generalisation of criteria for qualifying or determining when contractual undertakings trigger legitimate expectations appears to be challenging. It would not be improper to suggest that treaty-based tribunals should take into account various factors, including the importance of an undertaking in question for the whole transaction, as well as a political and socio-economical context in the state, at the time of the contract's conclusion.[121] Some scholars develop somewhat peculiar theoretical foundations for FET where, for instance, instead of legitimate expectations the *core standard of treatment* is identified as forming the basis for assessment of FET violation.[122] Regardless of the ultimate decision as to whether a certain contractual undertaking ultimately triggers legitimate expectations of a foreign investor or not, ascertainment of its content becomes an indispensable part of the decision on FET. This is where contract interpretation appears on the scene.

To establish whether there has been a violation of FET, either in respect to the overall contract or in respect to individual clauses, a tribunal should look at the essence of the contractual arrangement and should interpret that arrangement, if necessary. Interpretation thus exercised is driven by a necessity to ascertain the expectations of a foreign investor that are protected by international investment law. Of the three cumulative elements of legitimate

118 Christoph Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6(3) Journal of World Investment & Trade 380.

119 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29 Decision on Jurisdiction of 12 February 2010, para. 146.

120 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 636.

121 See, for instance the clarification in *Duke Energy Electroquil Partners and Electroquil S.A. v Ecuador*: '[t]*o be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest*' – see *Duke Energy Electroquil Partners and Electroquil S.A. v. Ecuador*, Award dated 18 August 2008, para. 340.

122 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 90–138.

expectations suggested by Ivar Alvik,[123] two might pose relevant questions for contract interpretation. The first is whether there are specific expectations as regards contractual undertakings and the second is whether those undertakings are entered into and relied upon in relation to a specific investment. The first question would lead to a discussion of the binding and non-binding character of the undertakings and specify their content and scope. The second question would necessitate looking at the connection between the overall undertaking and the investment in question. Either expressly or implicitly, tribunals verify these legitimate contract-based expectations in light of these two questions.

Contract interpretation in the context of FET comes in all forms. While analysis may be viewed as emphasising the subjective intent, or expectations of one contractual party only (a foreign investor), this impression is wrong. Treaty-based tribunals tend to ascertain the content of contractual provisions which raise legitimate expectations objectively and reasonably. The approach may be compared with contract interpretation exercised in relation to a non-party to a contract, i.e. based on the apparent meaning of the text and its reasonableness[124] and with regard being given to the various potentially relevant circumstances.[125] It is therefore not uncommon that textual analysis drives the tribunals' efforts when they often accept the *absence of a textual expression* of certain undertakings as a preclusion for further interpretative efforts and a confirmation of a lack of legitimate expectations. Contract interpretation may also become somewhat deeper and more contextual in situations in which the contract does not textually reflect the full scope of reasonable expectations that a foreign investor may have on its basis. On these occasions, tribunals may take the purpose of the transaction into account, as well as other contractual provisions and the relevant contexts surrounding the transaction, to infer certain undertakings as a basis for legitimate expectations.

There is a broad consensus that FET as a standard of investment protection is not supposed to address separate or discrete violations of contractual

123 Ivar Alvik explains that the concept of legitimate expectations has three '*basic and cumulative elements*' consisting of (1) specific expectations pursuant to contractual or comparably definite undertakings of a state, which (2) have been entered into and relied on in relation to specific investments, and which (3) have subsequently been repudiated by the state in its government or political capacity. See Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart 2011) 160.

124 See for instance, an articulated approach towards contract interpretation if a question arises in relation to a third party relying on a contract term in Article II.-8:101 (3) (b) Draft Common Frame of Reference.

125 Article II.-8:102 (2) of the Draft Common Frame of Reference.

provisions, but rather a substantial intervention in the overall integrity of a contract. Stabilisation, renegotiations and economic equilibrium clauses, together with provisions on price adjustment, payment and contract termination are the frequent candidates for interpretative efforts in the context of FET. These provisions, although distinct, ultimately shape the overall integrity of an investment transaction: the stability of the legal framework surrounding contractual provisions (stabilisation clause, renegotiations, economic equilibrium clauses, predictability of the regulation on termination), the financial essence or foundation of a bargain (payment clause) and a predictable framework of contractual relations (termination clause). The examples below illustrate the point.

In *Parkerings v. Lithuania*,[126] for instance, the tribunal expressly tied a lack of legitimate expectations to the failure to incorporate a stabilisation clause into the contract:

> By deciding to invest notwithstanding this possible instability, the Claimant took the business risk to be faced with changes of laws possibly or even likely to be detrimental to its investments. The Claimant could (and with hindsight should) have sought to protect its legitimate expectations by introducing into the investment agreement a stabilization clause or some other provisions protecting it against unexpected and unwelcome changes.[127]

Similarly, a treaty-based tribunal found ambiguous rights on exclusivity in a contract on the operation of duty free stores in Moldova as being not sufficient for implying contractual undertakings of exclusivity and on their basis legitimate expectations of a foreign investor in *Mr. Franck Charles Arif v. Republic of Moldova*:

> 552. This 'exclusive right' was defined in Clause 1.1.: "Exclusive rights: exclusive right of the Investor to manage and administrate the duty-free store network at the state border crossing points is established by the Government Decision no. 172 of 18 February 2008 at the exclusive managerial risk of the Investor according to the provisions of this Agreement. The exclusive rights of the Investor shall not be opposable any longer to the Authority when, following the organization, according to the legislation, of a public

126 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8.

127 Ibid. Award dated 11 September 2007, para. 336.

> tender, a third party shall obtain the right to build and open duty-free-stores at the state border crossing points."
>
> 553. This is a qualified and ambiguous exclusive right. It refers to the Tender ("Government Decision no. 172 of 18 February 2008") but this Tender, as already mentioned, did not offer or establish any exclusive right. Further, the definition in fact recognised that the Authority could conduct another tender to allow a third party to build and open duty free stores, so the 'exclusivity' was not expected to endure any longer than the Authority required to organise such a tender.
>
> 554. *The qualified and ambiguous references to exclusivity do not support a legitimate expectation* that Claimant would have an exclusive right to operate duty free stores at the border locations. The only legitimate expectation of Claimant for the purposes of the fair and equitable treatment obligation in Article 3 of the BIT in relation to the border stores was the more generalised expectation that Claimant was entitled to open duty free stores at five named border locations, and that the State would co-operate with him in this regard.[128] [emphasis added]

Approaching a contract somewhat differently in *MTD v. Chile,* the treaty-based tribunal deemed there to be legitimate expectations even in the absence of an express undertaking.[129] The contract related to a residential development project and an undertaking at stake concerned a zoning modification of the land necessary for the realisation of the project. The claimant in particular asserted that:

> [the respondent] created and encouraged strong expectations that the Project, which was the object of the investment, could be built in the specific proposed location and entered into a contract confirming that location, but then disapproved that location as a matter of policy after MTD irrevocably committed its investment to build the Project in that location.[130]

128 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013, para. 552–554 (it should be noted that the decision on lack of legitimate expectations was premised on broader considerations beyond conclusions relating to the clause on exclusivity).

129 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* ICSID Case No ARB/01/7.

130 Ibid. Award dated 25 May 2004, para. 116.

The claimant suggested that the contract had to be interpreted '*with its plain language and the general principles of contract law, in keeping with the internationalization of contract obligations*'.[131] The claimant further substantiated their own legitimate expectations by referencing the fact that the contract was one of adhesion, in which the investor accepted the terms offered. At the same time, the claimant specified that both parties shared a common understanding that the necessary permits, including zoning modification, were mere formalities.[132] Having assessed the contractual undertakings in relation to the realisation of the residential development project in their totality, the tribunal found that a foreign investor could validly assume legitimate expectations that a necessary permit for the project zoning modification would be granted. The tribunal extended legitimate expectations beyond express contractual provisions on the basis of what would be a reasonable assumption from the terms the parties actually agreed:

> As already discussed under fair and equitable treatment, what is unacceptable for the Tribunal is that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government. Even accepting the limited significance of the Foreign Investment Contracts for purposes of other permits and approvals that may be required, they should be at least in themselves *an indication* that, from the Government's point of view, the Project *is not* against Government policy.[133] [emphasis added]

Similarly, the tribunal implied certain legitimate expectations from the preamble and various other contractual provisions of the privatisation contract in *Eureko B.V. v. Poland*[134] (the case is addressed in more detail in the conclusive chapter of this work from a position of failure to apply national law to contract interpretation, which *MTD v. Chile* can also be criticised for).

Overall, one can come across diverse approaches to contract interpretation. Textualism, while noticeable, does not belong to a dominant interpretative preference exercised in the context of FET. Depending on the circumstances

131 Ibid. para. 179.

132 Ibid. para. 180.

133 Ibid. para. 189.

134 *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment, Partial Award of 19 August 2005, para. 53, 136, 152.

of a particular case, tribunals may find it rewarding to look at contractual purpose and other relevant considerations and to imply some contractual undertakings on their basis.

1.2.5 *National Treatment and Most-Favoured-Nation Treatment*

It may not be immediately apparent whether contract interpretation may take place in the context of national treatment and MFN.[135] While indeed rare, the standards should not be discarded altogether as having nothing to do with ascertainment of the content of contractual provisions. Both national treatment and MFN are contingent standards of investment protection.[136] They depend on a careful comparison of the treatment afforded to a foreign investor: in the case of national treatment – with/to national or local investors in the same business sector, and in the case of MFN – with/to treatment accorded to other foreign investors. National treatment presupposes a relatively simple comparative exercise focused on the most detectable differences in the treatment of a foreign investor and of a national investor assessed reasonably. Analysis of MFN concentrates as a rule on the comparison of standards of investment protection and (with much debate) procedural regulation. The example below illustrates a case which could have been a good case for contract interpretation hadn't the parties settled.

In *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*,[137] the claimants argued that Ecuador breached various treaty obligations and contractual obligations, including an obligation not to discriminate. One of the claimants had entered into a

135 It is not rare that the application of the standard ends at factual observations confirming the absence of similar circumstances for a meaningful comparison. In *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, the claimant alleged discrimination and arbitrary treatment in comparison with producers who signed specific contracts with the state (signatory producers). The tribunal refused to find a violation of arbitrary and discriminatory conduct without digging into the content of contracts but rather performed an assessment on general terms and concluded that signatory and non-signatory producers were not in the same circumstances – *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. arb/04/16, Decision on Jurisdiction and Liability, 10 April 2013, para. 891–893.

136 Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn Oxford University Press 2017) 336–353; Andrea Bjorklund, 'National Treatment' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 29–58.

137 *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12.

concession agreement with Ecuador for the construction, installation and operation of an electric power generation plant with authorisation to generate electricity and sell it to the wholesale electricity market in the country. Another claimant concluded an investment agreement with Ecuador in relation to the concession contract under which the claimant planned to invest USD228,200,000 to be made during the term of the Concession Contract, whereas Ecuador provided certain guarantees in relation to investments. An allegation of discrimination was submitted under various premises and in relation to various sets of facts. The claimants argued, in particular, that Ecuador breached national treatment and MFN by providing more preferential terms to Colombian power generators. Furthermore, the claimant relied upon contractual terms on non-discrimination, or a term of the most favoured concessionaire, in the concession contract concluded with the state, which was supposed to ensure that the claimants received no less favourable treatment than '*other electric power generation concessionaires, whether individuals or corporations*'.[138] Interpreting the provision, the claimants even submitted that the more favourable regime with other power producers therefore should be deemed to be incorporated '*pari passu*' into their contract.[139] Had the case not been settled at the merits stage with USD70 million being paid to the claimants, it would have been interesting to see the precise interpretation of contractual terms on non-discrimination in its interplay with the treaty standards on national treatment and most-favoured-nation treatment in the Ecuador–United States of America BIT (1993) in force at the time of the investment and applicable in this case. Given that both standards are premised on comparison, it is rather likely that approaches to contract interpretation would not step beyond textualism.

1.2.6 *The Umbrella Clause*

Treaty-based tribunals have to ascertain the content of contractual provisions when deciding on the application of a specific standard of investment protection – the umbrella clause.[140] Umbrella clauses appeared in the first drafts

138 Ibid. Decision on Jurisdiction dated 5 March 2008, para. 173.

139 Ibid. 174.

140 While the umbrella clause is nowadays a commonly recognisable term, the provision may also be found as being referred to as a 'mirror effect', 'elevator', 'parallel effect', 'sanctity of contract', 'respect clause' and merely 'pacta sunt servanda', 'observance of specific investment undertakings' or 'observance of undertakings clause' – see Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (2006) OECD Working Papers on International Investment No 2006/03, 1 < https://www.oecd.org/investment/internationalinvestmentagreements/WP-2006_3.pdf> accessed 26 September 2021;

of the multiparty treaties on the protection of foreign investments in the late 1950s to early 1960s as a reflection of the principle of *pacta sunt servanda*[141] and since that time have spread across numerous IIAs with various wordings.[142] This treaty provision aims to ensure the observation of specific obligations, which a state undertakes in respect to a foreign investor, including contract-based undertakings.[143] The frequency of contract interpretation exercised in the framework of umbrella clauses is comparable to interpretation exercised under FET with some allowance for a number of IIAs containing umbrella clauses in comparison to a number of IIAs with FET. The lesser number of IIAs with umbrella clauses in comparison to IIAs with FET makes reliance on umbrella clauses somewhat less frequent than reliance on FET. Furthermore, when the same factual circumstances and contractual provisions trigger both FET and the umbrella clauses, tribunals may either interpret provisions in the framework of one standard only and thereafter rely on that interpretation when assessing a claim under an umbrella clause or treat a decision on an umbrella clause as a more controversial standard to be moot.[144]

Many controversies surround the provision. The most critical disagreements relate to the possibility that the umbrella clause could transform a pure contractual breach into a treaty breach. It remains unclear whether any contract breach shall be automatically equated to a treaty breach and how far the umbrella clause departs from a position on contract protection under customary international law. Some disagreement also touches on the question of the internationalising effect of the umbrella clause and its impact on the national law applicable to a contract. A further area of uncertainty relates to some disagreements as to whether a state should be a contracting party directly and

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Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 488; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 166.

141 Anthony C Sinclair, 'Origins of the Umbrella Clause in the International Law of Investment Protection' (2004) 20(4) Arbitration International 411.

142 The most repeated figure in relation to the umbrella clause is its presence in 40% of the existing IIAs quoted in the Katia Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (2006) OECD Working Papers on International Investment No 2006/03, 1 < https://www.oecd.org/investment/internationalinvestmentagreements/WP-2006_3.pdf> accessed 26 September 2021.

143 The umbrella clause is also discussed in the context of unilateral state promises – see María Cristina Gritón, 'Do Umbrella Clauses Apply to Unilateral Undertakings?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 490–96.

144 *Murphy Exploration & Production Company-International v. The Republic of Ecuador* II, Final Award dated 10 February 2017, para. 29–32.

what the appropriate rules for deciding who the contracting parties to a contract are. Finally, continuing controversy exists as to whether a forum selection clause in a contract constitutes a jurisdiction impediment to a claim on the basis of an umbrella clause.

One may see certain correlations between uncertainty in the application of umbrella clauses and their spread in IIAs. In the jurisprudence of investment treaty arbitration, the controversies surrounding umbrella clauses came to light first in 2003–2004 when on the face of apparently similar wordings treaty-based tribunals disagreed on its effect.[145] Save for an identifiable agreement that an umbrella clause does not change the law applicable to a contract, so far not much consensus has been reached in relation to other areas of uncertainty. The absence of conclusive answers to these questions made the umbrella clause less attractive for states. Despite a relatively low success rate of reliance on the provision,[146] a trend of excluding umbrella clauses from the new generation of FTAs and new Model BITs appears to be gaining momentum.[147]

That umbrella clauses are becoming less spread in IIAs, does not make them disappear. The provision remains enforceable through numerous IIAs. When tribunals give full effect to it, they may also need to ascertain the content of

145 The two decisions in which umbrella clauses demonstrated different effects are *SGS v. Pakistan*, Decision on Jurisdiction dated 6 August 2003 and *SGS v. Philippines*, Decision on Jurisdiction dated 29 January 2004. For a summary of key disagreements about umbrella clauses, with a broader overview of available jurisprudence, see Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 128 -140; Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 196–214; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 166–178; Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 488–490.

146 According to the UNCTAD Investment Policy Hub, the provision has been relied upon in 125 cases and its breach was found only in 17 cases, i.e. 13.6% – see UNCTAD Investment Policy Hub <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 30 January 2019. Unsuccessful cases are not necessarily a sign of a dominant restrictive approach towards the interpretation of umbrella clauses diminishing its independent operation. A denial of a claim based on an umbrella clause may be explained by a failure to prove factual components.

147 My calculations show that the umbrella clause was increasingly used in the first five decades from its appearance, reaching 52.11% of the concluded IIAs, whereas the last 16 years (calculated up to 2017) witnessed an abrupt decline from 52.11% to 22.98%, i.e. by 29.13%. The initial draft of the research paper was presented at the conference of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law on 24–25 November 2016 'DEBACLES – Illusions and Failures in the History of International Adjudication' < https://www.mpi.lu/news-and-events/debacles-illusions-and-failures-in-the-history-of-international-adjudication/> accessed 25 June 2021.

contractual undertakings underlying an international obligation of the state to perform its undertakings. By way of example, they may need to look at obligations to pay,[148] to supply goods,[149] to stabilise an entire contract,[150] and others. One can hardly think of any other standard of investment protection coming *so close* to contractual undertakings *in their pure* form as the umbrella clause.

The reliance on plain text is reflected in many ways in awards. The selection of examples below illustrates loyalty to contractual texts:

- '[t]he Tribunal *notes* that Article 12 of the Concession Agreement makes *explicit mention* of shareholders' and further '[l]ogic as well as *specific Concession language* run counter to any suggestion that Claimant's rights to calculate tariffs in U.S. dollars were to depend on survival of the Convertibility Law' and finally '[s]uch finding is further supported by *the text* of the Currency Clause';[151]
- '[t]he Tribunal must also *note* that Clause 18.2 of the License, in prohibiting the modification of the License *makes special reference* to the fact that … the Licensee will have the right to request the pertinent adjustment of the tariff';[152]
- 'the Altai Agreement contains *no express* commitment not to amend … and the Arbitral Tribunal finds *no ground for implying* any such commitment';[153]

148 *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay,* ICSID Case No.ARB/07/29, Award dated 10 February 2012, para. 79–156; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision on Jurisdiction dated 29 January 2004, para. 127–128; *Garanti Koza LLP v. Turkmenistan,* ICSID Case No. ARB/11/20 Award dated 19 December 2016, par. 328–359*; Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador,* ICSID Case No.ARB/04/19, Award dated 18 August 2008, para. 317–325.

149 An alleged undertaking to supply blood plasma in *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award dated 16 May 2014, para. 203 (the claim denied at the merits stage).

150 *Enron Creditors Recovery Corporation* (*formerly Enron Corporation*) *and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 269–277 (the tribunal construed the state undertakings on the basis of contracts, together with undertakings given through law and regulations).

151 *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award dated 11 June 2012, para. 942, 961, 965.

152 *Enron Creditors Recovery Corporation* (*formerly Enron Corporation*) *and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 155, see also para. 269-277.

153 *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award dated 1 November 2013, para. 336.

– 'the Claimants have *failed to refer to any provision* of the Privatization Agreement which guarantees … [i]ndeed, the Privatization Agreement does not contain any such assurance or guarantee'.[154] [emphasis added]

At the same time, tribunals may not always be satisfied by textual reading of the provisions only. It may be necessary for them to look at a larger scope of relevant circumstances in order to establish the precise content of the provisions. Tribunals may need, for instance, to look at pre-contractual material containing a provision which was ultimately excluded from the final text. They may also find it important to verify that interpretation does not deprive an agreement of practical effect. *David Minnotte and Robert Lewis v. Republic of Poland* illustrates a certain restrictive interpretation of the contractual text:

177. In the view of the Tribunal, the express terms of Article 4.1 cannot be construed as requiring the Respondent to deliver plasma for the purposes of pre-production testing, either on demand or by any given date. The Tribunal notes that a contractual term that would have imposed such a duty was included in a draft of the 1997 Fractionation Agreement but was not included in the agreed final text of the 1997 Fractionation Agreement.
178. The Respondent had monopoly control over the supply of Polish plasma (but not over all plasma; and non-Polish plasma could be and was used for the initial stage of the testing). It is certainly arguable that the Respondent was obliged to supply Polish plasma at some stage for testing purposes. That conclusion is at least arguably necessary in order to give the 1997 Fractionation Agreement practical effect: at some stage LFO had to obtain Polish plasma for testing from somewhere. But the Claimants' case requires more than that.[155]

Overall, textualism appears as a dominant perspective again, primarily because tribunals mostly focus on the objective of establishment of the existence of a legal obligation.

154 *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3, Award dated 24 November 2015, para. 257.

155 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award dated 16 May 2014, para. 177–178.

1.2.7 *Compensation*

When deciding on compensation for violations of standards of investment protection, treaty-based tribunals routinely engage in a complex analysis with different valuation factors.[156] IIAs, as a rule, bring little clarity on the precise methodology to be used.[157] Contracts appear in various perspectives in this context. Treaty-based tribunals may need to decide on compensation to be awarded for the expropriation of contractual rights, for the FET violation, or for other violations in relation to contractual rights.[158] An economic value of contractual rights assessed in light of the internal contractual mechanism envisaging distribution of profits may become important for the assessment.[159] Treaty-based tribunals may also need to evaluate the economic effect of contracts which do not trigger protection in investment treaty arbitration, such as a transaction between a claimant and a third party.[160]

Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan[161] illustrates a situation where a contractual provision in the investment contract appeared central for estimating an amount of compensation. The case arose out of the detention by Pakistan of electricity-generating vessels owned by the claimant, and breaches of contractual payment obligations for electricity

156 Campbell McLachlan and others, *International Investment Law: Substantive Principles* (2nd edn, Oxford University Press 2017) 417–447; Thomas Wäelde and Borzu Sabahi, 'Compensation, Damages and Valuation' in Peter Muchlinsky and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1049–1125; Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 573–583.

157 IIAs may rather exceptionally provide for national law to be applicable for calculating compensation. For instance, Cyprus – Hungary BIT (1989) provides in Article 4(3) that: '*The amount of this compensation may be estimated according to the laws and regulations of the country where the expropriation is made*', which was discussed in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award dated 2 October 2006, para. 292.

158 *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 479–485; *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, Award dated 3 March 2010, para. 479–485; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award of the Tribunal dated 8 March 2019, para. 92–93, 160–195, 207–229; *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award dated 16 September 2015, para. 343–347.

159 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009, para. 577–584.

160 *CME Czech Republic B.V. v. The Czech Republic*, Award dated 14 March 2003, para. 514, 560.

161 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 August 2017.

generated by the claimant. Having found that contractual rights were expropriated, the tribunal proceeded to the calculation of compensation. Despite the objections of the respondent, the tribunal found contractual termination charges relevant and valid for determining compensation.[162] In the tribunal's view, had the court not declared the contract void, the claimant could have terminated the contract and been entitled to receive termination charges as a sovereign guarantee. Regarding allegations of the respondent that the provision was a penalty prohibited under the law applicable to a contract, the tribunal applied a standard that reflected the well-known discussion on penalty clauses versus liquidated damages under English contract law.[163] The tribunal concluded that the termination charges represented '*a precise and rational method for the calculation of a genuine pre-estimate of the loss in the case of termination of the Contract*'.[164] Furthermore, while not framing its inquiry in terms of *contra proferentem*, the tribunal considered that the fact that the state drafted the disputed provision, and that the provision as such was inserted into a contract without further negotiations, was another relevant factor for a finding of its reasonableness.[165] The tribunal accordingly observed that the provision on termination charges could not be perceived as an 'improper penalty'[166] and was compliant with Pakistani law. The ultimate assessment of compensation due for the expropriation of contractual rights included, accordingly, the termination charges which the tribunal estimated to amount to USD149,802,431.

While *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* demonstrates reliance on contractual provisions for calculating compensation, contractual provisions may also be used to limit or exclude compensation.[167] The contractual limitation on compensation is not entirely settled in investment treaty arbitration. More discussion follows in Chapter 4 of this

162 Ibid. para. 686.

163 Ibid. para. 694. For a discussion on penalty clauses versus liquidated damages in ordinary commercial context, see *Cavendish Square Holding BV v. Talal El Makdessi; Parking Eye Limited v. Beavis* [2015] UKSC 67; John Sharples, 'Supreme Court Changes Law Relating to Liquidated Damages and Penalty Clauses' (2015) <https://www.stjohnschambers.co.uk/wp-content/uploads/2018/08/Supreme-Court-changes-law-relating-to-liquidated-damages-and-penalty-clauses.pdf> accessed 25 June 2021; Richard Manly and Matthew Bell, 'Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem' (2012) 29 The International Construction Law Review 386.

164 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/13/1) Award dated 22 August 2017, para. 695.

165 Ibid. para. 697.

166 Ibid. para. 698.

167 See, for instance, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12), Award dated 7 June 2012, para. 85.

book where a doctrinal effect of contractual provisions, including contractual provisions on limitation on liability, are addressed.

Overall, one may distinguish textualism as a dominant interpretative preference. However, interpretation of the content of contractual provisions in the context of compensation is not necessarily limited to it. Tribunals may need to have a broader focus beyond the text to understand the precise content and intended operation of the provision in question.

1.3 Procedural Setting

The procedural setting under which tribunals interpret contracts in the analysed cases is rather diverse and essentially reflects 'the whole world' of investment treaty arbitration. The ICSID Arbitration Rules define the procedure in the majority of the analysed cases with elements of contract interpretation – 91 (71%) out of all 128 cases (for the full list of 128 cases, see Annex IV).[168] Cases conducted under the ICSID Arbitration Rules are cited most often in this work. The second place in terms of frequency belongs to the UNCITRAL Arbitration Rules – used in 20 (16%) out of 128 cases. Of the three editions of the UNCITRAL Arbitration Rules,[169] it is the earlies edition of 1976 that has been applied in most cases. The edition of 2010 has found application only in *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*. A relatively insignificant number of cases conducted under the UNCITRAL Arbitration Rules received no administrative assistance by arbitral institution,[170] whereas most were conducted with some administrative support provided by the PCA,[171] the

168 For instance, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24.

169 The UNCITRAL Arbitration Rules 1976, the UNCITRAL Arbitration Rules 2010 (revised) and the UNCITRAL Arbitration Rules 2013 (incorporating the Rules on Transparency for arbitration initiated pursuant to an investment treaty concluded on or after 1 April 2014).

170 *Energoalians TOV v. Republic of Moldova*; *Oxus Gold v. Republic of Uzbekistan*; *Ronald S. Lauder v. The Czech Republic*; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*; *Eureko B.V. v. Republic of Poland.*

171 *Chevron Corporation* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. The Republic of Ecuador* (PCA Case No. 34877); *Chevron Corporation and Texaco Petroleum Corporation*

ICSID[172] or the LCIA.[173] The third place in terms of frequency was use of the ICSID Additional Facility Rules (12 cases or 9%).[174] The fourth place was use of the SCC Arbitration Rules (4 cases or 3%).[175] There were also two cases conducted under the Arbitration Rules of the Moscow Chamber of Commerce and Industry (MCCI Arbitration Rules).[176] While in the analysed cases with elements of contract interpretation, no other arbitration rules were used, it may appear that non-available cases which were excluded from the analysis or new cases with elements of contract interpretation are conducted under other arbitration rules, for instance the ICC Arbitration Rules, the LCIA Arbitration Rules, etc.

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v. The Republic of Ecuador (PCA Case No. 2009-23); *Flemingo DutyFree Shop Private Limited v. the Republic of Poland*; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia* (PCA Case No. 2011-09); *Luigiterzo Bosca v. Lithuania* (PCA Case No. 2011-05); *ST-AD GmbH v. Republic of Bulgaria* (PCA Case No. 2011-06); *Ulysseas, Inc. v. The Republic of Ecuador* (PCA Case No. 2009-19); *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434); *Saluka Investments B.V. v. The Czech Republic*; *Peter Franz Vocklinghaus v. Czech Republic*.

172 For instance, *AWG Group Ltd. v. The Argentine Republic*.

173 *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA Case No. UN3467); *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. Kingdom of Thailand*.

174 The ICSID Additional Facility Rules apply when the ICSID Convention is not applicable. *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6; *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3; *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3.

175 *William Nagel v. The Czech Republic*, SCC Case No. 049/2002; *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC; *CCL v. Republic of Kazakhstan*, SCC Case No. V 122/2001; *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010.

176 *OKKV* (*OKKB*) *and others v. Kyrgyz Republic*; *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*.

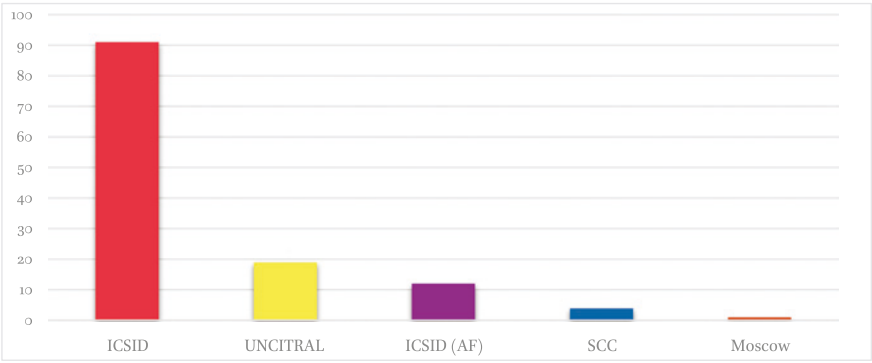


FIGURE 1 Arbitration rules in cases with elements of contract interpretation in investment treaty arbitration

The figure above summarises the frequency of arbitration rules used in the analysed cases. It may be interesting to observe that the frequency of use of arbitration rules in the cases *with contract interpretation* by and large reflects the frequency of the use of arbitration rules generally in investment treaty arbitration with the ICSID and the SCC Arbitration Institute being among the most used institutions and the UNCITRAL Arbitration Rules being among the most used for *ad hoc* arbitration.[177] Other arbitration rules, which are not applicable in the analysed cases with elements of contract interpretation, can appear in some other new cases.

The cases with contract interpretation which are not conducted under the delocalised (ordinary) ICISD Arbitration Rules all have a seat. These are the proceedings under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, the SCC Arbitration Rules, and the MCCI Arbitration Rules. The chosen seats were in Washington (mostly for the ICSID Additional Facility Rules),[178] Paris,[179]

177 Kaj Hobér, 'Investment Treaty Arbitration and Its Future – If Any', 7 (2015) Yearbook of Arbitration and Mediation 58.

178 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3; *National Grid plc v. The Argentine Republic*; *Talsud S.A. v. The United Mexican States*, ICSID Case No.ARB(AF)/04/4; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)04/6; *Waste Management, Inc. v. United Mexican States* (*"Number 2"*), ICSID Case No. ARB(AF)/00/3; *AWG Group Ltd. v. The Argentine Republic.*

179 *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1; *Energoalians TOB v. Republic of Moldova*; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*; *MNSS B.V. and Recupero Credito*

The Hague,[180] Stockholm,[181] Geneva,[182] London,[183] Brussels,[184] Toronto,[185] Singapore[186] and Moscow.[187] The figure below summarises the information on the seats chosen.

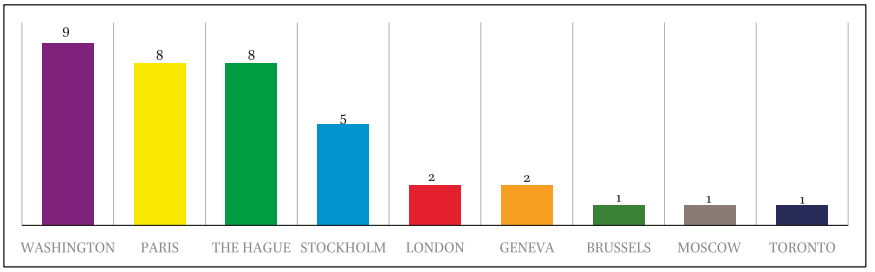


FIGURE 2 Seats in cases with elements of contract interpretation in investment treaty arbitration

Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/1; *Oxus Gold v. Republic of Uzbekistan; Peter Franz Vocklinghaus v. Czech Republic*; *Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland*, ICSID Case No. ARB(AF)/11/3.

180 *British Caribbean Bank Limited v. The Government of Belize*, PCA Case No. 2010-18; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador,* PCA Case No. 2009-23; *Flemingo DutyFree Shop Private Limited v the Republic of Poland*; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*; *ST-AD GmbH v. Republic of Bulgaria,* PCA Case No. 2011-06; *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19.

181 *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case No. V 116/2010; *CCL v. Republic of Kazakhstan*, SCC Case No. V 122/2001; *Luigiterzo Bosca v. Lithuania*, PCA Case No. 2011-05; *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002.

182 *Saluka Investments B.V. v. The Czech Republic*; *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand.*

183 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1.

184 *Eureko B.V. v. Republic of Poland.*

185 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3.

186 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6.

187 *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*, Arbitration at the Moscow Chamber of Commerce Case No. A-2013/08.

1.4 Patterns for Contract Interpretation

Tribunals' reasoning, evidencing attempts to ascertain the content of contractual provisions, may be better understood if allocated into groups of repeatedly exercised approaches, or patterns. Many ways exist to classify these patterns. One of the possibilities, for instance, is to single out the patterns in light of how theory and philosophy of law approach legal argumentation and justification. If one employs Robert Alexy's classification of external legal justification, the interpretative efforts of treaty-based tribunals in relation to contracts may be captured through categories of [proper] interpretation, dogmatic argumentation, the use of precedents and empirical reasoning.[188] If one applies Joxerramon Bengoetxea's perspective, one can distinguish between literal arguments, systemic arguments and common sense arguments invoked by tribunals in their interpretation of contracts.[189] Another possibility is to identify interpretative patterns depending on the interpretative challenges within a contract which treaty-based tribunals have to solve in the framework of a given case. This could lead to distinguishing between interpretations exercised in relation to ambiguous, vague, insufficient or silent contractual provisions.[190]

188 For Alexy's classification of legal reasoning see Robert Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press 1989) 261–360. According to Alexy, *external* justifications deal with the soundness and validity of inferences in the *internal* logical reasoning and the soundness of premises upon which it is based. Of the six forms for external justification which Alexy names, four receive most frequent expression in the patterns of disengagement from national law in relation to contract interpretation in the reasoning of the Permanent Court of Justice (PCIJ), the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Iran-USA Claims Tribunal and in investment treaty arbitration. Relying on this work, I attempted to taxonomise reasoning in relation to the ascertainment of the content of contractual provisions exercised by international courts and tribunals through the taxonomy of external justification for legal reasoning in the paper 'Disengagement from Domestic Law in Contract Interpretation in Public International Law Context' presented at the Workshop 'Engaging with Domestic Law in International Adjudication: Fact-finding or Transnational Law-Making?' at the University of Amsterdam on 1 March 2019.

189 Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Oxford University Press 1993) 218–270.

190 Liliana E Popa, for instance, divides patterns of treaty interpretation according to the difficulties in the text being insufficiently clear, inconsequent, ambiguous, doubtful, obscure, vague or silent treaty provisions – see Liliana E Popa, *Patterns of Treaty Interpretation as Anti-Fragmentation Tools: A Comparative Analysis with a Special Focus on the ECtHR, WTO and ICJ* (Springer 2018) 4. On the distinction between ambiguity and vagueness, see Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Lawrence M Solan and

There is also a possibility to identify patterns depending on *obedience* to or *deviation* from the national law applicable to a contract.

The most revealing for the purpose of this work appears to concentrate on the role of national law applicable to a contract for its interpretation. This focus assists to understand the tribunals' interpretative routines vis-à-vis what can be described as a normative standard for contract interpretation. Indeed, a proper law of contract appears as a commonly recognised, normative standard for contract interpretation similar to how the VCLT is for treaty interpretation. This perspective, featuring an adherence to national law, captures the most critical characteristics of contract interpretation as an analytical exercise in investment treaty arbitration – its normative foundation.

All 128 cases with elements of contract interpretation are accordingly divided into two principal groups: those cases in which tribunals relied on national law to understand the content of contractual provisions and those cases in which tribunals failed to rely on or deliberately choose not to rely on national law for contract interpretation. *Express reliance* on national law in those parts of the awards, which evidence the tribunals' efforts on ascertaining the content of contractual provisions, served as a basis for allocating the cases to one group or another. Furthermore, cases were placed in the group in which national law informed interpretative efforts if a tribunal relied *at least once* on national law *to ascertain* the content of contractual provisions. Cases, accordingly, were placed in the category without reliance on national law for contract interpretation if there was no single reference to national law in the parts evidencing the tribunals' *efforts to ascertain* the content of contractual provisions. The *screening* thus exercised was textual, based on the awards' 'surface' express references to national law, and did not go deeper in the analysis of the correctness of the application of national law in contract interpretation.[191] Put differently, if an award evidenced the tribunal's express reliance on national law to ascertain the content of contractual provisions, even an abbreviated one, the case appears in the category with application of national law regardless of possible mistakes and failures in its application.

Despite being somewhat superficial in character, the overview nevertheless represents a valuable general *indication* of the positions that treaty-based tribunals take in relation to the role of national law for contract interpretation. The allocation of cases between the two groups shows that national

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Peter Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 128–145.

191 For a more nuanced critical look at the application and non-application of national law to contract interpretation, see Chapter 4 of this work.

law did not inform the tribunals' interpretative efforts in a significant number of cases – 47% of all cases with elements of contract interpretation (or 128-12-56=60 cases). Tribunals accordingly relied upon national law to various extents in their efforts to ascertain the content of contractual provisions in the majority of cases – 53% of the cases (or 12+56=68 cases).[192] A closer look at the cases shows, however, more reason for the discomfort associated with disengagement from national law as a normative standard for contract interpretation. Only 9% of all cases with elements of contract interpretation (or 12 cases) demonstrate tribunals' reliance on *interpretative rules and principles* of national law for contract interpretation (Annex V).[193] The predominant portion of cases with reliance on national law (56 cases) shows that national law appeared merely as a *background law*.[194] When relying on national law

192 Annex VI and Annex V together.

193 Even if the tribunals' reasoning also demonstrates reliance on national law as a background law, so far as interpretative rules are invoked, the case was allocated to the category with application of interpretative rules for contract interpretation (Annex V) – see *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award dated 17 April 2015, para. 79; *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award dated 3 May 2018, para. 220–222; *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan*, ICSID Case No. ARB/06/15, Award dated 8 September 2009, para. 61, 64–65, 90–91; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award dated 27 September 2017, para. 601–610, 658; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999, para. 50–51; Award dated 29 December 2004, para. 82–93, 113–114; *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009–23, First Partial Award on Track I dated 17 September 2013, para. 63–90; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 221; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012, para. 133; *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award dated 15 June 2015, para. 260, 265; Decision on Annulment dated 3 October 2017, para. 52–53, 141, 180–181, 186–187, 216–218; *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Interim Ruling on Issues Arising Under the Deed of Settlement dated 19 December 2014, para. 74, 91, 102–103, 114–115, fn 35–38; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated 12 September 2014, para. 326, 356–359; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002; Final Award dated 9 September 2003, para. 68, 104, 228.

194 Provided that the parties agree on the relevance of national law for contract interpretation, they rarely, in fact, dispute the content of the interpretative provisions of national contract laws. Furthermore, it is not unusual for treaty-based tribunals, as a result, to report that both parties are in agreement on the content of interpretative rules. Parties disagree, however, typically on the application of these rules to particular facts. See, for

as a background law, tribunals regarded it as supplementing understanding of an individual contractual term,[195] for understanding certain (larger) parts of the contract which incorporated the elements of the statutory provisions *verbatim*[196] or became *'the particularized versions of the principles'* specified in various legislative acts[197] to understand the content of the parties' mutual undertakings given in the context of the general civil or commercial law regulation,[198] and to understand the content of the parties' specific mutual undertakings given in the context of the specialised legislature relating to public-private contracting (concessions, tender/bidding, privatisation) or to industry specialised areas (construction, broadcasting, banking, etc.).[199]

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instance, in *ACP Axos Capital GmbH v. Republic of Kosovo* the tribunal noted that it was beyond dispute between the parties that the post-contractual conduct of the parties was relevant for contract interpretation under Kosovar law – *ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22,* Award of 3 Mary 2018, para. 220; in *Gambrinus Corp. v. Bolivarian Republic of Venezuela*, the tribunal noted *'[b]oth Parties and their legal experts have made reference to the rules of contract interpretation of Venezuelan law reaching however different conclusions.'* – see *Gambrinus Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award dated 15 June 2015, para. 265. For the role of background law for contract interpretation and for examples of some scholarship featuring the role of background law, see the next chapter.

195 For instance, the term *'in caso d'uso'* in the office lease agreement – see *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki dated 5 June 2007, para. 101–102.

196 For instance, the Broadcasting Agreement in *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz* was concluded between the National Radio and Television Board and Országos Kereskedelmi Rádió Részvénytársaság. It incorporated certain elements of the Hungarian Media Law – see *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award dated 17 April 2015, para. 77–107.

197 *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability dated 30 July 2010, para. 99.

198 Set-off regulation in *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 August 2008, para. 238–242.

199 For instance, in *ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22,* to understand whether a binding contract came into existence as a result of the bidding process, the tribunal had to understand the exchanges between the parties against the normative regulation of the bidding procedure in the Republic of Kosovo. The tribunal shared the position of an expert on public law who explained the relevance of three laws (Law No. 03/L-087 on Publicly Owned Enterprises, Law No. 04/L-045 on Public-Private Partnership, and Law No. 04/L-042 on Public Procurement) for the decision and decided to apply all three within their respective scope together with the Law on Obligations – see *ACP Axos Capital GmbH v. Republic of Kosovo,* ICSID Case No. ARB/15/22, Award dated 3 May 2018, para. 208–211. In *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, to ascertain the content and effect of the settlement agreement the

To understand what this 9% in fact means, one can draw an analogy with treaty interpretation and imagine a situation in which only 9% of cases with treaty interpretation evidence the application of interpretative provisions of Articles 31–33 of the VCLT. This number would appear far beyond what one would normally expect from the proper approach to treaty interpretation. Similarly, 9% of cases relying on interpretative rules or principles of national law applicable to contract is far beyond what one would normally expect in relation to the proper methodological approach to contract interpretation.

This 9% is also indicative of the scarcity of instructive pronouncements on the tribunals' power to interpret contracts and of a proper methodology of contract interpretation in the awards. This is again in contrast to a general recognition of a power to interpret treaties or routine acknowledgement of the role of Articles 31–33 of the VCLT for treaty interpretation in investment treaty arbitration. Regarding clarification of the mandate of treaty-based tribunals in relation to contract interpretation, one may find useful guidance only in a limited number of cases. For instance, in *Laos Holdings N.V. v. The Lao People's Democratic Republic* the tribunal specified that '[*t*]*he power to apply a provision in a contract necessarily implies the power to interpret that provision*'.[200] In *William Nagel v. The Czech Republic*, the tribunal expressly affirmed that: '[*a*]*n incidental need to interpret an instrument under domestic law cannot exclude the Arbitral Tribunal's jurisdiction*', further specifying that '[*i*]*f it did, virtually every similar tribunal would also be denied jurisdiction. Few, if any, investment disputes do not require the interpretation of agreements entered into under domestic law*'.[201] In *Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan* the tribunal helpfully distinguished contract interpretation under national law (English law)

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tribunal had to consider Article 19–2 of the Ecuadorian Constitution in force at the time of the conclusion of the settlement agreement – see *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA No.2009-23, First Partial Award on Track I dated 17 September 2013, para. 98–107; in *CMS Gaz Transmission Company v. The Republic of Argentina* the tribunal had to decide on the relevance of the Gas Law, the Gas Decree and the Convertibility law for interpretation of the concession – see *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 127–138. In *AWG Group Ltd. v. The Argentine Republic*, the concession set a hierarchy of specific legal acts relevant for its interpretation – see *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability dated 30 July 2010, para. 98.

200 *Laos Holdings N.V. v. The Lao People's Democratic Republic* ICSID Case No ARB (AF) 12/6, Interim Ruling on Issues Arising Under the Deed of Settlement dated 19 December 2014, para. 66.

201 *William Nagel v. The Czech Republic*, SCC Case No 049/2002, Award dated 9 September 2003, para. 123.

from treaty interpretation under international law.[202] These valuable clarifications of the methodological aspects of contract interpretation have not gained weight in the reasoning for other tribunals and have not been referred.

Further, expressly endorsing the relevance of national law to contract interpretation does not ensure its proper application. One may raise questions about the adequacy of the ascertainment of national law, or in other words, ask whether the tribunals properly consider the content of relevant national law while interpreting contracts. To illustrate, it appears that the tribunal in *Garanti Koza LLP v. Turkmenistan*,[203] while refusing to consider the relevance of the existent practice in the construction industry in Turkmenistan in regard to predicting and reporting the cost of construction work and assessing their value (so-called 'SMETA'), failed to consider that business practices and trade usages were a source of civil regulation in addition to statutory provisions under Article 5 of the Civil Code of Turkmenistan. Furthermore, the tribunal did not consider that Article 357 of the Civil Code of Turkmenistan makes trade usages and 'traditions' (akin to customs) among the relevant considerations possible for '*defining parties' rights and obligations under the contract*.' Above all, Article 77 of the Civil Code of Turkmenistan expressly prioritises the common will of the parties over the contractual text. These three provisions, if not necessarily leading to a different conclusion than reached by the tribunal, at least require the tribunal to explain in a more satisfactory manner the reason for not implementing certain contractual obligations. A mere acknowledgement that SMETA was not part of legislative regulation[204] did not suffice for that purpose. This criticism about *paying lip service* to national law mirrors similar concerns in relation to the proper application of the VCLT for treaty interpretation.[205]

The list of national laws, which tribunals have applied at various times in relation to the ascertainment of the content of contractual provisions, in

202 *Azpetrol International Holdings B.V., Azpetrol Group B.V., and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan,* ICSID Case No ARB/06/15, Award dated 8 September 2009, para. 63–64.

203 *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20).

204 Ibid. para. 331.

205 *See*, for instance, Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2016) 8; Donald M McRae, 'Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body' in Stephan Breitenmoser and others, *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Nomos Verlagsgesellschaft 2007) 1407–1422; Michael Waibel, 'Uniformity versus Specialization (2): A Uniform Regime of Treaty Interpretation?' in Christian J Tams and others (eds), *Research Handbook on the Law of Treaties* (Edward Elgar Publishing 2014) 376, 395, 407.

alphabetical order, is as follows (the number of cases in footnotes demonstrates the frequency of the reliance on the national law of a particular country/state/administrative part):

– law of Argentina;[206]
– law of British Columbia;[207]
– law of Bulgaria;[208]
– law of Chile;[209]
– law of Costa Rica;[210]
– law of Croatia;[211]
– law of the Czech Republic;[212]

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206 *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Decision on Liability dated 30 July 2010, para. 66, 79, 98, 231; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 210, 213–214; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, para. 324–328; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of The Arbitral Tribunal dated 8 December 1998, para. 18–19, 26; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award dated 3 November 2008, para. 117–124; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic,* ICSID Case No. ARB/07/26, Award dated 8 December 2016, para. 325–328, 374, 940–942; *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Award dated 14 July 2006, para. 255–261; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Award dated 11 June 2012, para. 943–969; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 205–227; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability dated 29 December 2014, para. 192.

207 *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 March 2018, para. 3.82–3.84.

208 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 August 2008, para. 101, 105, 197, 199–200, 267.

209 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004, para. 187–189, Decision on Annulment dated 21 March 2007, para. 73–75.

210 *Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/09/20, Award dated 16 May 2012, para. 118, 170, 189–190, 287.

211 *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award dated 25 July 2018, para. 458–462, 850–855.

212 *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award dated 29 December 2004, para. 68, 72, 82–95, 113–114; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award dated 9 September 2003, para. 308, 315–320; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award dated 3 September 2001, para. 265–274; *Peter Franz Vocklinghaus v. The Czech Republic,* Award dated 19 September 2011, para. 160–165.

– law of Ecuador;[213]
– law of Egypt;[214]
– law of England and Wales;[215]
– law of Grenada;[216]
– law of Guatemala;[217]
– law of Germany;[218]

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213 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-23, First Partial Award on Track I dated 17 September 2013, para. 62–63, 72, 84–85, 90, 96–97, 100; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6, Decision on Jurisdiction dated 30 June 2011, para. 142–146; Decision on Remaining Issues of Jurisdiction and on Liability dated 12 September 2014, para. 358, 369, 375; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012, para. 308–310; *Chevron Corporation* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits dated 30 March 2010, para. 375, 400–401, 411–412, 433, 453–454; *Occidental Exploration and Production Company v. The Republic of Ecuador,* LCIA Case No. UN3467, Final Award dated 1 July 2004, para. 98–115; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (*II*), ICSID Case No. ARB/06/11, Award dated 5 October 2012, para. 616–644, 650; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award dated 18 August 2008, para. 238–244.

214 *Malicorp Limited v. The Arab Republic of Egypt,* ICSID Case No. ARB/08/18, Award dated 7 February 2011, para. 130; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award dated 31 August 2018, para. 9.69.

215 *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan,* ICSID Case No. ARB/06/15, Award dated 8 September 2009, para. 49–61, 90; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 February 2017, para. 312–316; *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine,* ICSID Case No. ARB/08/8, Decision on Jurisdiction dated 8 March 2010, para. 69–71, fn.49 (only excerpts of the award are available evidencing some attempts of the tribunal to find out the effect of the bareboat charter in the light of English law and Ukrainian law). According to the contractual terms, English law was applicable so far '*it does not come into contradiction with Ukrainian law* (*material and procedural*)'. It would be interesting to see whether the case triggered discussion of the acute differences in contract interpretation under English and Ukrainian law.

216 *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, ICSID Case No. ARB/10/6, Award dated 10 December 2010, para. 7.1.8 (i).

217 *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award dated 29 June 2012, para. 122.

218 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012, para. 133, 135, 137, 147–150; *Peter Franz Vocklinghaus v. Czech Republic,* Award dated 19 September 2011, para. 155–159.

– law of Hungary;[219]
– law of Italy;[220]
– law of Kazakhstan;[221]
– law of Kosovo;[222]
– law of Kyrgyzstan;[223]
– law of Latvia;[224]
– law of Luxembourg;[225]
– law of Mexico;[226]
– law of Moldova;[227]
– law of Mongolia;[228]

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219 *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award dated 17 April 2015, para. 77–96, 108, 114; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Award dated 16 April 2014, para. 196–199; *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 535–538.

220 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki dated 5 June 2007, para. 101–102.

221 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhsta*n, ICSID Case No. ARB/13/13, Award dated 27 September 2017, para. 601–610; *CCL v. Republic of Kazakhstan*, SCC Case 122/2001, Jurisdictional Award dated 2003, p. 130.

222 *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22, Award dated 3 May 2018, para. 152–156.

223 *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*, Award dated 13 November 2013, para. 3.3 (sub.- para. 4).

224 *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award dated 16 December 2003, para. 3.7; *UAB E energija* (*Lithuania*) *v. Republic of Latvia,* ICSID Case No. ARB/12/33, Award dated 22 December 2017, para. 863.

225 *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, para. 5–24, 5–28, 5–33; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 5–24, 5–28, 5–33.

226 *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, para. 5–24, 5–28, 5–33; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 5–24, 5–28, 5–33.

227 *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award dated 8 April 2013, para. 398–420, 551–555.

228 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability dated 28 April 2011, para. 529–533, 548, 600–605.

– law of New York;[229]
– law of Thailand;[230]
– law of Turkmenistan;[231]
– law of Oman;[232]
– law of Pakistan;[233]
– law of Paraguay;[234]
– law of the Philippines;[235]
– law of Poland;[236]
– law of Romania;[237]
– law of Turkey;[238]

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229 *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Interim Ruling on Issues Arising Under the Deed of Settlement dated 19 December 2014, para. 74, 91, 114–118, 129–135; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award dated 5 October 2012, para. 195, 616, 645–648, 650.

230 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award dated 1 July 2009, para. 7.6.–7.13.

231 *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on annulment dated 15 January 2016, para. 132, 265; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016, para. 150, 288, 331.

232 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award dated 3 November 2015, para. 298–312.

233 *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 August 2017, para. 690–698.

234 *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Award dated 10 February 2012, para. 104, 108; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009, para. 85–92.

235 *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II)*, ICSID Case No. ARB/11/12, Award dated 10 December 2014, para. 428–468; the tribunal finding the claim under umbrella clause inadmissible nevertheless engaged into a limited ascertainment of exclusive jurisdictional clause and its effect under national law in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines,* ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 January 2004, para. 136–138.

236 *Flemingo DutyFree Shop Private Limited v the Republic of Poland,* UNCITRAL, Award dated 12 August 2016, para. 470, 476–478, 591.

237 *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award dated 8 October 2009, para. 240–269; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award dated 12 October 2005, para. 114.

238 *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction dated 4 June 2004, para. 85–89, 97.

– law of Ukraine;[239]
– law of Venezuela[240]

The cases (47% or 60 cases) where tribunals have not relied on national law are not uniform. In addition to the dominant group of autonomous contract interpretation uninformed by any external justification,[241] one can distinguish cases in which the tribunals understood contracts in light of international law or its specific doctrines[242] and in light of transnational law.[243] When not relying on national law as the applicable law for contract interpretation, tribunals can also represent their analytical efforts as fact-finding.[244]

Despite the visibility of heterogeneity in patterns for understanding the content of contractual provisions, all the analysed cases have two common denominators. Firstly, similarities can be found in *what* the tribunals were looking at when they had to understand the contracts. While the investigation could be

239 *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 November 2010, para. 439–440; *Energoalians TOB v. Republic of Moldova*, UNCITRAL, Arbitral Award dated 23 October 2013, para. 193–194, 199.

240 *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award dated 15 June 2015, para 255–256, 265; Decision on Annulment dated 3 October 2017, para. 141; *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award dated 18 January 2019, para. 335–337, 344–347, 351–355.

241 For instance, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 252–256, 368–373; *David Minnotte & Robert Lewis v. Republic of Poland,* ICSID Case No. ARB (AF)/10/1, Award dated 16 May 2014, para. 172–178; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (II), ICSID Case No. ARB/03/19, Award dated 9 April 2015, para. 42–43; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, para 212–217, 263–266; *Biwater Gauff* (*Tanzania*) *Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 495–496, 631–650; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6,* Award dated 31 July 2007, para. 253–280.

242 For instance, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 151; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated 23 September 2010, para. 9.3.25, 9.3.31; *Ionannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 March 2010, para. 477–485; *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 477–485; *Desert Line Projects LLC v. The Republic of Yemen,* ICSID Case No. ARB/05/17, Award dated 6 February 2008, para. 145–194.

243 For instance, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 109–111.

244 For instance, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 135, 458; *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012–16 (formerly AA 434), Partial Final Award dated 6 May 2016, para. 361.

either detailed or more concise, tribunals as a rule did not deal with contracts as they would with other documentary evidence. Rather, they looked at the normative content of contracts as legal texts and not just as texts. Such an ascertainment of the normative meaning of legal texts is traditionally referred to as legal interpretation.[245] Tribunals were not so interested to see what the texts *said* as such; they were rather more interested in what the texts *meant*. In addressing or relying upon contractual provisions, treaty-based tribunals accordingly engaged in contract interpretation. Secondly, similarities can be found in *the way* tribunals attempted to understand contracts. If seen on a subjective-objective spectrum, the prevailing approach towards understanding the content of contractual provisions in investment treaty arbitration tends to be more objective than subjective. Even when subjective intent had to be investigated because of the chosen methodology, tribunals gave weight to post-contractual conduct and other objective confirmations of the proper contractual meaning. The fact that parties in the arbitral proceedings, on frequent occasions, were not precisely the same parties to the contracts at stake, also explains the preference for objectivity and frequent textualism.[246] Furthermore and connected to the above, an objective approach benefits from further reinforcement by the fact that disputes in investment treaty arbitration do not hinge as a rule upon the direct enforcement of the contractual rights between the parties.[247]

1.5 Conclusion

Treaty-based tribunals interpret a broad range of contractual provisions which are part of rather divergent contractual arrangements. The purposes of their

245 For instance, Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans., Princeton Univ. Press 2005) 3.

246 In this context, it is interesting to observe some similarity between an objectivity in contract interpretation in investment treaty arbitration and an approach taken in the Draft of Common Frame of Reference (DCFR) for contract interpretation that directly emphasises the necessity to interpret the contract objectively when an issue at stake relates to the rights of third parties (Book II, Article II. – 8:101(3)(b): '*The contract is, however, to be interpreted according to the meaning which a reasonable person would give to it:* [...] (*b*) *if the question arises with a person not being a party to the contract or a person who by law has no better rights than such a party, who has reasonably and in good faith relied on the contract's apparent meaning.*'

247 Somewhat exceptionally, an umbrella clause can be viewed as enforcing contractual undertakings through the treaty standard of investment protection. Importantly, the enforcement thus exercised is not direct but rather through the standard of investment protection.

interpretative efforts reflect investment treaty arbitration *from top to bottom*: jurisdiction, attribution, violation of standards of investment protection, compensation, etc. And while noticeable in approximately 53% of awards with elements of contract interpretation, national law has not secured a dominant *methodological* position. Only 9% of cases demonstrate reliance on *interpretative* rules and principles of national law.

The empirical observations revealed here may lead to various avenues of further research. It may be interesting to concentrate on the specific types of contractual arrangements which treaty-based tribunals have to ascertain. It may be promising to look at differences in approaches to the interpretation of various contractual clauses. It may be informing to contrast contract interpretation exercised in different procedural settings of investment treaty arbitration whilst differentiating between ICSID and non-ICSID arbitration. It may be engaging to verify potential implications which different substantive regimes of IIAs might have for contract interpretation. It may be enlightening to contrast contract interpretation exercised for jurisdictional purposes with contract interpretation exercised for the merits of a treaty claim. All of these, as well as many other aspects identified in this chapter, are potentially rewarding. They advance understanding of interpretative preferences in interrelationships with interpretative material, interpretative occasions, and procedural frameworks. However, neither of these directions for research directly clarify the second research question that remains to be answered in this work, regarding how treaty-based tribunals should interpret contracts. This will be explored in the next chapters.

PART 2

Defining a Relevant Legal Frame

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CHAPTER 2

National Laws and Contract Interpretation

It is not simple naivety, but a gross misunderstanding, to assume that national laws govern contract interpretation identically or in a substantially similar way. The need to determine the parties' joint intent, i.e., the common purpose of an interpretative exercise, does not automatically equate with the ways national law offers to achieve this aim. Nor does it automatically ensure similar results.

The proposition that national laws govern contract interpretation differently triggers two circular suggestions. On the one hand, the proposition follows a broader appreciation that the totality of contract law shapes contract interpretation via fundamental values, prevailing principles and other non-interpretative doctrines. This understanding of contract interpretation, as a product of the overall regulation of contract law, is well illustrated by those countries, such as Denmark or Norway, which, while having statutory regulation for contracts, do not have a formal enumeration of all general rules applicable to contract interpretation and where interpretation primarily develops through judicial guidance.[1] On the other hand, the rules on contract interpretation themselves are focal for understanding the contract law's differences. They are an '*acid test of comparative law*'[2] that helps appreciate the peculiarity of a given state's contract law. For instance, it is the existing differences in approaches towards contract interpretation that mark certain contract laws as being more attractive for commercial transactions, such as English law,[3] or ones that are more attractive for protecting weaker parties, such as Danish, Norwegian or Swedish laws.[4] In other words, the contract laws of various states

1 See, for instance, Ruth Nielsen, *Contract Law in Denmark* (DJØF Publishing/Wolters Kluwer Law & Business 2011) 150–152.

2 Filippo Viglione, 'Good Faith and Reasonableness in Contract Interpretation: A Comparative Perspective' (2009) 20 European Business Law Review 835, 835.

3 English law has a well-known history of application in international commerce, be that regarding the sale of soft commodities, international financial transactions, mergers and acquisitions or other transactions. Reliance on the words of the contract ensures predictability in contract interpretation and serves as an important factor for the choice of English law for international commercial transactions. For the attractiveness of this interpretative approach for commercial transactions, referred to as the minimalist approach, see Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 183.

4 Nordic laws are known for the far reach of good faith in correcting contractual imbalances, albeit somewhat limited in commercial context. See, Ole Lando, Marie-Louise

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are distinct, and so is contract interpretation. Vice versa, contract laws vary because contract interpretation differs from one country to another.

Instead of investigating *de novo* all the differences of contract interpretation to varying degrees of magnitude, this chapter aims to provide an overview of some critical markers of similarities and dissimilarities in the regulation of contract interpretation across various national laws. The chapter proceeds by firstly analysing the contribution of comparative scholarship to the existing body of knowledge and then by cataloguing selected similarities and differences of contract interpretation across jurisdictions.

2.1 What Do We Know: Comparative Scholarship

A general observation that various laws might have different regimes for contract interpretation does not raise much complexity or imagination. Nor is it counterintuitive. Laws do differ across jurisdiction. And if contract formation, contract performance, contract termination or contract validity all might be subject to different regulation, there is nothing extraordinary in the proposition that contract interpretation may differ as well. Nevertheless, investigation of *precisely* how different the laws are with regard to contract interpretation constitutes an extremely demanding exercise.

The complexity of the precise understanding of differences in contract interpretation under national laws is manifold. Difficulties pertain to the overall number of laws, the fact that many of them have not been translated, dominant mono-national focus in scholarship on contract interpretation, as well as complexities associated with contract interpretation as an object of comparison. Indeed, the existence of roughly 200 countries, some of which have quite distinct regulations on contract interpretation, even within their constituent parts,[5] represents an objective challenge for an all-encompassing meaningful

Holle and others (eds), *Restatement of Nordic Contract Law* (DJØF Publishing) 167–195; Boel Flodgren and Eric M Runesson, *Contract Law in Sweden* (Kluwer Law International 2015) 94–101; Kåre Lilleholt, 'Application of General Principles in Private Law in the Nordic Countries' (2013) 20 Juridica International 12. Unsurprisingly, the initiatives to promote the choice of Nordic law for international transactions emphasise some other arguments, but not approaches to contract interpretation as such. For instance, Swedish contract law is presented as a neutral choice primarily for parties from common and civil law countries who wish to choose neither of them – see Boel Flodgren, Eric M Runesson and Björn Riese, 'Retten som konkurrensmedel' (2016/2017) 2 Juridisk Tidskrift 295.

5 Distinctions in approaches towards contract interpretation in the UK and the USA are classic examples – see Darius Palia and Robert E Scott, 'Ex Ante Choice of Jury Waiver Clauses in Mergers' (2015) 17 American Law and Economics Review 566, 571–572; Gregory Klass,

comparison. Academic work on contract interpretation progress rather independently in many of these jurisdictions without being engaged in comparative exercises. While some publications, especially with regard to laws that are frequently applied in international transactions are either originally written in English or translated into it,[6] those laws that are less exposed to global application in international transactions are addressed mostly in national languages.[7]

'Contract Law in the United States' in Jacques H Herbots and others (eds), *International Encyclopaedia Contracts* (2nd edn, Kluwer Law International 2012) 142–151; Edward Allan Farnsworth, *Contracts* (2nd edn, Little, Brown and Company 1990) 463–559; Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 108–124; Scottish Law Commission, 'Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses' (SCOT LAW COM No 252, SG/2018/34, March 2018) 94–97, available at <http://www.scotlawcom.gov.uk/files/1115/2222/5222/Report_on_Review_of_Contract_Law_ -_Formation_Interpretation_Remedies_for_Breach_and_Penalty_Clauses_Report_No_252.pdf> accessed 25 June 2021.

6 The White & Case and Queen Mary University survey in 2010 revealed the following to be among the most used substantive laws in international transactions: English law (40%), New York law (17%), Swiss law (8%), French law (6%) and US law where the respondents did not specify the state (5%), other laws as a residual category and including German, Australian and Californian (24%) – see White & Case and Queen Mary, University of London, '2010 International Arbitration Survey: Choices in International Arbitration' (2010) <http://www.arbitration.qmul.ac.uk/research/2010/> accessed 25 June 2021. On contract interpretation under English law, law of New York, Swiss law, French law, German law and Australian law in the English language see, for instance, Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press 2016) 80–95; Catherine Mitchell, *Interpretation of Contracts* (2nd edn, Routledge 2019); Lord Justice Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2017); John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart Publishing 2016) 202–210; Glen Banks and Judith S Kaye, *New York Contract Law: A Guide for Non-New York Attorneys* (New York State Bar Association 2015) 149–189; Eugen Bucher, 'Law of Contracts' in François Dessemontet and Tuğrul Ansay (eds), *Introduction to Swiss Law* (3rd edn, Kluwer Law International 2004) 112–115; Simon Whittaker, 'Contract, Contract Law and Contractual Principle' in John Cartwright and Simon Whittaker (eds), *The Code Napoléon Rewritten: French Contract Law after the 2016 Reforms* (Hart Publishing 2017) 29, 43–54; Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* (British Institute of International and Comparative Law 1993) 11–37; Basil S Markesinis and others, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 119–143; Lord Justice Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Thomson Reuters 2011).

7 For instance, contract law, more generally, and contract interpretation in particular, in countries such as Belarus, the Russian Federation or Ukraine remains unknown to a larger audience, with publications mostly in Russian, Belarussian and Ukrainian – see Василий Владимирович Витрянский и Михаил Исаакович Брагинский, *Договорное Право: Общие Положения,* Кн. 1 (3-е изд, Статут 2009) [Vasily Vladimirovich Vitryansky and Mikhail Isaakovich Braginsky, *Contract Law: General Provisions* (Book 1, 3rd edn, Statute 2009)]; Валерий Николаевич Годунов, 'Гражданско-правовой договор и сфера его применения' (2004) 9 Право в Современном белорусском обществе, 301–312 [Valery

The lack of translations of the regulation and works on contract interpretation in English as the *lingua franca* of modern academia leaves comparison for international scholars a complicated endeavour. Above all, the most important challenge lies not so much in the number of different laws, or the necessity of their translation, or accessibility of scholarship focused on national laws' regulation in the field of contract interpretation, but in the *rules* and *regulations* that are to be compared. Being inseparable from *legal reasoning and legal method*, contract interpretation cannot be understood meaningfully through static comparison of the existent rules and regulations. Only dynamic comparison of the law in operation would bring a proper understanding of contract interpretation. Such comparison requires a deep understanding of the operation of the legal rules in the jurisdiction in question. Despite all the complexities, it is still fair to say that comparative studies inform our understanding of how differently national laws approach contract interpretation.

To overcome the challenge pertaining to the object of comparison, some of these studies employ a *functional* method. Concentrating on how interpretative rules operate,[8] the method permits not only the addressing of the

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Nikolaevich Godunov, 'Civil Law Contract and the Sphere of its Application' (2004) 9 Law in the Modern Belarusian Society 301–312]; Олександр Васильович Дзера та інші, (ред.), *Науково-практичний коментар Цивільного кодексу України*, 1 т. (5-е вид., Юрінком Інтер 2013) 363–364 [Dzera O.V. and others (eds), *Scientific and Practical Commentary to the Civil Code of Ukraine* (5edn, 1 volume, Yurinkom Inter 2013, 301–312]; Наталья Вацлавовна Степанюк, *Толкование гражданско-правового договора: проблемы теории и практики* (НИЦ ИНФРА-М 2013) 25 [Natalia Vatslavovna Stepanyuk, *Interpretation of Civil Contracts: Problems of Theory and Practice* (Scientific-Research Center INFRA-M 2013) 25]. At the same time, one has to acknowledge some academic initiatives to enhance the information on the contract laws of various states in English. One of the most complete book projects currently covers 46 jurisdictions in national monographs – see Jacques H Herbots (ed), *International Encyclopaedia for Contracts* (Wolters Kluwer) <www.kluwerlawonline.com/toc.php?pubcode=CONT> accessed 25 June 2021.

8 The Cornell project of Professor Schlesinger and Sacco's theory of legal formants shaped the functional method. On Schlesinger's approach to comparison, see Rudolf Schlesinger, 'The Common Core of Legal Systems – And Emerging Subject of Comparative Studies' in Kurt H Nadelmann, Arthur T von Mehren and John N Hazard (eds), *Legal Essays in Honor of Hessel E. Yntema* (A. W. Sijthoff 1961) 65. On Sacco's theory of legal formants, see Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law' (1991) 39 American Journal of Comparative Law 1, 34. The functional method, as applied by R. Schlesinger, has influenced other comparatists. For instance, the project of the Common Core of European Private Law has expressly acknowledged Schlesinger's method as *'the cultural heritage of anyone who claims to engage in comparative law'* and as *'the cultural DNA'* of each participant in the project – see the official page for the Common Core of European Private Law – Mauro Bussani and Ugo Mattei, 'Common Core of European Private Law' <http://www.jus.unitn.it/dsg/common-core/approach.html#3> accessed 25 June 2021. For a comprehensive observation on functional method(s) in comparative law, including existing

apparent differences in contract interpretation, but, importantly, tackling of *different interpretative* rules leading to the same results, because of the operation of other non-interpretative doctrines or, vice versa, to identifying the relevance of other non-interpretative doctrines that, in the presence of *similar interpretative rules*, lead to different results.[9] The core of the method represents observations and comparison of the application of legal rules to concrete situations described in neutral terms. An exclusion of legal terms in descriptions with a preference for a factual – and to the extent possible – non-legal description, contributes to the required neutrality and diminishes misunderstanding that follows from a different meaning attributed to the same or similar legal concepts under various laws. The studies informed by the method give a more nuanced and differentiated answer to a false assumption on the similarities of contract interpretation across laws or different legal systems because of the similarities of the results.[10] At the same time, the method is not blind

criticism, see Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 340–380.

9 The point may be illustrated by the example used by Giuditta Cordero-Moss on the transfer of activity between two doctors (medical firms), who failed to agree to anticompetitive provisions in their contract on activity swapping. The case not only demonstrates differences between the laws in addressing a gap in a contract (German and Norwegian laws), but also that the same results were obtained through different interpretative rules and doctrines (Italian and English law) – see Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 89, 93–98.

10 The works applying functional method elucidate numerous distinctions in areas that might create an illusion of uniform perception. For the examples of the different treatments of boilerplate clauses under various legal traditions, see Giuditta Corder-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011). At the same time, doctrinal writings, uninformed by a functional method, demonstrate a tendency for more ready assertion that a distinction in interpretative approaches between various national laws may be exaggerated – see, for instance, Jonas Rosengren, 'Contract Interpretation in International Arbitration' (2013) 30 Journal of International Arbitration 1–16. Similarly, claims on convergence between the interpretative approaches of various laws are more easily inferred by those who are not using a functional method. For instance, while acknowledging the differences between 'interpretative cultures' in general terms, Alexander Komarov seems to affirm convergence between various approaches: '*… at present, the development of law and practice in terms of the globalised world of international economic turnover indicates that the differences in principal approaches are now becoming less substantial than before*' – see Alexander Komarov, 'Contract Interpretation and Gap Filling from the Prospect of the UNIDROIT Principles' (2017) 22(1) Uniform Law Review 29, 30.

to a possible convergence or similarities in approaches between laws that are traditionally perceived as being distinct.[11]

If properly exercised, functional method is a demanding endeavour, as it anticipates the knowledgeable application of legal rules as practised in a particular country. Because of the difficulties, many scholars are satisfied with the dogmatic analysis that often focuses on various dichotomies that describe approaches to contract interpretation, such as the objective-subjective, textual-contextual, literal-broad approaches, etc.[12] Not many studies apply it, but those that do so reveal a lot.[13]

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11 See, for instance, Edward T Canuel, 'Comparing Exculpatory Clauses Under Anglo-American Law: Testing Total Legal Convergence' in Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011) 80–103.

12 For instance, Gerard McMeel and Hans Christoph Grigoleit, 'Interpretation of Contracts' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 341–372; Claus-Wilhelm Canaris and Hans Christoph Grigoleit, 'Interpretation of Contracts' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (3rd edn, Kluwer Law International 2004) 445–469; Jacques H Herbots, 'Interpretation of Contracts', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 325–347; James Spigelman, 'The Centrality of Contractual Interpretation: A Comparative Perspective' (2015) 81 Arbitration 234, 234–253; Stefan Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in Andrew Burrow and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2008) 128–152; Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: an Exercise in Comparative Legal Rhetoric' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 77–114; Alberto Luis Zuppi, 'The Parol Evidence Rule: a Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' (2007) 35 Georgia Journal of International and Comparative Law 233, 233–276; Blake D Morant, 'Contractual Interpretation in the Commercial Context' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspective* (Oxford University Press 2016) 248–271; Mark Van Hoecke, 'Deep Level Comparative Law' in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing 2004) 172–174 (the work of Mark Van Hoecke is somewhat specific, as the author does not aim to compare contract interpretation under various laws; Van Hoecke rather discusses the methodological and epistemological difficulties of comparative law, using the example of contract interpretation. Nevertheless, similarities and distinctions are spotted on a dogmatic level without the application of a functional method); Filippo Viglione, 'Good Faith and Reasonableness in Contract Interpretation: A Comparative Perspective' (2009) 20 European Business Law Review 835, 835–850; Laurent Lévy and Fabrice Robert-Tissot, 'L'interprétation arbitrale' (2013) 4 Revue de l'Arbitrage 861, 861–952.

13 The works that apply a functional method and cover a broad range of jurisdictions are mostly the results of large projects. For example, the book on good faith, edited by Reinhard Zimmermann and Simon Whittaker, appeared as a result of the project on the Common Core of European Private Law – see Reinhard Zimmermann and Simon

Having a primary objective to provide an analytical summary of the similarities and differences in contract interpretation across national laws, the chapter does not delve into the independent application of a functional method. Instead, it relies both on studies that were able, by applying a functional method, to animate and accentuate various similarities and distinctions in contract interpretation and those works that use other methods to investigate contract interpretation.[14]

The knowledge we possess now is primarily the result of two kinds of aspirations for comparative exercises: *comparison for comparison* and *comparison for harmonisation. Comparison for comparison* results in various publications on contract interpretation under national laws, some of which have already been mentioned above. *Comparison for harmonisation* ends up either with interstate or non-state unified instruments in the field of contract law, which boost comparative research in the course of the preparation of these instruments, and thereafter, following their appearance and, where relevant, application. Among the most influential interstate sources containing the uniform rules of contract interpretation, one can name the United Nations Convention on the Contracts on International Sales of Goods (CISG) and the EU regulation on unfair contract terms. While acknowledging the role of the parties' intent

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Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000); the book, referenced earlier, on boilerplate clauses under various laws, appeared as a result of the 'Anglo-American Contract Models and Norwegian and Other Civil Law Governing Laws' project, run by Giuditta Cordero-Moss at the University of Oslo from 2004 to 2010 – see Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011). Monographic works applying a functional method usually cover a limited number of jurisdictions. For instance, when investigating contract interpretation and gap filling, Nikole Kornet chose German, Dutch and English law – see Nikole Kornet, *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (Intersentia 2006); Giuditta Cordero-Moss rather exceptionally covers Norwegian, German, Italian, and English law, and various transnational and international instruments – see Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 88–104. It is also important to note that functional method does not exclude other methods and approaches, for instance, law & economics (see Nikole Kornet), or dogmatic analysis (book projects of Reinhard Zimmermann and Simon Whittaker on good faith, and of Giuditta Cordero-Moss on boilerplate clauses).

14 Scholarship relying on the dogmatic method has already been identified. The historical method may be evidenced by the work of Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996). The empirical method is well-represented, for instance, in Uri Benoliel, 'The Interpretation of Commercial Contracts: An Empirical Study' (2017) 69 Alabama Law Review 469.

for contract interpretation in Article 8, the CISG emphasises the necessity for objective analysis.[15] The success of the CISG largely inspired subsequent initiatives on the harmonisation of contract rules and further work on contract interpretation in the UNIDROIT Principles of International Commercial Contracts (UPICC),[16] the Principle of European Contract Law (PECL),[17] the Draft Common Frame of Reference (DCFR),[18] and the draft Common European Sale Law (CESL).[19] The Directive on Unfair Terms in Consumer Contracts, in turn introduced an interpretative presumption in favour of consumers.[20] The presumption not only reflects the point of agreement for EU members but also for a growing number of other states.[21]

If comparative studies have informed and facilitated harmonising efforts, the harmonising efforts, in turn, have substantially enhanced the rise and quality of further comparative research for contract interpretation. The legal

15 Article 8 of the CISG is discussed in more detail, from the perspective of the uniform private law convention, in the next chapter. See also, Alberto Zuppi 'Article 8' in Stefan Kröll, Loukas A Mistelis and Pilar Rerales Viscasillas, *UN Convention on Contracts for the International Sale of Goods* (*CISG*)*: Commentary* (C.H. Beck/Hart/Nomos 2011) 142–153.

16 Chapter 4 of the PIICL on contract interpretation has not sustained changes in all editions in 1994, 2004, 2010 and 2016 – see UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts 2016' (2016) <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/> accessed 26 September 2021; UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts 2010' (2010) <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/> accessed 26 September 2021; UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts 2004' (2004) <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2004-English-i.pdf> accessed 26 September 2021; UNIDROIT, 'UNIDROIT Principles of International Commercial Contracts 1994' (1994) <www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994> accessed 25 June 2021.

17 Article 5:101–5:107 of the PECL – see Commission on European Contract Law, *Principles of European Contract Law: Parts I and II* (Kluwer Law International 2000).

18 Chapter 8 of the DCFR – see Study Group on a European Civil Code and Research Group on EC Private Law, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (*DCFR*) (Sellier European Law Publishers 2009) 216–218.

19 Chapter 6 of the CESL – see European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' (COM(2001) 635 final, 2011/0284 (COD), 11 October 2011) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN> accessed 25 June 2021.

20 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts [1993] OJ L95/29 provides in recitals that: '*the consumer should actually be given an opportunity to examine all the terms and, if in doubt, the interpretation most favourable to the consumer should prevail*'. See also Christian Twigg-Flesner, *The Europeanisation of Contract Law: Current Controversies in Law* (2nd edn, Routledge 2013) 52–116.

21 For instance, Article 18 of the Law of Ukraine 'On Protection of Consumers Rights' of 1991 with amendments.

science has benefited enormously from the self-refection of this comparative twist. The harmonised instruments' practical success has not played a decisive role in the growth of this scholarly interest: their mere existence has triggered attention.[22] Scholars have started to compare the harmonised international and transnational sources with national laws and investigate their relationship. While demonstrating an aspiration for uniformity and neutrality,[23] the harmonised sources showed how much they were affected by a particular national legal tradition.[24] The resulting studies have affirmed a predominant approach to contract interpretation as a legal question and not merely as a question of facts.[25] They have revealed a great deal about the diversity of the doctrines relevant to contract interpretation across various legal traditions

22 For instance, the CISG currently has 94 contracting parties (UNCITRAL, 'Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/> accessed 26 September 2021, whereas the PECL and the DCFR remained academic initiatives.

23 Stefan Vogenauer, 'General Principles' of Contract Law in Transnational Instruments' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing 2014) 291–318.

24 Giuditta Cordero-Moss, for instance, makes a (delicate) observation on the influence of Romanistic legal tradition in the UPICC and Nordic tradition in the PECL: '*The transnational restatements follow the Civil Law tradition in this context* (*and so does the CISG, but only to a limited extent*). *It might be tempting to notice an interesting symmetry: While the PECL, where the works have been led by a Nordic professor, have an approach that is close to the Germanic-Nordic tradition, the UNIDROIT Principles, where the works were led by an Italian professor, have an approach that is close to the Romanistic tradition. However, in view of the truly international composition, attitude and research that characterised both restatements, it seems unlikely that the legal background of the respective chairmen might have played such an important role*' – see Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 100–101.

25 For the UPICC, see, for instance, clarification of Stefan Vogenauer who explains: '*Questions on contractual interpretation are therefore questions of law and not questions of fact. In this respect, the PICC* [*the UPICC*] *differ from some domestic contract laws, such as French law, or as far as oral contracts are concerned, English law. The effects of this classification depend on the procedural rules of the forum. For example, questions of law are typically open to review at the appellate level whilst questions of fact are not, questions of law may be for the judge rather than for the jury, etc.*' – Stefan Vogenauer, '4: Interpretation' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (2nd edn, Oxford University Press 2015) 497. On the factual approach to contract interpretation primarily because of the peculiarities of the organisation of justice in France and the USA, see further in the texts of this chapter; see also Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 37–39, 108–124.

and the overall sensitivity of contract interpretation for a national legal tradition.[26]

Interestingly enough, the comparison of contract interpretation in national and transnational instruments spans not only academia, but also politics. A discussion of the DCFR in the House of Lords, in the UK, is illustrative in this regard. In 2008, Stefan Vogenauer, who was Professor of Comparative Law at the University of Oxford at that time, was asked to prepare a memorandum on a number of issues relating to the DCFR and to appear as a witness for testimony before the House of Lords. In the memorandum, he stressed various areas of distinctions between the DCFR and English contract law, particularly emphasising the broad scope of the principle of good faith and fair dealing contained in the DCFR. Over the course of questioning, when asked to give examples of the *practical nature* of the differences between the DCFR and English law, Vogenauer chose to comment on contract interpretation:

> If we look at more practical issues, and I would like to come to deeper issues later because they may be more significant in the long run, a very practical issue that arises quite often in the interpretation of contracts is that English law does not allow recourse to the preliminary negotiations, they are not to be used as an aid to the interpretation of contracts. Although much has changed in the law of contractual interpretation over the last ten or 15 years, as Lord Steyn once said that is a sacred cow of English contract law. The Draft Common Frame of Reference would admit those statements as aids to interpretation, which might lead to a very different outcome in a particular case.[27]

The final report of the House of Lords referred to differences mentioned by Stefan Vogenauer as a demonstration of the civilian approach that may undermine certainty, and result in what was referred to as '*often inconclusive*

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26 For contemporaneous comparison of the DCFR with EC contract law see Reiner Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, Sellier European Law Publishers 2009). For comparison of the CESL with German and English contract law see Gerard McMeel and Hans Christoph Grigoleit, 'Interpretation of Contracts' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 341–372.

27 'European Contract Law: the Draft Common Frame of Reference – European Union Committee Contents, Examination of Witness Professor Stefan Vogenauer' (26 November 2008) <https://publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/8112603.htm> accessed 25 June 2021.

investigation of pre-contractual discussions and subjective intentions'.[28] Similar debates at various venues can be found in relation to other suggested instruments, including the latest CESL initiative.[29]

A further awareness of the differences in the regulation of contract interpretation under various national laws emerges from scholarship focused on the noticeable practice in international commercial arbitration where arbitral tribunals interpret contracts simply from the perspectives of reasonableness and business sense and with entire disengagement from applicable national law. This interpretative approach has been increasingly criticised by various scholars, including Joshua Karton, Giuditta Cordero-Moss and Gary Born, to name a few. Karton illustrated the widespread misconception about the capacity of international arbitration to disengage contract interpretation from applicable national law by providing a thorough overview of various publications supporting, negating or diminishing the role of national law in contract interpretation.[30] Cordero-Moss developed an argument in support of national law

28 'European Contract Law: the Draft Common Frame of Reference – European Union Committee Contents, Chapter 3: The Draft CFR' (2009) <https://publications.parliament.uk/pa/ld200809/ldselect/ldeucom/95/9506.htm#a7> accessed 25 June 2021.

29 In 2012, the Bar Council of England & Wales issued its response to the UK government's call for evidence on the Common European Sales Law in which it criticised the Commission's October 2011 proposal calling additional principles of contract interpretation 'broad and vague'. The Bar Council also warned of the possible educational burden and costs as such principles are unfamiliar to lawyers and judges in some Member States. See Bar Council of England and Wales, 'Bar Council of England & Wales response to UK Government call for evidence on the Common European Sales Law' (May 2012) <www.barcouncil.org.uk/media/159762/barcouncilof_england___wales__response_to_moj__bis_call_on_cesl__may2012final.pdf> accessed 3 May 2018. See also a discussion of the CESL in the parliaments of Germany and the UK – European Parliament Committee on Legal Affairs, 'Notice to Members: Reasoned Opinion by the Bundestag of the Federal Republic of Germany on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' (COM(2011)0635, 2011/0284(COD), 16 December 2011) <www.europarl.europa.eu/RegData/commissions/juri/communication/2011/478528/JURI_CM(2011)478528_EN.pdf> accessed 25 June 2021.

30 Karton's overview includes the astonishingly straightforward assertion of the ICC in 2014, which suggested that: '*Arbitrators are not beholden to national legal systems. They enjoy greater freedom than state courts when engaging in contractual interpretation.*' Karton also refers to publications of well-known scholars and arbitrators (including Julian Lew, Karl-Heinz Böckstiegel, Derains and others), in addition to the result of interviews conducted with 20 active arbitrators and an overview of 73 arbitral awards – see Joshua Karton, 'The Arbitral Role in Contractual Interpretation' (2015) 6 Journal of International Dispute Settlement 4, 4–41. The sources cited by Karton may be viewed as variations of a large theme that evolves in parallel to scholarly writings and emphasises the transformation of international arbitration from occasional private justice in individual cases to legitimised private justice exercised by the arbitration community – see, for instance,

for contract interpretation from various angles, including the limits of party autonomy in international commercial arbitration,[31] the impossibility to fully disengage international contracts from applicable governing law,[32] the continuous importance of conflict of laws rules for international commercial arbitration,[33] substantial distinctions in approaches towards contract interpretation under various national laws,[34] the limitations of the transnational sources

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Dolores Bentolia, *Arbitrators as Lawmakers* (International Arbitration Law Library Series Volume 43, Kluwer Law International 2017) 145–194, including fn 808–814 in the book. While the idea of the transformed character of international commercial arbitration, resulting in the emerged community of international arbitrators, may be persuasive in general terms, it is still vulnerable in the face of the normative criticism that emphasises a positivist account of national law as an unavoidable legal source. Precisely for this failure of not developing a normative claim on the autonomy of international arbitration, Stavros Brekoulakis criticises the scholarship on international arbitration – see Stavros L Brekoulakis, 'International Arbitration Scholarship and the Concept of Arbitration Law' (2013) 36 (4) Fordham International Law Journal 745, 745–787.

31 Giuditta Cordero-Moss, 'Limitations on Party Autonomy in International Commercial Arbitration' (2014) 372 Recueil des Cours de l'Académie de Droit International 133–326. While the title of the monograph emphasises the limits of party autonomy, the underlined idea revolves around the deep and more subtle question of contract interpretation in international commercial arbitration. The monograph may be also viewed as a summary of the arguments on the significance of the role of national law for contract interpretation.

32 Giuditta Cordero-Moss, 'Does the Use of Common Law Contract Models Give Rise to Tacit Choice of Law or to a Harmonised, Transnational Interpretation?' in Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011) 37 – 61; Giuditta Cordero-Moss, 'Conclusion: the Self-sufficient Contract, Uniformly Interpreted on the Basis of Its Own Terms: an Illusion, but not Fully Useless' in Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011) 344 – 373; Giuditta Cordero-Moss, 'International Arbitration Is not Only International' in Giuditta Cordero-Moss (ed), *International Commercial Arbitration* (Cambridge University Press 2013) 7 – 39; Giuditta Cordero-Moss, 'International Arbitration and Commercial Contract Interpretation: Contract Wording, Common Law, Civil Law and Transnational Law' in Göran Millqvist and others (eds), *Essays in Honour of Michael Bogdan* (Juristförlaget 2013) 33 – 57; Giuditta Cordero-Moss, 'Interpretation of Contracts in International Commercial Arbitration: Diversity on More than One Level' (2014) 22 European Review of Private Law art. 3, 13–36.

33 Giuditta Cordero-Moss, 'International Arbitration and the Quest for the Applicable Law' (2008) 8 Global Jurist 1, 1–42.

34 Giuditta Cordero-Moss, 'The Importance of Legal Culture for Contract Construction: Norwegian Law, English Law and International Arbitration' (2017) 10(1) New York Dispute Resolution Lawyer 39, 39–41; Giuditta Cordero-Moss, 'Some Observations on the Significance of Local Law for Energy Contracts – the Example of Norwegian Law' (2017) 2(1) European Investment Law and Arbitration Review 258, 258–276; Giuditta

as applicable rules[35] and the hidden influences of national law traditions on contract interpretation.[36] Gary Born methodologically elucidates the various areas in which substantive applicable law matters, including contract interpretation.[37] Scholarship focused on investment treaty arbitration stands apart from this discourse and this work aims to fill the gap.

Another increasingly noticeable development in international arbitration (which is still in its infancy) can enhance our awareness of the role of the proper law for contract interpretation. Studies of unconscious or implied biases in international commercial arbitration may reveal how national legal traditions can form certain unexpressed expectations among arbitrators in respect to contract interpretation.[38] This is another extreme, which, instead of disengaging the contract from any applicable national law, subjects it to the hidden application of another law. Biases informed by national law traditions may lead arbitrators, for instance, to expect the submission of contextual evidence relating to pre-contractual negotiations or post-contractual conduct, in which the contract is governed by English law, under which such evidence is forbidden. Conversely, an arbitrator from a common law tradition may be more prepared/inclined to disregard contextual evidence as irrelevant, when the contract is in fact governed by Ukrainian law, which enables contextual evidence to be considered. To date, no thorough investigation has been conducted in this field. The literature available consists either of anecdotal descriptions[39] or

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Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 1–194.

35 Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014).

36 Giuditta Cordero-Moss, 'Non-national Sources in International Commercial Arbitration and the Hidden Influence by National Traditions' in (2017) 63 *Scandinavian Studies in Law* 23, 23–43.

37 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1317–1403, 2614–2778.

38 Stavros L Brekoulakis conceptualises implicit biases, as opposed to apparent biases, relating to the personal or financial interests of an arbitrator. According to Brekoulakis, implicit biases originate from the '*values and cognition of arbitrators, as well as the culture embedded in international arbitration*' – see Stavros L Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (International Arbitration Law Library Series Volume 40, Kluwer Law International 2017) 346–349.

39 William W. Park, for instance, describes the biases of the counsel who failed to address post-contractual conduct in aid of contract interpretation that was subjected to New York law primarily because of their background in English law. The tribunal directed the parties to the possibility of presenting evidence on post-contractual conduct – see William W Park, 'Rules and Reliability: How Arbitrators Decide' in Tony Cole (ed), *The Roles of*

of calls for greater multidisciplinary research.[40] It is, however, clear that with both examples being either about the non-application of any national law to contract interpretation or a hidden reliance on a law which has been erroneously subconsciously applied, the result may deviate from what the proper law of the contract ensures. In both situations, the results would also differ from what the parties legitimately expect when they choose the law applicable to the contract or what can be reasonably expected because of the applicable conflict of laws provisions, if the parties fail to agree on the applicable law.

Even though as a result of *comparison for comparison*, *comparison for harmonisation* and research on international arbitration, we know substantially more about contract interpretation from a comparative perspective, the proposition as to the lack of comprehensive comparative coverage of all laws still remains valid. Not having an ambition to fill the existent gap in the knowledge on the precise distinctions among various national laws on contract interpretation in this work, it would suffice at this stage to refer to some fundamental findings spotting important differences by way of illustration. We currently understand that not only interpretative approaches as such may differ, but it may well be that various jurisdictions have somewhat different perspectives on other relevant aspects, including, for instance, sources by which contract interpretation is regulated, the role of an interpreter impacting what is ultimately perceived

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Psychology in International Arbitration (International Arbitration Law Library Series Volume 40, Kluwer Law International 2017) 12–13.

40 Giuditta Cordero-Moss discusses the desirability of the multidisciplinary method in addressing unconscious psychological influences of the legal culture on contract interpretation, indicating the relevant disciplines that could contribute to this, and formulating a research question for such studies – '*to what extent the construction of a contract or application of the transnational law is influenced by the interpreter's legal culture*' – see Giuditta Cordero-Moss, 'Non-national Sources in International Commercial Arbitration and the Hidden Influence by National Traditions' (2016) 63 Scandinavian Studies in Law 23, 41. Having overviewed the studies on arbitral decision-making, Stavros L Brekoulakis criticises the limits of the *behavioural* and *attitudinal* approaches and calls for a multi-methodological institutional study, with the following suggestion: '*whether, for example, certain values and ideology are embedded into international arbitration, which implicitly inform the judicial attitude of the individuals acting as arbitrators; whether international arbitration over time has developed informal processes that implicitly shape the legal concepts of those involved in the practice and teaching or arbitration; whether there are mechanisms in place that ensure that any individual who aspires to enter the world of international arbitration, espouses certain legal values and ideological assumptions that conserve the status quo of international arbitration*' – see Stavros L Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' in Tony Cole (ed), *The Roles of Psychology in International Arbitration* (International Arbitration Law Library Series Volume 40, Kluwer Law International 2017) 371.

as contract interpretation, the grounds triggering/necessitating contract interpretation, the priority order of application of certain interpretative rules and canons of interpretation, or evidentiary matters pertaining to contract interpretation, etc. Below is an overview of the most significant and ascertainable similarities and distinctions.

2.2 The Concept of Contract Interpretation

One typically understands the concept of contract interpretation as a type of legal interpretation aiming at ascertaining the parties' *joint intent*. The focus on intent naturally follows from the object of interpretation – a contract. By entering into the contract, parties agree to assume mutual *individualised* undertakings. To give effect to these undertakings, an interpreter (a judge or an arbitrator) has to find out what the parties meant, i.e. their joint intent. Implicitly[41] or explicitly,[42] the focus on intent appears central to contract interpretation and distinguishes this type of legal interpretation from statutory interpretation.[43]

Further, following the mainstream of philosophical hermeneutics that argues that language is inherently ambiguous and that every text requires interpretation, it has become more readily acceptable nowadays that a conclusion that a contractual provision is *clear* also represents an act of interpretation.[44] To understand the development, one may start with Roman law. In early Roman law, the maxima attributed to Paulus *cum in verbis ambiguitas est, non debet admitti voluntatis quaestio* suggested that only ambiguous words required investigation of the parties' will. With time, when Roman contract law moved to become less formalist, the maxima was reversed, whereas in medieval and Renaissance times, lawyers again accepted that clear words excluded

41 The fact that some laws, like the law of England and Wales, prioritise textual or literal interpretation does not mean that parties' joint intent is not considered. See, Catherine Mitchell, *Interpretation of Contracts: Current Controversies in Law* (Routledge 2007) 32–33.

42 Article 431 of the Civil Code of the Russian Federation, Article 447 (1) of the Civil Code of Armenia, Article 401 of the Civil Code of Byelorussia and Article 392 (1) of the Civil Code of Kazakhstan stipulate that the joint intent of the parties has to be considered if the literal meaning does not enable the clarification of the content of the contractual provisions.

43 For a detailed discussion on the peculiarities of statutory interpretation, see Stefan Vogenauer, 'Statutory Interpretation' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 677–687.

44 See, for instance, Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 11–14, 54–60.

the investigation of the parties' will.[45] Nowadays a heritage of Roman law – the provision on *les clauses claires et précises* under French law and the principle of *in claris non fit interpretatio* under Italian law – instead of excluding contract interpretation of clear provisions *as such*, should rather be understood as reflecting an initial stage in contract interpretation. In France, regulation of clear contractual clauses plays a specific role that ensures control by higher courts over interpretation, which is otherwise excluded.[46] In Italy, the principle has received a more distinct feature as a canon of interpretation, bringing Italian law closer to English law in the approach to contract interpretation.[47]

What really divides jurisdictions in their understanding of contract interpretation as a *concept*, is the role of an interpreter vis-à-vis contractual text. Some jurisdictions may accept, relatively readily, that an interpreter goes beyond the text of a contract,[48] while others may not.[49] The differences essentially reflect the acceptable *frontiers* for contract interpretation for each jurisdiction, or in other words distinguishes contract interpretation from other borderline analytical efforts in relation to contracts.

By way of example, the laws belonging to the civil law tradition indeed frequently differentiate between simple, or genuine, interpretation, on the one

45 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996) 621–650 (Zimmermann draws connection between the Paulus maxima and objective preferences in German law and 'plain meaning' rule in English law); Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge University Press 1992) 89–90.

46 For contract interpretation under French law, see Jan M Smits, *Contract Law: A Comparative Introduction* (2nd edn, Edward Elgar Publishing 2017); Marcel Fontaine and Filip de Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 108, Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 37–39; see also the discussion on procedural peculiarities associated with treatment of contract interpretation as a question of fact in France in Chapter 4 of this work.

47 For contract interpretation under Italian law, see Giuditta Cordero Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith' (2007) 7(1) Global Jurist art. 3, 17; Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 41–43.

48 For example, in German, Portuguese, French, Austrian and Belgian laws – see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (Kluwer Law International 2000) 305; Axel-Volkmar Jaeger and Götz-Sebastian Hök, *FIDIC – A Guide for Practitioners* (Springer 2010) 173; Danny Busch and others (eds), *The Principles of European Contract Law and Dutch Law: A Commentary* (Kluwer Law International 2002) 241.

49 For example, English and Irish law – see Ole Lando and Hugh Beale (eds), *Principles of European Contract Law* (Kluwer Law International 2000) 305.

hand, and more qualified types of contract interpretation. Interpretative construction or supplementary interpretation in these jurisdictions may refer to a variety of distinct exercises, all of which are part of contract interpretation. An interpreter may be authorised to supplement those terms which parties fail to agree on and that can be implied from the relevant express statutory regulation. An interpreter may also be engaged in a more intense interpretative effort that is not exclusively based on supplementation on the basis of statutory regulation. Furthermore, though with more caution and rather exceptionally, certain civil laws may be more inclined to include the construction of omitted terms in an interpretative exercise and authorise corrective interpretation, which would downplay certain contractual terms.

Unlike civil law tradition, it is more difficult for the laws belonging to the common law tradition to accept that an interpreter can go beyond the text of a contract.[50] On a conceptual level, common law tradition differentiates more firmly between genuine interpretation as hermeneutic understanding of the contractual terms and the construction and supplementation of terms as distinct (*non-interpretative*) analytical exercises. For instance, if the text of a contract does not suffice, a functional equivalent to the qualified interpretation – a doctrine of implied terms – may be relied upon to respond to unnecessary formalism.[51] Leading to a similar result as a qualified contract interpretation, the doctrine nevertheless is conceptually distinct from contract interpretation.

50 For a comparison of a broad concept of contract interpretation under Norwegian law and a narrower concept of contract interpretation under English law, see Alf Petter Høgberg, 'Avtaletolkning – om forutberegnelighet og rimelighet i nordisk tradisjon' in Mads Bryde Andersen and others (eds), *Aftaleloven 100 år. Baggrund, status, udfordinger, fremtid* (DJØF Publishing Copenhagen 2015) 160–161; on the distinctions between interpretation and construction in the USA, see Gregory Klass, 'Interpretation and Construction in Contract Law' (2018) Georgetown Law Faculty Publications and Other Works 1, 1–48; Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 108–109.

51 Save for some exceptions, the common law tradition keeps the doctrine of implied terms conceptually distinct from contract interpretation. The doctrine of implied terms emerged from statutory supplementation in sales contracts and developed further to such sources of implication as trade usages, customs and factual circumstances surrounding a contract. By justifying implication or supplementation of the terms, common law courts may introduce considerations of intent into reasoning, but it does not necessarily reflect the activity as being contract interpretation. For scholarship addressing various aspects of the doctrine of implied terms under English law, see Richard Austen-Baker, *Implied Terms in English Contract Law* (2nd edn, Edward Elgar Publishing 2017) 3–4, 76–95, 136–170; Gerard McMeel, *Construction of Contracts: Interpretation, Implication, and Rectification* (3rd edn, Oxford University Press 2017); Nicole Kornet, *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives* (Intersentia Publishers 2006) 247–255; T T Arvind, *Contract Law* (Oxford University Press 2017) 223–225; Richard Stone and

Overall, one has to conclude by saying that conceptually viewed contract interpretation is not identical across jurisdictions. The mere focus on the parties' intent does not render the concept aligned across jurisdictions. While the distinctions between interpretative and non-interpretative analytical exercises are not always clear-cut, even for those jurisdictions that tend to maintain the distinction,[52] they suffice to warn against bare assumptions on the similarities in the *role* of an interpreter across jurisdictions.

2.3 Regulation

Jurisdictions differ as to the availability of the statutory precepts of *interpretative rules*[53] relevant to contract interpretation. Civil law countries traditionally carry out statutory regulation of contract interpretation.[54] Common

James Devenney, *The Modern Law of Contract* (12 edn, Routledge 2017) 214; Catherine Mitchell, *Interpretation of Contracts* (1st edn, Routledge 2007) 23–26; Lord Hoffmann 'The Intolerable Wrestle with Words and Meanings' (1997) 114 South African Law Journal 656; Lord Justice Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2017) 282–285; John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart Publishing 2016) 210–217.

52 Supplying an omitted term under Section 204 of the American Restatement (Second) may not always be easy to distinguish from contract interpretation – Robert Braucher, 'Interpretation and Legal Effect in the Second Restatement of Contracts' (Symposium on the Restatement (2d) of Contracts) (1981) 81 (1) Columbia Law Review 13, 15. Commenting on Article 4.8 of the UPICC, Stefan Vogenauer, for instance, observes distinctions under national law and concludes on the impossibility to draw a '*bright line*' between interpretation, supplementation and implication of contractual terms – Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2nd edn, Oxford University Press 2015) 534.

53 For the specific nature and importance of interpretative rules, see Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 47–49.

54 For instance, Article 1198 of the Civil Code of Argentina and Article 218 of the Commercial Code of Argentina, Section 914–915 of the General Civil Code of Austria, Article 1156–1164 of the Civil Code of Belgium, Article 20 of the Law of Obligations and Contracts of Bulgaria, Article 125 of the Chinese Law on Contracts, Articles 1188–1192 of the Civil Code of France, Sections 133 and 157 of the German BGB, Articles 173 and 200 of the Greek Civil Code, Articles 1362–1371 of the Italian Civil Code, Articles 6.193–6.195 of the Civil Code of Lithuania, Articles 1266–1269 of the Civil Code of Romania, Article 1281–89 of the Civil Code of Spain, Article of 637 of the Civil Code of Ukraine, etc. It may be interesting to learn that during Soviet times, the civil codes of the Soviet republics did not contain express regulation of contract interpretation. With the commercialised relationships, it was felt necessary for the new civil codes of the post-Soviet republics to expressly address contract interpretation in order to guide judges over contract interpretation – see

law countries traditionally develop contract interpretation via judicial precedents.[55] The divide between statutory regulation and judicial guidance for contract interpretation does not necessarily follow a classical divide between sources of legal rules in common and civil law traditions. Due to its nature pertaining to legal reasoning, contract interpretation turns to a fruitful and quite natural field for judicial clarifications, even for civil law tradition. Some civil law countries even demonstrate what can be externally perceived as a radical decision, completely reversing them from the statutory regulation of contract interpretation to judicial guidance.[56] Others, while retaining statutory regulation of contract interpretation, experience an increase in the role of judicial clarifications in the field of contract interpretation.[57]

Article 401 of the Civil Code of the Byelorussia, Article 431 of the Civil Code of the Russian Federation and Articles 213 and 613 of the Civil Code of Ukraine.

55 For English law on contract interpretation, for instance, the following precedents are of note: *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 (HL); *Rainy Sky SA and others v. Kookim Bank* [2011] UKSC 50, [2011] 1 WLR 2900, [2010] EWCA Civ 582, [2011] 1 Lloyd's Rep 233; *BMA Special Opportunity Hub Fund Ltd and others v. African Minerals Finance Ltd* [2013] EWSA Civ 416. For a discussion of these and other precedents in the field of contract interpretation, see also Catherine Mitchell, *Interpretation of Contracts* (2nd edn, Routledge 2019).

56 The Netherlands, for instance, while adopting the new Civil Code in 1992 chose not to include what were earlier express statutory provisions on contract interpretation of the old Civil Code. The rationale behind the decision underlined the necessity to retain flexibility in interpretative approaches through judicial guidance that was significant already prior to the adoption of the new Civil Code. The *Haviltex* case from the pre-reform period is still considered influential. In this case, the Dutch Supreme Court emphasised the necessity to establish the parties' intent and decided to go beyond the visibility of clear contract language – see *Ermes v. Haviltex*, HR 13 March 1981, *NJ* 1981, 635; Sanne Taekema, Anni de Roo and Carinne Elion-Valter (eds), *Understanding Dutch Law* (Eleven International Publishing 2011) 265–267; Jacques H Herbots, 'Interpretation of Contracts' Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 332; Mark Wissink, 'Legal Certainty and the Construction of Contracts in Dutch Law' in Alex Geert Castermans and others (eds), *Foreseen and Unforeseen Circumstances* (Kluwer Law International 2012) 41–55.

57 For instance, in Ukraine, Articles 213 and 637 of Civil Code of Ukraine establish the basic statutory requirements for the interpretation of contracts and the procedures which should be followed. At the same time, much of the clarification comes from judicial practice. On 6 November 2009, the Plenum of the Supreme Court of Ukraine adopted Regulation No 9 specifying that courts may interpret contracts only in adversary proceedings, at the request of a party or parties or their successors. The High Commercial Court of Ukraine also clarified in their decisions the grounds and purposes for interpreting contracts by the court, the prohibition of creating new contractual clauses as a result of interpretation, etc. – see Decision of the High Commercial Court of Ukraine, Case 920/696/16, 29 March 2017; Decision of the High Commercial Court of Ukraine, Case 910/4938/16, 12 December 2016; Decision of High Commercial Court of Ukraine, Case 15/070-12,

As contracts come into existence as a matter of national law and cannot operate in entire isolation from it, a broader set of substantive regulations, or background laws,[58] also influence contract interpretation, in addition to the *interpretative rules* evidenced by statutory precepts and judicial clarification. The law applicable to a contract does not merely define the limits of party autonomy; it represents a normative universe to which an interpreter commits (see Figure 3 on the next page). National law, thus relevant for contract interpretation, serves as a basis for the implication of contractual terms on the basis of specific statutory regulation, known to various extents both for civil and common law traditions. National law, thus relevant for contract interpretation, also sets deeper ties penetrating and growing through the entire contract, either because of the core of a contract and civil law regulation or because of specialised regulation relevant for a specific contract. As part of general contract law, the rules relate to fundamental principles of contract law, which, along with contract interpretation, inform various other borderline concepts of contract law, such as contract validity, termination, mistake, etc. As will be demonstrated by the example of good faith, even when these rules or principles are not framed as *interpretative* rules, they may nevertheless guide an interpreter in contract interpretation. As part of general specialised regulation, the relevant rules of national law may pertain to non-contractual fields of laws, such as competition law or to various specific fields of contracting, including public-private partnership, oil and gas, media, etc.

Either in statutory precepts or judicial clarifications, national law regulations affecting contract interpretation are not set in stone. The rules may evolve. Throughout the larger historical period, one may observe some of the most dramatic changes to contract interpretation. Giving rise to the European

16 July 2013. On18 April 2018, the Supreme Court, in its mandatory clarification for the lower courts, introduced the *contra proferentem* principle, which has to be applied as a last resort, both for those terms that were not individually negotiated and those that were included because of the dominant influence of one of the parties – see Decision of the Supreme Court, Case No 753/11000/14-11, 18 April 2018.

58 One may observe an increasing attention to the relevance of background law for contract interpretation in the scholarship. To what extent a background law may matter for contract interpretation also varies across jurisdictions. For a discussion of the relevance of background law in the Norwegian context, see Amund Bjøranger Tørum, *Interpretation of Commercial Contracts* (Universitetsforlaget 2019) 144–180; Ivar Alvik, 'Alminnelige kontraktsrettslige prinsipper og kontraktstyper i norsk rett' (2017) 52 (6) Jussens venner, 378–405; Inger Berg Ørstavik, 'Konkurranserettens betydning ved tolkning og utfylling av avtaler' (2016), Tidsskrift for rettsvitenskap, 372- 418; Alf Petter Høgberg, *Kontraktstolkning: særlig om tolkningsstiler ved fortolkning av skriftlige kontrakter* (Universitetsforslaget 2006) 164–167.

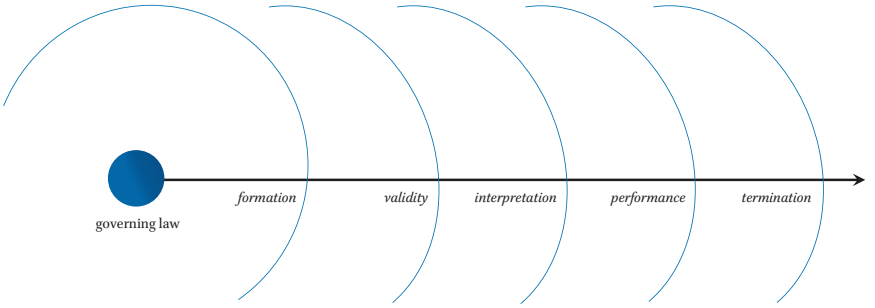


FIGURE 3 Effect of the governing national law upon a contract

contract law tradition over the centuries, contract interpretation in Roman law steadily moved from *verba* to *voluntatis*, i.e. from strict adherence to the words of a contract in the pre-classical period to obsession with subjective intent in post-classical jurisprudence. The maturity of contract interpretation reflected the changes in values and policies within society. When *verba* was in focus in contract interpretation, the underlined period demonstrated an adherence to strict and very formal rituals for any legal act. In Zimmermann's words, *'[t]he smallest mistake, a cough or stutter, the use of a wrong term invalidated the whole act'*.[59] Being surrounded by a formal set of protocols, the status of contracts were raised beyond ordinary life to legally significant acts. *Voluntatis*, for an interpreter, corresponded to an increased role of moral and Christian values in society that became the standard of assessment of human behaviour, including in contracting.[60] Investigating *verba* did not necessitate a sophisticated set of canons for interpretation or evidence. The task of an interpreter was quite straightforward in meticulously assessing compliance with all necessary rituals. The investigation of *voluntatis*, in turn, required the development of various canons of interpretation, which later, according to certain sources, amounted to no less than one hundred different interpretative rules.[61] Some of these canons of interpretation found their way into modern law and continue to be relied upon in modern jurisprudence. The role of evidence has also

59 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996) 622.

60 Ibid. 624.

61 In referring to more than one hundred interpretive rules, Zimmermann cites Hans Erich Troje, 'Ambiguitas Contra Stipulorem' (1961) 27 Studia et documenta historiae et juris 96, 105 – see fn 106 in Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996) 634.

significantly increased because interpreters attempted to go beyond parties' clarifications in an attempt to find a joint, subjective will.

In the modern world, jurisdictions continue to adjust their policies in contract law, directly or indirectly affecting contract interpretation. Given how mature modern contract laws have arguably become, through various specific means, changes in contract interpretation today are less dramatic and have less amplitude than those that Roman law manifests. Nevertheless, many of them are quite palpable. Upon more close and nuanced investigation, one may, for instance, observe developments evidencing a change from subjective to objective preferences in contract interpretation in Italy since the 1960s.[62] One can also observe some jurisdictions, such as Scotland, being one step away from clear statutory changes pertaining to contract interpretation, but ultimately choosing not to proceed with them.[63] Among the most observable, one notes a recognition of the necessity to protect consumers and weaker parties,[64] which relatively recently affected a broad range of jurisdictions and led

62 Luca G Radicati di Brozolo and Giacomo Marchisio, 'Trade Usages and Implied Terms in Italy' in Fabien Gelinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press 2016) 61.

63 In Scotland in 2011, the Law Commission performed a thorough investigation of contract interpretation suggesting to have statutory restatement expressing a clear support for a civil law approach to contract interpretation, particularly as evidenced by the DCFR – see The Scottish Law Commission, 'Review of Contract Law: Discussion Paper on Interpretation of Contract' (Discussion Paper No 147, February 2011) <www.scotlawcom.gov.uk/files/7412/9829/2343/dp147.pdf> accessed 25 June 2021. With Brexit, the reform plans aiming to make Scottish law closer to civil law traditions in the EU regarding contract interpretation will not go forward. In March 2018, the Scottish Law Commission observed in a Report that a much greater degree of consensus in the Scottish courts had emerged and that is why it refused to propose legislative reform or a statutory restatement of this matter – see Scottish Law Commission, 'Report on Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses' (SCOT LAW COM No 252, SG/2018/34, March 2018) 69–96, available at <http://www.scotlawcom.gov.uk/files/1115/2222/5222/Report_on_Review_of_Contract_Law_ -_Formation_Interpretation_Remedies_for_Breach_and_Penalty_Clauses_Report_No_252.pdf> accessed 25 June 2021.

64 Even though the level of intervention of state policy in between business parties' B2B contracts is more restrictive, certain differentiations can take place in relation to small or individual entrepreneurs who are not formally consumers but who may apparently be seen as a weaker party. Blake D Morant argues on more differentiation towards small business as unequal parties in the USA – Blake D Morant, 'Contractual Interpretation in the Commercial Context' in Larry A DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press 2016) 270–271.

either to the introduction or the actualisation of *contra proferentem* rules in various contexts.[65]

Finally, while national laws set down fundamental rules on this question to deprive judges and arbitrators of untrammelled freedom, the nature of contract interpretation and its close intertwinement with the assessment of evidence and various interpretative choices brings certain discretionary elements into interpretative analysis. In permitting contextual evidence, some laws of the civil law tradition suggest that contract interpretation is a sequential or hierarchical analysis that stops at certain stages, if it achieves an unambiguous answer.[66] Others leave the issue more to the adjudicators' discretion or have a

65 The idea of relying on *contra proferentem* has already gained widespread consensus in the EU at a regulatory level, with the protection of consumers. *Contra proferentem* has also been implemented by the UPICC and in the instruments attempting to harmonise European contract law more broadly than just in the field with consumers – the PECL, the DCFR and the CESL. In France, the amendments to the Civil Code introduced in Article 1190 a presumption of the interpretation against the creditor for the adhesion contract. Article 1190 reads in English as follows: *'In case of any doubts, a* [*mutual*] *agreement shall be interpreted against the creditor and in favour of the debtor, and an adhesion contract-against the party who offered it.'* In Ukraine, for instance, the *contra proferentem* rule was not made an express part of the statutory regulation of contract interpretation under Ukrainian law in Article 213 and, accordingly, was not seen in jurisprudence relating to contract interpretation. *Contra proferentem* has appeared only very recently with the Decision of the Supreme Court of Ukraine on 18 April 2018. Somewhat earlier, *contra proferentem* penetrated into Russian law similarly through judicial guidance. Article 431 of the Civil Code of the Russian Federation did not contain a specific provision relating to *contra proferentem.* The principle was incorporated after the clarification of the Presidium of the High Commercial Code of the Russian Federation in 2014. Para.11 of the Decree of the Plenum of the High Commercial Code of the Russian Federation of 14 March 2014 No. 16 'On Contract Freedom and Its Limits' – Постановление Пленума Высшего Арбитражного Суда Российской Федерации №16 'О свободе договора и ее пределах' (14 марта 2014) <http://base.garant.ru/70628260/> accessed 25 June 2021. On a comparative perspective of the *contra proferentem rule*, see Péter Cserne, 'Policy Considerations in Contract Interpretation: the Contra Proferentem Rule from a Comparative Law and Economics Perspective' (2007) 5 Hungarian Association for Law and Economics Working Paper 1 <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=16418DDB5B3905C5577040BF61DACE10?doi=10.1.1.624.5797&rep=rep1&type=pdf> accessed 25 June 2021.

66 In Ukraine, according to the clarification of the Supreme Court, contract interpretation under Ukrainian law is three-tiered. The first stage is reading the words with their ordinary natural meaning, and if this does not lead to clarity, the second stage suggests looking at the contract as a whole. If this does not provide a clear answer, a third stage permits one to look at the broader context; see Decision of Supreme Court (Ukraine), Case No 753/11000/14-ц, 18 April 2018. The three stages follow from the content of Article 213 of the Civil Code of Ukraine, though Article 213 does not expressly refer to stages.

somewhat blurred distinction.[67] Unless the distinctions are clearly identified in a relevant regulation and faithfully observed in practice, their separation in scholarly writings is of little practical implication. When the stages are clearly identified, their observance may result in notable differences.[68] Contextual evidence, for instance, may be permitted only if one discharges other attempts to ascertain the content of the contract, that in addition to a textual ascertaining, may require a reasonable construction of the third reasonable party.[69] Even stages for contract interpretation do not however convert contract interpretation into a precise algorithm. Certain stages may be set, some preferences may be emphasised, or specific content may be excluded (for instance, pre-contractual negotiations and post-contractual conduct), but ultimately it is always up to the interpreter to structure an analysis and choose the relevant tools.

2.4 Interpretative Approaches: Good Faith and Predictability

The fundamental and widely reiterated distinction between civil and common law, in respect to contract interpretation, lies in the values that are ensured

67 For instance, *contra proferentem*, clearly used in Ukraine only as a last resort, receives a somewhat blurred application in Norwegian law, where the principle is used together with the application of other techniques – see Ole Lando and others (eds), *Restatement of Nordic Contract Law* (DJØF Publishing 2016) 167–195.

68 Article 431 of the Civil Code of the Russian Federation, establishing the primacy of literal interpretation to the exclusion of contextual evidence, has been criticised recently precisely because of its stages. Some scholars have suggested introducing a rebuttable presumption of a literal reading contained in Article 431 – see Байрамкулов Алан, 'Толкование договора в российском и иностранном гражданском праве' (Диссертация, Институт законодательства и сравнительного правоведения при Правительстве Российской Федерации) 41–42. For other critical observations on the dominant literalism in the judicial application of Article 431 of the Civil Code of the Russian Federation, see Наталья Вацлавовна Степанюк, *Толкование гражданско-правового договора: проблемы теории и практики* (НИЦ ИНФРА-М 2013) 25 [Natalia Vatslavovna Stepanyuk, *Interpretation of Civil Contracts: Problems of Theory and Practice* (Scientific-Research Center INFRA-M 2013) 25].

69 The traditional approach to stages of contractual interpretation focus on the text first and then proceed to external sources and good faith and reasonableness, if applicable. Other authors rather idiosyncratically suggest a reverse interpretation hierarchy, starting from good faith and reasonableness and then moving on to the text. Social conceptions of contract law seem to dominate in this unconventional contractual interpretation sequence. In their view, this approach corresponds to the existing rules and doctrines of contractual interpretation, the parties' perception of their obligations under contracts and the social legitimisation of contractual values – see Eyal Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97 Columbia Law Review 1710, 1710–1803.

through interpretation. As discussed in the previous section, civil law traditionally emphasises a principle of good faith in contract interpretation, whereas common law emphasises predictability. Good faith implies that a contract has to be understood as having internal balance with reliability on the promises the parties have made. Ideas of reasonableness and fair dealing guide an interpreter in assessing and extracting the content of contractual provisions.[70] Certain omissions are, accordingly, construed by implying what the parties might have meant but failed to expressly put into a contract. In addition to the construction of the implied terms of the contract, the principle can move an interpreter further, to reconstruction. Here, on the conceptual borderline of interpretation, the principle of good faith may catalyse far-reaching consequences by filling in omitted terms, downplaying unfair terms and correcting other contractual imbalances. Predictability in common law tradition prioritises the parties' agreement as reflected by the text of a contract.[71] Driven by considerations of party autonomy and the sanctity of the contract, an interpreter has to accept that a contract properly and fully reflects the parties' undertakings. Any attempt to go beyond what the parties expressly agreed is not desirable under common law as it decreases the certainty of contracting.

Both principles are not necessarily mutually exclusive. On the one hand, the predictability of English contract law is frequently connected to fairness via certainty. On the other hand, adherence in the first place to what the parties agreed in the text of a contract may be viewed as a reflection of an interpretation exercised in good faith. The mutual exclusion of good faith and predictability, nevertheless, is not a phantom. It appears in marginal cases in which the application of one principle, at its critical capacity, excludes the results promoted by another. The most ascertainable examples of the collision between good faith and predictability emerge when good faith leads to the implication

70 Jacques H Herbots, 'Interpretation of Contracts', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 343–344; Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 86–125; Bruno Zeller, 'Good Faith – Is it a Contractual Obligation?' (2003) 15(2) Bond Law Review 215, 215–239; Hugh Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 237–238.

71 Justice Steyn, 'The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?' (1991) 6 The Denning Law Journal 131, 131–141; Jacques H Herbots, 'Interpretation of Contracts', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 330–331; Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 86, 95–96.

or supplementation of the terms or even trumps certain elements of the contractual text. It is precisely these marginal examples that civil lawyers praise for fairness and common lawyers criticise for unpredictability and uncertainty.[72]

The general distinction between the operation of good faith and predictability for contract interpretation does not exhaust all differences. Nor does it mean that each principle operates similarly in each jurisdiction in which they inform contract interpretation.

Regarding good faith in civil law tradition, it has a plurality of faces. While the Latin phrase *bona fide* may rightly be viewed as a common origin for good faith in European contract law, detailed studies demonstrate that the concept emerged and evolved individually in each state.[73] It is, accordingly, not surprising that good faith may appear under various other names and in various, often undistinguishable, combinations of concepts: '*reasonableness*',[74] '*loyalty and fair dealing*',[75] '*sincerity and faith*'[76] and '*fairness, good faith and*

72 For critics of good faith by common lawyers see 'Why English Law Governs Most International Commercial Contracts' (*QLTSchool*, 12 September 2016) <www.qlts.com/blog/english-law/why-english-law-governs-most-international-commercial-contracts> accessed 25 June 2021 (this article puts forward reasons why English law is most used for international business transactions). For an illustration of statements by civil lawyers in support of good faith see Catherine Valcke, 'Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009).

73 See the first four chapters in *Good Faith in European Contract Law* – Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 7–62; Martin Josef Schermaier, '*Bona Fides* in Roman Contract Law' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 63–92; James Gordley, 'Good Faith in Contract Law in the Medieval *Jus Commune*' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 93–117; Robert S Summers, 'The Conceptualisation of Good Faith in American Contract Law: A General Account' Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 118–144; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996) 622, 637.

74 Section 307 of the German Civil Code; Article 6:248 of the Dutch Civil Code (referring also to fairness); Article 2 of the Civil Code of Byelorussia (the principle of fairness and reasonableness of the participants of civil legal relations).

75 In Nordic laws – Ole Lando and others (eds), *Restatement of Nordic Contract Law* (DJØF Publishing 2016) 181–183.

76 In addition to the principle of reasonableness, the German Civil Code establishes the principle of '*Treu und Glauben*' in Section 242 as follows: '*An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.*'

reasonableness'.[77] Furthermore, good faith can sometimes be construed from the negative concept of *bad faith*.[78] The mentioned terms are not necessarily full equivalents and may have somewhat different meanings depending on the context. Good faith can receive express statutory categorisation in various combinations, as an overarching principle of contract law,[79] or as a more specific duty between the contracting parties during negotiations[80] and in the course of contract performance,[81] or directly as a criterion for interpretation.[82] Even if the relevant law of the civil law tradition does not formally list good faith as a criterion for interpretation, this does not necessarily impede its role for such interpretation. On the other hand, the express listing of good faith as a criterion for contract interpretation does not automatically ensure its primary operation in such interpretation. Certain laws may attribute to good faith a much narrower function than might otherwise be contemplated from its express statutory formulation as a standard or a criterion for contract interpretation.

Below are some examples demonstrating that good faith operates somewhat differently in relation to contract interpretation across civil law traditions.

77 Article 6 of the Civil Code of the Russian Federation; Article 3 of the Civil Code of Ukraine.

78 Article 1 of the Civil Code of the Russian Federation; Section 815 of the German Civil Code.

79 The Civil Code of Ukraine, for instance, in Article 3 considers good faith as one of the main principles of civil law: '*1. General foundations of the civil legislation include: 1*) *unacceptability of a self-willed intrusion into a private life of a human; 2*) *unacceptability of ownership deprivation except as established by the Constitution of Ukraine and the law; 3*) *freedom of agreement; 4*) *freedom of entrepreneurial activity; 5*) *judicial protectionof a civil right and interest; and 6*) *equity, good faith and reasonability'*. See also Jacques H Herbots, 'Interpretation of Contracts', *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 343–345.

80 Section 311 of the German Civil Code; for Norwegian law – Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 128–129.

81 Section 242 of the German Civil Code (performance in good faith), for Norwegian law – Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 128–129.

82 Article 1198 of the Civil Code of Argentina (interpretation in good faith), Article 173 of the Civil Code of Greece (interpretation in conformity with the requirements of good faith taking into consideration business usage), Article 1366 of the Civil Code of Italy (interpretation in good faith), Article 20 of the Law on Contracts of Bulgaria (interpretation taking into account usages and good faith), Article 125 of the Chinese Law of Contracts (interpretation in conformity with usages and good faith), Section 157 of the German Civil Code (interpretation as required by good faith, taking customary practice into consideration); Article 1375 of the Civil Code of Italy (interpretation assessing the overall behaviour of the parties after contract conclusion), Article 1258 of the Civil Code of Spain (interpretation taking into account the acts at the time of performance and subsequently).

The German Civil Code (*Bürgerliches Gesetzbuch* – BGB) lists good faith (in German '*Treu und Glauben*' or literally "sincerity and faith") as a criterion for exercising contract interpretation (Section 157 of BGB: '*Contracts shall be interpreted according to the requirements of good faith, giving consideration to common usage*.'). BGB also refers to good faith as a duty to perform an undertaking. (Section 242 of BGB says: '*The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage*.') The principle of good faith as a normative standard of interpretation has received pervasive reliance for a wide spectrum of interpretative tasks ranging from completion, concretisation and limitation to the correction of contracts.[83] Judges have relied not only on Section 157, but mostly on Section 242 as a reflection of the dominant policy in contract relations.[84] Prior to the appearance of Section 313, judges relied upon good faith as a corrective function in relation to unforeseen matters.[85]

In Italy, Article 1366 of the Civil Code, similarly to BGB, provides for an express statutory obligation to interpret contracts in good faith (in Italian '*Il contratto deve essere interpretato secondo buona fede*' or in English '*The contract must be interpreted according to good faith*'). Similar to Germany, good faith appears in other contexts, beyond interpretation, in the Italian Civil Code: in negotiations and contract drafting (Article 1337 of the Civil Code), in execution and performance of the contractual obligations (Article 1375 of the Civil Code), in a right not to perform because of the other party's failure (Article 1460 of

83 The significant role of good faith, as part of the relevant normative context against which a contract has to be understood, is well captured by Helge Dedek (though the chapter focuses on trade usages and not contract interpretation as such): '*The idea that contract is never just a bare exchange of promises but is automatically and, by its very "nature," embedded in a framework of default rules,* ***duties of good faith****, and social obligations, is thus a civilian feature very strongly present in the German law of contract. Contracting is not only perceived as an activity subject to "disciplining" but also one that is intrinsically interwoven with a normative context*.' [emphasis added] – see Helge Dedek, 'Not Merely Facts' in Fabien Gelinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (Oxford University Press 2016) 92.

84 For the explanation of historical reasons for the active judicial application of Section 242 of the German Civil Code, see Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 123–124; Simon Whittaker and Reinhard Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Reinhard Zimmermann and Simon Whittaker (eds), *Good Faith in European Contract Law* (Cambridge University Press 2000) 18–32.

85 Ole Lando, 'Tradition versus Harmonization in the Recent Reforms of Contract Law' (2010) 3 Collected Courses of the Xiamen Academy of International Law 81, 100–101; Giuditta Cordero-Moss, *International Commercial Contracts: Applicable Sources and Enforceability* (Cambridge University Press 2014) 86.

the Civil Code). Unlike in Germany, Article 1366 of the Italian Civil Code is less frequently invoked for contract interpretation – judges apply the provision on a residual basis when other rules of interpretation do not assist.[86] And when good faith is invoked, it operates somewhat differently. The primary function of the provision is to ensure the objective approach towards contract interpretation. The provision is located precisely between subjective (Articles 1362–65 of the Italian Civil Code) and objective (Article 1367–71 of the Italian Civil Code) pillars of the interpretative rules in the Italian Civil Code. Effectively, good faith in Italian law does not control the language of the contract and is not capable of correcting clear language.[87]

In Ukraine, unlike in Germany and Italy, good faith is not included in the provision on methods of contract interpretation (Article 213 of the Civil Code). At the same time '*fairness, good faith and reasonableness*' appear as a fundamental principle of the civil law of Ukraine (Article 3(6) of the Civil Code of Ukraine). Despite the promising status of a fundamental principle and the non-exhaustive list of rules for contract interpretation in Article 213 of the Civil Code of Ukraine, good faith, accordingly, has not emerged as a relevant normative standard for contract interpretation.[88]

It is also interesting to observe that in the Netherlands, in the absence of an express provision on the application of good faith for contract interpretation (to be precise in the absence of any statutory provision on contract interpretation) judges nevertheless rely on good faith when they have to ascertain the content of a contract.[89] Good faith ('*redelijkheid en billijkheid*' or in English '*reasonableness and equity*') under Dutch contract law, similarly to good faith in German law, is far-reaching. Relying on *redelijkheid en billijkheid*, an interpreter can correct and even supplement contractual provisions.

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86 Silvia Ferreri, 'Chapter 5 Interpretation' in Luisa Antoniolli and Anna Veneziano (eds), *Principles of European Contract Law and Italian Law – A Commentary* (Kluwer Law International 2005) 258–259; Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 94–95.

87 Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 116.

88 Олександр Васильович Дзера та інші (ред.), *Науково-практичний коментар Цивільного кодексу України*, 1 т. (5-е вид., Юрінком Інтер 2013) 363–364 [Dzera O.V. and others (eds), *Scientific and Practical Commentary to the Civil Code of Ukraine* (5edn, 1 volume, Yurinkom Inter 2013, 301–312].

89 Martijn W Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd fully rev. and exp. edn, Kluwer Law International 2004) 629; Sanne Taekema and others (eds), *Understanding Dutch Law* (Eleven International Publishing 2011) 266, 270–273.

Similarly to differences in the application of good faith for contract interpretation in civil law tradition, the principle of predictability differs in its effect in common law traditions as well. The recent development under English law with Lord Hoffmann's widely cited five principles of interpretation,[90] despite some views on introduced novelties,[91] have not reversed the prevailing support towards predictability. The role of context – '*matrix of fact*' – was not given a powerful changing role. According to Lewis, instead of representing '*a new departure in the interpretation of contracts*', the five principles are *'restatement with differences of emphasis*'.[92] The natural and ordinary meaning of the contractual text remains a default preference that can only be overturned/reversed under exceptional circumstances and with the application of other non-interpretative doctrines. In this respect, English law is rightly found to be significantly more predictable than the laws operating in the United States across a whole range of factors, including contract interpretation. According to Patrick Selim Atiyah, '*the English tradition of looking almost exclusively at the words of a document, and confining our attention to the general context of the document tends to lead to more predictable results, than the American tradition of allowing all sorts of other evidence to be produced*'.[93] The laws of many states in the United States allow the admission of evidence external to the text, which may cause less predictability for the interpretative result.[94] English law in turn remains most praised for safeguarding predictability, and this arguably enabled it to become one of the most used in international business transactions.[95]

Another distinction, intrinsically connected to the above and relatively easily palpable, between approaches in contract interpretation among various laws, relates to the admissibility of contextual evidence. Civil laws do not usually impose limitations on the scope of admissible evidence for the purpose of contract interpretation. On the contrary, many of them have express statutory

90 Lord Hoffmann summarised the principles in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896 (19 June 1997).

91 Jacques H Herbots, 'Interpretation of Contracts' *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 331.

92 Kim Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) 3.

93 Patrick Selim Atiyah, 'Justice and Predictability in the Common Law' (1992) 15 University of New South Wales Law Journal 448, 458 <www.austlii.edu.au/au/journals/UNSWLawJl/1992/19.pdf> accessed 25 June 2021.

94 Ahmet Cemil Yildirim, *Interpretation of Contracts in Comparative and Uniform Law* (Kluwer Law International 2019) 108–124.

95 See the results of the White & Case and Queen Mary University survey of 2010 at the beginning of this chapter; see also Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press 2013) 171–217.

provisions openly endorsing considerations of pre-contractual negotiations and parties' conduct.[96] Common law countries traditionally control admissible evidence through the *parol evidence rule* that, in the presence of written text, excludes external evidence aiming to challenge or modify the parties' written agreement.[97] The *parol evidence rule* has nothing to do with the traditional understanding of which evidence is admissible based on its relevance and reliability. Strictly speaking, the *parol evidence rule* is not a rule about evidence as such. The rule does not address evidence that lacks relevance or reliability; rather, it attacks a legal reasoning that attempts to overturn the meaning of a written contract. The evidentiary aspects discussed here accordingly are not of a procedural nature. They are of substantive character and primarily relate to the preferences given to written text through the exclusion of evidence external to the text. Being substantive in nature, the discussed rules retain importance and 'follow' a contract regardless of the procedural legal framework, whether it be court proceedings or international arbitration.[98]

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96 For instance, Article 431 of the Civil Code of the Russian Federation, Article 213 of the Civil Code of Ukraine, Article 1362 of the Civil Code of Italy and Article 1282 of the Civil Code of Spain. At the same time, civil laws may impose some limitation on evidence if a mandatory written form for a contract was not observed. In Ukraine, for instance, when a statute requires a mandatory written form, one cannot rely on oral witness statements to challenge its existence or to challenge certain parts – Article 218 (1) of the Civil Code of Ukraine.

97 Describing a history of parol evidence rules at the beginning of the last century, John H Wigmore traces the origin of the rule back to the Middle Ages: '*Our primitive system knew it not. Towards the end of the middle ages does it come into and only in fairly modern times does it gain complete recognition.*' – John H Wigmore, 'A Brief History of the Parol Evidence Rule' (1904) 4 Columbia Law Review 388, 338–355. On nuances in the application of the rules in various jurisdictions see Alberto Luis Zuppi, 'The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and *Lex Mercatoria*' (2007) 35 Georgia Journal of International and Comparative Law 233, 233–276; Jacques H Herbots, 'Interpretation of Contracts' *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 336–339; for somewhat diverse views on the operation of the *parol evidence* rule see also Edward Allan Farnsworth, *Contracts* (2nd edn, Little, Brown and Company 1990) 520–528.

98 For instance, in a case of international commercial arbitration, a contract was governed by the substantive law of New York, which is known to include the *parol evidence* rule. Relying on the applicable substantive law, the sole arbitrator excluded witness evidence submitted by the respondent in the case. The respondent tried to have the award cancelled in the place of the seat, alleging that the non-acceptance of the witness evidence was a procedural defect which did not allow the respondent to fully present its case. However, the Svea Court of Appeal rejected the respondent's request and held that no violation of procedural law had taken place, as the parties had expressly agreed on the application of the law of New York while concluding the underlying agreement, and thus should have been aware of the exclusion of the *parol evidence rule* in the event of a

The above description of differences between approaches towards contract interpretation under various laws, even over-simplified, is nevertheless helpful to better appreciate the role of national laws in contract interpretation. The juxtaposition between justice, value in civil laws jurisdictions, and predictability, endorsed in common laws, explains the operation of various conceptual solutions present in one legal tradition and absent in another. Limitations for contextual evidence, for instance, increase the predictability of reliance on the textual expression of a contract, whereas admission of pre-contractual negotiations and post-contractual conduct of the parties assists to ensure a fair result of contract interpretation. A more nuanced perspective on good faith and predictability reveals that neither principle operates identically across jurisdictions. The principles have their precise normative content that is formed historically in a given state and informs various distinctions of degree in contract interpretation. These differences again call for a thorough investigation of the applicable national law for contract interpretation.

2.5 Limits of *Subjective-Objective* and Other Dichotomies

The overview of the differences in approaches would not be complete if one were not to enter an area of various characteristics that are traditionally applied to mark distinctions across national laws: *subjective-objective*, *fair-predictable*, *broad-literal*, *contextual-textual*, etc. Because these characteristics penetrate so firmly into what we understand about differences in approaches to contract interpretation across various jurisdictions, it might be tempting to simply rely on some of them *in a substitution to the actual* investigation of the applicable regulation. An interpreter may, for instance, emphasise the joint intent of the parties to complement or override the textual expression of a contract, relying on the *subjective* approach of the applicable law to contract interpretation. Alternatively, an interpreter may emphasise that it is text as ascertained by a reasonable third party that has to take preference over any other consideration, relying on the *objective* preference to interpretation under applicable

dispute – see *Mr. RR, Mr. VR and Ukio Banko Investiciné Grupé UAB v Rual Trade Limited*, Svea Court of Appeal Case No. T 6238-10, Judgment of 24 February 2012 <https://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95791&docId=1767474&propId=1578> accessed 25 June 2021; Erik Mårild, 'Oral Representation of Evidence and the Application of the Parol Evidence Rule in International Arbitration' (2013) 24(2) American Review of International Arbitration 325.

national law. For the reasons explained below, the described characteristics, however, cannot substitute proper investigation of the content of national law applicable to contract interpretation.

While being informative as to the existent differences across the legal spectrum,[99] *subjective-objective*, *fair-predictable*, *broad-literal*, *contextual-textual* characteristics are merely the product of commentators. National laws do not explicitly use these terms in the wordings of the relevant parts on contract interpretation. The laws do not say that analysis must be '*subjective*', but they may well say, '*the contract shall be interpreted according to the common intention of the parties*'.[100] Nor do the laws necessarily say that the interpretation must be '*contextual*', but it may say that if it is impossible to establish the parties' true intentions from a literal reading of the contract, the purpose of the transaction, the content of previous negotiations, the established practice between the parties, usages, the parties' subsequent conduct, the text of standard contracts, and other circumstances which may have substantial significance should be considered.[101] Judicial clarifications on contract interpretation, dominant for some jurisdictions, do not rely on these characteristics either.[102] *Subjective-objective*, *fair-predictable*, *broad-literal*, *contextual-textual* are not interpretative rules, nor are they canons of interpretation.[103] They are merely the *dogmatised labels* that reflect the doctrinal perspective on the peculiarities for contract interpretation under certain laws.

As the products of generalisation, these characteristics are not entirely explicit. Some of them may be on the verge of losing their sharpness or distinctiveness entirely. For instance, instead of being in polar opposition to each other, the *subjective* and *objective* approaches to contract interpretation appear rather as an accentuation of what is perceived to be dominant. From a more

99 The previous sections have used some of these dichotomies to mark the differences across the laws on contract interpretation, and some of the characteristics are also continuously relied upon throughout the work.

100 Article 213 (3) of the Civil Code of Ukraine provides, for instance, that '*[i]n case the literal meaning of words and expressions as well as the meaning of terms generally accepted in the appropriate field of relations does not allow to establish the content of certain parts of the transaction, the content shall be established by comparing the relevant part of the transaction with the content of other parts thereof, with its general content and intentions of the parties*'.

101 Article 213 (4) of the Civil Code of Ukraine.

102 See for instance, five principles summarised by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society,* [1998] 1 WLR 896 (19 June 1997).

103 On the critical perspective over canons of interpretation, see the next chapter.

nuanced perspective, one cannot but agree with James Spigelman's assessment, which helpfully captures the development of common law to become objective '*with a number of subjective exceptions*'[104] and for civil law to be subjective '*with some objective exceptions*'.[105] Indeed, it would currently be fairer to say that civil law jurisdictions do not perceive investigation of the joint intent of the parties in isolation from the objectivised confirmation,[106] whereas common law jurisdictions permit one to look beyond the text alone to ensure that the parties' joint intent has been properly captured.[107] At the same time, the precise degree of objective and subjective considerations much depend on thorough investigation of the regulation of the applicable national law. Similarly and as discussed before, there could be sensitive differences between various laws in what they precisely understand to be behind the role of good faith in contract interpretation or which extent of predictability is endorsed. Not only are these characteristics not entirely explicit, the commentators may mark *what* they emphasise somewhat differently, by applying the same or similar terms. In addressing '*objective*' and '*subjective*', '*textual*' and '*contextual*', etc., different authors may refer to '*approaches*',[108] '*theories*'[109] or '*dichotomies*',[110] etc. Misunderstanding the meaning behind these categories has already led to the allegation of poorly-constructed arguments in scholarly writings.[111] If

104 James Spigelman, 'The Centrality of Contractual Interpretation: A Comparative Perspective' (2015) 81 Arbitration 234, 249.

105 Ibid.

106 For instance, while Section 133 of the BGB provides that '*in interpreting a declaration of will one must seek out what was really intended and not adhere to the literal meaning of the words used*', Section 157 of the BGB enables one at the same time to rely on fair dealing and normal practice, which is an objectivised area external to the subjective intent. Similarly, the Civil Code of France, while endorsing the necessity to investigate the common intent of the parties, contains an objectivised standard of a reasonable person in Article 1188.

107 The restatement of rules of contract interpretation by Lord Hoffmann, discussed earlier, confirms more openness towards the parties' intent.

108 Gerard McMeel and Hans Christoph Grigoleit refer to three approaches '*three related spectra: certainty and justice; subjective and objective; textual and contextual*' – Gerard McMeel and Hans Christoph Grigoleit, 'Interpretation of Contracts' in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford University Press 2013) 341.

109 Steven J Burton refers to literalism, objectivism and subjectivism in Steven J Burton, *Elements of Contract Interpretation* (Oxford University Press 2009) 17–34.

110 Larry A DiMatteo, 'False Dichotomies in Commercial Contract Interpretation' (2012) 11(1) Journal of International Trade Law and Policy 27, 39.

111 See, for instance, Steven Burton pointing to a somewhat different understanding of literalism by scholars in law and economics in comparison with a doctrinal perception of literalism dominant for a particular jurisdiction – Steven J Burton, *Elements of Contract Interpretation* (Oxford University Press 2009) 36–37. Further, Giuditta Cordero-Moss

relied upon in isolation from the relevant normative regulation, said characteristics may mislead, when what is precisely meant by them is not properly explained.

The limits of dogmatised labels can be appreciated further with historical examples. Approaching the practice of contract interpretation in Roman law from nowadays, one may indeed perceive it to be unduly formalistic at one period of time and unduly subjective at another. Reinhard Zimmerman, warns against this understanding. At that time, lawyers did instrumentalise the *subjective* and *objective* categories and perceived contract law in its entirety '*without isolating their individual components or dogmatising the objective or subjective elements contained in them*'.[112] For this reason, applying an objective or subjective approach, no matter how one understands 'objective' or 'subjective', would not work for the proper application of Roman law. Reliance on these categories in disengagement from applicable law in existence at that time would evidence a temporal bias. Reliance on these categories in disengagement from applicable law nowadays instead of a temporal bias could open a door to subjective biases. An interpreter may rely upon dogmatised labels to imitate certain normative justifications, essentially hiding the subjective element of what one perceives as being *subjective* or *objective*, *textual* or *contextual, fair* or *predictable*, etc. As it would not be proper to put '*the past into the straitjacket of contemporary conceptions*',[113] it would not work to reduce all contract regulation on contract interpretation to several dichotomies.

Thus, the commonly referred labels cannot guarantee that interpretation properly reflects how contract interpretation shall be exercised under applicable national law. Accordingly, they cannot turn into a substitute to a thorough investigation of contract interpretation under proper national law. At the same time, *subjective-objective, fair-predictable, textual-contextual*, etc., are all helpful

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illustrates differences in understanding 'objective' under English and Norwegian contract doctrine – Giuditta Cordero-Moss, 'Ulike Trekk ved Norsk og Engelsk Kontraktsrett og Deres Betydning for Kontraktens Virkninger – Noen Komparativrettslige Betraktninger, (2016) 51 Jussens venner 276, 276–289. At the same time, Jacques H Herbots suggests that the role of the subjective-objective divide diminished in its role in scholarly writings: '*In our days this different approach no longer gives rise to hefty academic discussions, but one continues to find the distinct accentuation in the various legal systems of the world*' – see Jacques H Herbots, 'Interpretation of Contracts' *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 329.

112 Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (reprint edn, Oxford University Press 1996) 626.

113 Ibid.

to understand some peculiarities of contract interpretation under national law as they can properly accentuate certain approaches. They may also appear as useful tools for describing interpretative preferences and enhancing contractual drafting and thorough decision-making processes.

2.6 Conclusion

Understanding that national laws govern contract interpretation differently follows from appreciation of contract interpretation as a complex phenomenon deeply integrated into relevant national law. We know nowadays that laws of various jurisdictions may apply different non-interpretative doctrines and achieve similar results, that can be wrongly viewed as a result of interpretation. Conversely, different laws may apply similar interpretative rules and doctrines but reach different conclusions precisely because of the influence of other non-interpretative doctrines. In other words, similarities in results do not ensure that the laws approach contract interpretation uniformly, nor do different results signal a different regulation of contract interpretation. This deep appreciation of contract interpretation as a distinct set of regulations, on the one hand, and as an integral part of the relevant national law, on the other hand, informs this research.

If traced distinctions in contract interpretation are summarised in a sentence, one can say that the national laws differ in the fundamental overarching approaches towards contract interpretation favouring either *good faith* or *predictability*. Again, the juxtaposition of good faith and predictability, while informative, does not discharge all other differences though. Even within a group of laws supporting good faith as a fundamental interpretative criterion, there could be a number of nuances and differences in the precise reach of good faith that would make each approach, if not distinct, then at least peculiar. Similarly, the adherence to predictability is not absolute and may be modified by various exceptions depending on jurisdiction. Also, the role of an interpreter is not equally aligned across various laws. An interpreter may be limited by the text of the contract or enjoy the right to imply terms or even fill the omitted terms. That terms are clear may exclude interpretation in some jurisdictions or be the result of interpretation in others. Other more detailed regulatory aspects of contract interpretation, including sources for contract interpretation, interpretative stages, the admissibility of some forms of evidence and non-admissibility of others, etc. can be equally significant for tracing distinctions and similarities. Above all, national law as a background law

featuring specific regulation in the fields of concession, privatisation, broadcasting, construction etc. may turn critical for understanding the contractual undertakings of the parties. Despite their high level of generalisation and the omission of more nuanced differences, the packing of the results of comparisons into either of the two groups is still informative for the main proposition of this chapter, namely that national laws govern contract interpretation differently.

Just as national law is not frozen, so may contract interpretation also evolve. Various reforms of contractual regulation directly or indirectly affect contract interpretation. The accentuation of certain preferences, or more substantial changes, regularly finds its way into national laws that, depending on jurisdiction, take the form of judiciary guidance or amendments of statutory provisions. One can discern movement from formalism to objectivism or back to more formalism with numerous more subtle developments. Viewed from this perspective, contract interpretation's uniqueness appears to be the live product of social and historical development of the national law of a particular state. It is not static, nor universal, but is evolving and reflective of the development of national law.

In addition to comparative studies, international commercial arbitration gives further thoughts on the significance of national law for contract interpretation. If in a national context, before the state courts, there are fewer possibilities to appreciate the differences in contract interpretation among various laws, but international commercial arbitration gives one this opportunity. Laws applicable to contract interpretation and laws known to arbitrators are frequently not the same. This leads to the temptation, for arbitrators, either to disengage contracts from applicable national law and construct contracts commercially or reasonably, or to rely consciously or unconsciously on the interpretative preferences of their home jurisdictions, regardless of the fact that those laws may be not applicable to the contract at hand. Both these reoccurring temptations demand a greater awareness. Firstly, contract interpretation disengaged from applicable national law has triggered critics and led to a growing consensus among scholars and practitioners on the role of national law for contract interpretation. Secondly, arbitrators' biases, originating from the preferences towards contract interpretation in their home jurisdictions, have gained deeper attention beyond simple anecdotal illustrations. And while an idea of transnational rules on contract interpretation might still be attractive, the growing trend appears to appreciate predictability in the tribunals' reasoning achievable through application of the national law governing contracts.

This chapter's conclusion that national laws do not regulate contract interpretation uniformly leads to other questions, such as whether international law may be viewed as capable of substituting national law in the regulation of contract interpretation. This question will be addressed in the chapter that follows.

CHAPTER 3

International Law and Contract Interpretation

It is not uncommon to explain giving effect to a national law in the context of public international law by a failure of the latter to regulate certain matters that lie in the exclusive domain of the former. This explanatory pattern rests, as a rule, upon two basic elements: firstly, on the *relevance* of certain statuses, rights or interests to public international law and their appearance exclusively under national law and, secondly, on the *unavailability* of substituting rules in public international law that would make it possible to regulate the matter *instead* of national law.[1]

While a similar pronouncement on the *relevance* of national law for contract interpretation is not controversial, a recognition of a *failure* of international law to address contract interpretation is less straightforward than one might think at first glance. On the one hand, international law, in the sense of public international law, does indeed primarily regulate inter-state relations and thus seems to have nothing to offer for understanding national-law instruments – contracts. Unsurprisingly, contracts that appear in investment treaty arbitration, either ones of principal importance or of peripheral importance for investment disputes, do not benefit from the specifically crafted interpretative rules of public international law. On the other hand, public international law is not a closed system. Exposure to contracts and a lack of specific rules on contract interpretation in a public international law setting, makes it tempting to rely on *structural* and *operational* elements of public international law as a system, including its own interpretative rules, for understanding contracts for the specific purposes of public international law. This extension of interpretative rules of public international law to contract interpretation finds its rare application in the practice of international tribunals. In addition to the interpretative rules of public international law, substantive provisions of international law may potentially inform efforts for understanding contracts. For instance, international investment law as a specialised subfield of public international law may be viewed as offering certain answers for understanding a specific category of contracts – investment or state contracts. Scholars trace these interpretative answers in the emergence of doctrinal views in international

1 *Case Concerning the Barcelona Traction, Light and Power Company, Ltd.* (*Belgium v. Spain*) (Judgment of 5 February 1970) [1970] ICJ Rep 3; *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Judgement of 30 November 2010, 675–676.

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investment law in relation to stabilisation clause, waiver of immunity, limited liability clause, forum selection clause and some other provisions.[2] Finally, the expansion of public international law sources (treaties and convention) beyond cross-border, inter-state cooperation in civil and commercial litigation and arbitration, directly to substantive regulation in the field of international commercial law, subjects contract interpretation, at least for these sources, to a direct regulation of international uniform rules. To summarise, all mentioned make a *failure* of public international law to govern contract interpretation if not less axiomatic, than at least necessitating a thorough and careful examination. Furthermore, a question as to whether public international law principles can apply to contracts and provide answers for their understanding seems not to be entirely outdated nowadays.[3]

This chapter, accordingly, verifies the *capacity* and *limits* of international law in its current shape to address contract interpretation. Instead of the relationship between public international law and national laws, the focus here turns to public international law *per se*. To this end, the work distances itself from a monist-dualist discussion and the constraints that each approach represents.[4] The work also steps out of the box of international investment law as a subfield of public international law, which is a dominant theme in this book. In addition to international investment law, the potential extension in application of existing, mostly interpretative, rules of public international law

2 See also Chapter 4.

3 Richard B Lillich, 'The Law Governing Disputes under Economic Development Agreements: Reexamining the Concept of "Internationalization"' in Richard B Lillich and Charles N Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (Transnational Publishers, Inc. 1994) 61–114.

4 For a comprehensive overview of the peculiarities of dualist and monist approaches in relation to state contracts, see Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 58–85; A F M Maniruzzaman, 'State Contracts in Contemporary International Law: Monist versus Dualist Controversies' (2001) 12 European Journal of International Law 309; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 31–34. Three propositions that seem uncontested by any of these approaches, either monist, dualist or a mixture of both, seem to be plausible. Firstly, national law is primarily applicable to contracts, and by extension, to contract interpretation. Secondly, international law can be applied in principle to contractual rights under certain premises and circumstances (and indeed what the premises and circumstances precisely are – monism and dualism differ). Thirdly, if international law is applied to contracts/contractual rights, its application is not of the same quality and effect as primary rules – contract law (again both monism and dualism differ on the precise effect of international law vis-à-vis national law). This common ground permits one to isolate the question from various doctrinal and theoretical controversies of relations between international and national law and to focus on international law, and its rules, *per se*.

to contract interpretation as well as the emergence of specific international regulations in new terrains of international law, are brought into focus.

The chapter starts by defining the (dissolving) borders of international law relevant for a focus on contract interpretation. It then turns to verifying the capacity of all classical sources of public international law to provide rules applicable to contract interpretation and to substitute national law regarding contract interpretation. Screening public international law in this way, the chapter looks both at a parallel set of *interpretative* technical rules, grasping various canons and principles of interpretation, and *substantive* regulation that may provide a relevant background for an interpretative exercise. Importantly, the work considers also other contracts that are not necessarily investment contracts, though the latter category is undoubtedly central to this inquiry because of being more exposed to the direct application of international law and the extension of international law for their ascertainment.

3.1 The Concept of International Law

Of the numerous perspectives pertaining to concepts of international law,[5] one in particular frames the inquiry detailed in this chapter. International law

5 This list is not structured to necessarily present opposing views, but rather the *plurality* of facets in understanding what international law is and what it is not. For a discussion on the concept of international law, see, for instance, Philip Allot, 'The Concept of International Law' (1999) 10 European Journal of International Law 31, 31–50; James Crawford, 'Chance, Order, Change: The Course of International Law, General Course on Public International Law' (2013) 365 Recueil des Cours de l'Académie de Droit International, 15 and subsequent; Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70(1) Modern Law Review 1, 1–30; Jean D'Aspremont, *Epistemic Forces in International Law: Essays on the Foundational Doctrines and Techniques of International Legal Argumentation* (Edward Elgar Publishing 2015) (the work of Jean D'Aspremont is also helpful in giving direction regarding the discourse on various understandings of international law as a set of rules and institutions, a set of authoritative processes, a combination of rules and processes, a set of legal relations, a discourse, a tool to create authoritative claims, a political project, etc.) For a discussion on whether international law is law, see Joshua Kleinfeld, 'Skeptical Internationalism: A Study of Whether International Law is Law' (2010) 78(5) Fordham Law Review 2451 and Andrew T. Guzman, 'Rethinking International Law as Law' (2009) 103 American Society of International Law Proceedings 155, 155–157. For a discussion on whether international law is a system, see Eyal Benvenisti, 'The Conception of International Law as a Legal System' (2007) 50 German Yearbook of International Law 393, 393–405; Yoram Dinstein, 'International Law as a Primitive Legal System' (1986) 19(1) New York University Journal of International Law and Politics 1. For a discussion on whether international law is international, see Anthea Roberts, *Is International Law International?* (Oxford University Press 2017); Anthea Roberts, 'Is International Law

appears in a normative, or even in a rather instrumental sense as a set of binding rules and principles that come into existence because of consent between states and that co-exist with national laws. Procedures and other facets of international law are of less concern for this chapter, as are numerous approaches to international law, including sociological, philosophical and other.[6] What matters here is the potential availability of rules on an international level that can inform or operate for contract interpretation – directly or by extension – and possibly substitute an originally applicable regime of national law.

Limiting this inquiry to the *rules* of international law and focusing primarily on *interpretative rules*, this chapter also looks at substantive regulation that results from the dissolving and expanding the regulatory scope of international law. Furthermore, if inter-state consent remains a central drive behind the appearance of these rules, inter-state relations no longer serve as the exclusive regulatory field. Two diverse developments expand the borders of international law beyond exclusive inter-state relations and beyond the exclusive public nature of these relations. One development features the increased engagement of international law with non-state actors[7] and resulting

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International? Continuing the Conversation' (*Blog of the European Journal of International Law*, 9 February 2018) <www.ejiltalk.org/is-international-law-international-continuing-the-conversation/> accessed 25 June 2021. Above all a view of Frédéric Mégret seems to embrace international law in its entirety best: '*International law's peculiar approach to law can perhaps best be described as that of a law that is 'in between,' characterised simultaneously by what it seeks to escape from* (*e.g. wars of religion*)*, what it is not* (*e.g. domestic law*)*, and what it aspires to achieve* (*perpetuation, surpassing, transformation, etc.*)*. This quality is a precarious one that relies on a particular conjunction of historical forces, preferred subjects, a certain ethos, a concept of society, legal constructs and a functional architecture*' – see Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press 2012) 88.

6 For instance, Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press 2015); Thomas Skouteris, 'Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship' (1997) 10 (3) Leiden Journal of International Law 415; Samantha Besson, 'Moral Philosophy and International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 386–406.

7 A recognition of the implications that non-state actors (individuals, investors, multinational corporations, etc.) contribute to the development of international law is by no means new. Here are a few examples – Ben Golder, 'Theorizing Human Rights' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 685–700; Fleur Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 636–654; Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart

functional specialisation in international law, or its fragmentation.[8] Another development relates to the ongoing emergence of public international law instruments attempting to harmonise a broad spectrum of private, decentralised relations, including areas such as the international sale of goods, financial leasing, agency, factoring, banking and other fields.[9]

The former horizontal development of international law resulting among others in the emergence of international investment law, while being contested at the early stage of its inception, has now received firm canonisation as a part of international law.[10] The latter vertical development – also captured by labels of globalisation of private law, globalisation of private international law, the privatisation of international law or appearance of international uniform law – still causes inconveniences to its perception as a part of international law *proper*. Taken together, despite substantial differences in methods and focuses, both developments represent a consolidated view on international law that is marked by increased engagement with contracts and other diverse relations of a private nature. This broader perspective enables one not to miss any sign of existing international legal rules, either substantive or interpretative, or a principle that might be relevant for contract interpretation.

Publishing 2015); Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (Oxford University Press 2018).

8 Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (finalized by Martti Koskenniemi, 13 April 2006) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 25 June 2021. In his recent interview, Martti Koskeniemi valuably captures fragmentation in international law arising from diversification and expansion of international law through the metaphor of 'managerial projects' – see Van Den Meerssche, 'Interview: Martti Koskenniemi on International Law and the Rise of the Far-Right' (Opinio Juris, 10 December 2018) <http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/> accessed 25 June 2021.

9 One can build a list from early instruments of harmonisation, from the Hague Rules on Bills of Lading (1924), the Warsaw Convention on Air Carriage, and the Geneva Convention on Bill of Exchange and Promissory Notes (1930) to more contemporaneous sources, such as the UN Convention on Independent Guarantees and Stand-by Letters of Credit (1995), the CISG, the UN Convention on Limitation Period in the International Sale of Goods (1974, amended 1980), the UNIDROIT Convention on Agency in the International Sale of Goods (1983 – not in force), the UNIDROIT Convention on International Financial Leasing (1988), the UNIDROIT Convention on International Factoring (1988).

10 See, for instance, the reference by the International Law Commission to international investment law as a self-contained regime within public international law. See also Freya Baetens (ed), *Investment Law within International Law Integrationist Perspectives* (Cambridge University Press 2013).

On the face of these two trends, another binary public-private divide that frequently operates as a criterion in separating international law (public dimension) from national law(s) (private dimension) ceases to define what international law is for this chapter.[11] The precise borders of the extension of international law have yet to be analysed, but the fact that international law is no longer exclusively about inter-state relations of a public nature seems to find increasingly firm support. It is also yet to be seen whether contracts turn into the object of international law so to trigger the emergence of the specific rules on contract interpretation or extension of the existent rules. What is clear is that the regulatory scope of international law has become broader and more complicated if compared with how international law, with its state-centralism, was perceived in the days of Arnold McNair, Hersch Lauterpacht and Wilfred Jenks. Neoliberal politics[12] appeared as an important driver of more recent changes for international law, prompting an extension of its borders and impacting its dominant rationales. In other words, international law is not reduced to being viewed via the traditional conceptual lenses of inter-state rules exclusively regulating inter-state relations of a public character, or public international law. The broad picture of international law under examination in this chapter, in addition to its undeniable subfield of international investment law, also includes what is referred to as private international law (its international dimension) and international commercial law.

The precise model of international law as addressed in this inquiry may be presented as an amalgamation of the two views. The first is the public-centred view of James Crawford which emphasises the traditional perspective of international law, assigning the state a central role, but recognising the openness of public international law as a system, as well as its historical determinacy.[13] The second is the private-centred view of Alex Mills acknowledging the public

11 Abandoning the public-private divide in defining the regulatory scope of international law I am attempting to broaden the scope of this investigation. At the same time, I am not dismissing the tension between private and public domains in contract interpretation.

12 For a valuable overview of neoliberal politics and international law see Honor Brabazon (ed), *Neoliberal Legality Understanding the Role of Law in the Neoliberal Project* (Routledge 2017).

13 See, James Crawford, 'Chance, Order, Change: The Course of International Law, General Course on Public International Law' (2013) 365 Recueil des Cours de l'Académie de Droit International 1, 27–252. More recently, addressing political challenges, such as Brexit, South Africa's purported withdrawal from the Rome Statute, and the United States' announced withdrawal from the Paris Agreement in 2018, Crawford wrote about international law as a stable sedimentary formation at a risk of erosion of its boundaries – James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 (1) Modern Law Review 1, 2, 21.

foundations of private international law and the private foundations of public international law. Overall, Mills appears to subscribe to the view that private international law is more than just the harmonisation of national law through public international law sources. At least part of the function of its rules is '*fundamentally 'public', 'international', and 'systemic' in its substantive character – it has at least a relationship of functional equivalence to some of the global governance ambitions of public international law*.'[14] If public international law undoubtedly underpins the formation of international law, this border erosion, or the affiliation of private international law with international law, has long been debated. The primary source of doubt comes from the obvious – the origin and function of private international law that demonstrates a tight and frequently indivisible connection with national regulation. This chapter recognises the mutual penetration of public international law and private international law and acknowledges private aspects in public international law and public international law aspects in private international law.[15]

Free from any self-imposed, predetermined restriction on the regulatory scope of international law, this chapter's perspective is essential for an objective attempt to address the capacity of international law to interpret national-law instruments – contracts. International law appears here as having no predetermined agenda for its own development. It is not bound to exclusively regulate inter-state conduct. Nor is it banned from inward looking and substituting national regulation in certain fields. If one sees Crawford's model of international law as a formation consisting of the stable fundamentals of public international law but open to new horizons with the Mills' understanding of the mutual penetration between private international law and public international law, albeit limited or moderate, one would get a picture of international law that is relied upon here. This broad perspective opens the door for the investigation of international law in its current shape. At the same time, it does not assert that international law necessarily *has* proper answers for contract interpretation. In other words, released from pre-existing flat denials or affirmations, this chapter tries to establish whether international law offers

14 Alex Mills, 'Connecting Public and Private International Law' in Verónica Ruiz Abou-Nigm and others (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018) 12–13.

15 See also Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009); Lucy Reed, 'Mixed Private and Public International Law Solutions to International Crises' (306) Recueil des Cours de l'Académie de Droit International 181, 199–210.

anything in relation to contract interpretation, and if so, how the concepts and apparatus of international law can assist, if at all, for understanding contractual instruments.

Accepting the broad content of the regulatory scope of international law in a binary distinction between international law and national law as two distinct legal orders this chapter also recognises the unavoidable, namely that a line between international law and national law is *relative* on many occasions. International law develops in many respects from conceptual frames of national laws. Its interpretative apparatus has not entirely lost its nexus with the legal method developed in national legal systems. Its penetration into or operation within the national legal order is frequently premised on national laws. The independence of international law is particularly elusive in the case of international *uniform* law when harmonised international law is premised on national implementations. Nevertheless, it is also recognised that international law retains its distinctiveness, having interstate consent as a primary condition for its emergence. This chapter accordingly focuses on international law as a separate legal order in order to examine its possible impact on the interpretation of contracts that appear in the setting of public international law in investment treaty arbitration.

Regarding the timing of the inquiry, given the departure from the restrictions of the classical view on international law, it goes without saying that it is the contemporary shape of international law that matters for this chapter. Historical observations on the status of international law whenever raised serve to explain the origin and the current shape of the rules of international law in focus and to exhibit the existing tension in their possible extension to ascertaining the content of contractual provisions. These observations are not meant to form a complete historiography of what preceded the emergence of international investment law, or international commercial law, or the confluence of private international law and public international law, something that has already been extensively and capably addressed by other scholars.[16]

16 The attractiveness of the linear, evolutive development in international law that enables one to present a comprehensive narrative of shortcomings in diplomatic protection, increased protection through mixed claims commissions and the emergence of investment treaty protection became dominant for the public international law wing of scholars who address contract protection in international investment law. For international commercial law, no linear development can be presented. Harmonisations and the appearance of uniform rules relating to international commercial contracts in public international law sources are undoubtedly growing, but their success is diverse and their capacity to exclude the relevance of national laws is still limited. It is accordingly no surprise that instead of being exhaustive, historical observations here are rather selective and illustrative. These observations are captured primarily through early arbitral

Prioritising the current state of international law, or *lex lata*, this chapter permits a limited investigation of ongoing initiatives and further distilling of the borders of international law that can be potentially marked as *lex ferenda*.[17]

The approach of this chapter, which attempts to be framed as 'an unbiased view' on international law, or more precisely on its regulated subject, is not opportunistic or deprived of principle. While broadening the scope of the regulation of international law beyond inter-state conduct, or public international law, to what can be largely seen as international commercial law and private international law, the investigation is kept within the classical *structural frame* of international law consisting of *sources* of public international law as defined by Article 38 of the ICJ Statute.[18]

The focus here primarily turns to two sources – international treaties and general principles of law recognised by civilised nations. International treaties warrant attention because they are more reactive to new challenges and shape modern international law. Furthermore, they are easily ascertainable.[19] Central to exploring the role of treaties for contract interpretation would be the VCLT that, albeit itself relating to the interpretation of treaties, may be largely viewed as shaping the overall interpretative paradigm of international law. General principles of law also serve as an important source for investigation of the capacity of international law to address the ascertainment of the content of contractual provisions.[20] Compared with treaties, general principles of

awards and scholarly writings that feature private and public wings in the development of international law and their confluence. For scholarly works, see, for instance, Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 12–45; Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 1–60.

17 On *lex ferenda* and distinctions with *lex lata* see/listen Ki-Gab Park '*Lex Ferenda* in International Law' (lecture, UN Audiovisual Library) <http://legal.un.org/avl/ls/Park-KiGab_IL.html> last accessed 25 June 2021.

18 Even though Article 38 does not pretend to enumerate 'sources' in a strict sense, it is widely perceived as a complete list of sources of international law (with varying role) – Jan Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 5.

19 No complexity arises as a rule with the establishment of the content of a treaty in comparison with the difficulties associated with making the evidence of customary international law – see Summaries of the Work of the International Law Commission 'Ways and Means for Making the Evidence of Customary International Law More Readily Available' available at <http://legal.un.org/ilc/summaries/1_4.shtml> accessed 25 June 2021.

20 General principles of law as sources of international law have recently received increasing attention. At its 70th session, in 2018, the International Law Commission decided to include the topic relating to general principles of law in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work. The Commission decided to appoint Mr. Marcelo Vázquez-Bermúdez as Special Rapporteur for the topic. The first report of the Special Rapporteur and the interim report

law are less proactive but more penetrating. Their relevance for investigation is premised precisely on their primary function to respond to uncertainties in the regulatory framework of international law. If treaties do not address contract interpretation, it is general principles which have to be tested first. Taken historically, the principles stem from the fundamental values of national legal systems and inherit their rationale. Their operation is frequently perceived as being *interpretative* in nature and even if it can be argued that no specific rules have appeared in international law that can help to understand contracts, it has to be verified whether general principles may suffice to supplement the *lacunae*, especially when lacunae relate to interpretation.[21]

The remaining source – international customs – is also considered along with sources for the clarification of the content of international law as judicial decisions and the teachings of the most highly qualified publicists in the world. In the contexts of contracts, scholars usually address these sources from the perspective of state responsibility for breach of investment contracts.

And if the role of customary international law is arguably lacking[22] in this regard, the role of arbitral awards is remarkably augmenting.[23] The chapter will verify whether the capacity of these sources results in rules for the interpretation of investment contracts and possibly other types of contracts appearing in investment treaty arbitration. In what relates to scholarly publications, the chapter will attempt to identify those scholarly publications which, while dealing with

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by the Chair of the Drafting Committee on draft conclusion 1 provisionally adopted by the Committee are available here <http://legal.un.org/ilc/sessions/71/> accessed 25 June 2021. See also, Jean D'Aspremont, 'What Was not Meant to Be: General Principles of Law as a Source of International Law' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) and Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017).

21 The role of general principles of law together with customary international law are directly recognised for assisting in the interpretation of treaties that relate to the fragmented field of international law – see the Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) <http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf> accessed 25 June 2021.

22 Jean Ho, 'The Evolution of Contractual Protection in International Law: Accessing Diplomatic Archives, Discovering Diplomatic Practice, and Constructing Diplomatic History' in Stephan W Schill and others (eds), *International Investment Law and History* (Edward Elgar Publishing 2018) 240.

23 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 61–88.

contract interpretation in investment treaty arbitration, may be viewed as coming closer to identifying the relevant rules of international law.

As a final comment on the scope of inquiry, being about international law, broadly understood, this chapter is not about *lex mercatoria*,[24] as non-state sets of rules or principles elaborated in the practice of international arbitration, nor is it about other transnational *soft* law regulation related to contract interpretation. While a certain overlap in ideas and principles between international law proper, *lex mercatoria* and transnational soft law regulation is unavoidable, mostly because of the common origin in general principles of law and before that in national law,[25] this study is about international law shaped by the classical sources of public international law as defined by Article 38 of the ICJ Statute, and importantly enough applied as such.

3.2 Treaties

3.2.1 *Rules on Treaty Interpretation*

Despite a well-understood first impulse to reject even posing a question on a possible extension of the rules of treaty interpretation to contract interpretation in investment treaty arbitration, there are reasons to ask it. No doubt, treaties and contracts remain different. However, the rules regarding their interpretation, it could be argued, are not necessarily that different. Both rules on treaty and contract interpretation share a common feature: they attempt to accurately distil the meaning behind the parties' consent. In the case of treaties, it is the common intent of states who are the contracting parties to a treaty; in the case of contracts, it is the common intent of the contracting parties. When states or their organs are directly a party to a contract – and investment treaty arbitration evidences a considerable number of such contracts concluded with a broad range of state-related entities[26] – even parties largely

24 For the non-state origin of *lex mercatoria* and its nature as '*an analytical framework for understanding the private law instruments that structure normative expectations in international commercial and financial transactions outside of the traditional sources of domestic and international law*', see Stephan W Schill, 'Lex Mercatoria', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1534> updated June 2014, accessed 25 June 2021.

25 For the origin of the general principles of law, including principles that are international, see, for instance, Charles T Kotuby Jr. and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 3–54.

26 For instance, the cases as follows relate to contracts concluded with a state or state-related entity *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July

2006, para. 41; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 9, 11–13; *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award dated 29 December 2004, para. 1; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Final Award, 31 August 2011, p. 4; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award dated 20 August 2007, para. 1.1.1; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 50; *Eureko B.V. v. Republic of Poland*, UNCITRAL, Partial Award dated 19 August 2005, para. 41; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award dated 18 June 2010, para. 22; *IBM World Trade Corporation v. República del Ecuador*, ICSID Case No. ARB/02/10, Decision on Jurisdiction and Competence dated 22 December 2003, para. 3, 50; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, para. 14; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Preliminary Decision: Jurisdiction of the Arbitral Tribunal dated 8 December 1998, para. 5; *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for provisional measures submitted by the Claimants dated 9 December 2009, para. 12; *David Minnotte & Robert Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award dated 16 May 2014, para. 71; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award dated 25 May 2004, para. 54; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Jurisdiction dated 30 June 2011, para. 12; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award dated 27 August 2008, para. 56–57, 63; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction dated 6 August 2003, para. 1; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay,* ICSID Case No. ARB/07/29, Award dated 10 February 2012, para. 26; *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction dated 29 January 2004, para. 13; *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II)*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*), Award dated 9 April 2015, para. 2; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award dated 12 July 2019, para. 132; Decision on Jurisdiction and Liability dated 10 November 2017, para. 32; *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award dated 22 December 2017, para. 100; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 14; *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated1 October 2014, para. 141; *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award dated 30 March 2015, para. 81; *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL (*formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand*), Award dated 1 July 2009, para. 2.35; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa

viewed may partly overlap. The shared focus on the parties' consent in contract and treaty interpretation makes both contract interpretation and treaty interpretation somewhat distinct from statutory interpretation, which is more concentrated on objectivised text as a reflection of the legislature's intent.

The desire to rely on the rules of treaty interpretation may be further strengthened by their historical origin, which demonstrates a direct connection with contract interpretation rules. Writing his inaugural work before the emergence of the VCLT, Hersch Lauterpacht acknowledged that *principles of contract interpretation* can be relied upon for treaty interpretation insofar as they are general and not specifically tied to a concrete jurisdiction.[27] As an international public

Estatal Petróleos del Ecuador (PetroEcuador)), Decision on Liability dated 14 December 2012, para. 6; *National Grid plc v. The Argentine Republic*, UNCITRAL, Award dated 3 November 2008, para. 57; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008, para. 2, 8; *Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland*, PCA Case No 2015-13, Award dated 27 June 2016, para. 4*; Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award dated 6 July 2012, para. 56; *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. RB(AF)/12/8, Award dated 4 May 2016, para. 46. The cases as follows evidence contracts concluded with state enterprises *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016, para. 4; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award dated 9 September 2003, para. 1, 51; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (*II*), ICSID Case No. ARB/06/11, Award dated 5 October 2012, para. 115, p. viii; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012, para. 6; *Flemingo DutyFree Shop Private Limited v the Republic of Poland*, UNCITRAL, Award dated 12 August 2016, para. 6; *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award dated 31 August 2018, para. 3.8, 5.16–5.17; *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia*, SCC, Arbitral Award dated 16 December 2003, para. 1.1.

27 Published in 1927 and still widely cited, Lauterpacht's monograph 'Private Law Sources and Analogies of International Law' explains the appearance of analogous reasoning based on private law sources in public international law precisely by the underdeveloped status of the latter: '*In modern international law the application of private law is, as a rule, rejected by positivist publicists as threatening the independence and the scientific character of international law, and as introducing by a side wind the discarded law of nature. An uncritical iconoclasm in relation to private law is indeed one of the characteristic features of modern international law, in spite of the fact that the rejected analogy reappears in the writing of modern positivists under the form of conceptions of general jurisprudence, of the reason of the thing, and of logical deductions*.', see Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co. Ltd. 1927; reprinted 2013 by The Lawbook Exchange) 297. Lauterpacht clarified that analogies mattered not only for the formative part of international law, but also contemporaneously, in 1927, when they penetrated the reasoning, despite the opposition of positivists either directly or under other premises. Criticising '[t]*he habit of falling back*

law scholar, Lauterpacht has not developed an argument regarding how different regulation, in respect to contract interpretation under various national laws can be, nor has he given examples of those *general* principles of contract interpretation that were not tied to a particular jurisdiction. He was cautious enough to emphasise that the principles of contract interpretation thus relied upon for treaty interpretation should be '*general*'. Later, Lauterpacht became one of the Special Rapporteurs and an active participant in the work of the International Law Commission on the elaboration of the VCLT.[28]

Because the VCLT was primarily a matter of codification of customary international law on treaties, including those on treaty interpretation, the practice of international courts and tribunals became an object of rigorous investigation. Reliance of these courts and tribunals on principles of contract interpretation could not remain unnoticed. Common principles or canons of interpretation, equally relevant for the interpretation of contracts, treaties and statutes, appeared in focus as well. A report by another Special Rapporteur, Sir Humphrey Waldock, on issues of treaty interpretation, not only acknowledged their existence, but expressly enumerated them:

> The great majority of cases submitted to international adjudication involves the interpretation of treaties, and the jurisprudence of international tribunals is rich in references to principles and maxims of interpretation. In fact, statements can be found in the decisions of international tribunals to support the use of almost every principle or maxim of which use is made in national systems of law in the interpretation of statutes and contracts; for example, those frequently referred to in their Latin forms, ut res magis valeat quam pereat, contra proferentem, eiusdem generis, expressio unius est exclusio alterius, generalia specialibus non derogant.[29]

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on private law'(*VII*), Lauterpacht advocated a more balanced approach towards private law analogies in international law. Such an approach required, prior to turning to analogy based on private law sources, an attempt to solve an issue through international law – '*by filling the gap by means of logical deductions from existing rules of international law or of analogy to them*.' – see Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co. Ltd. 1927; reprinted 2013 by The Lawbook Exchange) 85.

28 The work spanned from 1949 to 1969.

29 Sir Humphrey Waldock, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission para. 5, p.54. <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf>lastaccessed 25 June 2021.

Taken more broadly, international law, at the time of Lauterpacht's work, was perceived in the area of treaty interpretation as a *recipient* of private law analogies relating to contract interpretation; the reverse capacity – important for this investigation – of being a *donor* of interpretative principles was far beyond any contemplation. And while various other scholars of the time, including Wilfred Jenks, dared to pose the question on the potential relevance of the rules of treaty interpretation (well before their own codification in the VCLT) for the interpretation of contracts that appear in a public international law setting, before the PCIJ,[30] in practice, those rules were not relied upon, neither in the PCIJ, nor in subsequent ICJ jurisprudence, even after the VCLT emerged in 1969 and defined the interpretative practices of many public international law courts.[31] Hersch Lauterpacht himself had an opportunity to reflect on the hypothetical question of the reverse relevance of rules on treaty interpretation regarding the interpretation of contracts that appear in a public international law setting. The opportunity arose in 1957 when Lauterpacht acted as an ICJ judge[32] in *Certain Norwegian Loans* (France v. Norway). In the Separate Opinion, he concluded without hesitation that it was the proper national law of the loan agreements – Norwegian law – that *primarily* defined how these contracts should be construed.[33] To international law, Lauterpacht attributed only a corrective role because '[*t*]*he question of conformity of national legislation with international law is a matter of international law*'.[34] The idea of a possible reliance on the rules of treaty interpretation was not raised at all.

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30 Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 599.

31 In the paper 'Disengagement from Domestic Law in Contract Interpretation in Public International Law Context' I analysed contract-related jurisprudence of PCIJ and ICJ and came to the conclusion that the World Court has not (expressly) relied on rules of treaty interpretation while approaching contracts. The paper was presented at the Workshop 'Engaging with Domestic Law in International Adjudication: Fact-finding or Transnational Law-Making?' at the University of Amsterdam on 1 March 2019.

32 Hersch Lauterpacht served as a judge of the ICJ in the period 1955–1960 – Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press 2010) 373–422.

33 Sir Hersch Lauterpacht justified relevance of national law in the following words: *'*[*u*]*ndoubtedly, the question of the interpretation of the contracts between the Norwegian State and the bondholders is primarily a question of Norwegian law. It is not disputed that the Norwegian law is the proper law of the contract and that it is for the Norwegian courts to decide what Norway had actually promised to pay*' – see Separate opinion of Sir Hersch Lauterpacht in *Case of Certain Norwegian Loans*, 37.

34 Ibid. 32. Lauterpacht's recognition in a subsequent ICJ case, in a different context, of the existence of common interpretative principles for contracts and treaties '*relevant to all legal instruments, of whatsoever description*' does not illustrate a change of view, but serves rather as a reiteration of the similarity he initially raised in 1927 in his *Private Law*

Nevertheless, there may be an explanation for the at least hypothetical readiness of the treaty-based tribunals to rely on treaty interpretation rules for contract interpretation in investment treaty arbitration. In their decision-making, treaty-based tribunals extensively and routinely apply rules on treaty interpretation. Tribunals have not only become familiar with the interpretative paradigm of the VCLT, they have become accustomed to it too. Their overall legal argumentative technique may be viewed as being more receptive to public law reasoning – national and international – than private national law reasoning.[35] Because of the various signs of these influences, it is unsurprising that private law critics of investment treaty arbitration are on the rise.[36] Instead of outright negation, the extension of the interpretative paradigm of the VCLT to contract interpretation, accordingly, merits investigation. And that is what this section will do.

To start with it is interesting to look at practice. Are there any cases in which the tribunal relied on the interpretative provisions of the VCLT for contract interpretation? On a thorough inquiry, at least one case can be identified. Before proceeding to the analysis of this case, it is important to understand what the interpretative provisions of the VCLT are and how different they are, if at all, from the interpretative provisions in national laws. The VCLT contains

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Analogies: *With Special Reference to International Arbitration* – see *Admissibility of hearings of petitioners by the Committee on South West Africa* (1956) (Advisory Opinion) [1956] ICJ Rep 23, 47–48.

35 On the role of the paradigm of public law in the reasoning of investment treaty tribunals, see Stephan W Schill, 'The Public Law Paradigm in International Investment Law' (*EJIL: Talk!*, 3 December 2013) <www.ejiltalk.org/the-public-law-paradigm-in-international-investment-law> accessed 25 June 2021; Stephan W Schill, 'The Impact of International Investment Law on Public Contracts' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 231–258. On the role of analogies drawn from public national laws, see Daniel Peat, 'International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method' (2018) 9(4) Journal of International Dispute Settlement 654. For the analogies drawn in legal reasoning from commercial arbitration and from public international law, see also Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008) 121–151. For a broad perspective of competing paradigms in understanding international investment that included views from public international law, international commercial arbitration, public law, trade law and human rights, see Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) American Journal of International Law 45.

36 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 6–38; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) American Journal of International Law 1; Julian Arato, 'The Logic of Contract in the World of Investment Treaties' (2016) 58(2) William & Mary Law Review 351.

interpretative provisions in three articles. Article 31 deals with the general rules of interpretation providing that interpretation shall be '*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'. Article 32 contains the supplementary rules of interpretation in the form of '*the preparatory work of the treaty and the circumstances of its conclusion*.' Article 33 clarifies approaches for linguistic discrepancies by specifying the equal authority of the text in each language in the absence of the specific provisions in the treaty to the contrary or the parties' agreement as to which text shall prevail.

The overall operation of the interpretative rules raises an ongoing debate. Articles 31–32 triggered numerous publications discussing whether they set clear stages for interpretative exercise,[37] how they deal with intertemporal aspects,[38] what the role of other uncodified rules of interpretation are,[39] and

37 For instance, Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (Cambridge University Press 2016); Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015); Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Hart Publishing 2016); Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007); Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22 European Journal of International Law 571.

38 For instance, on intertemporal aspects of treaty interpretation and evolutive interpretation, see Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014); Giovanni Distefano, 'L'interpretation évolutive de la norme internationale' (2011) 115(2) Revue Générale de Droit International Public 373; Julian Arato, 'Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences' (2010) 9(3) Law & Practice of International Courts and Tribunals 443; Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties Part I' (2008) 21(2) Hague Yearbook of International Law 101; Marko Milanovic, 'The ICJ and Evolutionary Treaty Interpretation' (*EJIL: Talk!*, 14 July 2009) <https://www.ejiltalk.org/the-icj-and-evolutionary-treaty-interpretation/> accessed 25 June 2021; Osamu Inagaki, 'Evolutionary Interpretation of Treaties Re-examined: The Two-Stage Reasoning' (2015) 22(2–3) Journal of International Cooperation Studies 127; Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 123; Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 German Yearbook of International Law 11; Sondre Torp Helmersen, 'Evolutive Treaty Interpretation: Legality, Semantics and Distinctions' (2013) 6(1) European Journal of Legal Studies 127; Ulf Linderfalk, 'Doing the Right Things for the Right Reason – Why Dynamic or Static Approaches Should be Taken in the Interpretation of Treaties' (2008) 10(2) International Community Law Review 109.

39 Michael Waibel, 'The Origins of Interpretative Canons in Domestic Legal Systems' in Joseph Klinger and others (eds), *Between the Lines of the Vienna Convention? Canons of Construction and Other Interpretive Principles in Public International Law* (Kluwer Law

some others. Article 33, on linguistic discrepancies, receives somewhat less attention.[40]

Raising itself disagreement in relation to its own interpretation, Articles 31–32 shall not accordingly form an illusion about their magic capacity to represent universal interpretative rules, which, as and when applied to contracts, by analogy or by extension, mute all the contrasts/differences to contract interpretation across national laws (as discussed in Chapter 2, the mission of neutralising discrepancies in contract interpretation across jurisdictions for various private law harmonisers became somewhat challenging). The described focus of interpretative rules on consent captures the similarity in contract and treaty interpretation on a very superficial level and does not react to the plurality of important distinctions as to how the meaning of consent is in fact extracted from a contract and from treaties. It is accordingly not surprising that the existent general similarity between contract interpretation and treaty interpretation that illuminated academic work of the previous century prior to the emergence of the VCLT almost disappeared from the radar of contemporary scholars.[41] Not only are we better informed now on the distinctions between contract interpretation in various national laws and the difficulties to reflect common rules in uniform transnational sources on harmonisation, more analysis has become available on the distinctions between treaty interpretation across various international law subfields. The fragmentation of international law and the growing of the somewhat isolated interpretative communities sharpened differences in treaty interpretation within investment, trade, financial, monetary, human rights and other regimes.[42] Furthermore, there seems to

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International 2018) 25–46. See also other chapters in Joseph Klingler and others (eds), *Between the Lines of the Vienna Convention? Canons of Construction and Other Interpretive Principles in Public International Law* (Kluwer Law International 2018).

40 For instance, Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 635–651; Peter Germer 'Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties' (1970) 11 Harvard International Law Journal 400, 400–427; Christopher B Kuner, 'The Interpretation of Multilateral Treaties: Comparison of Texts versus the Presumption of Similar Meaning' (1991) 40(4) International and Comparative Law Quarterly 953, 953–964.

41 Some references nevertheless may still be found – see Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 99–105.

42 Michel Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015) 147–165. For various aspects of the application of VCLT to the interpretation of treaties in the subfields of international law, see, for instance, Christoph Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in Malgosia Fitzmaurice and others (eds), *Treaty Interpretation and Vienna Convention on the Law of Treaties: 30 Years*

be an increasing interest in interpretative rules of international law in relation to sources other than treaties. Interpretation of customary rules of international law appears increasingly in focus.[43] The described distinctions to a certain extent resemble differences in contract interpretation under applicable national regimes[44] and similar distinctions in statutory interpretation across jurisdictions and even across federal parts.[45] To put it simply, neither treaty interpretation nor contract interpretation are monochrome and homogenous concepts; they are concepts that welcome to various extents, under their umbrella, a range of distinct approaches.

Further, comparison of Article 31 and Article 32 of the VCLT with rules on contract interpretation in national laws reveals numerous rather sensitive distinctions between them. For instance, for English law, not only a reference to good faith in Article 31 will serve as a red flag; a reference to the object and purpose of the document/treaty will be perceived as an open invitation to investigate subjective intent, something that English contract law tries to diminish.[46] A reference to any subsequent practice of the parties in the application of the document will turn equally rebellious against fundamental

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on (Martinus Nijhoff 2010) 129–151; J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012); Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009). Georges Abi-Saab, 'The Appellate Body and Treaty Interpretation', in Malgosia Fitzmaurice and others (eds), *Treaty Interpretation and Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010) 97–109.

43 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 496–510. See also ERC projects, 'The Rules on Interpretation of Customary International Law' <https://cordis.europa.eu/project/rcn/212805/en> accessed 25 June 2021 and Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 (3–4) International Community Law Review 229, 229–256.

44 See Chapter 2.

45 On distinctions in statutory interpretation, see Stephan Vogenauer, 'Statutory Interpretation' in Jan M Smits (ed), *Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012) 826–838; Christopher Hunt and others, *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Thomson Reuters 2018).

46 See Chapter 2. English contract law traditionally has a restrictive approach to good faith as undermining predictability in contractual relations. Even for relational types of contracts that usually imply considerations of good faith in civil law jurisdictions, English courts are somewhat sceptical. In *Globe Motors Inc v. TRW Lucas Variety Electric Steering Ltd*, the Court of Appeal rejected the relevance of good faith consideration as a general principle and emphasised a need for more clear incorporation: '*the implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract.' – Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd*, [2016] EWCA Civ 396.

principles of interpretative rules under English contract law that prioritise text.[47] In fact, as addressed in Chapter 1, a treaty-based tribunal had an opportunity to contrast these interpretative approaches under international law along the same lines in *Azpetrol v. Azerbaijan*, emphasising the role of subsequent practice and *travaux préparatoires* as the most sharp distinctions in approaches.[48] Equally, however unsatisfactory Articles 31 and 32 may be, if assessed from the civil law tradition of French law, even if one may align general rules of treaty interpretation with that of contract interpretation under Article 1188 of the French Civil Code, other sensitive distinctions nevertheless emerge. An interpretation of a reasonable man in the same situation[49] as a default interpretative rule under the French law and the absence of the precise rule in the VCLT may disappoint a French interpreter relying on the VCLT for contract interpretation. Furthermore, a lack of more specific provisions in the VCLT, that are available in French law regarding interpretation in favour of certain parties – the debtor or the party that acceded to a document/contract[50] – may turn out to be equally sensitive distinctions.

If one were to attempt to reconstruct whether a reference to good faith in the VCLT is in fact a transplant from the national laws making the VCLT closer to a civil law approach to contract interpretation, one would be equally disappointed. Rather than bringing the corrective function of good faith considerations into civil law tradition, a reference to good faith appeared primarily in the VCLT as a manifesto directed at interpreters who have to interpret in good faith. The origin of the appearance of good faith in the VCLT and other

47 As a general rule, English contract law does not permit consideration of the subsequent conduct of the parties for interpretation. An exception to the general rule can take place when an original intent has to be established when a contract is part oral and part written – *Brian Maggs v. Guy Marsh* [2006] EWCA Civ 1058. Another exception comes in cases of rectification as identified in a leading case on contract interpretation *Investors Compensation Scheme Ltd. v. West Bromwich Building* [1998] 1 WLR 898.

48 *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan,* ICSID Case No. ARB/06/15, Award dated 8 September 2008, para 62–65.

49 Article 1188 (2) of the French Civil Code in force as of 1 October 2016 provides: '*Lorsque cette intention ne peut être décelée, le contrat s'interprète selon le sens que lui donnerait une personne raisonnable placée dans la même situation.*' [When the intention cannot be defined, the contract shall be interpreted in the sense that would be given to it by a reasonable person in the same situation.]

50 Article 1190 of the French Civil Code in force as of 1 October 2016 specifies: '*Dans le doute, le contrat de gré à gré s'interprète contre le créancier et en faveur du débiteur, et le contrat d'adhésion contre celui qui l'a proposé.*' [In case of doubt, a contract concluded in negotiations is interpreted against the creditor and in favour of the debtor, and the contract of adhesion against the one who proposed it].

considerations associated with good faith are addressed in more detail in the section dealing with general principles of law below.

Viewed from contract law perspectives of any jurisdiction, it would be unlikely that the interpretative provisions of Article 31–32 of the VCLT would settle all differences. Should they be able to do so, it would have certainly been the VCLT that influenced the drafting efforts on interpretative provisions in transnational sources – such as the UPICC. The history of the UNIDROIT text however demonstrates that it was rather the CISG than the VCLT that affected interpretative provisions. In turn, and as discussed in the subsequent section on the CISG, the VCLT has not informed its interpretative provisions and was raised as an argument for the overall exclusion of interpretative principles from the CISG.

While not responding to expectations on contract interpretation under national laws, interpretative provisions of the VCLT bring nevertheless some novelty which is not routinely found in national laws – rules on linguistic discrepancy.[51] Article 33 suggests that if no preference is established either by a treaty or by the parties' agreement, the differences should be attempted to be removed using general rules of interpretation established by Articles 31 and 32 of the VCLT. If this exercise does not remove discrepancy, a harmonising interpretation reconciling both texts with a view to a treaty object and purpose shall be adopted.

The approach to dealing with linguistic discrepancy substantially differs from that suggested later by the UPICC. The VCLT suggests to attempt to remove discrepancies primarily by teleological and purposive interpretation without giving any single language predetermined priority. The UPICC in turn favours the initial or original language in which a provision or the whole contract were drafted.[52]

Linguistic practice existent in treaty drafting at the time of the work on the VCLT largely explains the reluctance of Article 33 to rely on the language in which a treaty is originally drafted. At that time, the predominant part of

51 Ingeborg Schwenzer and others, *Global Sale and Contract Law* (Oxford University Press 2012) 296–297, para. 26.18.

52 Article 4.7 of the UPICC provide as follows: '*Where a contract is drawn up in two or more language versions which are equally authoritative there is, in case of discrepancy between the versions, a preference for the interpretation according to a version in which the contract was originally drawn up.*' See also a commentary on the provision – Stefan Vogenauer, 'Article 4.7' in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (Oxford University Press 2009) 531–533.

treaties was drafted in French.[53] A reference to the original language would almost automatically give a preference to the French language. The Special rapporteur explained the undesirability to prefer a single language and the appropriateness of reconciling and only thereafter applying the general rules of interpretation as follows:

> Plurilingual in expression, the treaty remains a single treaty with a single set of terms the interpretation of which is governed by the same rules as unilingual treaties, that is, by the rules set out in articles 70–73 [now articles 31–33] …
>
> The plurilingual form of the treaty does not justify the interpreter in simply preferring one text to another and discarding the normal means of resolving an ambiguity or obscurity on the basis of the objects and purposes of the treaty, travaux préparatoires, the surrounding circumstances, subsequent practice, etc. On the contrary, the equality of the texts requires that every effort should first be made to reconcile the texts and to ascertain the intention of the parties by recourse to the normal means of interpretation.[54]

It might be tempting, accordingly, to see political considerations behind the rules in the VCLT dealing with linguistic discrepancy and practical considerations behind the UPICC provision.

A single attempt so far to engage with the VCLT for contract interpretation evidences precisely a reliance on Article 33 of the VCLT when dealing with linguistic discrepancy.[55] The tribunal in the *Eurotunnel* case found that even though '*the Concession Agreement is not a treaty, it is an agreement governed by international law, an "international contract", and that international law principles of interpretation are to be applied*';[56] furthermore, with reference to the parties' agreement, the tribunal clarified that '*the principles of interpretation laid down in the Vienna Convention on the Law of Treaties*

53 Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn, Springer 2018) 635, 637.

54 Sir Humphrey Waldock, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 63–64 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf> last accessed 25 June 2021.

55 This chapter does not deal with the unconscious reliance on interpretative rules in the VCLT that could have taken place in the analysis of those tribunals that were more affected by the public international law paradigm.

56 *The Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 92.

(*"Vienna Convention"*) *are declaratory also for agreements between States and private parties under international law and should be applied to resolve any discrepancies*.'[57] Relying on Article 33, the tribunal, consisting primarily of public international law lawyers,[58] chose to emphasise its customary character.[59]

While *Eurotunnel* was primarily a contract-based case, a public international law source – the Treaty of Canterbury[60] – constituted an important part of its legal framework.[61] The treaty backed up the concession supplying relevant

57 Ibid.

58 The tribunal was composed of James Crawford, L Yves Fortier, Gilbert Guillaume, Lord Millett, and Jan Paulsson. Nowadays when many lawyers practise both public international law and international commercial arbitration, it may be difficult to attribute to a profile an exclusive or dominant specialisation in public international law. At the same time no difficulty arises to see a public international law *highlight* for this panel. James Crawford was Former Whewell Professor of International Law of the University of Cambridge, judge of the ICJ from 2014–2021; L Yves Fortier is a former Canadian diplomat, Gilbert Guillaume is a former Judge and President of the ICJ and Member of the Institute of International Law; Lord Millet is a non-permanent judge of the Hong Kong Court of Final Appeal and a former Lord of Appeal in Ordinary and barrister of the United Kingdom; Jan Paulsson, while being seen more in international commercial arbitration, served also in other tribunals including as President of the World Bank Administrative Tribunal and President of the EBRD Administrative Tribunal.

59 *The Eurotunnel Arbitration*, Partial Award of 30 January 2007, fn 242: '*The International Court recognized the customary character of Article 33(4) of the Vienna Convention in the LaGrand case*' (*Germany v. United States of America*) *ICJ Reports 2001, 466, 502* (*para. 101*).

60 The Treaty concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link was signed at Canterbury on 12 February 1986. Following ratification by both States it entered into force on 24 July 1987.

61 The tribunal explained the limits of its jurisdiction and relevance of the Treaty of Canterbury as follows: '*The conclusion that the Tribunal lacks jurisdiction to consider claims for breaches of obligations extrinsic to the provisions of the Concession Agreement* (*and the Treaty as given effect by the Concession Agreement*) *does not mean that the rules of the applicable law identified in Clause 40.4 are without significance. They instruct the Tribunal on the law which it is to apply in determining issues within its jurisdiction. They provide the legal background for the interpretation and application of the Treaty and the Concession Agreement, and they may well be relevant in other ways. But it is the relationship between the Principals and the Concessionaires as defined in Clause 41.1 on which the Tribunal is called to pronounce … To conclude, the Tribunal's jurisdiction is limited to claims which implicate the rights and obligations of the Parties under the Concession Agreement as defined in Clause 41.1. Thus, the source and the only source of the Parties' respective rights and obligations with which the Tribunal is concerned is* (*a*) *the Treaty* (*but only insofar as it is given effect to by the Concession Agreement*) *and* (*b*) *the Concession Agreement* (*whether or not it goes beyond merely giving effect to the Treaty*).' – *The Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 151, 153.

rules that affected the jurisdiction and substance of the dispute. At the same time, the treaty did not serve as an independent cause of action in the dispute and was relied upon through a concession agreement.[62] In the absence of any refined/clear examples of cases of investment treaty arbitration which relied on the interpretative provision in the VCLT, and with necessary caveats, the *Eurotunnel* is used here for illustrative purposes.

The concession agreement that appeared central to the dispute was entered into by two entities of the *Eurotunnel* group and the governments of France and the United Kingdom for the construction of the Fixed Link between France and the United Kingdom. Claimants said that they had suffered losses because of the incursions caused by refugees who illegally attempted to travel to the United Kingdom, and claimed that both states had failed to prevent said incursions. Linguistic discrepancies marked one of the most important provisions of the concession – clause 2.1 – relating to the nature of undertakings assumed by the states vis-à-vis concessioner, either as an obligation of coordination, or as an obligation individually and, where necessary, collectively to take appropriate measures for the development, financing, construction and operation of the Fixed Link in accordance with the concession agreement. Relying on Article 33 of the VCLT and equating pre-contractual correspondence and negotiations to *travaux préparatoires*,[63] the tribunal concluded that clause 2.1 related not only to coordination undertakings, but also to individual and collective measures, and that the principals under the concession agreement had failed to observe said undertakings.

Even though the contract in question involved states as contracting parties and even though the tribunal predominantly consisted of public international law lawyers, this alone does not suffice to justify reliance on the VCLT for interpreting a contract. A thorough investigation reveals that it was rather the parties' agreement that made a reliance technically possible.[64] The parties did not dispute the relevance of Article 33, most likely because the provision represents a rather unique set of rules that expressly govern issues of linguistic discrepancies which states are familiar with. While one can no doubt agree with the proposition that contractual laws are more advanced to address a broad variety of peculiarities surrounding contracts, contractual multilingualism does not however turn as a rule into an issue for express regulation in national laws.

62 The tribunal, for instance, found that two states were in a breach of obligations under the Treaty of Canterbury 'as given effect by the Concession Agreement' – *The Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 395 (1).

63 Ibid. para. 94.

64 Ibid. para. 92.

Parties usually distribute risks associated with language discrepancies across their contracts by including provisions expressly setting which linguistic version of a contract should prevail in the case of discrepancy. In the absence of this provision, such as in the concession agreement for the *Eurotunnel*, as well as in the absence of specific regulation in national law, tribunals can do nothing but resolve issues circumstantially.[65] Stephan Vogenauer acknowledges an innovative provision on linguistic discrepancy, commenting on the interpretative rules in the UPICC, which while somewhat different from the VCLT's approach,[66] could also potentially serve as a basis for contract interpretation, but it failed, possibly because of its applicability to 'commercial' contracts.[67] A reliance on the provisions on linguistic discrepancy may be a ground to consider that the VCLT was not applied as a source of international law, but rather as a reflection of certain interpretative rules to which both parties expressed agreement after the dispute arose – closer to a transnational source than a public international law instrument proper.

That it was a rather unique coincidence of factors that led to the application of Article 33 (4) of the VCLT to contract interpretation in *Eurotunnel* is indirectly supported by other investment treaty arbitration cases in which arbitrators involved in *Eurotunnel* acted and in which they had to interpret contracts.[68] There is no single case with the participation of these arbitrators which demonstrates any

65 Schlechtriem & Schwenzer's Commentary on the UN Convention on the International Sale of Goods (CISG) provides a helpful overview of factors that might assist to resolve language discrepancies, and which might be equally applicable to the context of analysis under national laws. The spectrum of factors includes trade or industry usages, the context of standard contracts, established practice between the parties, the official language in the place of business, etc. – see Ingeborg Schwenzer (ed), *Schlechtriem & Schwenzer Commentary on the UN Convention on the International Sale of Goods* (4th edn, Oxford University Press 2016) 164–166.

66 Stefan Vogenauer, 'Article 4.7' in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (Oxford University Press 2009) 531.

67 For a discussion of the binary nature of commercial and investment contracts see below.

68 For clarity it should be noted that it appears from the public sources that James Crawford, Jan Paulsson, Gilbert Guillaume, L Yves Fortier and The Rt. Hon. Lord Millett – arbitrators involved in the Eurotunnel case – have not sat all on the same panel thereafter and neither of the cases in which they acted and interpreted contracts in fact related to contracts where more than one party was a state, and no linguistic discrepancy in the text of a contract appeared either. James Crawford acted as an arbitrator/member of an annulment committee in the investment treaty arbitration involving contract interpretation in the cases as follows: *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6; *Waste Management, Inc. v. United Mexican States* (*"Number 2"*), ICSID Case No. ARB(AF)/00/3; *MTD Equity Sdn. Bhd. and MTD Chile*

attempt to rely on the VCLT as a declaration of the relevant interpretative principles for contract interpretation. Somewhat distant similarities may be, however, found in *Lemire v. Ukraine* (*II*), with participation of one of the arbitrators from the *Eurotunnel* case – Jan Paulsson. Although not referring to the VCLT, the tribunal in *Lemire v. Ukraine* (*II*) considered the parties' failure to expressly choose which law was to be applicable in the settlement agreement as a 'negative choice' of national law and a proxy to rely on transnational principles.[69]

S.A. v. Republic of Chile, ICSID Case No. ARB/01/7 (Annulment), *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment). Jan Paulsson acted as an arbitrator in the investment treaty arbitration involving contract interpretation in *Desert Line Projects LLC v. The Republic of Yemen,* ICSID Case No. ARB/05/17; *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18; *Generation Ukraine, Inc. v. Ukraine,* ICSID Case No. ARB/00/9; *Adem Dogan v. Turkmenistan,* ICSID Case No. ARB/09/9; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)04/6. Gilbert Guillaume acted as an arbitrator/member of an annulment committee in the investment treaty arbitration involving contract interpretation in *Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia,* ICSID Case No. ARB/09/16, *CMS Gas Transmission Company v. The Argentine Republic,* ICSID Case No. ARB/01/8 (Annulment), *Siemens A.G. v. The Argentine Republic,* ICSID Case No. ARB/02/8 (Annulment), *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7 (Annulment), *Venezuela Holdings, B.V., et al* (*case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.*) *v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27. L Yves Fortier acted as an arbitrator/member of an annulment committee in the investment treaty arbitration involving contract interpretation in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay,* ICSID Case No. ARB/07/9*; Eureko B.V. v. Republic of Poland; Ron Fuchs v. The Republic of Georgia; Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/3*; Talsud S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/4*; Hulley Enterprises Limited* (*Cyprus*) *v. The Russian Federation,* UNCITRAL, PCA Case No. AA 226*; Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey,* ICSID Case No. ARB/02/5*; Bernhard von Pezold and Others v. Republic of Zimbabwe* (ICSID Case No.ARB/10/15); *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, *Oko Pankki Oyj, VTB Bank* (*Deutschland*) *AG and Sampo Bank Plc v. The Republic of Estonia,* ICSID Case No. ARB/04/6, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia and Monatom Co., Ltd.* (PCA Case No.2011-09), UNCITRAL, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment).

69 *Joseph Charles Lemire v. Ukrain*e, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 111.

It is further noteworthy that no other analysed case in investment treaty arbitration dealing with issues relating to linguistic discrepancies in contracts evidences a reliance on the VCLT. The issue of linguistic discrepancy has arisen in at least two cases: *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. The Kingdom of Thailand*[70] and *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*.[71] In contrast to *Eurotunnel,* the parties in these cases expressly allocated risks between themselves in relation to linguistic discrepancy, either by agreeing in a straightforward manner which language prevailed from the outset,[72] or by providing a more complex mechanism which, on the one hand, would emphasise the equal nature of drafts in both languages, while on the other hand retaining one language as an ultimate recourse.[73] In *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. The Kingdom of Thailand*, the tribunal, with the assistance of the Thai arbitrator on the panel, reconfirmed that the terms in question in the dominant Thai language did not substantially differ from the English variant. In this regard, the tribunal exclusively relied on the contractual provision on prevalence of one language and did not find it necessary to corroborate the finding by reference to the law applicable to a contract. In *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, the tribunal faced a more complicated task.

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70 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. The Kingdom of Thailand, UNCITRAL* (*formerly Walter Bau AG* (*in liquidation*) *v. The Kingdom of Thailand*).

71 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13.

72 *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. The Kingdom of Thailand,* UNCITRAL (*formerly Walter Bau AG* (*in liquidation*) *v. The Kingdom of Thailand*), Award dated 1 July 2009, para. 7.13–7.14. Clause 35.7, paragraph two, of the Concession Agreement reads in part: '*This Concession Agreement is executed in Thai and English languages in duplicate with identical wording and the Thai version shall govern in the event of discrepancies.*'

73 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award dated 27 September 2017, para. 600. The contract provided: '*30.1 The text of this Contract shall be made in the State, Russian and English languages and all signed versions shall have equal legal force. 30.2 In case of any inconsistency or conflicts among the versions, the versions of the text in Russian and English shall be used to resolve such inconsistency or conflict and both texts will be considered on an equal basis; provided, however, that in case of any conflict between the English and Russian texts in any arbitration under this Contract, the arbitration panel shall conform the two texts to the extent possible and shall revert to the Russian text for the interpretation of any specific provisions, using general principles of fairness.*'

In deciding whether the contract at stake represented the parties' agreement to treat one of the parties to be a foreign one for the purpose of the ICSID Convention,[74] the tribunal had to resolve the parties' disagreements over the effects of a provision specifying the Lebanese nationality of the claimant in the Russian version. The tribunal was not in search of international or transnational rules, and based its analysis exclusively within the ambit of national law. A principle to consider is that an agreement as a whole under Kazakh law shaped the tribunal's interpretative exercise.[75] The two cases again reaffirm the rather unique assembly of factors that surrounded the reliance on the VCLT in *Eurotunnel*.

Having seen the rather peculiar nature of reliance on the VCLT for solving linguistic discrepancy in *Eurotunnel* and the lack of other cases affirming the approach either in general or in relation to linguistic discrepancy, one may treat the words of Eirik Bjørge on there being a 'tendency',[76] that *Eurotunnel* represents something rather premature. However, if assessed from a broader perspective, a proposition seems to resonate with Stephan Schill's observation on the reasoning of public international law in investment treaty arbitration.[77] What remains certain is that the interpretative rules of the VCLT are not designed to be extended to contract interpretation and any reliance on them requires considerably more legitimising factors, including the parties' agreement. Furthermore, when applied through parties' agreement, the interpretative provisions of the VCLT lose their features as a source of international law and become mostly a reflection of a certain transnational regime that the parties made applicable to a particular contract.

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74 Article 25(2)(b) of the ICSID Convention specifies parties' agreement as to nationality among one of the conditions for its jurisdiction. According to the provision, juridical persons are considered to have the 'nationality of another Contracting State' where, because of foreign control, the parties agreed to treat such person as a national of another Contracting State for the purposes of the ICSID Convention.

75 *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan,* ICSID Case No. ARB/13/13, Award dated 27 September 2017, para. 601.

76 Eirik Bjørge, "Contractual' and 'Statutory' Treaty Interpretation in Domestic Courts?' in Helmut Phillipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 53–54.

77 Stephan Schill notes: '*At the same time, investment tribunals are themselves increasingly breaking with the mind-set of international commercial arbitration by making use of argumentative techniques known from* (*national and international*) *public law, such as proportionality balancing, doctrines of deference, and comparative public law reasoning*.' – see Stephan W Schill, 'In Defence of International Investment Law' in Marc Bungenberg and others (eds), *European Yearbook of International Economic Law 2016* (Springer 2016) 328–329.

3.2.2 *International Investment Agreements*

As the critical legal framework for treaty-based disputes, international investment agreements (IIAs) are the next stop in the inquiry on the availability of specific rules of international law for contract interpretation. Because IIAs have emerged to provide an additional layer of protection for foreign investors in international law, but not to intervene in substantive regulation of investment activity in the respective states, an intuitive reaction would suggest that no interpretative provisions could be traced in their texts. A continuous failure of IIAs to solve the general intricacies of the contract-treaty divide makes it further rather unlikely that IIAs would expressly address contract interpretation.[78] At the same time, treaty language is not put in stone. Even though states are signing less bilateral treaties than before, they continue to be actively engaged in megaregional trade treaties with investment chapters.[79] Their choices seem to be more informed regarding new-generation IIAs and amendments of existing IIAs.[80] This intensified dynamics makes it less certain that no specific provisions in IIAs on contract interpretation can be found in the texts of IIAs. In any event, an intuitive scepticism, even if reflecting the true picture, cannot substitute a proper investigation that has to be performed if one wants to find an answer.

The task to verify whether IIAs contain specific provisions that might shed light on contract interpretation is a demanding exercise. To answer properly, one has to deal with a large number of IIAs.[81] In addition to concluded treaties,

78 Numerous unsettled issues that mark the contract-treaty divide in investment treaty arbitration, and which find their most dramatic development in the application of an umbrella clause and the FET standard, would not have taken place should IIAs resolve them expressly. The ISDS Academic Forum marks treaty silence on the contract-treaty divide as a reason for inconsistency in investment treaty arbitration ultimately compromising its overall legitimacy – see, ISDS Academic Forum, 'Concept Paper on Issues of ISDS Reform. Working Group No 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues', para. 41, available at <https://www.cids.ch/images/Documents/Academic-Forum/3_Inconsistency_-_WG3.pdf> accessed 25 June 2021.

79 UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* (UNCTAD/WIR/2018) 88–103, available at <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>, accessed 25 June 2021; UNCTAD, World Investment Report 2019, 17–18, available at <https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf> accessed 25 June 2021.

80 UNCTAD, *World Investment Report 2019: Special Economic Zones* (UNCTAD/WIR/2019) 19–20, available at <https://unctad.org/en/PublicationsLibrary/wir2019_overview_en.pdf> accessed 25 June 2021; UNCTAD, 'IIA Issues Note No. 3, 2019. Taking Stock of IIA Reform: Recent Developments' 2–8, available at <https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d5_en.pdf> accessed 25 June 2021.

81 Available at the UNCTAD Investment Policy Treaty Hub as of 30 January 2019 <https://investmentpolicyhub.unctad.org/IIA> accessed 25 June 2021.

available model BITs also have to be considered because they may serve as an articulation of state policy and provide valuable insight into future changes in the wording of IIAs.[82] In other words, the study has to engage with empirical analysis of the *corpus linguistic* of IIAs and model BITs.

To find an answer, this work has scrutinised the content of 1,525 IIAs (Annex VII) and 47 model BITs (Annex VIII) whose texts were available in English. As with all awards analysed in this book, only those treaties that were available as of 30 January 2019 were taken into account. Each and every treaty text was analysed first manually. Thereafter, all texts were run through verification with a computer search of key words. The following key words were used – 'contract', 'agreement', 'interpret' and 'interpretation'. All findings with these words were read again to double check that no omissions had occurred and no single provision was missed that could qualify under the rule or principle relevant for contract interpretation in investment treaty arbitration.

The study organised in this way found no rules or principles on contract interpretation. Of particular interest was the verification stage which revealed a broad range of treaty provisions expressly dealing with *contracts* or *interpretation*. In particular, contracts are frequently named in IIAs and Model BITs to define the term *investment*.[83] Treaties may expressly distinguish between two types of contracts – investment and commercial. If an investment contract, they receive treaty protection as an investment. Commercial contracts are referenced as an illustration of contractual arrangements that must not fall under the concept of investment (more discussion on this comes in the section on uniform private law conventions and contract interpretation below). Contracts are also occasionally mentioned in substantive treaty provisions, such as umbrella clauses.[84] Regarding interpretation, analysed treaties offer rules on dispute settlement in relation to inter-state disputes on treaty

82 An approach adopted by India is remarkable in this regard. After having prepared a revised Model BIT in 2015, India terminated all its previous BITs and started to conclude new ones. See, for instance, Alison Ross, 'India's termination of BITs to begin' GAR 22 March 2017 available at <https://globalarbitrationreview.com/article/1138510/indias-termination-of-bits-to-begin> accessed 25 June 2021. Not all states can be found to aggressively insist on the application of their own template, but Model BITs nevertheless represent a refined picture of what a particular state considers attractive when isolated from negotiations.

83 See, for instance, Article 1 Canada Model BIT (2004); Article 3 of Brazil Model CFIA (2015); Article 1 of the Netherlands Model BIT 2019; Article 1 of Azerbaijan – Serbia BIT (2011); Article 1 of Benin – Canada BIT (2013); Article 1 of Italy-Qatar BIT (2000).

84 For instance, Article 11(1) of Kazakhstan-Austria BIT (2010); Article 11 Tajikistan – Austria BIT (2010).

interpretation.[85] Many treaties of the new generations introduce more elaborate provisions on treaty interpretation that include binding interpretation by joint commissions or committees[86] and clarification of the rules applicable to treaty interpretation.[87] Some treaties also offer clarifications even for the interpretation of national law exercised by treaty-based tribunals.[88] No treaty, however, appears to exist as of 30 January 2019 that provides any clarity as to how contracts should be interpreted.

This gap in IIAs and model BITs has a direct connection with the lack of uniformity in approaches to contract interpretation in investment treaty arbitration. One can explain this gap as being rather deliberate and thus indirectly supporting the exclusivity of national law in relation to contract interpretation. One can also interpret the lack of guidance in IIAs as *carte blanche* for other interpretative techniques that are not necessarily based on national law. To recall, as analysed in Chapter 1, arbitration awards reveal a majority of occasions in which tribunals have applied national law to contract interpretation (53% of cases with elements of contract interpretation), but the predominant number of these awards does not show however that *interpretative* rules of national law were in fact applied (only 9% of awards with elements of contract interpretation indicate application of *interpretative* rules). Furthermore, a rather significant number of cases (47%) also demonstrate ascertainment

85 For instance, Article 10 of Chile – Switzerland BIT (1999); Article 8 of China – Colombia BIT (2008).

86 See, for instance, Albania – Israel BIT (1996), Argentina – Israel BIT (1995) and Belgium-Luxembourg Economic Union – China BIT (2005). For an overview of the trend, see Yuliya Chernykh, 'Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence?' in Szilárd Gáspár-Szilágy, Daniel Behn and Malcolm Langford (eds), *Adjudicating Trade and Investment Law: Convergence or Divergence?* (Cambridge University Press 2020) 211–243.

87 Canada – EU CETA (2016) stipulates, for instance, in Article 8.31: '*When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.*' See, also Article 24 of Belarus – India BIT (2018) and Article 3.13 of EU – Singapore Investment Protection Agreement (2018).

88 For instance, Article 8.31 of the CETA, Article 3.42 of the EU-Vietnam. Article 8.31 of the CETA reads as follows: '*For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.*'

of the content of contractual provisions that were not expressly based on national law regulation of contract interpretation. The existent uncertainty around application of national law to contract interpretation in investment treaty arbitration calls for an appropriate clarification in IIAs and Model BITs.

The necessity may become more obvious if one looks at issues through the paradigm of Jeswald Salacuse, who suggested that investment treaty disputes trigger three legal frames – international, national and contractual.[89] Given that some IIAs have already started to expressly clarify how international and national regulation have to be approached, i.e. methods for treaty and statutory interpretation, the time is ripe to give clarification in relation to contract interpretation as well. The UNCTAD's statement, with its emphasis on the necessity to enhance coordination between various regulations affecting investment,[90] may be viewed as supporting the proposition too. Overall, with clear treaty guidelines on the precise role of national law in the analysis of investment treaty tribunals more generally and in the analysis relating to contract interpretation in particular, much more clarity and predictability could be achieved.

3.2.3 *Uniform Private Law Conventions*

While IIAs are silent on rules concerning contract interpretation, it is interesting to turn our attention to the harmonisation of private law rules via public international law sources in the field of international commercial law – uniform private law conventions.[91] These conventions are unduly ignored in the

89 Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (Oxford University Press 2013) 35–50.

90 UNCTAD noted, for instance, as follows: '*In sum, in considering next steps for investment policy reform, countries should be guided by the objectives of fostering coherence, maximizing synergies and improving interaction between various instruments that govern investment.*' – UNCTAD, *World Investment Report 2018: Investment and New Industrial Policies* <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 25 June 2021.

91 The term can be found in Jürgen Basedow, 'Uniform Private Law Conventions and the Law of Treaties' (2006) 11(4) *Uniform Law Review* 731, 731–746 or here – Ulrich G Schroeter, '*The Withdrawal of Reservations under Uniform Private Law Conventions*' (2015) 20(1) Uniform Law Review 1, 1–18. The uniform private law conventions may also be referred to as 'international uniform commercial law conventions' – see Herbert Kronke, 'International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice' (2000) 5(1) Uniform Law Review 13, 13–21. These conventions may also be addressed as 'private commercial law conventions' – see Roy Goode, 'Private Commercial Law Conventions and Public and Private International Law: The Radical Approach of the Cape Town Convention 2001 and its Protocols' (2016) 65(3) International and Comparative Law Quarterly 523.

general discourse relating to international treaties and conventions.[92] They are also invisible in the discourse of investment treaty arbitration. Because the uniform private law conventions deal primarily with the rights and obligations of non-state parties, they are indeed somewhat peculiar. At the same time they remain international conventions and impose certain obligations on contracting state parties.[93] The private law dimension [regulatory focus] of these conventions makes it highly probable that they would have certain provisions on contract interpretation. What follows below will accordingly discuss whether uniform private law conventions provide any clarity regarding contract interpretation, and if so, whether these rules may be of any assistance in the context of investment treaty arbitration. The focus here is thus two-fold and encompasses both a *question on availability* and a *question on applicability*.

The answer to the *question on availability* could easily receive a negative response if one looks back at history. At the time of the previously cited scholars and international judges, Hersch Lauterpacht or Lord McNair, for instance, international law was quite far from being able to cover private law matters and from attempting to harmonise national regulation. An insight from a bit further back, in 1907, prior to Hersch Lauterpacht's and Lord McNair's time, reveals the most striking context of the discussion on the interaction between conventional norms and contracts one could ever imagine. Instead of harmonising private law in relation to contracts, 17 countries had to agree to limit the *use of force* in relation to the recovery of contractual debts '*claimed from the Government of one country by the Government of another country as being due to its nationals.*'[94] The resulting Convention respecting the Limitation of

92 This observation is easy to confirm by looking at classical monographs in public international law. The scholars cited above, Jürgen Basedow, Roy Goode and Ulrich G. Schroeter share this view.

93 Most typical for these conventions are to impose certain undertakings on harmonisation and unification of regulation in a specific field upon the contracting parties.

94 Dramatic events in 1902 surrounding the use of military force by the United Kingdom, Germany and Italy to compel Venezuela to comply with contractual debts, preceded the conclusion of the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts on 18 October 1907. From 1909 to 1911, 17 states ratified the convention: Austria-Hungary, Denmark, El Salvador, Germany, Great Britain, Mexico, the Netherlands, Russia, and the USA (all on 27 November 1909), Nicaragua (on 19 November 1910), China (on 15 January 1910), Haiti (on 2 February 1910), France (on 7 October 1910), Norway (on 19 November 1910), Guatemala (on 15 March 1911), Portugal (on 13 April 1911), and Panama (on 11 November 1911). On the contemporaneous perception of the convention, as well as its context and the history of its conclusion, see George Winfield Scott, 'Hague Convention Restricting the Use of Force to Recover on Contract Claims' (1908) 2(1) The American Journal of International Law 78, 78–94. On the modern understanding of the Convention's role, see Wolfgang Benedek, 'Drago-Porter Convention (1907), *Max*

the Employment of Force for the Recovery of Contract Debts (1907), or the Drago-Porter Convention, imposed an obligation not to use force before having recourse to arbitration in relation to the question of contractual debts. Later, the UN Charter would outlaw the use of force and the Convention became redundant. As a result, adjudicative bodies, in particular arbitral institution, became the real battlefields.[95] For the sake of completeness, it should be acknowledged that some initiatives in the field of the harmonisation of intellectual property law, the transport of goods by rail and by sea, as well as in other fields were also ongoing at the beginning of the last century.[96] The real results covering a broad range of private law regulation appeared only with the intensification of international commercial relations after the Second World War. The enhanced work of the two institutions – the International Institute for the Unification of Private Law (UNIDROIT) as an independent intergovernmental organisation with a mission to modernise, harmonise and coordinate private and commercial law between states[97] and the UN Commission on International Trade Law (UNCITRAL) on the unification of international trade law[98] contributed most to elaboration of the substantive harmonised rules in the private law uniform conventions. The work of the Hague Conference on Private International Law (HCCH) contributed mostly to other aspects of harmonisation, relating primarily to the choice of law and jurisdictions.[99]

Planck Encyclopedia of Public International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e733> updated January 2007, accessed 25 June 2021.

95 According to Taylor St John, permanent arbitral institutions ultimately outlawed the use of force: '*The gradual, decades-long effort toward outlawing the use of force dovetailed with the development of permanent institutions for arbitration*' – see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press 2018) 59.

96 For a broader historical account covering the appearance of uniform private law conventions, see Jürgen Basedow, 'Uniform Private Law Conventions and the Law of Treaties' (2006) 11 (4) *Uniform Law Review* 731, 731–736.

97 UNIDROIT has existed since 1926 – <www.unidroit.org> accessed 25 June 2021.

98 UNCITRAL has existed since 1966 – <https://uncitral.un.org/en> accessed 25 June 2021.

99 HCCH has existed since 1893. Apart from some conventions with limited reach relating to the choice of law regarding the sale of goods, HCCH has not elaborated any other convention or treaty that would address any specific type of contract. For a broad overview of the conventions prepared by HCCH, see Dieter Martiny, 'Hague Conventions on Private International Law and on International Civil Procedure', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e942 > updated September 2009, accessed 25 June 2021. The significant contributions of HCCH in the development of conflict of laws regulation include the Principles on Choice of Law in International Commercial Contracts.

These days, the unification and harmonisation of international commercial law results in numerous instruments directly regulating various contracts,[100] such as the Hague Rules on Bills of Lading (1924),[101] the Warsaw Convention on Air Carriage (1929),[102] the Geneva Convention on the Bill of Exchange and Promissory Notes (1930),[103] the CISG (1980),[104] the UN Convention on Independent Guarantees and Stand-by Letters of Credit (1995),[105] the UNIDROIT Convention on International Financial Leasing (1988),[106] the UNIDROIT Convention on International Factoring (1988),[107] and the Cape Town Convention on International Interests in Mobile Equipment(2001), to name but a few.[108] There are also some conventions that may come into force and start to uniformly regulate other types of contractual arrangements such as the UNIDROIT Convention on Agency in the International Sales of Goods (1983), for instance.[109] Furthermore, the UNIDROIT's ongoing work

100 Unification of certain facets of contract law in the EU as a supra-national law and not international law is left aside from this inquiry. For an overview of the EU law see Achilles Skordas and Luke Dimitrios Spieker, 'Supranational Law', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1723> last updated May 2014, accessed 25 June 2021.

101 'International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("Hague Rules"), and Protocol of Signature' <https://comitemaritime.org/wp-content/uploads/2018/05/Status-of-the-Ratifications-of-and-Accessions-to-the-Brussels-International-Maritime-Law-Conventions.pdf> accessed 25 June 2021.

102 'Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the Said Convention Signed at the Hague of 28 September 1955' <www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf> accessed 25 June 2021.

103 United Nations, 'Convention providing a Uniform Law for Bills of Exchange and Promissory Notes' <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=553&chapter=30&clang=_en> accessed 26 September 2021.

104 UNCITRAL, 'Status: United Nations Convention on Contracts for the International Sale of Goods' <https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status> accessed 25 June 2021.

105 UNCITRAL, 'Status United Nations Convention on Independent Guarantees and Stand-by Letters of Credit' <https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees/status> accessed 25 June 2021.

106 UNIDROIT, 'Status – UNIDROIT Convention on International Financial Leasing' <https://www.unidroit.org/instruments/leasing/convention/status/> accessed 26 September 2021.

107 UNIDROIT, 'Status – UNIDROIT Convention on International Factoring' <https://www.unidroit.org/instruments/factoring/status/> accessed 26 September 2021.

108 UNIDROIT, 'Convention on International Interests in Mobile Equipment (Cape Town, 2001) – Status' <https://www.unidroit.org/instruments/security-interests/cape-town-convention/> accessed 26 September 2021.

109 UNIDROIT, 'Status of The Convention on Agency in the International Sale of Goods' <https://www.unidroit.org/instruments/agency/status/> accessed 26 September 2021.

in relation to contracts of reinsurance[110] and agricultural land investment contracts,[111] while being currently within a modest ambition of creating guidance and principles, is not prohibited from turning into more powerful forms of international treaties and conventions. The UNCITRAL in turn also addresses, with its current efforts, contractual aspects of cloud computing in electronic commerce,[112] the private financing of infrastructure projects[113] and the judicial sale of ships,[114] each area inevitably dealing with specific types of contracts.

Of the identified range of conventions currently in force, the CISG appears not only to be among the most powerful, but surprisingly it is the only one directly and explicitly regulating contract interpretation. As evidenced by Annex IX, other mentioned conventions touch contract interpretation only on a tangent through provisions that may impact understanding, but that do not provide universal general regulation/guidance on their interpretation. The CISG was quite close to adhere to their way, were it not for a proposition by Poland that was shared by other delegates, developing further and which was subsequently defended during the UNCITRAL working sessions.

During the 10th Commission Session, a delegate from Poland specified:

> 7. It seems advisable to precede article 13 of the draft by a general clause to the effect that in the interpretation and application of the stipulations of a contract, the intention of the parties as well as the purpose they wish to achieve are to be taken into account.
> 8. The rationale of the foregoing suggestion is as follows:
> The draft convention deals with a contract of sale of goods. In case of a dispute, the stipulations of the contract concerned are to be examined. If any of the said stipulations gives rise to doubts, the court when considering a case should try to clear up the intention of the parties at the conclusion of the contract. The court should also

110 UNIDROIT, 'Study L – Formulation of Principles of Reinsurance Contracts Law <https://www.unidroit.org/work-in-progress/reinsurance-contracts> accessed 25 June 2021.

111 UNIDROIT, 'Study LXXX B – Preparation of an International Guidance Document on Agricultural Land Investment Contracts' <https://www.unidroit.org/work-in-progress/agricultural-land-investment> accessed 25 June 2021.

112 UNCITRAL, 'Working Group IV: Electronic Commerce' <https://uncitral.un.org/en/working_groups/4/electronic_commerce> accessed 25 June 2021.

113 UNCITRAL, 'Privately Financed Infrastructure Projects' <https://uncitral.un.org/en/working_groups/1/pfip> accessed 25 June 2021.

114 UNCITRAL, 'Working Group VI: Judicial Sale of Ships' <https://uncitral.un.org/en/working_groups/6/sale_ships> accessed 25 June 2021.

> consider what the parties wanted to achieve, i.e. what was the purpose of the contract.[115]

Not all delegates were positive about having a general provision on interpretation and the appearance of Article 7 in the semi-final draft of 1978 (ultimately Article 8) did not prevent hot discussions. Criticism ranged from the overall utility and appropriateness of having specific interpretative provisions in the first place, to attacking their precise content.[116] Article 7 of the CISG was very close to being dropped, in a similar way to provisions on the validity of the contract, the rights of third parties and passing of title to national law that were ultimately excluded from the scope of the CISG regulation. Among the most critical of the provision was the ICC, which suggested that article 7 should have been deleted and if interpretative rules were to be included at all '*a more objective standard should be set up*'.[117] Later, the representative from Sweden also argued against the introduction of the provision in the text, mainly because it differed from the principles of treaty interpretation contained in Part III of the VCLT.[118] This opposition was met with resistance and the representatives of many states argued in favour of the provision. Remarkably, the representatives from the USA and the United Kingdom, whose rules are nowadays largely viewed as being different to what the CISG offers for contract interpretation, supported the insertion of Article 7.[119] A view expressed by a delegate from the German

115 UNCITRAL, 'Comments by Governments and international organizations on the draft convention on the international sale of goods (A/CN.9/125 and A/CN.9/125/ Add.l to 3)' (22 March 1977) <https://undocs.org/en/A/CN.9/125/Add.1>, <https://undocs.org/en/A/CN.9/125/Add.2>, <https://undocs.org/en/A/CN.9/125/Add.3> accessed 26 September 2021.

116 See, for instance, Gyula Eörsi, 'General Provisions' in Nina M Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (Matthew Bender 1984), available at <https://iicl.law.pace.edu/cisg/scholarly-writings/general-provisions> accessed 26 September 2021.

117 Ibid.

118 The summary of records describes the position of the representative of Sweden, Mr Hjerner, in the following words: '*Introducing his delegation's amendment* (A/CONF.97/C.1/L.52), [the representative of Sweden] *said that the discussion had shown that there were wide differences of view on the question dealt with in the article. In his opinion, it was neither necessary nor useful to set forth new rules for the interpretation of contracts, which might be contrary to those established in section 3 of the Vienna Convention on the Law of Treaties. That was why his delegation had proposed that article 7* [later Article 8] *should simply be deleted.*' – see *Summary Records of Meetings of the First Committee 6th meeting of 14 March 1980*, para. 46. available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>, accessed 26 September 2021.

119 Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on Contracts for the International Sale of Goods, and on Draft

Democratic Republic reflected a broader compromise that Article 7 [later Article 8] was based on.[120] Article 8 was adopted unanimously by 42 votes to none, with four abstentions.[121]

During the drafting process, the 1978 version of Article 7 remained almost unchanged compared to what is now Article 8. The minor change related to the specification that a standard of a reasonable person received: a reference to 'of the same as the other party' was included to identify what kind a reasonable person should be. Article 8 in its final wording, that is currently in use, looks as follows:

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.
(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.
(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

Provisions Concerning Implementation, Reservations and Other Final Clauses Prepared by the Secretary-General Document A/CONF.97/9 of 21 February 1980, available at <https://digitallibrary.un.org/record/10782?ln=es> accessed 26 September 2021.

120 Summary Records of Meetings of the First Committee 6th meeting of 14 March 1980 evidences a rather intense discussion of Article 7. The position of the representative of the German Democratic Republic, Mr Wagner, was described in the following words: '*50. Mr. WAGNER* (*German Democratic Republic*) *said that the existing text of article 7* [later Article 8] *did not give rise to major differences of views on the interpretation of contracts. It was a balanced compromise and deserved to be retained … 54. Mr.* HERBER (*Federal Republic of Germany*) *said that the deletion of article 7* [later CISG article 8] *would leave a gap in the Convention which would have to be filled by reference to national law. His delegation was thus strongly opposed to its deletion.*'– see Summary Records of Meetings of the First Committee 6th meeting of 14 March 1980, para. 50, 54, available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>, accessed 26 September 2021.

121 UNCITRAL Official Records 10 March-11 – April 1980, Part Two Summary Records, 6th plenary meeting, p.203, para. 64 – available at <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>, accessed 26 September 2021.

The compromise came at a cost. The content of Article 8 continues to raise numerous concerns of a more nuanced nature.[122] One can see both strength and weakness in the existing lack of clarity regarding the application of the provision. Its strength lies in the flexibility or even the elasticity of the interpretative method that enables one to see the provision as being compliant even with those systems that at first glance offer a somewhat divergent regime.[123] Its weakness lies in the ambiguity that opens a door for a 'home bias approach' that, instead of uniform regulation, relies on domestic rules for contract interpretation, even though the CISG attempts to set a preclusive effect on national rules for contract interpretation.

A thorough analysis of Article 8 indeed reveals areas of potential ambiguity. The first striking element lies in the object of interpretation. The text of the provision technically refers to *unilateral statements* and *conduct of a party* as an object of interpretation. The UNCITRAL Secretary was careful to make the point clear in the commentary to the first draft of the convention of 1978 emphasising that, 'analytically', the contract is perceived as an exchange of an offer and its acceptance; therefore, principles for interpretation of the components are equally applicable to the interpretation of the whole contract.[124] The question, however, may arise as to how precisely to deal with these components,

122 For an updated most recent extensive commentary on the provision addressing various areas of critics, see Ingeborg Schwenzer (ed), *Schlechtriem&Schwenzer Commentary on the UN Convention on the International Sale of Goods* (*CISG*) (4th edn, Oxford University Press 2016) 143–180.

123 Jacob S. Ziegel and Professor Claude Samson demonstrate general compliance of the provision with a common law approach, though they note some caveats, relating, for instance, to a more restrictive approach to extrinsic evidence under common law – see Jacob S Ziegel and Claude Samson, 'Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods', July 1981, available at <https://iicl.law.pace.edu/cisg/bibliography/report-uniform-law-conference-canada-convention-contracts-international-sale-1>, accessed 26 September 2021; on deeper similarities with common law system on the example of the law of Singapore, see Chan Leng Sun, 'Interpreting an International Sale Contract', presented in 'Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods' (Collection of Papers at UNCITRAL – SIAC Conference 22–23 September 2005, Singapore), reproduced with permission of the SIAC at <https://www.cisg.law.pace.edu/cisg/biblio/sun1.html>, accessed 26 September 2021.

124 The Commentary of the UNCITRAL Secretariat to Article 7 of the Draft 1978 [later CISG Article 8] clarified: '*Nevertheless article 7 is equally applicable to the interpretation of 'the contract' when the contract is embodied in a single document. Analytically, this Convention treats such an integrated contract as the manifestation of an offer and an acceptance. Therefore, for the purpose of determining whether a contract has been concluded as well as for the purpose of interpreting the contract, the contract is considered to be the product of two unilateral acts.*' – available at <http://www.cisg-online.ch/index.cfm?pageID=644> accessed 26 September 2021.

and more particularly whether Article 8 (1) is equally applicable to those contracts, which do not come in refined and distinguishable forms of offers and acceptance (which are arguably a predominant part of contracts). Whether these contracts are to be interpreted through distinguishing common intent, or Article 8(2) with the standard of a reasonable person should guide interpretation remains unsettled.[125] Furthermore, giving effect to all relevant circumstances of the case, including negotiations, practices established between the parties, usage and their subsequent conduct in Article 8(3), the CISG does not allocate any superior role to any of these elements. This rather deliberate failure makes the operation of the provision less clear and predictable, but again, it also makes it more flexible. Among other common areas of concern are the interaction of Article 8 with plain meaning rules in certain jurisdictions and entire agreement contract clauses, as well as the overall effect of the provision on domestic procedural rules, including *parol evidence*.[126]

The inherent ambiguity of the provision,[127] as a result of a compromise in its drafting history and an attempt to meet rather diverse national expectations,

125 Enderlein's and Maskow's Commentary explains the complexity in the following terms: '[2.3] *Article 8 relates directly only to the acts* (*legal acts – referred to below also as acts*) *of a party and contains no provision for the interpretation of contracts. Insofar as contracts are based on corresponding unilateral acts by the parties, there will be no problems. This also holds true where a party accepts the contract offer made by the other party, for instance, by signing it. When the contract, however, is contained in a joint document of the parties, it cannot be generally determined which party made a specific statement becoming part of the document. Basically, each party has then made a statement relating to the entire, substance of the contract document so that the general rule can be applied, as in the case of corresponding individual statements of intent, i.e. the relevant clause is interpreted first as the statement of the one party and then as the statement of the second party* (*so already in the Secretariat's Commentary, O.R., 18; Farnsworth/BB, 101*), *their identity resulting in a common intent. Honnold* (*137*) *wants to apply here only paragraph 3, which seems inconsistent to us.*' – see Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods, Convention on the Limitation Period in the International Sale of Goods* (Oceana Publications 1992) available at <https://iicl.law.pace.edu/sites/default/files/cisg_files/enderlein.html#art08> accessed 26 September 2021.

126 On the complexity surrounding the parol evidence rule and the CISG, see, for instance, Bruno Zeller, 'The Parol Evidence Rule and the CISG: a Comparative Analysis' (2003) 36 (3) *Comparative and International Law Journal of Southern Africa*, 308–324; see also parts IV (4) and VIII to the commentary to Article 8 in Ingeborg Schwenzer (ed), *Schlechtriem&Schwenzer Commentary on the UN Convention on the International Sale of Goods* (*CISG*) (4th edn, Oxford University Press 2016) 158–161, 179–180.

127 For an extensive discussion on the consequences and possible responses to the ambiguity of Article 8, see Donald J Smythe, 'Reasonable Standards for Contract Interpretation Under the CISG' (2016) 25 Cardozo Journal of International and Comparative Law 1. While the ambiguity of Article 8 of the CISG is generally perceived to be a problem, some choose to praise it for its practicality and universality – see Gyula Eörsi, 'General Provisions' in

does not put it aside. Article 8 is frequently used by domestic courts and international commercial arbitration tribunals.[128] To enhance its further uniform application, the CISG Advisory Council[129] issued an opinion[130] clarifying its various facets and reconfirming that interpretative provisions of the CISG prevail over domestic regulation. The opinion emphasised the default nature of the provision and the parties' right to modify its content in relation to principles applicable to contract interpretation. The opinion made it also clear that Article 8 does not encapsulate the plain meaning rule *per se*, nor does it encapsulate the *parol evidence rule*. Existing commentaries to the CISG may offer some nuanced views on the operation of Article 8, but they essentially conform to what the CISG Advisory Council clarified.

Turning from the issue of availability in international law to the issue of applicability in investment treaty arbitration, one has to consider the original scope of application of CISG, and possiblerelevance of the sales of goods for investment treaty disputes. The CISG is applicable on two occasions: firstly when a contract pertaining to the sale of goods is concluded between parties whose places of business are in different states and when those states are contracting states to the CISG (Article 1(1)(a)) and secondly when a contract pertaining to the sale of goods is concluded between parties whose places of business are in different states and the rules of private international law lead to the application of the law of the contracting state (Article 1(1)(b)). Either ground may arise in relation to the sale of goods that come in focus in investment treaty arbitration.

Nina M Galston and Hans Smit (eds), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods,* (Matthew Bender 1984), 2–1 to 2–36, available at <https://iicl.law.pace.edu/cisg/scholarly-writings/general-provisions>, accessed 26 September 2021.

128 Albert H Kritzer CISG Database maintained by the Pace Law School contains 423 retrieved cases – see <https://iicl.law.pace.edu/cisg/cisg> accessed 26 September 2021; Case Law on UNCITRAL Texts (CLOUT) contains at least 485 cases – see <https://uncitral.un.org/en/case_law>, accessed 25 June 2021; see also the UNCITRAL CISG Digest 2016 edition – <http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf>, accessed 25 June 2021.

129 The CISG-Advisory Council of (CISG-AC) is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, and University of London. The International Sales Convention Advisory Council (CISG-AC) has a mission to enhance understanding of the CISG and to promote its uniform application.

130 Richard Hyland 'CISG-AC Opinion no 3: Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004 Rapporteur: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA' <https://www.trans-lex.org/500153/_/cisg-advisory-council-opinion-no-3:-parol-evidence-rule-plain-meaning-rule-contractual-merger-clause-and- > accessed 26 September 2021.

Furthermore, it is difficult to find reasons why the CISG should not be given effect in contexts that do not relate to contractual disputes when some of these conditions are satisfied. Obviously, its effect comes not from outside but rather from within the contract in question, but that itself changes nothing.

What makes the CISG, and any other interpretative rules, possibly less relevant, is the specific nature of questions that usually arise in relation to contracts of international sales of goods in investment treaty arbitration. The nature of questions that arise in relation to the international sales of goods is rather of identity, or *qualification*, than of interpretation.[131] In the context of investment treaty arbitration, contracts of sale are frequently associated with commercial contracts and thus often contrasted with investment contracts. The discussion, accordingly, limits the investigation to just one question about whether a particular contract is a contract of sale and thus deprived of treaty protection or not. Typically, if at all, this sort of investigation takes place at the jurisdictional stage. It may also be part of the discussion at the merits stage, most often though when the jurisdictional stage is connected to the merits. For this task, IIAs and not national laws primarily guide tribunals in their qualification as to whether a particular contract is a commercial contract or a sales contract and not an investment contract. At the same time, it is not automatic, however, for qualifications to exclude interpretation. While IIAs form independent concepts of what investment and commercial contracts are, the precise content of these contracts, whenever needed, should be established, according to the proper law of the contract, of which the CISG (being a uniform private law convention) may be part. A thorough understanding of the parties' mutual obligations might indeed be needed to decide to which type a contract belongs – either to investment or commercial ones. Certain provisions may require more thorough ascertainment than what is on the surface. On some occasions, while still presenting a minimalistic analysis of qualifications, tribunals expressly acknowledge that a contract has an interpretative element in itself.[132] On other occasions, tribunals acknowledge that qualifications necessitate a rather thorough study of the parties' undertakings, taken as a broad picture of all transactions involved.[133] Furthermore, contracts of sale may appear in other contexts

131 A typical kind of qualification analysis is helpfully captured in *Joy Mining Machinery Limited and The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 August 2004, para. 55.

132 See, for instance, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award dated 1 December 2010, para. 57.

133 See, for instance, *H&H Enterprises Investments, Inc. and Arab Republic of Egypt*, ICSID Case No. ARB/09/15, The Tribunal's Decision on Respondent's Objections to Jurisdiction dated 5 June 2012, para. 42.

of investment treaty arbitration that might necessitate a thorough analysis and possible interpretation. Issues of foreseeability for the calculation of compensation might open room for an interpretative exercise.[134] Be that as it may, the CISG has not received any application in the analysis of sales agreements in investment treaty arbitration in the awards analysed in this book, nor has it received any broader impact (extended by analogy or convenience) for interpreting other types of contractual arrangement.

Remarkable in this silence, is the appraisal that the CISG received as the convention in one case brought under the UK – Egypt BIT *Joy Mining Machinery Limited and The Arab Republic of Egypt* (ICSID Case No. ARB/03/11), but again without being put into operation. In this case, the tribunal recognised the CISG's role in unifying the laws governing sales contracts, but emphasised that sales and procurement contracts involving state agencies would not typically qualify as investment in the absence of specific investment-related undertakings:

> 58. The Tribunal is also mindful that if a distinction is not drawn between ordinary sales contracts, even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment. International contracts are today a central feature of international trade and have stimulated far reaching developments in the governing law, among them the *United Nations Convention on Contracts for the International Sale of Goods*, and significant conceptual contributions. Yet, those contracts are not investment contracts, except in exceptional circumstances, and are to be kept separate and distinct for the sake of a stable legal order. Otherwise, what difference would there be with the many State contracts that are submitted every day to international arbitration in connection with contractual performance, at such bodies as the International Chamber of Commerce and the London Court of International Arbitration?[135] [emphasis added]

While Article 8 of the CISG has not informed any of the interpretative efforts of the treaty-based tribunals in the analysed cases, its overall conceptual framework turned out to be a point of inspiration for some scholars in proposing a solution for a contract-treaty divide in investment treaty arbitration. The CISG,

134 See, for instance, the dissenting opinion of Zachary Douglas in *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, para. 13.

135 *Joy Mining Machinery Limited and The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction dated 6 August 2004.

on the one hand, represents a uniform regulation for the international sale of goods, and on the other hand, a unique mechanism that retains a certain autonomy of the parties to a contract to modify its provisions and to opt out from it entirely. Julian Arato used both of these features in his proposition to deal with investment contracts. On the one hand, a multilateral convention on international investment contracts could turn into a uniform regulation of investment contracts with a harmonised set of standards of investment protection, while on the other hand, foreign states and investors could retain a certain autonomy to modify the provisions in their contracts or to opt out of them entirely.[136]

There is nothing unusual in such proposition. Similar attempts to rely on a successful multilateral instrument can be found in other contexts. For instance, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards served as a point of inspiration for introduction of a legal fiction that equates the decisions of a future (currently non-existent) investment court with awards for the purpose of their enforcement in the new generation of free trade agreements.[137]

The question that can be raised in relation to a proposal to rely on the CISG model for a multilateral instrument for investment contracts, lies not only in the overall feasibility of the multilateral proposal, but also in the much harder necessity to come to a common understanding of the interplay between contracts and treaties. Should that happen, it would be interesting to see whether interpretative provisions of the CISG, or the VCLT, or other sources, would be part of the proposal.

To conclude this part of the discussion on the relevance of the uniform private law conventions for contract interpretation in investment treaty arbitration, one has to respond to questions of availability and applicability. In terms of availability, Article 8 contains interpretative provisions that govern the interpretation of the international sale of goods. While some discussion may touch on its efficiency, the provision nevertheless represents an exhaustive framework for analysis in relation to all inquiries directed at the interpretation

136 Julian Arato, 'The Logic of Contract in the World of Investment Treaties', (2016) 58 William & Mary Law Review 351, 364–365.

137 The wording equating final awards rendered under the investment sections of free trade agreements to arbitral awards in claims arising out of a commercial relationship or transaction is contained in the EU-Vietnam FTA, the TTIP and the CETA. See also August Reinisch, 'Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration' (2016) 19 (4) Journal of International Economic Law 761, 761–786.

of contracts and is widely used in a commercial context. And while the CISG is frequently applicable via private international law rules *as a proper law of a contract* and not as a source of public international law *per se*, as a matter of principle, there is no reason not to consider it for the purpose of interpretation of contracts that fall into its scope of application. Given that contracts for the international sale of goods may appear in the context of investment treaty arbitration, and their analysis may be more complex than simply identity/qualification, no grounds exist to ignore the CISG when it constitutes a part of the law applicable to these contracts.

To sum up, the distinctions between contracts and international law as objects of interpretation are so considerable that the mere question of relevance of interpretative rules of international law to contract interpretation may sound like an absurd question to which a serious answer is attempted to be offered in this chapter. The common origin of interpretative rules of international law and domestic interpretative rules, as well as the frequent occasions when state or state-related entities become contracting parties allows the question on the extension of interpretative rules of international law to contract interpretation to be less absurd, whereas a reliance on the rules of treaty interpretation at least in one investment case [hybrid, precise qualification] makes the question less hypothetical.

As approaches in national laws differ in relation to contract interpretation, so too may they differ in international law in respect to treaty interpretation in certain subfields of international law and in relation to interpretation regarding different objects of interpretation being treaties, jurisdictional instruments, unilateral acts, customs, etc. The interpretative rules do not operate in a vacuum and are supplemented by the relevant legal framework: for international law by the relevant provisions of international law and for contract by the relevant provisions of national laws (background law). Crossing different legal orders (national law – international law), certain interpretative rules or canons of interpretation can potentially retain legacy and even supplant some gaps. However, similar interpretation-related concepts and approaches on domestic and international levels, more often than not, have peculiar operation and may mislead as to their capacity to operate interchangeably.

3.3 Customary International Law

To answer the question as to whether customary international law contains any rules for the interpretation of contracts, one may attempt to look at customary international law in its entirety. This task would be extremely difficult, as well

as considerably more cumbersome than the analysis of IIAs performed previously. The complexity of identifying the rules of customary international law will become a major challenge.[138] A more pragmatic and yet still meaningful approach to answer the question is to only examine those rules of customary international law that matter in the context of investment treaty arbitration.

Customary international law becomes applicable or relevant to investment treaty arbitration in various ways. State attribution serves as one of the most typical examples where rules of customary international law are frequently applied.[139] State succession forms another, though less frequent, example.[140] Furthermore and as discussed, whenever treaty-based tribunals rely on rules on treaty interpretation as codified by the VCLT, they may be viewed as giving effect to customary international law. Finally, rules of customary international law that protect the property of aliens retain their relevancy for state contracts in investment treaty arbitration. Even if they do not necessarily constitute independent grounds for a claim,[141] these rules may become indispensable for

138 Only a fraction of customary international law rules are formally expressed in treaties. The ongoing work of the International Law Commission on the *identification* of customary international law evidences this complexity – see Text of the Draft Conclusions as Adopted by the Drafting Committee on Second Reading 'Identification of Customary international Law' A/CN.4/L.908, available at <http://legal.un.org/docs/?symbol=A/CN.4/L.908> accessed 25 June 2021.

139 International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001' available at <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, accessed 25 June 2021. The customary nature of attribution rules have been widely recognised – see Kaj Hobér, 'State Responsibility and Attribution' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 551; Simon Olleson, 'Attribution in Investment Treaty Arbitration', (2016) 31(2) *ICSID Review – Foreign Investment Law Journal* 457; Zachary Douglas, 'Specific Regimes of Responsibility: Investment Treaty Arbitration' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 815, 821.

140 In the 41 years since its adoption, the 1978 Vienna Convention on Succession of States in respect of Treaties has secured only 23 parties, having been unable to achieve a broader acceptance among states and therefore fragmenting the regulatory field of state succession – see <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIII-2&chapter=23&clang=_en>, accessed 26 September 2021; for an overview of the relevance of the rules of state succession to investment treaties, the role of customary international law and the limited number of cases where the issue was addressed, see Christian J Tams, 'State Succession to Investment Treaties: Mapping the Issues' (2016) 31 (2) *ICSID Review – Foreign Investment Law Journal* 314, 314–343.

141 Kate Parlett, for instance, provides a detailed observation on the possibilities and jurisdictional constraints for self-standing customary international law claims in investment treaty arbitration– see Kate Parlett, 'Claims under Customary International Law in ICSID Arbitration' (2016) 31 (2) *ICSID Review – Foreign Investment Law Journal* 434–456. See also,

assessing the content of treaty standards of investment protection in investment treaty arbitration. Some IIAs incorporate a minimum standard of treatment under customary international law into their standards of investment protection;[142] others while not expressly incorporating a minimum standard of treatment may nevertheless treat the rule as a benchmark for construing the content of a treaty standard in a relevant IIA.[143]

Of the described occasions when customary international law becomes applicable or relevant for investment treaty arbitration, only the minimum standard rule cannot easily be discarded from the analysis from the outset

Berk Demirkol, 'Non-treaty Claims in Investment Treaty Arbitration' (2018) 31 Leiden Journal of International Law 59, 59–91.

142 For instance, Article 5 of the 2012 USA Model BIT expressly equates FET and full protection and security standards to a minimum standard of treatment as understood under customary international law – the 2012 USA Model BIT is available at <https://2009-2017.state.gov/documents/organization/188371.pdf>, accessed 25 June 2021. It is also well-known that Article 1105 of the NAFTA entitles parties to a 'minimum standard of treatment' – see Notes of Interpretation of Certain Chapter Eleven Provisions (NAFTA Free Trade Commission, 31 July 2001), available at <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>, accessed 25 June 2021. Jean Ho characterises the interaction between international investment law and customary international law, when FET expressly relies on a minimum standard of treatment (MST), as '*MST-linked FET*' – see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 229–237. See also OECD (2004), 'Fair and Equitable Treatment Standard in International Investment Law', OECD Working Papers on International Investment, 2004/03, OECD Publishing, <https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf>, accessed 25 June 2021; Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) 14–98.

143 A view may be traced back to the Abs-Shawcross Draft Convention and the OECD Draft Convention on the Protection of Foreign Property where drafters gave a definition of FET via the minimum standard of treatment under customary international law – Hermann Abs and Hartley Shawcross, 'The Proposed Convention to Protect Foreign Investment: A Round Table', (1960) 9 Journal of Public Law 115, 119–120; OECD, 'The Draft Convention on the Protection of Foreign Property' (OECD Publication 1962) 9 <www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf> accessed on 25 June 2021; Yuliya Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in Stephan W Schill and others (eds), *International Investment Law and History* (Edward Elgar Publishing 2018) 254. See also Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?' (2016) 31(2) ICSID Review – Foreign Investment Law Journal 257, 257, 266; for an earlier, similar opinion of the same author on the role of customary international law for international investment law, see Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) International and Comparative Law Quarterly 361, 361–401.

and requires a deeper assessment. Indeed, the latter category directly interacts with contracts, whereas other types of described rules of customary international law do not have a similar exposure. Clearly stating that it is inappropriate to automatically equate a breach of contract to a breach of international law and acknowledging that an entry into or a breach of a contract by a state organ may be attributable to the state,[144] at no point do the ILC Articles on the Responsibility of States for Internationally Wrongful Acts clarify how those contracts have to be ascertained. Furthermore, an occasion of reliance on the content of contractual provisions in this work for deciding on state attribution does not reveal any specific rule of customary international law for ascertaining their content.[145] Rules on state succession to investment treaties have nothing to do with contracts in principle. As discussed, the rules for treaty interpretation do not turn into a functional substitute for the rules for contract interpretation. The only hypothesis to be assessed thus falls on those rules of customary international law that actively interact with state contracts by offering them international protection.

A closer analysis of the operation of the rules of customary international law in relation to state contracts will reveal an absence of rules for ascertaining their content and the reason for this absence. Customary international law offers protection primarily for those breaches of state contracts that are committed by states in their sovereign capacity. The expropriation of contractual rights, interference with contractual rights in an arbitrary manner contrary to a minimum standard of treatment and the denial of justice are three situations that are traditionally perceived as violating customary international law.[146]

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144 A commentary to Article 4 the ILC Articles explains: '*It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as acta iure gestionis. Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act.*' – International Law Commission, 'Report of the International Law Commission on the Work of its Fifty-third Session' (23 April–1 June and 2 July–10 August 2001) A/CN.4/SER.A/2001/Add.1 (Part 2), 41 <https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf>> accessed 26 September 2021.

145 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20; Award of 19 December 2016, para. 335.

146 Stephan W Schill, 'The Impact of International Investment Law on Public Contracts' in Mathias Audit and Stephan WSchill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 236–238; Régis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 334–336.

States may commit these violations either by sovereign decisions, directly and intentionally modifying or terminating state contracts, or by sovereign decisions modifying the legal environment of state contracts, as well as by other sovereign decisions adversely affecting contractual rights.[147] Having looked at this broad scope of protection, one may still expect customary international law in its engagement with contracts to offer certain rules for their ascertainment. The obvious negative answer appears only when one appreciates the precise approach that customary international law takes in relation to state contracts when providing them international protection. Rather than being treated *as contracts*, state contracts are treated *as property* under customary international law. Protection is offered only to those state contracts that have proprietary features and for those violations of international law that interfere with the proprietary, contract-related rights of a foreign investor. Instead of looking at contracts as contracts, customary international law accordingly looks at contracts as property.[148] This assimilation not only explains the restricted protection offered to state contracts under customary international

147 Régis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 334–336.

148 There is nothing unusual in this assimilation if one looks at precedents on contract as property in national laws as valuably summarised by Jean Ho through the overview of the expanded meaning of property, constitutional protection of property rights and judicial elaboration on contract as property – Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 142–152. Furthermore, a comparative perspective on contracts as property, in the field of human rights and in investment treaty arbitration, reveals that this approach is not exclusively tied to international investment law – see Christoph Schreuer and Ursula Kriebaum, 'The Concept of Property in Human Rights Law and International Investment Law' in Stephan Breitenmoser and others (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (Dike 2007) 6–10. It may be revealing to discover the reasons behind the assimilation of contracts to property in the general observations of Henry Hansmann and Reinier Kraakman unrelated to international law: '*Just using the ordinary tools of contract, it is possible with sufficient effort to fashion nonpossessory rights in an asset that will bind third-party purchasers. The rules of law that offer explicit recognition of particular types of property rights simply reduce the costs of establishing those rights. Consequently, it is not quite right to say that the law limits the kinds of property rights that can be created. Rather, it is more accurate to say that there are only limited kinds of property rights whose creation the law affirmatively facilitates.*' – Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 10 The Harvard John M Olin Discussion Paper Series 1 <http://www.law.harvard.edu/programs/olin_center/papers/pdf/388.pdf> accessed 25 June 2021.

law in comparison to that offered by IIAs,[149] but, more importantly, as will be clarified below, it sheds light on the lack of any specific rules in principle that can assist in ascertaining the content of contractual provisions.

By assimilating contracts to property, customary international law becomes blind or agnostic to the 'contractual nature' of contracts and therefore is not in need of any specific rule for contract interpretation. The only elements that matter are proprietary features in the contract in question and the assessment of the precise character of state interference with a contract. Verification of the existence of proprietary rights in state contracts appears to be less detailed and less nuanced an exercise if compared with the assessment of the content of contractual provisions under various standards of investment protection under international investment law.[150] Monetary value, enforceability against the world at large and alienability serve as the key areas of assessment.[151] While parties may disagree as to whether construction of a contract in relation to the above three points is correct, this disagreement will most likely be treated as a factual issue that befits proprietary rights and not as an interpretative issue tied to contractual rights. What the legitimate expectations are under a contract, an issue in relation to which parties frequently disagree in investment treaty arbitration and which frequently necessitates interpretation, becomes of no concern for customary international law. Because licences represent rights *in personam* and not *in rem*,[152] a failure of a state to renew the licence or other permit which a foreign investor legitimately expects under an existing contract, does not as a rule grant protection under customary international law to

149 Kate Parlett gives examples of when customary international law as a background legal framework may in fact enlarge protection that is otherwise available to investments under a relevant IIA. Situations however arise when the IIA itself offers limited protection, and excludes, for instance, the FET. For more details, see Kate Parlett, 'Claims under Customary International Law in ICSID Arbitration' (2016) 31(2) ICSID Review – Foreign Investment Law Journal 434, 435–436.

150 It should be noted, however, that tribunals in investment treaty arbitration may also approach investment/investment contracts as property. For a broad overview of the approaches to investment, see Zachary Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Zachary Douglas and others (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 363–406.

151 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 142–144, 271–272.

152 Zachary Douglas gives a more nuanced example when an alienable licence may be viewed as property – see Zachary Douglas, 'Property, Investment and the Scope of Investment Protection Obligations' in Zachary Douglas and others (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 363, 375.

the said investor. In the same vein, customary international law cannot offer protection for expenditures at the pre-contractual stage.[153] Until and before contracts come into existence, there are no protectable proprietary rights under customary international law in principle and when contracts do come into existence, they are of interest only as property. Once proprietary rights in a contract are verified as a precondition for the application of customary international law, the analysis immediately switches to state interference with the proprietary rights. Given the blindness of customary international law towards the 'contractual nature' of contracts and their assimilation to the property of aliens, it comes as no surprise that customary international law does not have rules on contract interpretation.

The only occasions that seem to come closer to interpretation relate to a principle that contractual forum selection clauses do not preclude the diplomatic protection or the jurisdiction of international courts or tribunals. Not only customary international law, but also general principles of law and decisions and awards of international courts and tribunals may be viewed as sources for this principle. As will be discussed at a later stage, the principle however is not a rule on contract interpretation and has nothing to do with contract interpretation. The non-exclusivity of forum selection clause in contracts, for the purpose of diplomatic protection or for the purpose of jurisdiction of international courts and tribunals, appears in another capacity as an example of the *overriding application* or *overriding effect* of international law.

The conclusion on the absence of rules for contract interpretation in investment treaty arbitration finds its further affirmation in two other examples.

153 Régis Bismuth supports this point by clarifying the absence of customary principles regulating government procurement and the absence of customary principles protecting pre-contractual expenditures – Régis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 334–336. For clarity, it should be noted that IIAs do not seem to offer express protection for pre-contractual expenditures – see UNCTAD, *International Investment Agreements: Key Issues: Volume I* (UN Doc. UNCTAD/ITE/IIT/2004/10 (Vol. 1), United Nations Publication 2004) 143–160. Even though investment treaty arbitration jurisprudence seems to also be reluctant, at least one reported case can be found offering protection – *Nordzucker AG v. The Republic of Poland* – see Irmgard Marboe, '*Nordzucker AG v The Republic of Poland ad hoc Arbitration* (*UNCITRAL*), *Partial Award, 10 December 2008; Second Partial Award, 28 January 2009; Third Partial and Final Award, 23 November 2009* (*Vera Van Houtte, Andreas Bucher, Maciej Tomaszewski*)' (2015) 16 (3) Journal of World Investment and Trade 533; Stephan W Schill, 'The Impact of International Investment Law on Public Contracts' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 246–247; fn 79 and 80.

Firstly, international courts or tribunals, including treaty-based tribunals in investment treaty arbitration, when engaged in contract interpretation, for various purposes and depending on their jurisdiction, do not seem to refer to any customary international law in their attempts to ascertain the content of contractual provisions. Furthermore, even *contra proferentem*, which some scholars in the context of treaty interpretation connect with customary international law, does not receive the same clarification when used by the international courts and tribunals in relation to contract interpretation.[154]

Enabling the protection of state contracts under international law, customary international law does not support an *internationalisation* theory in any form. The assimilation of a state contract to property for the purpose of protection under international law does not affect the proper law of a contract. Nor does an assessment of state conduct in relation to state contracts under customary international law change the proper law of a contract. Stephan Schill goes further and suggests that customary international law is not merely ambivalent to *internationalisation*; rather it is against it.[155] A similar point can be found in the works of the most consistent opponent of the theory of internationalisation – Muthucumaraswamy Sornarajah.[156] The positively accepted jurisprudence of the ICJ in recognition of the role of national law for contracts can serve as evidence of the customary rule that the mere fact of appearance of contracts in the context of disputes governed by international law does not

154 For instance, Isabelle Van Damme comparing *contra proferentem* to the principle of restrictive interpretation in relation to treaty interpretation clarifies that: '[*t*]*he contra proferentem principle, in contrast, is more accepted as part of customary international law*.' – see Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) 62, fn 142. In investment treaty arbitration as well as in the practice of the Iran-USA Claims Tribunal the principle of *contra proferentem* whenever applied to contracts was either justified by national laws (*Inceysa Vallisoletana S.L. v. Republic of El Salvador,* ICSID Case No. ARB/03/26, Award dated 2 August 2006, para. 273–276) or was applied without explaining its origin by any of the existent legal orders (*William Nagel v. The Czech Republic,* SCC Case No.049/2002, Final Award, para. 172*; Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic,* ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, para. 51*; First Travel v. Government of the Islamic Republic of Iran and Iran National Airlines Corporation,* Award No. 206-34-1 dated 3 December 1985, pp.15–16 <https://iusct.com/wp-content/uploads/1985/12/C34-Doc-127.pdf> accessed 25 June 2021.

155 Stephan W Schill, 'The Impact of International Investment Law on Public Contracts' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 237.

156 Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (4th edn, Cambridge University Press 2017) 339–357.

lead to a substitution of proper law over a contract by another regulation.[157] Thus, it is not only that customary international law does not have specific rules for contract interpretation for state contracts in principle because it 'sees' property instead of 'contracts'. Importantly enough, customary international law may be further viewed as being against any attempt to disengage contracts from the relevant national law/proper law of a contract.

The analysis would not be complete, if one ignores the evolution of customary international law. Customary international law does not remain constant.[158] Addressing emerging changes, some authors while openly recognising the absence of rules on certain issues that are traditionally regulated by national law, seem to be more positive in relation to the emergence of others. For instance, Régis Bismuth, recognising an absence of any rule on a form of a state contract in customary international law, points to the emergence of a concept of contract validity in [customary] international law in parallel to the national law concept of contract validity.[159] Bismuth substantiates the point by referencing some cases in investment treaty arbitration. The cited cases indeed demonstrate that invalidity under national law does not constitute an absolute ground for the invalidity/non-recognition of rights under contract with only a limited number of specific grounds justifying the absolute invalidity of contracts under customary international law. While the proposition on the parallel contract-related concept of validity under customary international law may be debated, not least on grounds of the sufficiency of the cited arbitral awards to evidence the emergence of a customary rule,[160] it would suffice to

157 See, for instance, *Case concerning the Payment of Various Serbian Loans Issued in France; Case concerning the Payment in Gold of the Brazilian Federal Loans Issued in France*, *Payment in Gold of Brazilian Federal Loans Contracted in France* (France v. Brazil), (Judgment of 12 July 1929) (1929) PCIJ Series A No 21.

158 Campbell McLachlan, 'Is There an Evolving Customary International Law on Investment?' (2016) 31(2) ICSID Review – Foreign Investment Law Journal 257, 257–269; Jean d'Aspremont, 'The Four Lives of Customary International Law' (2019) 21 (3–4) International Community Law Review 229.

159 Régis Bismuth, 'Customary Principles Regarding Public Contracts Concluded with Foreigners' in Mathias Audit and Stephan Schill (eds), *Transnational Law of Public Contracts* (Bruylant 2016) 334–341.

160 On the limited role of arbitral awards as evidence of customary international law, see, for instance, Muthucumaraswamy Sornarajah, who concludes: '*The argument in some recent awards that consistent practice among arbitral tribunals can create customary law is one that is made without an adequate understanding of international law. It arrogates a power to a group of individuals which the ICJ itself has not claimed. It is an elementary proposition that awards of tribunals are but 'subsidiary sources' of international law.*' – Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 92. For a more affirmative role

say here that no attempts have yet been made that would suggest any similar parallel emergence of a specific rule on contract interpretation in customary international law. Regarding contract interpretation, customary international law retains lacunae.

To conclude, while having a role in investment treaty arbitration and while engaging with contractual rights, customary international law does not have rules on the ascertainment of the content of contractual provisions. The principal reason for this lies in the assimilation of state contracts to property rights that customary international law maintains while offering international law protection to state contracts.[161]

3.4 General Principles of Law

Dismissing the proposition that general principles of law can play a role in contract interpretation in investment treaty arbitration is not as easy as one might assume. The primary hesitation rests on the universal character of the general principles of law and their interpretative[162] and lacunae-filling functions.[163] These features extend the operation of general principles to various relatively new areas of international law, including international investment

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of arbitral awards, see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 61–89.

161 The argument advanced in this section and explanation behind it on the absence of rules on contract interpretation in customary international law does not serve as a proposition that tribunals applying customary international law should not interpret contracts. If they need to interpret, interpretation should be conducted under national law, that is, a proper law of contract. Furthermore, a mere recognition of the role of national law under customary international law confirms this proposition. The point is important, because some tribunals in investment treaty arbitration in applying IIAs, also approach contracts as property and that alone should not exclude interpretation; it merely explains a lack of interpretative rules in customary international law that does not recognise the contractual nature of contracts.

162 The interpretative function of the general principles of law even triggered doubt as to whether they are sources of international law – see Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Springer 2018) 163–184.

163 The lacunae-filling function of the general principles of law has been long recognised ever since their formal codification in the statutes of the PCIJ and thereafter in the statutes of the ICJ – see, for instance, Michael Bogdan, 'General Principles of Law and the Problem of Lacunae in the Law of Nations' (1977) 46(1–2) Nordic Journal of International Law 37, 37–53.

law, and augment their potential significance for those areas that remain unregulated in international law. If international law is generally silent about contract interpretation, as has been evidenced via the analysis of treaties and customary international law, it might be the case that general principles of law are capable of filling the existing gap. State contracts may be more receptive to the relevance of the general principles of law. The roots of general legal principles in national law may potentially identify their aptness, or at least their predisposition to address the interpretation of private law instruments more meaningfully than any other source of international law. Furthermore, a possible overlap between the general principles of law as recognized by the civilized nations, on the one hand, and the general principles of contract law as a reflection of a transnational legal order, on the other hand, makes it more demanding to deny the role of the general principles of law as a source of international law for contract interpretation.[164] When ideas represent certain universally accepted values, the precise basis of their application, whether it be the international legal order or the transnational legal order, becomes more elusive. Ultimately, a historic aspect of the reliance on the general principles of law in choice-of-law provisions in the early concession disputes in the epoch preceding investment treaty arbitration, their use in the tribunals' reasoning, and thereafter theorisation in scholarly writings, makes it necessary to verify the relevance, if any, of these cases and resulting theories they nourish for the contemporary context of contract interpretation in investment treaty arbitration. In other words, general principles of law cannot be easily discarded and require a thorough investigation.

The starting complexity of approaching the general principles of law resembles a challenge one faces while addressing customary international law. Like customary international law, general principles of law remain uncodified. Their identification seems to be even more complicated because of the lack of uniform criteria that one can, for instance, observe in a two-fold test to identify customary international law rules.[165] The comparative method is often mentioned for defining general principles through commonalities among various

164 Recognising the expanding borders of international law in terms of the scope of regulation earlier in this chapter, one also has to acknowledge that international law is considered here to be rules that are of international character and that bind states. Transnational law, while potentially overlapping in part with international law, does not bind states as such. It has an impact either through agreement or because of its pervasive character, and is essentially based on decentralised, non-state rules.

165 For criteria and challenges in the identification of the general principles of laws as sources of international law, see, for instance, Rumiana Yotova, 'Challenges in the Identification of the 'General Principles of Law Recognized by Civilized Nations': The Approach of

national laws.[166] At the same time, some of the principles have received such high recognition that they do not require one to repeatedly perform a comparative exercise. The consensus regarding their fundamental and pervasive character, supported by the reoccurrence in the reasoning of the international courts and tribunals seem to be relevant, though frequently unarticulated. By and large, it would not be improper to say that one recognises general principles when one sees them, but one faces serious difficulties in defining how to identify them.

The approach, based on the analysis of the reasoning of international courts and tribunals, informed efforts of Bin Cheng in his classical book *General Principles of Law as Applied by International Courts and Tribunals*,[167] written in 1953, that represents one of the first and most complete empirical studies of the general principles of law.[168] Subsequent scholarly works on the subject

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the International Court' (2017) 3 Canadian Journal of Comparative and Contemporary Law 269.

166 For instance, Michael Bogdan suggests that '*that the only acceptable way of determining the general principles of law goes through the use of the methods of comparative law*' – see Michael Bogdan 'General Principles of Law and the Problem of Lacunae in the Law of Nations' (1977) 46(1–2) Nordic Journal of International Law 37, 49. For a critique of the methods of identification of the general principles of law, in light of the possible lessons drawn from comparative law, see Jaye Ellis, 'General Principles and Comparative Law' (2011) 22(4) European Journal of International Law 949, 949–971. It is impossible to omit how excited and rather overoptimistic scholars specialising in comparative law became in the 1950s in relation to the possibility to study the general principles of law and to make a comparative exercise in various fields for international judges and arbitrators. In 1957, Rudolf B Schlesinger noted: '*No attempt has been made to find and formulate the common core of the world's legal systems in the area of substantive private law, including commercial law, and of civil procedure. Until about a year ago even the feasibility of such an attempt had not been seriously examined. During the last year, with the help and encouragement of his faculty colleagues at the Cornell Law School and of other scholars, the author has worked on the blueprint of a project designed to fill this void. The lines on the blueprint are still tentative, and perhaps a bit blurred. It is not even quite certain what the name of the project should be. Stressing its substance, one might call it "Research on General Principles of Law."*' – Rudolf B Schlesinger, 'The Research on the General Principles of Law Recognized by Civilized Nations' (1957) 51(4) The American Journal of International Law 734, 751. Subsequently, instead of maintaining the declared broad focus on general principles of laws in private law, Rudolf B Schlesinger had to substantially narrow his research agenda to achieve a feasible result. For comparatists, he became known for the seminal 10-year international research project on contract formation – 'Formation of Contracts: A Study of the Common Core of Legal Systems.'

167 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953).

168 At the time, the empirical method received increasing recognition under the name of the inductive approach. Bin Cheng acknowledged the influence of his supervisor George

inescapably revolve around those principles identified by Bin Cheng.[169] A practice of international courts and tribunals that has been emerging for more than 60 years since Cheng's publication has nourished further works. For instance, a book project by Charles T Kotuby and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*,[170] became of a similar breadth as Cheng's book. Drawn on the same principles as enumerated by Bin Cheng, Kotuby's and Sobota's work revisits them with the example of the modern practice of international courts and tribunals, including treaty-based tribunals. The authors make a remarkable turn from Bin Cheng's work by arguing that an evolution of the system of international justice in the time that has passed since Cheng's work demonstrates the extension of the general principles to private conduct, including asymmetric relations between states and private actors/investors in investment treaty arbitration.[171] One may see in the extension, a transnational broader role that Kotuby and Sobota attribute to general principles of law that steps out of tenets of a source of international law. Unlike other discussions on the transnational legal order that frequently start from transnational ideas, *lex mercatoria* and the UPICC, Kotuby and Sobota start the discussion from general principles as a source of international law.

This chapter does not engage in an independent verification of the existence of the general principles of law. It limits its inquiry to those general principles of law, the existence of which remains uncontested in scholarly works, more particularly to some of those that may play a role in contract interpretation in

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Schwarzenberger on the methods used in his research – Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) XIV. On the theoretical foundation of the inductive or empirical method as clarified contemporaneously by George Schwarzenberger, see George Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60(4) Harvard Law Review 539, 539–570; see also, L C Green, *International Law through the Cases* (Stevens & Sons 1970) and Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 617–662.

169 Published in 1953, Bin Cheng's *General Principles of Law as Applied by International Courts and Tribunals* were reprinted three times, in 1987, 1994 and 2006. Charles T Kotuby Jr and Luke A Sobota recognise that Cheng's work is '*among the most cited authorities in international arbitration*' – see Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) xiii.

170 Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017).

171 Ibid. xii-xiv. The transnational nature of general principles seems to be a primary, underlying idea behind Kotuby's and Sobota's work, which is also partially reflected in the title of the book that points to transnational disputes.

an adjudicative setting of public international law. Furthermore, since general principles of law may find their expression through other sources of international law, such as treaties and customary international law,[172] general principals of law are analysed here if and when applied in their own name.

The separation of those general principles of law that potentially matter for contract interpretation represents another complexity. Looking at the principles that Cheng named in his Draft Code of General Principles of Law, purely for interstate application,[173] and at those that Kotuby and Sobota reiterate with their broader perspective,[174] one can distinguish two categories of general principles. The first category relates to general principles that bear substantive regulation, and include good faith, proportionality, principles of causation and reparation, and principles of responsibility and fault. The second category relates to those general principles that become relevant for various procedural aspects of dispute resolution, and includes principles of judicial independence and impartiality, procedural equality and the right to be heard, condemnation of fraud and corruption, and the principle of *res judicata*. General principles in the first category may *mimic* national law regulation when addressed to contractual material, and are thus capable of assisting to a certain degree to contract construction. One principle, the principle of good faith, is even more relevant[175], and it is this principle alone that Kotuby and Sobota rely upon when they illustrate the role of the general principles for contract interpretation. The

172 For instance, the principle of *pacta sunt servanda* may appear as a principle of international law, a part of customary international law and an express treaty provision in the VCLT. Tarcisio Gazzini helpfully clarifies that: *'[g]eneral principles of law derived from national system interact with the other sources of international law too. They may develop into customary rules, find their way in treaties, or fill the gaps of both treaties and customs. Treaty rules, customary international rules and general principle of law are by no means mutually exclusive categories.*' – see Tarcisio Gazzini 'General Principles of Law in the Field of International Investment Law' (2009) 9(1) Journal of World Investment & Trade 1, 3. See also on interrelations of sources of international law in the context of international investment law, Christoph Schreuer, 'Sources of International Law: Scope and Application: Emirates Lecture Series 28' (The Emirates Center for Strategic Studies and Research) <https://www.univie.ac.at/intlaw/sources.pdf>, accessed 25 June 2021.

173 Appendix 1 'Draft Code of General Principles of Law' in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 397–399.

174 Annex of cases in Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 211–271.

175 Focused on inter-state relations, and writing before the VCLT, Cheng mentions the role of good faith in treaty relations, good faith in the exercise of rights in interstate relations and some other applications of the principle – see Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 105–162.

analysis exercised here will be, accordingly, narrowed to the relevance of the general principle of good faith as a possible source of international law for contract interpretation.[176]

Addressing good faith as the general principles of law, the source of international law, for contract interpretation, makes it important to place the discussion in a broader context of good faith as an idea that informs numerous concepts, rules and principles in national law, international law and transnational law and as a foundation for interpretative approaches under these legal orders. At a very high level of abstraction, largely balancing, complementing and correcting functions of good faith *as an idea* have a persuasive appeal of universality. One can argue that good faith becomes inherent to the very notion of law, becomes its 'irreducible predicate',[177] and finds its natural expression in all three legal orders – in international law, in national law and in transnational law. Unsurprisingly, one can trace an idea of good faith in numerous recognised forms in investment treaty arbitration. Good faith informs various concepts, rules and principles, expressly and implicitly. Good faith informs the content of legitimate expectations, the concept that forms a central part of various substantive standards of investment protection, including FET ,[178] expropriation,[179] umbrella clauses,[180] etc. The concept is also frequently invoked

176 Remarkably, in one of the most complete and comprehensive book projects on the effect of general principles in investment arbitration, no general principles applicable to contract interpretation are identified and discussed – see Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Nijhoff 2018).

177 Charles T Kotuby Jr and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 88–89.

178 For a comprehensive overview of the role of good faith in FET, see Martins Paparinskis, 'Good Faith and Fair and Equitable Treatment in International Investment Law' in Andrew D Mitchell and others (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 143–172; Rumana Islam, 'Role of Good Faith in Interpreting Fair and Equitable Treatment (FET) Standard in Arbitral Practice' (2017) 12(1–2) Bangladesh Journal of Law 107; Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2014) 12(1) Santa Clara Journal of International Law 7; Campbell McLachlan, 'Investment Treaties and General International Law' (2008) 57(2) The International and Comparative Law Quarterly 361, 380–401.

179 See, for instance, a discussion on public interest in expropriation – Andrew Paul Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 370.

180 See, for instance, Greece-Serbia and Montenegro BIT 1997 Article 2: '*Promotion and protection of investment ... (4) Each Contracting Party shall, in its territory, respect in good faith all obligations concerning a particular investor of the other Contracting Party undertaken within its legal framework.*'

as a state's defence in opposing the jurisdiction or admissibility of a case.[181] Examples of the concept may be found in the analysis of corporate structures for deciding on protected investments.[182] Good faith is also frequently called upon to measure the appropriateness of the parties procedural behaviour.[183] As a source of international law – a general principle of law – good faith can turn into part of a substantive regulation along with IIAs,[184] etc.

Given the pervasiveness of the idea of good faith, one can, to a certain extent, align the role of good faith across international and national laws: good faith as a principle of international law and as an overarching principle of civil/contract laws (in civil law jurisdictions); good faith as a recognised interpretative tool for treaty interpretation and good faith as an interpretative standard for contract interpretation (again in civil law jurisdictions). The appearance of interchangeability, though, is deceptive. Despite numerous natural parallels and overlaps because of the inherent idea of *bona fide* in various legal concepts,[185] good faith is conceptualised somewhat differently in the three legal orders – international law, national law and transnational law.[186]

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181 Tania Voon, Andrew D Mitchell and James Munro, 'Good Faith in Parallel Trade and Investment Disputes' in Andrew D Mitchell and others (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 60–87; Muthucumaraswamy Sornarajah, 'Good Faith, Corporate Nationality, and Denial of Benefits' in Andrew D Mitchell and others (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 117–142; Chittharanjan Félix Amerasinghe, *Jurisdiction of International Tribunals* (Martinus Nijhoff Publishers 2003) 305; Chittharanjan Félix Amerasinghe, *International Arbitral Jurisdiction* (Martinus Nijhoff Publishers 2011) 100–101.

182 Stephan W Schill and Heather L Bray, 'Good Faith Limitations on Protected Investments and Corporate Structuring' in Andrew D Mitchell and others (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 88–116.

183 Eric de Brabandere, 'Good Faith', 'Abuse of Process' and 'the Initiation of Investment Treaty Claims' (2012) 3(3) Journal of International Dispute Settlement 609.

184 For instance, some IIAs expressly recognise the role of the general principles of law as applicable regulation – see Article 17 (1) of the United Kingdom-Mexico BIT (2006) (in force) or Article 13 (5) the Netherlands-Bolivia BIT (1992) (terminated).

185 Views on good faith as a principle reinforce an impression of a certain degree of high-level universality that it possesses. For good faith as a principle of international law, see Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53(1) Netherlands International Law Review 1, 1–36; Robert Kolb, *Good Faith in International Law* (Hart Publishing 2017) 3–37. For good faith as a principle in civil law jurisdictions, see Hugh Collins (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 237.

186 Steven Reinhold, for instance, helpfully clarifies the distinction as follows: '*In national law, good faith acts to balance out unequal sides of a bargain. In international law this asymmetrical power balance, whether real or perceived, is absent. The principle of sovereign equality of nations dictates that there is no 'weak party' to a bargain in international law: by*

Upon deeper investigation, one will face a plurality of distinctions in the application of good faith, depending on whether its specific source is international, national or transnational law. These sources define whether and to what extent good faith imposes a standard of behaviour for actors in the exercise of their authority, discretion or rights, whether and to what extent good faith assists to ensure equality between the parties, and whether and to what extent good faith leads to corrective justice, etc.

The examples relating to interpretation of various instruments that follow illustrate the differences.

In the VCLT, good faith opens the general rule of treaty interpretation in Article 31: '*A treaty shall be interpreted* ***in good faith*** *in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*.' Despite the appearance of simplicity, the precise intent of the drafters behind the inclusion of 'good faith' in a rule on treaty interpretation is not easy to establish. A thorough investigation of the *travaux préparatoires* evidences that a reference to good faith appeared as a result of complex circumstantial discussions, without being directly informed by any of the specific roles good faith plays in national laws.

According to the *travaux préparatoires* of the VCLT, good faith first appeared in the discussion as an extension of the principle that treaties shall be performed in good faith.[187] While referring to good faith in interpretation, the International Law Commission did not even decide whether, after all, it would be advisable to have a separate provision focused on the methods of treaty

"entering the Family of Nations a State comes as an equal to equals". This does not necessarily mean that States are completely equal as regards power, territory, and the like. But as States, they are legally equal, at least in principle, whatever differences between them may otherwise exist. As a result, even though sovereign equality can still serve to protect weaker States from the hegemony of stronger States, the fundamental conception of good faith as a means of corrective justice is not directly applicable to the relations between States.' – see Steven Reinhold, 'Good Faith in International Law' (2013) 2 Bonn Research Paper on Public International Law 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269746> accessed 25 June 2021. See also Giuditta Cordero-Moss listing the concept of 'good faith' among 'the false friends' in public international law and national commercial laws in Giuditta Cordero-Moss, 'Commercial Arbitration and Investment Arbitration: Fertile Soil for False Friends?' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 782, 789.

187 Sir Humphrey Waldock, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 5, 52–57 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf> accessed 25 June 2021.

interpretation. Rather than presenting a self-standing canon of treaty interpretation, a provision just affirmed a proposition that was not controversial *per se*. Namely, if treaties are to be performed in good faith, they have to be interpreted in good faith by contracting parties as well. This extension of the *pacta sunt servanda* principle towards interpretation tied for some authors the origin of good faith in treaty interpretation to good faith in contract interpretation.[188] The connection, though, is nothing but pure analogy. Good faith as it is understood in private law – as an overarching principle of contract/civil law and an important tool for contract interpretation under some national laws – has not informed the content of good faith in the mentioned proposition. Nor, as will be demonstrated below, has it informed the inclusion of good faith in the subsequently elaborated Article 31, focused on the methods of treaty interpretation.

When the drafting group of the ILC decided to have provisions on treaty interpretation and turned to the discussion of canons and the principle of treaty interpretation in what is presently Article 31 of the VCLT, good faith emerged again. The Special Rapporteur, Sir Humphrey Waldock, tied good faith again to the principle of *pacta sunt servanda*, at the same time recognising that an idea of integrity was also of good faith.[189] Efficiency Waldock put into a separate provision – Article 72 'Effective interpretation of the terms' (*ut res magis valeat quam pereat*).[190] Being supportive of the role of good faith,

188 Propositions on similarities follow a widely cited statement by Hersch Lauterpacht, who said: '*Most of the current rules of interpretation, whether in relation to contracts or treaties … are no more than the elaboration of the fundamental theme that contracts must be interpreted in good faith.*' – Hersch Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 British Yearbook of International Law 48, 56. See, for instance, Eric De Brabandere and Isabelle Van Damme who start their analysis of good faith in treaty interpretation with an analogous comparison with the interpretation of contracts in good faith, citing Hersch Lauterpacht – Eric De Brabandere and Isabelle Van Damme 'Good Faith in Treaty Interpretation' in Andrew D Mitchell, Muthucumaraswamy Sornarajah and Tania Voon, *Good Faith and International Economic Law* (Oxford University Press 2015) 37. To the authors' knowledge, no deep inquiry into the comparison of good faith in treaty interpretation and good faith in contract interpretation has been exercised, but see a comprehensive overview of various facets of the role of good faith in investment treaty arbitration with a concept built on a summary of its use in international law and national laws in Emily Sipiorski, *Good Faith in International Investment Arbitration* (Oxford University Press 2019) 20–47.

189 Sir Humphrey Waldock, 'Third Report on the Law of Treaties' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 5, 56 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf> accessed 25 June 2021.

190 Sir Humphrey Waldock, 'Third Report on the Law of Treaties' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 5, 53 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf> accessed 25 June 2021.

six principles of treaty interpretation prepared by Sir Gerald Fitzmaurice[191] and the 1956 Resolution of the Institute of International Law[192] informed his efforts.[193] Looked at nowadays, both integrity and efficiency seem to form an inseparable package of what interpretation *in good faith* means to Article 31 of the VCLT.[194] The fact that both Sir Gerald Fitzmaurice and Sir Humphrey Waldock were British lawyers and that good faith is not an overarching principle for English contract law,[195] may reinforce the view that national law did not inform the content of good faith in its appearance among methods of treaty interpretation.

Subsequent discussion within the ILC evidences how good faith 'absorbed' a separate provision on efficiency and offered safe tenets for consensus. As the discussion proceeded after Waldock introduced a separate provision on efficiency, a tension arose between those who wanted to have a principle of effectiveness to be inserted into the VCLT as a self-standing provision and those who affirmed the principle of effective interpretation, but not as an independent provision. Furthermore, a substantial schism between capitalist and communist blocks burdened the overall work on the text: the former preferred intentionalism and the latter preferred textualism.[196] The ultimate reference to good faith in the opening paragraph of Article 31 safeguarded all interests. Treaties had to be interpreted 'in good faith' to impose a discipline on interpreters and to secure that all tools of interpretation would be used properly. The contemporaneous explanation emphasised the connecting role of good faith between all elements of treaty interpretation and, more importantly,

191 Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points' (1957) 33 British Yearbook of International Law 203.

192 The 1956 Resolution of the Institute of International Law available at <http://www.idi-iil.org/app/uploads/2017/06/1956_grena_02_fr.pdf>, accessed 25 June 2021.

193 Sir Humphrey Waldock, 'Third Report on the Law of Treaties' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 5, 55 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf> accessed 25 June 2021.

194 Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (1st edn, Springer 2012) 540, 548.

195 One may also argue though that a cautious attitude to good faith under English contract law did not impede active contribution to the drafting of the CISG, an observation that is made in contemporary literature advocating the attractiveness of the CISG for the UK. For instance, on reasons for the UK to refuse accession tied with the distinctions in contract regulation to the CISG, see Nathalie Hofmann, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe' (2010) 22(1) Pace International Law Review 145.

196 Fuad Zarbiyev, 'A Genealogy of Textualism in Treaty Interpretation' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015) 74.

between purposive and textual readings of a treaty: '*An interpretation given in good faith and taking account of the object and purpose of a treaty would always necessarily seek to give a meaning to the text*.'[197] Rather than being informed by considerations of national law, good faith, in treaty interpretation, became a product of consensus.

Corresponding to these (complex) original expectations, the contemporaneous function of good faith in treaty interpretation in investment treaty arbitration has a plurality of appearances, valuably summarised by Eric De Brabandere and Isabelle Van Damme:

> Good faith may thus be used to justify: the use of certain principles of treaty interpretation above others: the use of other tools, principles or values that can be taken into account in interpreting treaties (such as the principle of effectiveness); the choice of what preparatory work to use in relying on supplementary means of treaty interpretation; or reliance on other (relevant) rules of international law. Good faith can also justify completing treaties with content that is not expressly stated and complementing treaties with norms of customary international law or general principles of law, including the principle of good faith itself. The principle of good faith equally functions as a limit on the exercise of discretion that any interpretative analysis involves and thus the exercise of judicial or judicial-like powers.[198]

Instead of vagueness, the plurality of examples in which good faith can be relied upon in treaty interpretation demonstrates its context-dependence. What remains clear is that good faith was not considered to be a bare escape from textualism. It was supposed to connect and calibrate all elements of treaty interpretation,[199] to justify interpretative choices under certain premises, in order to ensure what is fair and reasonable under given circumstances, and, where relevant, to reinforce their textual meaning. Furthermore, while

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197 International Law Commission, 766th meeting minutes dated 15 July 1964, (1964) 1 Yearbook of the International Law Commission 290, para. 106 (chairman of ILC Roberto Ago speaking as a member of the Commission).

198 Eric De Brabandere and Isabelle Van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchell and others (eds), *Good Faith and International Economic Law* (Oxford University Press 2015) 59.

199 Richard Gardiner emphasises that '*not only was the scene set for a broad view of good faith but that concept was also aligned from the start with other elements of the general rule, such as the role of object and purpose*' – see Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 170.

the reach of good faith seems to be broad, one should not omit a view that emphasises the dominant textualism in treaty interpretation that emerges regardless of the plurality of methods as envisaged in Article 31 of the VCLT.[200] According to this view, as a matter of practice and regardless of the introduction of good faith and numerous other tools on treaty interpretation in the VCLT, textualism which was quite dominant at the time of the VCLT's drafting,[201] developed into a prevailing approach.[202] An indirect understanding of this trend can be seen in how modern treaties are drafted in ever-increasing detail within texts.[203] Importantly for the present discussion, other considerations distinct from the ordinary operation of good faith for contract interpretation in national laws inform its appearance and its actual application in treaty interpretation.

In what relates to good faith in transnational, non-state regulation, instruments such as, for instance, the PECL and the UPICC,[204] are difficult to understand autonomously from the national legal traditions.[205] Despite the attempts of their drafters to find truly neutral grounds, differences in the role of good

200 Fuad Zarbiyev, 'A Genealogy of Textualism in Treaty Interpretation' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015) 251–267.

201 It is interesting to observe how Waldock explains dominant textualism noting that the report '*accepts the view that the text must be presumed to be the authentic expression of the intention of the parties*' and that '*the Institute of International Law adopted this – the textual – approach to treaty interpretation, despite its first Rapporteur's* [H Lauterpacht] *strong advocacy of a more subjective, 'intentions of the parties', approach'* – Sir Humphrey Waldock, 'Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur' (A/CN.4/167, 1964) 2 Yearbook of the International Law Commission 5 <http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf>, accessed 25 June 2021.

202 On changes of the approaches towards textualism in time and on primary operation of the plain and ordinary meaning in treaty interpretation under the VCLT, see also Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 301–322.

203 Certain similarities can be drawn from extensive and rather detailed contracts subjected to English law and more extensive and detailed treaties concluded by states. New generations of FTAs serve as a good illustration for detailed and voluminous treaties.

204 Though the UPICC and the PECL are referred to as non-state transnational instruments, one can find numerous areas that are influenced by the national laws of certain jurisdictions. While I refer to express provisions here, one can however find expression of the principle of good faith in provisions on integrity and efficiency of interpretation in which good faith was not formally mentioned. For the PECL – Articles 5:105, Article 5:106; for the UPICC – Article 4.4, Article 4.5.

205 See, for instance, some observations in Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Institute of Private Law, University of Oslo 132–134.

faith can be spotted even on a perfunctory level. While the PECL expressly features good faith among relevant circumstances for contract interpretation,[206] the UPICC attributes this role to good faith for supplying the omitted terms[207] and omits a reference to good faith in a general provision featuring the relevant circumstances for contract interpretation.[208] Even the *contra proferentem* rule receives somewhat different wording that might affect its ultimate application. While the PECL extends the rule to 'doubts' about the meaning of contract terms,[209] the UPICC links it to the 'unclarity' of the term.[210]

Furthermore, differences and nuances in approaches towards good faith do not only appear between legal orders: the national contract laws of various states differ dramatically between themselves in the role allocated to good faith. What is more, and as illustrated in Chapter 2, good faith informs the fundamental distinctions in contract interpretation under national laws across various legal traditions. The span ranges from an overarching principle and a powerful mechanism for control over the contractual content to a categorical rejection of its role in interpretation with the recognition of only a very limited role on certain precisely defined occasions.

The identified differences in the operation of good faith as a part of various legal orders makes it necessary to look at its precise function as a general principle of law, a source of international law, and in contract interpretation, if there is any precise function one can distil. First, this chapter will consider the analysis and examples given by Kotuby and Sobota on the application of the principle for contract interpretation in investment arbitration. Thereafter the work will attempt to identify and look independently at occasions when good faith was raised or relied upon in investment treaty arbitration for contract interpretation as a general principle of law in its own name, disengaged from national law and transnational law.

According to Kotuby and Sobota, the principle of good faith matters for ensuring contract performance (*pacta sunt servanda*), for excusing contractual performance and for remedying non-performance. Each of the identified areas in which good faith operates may require contract interpretation. When applied for interpretative purposes, good faith finds expression in three sub-principles. Firstly, good faith appears as a demonstration of a principle of integrity – *ut res magis valeat quam pereat* ('*no construction shall be admitted*

206 Article 5:102 of the PECL.
207 Article 4.8 of the UPICC.
208 Article 4.3 of the UPICC.
209 Article 5:103 of the PECL.
210 Article 4.6 of the UPICC.

which renders a [*contract*] *null and illusive, nor which leaves it in the discretion of the party promising to fulfil or not their promise'*).[211] Secondly, good faith appears as a demonstration of effectiveness (interpretation of '*an agreement as a whole to achieve its purpose and aim, which ensures that individual words or phrases within the agreement are given meaning, force, and effect'*).[212] Thirdly and finally, according to Kotuby and Sobota, good faith appears as a foundation of the *contra proferentem* principle.

The first two expressions of good faith essentially reflect the holistic ideas of taking a contract as a whole and of not depriving a single term of its significance. These approaches to interpretation hardly require any external justification, be that general principles as a source of international law or general principles as an emanation of a transnational legal order, or more generally international law, national law and transnational law.[213] Alexander Orakhelashvili helpfully notes the limits of holistic approaches to treaty interpretation that retain validity in the context of contract interpretation. He notes, in particular, that a holistic approach does not present a method of interpretation, but it rather leads to '*the balance of interpretative outcomes under particular methods of interpretation*.'[214] Importantly, holistic functions/derivatives of the principle of good faith as a general principle of law differ from the ordinary and conventional operation of good faith in contract interpretation as a concept of national (civil/contract) law in civil jurisdictions. Rather than operating to ensure that neither term is unduly discarded and an agreement is treated as a whole, good faith under national laws operates mostly for corrective

211 Charles T Kotuby Jr. and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 97, reference in fn 59.

212 Ibid. 97–98.

213 Holistic approaches to contract construction reflect hermeneutic principles based on an understanding of the words in context. In other words, the method is inherent to the nature of language and does not require external justifications. Stefan Vogenauer, for instance, in his Commentary on similar provisions in reference to 'a contract as a whole' in Article 4.4. emphasises the hermeneutic foundation of the provision, whereas in relation to 'all terms to be given effect' in Article 4.5 of the UPICC – the common sense of the provision, see Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (1st edn, Oxford University Press 2009) 521, 524. At the same time, some national laws may expressly codify holistic principles as a part of the rules for contract interpretation. For instance, Article 20 of the Law of Obligations and Contracts of Bulgaria and Article 1.267 of the Civil Code of Romania.

214 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 311.

interpretation in extreme cases. This corrective application, addressed in a comparative perspective in Chapter 2, works in reverse order by precisely discarding the significance of some contractual terms because of the unfair implications they bring.

In what relates to the third and probably the most characteristic example of the application of the general principles of law to contract interpretation out of those that Kotuby and Sobota name, *contra proferentem,* one cannot omit scepticism. While indeed being premised on good faith, whenever applied to contracts, the *contra proferentem* rule nevertheless depends on the applicable national law and the operation of good faith under that particular law. Comparative analysis demonstrates distinctions in the application of *contra proferentem* across various jurisdictions.[215] A distinction drawn by Alexander Orakhelashvili between principles of interpretation and interpretative maxims in the context of treaty interpretation is again helpful here. According to Orakhelashvili, maxims or canons of interpretation, including *contra proferentem*, do not possess an independent legitimacy, or normativity, and may be applied '*in so far as they constitute the application of the principles of interpretation*'.[216] In the context of treaty interpretation, being an uncodified canon of interpretation*, contra proferentem* is not a recognised principle or rule of treaty interpretation. It can only be applied through rules on treaty interpretation. Sean D Murphy is even more clear about why one should apply canons of interpretation to treaty interpretation with care: '*… the invocation of a canon as requiring a particular outcome may be an attempt to mask with legal jargon the interpreter's own policy preference, even when invoked simply as an interpretative aide, such canons must be used with caution taking full account of the context at issue*.'[217] In the same vein, *contra proferentem* when applied to contract interpretation does not bear universal independent legitimacy and can only be applied for contract interpretation so far as an applicable national law permits or justifies it.

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215 Péter Cserne, 'Policy Considerations in Contract Interpretation: the *Contra Proferentem* Rule from a Comparative Law and Economics Perspective' (2007) 5 Hungarian Association For Law and Economics Working Paper <http://citeseerx.ist.psu.edu/ viewdoc/download;jsessionid=16418DDB5B3905C5577040BF61DACE10?doi=10.1.1.624.5797&rep=rep1&type=pdf> accessed 25 June 2021.

216 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 317.

217 Sean D Murphy, 'The Utility and Limits of Canons and Other Interpretative Principles in Public International Law' in Joseph Klinger, Yuri Parkhomenko and Constantinos Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2018) 13, 23.

Given these points, it is not surprising that both examples on *contra proferentem* that Kotuby and Sobota raise to illustrate the operation of the principle of good faith in its proper name (i.e. disengaged from national law) to contract interpretation in the field of contract-based and treaty-based investment arbitration are problematic. While a discussion on *contra proferentem* in *Ceskoslovenska Obchodni Banka v. The Slovak Republic*[218] was not indeed formally corroborated by reliance on national law,[219] the tribunal did not rely on the principle, but rather rejected it in one sentence. What is more, the tribunal construed the contract in question – the financial consolidation agreement concluded among the Czech Republic, the Slovak Republic and ČSOB in relation to the bank's financial restructuring (the Consolidation Agreement) – by relying on Czech law applicable to it and not general principles of law as a source of international law.[220] In the treaty-based case of *Int'L Thunderbird Gaming Corp. v. United Mexican States*,[221] Thomas Wälde indeed introduced *contra proferentem* as a general principle, in his words, *'a traditional international law principle'*.[222] However, Wälde suggested a principle for interpretation of a unilateral act – an 'interpretative assurance' or a 'comfort letter' provided to the Secretary of the Interior, and not for contract interpretation, and only in a separate opinion unsupported by other members of the tribunal.[223] In light of the above, it can hardly be accepted that the presence of the idea of good faith in *contra proferentem* raises the rule to a general principle of law applied in its name proper.

Given the limited number of examples that Kotuby and Sobota provide to illustrate how the principle of good faith operates for contract interpretation in investment arbitration, an independent empiric verification becomes necessary. An analysis of awards in investment treaty arbitration reveals two distinct problems inherent to the notion of good faith. For the first, there are cases in investment treaty arbitration with express reliance on good faith in the context

218 The case of *Ceskoslovenska Obchodni Banka v. The Slovak Republic* is essentially a contract-based case. The Czech-Slovakia BIT did not come into force and was applied by the tribunal exclusively as a part of the parties' agreement.

219 *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction dated 24 May 1999, para. 55.

220 *Ceskoslovenska Obchodni Banka v. The Slovak Republic*, ICSID Case No. ARB/97/4, Award dated 29 December 2004, para. 52, 58–68.

221 *International Thunderbird Gaming Corporation v. The United Mexican States,* UNCITRAL, Arbitral Award dated 26 January 2006.

222 *International Thunderbird Gaming Corporation v. The United Mexican States,* UNCITRAL, Separate Opinion of Thomas Wälde, dated 1 December 2005, para. 50.

223 Ibid. para. 6.

of contract construction, but in the absence of the tribunal's explanation, it may prove difficult to recognise that good faith actually operates *as a general principle*.[224] McNair's observation in 1961 on the difficulty '*to give the expression of the precise meaning*'[225] in frequent reliance on good faith in judicial reasoning retains its validity nowadays. For the second, there are various other cases in which tribunals relied on efficiency and integrity in contract construction but were silent as to the possible ties of the exercised approach with the principle of good faith as a source of international law.[226] Tying justification that relies on efficiency and integrity to the principle of good faith now instead of tribunals may be an undue stretch. Bearing in mind these difficulties, priority is given only to those cases that contain an express reliance on good faith in relation to the ascertainment of the content of contractual provisions *and* that mark good faith as a principle. As striking as it can be, only one case out of those analysed – *Azurix Corp. v. The Argentine Republic*[227] – *satisfies* the criteria on a *prima facie* basis. In the case, the tribunal relied on the maxim *exceptio non adimpleti contractus* (exception due to a contractual breach) in relation to concession, expressly attributing it to the principle of good faith.[228] The *prima facie* fitness of the case would be rejected though, on a more detailed analysis,

224 In *Swisslion v. Macedonia,* for instance, the tribunal extensively referred to good faith in an interpretation of a share sale agreement. Reliance did not, however, constitute an independent good faith construction that the tribunal exercised. The tribunal was rather satisfied that given the ambiguity of the contractual terms, both parties to the contract could disagree on the construction '*in good faith*', and therefore the application by the state to a national court for the termination of the share sale agreement was not in bad faith *per se* (Award dated 6 July 2012, para. 266). In *ICS Inspection and Control Services Limited v. the Argentine Republic*(*I*)*,* for instance, the respondent attempted to base a legal argument on good faith as part of a holistic interpretation, stressing that disregarding the language of a forum selection clause by the claimant was contrary to good faith (para. 167–168 of the Award on jurisdiction of 10 February 2010). Good faith was called to reinforce the textual integrity – the content of the forum selection clause. The tribunal denied jurisdiction on other arguments advanced by the respondent and has not reacted to the argument based on good faith, however. For a critique of minimalism in legal reasoning, see also Federico Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3(1) Journal of International Dispute Settlement 31, 31–52.

225 Arnold McNair, *Law of Treaties* (Clarendon Press 1961) 465.

226 See, for instance, *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal dated 16 July 2010, para. 98; *Biwater Gauff* (*Tanzania*) *Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award dated 24 July 2008, para. 495–496.

227 *Azurix Corp. v. The Argentine Republic* (*I*)*,* ICSID Case No. ARB/01/12, Award dated 14 July 2006.

228 Ibid. para. 260.

thus leaving untouched the sceptical view on the independent and immediate role of the general principles of law as a source of international law for contract interpretation.

In *Azurix Corp. v. The Argentine Republic,* a dispute arose in relation to the 30-year concession concluded between an Argentinian subsidiary of the American corporation, Azurix Corp., and the Province of Buenos Aires regarding the distribution of drinkable water and the treatment of sewage in the Province. Under the concession agreement, the Province had to fulfil its undertakings in relation to completion of the infrastructure repair works. The failure to do so resulted in an algae outbreak that contaminated the water, rendering it unfit for human consumption. The government, however, blamed an investor for this failure and encouraged consumers not to pay bills to the concessioner. Furthermore, the provincial authorities precluded the Argentinian subsidiary of Azurix Corp. from increasing tariffs. Experiencing negative economic consequences as a result of the cumulative acts of the provincial and governmental authorities, the concessioner terminated the contract. The Province, however, rejected the termination, and only after the concessioner filed for bankruptcy, did the Province terminate the concession, referring to the failures of the concessioner to perform its undertakings under the concession. Bringing the case to the ICSID, Azurix Corp. claimed that Argentina was responsible for indirect expropriation, for violation of FET, full protection and security, and an umbrella clause, as well as for arbitrary, unreasonable, and/or discriminatory measures. The tribunal found that Argentina had violated the FET principle and was responsible for arbitrary measures. The remaining claims were rejected.

To decide the case, the tribunal had to undertake an extensive analysis of the concession agreement to which neither the claimant, nor the respondent were formal parties.[229] The contractual provision on contract termination became one of the hot points of disagreement. The claimant argued that the concessioner was empowered to terminate the concession pursuant to its terms and that a contrary view would lead to an unjustified abuse of rights that would enable a party failing to perform its part of reciprocal obligations to benefit from its own failure. The province disagreed, arguing that it alone possessed the exclusive right to terminate the concession. According to the Province, the concessioner had to first apply to the Province for termination,

229 Ibid. para. 41. The concession was concluded between an Argentinian subsidiary of Azurix – Azurix Buenos Aires S.A., Administración General de Obras Sanitarias de la Provincia de Buenos Aires ('AGOSBA') – and the Province.

and only if the Province did not agree, would the matter be referred to the court for termination.

Addressing the disagreement, the tribunal referred to the maxim *exceptio non adimpleti contractus*, presenting it as an expression of the principle of good faith:

> The difficulty in interpreting the provisions of Article 14 harmoniously is compounded by Article 49-11 of the Law which, as already noted, prescribes that termination "must be resolved by the Provincial Executive Authority with the intervention of ORAB." The Law does not distinguish between termination by the Grantor or the Concessionaire. It would seem appropriate that the Concession Agreement be interpreted consistently with the provisions of the Law. On the other hand, the Tribunal cannot ignore the practical result of this interpretation: if taken to the extreme, a concessionaire would be obliged to continue to provide the service indefinitely at the discretion of the government and its right to terminate the Concession Agreement would be deprived of any content. For this reason, the application of the *maxim exceptio non adimpleti contractus* provides a balance to the relationship between the government and the concessionaire. The Tribunal considers it immaterial whether ABA [Azurix Buenos Aires S.A.] raised this defense in its recourse to the Argentine courts. The Tribunal is assessing the conduct of the Respondent and its instrumentalities in the exercise of its public authority against the standards of protection of foreign investors agreed in the BIT, *and the application of the maxim exceptio non adimpleti contractus has been raised by the Claimant in these proceedings. This exception is not unknown to Argentine law and to legal systems generally as it is a reflection of the principle of good faith.* The Tribunal will take it into account when evaluating the actions of the Province under the standards of protection.[230] [emphasis added]

In the subsequent reasoning, the tribunal was not very explicit as to the announced operation of *exceptio non adimpleti contractus* as part of the principle of good faith. Nor did the tribunal clarify the role of national law – Argentinian law – applicable to the concession in relation to the operation of the principle. One can see nevertheless that the tribunal understood that it was the concessioner who possessed the right to terminate and exercised it properly.[231] Zachary Douglas criticised the award precisely for the failure to

230 Ibid. para. 259–260.
231 Ibid. para. 255–260.

apply national law, pointing to the inconsistency of the adopted principle of *exceptio non adimpleti contractus* with the concept of the administrative contract under French tradition that informed the Argentinian administrative law applicable to concessions.[232] Argentina advanced the same argument in the annulment proceedings arguing that reliance on the principle was contrary to applicable national law and largely an unauthorised assumption of the function of *ex aequo et bono*.[233] Azurix Corp. insisted that the respondent mischaracterised the reliance on the principle, its source and role in the tribunal's reasoning and highlighted the limited mandate of the annulment committee to review the award based on its substance.[234] The annulment committee rejected the argument that the tribunal found the principle of *exceptio non adimpleti contractus* to be a part of Argentinian national law applicable to concessions.[235] To the annulment committee, the tribunal's reasoning that the principle of *exceptio non adimpleti contractus* was '*not unknown in Argentine law*' should not be perceived as a misconstruction of national law and in any event should not amount to the annullable failure.[236]

If one attempts to understand the precise operation of *exceptio non adimpleti contractus* in the tribunal's reasoning, through the perception of the annulment committee, one would rather see it not as a general principle of international law but as an emanation of the 'treaty standard' on fair and equitable treatment.[237] A more detailed analysis of *exceptio non adimpleti contractus* reveals, however, that the principle was relied upon in a more sophisticated manner, first to offset constraints of the applicable national law and, second, to harmonise findings with other contractual provisions. The principle became an instrument to overcome unfair constructions that would deprive the concessioner of the right to terminate the contract because of the potential faults

232 See Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 71–72, including fn 170 with reference to the works on administrative contracts.

233 *Azurix Corp. v. The Argentine Republic* (*I*), Decision on the Application for Annulment of the Argentine Republic dated 1 September 2009, para. 134 (d-j). It is interesting to see the parallel with the *Sapphire* case where the arbitrator, Judge Pierre Cavin, chose to emphasise that his reliance on general principles of law shall not be treated as a decision on *ex aequo et bono* as he '*had no intention of deciding the case according to 'equity', like an 'amiable compositeur' – Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (1963) 35 ILR 135, 175.

234 *Azurix Corp. v. The Argentine Republic* (*I*) Decision on the Application for Annulment of the Argentine Republic dated 1 September 2009, para. 135 (h)-(j), (n), (o).

235 Ibid. para. 165–167.

236 Ibid. para. 169.

237 Ibid. para. 167.

committed by the Province and would require the concessioner to continue to operate under the terms of the concession. One can recognise in this application of *exceptio non adimpleti contractus* a corrective function of international law operationalised via one of its sources – good faith as a general principle of law.[238]

Justification behind the corrective function of international law requires substantial efforts. At the same time, it is the task of the tribunal to justify its findings in a transparent, comprehensive and methodologically sound manner. If one were to agree with this proposition, one would also recognise that the corrective function of good faith as a principle does not operate directly under contract construction, bypassing national law. Lack of a clear pronouncement in that regard led the respondent to believe that the tribunal justified the award on the basis of *ex aequo et bono* without being authorised by the parties. *Azurix Corp. v. Argentina* is therefore not a supporter of the primary or initial application of the general principles of law as a source of international law to contract interpretation, but can be a good case for illustrating an attempt to exercise the corrective function of international law.

To conclude an observation on the operation of good faith as a general principle in contract interpretation, one has to recognise that despite sharing similar ideas, good faith in international law, transnational law and national law do not operate as functional substitutes. Their content and mechanics of application are different. While any attempt to draw a clear line will be met with unavoidable criticism, a distinction, nevertheless, in the operation of good faith in interpretative rules/principles in international law, national laws and transnational sources, reflected in the summary below, is representative. Importantly, general principles of law while being almighty, do not solve all tasks and should not be used as a short way in reasoning bypassing essential elements, national law being part of it. A table summarising these observations is provided on the next page.

238 The corrective function of international law has been expressly recognised, albeit with some differences in accentuation, in scholarly works. See, for instance, W Michael Reisman, 'The Regime for *Lacunae* in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15 (2) *ICSID Review – Foreign Investment Law Journal* 362–381; Prospeil Weil, 'The State, the Foreign Investor, and International Law: The No Longer Stormy Relationship of a *Ménage À Trois* (2000) *15* (2) *ICSID Review – Foreign Investment Law Journal* 401–416); Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 620–627. On the relevance of national law to contract interpretation and on the corrective function of international law, see, for instance, the earlier cited Separate Opinion of Hersch Lauterpacht in the *Certain Norwegian Loans* (France v. Norway).

TABLE 2 Good faith in interpretation under three legal orders

Good faith in interpretation	International law		National laws	Transnational sources
	VCLT	General principles of law		
General observation	holistic approach and as a standard directed to an interpreter	holistic approach	mostly perceived through corrective function; may also have a nuanced role depending on jurisdiction	hybrid nature: mimicking national laws and international law and evidencing both holistic and corrective approaches; varies slightly across the codified sources of transnational law
Holistic approach	+ -integrity -efficiency	+ -integrity -efficiency	+ as a rule, not codified, inherent to interpretative efforts	+ -integrity -efficiency
Corrective approach	-	- but could be possible under limited circumstances and as a part of the corrective function of international law	+ corrective interpretation and filling of omitted terms	+ mostly, filling of omitted terms
Contra proferentem	-	+ applicable, as a rule, to unilateral statements	+ varies depending on jurisdiction	+ varies across the codified sources of transnational law

Contemporary misunderstanding about the role of the general principles of law in contract interpretation mostly echoes a number of widely discussed concession contract-based disputes. The disengagement from national laws, entire or partial, and reliance on general principles of law in these cases creates an impression of the inherent legitimacy proved by time that general principles of law possess in relation to contract interpretation. A more thorough analysis of these cases reveals in fact the limited role of the general principles as sources of international law in contract interpretation. History accordingly supplies further arguments.

Of the numerous concession disputes from 1930–1982, *Lena Goldfields Company*,[239] *Abu Dhabi Oil Arbitration*,[240] *Sapphire*,[241] *Aramco*,[242] three *Libyan Oil* arbitrations,[243] and *Aminoil*[244] became the most widely known.[245] These cases – all contract-based – evidence the augmented role of general principles of law either through the parties' express choice to have them act as applicable law or through the tribunals' application of them, or both. They triggered a theory of *internationalisation* and continue to nourish the development of its

239 Award is reproduced in Arthur Nussbaum, 'The Arbitration between the Lena Goldfields Ltd. and the Soviet Government' (1950) 36(1) Cornell Law Quarterly 31.

240 *Petroleum Development Ltd v. Sheik of Abu Dhabi* (Award 1951) 18 ILR 144; *In the matter of an arbitration between Petroleum Development* (*Trucial Coast*) *Ltd. and the Sheikh of Abu Dhabi*, Award of 28 August 1951 reproduced in (1952) 1 International & Comparative Law Quarterly 247–261.

241 *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (NIOC) (Award, 1963) 35 ILR 136.

242 *Saudi Arabia v. the Arabian American Oil Company* (*Aramco*), (Award 1958) 27 ILR 117–229.

243 *BP Exploration Co* (*Libya*) *v. Government of Libya* (Award, 1973) 53 ILR 297; *Texaco Overseas Petroleum Co v. Government of Libya* (Award, 1977) 53 ILR 389; *Libyan American Oil Co* (*LIAMCO*) *v. Government of Libya* (Award, 1977) 62 ILR 141.

244 *The Government of the State of Kuwait v. The American Independent Oil Company* (AMINOIL) (Award, 1982) (1982) 21 ILM 976; F A Mann, 'The *Aminoil* Arbitration' (1984) 54 (1) *British Yearbook of International Law*, 213–221.

245 For some other similar cases of the period, including, for instance, arbitration *Ruler of Qatar Case* (*Ruler of Qatar v. International Marine Oil Company Ltd.* (Award 1953) (1953) 20 ILR 534, ICJ case *Anglo-Iranian Oil Co* (1952) ICJ, see Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 33–37. For a list of other less known and less commented arbitration proceedings in the period, see also Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case' (1964) 13(3) International and Comparative Law Quarterly 987, 987–989. For significant arbitration cases on stabilisation clauses in the epoch preceding investment treaty arbitration, see also Peter D Cameron, 'Reflections on Sovereignty over Natural Resources and the Enforcement of Stabilization Clause' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy: 2011–2012* (Oxford University Press 2013) 311, 317, fn 22.

various facets. What is more, the cases, while starting to engage with general principles of law as sources of international law, essentially discovered their transnational dimension and blurred an existing distinction between general principles of law as sources of international law and general principles of law as part of transnational law. The analysis of the potential interpretative role of general principles of law as sources of international law for contracts in investment treaty arbitration would not, accordingly, be complete if the *momentum* that general principles of law had gained in these concession arbitrations in the epoch preceding investment treaty arbitration had not been properly considered, and their associated myths dispelled. The remaining section, therefore, attempts to verify whether tribunals in these cases, in fact, relied upon general principles of law in their own name in order to ascertain the content of contractual provisions, and if so, whether said reliance stepped beyond a holistic dimension and the *contra proferentem* as identified by Kotuby and Sobota, to feature more specific rules.

Each case emerged in a rather peculiar historic and political conundrum, the elucidation of which is not necessary for the purpose of this discussion, although it is helpful for understanding the true motives that stand behind ideas of internationalisation.[246] Many of these cases demonstrate an involvement of the same actors as counsel or arbitrators.[247] Not all those that are mentioned will be elaborated upon here in detail. For a more complete overview, one is advised to refer to other sources.[248] Here, the focus turns to tribunals' reasoning in relation to the ascertainment of the content of contractual provisions in concessions. At the same time, to give certain historic flavour and context to the analysis, some observations will be made on the nature of the concessions and the underlying circumstances behind the dispute.

Before turning to the cases, the theory of *internationalisation* needs to be introduced. Its discussion is also relevant for the whole chapter because of the illusion that the theory creates as to the capacity of international law to give

246 Among recent and informative insights, see, for instance, Katayoun Shafiee, 'Technopolitics of a Concessionary Contract: How International Law was Transformed by its Encounter with Anglo-Iranian Oil' (2018) 50(4) International Journal of Middle East Studies 627, 627–648; see also Katayoun Shafiee, *Machineries of Oil: An Infrastructural History of BP in Iran* (The MIT Press 2018).

247 By way of illustration, counsel in *Lena Goldfields Company,* Vladimir Idelson, a lawyer from the Russian Empire, also drafted a concession agreement in *Anglo-Iranian Oil Co* – see Norman Bentwich and K S C, 'Vladimir Idelson, Q. C.' (1955) 4(1) The International and Comparative Law Quarterly 27, 27–29.

248 See, for instance, Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997).

substantive regulation to state contracts. The biggest and the most widespread mistake is to treat internationalisation as a single theory. *Internationalisation* is nothing but a range of various consolidated – and sometimes intersecting – argumentative threads that various arbitration awards trigger, demonstrating the disengagement, partial or entire, of contracts from applicable national law. The arguments informing internationalisation may largely be divided into two groups: private and public. The private thread sees disengagement via methods based on party autonomy – arbitration clauses, choice-of-law provisions and stabilisation clauses; the public thread sees disengagement from national law via public international law, primarily provisions in IIAs, but also other fundamental provisions of international law, including general principles of law, that have an overriding correcting function. General principles of law play a role in both threads: in the private thread as part of the parties' express choice of applicable law and in the public thread as a constituent part of international law operating as an instrument of disengagement. Both threads were discernible in the inaugural part of the so-called theory in the 1960s in some of the concession cases discussed here where in the absence of the IIAs, general principles of law served instrumentally for the disengagement of state contracts from national laws.[249] With the emergence of investment treaty arbitration and proliferation of IIAs, the theory of internationalisation received more fuel in standards of investment protection in IIAs,[250] and the reliance on the general principles of

249 For contemporaneous publications on internationalisation, see, for instance, Arnold McNair, 'The General Principles of Law Recognized by Civilized Nations ' (195) 33 British Yearbook of International Law 1; F A Mann, 'The Proper Law of Contracts Concluded by International Persons' (1959) 35 British Yearbook of International Law 34, 41; Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case' (1964) 13(3) International and Comparative Law Quarterly 987; on reconsidered role of general principles of law see A A Fatouros, 'International Law and Internationalized Contract' (1980) 74(1) American Journal of International Law 134, 134–141. For a contemporary analysis of the genesis of the period of internationalisation, see Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Harts Publishing 2011) 30–34. That the role of general principles in internationalisation is less visible in Alvik's analysis, is not a matter of disagreement, but rather of accentuation. Ivar Avik emphasises a particular role of arbitration in internationalisation. The interaction between arbitration, international law and national law in relation to contracts received further clarification in Alvik's subsequent publication – see Ivar Alvik, '*Arbitration in Long-Term International Petroleum Contracts: the 'Internationalization' of the Applicable Law*' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy: 2011–2012* (Oxford University Press 2013) 388, 404.

250 On the role of the treaty provisions in internationalisation, see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 196–220.

law as a source of international law for internationalisation became less visible.[251] Responding to new trends, it became much rarer for general principles of law to be included in the choice-of-law provisions, whereas the role of national law became more apparent.[252]

The theory received fierce criticism because of its incapacity to fit comfortably, either in the doctrine of international law, or in the doctrinal constraints of national law. Analysing the method of internationalisation, commentators observe its self-referential character that justifies an external power of gravity for contracts in itself – primarily under the principle of *pacta sunt servanda*.[253] Analysing the effect of internationalisation, commentators also

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251 It seems that general principles of law gravitated towards a new dimension/transformed into a transnational legal order or *lex mercatoria.* This point receives thorough development in the recently finalised research project of Stephan Schill on *lex mercatoria publica* 'Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica'.

252 There is a certain deficit of empirical studies on the plurality of concession agreements, as noted by Peter D Cameron with reference to readily available model concession agreements – see Peter D Cameron, 'Reflections on Sovereignty over Natural Resources and the Enforcement of Stabilization Clauses' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy: 2011–2012* (Oxford University Press 2013) 317, including fn 21. If one considers concession agreements invoked in investment treaty arbitration cases, one can see more often an express choice in favour of national law without any reference to general principles of law. See, for instance, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award dated 20 August 2007, para. 4.5.1; *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag* (*In Liquidation*) *v. The Kingdom of Thailand, UNCITRAL,* Award dated 1 July 2009, para. 2.39; *AWG Group Ltd. v. The Argentine Republic, UNCITRAL*, Decision on Liability dated 30 July 2010, para. 98; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment dated 5 February 2016, para. 219; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award dated 8 December 2016, para. 76, 78. At the same time a reference to international law can nevertheless be occasionally found – see, for instance, *CCL v. Republic of Kazakhstan, SCC Case 122/2001*, Jurisdictional Award dated 1 January 2003, where the choice of applicable law in addition to the host state law also included international law.

253 The origin of the criticism on the incapacity of international law to address contracts meaningfully can be found in early publications. For instance, A A Fatouros noted: '*Internationalization of the contract, moreover, resolves nothing by itself. It provides no generally accepted answers to the quest for the legal rules applicable. The only explicit rule the award* [in *Texaco Overseas Petroleum Co v. Government of Libya* dated 19 January 1977] *appears to deduce is that the principle pacta sunt servanda is applicable, which does not help much. Any law of contracts, national or international, is bound to start with this principle. But is cannot just stop there. In reality, the most important consequence of internationalization is implicit. In simplest terms, once a contract has moved to the international level, it cannot*

became sceptical regarding its capacity to meaningfully address all the possible issues that might arise in relation to a contract. The criticism culminated in the recognition that an attachment of contracts to international law does not solve any substantive problem as international law in its current stage of development is not apt to turn into a functional substitute for national law [an idea supported by this chapter, and which does not deny the potential capacity for international law to advance in that direction]. The analysis of the general principles recognised by international law demonstrates that while on abstract terms, general principles of law may be attractive in their capacity to substitute the national law, when analysed *in concreto*, however, their application is not capable of doing more than offer holistic principles of interpretation. If all the camouflage of attachment to international law is put aside, the only functional purpose of attachment of contracts to international law lies in the idea of *pacta sunt servanda*.

What remains to be done in the final part of this section, on the general principles of law and contract interpretation, is to verify the role of said general principles in the inaugural, first cases of internationalisation. Some of the most cited contract-based concession cases will be considered chronologically, by identifying the nature of the concessions, the character of the dispute, as well as the parties' choice and/or the tribunal's reliance on the general principles of law. While these cases have been addressed in a number of publications from various angles, they have not been considered from the perspective of contract interpretation, and the role of general principles of law in it.

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lawfully be affected by unilateral national legal action. Since states cannot invoke their sovereignty to abrogate an international treaty, it is argued, neither can they do so to alter an internationalized contract.' – see A A Fatouros, 'International Law and Internationalized Contract' (1980) 74(1) American Journal of International Law 134, 136–137. For a more nuanced appreciation of internationalisation, essentially noting that internationalisation has nothing to do with the choice of substantive laws as such, but rather and exclusively with the binding effect of a contract, see Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 56–58. For a comprehensive overview of the existent critique of internationalisation, including its impracticalities, see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 186–189. For a critique with a more severe tone engaging with the foundational basis of international law and national law, see Muthucumaraswamy Sornarajah, '*The Myth of International Contract Law*' (1981) 15(3) Journal of World *Trade 187*, 187–217; see also Jean Ho reflecting and contextualising Sornarajah's critique – Jean Ho, 'Internationalisation and State Contracts: Are State Contracts the Future or the Past?' in Chin Leng Lim (ed), *Alternative Visions of the International Law on Foreign Investment Essays in Honour of Muthucumaraswamy* (Cambridge University Press 2016) 377–402.

The dispute in *Lena Goldfields Company* arose in relation to the termination of the concession agreement for exploration, mining and transportation of gold and other minerals in the territory of the Soviet Union concluded between the company, registered in the UK, and the Soviet Government. Concluded in 1925, the contract was revoked in 1929 under the circumstances of the changed state policy. The liberalisation of the economic thaw associated with the new economic policy, or NEP, was over. Instead the economy became centralised with five-year plans and supremacy of the state property and management in economic life. *Lena Goldfields* initiated arbitration against the State on the basis of the arbitration agreement contained in the concession claiming damages that arose because of termination of the concession. The respondent appointed an arbitrator, but thereafter failed to take part in the process. The arbitrator appointed by the respondent also failed to participate in the decision-making process, and the award was signed by the two other arbitrators: an arbitrator appointed by the claimant and by the chairman. According to Ivar Alvik, the ultimate award against the Soviet Union amounted to a considerable amount of about 500 million pounds, when adjusted to 2005.[254] The case was subsequently settled, whereas difficulties with performance of the settlement received express regulation in the inter-state treaty between the UK and the Soviet Union in 1968.[255]

Section 89 of the concession specified general principles of laws as being applicable to the contract and its interpretation: '*the parties base their relations with regard to this agreement on the principle of good will and good faith, as well as reasonable interpretation of the terms of the agreement*.'[256] Exploring this choice further, counsel for the claimant emphasised in the course of the proceedings that '*many of the terms of the contract contemplated the application of international rather than merely national principles of law*.'[257] The tribunal shared this view, and essentially based its decision on principles of unjust enrichment.[258] At the same time, general principles of law did not inform the contract's interpretation. Rather than relying on any external source of

254 Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 31.

255 Andrea Ernst, 'Lena Goldfields Arbitration', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e158?prd=EPIL> updated August 2014, accessed 25 June 2021.

256 The award is reproduced in and cited here from Arthur Nussbaum, 'The Arbitration between Lena Goldfields Ltd. and the Soviet Government' (1950–1951) 36 Cornell Law Quarterly 31, 42, para. 6.

257 Ibid. para. 22.

258 Ibid. para. 25.

justification, the tribunal approached the contractual provisions in complete isolation from any legal order.

In *Abu Dhabi Oil Arbitration,* a dispute arose in relation to a concession concluded in 1939 between Petroleum Development Ltd., a company registered in the UK, and the Sheik of Abu Dhabi over the exclusive rights to drill and extract mineral oil in Abu Dhabi for 75 years.[259] The dispute arose because the Sheik transferred the rights to explore oil in the territories outside of the territorial waters of Abu Dhabi to an American company. Petroleum Development Ltd. perceived this as a violation of the scope of the own concession agreement with the Sheik. The arbitrator (an umpire appointed because the two other arbitrators disagreed) had to decide on declaratory relief – whether a new contract violated the concession agreement of 1939. The terms of the concession contract appeared critical. In the concession, the parties agreed '*to execute this Agreement in a spirit of good intentions and integrity, and to interpret it in a reasonable manner*.'[260] The award is notorious for the rather sharp comments of the umpire in relation to the existence and capacity of applicable Sharia law to address '*the construction of modern commercial instruments*'[261] and his decision to base the award on '*the good sense and common practice of the generality of civilized nations – a sort of modern law of nature*'.[262] The arbitrator treated the choice of law as repelling the notion of national law. At the same time his sharpness in comments on Sharia law did not translate into a negative decision for the respondent, and some of the claimant's requests were subsequently denied. General principles on their proper name did not technically inform contract interpretation. The contract was taken in isolation with exception to the key disagreement being the territorial scope of the concession – the concept of 'territorial waters' – that the arbitrator interpreted, in light of the position under international law. In other words, while the general principles of laws did not inform interpretation, the concept of international law became a

259 *Petroleum Development Ltd v. Sheik of Abu Dhabi* (Award 1951) 18 ILR 144; *Arbitration between Petroleum Development* (*Trucial Coast*) *Ltd. and the Sheikh of Abu Dhabi*, (1953) 47(1) The American Journal of International Law 156, 156–159; Asquith of Bishopstone, 'Award of Lord Asquith of Bishopstone' (1952) 1(2) International and Comparative Law Quarterly 247, 247–261; Rudolf Dolzer, 'Abu Dhabi Oil Arbitration', *Max Planck Encyclopedia of Public International Law* <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e84> updated December 2006, accessed 25 June 2021..

260 *Petroleum Development Ltd v. Sheik of Abu Dhabi* (Award 1951) – see Asquith of Bishopstone, 'Award of Lord Asquith of Bishopstone' (1952) 1(2) International and Comparative Law Quarterly 247, 249–250.

261 Ibid. 251.

262 Ibid.

relevant background against which the content of the contractual provisions was construed.

In the *Sapphire* case,[263] a joint venture to expand the production and exportation of Iranian oil was concluded between the National Iranian Oil Company (NIOC) and Sapphire Petroleum Ltd. (Sapphire), a Canadian company. The parties set up the joint Iranian Canada Oil Company to carry out the contract. Sapphire International, to which Sapphire Petroleum Ltd. assigned its rights under the contract, claimed reimbursement of the expenses from the NIOC, which Sapphire International incurred in the concession area. The NIOC refused to cover these expenses, arguing that the works carried out by Sapphire had not been agreed to with the NIOC, ultimately repudiating the contract. The contract did not contain any express choice-of-law provision. From the choice of arbitration, a reference to good faith and from no choice of applicable law, the tribunal implied a negative choice, excluding the application of the most relevant Iranian law, deciding that general principles of law were relevant.[264] In the absence of any express tie of good faith to national law in the contractual clause, the tribunal connected it to the general principle of law as a source of international law:

> On the other hand a reference to rules of good faith, together with the absence of any reference to a national law, leads the judge to determine, according to the spirit of the agreement, what meaning he can reasonably give to a provision of the agreement which is in dispute. It is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but rather to rely upon the rules of law, based upon reason, which are common to civilised nations. These rules are enshrined in article 38 of the Statute of the International Court of Justice as a source of law, and numerous decisions of international tribunals have made use of them and clarified them. Their application is particularly justified in the present contract, which was concluded between a state organ and a foreign company,

263 *Sapphire International Petroleums Ltd. v. National Iranian Oil Company* (NIOC) (Award, 1963) 35 ILR 136; Martins Paparinskis, 'Sapphire Arbitration', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e205> updated April 2010, accessed 25 June 2021.

264 Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case' (1964) 13(3) The International and Comparative Law Quarterly 987, 1012. One can see a similar line of argumentation on negative choices of law in the contemporary treaty-based case *Lemire v. Ukraine* (II).

> and depends upon public law in certain of its aspects; it has therefore a quasi-international character which releases it from the sovereignty of particular legal system and it differs fundamentally from an ordinary commercial contract. It should be mentioned that the question of the law applicable did not altogether escape the draftsman of the agreement-see letter (d) below; and the absence of any reference to a national law can only confirm this conclusion.[265]

The award became exemplary of the extensive and detailed comparative efforts to distil common principles in various national laws in relation to the very specific and rather complex interpretative problem of synallagmatic contracts – contracts with interdependent mutual/reciprocal undertakings between the parties. After demonstrating that the principle of reciprocal interdependent undertakings finds its place in the laws of various jurisdictions, the tribunal chose to emphasise its common sense and fairness:

> These principles are no more than the expression of a logical requirement, which explains why they are generally recognized. However different the judicial techniques employed may be, however divergent may be the theoretical explanations given by doctrine, one point is certain: this principle is explained by the interdependence of the obligations contained in the same contract. It would be illogical and contrary to the most elementary notions of equity if one party could obtain satisfaction while the other suffered a loss. Whether the notion of the reciprocal effect of obligations, of the equal value of obligations, or of the implied condition is relied on, it is impossible to escape the essential and elementary conclusion that one of the parties must not benefit from the performance of the contract by his partner while evading his own obligations.[266]

The principle of interdependent undertakings assisted in finding the breach of the concession, but at the same time, it had little impact on contract interpretation as such. The tribunal construed the contract rather on its own terms, taken as a whole and without finding external justification in international law.

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265 Ibid. 1013.

266 Ibid. 1016–1017 (cited on the basis of award extracts published as an annex to the article of Jean-Flavien Lalive).

In the *Saudi Arabia v. Aramco* case,[267] a dispute arose between Saudi Arabia and the *Arab American Oil Company* (Aramco) in relation to interpretation of the concession agreement between them concluded in 1930 in light of the exclusive general rights of transportation of oil being subsequently granted by Saudi Arabia to another company, the Saudi Arabian Maritime Tankers Company (Satco). Saudi Arabia attempted to compel Aramco to transport oil using Satco tankers whereas Aramco objected, justifying its decision by pointing to undertakings of Saudi Arabia under their concession agreement. The key interpretative question that arose before the tribunal related to ascertaining whether Aramco acquired a right of transportation under the concession with Saudi Arabia. While the tribunal made it explicit that public international law did not govern the concession, it recognised that international law was relevant to certain aspects of the dispute that could not be governed by national laws, including state responsibility. In what relates to contract interpretation, the tribunal predominantly exercised a textual approach as '*the supreme authority of the text which was the object of the Parties' agreement must always be upheld*', or in the words of one of the counsel in the case, Stephen Schwebel, '*the written word came first*'.[268] The tribunal refused to rely on *contra proferentem* or to exercise a restrictive interpretation, although it accepted the existence of a principle of restrictive interpretation: '*The principle of restrictive interpretation of the contractual obligations of a government toward a private individual is not a cardinal rule of legal interpretation. It is only one rule among many others. To resort to restrictive interpretation, it is not enough to contend that the text of a contract is ambiguous or incomplete. That must be established before one can have recourse to restrictive interpretation. But in this case, the Government had failed to prove that the meaning of the Concession's text was doubtful.*'[269]

The concessions in three Libyan oil cases, involving British Petroleum (BP),[270] the Texaco Overseas Petroleum Company (TOPCO),[271] and the Libyan American Oil Company (LIAMCO),[272] were all based on the same model which provided that concessions '*shall be governed by and interpreted in accordance*

267 Stephen Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis agreement' (2010) 3(3) The Journal of World Energy Law & Business 245, 245–256.

268 Ibid. 251.

269 Ibid. 253.

270 *BP Exploration Co* (*Libya*) *v. Government of Libya* (Award, 1973) 53 ILR 297.

271 *Texaco Overseas Petroleum Co v. Government of Libya* (Award, 1977) 53 ILR 389; Julien Cantegreil, 'The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law' (2011) 22 (2) The European Journal of International Law 441.

272 *Libyan American Oil Co* (*LIAMCO*) *v. Government of Libya* (Award, 1977) 62 ILR 141.

with the principles of the law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals'. The reasoning in each of the awards differed. In *BP v. Libya*, in deciding the dispute, the sole arbitrator, Gunnar Lagergren,[273] relied on general principles of law without connecting them to international law.[274] In *Texaco v. Libya*, René-Jean Dupuy attempted to navigate between recognising the role of national law as the 'proper' law of a contract and international law as '*the legal order from which the binding nature of the contract stems*'.[275] In *LIAMCO v. Libya*, Dr Mahmassani found that Libyan law applied to the extent common to international law and general principles of law,[276] an approach marked by Ivar Alvik as a '*conditioned version of national law*'.[277] In any case, attributing somewhat different functions to general principles in overall reasoning over the *causae*, in none of the Libyan oil cases did the tribunal justify their interpretation of concession agreements by relying on certain general principles of law in their own name. Rather, concessions were construed in isolation, without any external justification.

In the *Aminoil* case,[278] a dispute arose in relation to the termination/nationalisation of the 60-year concession agreement concluded between Aminoil, an American company, and Kuwait in 1949. The tribunal found the nationalisation to be lawful and not in violation of the stabilisation clause, at the same time awarding compensation to Aminoil. The parties gave leeway to the tribunal in determining applicable law, having agreed that: '*The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world*'.[279] The tribunal understood the provision as welcoming the application of Kuwaiti law, together with due consideration of international law, including the general principles of law.[280] The tribunal found it essential to underline

273 Gunnar Lagergren subsequently became a President of the Iran-USA Claims Tribunal where finding principles of law common to the law of the USA and Iran frequently became the dominant approach of justification in relation to contract-based cases.

274 *BP Exploration Co* (*Libya*) *v. Government of Libya* (Award, 1973) 53 ILR 297, 327–9.

275 *Texaco Overseas Petroleum Co v. Government of Libya* (Award, 1977) 53 ILR 389, 443.

276 *Libyan American Oil Co* (*LIAMCO*) *v. Government of Libya* (Award, 1977) 62 ILR 141, 175–6.

277 Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing) 39.

278 *Aminoil v. Kuwait* (Award, 1982) (1982) 21 ILM 976; F. A. Mann, 'The Aminoil Arbitration' (1984) 54(1) British Yearbook of International Law 213, 213–221.

279 Ibid. para. 8.

280 Ibid. para. 6–10.

that international law was essentially part of Kuwaiti law.[281] Interpretation of the stabilisation clause became critical and the tribunal found that the provision did not possess absolute power in the sense of prohibiting nationalisation *per se*, but rather in prohibiting a confiscatory nationalisation without due compensation.[282] Rather than justifying the limited interpretation of the stabilisation agreement by some external principles, the tribunal referred to the inner content of the contractual relations that had undergone substantial transformations with time: '*It is not a case of a change involving a departure from a contract, but of a change in the nature of the contract itself, brought about by time, in the acquiescence or conduct of the Parties.*[283] Above all, general principles of laws were not expressly relied upon for construing the contractual provisions.

For these historic arbitration cases to primarily empower the general principles of law meant to switch to another centre of gravity for contracts that would provide external justifications. While expressly located in general principles of law as a source of international law, that centre of gravity in fact stepped outside international law *stricto senso*. In addition to internationalisation, the analysed cases may be viewed as precursors to the emergence of the transnational legal order.[284] In any case, be it international law or emerging transnational law,

281 Ibid. para. 10.

282 Ibid para. 88–102.

283 Ibid para. 101.

284 For instance, the 1957 work of Arnold McNair, largely perceived by contemporary arbitrators as a proxy for the application of the general principles of law ought to be understood with more nuance and care. Rather than perceiving general principles of law as sources of international law in their operation in relation to private parties, McNair saw that the legal system, applicable to economic development contracts, was of a transnational character: '*… it is submitted that the legal system appropriate to the type of contract under consideration is not public international law but shares with public international law a common source of recruitment and inspiration, namely, 'the general principles of law recognized by civilized nations*' – Arnold McNair, 'The General Principle of Law Recognized by Civilized Nations' (1958) 33 British Yearbook of International Law 1, 6. Further signs of transnational legal order in the reliance on general principles of law at the time and in relation to the concession arbitration can be found in the works of J.-F. Lalive, cited above, and who observed: '*The second problem, of a less conspicuous and more subtle nature, is that of the legal system, or systems, in which the general principles may be incorporated and of which they form part. Are they necessarily part of international law only, and is it not preferable to envisage a third and new system, called Transnational Law? The great majority of lawyers drafting contracts, judges, arbitrators and writers have taken for granted that the "general principles" belong to international law and are to be equiparated to "general principles of international law.*' – Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company: Theory and Practice: Choice of Law in a New Arbitration Case' (1964) 13(3) The International and Comparative Law Quarterly 987, 987, 1000. See

the functional operation of this new centre of gravity was limited to *pacta sunt servanda*. For contract interpretation, that meant very little. Out of the mentioned cases, only with *Aminoil* did the tribunal rely on efficiency in addressing the concession. However, the justification for the approach, based on efficiency, pointed rather to transnational rather than international law. It is accordingly no surprise that the award is featured on the 'Creeping Codification' project through the TransLex Principles at www.trans-lex.org operated by the Center for Transnational Law (CENTRAL) at Cologne University, Germany.[285] In other words, a recognition of an international/transnational component in applicable substantive regulation in the early concession cases does not supply any concrete instrument for contract interpretation, beyond discussed dimensions of integrity and efficiency that largely correspond to holistic principles of interpretation and common sense.

Thus, general principles of law as sources of international law, while capable of providing certain answers to interpretative problems surrounding contracts (if one accepts their extension to private law instruments in the first place), have limited instrumentality. Currently, the existent practice of international courts and tribunals, as well as historic cases, that extensively relied on general principles, does not permit one to see that the principles were applied to distil either through interpretation or through lacunae-filling function distinct rules in international law for contract interpretation. When analysed as substantive regulatory principles or norms, general principles also show that they reach contractual material at a very high and abstract level. Logical and axiological premises of good faith undergo denationalisation and reduction to the standard of reasonableness. This level may appear to achieve justice and is no doubt important, but it does not constitute a sufficient regulation for contract interpretation. The resulting instrumentality that one may potentially distil from

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also, A A Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press 1962), 284–285. Undoubtedly, the revolutionary work of Philip Jessup on transnational law did not remain unnoticed during the period – Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956). On the role of international law in the emergence and flourishing of transnational law pointing to the same period, see also Gregory C Shaffer and Carlos Coye, 'From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders' (2017) 2 UC Irvine School of Law Research Paper <https://ssrn.com/abstract=2895159> accessed 25 June 2021.

285 *Kuwait v. The American Independent Oil Company* (AMINOIL) available at <https://www.trans-lex.org/261900>, accessed 25 June 2021. See also, Klaus Peter Berger, 'Creeping Codification of the New Lex Mercatoria: The TransLex Principles at www.trans-lex.org', (*Kluwer Arbitration Blog*, 20 January 2010) <http://arbitrationblog.kluwerarbitration.com/2010/01/20/creeping-codification-of-the-new-lex-mercatoria-the-translex-principles-at-www-trans-lex-org>, accessed 25 June 2021.

the general principles of law as a source of international law does not step beyond the two holistic principles of interpretation – integrity and efficiency, principles that hardly require external justification.

Furthermore, as a more encompassing overview, even if one agrees that international law governs contracts, the rules available to international law, international treaties, customary international law, and the general principles of law, offer neither a thorough regulated background law, nor a tuned apparatus capable of independently addressing all the possible nuances of contract interpretation.

3.5 Subsidiary Means for Determining the Content of International Law

Having identified the somewhat limited capacity of two sources of international law[286] to address contract interpretation, it may be moot to attempt to look at judgments and the '*teachings of the most highly qualified publicists*' independently, as a secondary means to determine the content of international law via the understanding of Article 38 of the ICJ Statute. Some of the judgments and scholarly publications have already been considered in previous subsections that address treaties, customary international law and the general principles of law. Nevertheless, for the sake of a complete overview of the capacity of international law, in its present shape and form, to address contract interpretation, we will briefly turn to the judgments and '*teachings of the most highly qualified publicists*' in this conclusive section.

Without engaging extensively in the complexity of attributing a status of a subsidiary source, as understood under Article 38 of the ICJ Statute, to judgments and scholarly works, a significant task in itself,[287] one might attempt

286 In previous sections, I identified rules for interpretation of contracts in the CISG. I also considered the limited role of the general principles of law as a source of international law for contract interpretation.

287 It is commonly accepted that not every judgment and not every publication is sufficient to reach the level of a secondary source as understood under article 38 of the ICJ Statute – see, for instance, Alain Pellet, 'Article 38' in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 731–870; Sir Michael Wood, 'Teachings of the Most Highly Qualified Publicists' (Art. 38 (1) ICJ Statute), *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1480> updated March 2017, accessed 25 June 2021; Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice'

to limit one's investigation to ***prima facie*** authoritative sources. For jurisprudence in public international law engaged in the ascertainment of the content of contractual provisions, the World Court will be prioritised.[288] For scholarly works and in the absence of institutional works on contract interpretation in the context of public international law,[289] it is important to primarily assess publications by regularly cited individual scholars. In other words, while *authority* remains important for this inquiry, it is not an independent focus in itself, and the primary emphasis for this section is rather on the *availability*

(2012) 3(1) Cambridge Journal of International and Comparative Law 136, 136–161; Christopher Greenwood, 'Sources of International Law: An Introduction' <http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> accessed 25 June 2021; Alain Pellet, 'Gaetano Morelli Lectures: Decisions of the ICJ as Sources of International Law?' (International and European Papers Publishing 2018) <http://crde.unitelmasapienza.it/sites/default/files/GMLS%20-%20Decisions%20of%20the%20ICJ%20as%20Sources%20of%20International%20Law%20%282018%29.pdf> accessed 25 June 2021. Different views exist on the precise significance of judgments and publications. A textual reading of article 38 of the ICJ Statute ensures a wide consensus that judgments and publications are considered to be subsidiary sources for identification. At the same time, there is also an accentuating view on the growing significance of these sources in the process of deformalising international law – Jean d'Aspremont, 'The Politics of Deformalization in International Law' (2011) 3(2) Goettingen Journal of International Law 503, 507. Furthermore, the work of Jean Ho identifies arbitral awards as a primary source for the rules on state responsibility for the breach of investment contracts – see, for instance, Jean Ho, 'Arbitral Awards and the Generation of International Law' in Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 61–89.

288 On the role of ICJ jurisprudence in international law, see also Christian Tams, 'Gaetano Morelli Lectures Series: The Development of International Law by the ICJ' (International and European Papers Publishing 2018) <http://crde.unitelmasapienza.it/sites/default/files/GMLS%20-%20Decisions%20of%20the%20ICJ%20as%20Sources%20of%20International%20Law%20%282018%29.pdf> accessed 25 June 2021; Robert Kolb 'The Jurisprudence of the ICJ' in Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar Publishing 2014) 375–403.

289 Institutional works, for instance, of the UN International Law Commission or International Law Association, gain high authority and credibility. None can be identified, though, in relation to contract interpretation for those contracts that, for instance, trigger state responsibility and appear in an adjudicative context of public international law. For a historic overview of state and private codification in relation to state responsibility for contractual breaches and controversy behind the topic that led to its exclusion from the work of the International Law Commission on state responsibility, see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 46–58. Yet, no specific provisions on contract interpretation, attributable to international law, were articulated at that time when the issue was not excluded from intense consideration. To the contrary, some of the discussed drafts in the period expressly provided for the role of the national law applicable to a contract in deciding on arbitrariness and wrongfulness of the states conduct – see Article 12 of the Harvard Draft Convention 1961.

of an indication of the rule of international law among judgments and scholarly works.

Given the limited result, which has already been revealed in relation to international treaties, customary international law and the general principles of law, there is a high probability that no indication of rules of international law for contract interpretation beyond what has already been spotted, can be identified. Therefore, accordingly, authoritative negative proclamations, i.e. on the role of national law instead of the role of international law for contract interpretation, will also be considered in this concluding section.

3.5.1 *Judicial Practice*

Even though contract interpretation is not a routine type of legal reasoning for the World Court, at least six cases – two advisory and four contentious – evidence the Court's various attempts to ascertain the content of contractual provisions for the various purposes of its mandate.[290] In *Settlers of German Origin in Poland*,[291] the PCIJ had to give an advisory opinion on the legal issue in a dispute on the application of the League of Nations. The PCIJ examined contracts, under which former German nationals who were domiciled in Polish territory previously belonging to Germany, and who had acquired Polish nationality, were occupying their holdings and which Poland planned to cancel. In another advisory opinion on the application of UNESCO in *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the United Nations Educational, Scientific and Cultural Organization*,[292] the ICJ analysed, among other things, employment contracts concluded between individuals and UNESCO. The remaining four contentious cases primarily related to the rights of aliens protected under international law. In the contentious *Serbian Loans*[293] and *Brazilian Loans*,[294] the focus turned to

290 These cases are also addressed in Chapter 4 to demonstrate the power of treaty-based tribunals to interpret contracts.

291 *Settlers of German Origin in Poland*, (1923) Advisory Opinion of 10 September 1923 [1923] PCIJ Report Series B, No. 6; Gudmundur Alfredsson, 'Cases Concerning the German Minorities in Poland', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e138> updated April 2010, accessed 25 June 2021.

292 *Judgments of the Administrative Tribunal of the International Labour Organization upon complaints made against the United Nations Educational, Scientific and Cultural Organization* (1956) Advisory Opinion [1956] ICJ Rep. 77.

293 *Payment of Various Serbian Loans Issued in France* (*France v. Yugoslavia*) (Judgment of 12 July 1929) PCIJ Series A No. 20.

294 *Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v. Brazil*) (Judgment of 12 July 1929) (1929) PCIJ Series A No 21.

loan agreements relating to the issue of bonds.[295] In *Lighthouses*,[296] the PCIJ had to consider concession contracts between a French firm and the Ottoman government concerning certain lighthouses situated in the territories of Crete and Samos. In *Mavrommatis*,[297] the PCIJ addressed concessions for the construction and working of an electric tramway system, for the supply of electricity and power and of drinking water in Jerusalem and Jaffa. The extent of the analysis varied. Save for *Serbian* and *Brazilian Loans*, other cases demonstrate rather perfunctory contract interpretation.

None of the cases are recent. The earliest took place in 1923, and the latest in 1956. A considerable gap emerged since the last attempt of the Court to construe the content of contractual provisions. The timing brings a specific historical flavour of espousal for these cases. In *Mavrommatis*, Greece claimed that the UK, having assumed control over the territory of Palestine, failed to recognise the full extent of the rights which Mavrommatis received under concessions concluded with Ottoman authorities in relation to work in Palestine prior to when the UK assumed control. In *Lighthouse*s, France espoused the claim of its nationals in relation to Greece, to which lighthouses (the object of the concessions) were assigned after being taken from the Ottoman government following the Balkan Wars. Both the *Serbian Loans* and the *Brazilian Loans* were taken out by France in favour of its nationals, but unlike in the above-mentioned cases, a special agreement between the two states (in the case of *Serbian Loans* – the Kingdom of the Serbs, Croats and Slovenes and France, and in the case of *Brazilian Loans*, Brazil and France) empowered the PCIJ to express its opinion on matters tied to the interpretation of currency clauses in loan agreements.[298]

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295 Given the contemporary distinctions between syndicated loans and bonds, Thomas Wälde suggested that the case should have been named in modern terms, as the Serbian Bonds Case – Thomas Wälde, 'The Serbian Loans Case – a Precedent for Investment Treaty Protection of Foreign Debt?' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 388.

296 *Lighthouses Case between France and Greece* (France v. Greece) (Judgment of 17 March 1934) (1934) PCIJ Series A/B, No. 62.

297 *Mavrommatis Jerusalem Concessions* (Greece *v.* UK) (26 March 1925) PCIJ, Series A, No. 5; for contemporaneous analysis, see Edwin M Borchard, 'The Mavrommatis Concessions Cases' (1925) 19(4) The American Journal of International Law 728, 728–738. For an interesting modern perspective on the case, see Rosalyn Higgins, 'Natural Resources in the Case Law of the International Court' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges, Essays in Honour of Patricia Birnie* (Oxford University Press 1998) 87–111.

298 The PCIJ explained its mandate to interpret contracts in *Serbian Loans* as follows: '*It must however be considered that the Court has been made cognizant of this case not by unilateral*

After a thorough analysis, none of the six cases have become indicative of the rules of international law on contract interpretation. Even though the World Court exercised a rather independent, *reasonable* construction of contractual terms, national law was not entirely ignored. The Court relied on national law to a certain extent, either for contract construction (*Settlers of German Origin in Poland*, *Serbian Loans*, *Brazilian Loans*) or findings on contract validity (*Lighthouses*). In the Court's independent construction and in the primacy of the contractual text, some of the authors see the World Court as being equipped by the general principles of law – good faith and *pacta sunt servanda.*[299] While it is quite possible that the considerations of these general principles of law became decisive, the Court however has not explicitly clarified the role of the general principle of law, if any, for contract construction. Furthermore, neither of the decisions cited above have subsequently been used as authority for suggesting that general principles of law guide contract interpretation in the practice of investment treaty arbitration.[300] Equally, at least three cases of *Serbian Loans*, *Brazilian Loans* and the *Case of Certain Norwegian Loans* (*France v. Norway*)[301] continue to frequently be retained for their symbolic recognition of the role of national law, whereas the rather specific context of those clarifications is often overlooked or omitted.[302]

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application but by a Special Agreement. The two States signing the Special Agreement approach the Court as they would an arbitrator and they ask it to decide – as they might ask legal experts – upon a question of the interpretation of contracts in regard to which they disagree.' – see *Payment of Various Serbian Loans Issued in France* (*France v. Yugoslavia*) (Judgment of 12 July 1929) PCIJ Series A No. 20.

299 Thomas Wälde, 'The Serbian Loans Case – a Precedent for Investment Treaty Protection of Foreign Debt?' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005) 395–398.

300 Jurisprudence of the PCIJ and the ICJ has not informed tribunals' interpretative efforts in relation to contracts. For the role of ICJ jurisprudence on other issues in investment treaty arbitration, see Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28(2) ICSID Review 223, 223–224.

301 In 1957, in *Case of Certain Norwegian Loans* (*France v. Norway*), the ICJ was close to interpreting a 'golden clause' in loans, similarly to what the PCIJ did in the *Serbian* and *Brazilian Loans* cases. The ICJ, however, declined its jurisdiction and this closed any investigation into the content of the contractual provisions of the loans. – *Case of Certain Norwegian Loans* (*France v. Norway*) (Preliminary Objections) [1957] ICJ Rep 9.

302 See, for instance, Hans van Loon and Stéphanie De Dycker, 'The Role of the International Court of Justice in the Development of Private International Law' in Randall Lesaffer and others (eds), *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht – Nr. 140 – One Century Peace Palace, from Past to Present* (T.M.C. Asser Press 2013).

All the cases discussed by the World Court belong to the epoch preceding investment treaty arbitration. Should no investment treaty arbitration have emerged enabling an individual to arbitrate with the state in relation to investment contracts, one could reasonably have expected more cases on espousal where the World Court would be required to ascertain the content of contractual provisions. As a result, Wilfred Jenks' contemporaneous observation on what has been deemed a rather '*scattered pronouncement*'[303] would not constitute a proper status these days. It is quite possible that the World Court would contribute to clarifying the methodology and overall approach of legal reasoning in relation to ascertaining the content of those contracts that appear in a setting of adjudicative public international law. Investment treaty arbitration seemingly released the World Court of that burden.

In what relates to jurisprudence of investment treaty arbitration, one cannot successfully mirror Jean Ho's argument on the role of arbitral awards as a primary source of international law on state responsibility for breaches of investment contracts and suggest that the same awards exhibit the rules of international law on contract interpretation.[304] Even though one can identify *lacunae* both for state responsibility for breach of investment contracts and for interpretation of these contracts, that probably would be the only point of alignment. For state responsibility for breach of investment contracts, the *lacunae* existed in scholarly literature, but not in international law, until Jean Ho capably filled it with her recent monography. Idiosyncratic express reliance on international law on more thorough examination turns out to be a rhetoric that hides ideas of transnational law,[305] or overrides the application of certain concepts or principles of international law that rather than being directed

303 Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 599.

304 Jean Ho, 'Arbitral Awards and the Generation of International Law' in Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 61–89. For the contribution of investment treaty arbitration to general international law, see also Stephan W Schill and Katrine R Tvede, 'Mainstreaming Investment Treaty Jurisprudence: The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law' (2015) 14(1) The Law and Practice of International Courts and Tribunals 94, 94–129.

305 In *Lemire v Ukraine* (*II*), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 111. With caveats regarding the peculiar and rather contract-based character of the *Eurotunnel Arbitration* and as discussed, a reliance on the VCLT for interpretation of the concession agreement, it was rather premised on the parties' agreement.

toward ascertaining the meaning of contractual provisions define their effect under international law.[306]

To conclude, one has to acknowledge occasions when the World Court first understood contracts without relying upon national laws, but that in itself does not necessarily lock that analysis within the exclusive ambit of international law. The World Court considered national laws in relation to contracts and frequently reconfirmed its own findings by relying on national law. While the precise role and function of national law in the reasoning of the World Court may be disputed, what remains rather undisputed is that its jurisprudence does not point to rules *in international law* on contract interpretation.

3.5.2 *Scholarly Publications*

There is no doctrine of contract interpretation in general international law. There never has been. There was, however, an attempt to find an external axis of stability for state contracts in the general principles of law as a source of international law during the time of the concession disputes prior to the emergence of investment treaty arbitration. Those attempts, while clearly drawing on ideas of the prevalence of the international legal order over national laws, stopped growing in the direction of international law, and changed their trajectory into an affirmation of the transnational legal order. The transition already became noticeable in some scholarly works of the period when authors showed indecisiveness as to the precise nature of general principles representing international law or transnational law.[307]

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306 For more detail on the role of international law in deciding on the legal consequences of stabilisation clauses, the limited liability clause, the waiver clause and the forum selection clause under international law, see Chapter 4.

307 In addition to the cited view of Jean-Flavien Lalive, an observation of A A Fatouros can be equally representative. In 1962 A A Fatouros wrote: '*It is clear that there is today a developing practice involving the application of general principles of law to state contracts. There still remain several problems, of course, the most important of which are the determination of the conditions under which such principles are to be applied and the establishment of a method for finding the precise content of the rules involved. It is not yet quite clear under what conditions transnational law is applicable to particular state contracts. There is little doubt as to its applicability when the parties include in the contract itself a provision to the effect that the "proper law of the contract" is transnational law or the general principles of law recognized by civilized nations …*' and further capturing dependency of transnational law upon international law: '*The close relationship between transnational law and public international law makes it probable that the former will depend on the latter for the determination of the precise content of the general principles to be applied.*'– A A Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press 1962) 293, 294. Somewhat later in 1989, Grant Hanessian clarified the mixed intervening nature of general principle of law as a source of international law and *lex mercatoria*: '*Both "general*

Unsurprisingly and as discussed, the concession cases from the period preceding investment treaty arbitration continue to retain their legitimacy nowadays regarding the use of the general principles of law as transnational sources.[308] Together with the IUSCT jurisprudence, they created a fertile empirical ground for the UNIDROIT works on the unification of transnational law.[309] They also continued to be used as a symbol of justification for a direct applicability of international law to state contracts when it suited the discussion,[310] without in fact triggering scholarly works willing and capable to elaborate a doctrine of contract interpretation within general international law[311].

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principles of civilized nations" and lex mercatoria are somewhat controversial as there is no consensus on the methodology, normative content, or source of obligation of either of these bodies of law. As applied by the Tribunal, however, these sources of law are blended into a system of obligations that is available for application to the disputes of private parties in international commercial arbitrations.' – see Grant Hanessian, 'General Principles of Law' in the Iran-U.S. Claims Tribunal' (1989) 27 Columbia Journal of Transnational Law 309, 312.

308 A clarification of the idea of transnational law largely coincided with the efforts on unification and harmonisation of uniform sales law that ultimately led to the emergence of international commercial law. On historical precursors to the CISG, see, for instance, Miriam Parmentier, 'Uniform Sales Law', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1543> updated August 2015, accessed 25 June 2021.

309 On concession-related disputes in the IUSCT, see André von Walter, 'Arbitration on Oil Concession', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e187> last updated December 2008, accessed 25 June 2021. On the relevance of the IUSCT jurisprudence for the *lex mercatoria* and the UNIDROIT work, see Charles N Brower and Jason D Brueschke, *The Iran-United States Claims Tribunal* (Martinus Nijhoff Publishers 1998) 669.

310 See, for instance, Ole Spiermann, 'Applicable Law' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (Oxford University Press 2008) 94–100.

311 Because of the tight contact with national laws on points of contract regulations, ideas of transnational law seem to be more responsive to contract-related matters and are thus more plausible for theorising the relevance of transnational law for contract interpretation – see, for instance, Miriam Parmentier, 'Uniform Sales Law', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1543> updated August 2015, accessed 25 June 2021; Stephan W Schill, 'Lex Mercatoria' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1534> updated June 2014, accessed 25 June 2021; Michael Joachim Bonell, 'Commercial Contracts, UNIDROIT Principles' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1888 > updated August 2009, accessed 25 June 2021. See, however, the discussion in Chapter 2 on the relevance of national law for contract interpretation.

No doctrine has been elaborated since the formation of investment treaty arbitration. If one looks at various theories surrounding *internationalisation*, one can observe a reincarnation of the role of general principles of law as a source of international law along with the role of the treaty provisions establishing standards of investment protection. Recognising the primary role of international law for treaty-based disputes, scholars nevertheless have acknowledged its limits in relation to contract-related issues. Regarding state contracts, international law enabled their stability, autonomy and textual supremacy, but was not able to address all interpretative moments in contract interpretation.[312] National laws were more appropriately tuned for that task, whereas the existing limits within international law do not enable it to entirely subsume contract regulation, including contract interpretation. It is accordingly impossible to point to any authoritative scholarly view at the moment that actually suggests that interpretation of state contracts may be entirely disposed of by international law.[313] An ongoing challenge of the role of general principles as a proper source of public international law[314] did not help to build a doctrine on their role for contract interpretation either.

No clarification on the role of international law for contract interpretation came from the angle of the emerged doctrine on state responsibility for breach of investment contracts. The chance for clarification was lost when

312 While general principles of law may, via their interpretative approach based on efficiency and integrity, contribute to contract interpretation, there could arise occasions where interpretation is needed for more complex situations. For instance, construction contracts are increasingly seen in investment treaty arbitration as a type of cooperative contract. This type of contractual arrangement may require a meticulous approach to contract interpretation. For instance, in *Koza Garanti v. Turkmenistan* ICSID Case No. ARB/11/20, it was difficult to interpret the construction agreement by merely reconciling its terms, i.e. ensuring integrity and efficiency. The tribunal had to decide on the meaning of a peculiar reporting system under the contract – so-called SMETA.

313 Again, see the discussion on the limits of the general principles of law for contract interpretation in relation to the proposition made by Charles T Kotuby and Luke A Sobota. Furthermore, Kotuby and Sobota seem to envisage a more transnational role behind the principles. On the divergence of the results that might follow from the application of general principles of law to contracts analysed at the level of remedies, see, for instance, Irmgard Marboe and August Reinisch, 'Contracts between States and Foreign Private Law Persons', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1391> updated May 2011, accessed 25 June 2021.

314 See, for instance, Jean d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law' in Riccardo Pisillo Mazzeschi and Pasquale De Sena (eds), *Global Justice, Human Rights, and the Modernization of International Law* (Springer 2018).

the International Law Commission excluded issues of state responsibility for breach of state contracts from its codification work on state responsibility. Both reports of the Special Rapporteur on State Responsibility, Fransisco García-Amador, identified, though with a lesser degree of affirmation,[315] that a contract breach was capable of being attributed to state responsibility. Because of the highly contentious character of the issue, the report of the second Special Rapporteur, Roberto Ago, had already excluded contract breach from the focus of the International Law Commission.[316] The resulting work of the ILC Articles became known as a general acknowledgement that not every breach of contract by a State is an international wrong as such and that it can be considered as a breach under certain circumstances only,[317] and was short

315 In his first report, Fransisco García-Amador, addressing acts and omissions which give rise to international responsibility, included those that violate contractual undertakings: '*the non-performance by the State – through the agency of any of its organs – of a contract entered into by the State with an alien, in which case the State is responsible for non-performance*.' – F V García-Amador, 'International Responsibility: First Report by F.V. García-Amador, Special Rapporteur' [1956] 2 Yearbook of the International Law Commission 173, UN Doc.A/CN.4/96, p.182. In his second report, Fransisco García-Amador, changed an affirmation to a more conditional statement*: '[t]his is certainly the consideration which decisively influenced the prevailing opinion on the subject, which is that the non-performance of contractual obligations of this type does not per se constitute an international wrong'* – F V García-Amador, 'International Responsibility. Second Report by F. V. García-Amador, Special Rapporteur' UN Doc.A/CN.4/106, p. 117.

316 Roberto Ago explained the expunction of issues of the non-performance of contracts by states as follows: '*Though responsibility theory had no doubt been based on a body of judicial precedents concerned specifically with violation of the rights of aliens, a distinction must now be made between two subjects: State responsibility in general and the treatment of aliens. The Commission should begin by studying the general principles governing State responsibility, wherever it was incurred, and then perhaps go on to study its application in specific fields, especially that of injury to aliens*.' – Roberto Ago, 'First Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – Review of previous work on codification of the topic of the international responsibility of States' (1969) 2 Yearbook of the International Law Commission 125 <https://legal.un.org/ilc/documentation/english/a_cn4_217.pdf> accessed 26 September 2021.

317 The Commentary to the ILC Draft on State Responsibility provides: '*Of course, the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act*.' – International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) 2(2) Yearbook of the International Law Commission, 41 <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 25 June 2021.

of further elucidations. Jean Ho made an important recent step by attempting to grasp fundamental rules of international law on state responsibility for breaches of investment contracts within customary international law and in international investment law. Drawing primarily on arbitral awards in investment treaty arbitration and not on scholarly works, she managed to formulate the contemporary doctrine of state responsibility for breach of investment contracts, leaving aside, however, the precise interaction between national and international law and the role of the two legal orders for contract interpretation, contract formation, contract validity and contract termination. Contract interpretation went behind the scenes, not least because, most likely, Jean Ho, similarly to Muthucumaraswamy Sornarajah, downplayed the role of contract-based legitimate expectations in the FET.[318] In any way, no rules of international law capable of dealing with issues of contract interpretation have been identified at the present stage of development of the doctrine on state responsibility for breaches of investment contracts. On the contrary, some works expressly emphasise the role of national law for contract-related concepts that have to be decided first before turning to issues of state responsibility.[319]

Further to the doctrine on state responsibility for breach of investment contracts to elucidate rules within international law for contract interpretation, it may be illustrative that another arena of international law – war and armed conflicts – is equally unable to point to the emergence of international law that would guide the effect of war and armed conflicts on contracts. The effect is still largely in the ambit of national laws.[320]

318 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 109–114. For Muthucumaraswamy Sornarajah's critical view on legitimate expectations as the 'most glaring example of expansionary activism', see Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015) 248.

319 For instance, in the work on the contract-treaty interplay in investment treaty arbitration, James Crawford, recognising the interaction between contracts and treaties, emphasises the role of national law, and alerts against the undue extension of contract-related legitimate expectations beyond the applicable proper law of a contract. Rather unsurprisingly, the paper cannot be construed as being indicative of the availability and suitability of international law rules for ascertaining the content of contractual provisions – James Crawford, 'Treaty and Contract in Investment Treaty Arbitration' (2008) 24 Arbitration International 351, 374.

320 See, Niels Petersen, 'Armed Conflict, Effect on Contracts', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e437?rskey=HQzxAa&result=1&prd=EPIL> updated September 2015, accessed 25 June 2021.

The continuous recognition of the relevance of national law, even for interstate commercial transactions, serves as another indication of the lack of a doctrine of contract interpretation in international law. In 1957, F A Mann, who influentially addressed issues of state responsibility for violation of state contracts,[321] was ready to accept the direct and entire regulation of contracts by (yet to be drafted/enacted) international law, or '*commercial law of nations*', only in the case of interstate contracts.[322] Wilfred Jenks recognised the relevance of public international law for interstate contracts, noting however doubts regarding the capacity of international law to address contractual matters with all necessary detail.[323] Nowadays, a little over 60 years later, we still have situations in which judges adjudicate disputes of a commercial character in relation to a contract between two sovereigns under national law, the proper law of a contract.[324] The same national law informs contract interpretation in these disputes. Due to state involvement, public international law arguments arise in these cases, essentially bringing about lengthy discussions on the correcting function of international law, but they do not inform contract interpretation as such.[325] Overall it appears that public international law does not subsume contract regulation and there are no authoritative scholarly views asserting that international law in fact regulates this issue. If interstate commercial contracting is short of specific rules of international law capable of responding to the task of their interpretation,[326] what remains to be said for

321 F A Mann, 'The Proper Law of the Contract: A Rejoinder', (1950) 3 The International Law Quarterly 597; F A Mann, 'State Contracts and State Responsibility' (1960) 54 The American Journal of International Law 572.

322 F A Mann, 'Reflections on a Commercial Law of Nations' (1957) 33 British Yearbook of International Law 20.

323 Clarence Wilfred Jenks, *The Proper Law of International Organizations* (Steven & Sons 1962) 150–151.

324 See, for instance, a recent dispute between Ukraine and the Russian Federation on the alleged USD3 billion loan made to Ukraine through the issuance of Eurobonds in 2013 during the presidency of Victor Yanukovych – *Ukraine v. The Law Debenture Trust Corporation P.L.C.* P [2018] EWCA Civ 2026 (Court of Appeal).

325 For instance, Ukraine's defence with reliance on public international law was summarised as follows: '*It submits that if as a matter of English law it is otherwise liable to pay the sums due on the Notes, it is entitled to refuse payment as a legitimate counter-measure to the effect of Russian interference on its territorial integrity and economy. The right to take proportionate countermeasures is a recognised principle of public international law on which the English court is competent to rule.*' – *Ukraine v. The Law Debenture Trust Corporation P.L.C.* P [2018] EWCA Civ 2026 (Court of Appeal), para. 20.

326 Michael Waibel suggests, for instance, that '*more than ninety percent of sovereign external bonds issued internationally are governed by New York and English law*' – Michael Waibel 'Sovereign Bonds: Internationalization and Partial Privatization' in Mathias Audit and Stephan W Schill (eds), *Transnational Law of Public Contracts* (Bruylant

asymmetric contractual relations (state or investment contracts) or contracts not marked by state character at all that also appear in the context of investment treaty arbitration – non-state and non-investment contracts?

In fact, the idea of a special branch of law that would address asymmetric contracting between state and investor was not absolutely unfamiliar during the period preceding investment treaty arbitration where great anticipation of that law heated the discussion and triggered private codification efforts. The idea continues to be observable contemporaneously in times of investment treaty arbitration, though mostly from the opposite angle. During the period preceding investment treaty arbitration, the inadequacy of international law for addressing only 'extreme cases' triggered discussions regarding the necessity of a new set of rules '*which will regulate the performance of state contracts, a body of law which while taking into account the fundamental difference between the parties to such contracts, will not decide all points in the abstract in favour of the one or the other of the parties. Recourse to public international law is possible and desirable, but only as a last resort, when the state actions involved clearly violate its rules*.'[327] Regarding the modern period of investment treaty arbitration, overcapacity or over-delivery of international investment law frequently beyond the parties' real undertakings under a contract pushed some authors to declare a *de facto* emergence of a rather aggressive form of international investment contract law.[328] Instead of pointing to a coherent set of international law rules, or international law of investment contracts, many publications cannot ignore the numerous disruptions that investment treaty arbitration brings, resulting in conclusions that are inconsistent with the proper law of a contract.[329] As a rule, these works do not focus distinctly on

2016) 568. Similarly, see Irmgard Marboe and August Reinisch, 'Contracts between States and Foreign Private Law Persons' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1391> updated May 2011, accessed 25 June 2021. On the governing law of sovereign bonds, see, for instance, Hayk Kupelyants who challenges the classical perception of the relevance of the law of a sovereign debtor, but still offers an option within national laws – the law of the creditor – see Hayk Kupelyants, *Sovereign Defaults before Domestic Courts* (Oxford University Press 2018) 111–140.

327 A A Fatouros, *Government Guarantees to Foreign Investors* (Columbia University Press 1962) 283.

328 Julian Arato, 'The Logic of Contract in the World of Investment Treaties' (2016) 58 William & Mary Law Review 393, 351, 414.

329 James Crawford, 'Treaty and Contract in Investment Treaty Arbitration' (2008) 24(4) Arbitration International 351; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 39–52, 90–94; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) American Journal of International

contract interpretation, but rather on more 'palpable' and much more vulnerable concepts of contract formation, validity and termination.[330]

Occasionally, some commentators envisage the role of general principles of law in the development of the international law of investment contracts, but no strong view is expressed in these works on a set of rules within international law on contract interpretation. My empirical analysis of tribunals' reasoning in relation to contract construction in investment treaty arbitration does not reveal numerous occasions of express reliance on general principles of law as sources of international law.[331] A *momentum* that general principles of law received for state contracts in the 1960s and at the beginning of the 1970s most likely will not be repeated again. And if repeated, resurgent transnational law and not international law would rather inform the content of general principles of law.

It is not only that doctrinal scholarly works do not identify rules in international law for contract interpretation, scholars working in the field of general international law and international investment law in principle rarely address contract interpretation as a distinct object. Despite their scarcity, a few views on contract interpretation observed from the perspective of general international law or international investment law may nevertheless be spotted. They will be addressed below in these final observations even if pointing to the primary or exclusive role of national law.

For works on general international law, one can find discussions on contract interpretation mostly in the form of a perfunctory comparison repeated after Hersch Lauterpacht on similarities between treaty and contract interpretation. These similarities draw on a high level of abstraction that primary and

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Law 1; Julian Arato, 'The Logic of Contract in the World of Investment Treaties' (2016) 58 William & Mary Law Review 351.

330 Only the most extreme situations, when international investment law may be viewed as implying unnegotiated terms to the parties' bargaining – implication of terms – come somewhat closer but not directly to addressing contract interpretation – see Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 (1) American Journal of International Law 1, 16–29.

331 Reliance on good faith for contract interpretation is discussed in the section on general principles. A broader principle of *pacta sunt servanda* was as a rule invoked not as a tool of contract interpretation as such, but rather as an external justification within international law to enforce certain contractual terms. In *Daimler Financial Services AG v. Argentine Republic*, the tribunal relied on the principle of *pacta sunt servanda* citing *Sapphire v. National Iranian Oil Company*, to give full effect to the parties' choice of law. *Pacta sunt servanda* essentially served as a justification for application of the national law – German law – to contraction of the SPA – see *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award of 22 August 2012, para. 146.

exclusively engage with consent and the parties' intent as common markers. They were not indicative of the interchangeable character of interpretative rules for contract and treaty interpretation. At the same time, existing deeper distinctions between contract interpretation and treaty interpretation have not remained unnoticed. Christopher Greenwood, addressing the relations between international and national laws in a UN audio-visual lecture, spotted important distinctions between rules on treaty and contract interpretation taking English law of contract as an illustration of national law.[332] His clarification also serves as a negative implication for the availability of the rules of international law for contract interpretation.

For specialised works on international investment law and investment treaty arbitration, contract interpretation as a distinct aspect rarely comes to the forefront. Contract interpretation rather comes as an implicit component for various discussions that surrounds contracts and standards of investment protection. When framed in the vocabulary of IIAs and international law, the issues absorbing contract interpretation most often include the availability and legality of investment, as well as the establishment of legitimate expectations. When framed in the vocabulary of contract law concepts, the issues absorbing contract interpretation more often include contract formation, contract validity and contract termination. Explicit scholarly engagement with the methodology of contract interpretation is still missing.

Exceptional to this observation on the scarcity of works in international investment law, but nonetheless indecisive as to the precise function of international law for contract interpretation, comes a widely cited work on stabilisation clauses by Thomas Wälde and George Ndi.[333] In the article, the authors acknowledge the relevance of international law for the interpretation of stabilisation clauses. They do not seem to suggest, however, that specific rules relevant for contract interpretation exist in international law, nor does their clarification operate to the exclusion of national law for contract interpretation. Some relevance primarily because of the participation of the state that inevitably brings sovereign-specific features seems to be their primary message:

> Treaty law certainly does not have the finely tuned systems of most developed contract law to deal with issues such as commercial impracticability,

332 ICJ Judge Greenwood on the Relationship between International Law and National Law 6 April 2010, <https://legal.un.org/avl/ls/Greenwood_IL.html> accessed 26 September 2021.

333 Thomas Wälde and George Ndi, 'Stabilizing International Investment Commitments: International Law versus Contract Interpretation' (1996) 31 Texas International Law Journal 215.

> damages, *force majeur*, or contributory negligence handled by specialized commercial arbitration tribunals. Nevertheless, the more a state contract and the stabilization clause it contains are impregnated by the state character of the agreement, the higher the sovereign content and sovereign intensity of an agreement (with significant implications for typically sovereign-state focused obligations, such as committing a state directly to freeze or not to apply its legislation). Hence, international treaty law may be of some relevance.[334]

The analysis of scholarly works would not be complete without a view on the works of Christoph Schreuer.[335] Exhibiting and analysing various approaches to applicable law to investment contracts under the ICSID Convention, Christoph Schreuer does not develop a doctrinal view on the distinct role of international law for interpretation of investment contracts, nor does he affirm the existence of the rules of international law for contract interpretation:

> International law does not thereby become the law applicable to the contract. The transaction remains governed by the domestic legal system chosen by the parties. However, this choice is checked by the application of a number of mandatory international rules such as the prohibition of denial of justice, the discriminatory taking of property or the arbitrary repudiation of contractual undertakings.[336]

In his other work, written together with Rudolf Dolzer, Christoph Schreuer acknowledges the potential relevance and the applicability of the two legal orders – international law and national law – for investment contracts, but does not suggest any direct relevance of international law for contract interpretation:

> Any reference in a choice of law clause to two different legal orders or principles will, in the event of conflict or diversity between them, pose the question of the hierarchy or selection of the legal order for the

334 Ibid. 253.

335 According to Thomas Schultz and Niccolò Ridi, Christoph Schreuer's commentary to the ICSID Convention has been cited no less than in 161 treaty-based awards – see Thomas Schultz and Niccolò Ridi, 'Arbitration Literature' in Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (Oxford University Press 2020) fn 35.

336 Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 42–115.

> individual issue concerned. A simple reference to domestic law will, in itself, raise the question whether an international tribunal would, in view of its own legal basis and in light of the rules of international law applicable to aliens and foreign companies, invariably consider international rules irrelevant.[337]

Recognising in this final section the absence of a doctrine on contract interpretation in the scholarship on international law,[338] no suggestion is being made that such a doctrine necessarily has to be developed. National law is more suitable and more finely tuned to dealing exhaustively with issues of contract interpretation. International law maintains a corrective role in relation to contracts. This corrective role may deprive certain contractual provisions or a contract in its entirety of the legal effect under international law, but it does not affect contract interpretation as an ascertaining process as such. What is greatly needed in terms of scholarly work is an elaboration of a doctrinal view,

337 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 81–82.

338 While it may be viewed somewhat mechanically, nevertheless, for the sake of completeness, the most cited sources in the field of international investment treaty arbitration have been closely scrutinised to find out whether they might point to the existence of any rules of international law for contract interpretation and my observations highlighted in this section remained unchanged. As an indication of highly cited works, the work of Thomas Schultz' and Niccolò Ridi' 'Arbitration Literature' is most useful – see Thomas Schultz and Federico Ortino (eds), *Oxford Handbook of International Arbitration* (Oxford University Press 2020) 2–32. Among the most cited overall works, the works as follows were considered: Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73(4) Fordham Law Review 1521, 1521–1625; Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2008). Among the most cited in 2008–2018 are: Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017); Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2012); Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (2nd edn, Wolters Kluwer 2011); Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law?' (2009) 9(2) Chicago Journal of International Law 471; Susan D Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) Harvard International Law Journal 435; Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International and Comparative Law Quarterly 573; Gus Van Harten, 'Arbitrator Behavior in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law Journal 211. Also, works included in *Classics of International Investment Law* do not point to the existence of international rules on contract interpretation – August Reinisch, *Classics of International Investment Law* (Edward Elgar Publishing 2014).

or a theory, on interpretative legal reasoning for investment treaty arbitration.[339] The theory has to engage openly with all the complexities relating to interpretative practices in legal reasoning without limiting its analysis to treaty interpretation. Casting more light on what has only partially been explained so far[340] and elucidating the precise role of each legal order, as well as the possible coordination between them for interpretative practices, would promote more transparency and predictability in the decision-making and contribute to pragmatic approaches.

3.6 Conclusion

The regulatory framework of international law – treaties, conventions and general principles of law – does not offer universal rules that are capable of offering solutions for contract interpretation. The existence of interpretative rules and principles in international law does not permit one to suggest that they can safely substitute national law applicable to contracts in contract interpretation. The VCLT contains provisions on treaty interpretation, but these provisions are rather specific. The *Azpetrol* case helpfully illustrates that textual preferences in the VCLT, for instance, are not sufficiently strict to comply with the minimalism of contract interpretation under the Law of England and Wales. One may think of other examples which would further distinguish interpretation under interpretative rules of the VCLT and national contract laws. While possessing an inherent interpretative capacity, the principles of international law, such as reasonableness, good faith, or *pacta sunt servanda*, are not equal to the similar principles in national laws. When applied to contracts, they cannot respond to a broad range of interpretative moments that contracts raise. Good faith as a general principle of international law is not a substitute for the

339 A deep theoretical and empirical insight into a work on the legal reasoning of the Court of Justice of the EU can serve as a good example of the type of scholarly study that investment treaty arbitration needs – see Gunnar Beck, *The Legal Reasoning of the Court of the EU* (Hart Publishing 2012).

340 Substantial scholarship addresses treaty interpretation in investment treaty arbitration both from normative and empirical perspectives. See, for instance, J Romesh Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012); Christoph Scheuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in Malgosia Fitzmaurice and others (eds), *Treaty Interpretation and Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff 2010); Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19(2) The European Journal of International Law 301.

concept of good faith in those national contract laws that have it. The harmonised substantive regulation in specific fields of international commercial law that contain interpretative guidance for specific types of contracts, such as the CISG, are of limited relevance for investment treaty disputes.

Observing the limits of exposure of international law to contract interpretation leaves little room for hesitation concerning the view that international law does not regulate contract interpretation. Interpretative rules of international law that occasionally parallel interpretative rules and principles under national laws applicable to contracts are nothing but false friends. Taken normatively, international law does not regulate contract interpretation *per se*; its rules have rather a limited effect and cannot autonomously and sufficiently address contract interpretation.

That being said, it does not mean that international law is a closed system with no ambitions regarding contract regulation. Having historically observed attempts to subject investment contracts to the direct application of international law, including aspects of its interpretation, it is not excluded that these attempts may be reiterated. Nor are these attempts necessarily bound to fail. At the moment, however, IIAs, while frequently expressly referring to investment contracts, do not as a rule specify anything except what types of contracts can be qualified as investments. Nor are there other reservoirs in international law for universal rules that would apply to contract interpretation.

TABLE 3 Interpretative rules in international law

Source	Rules for treaty interpretation	Rules for statutory interpretation	Rules for contract interpretation
VCLT	+ Art.31–33	–	–
CIL	+ codified	–	–
General Principles	+	–	–
IIAs	+ some	+ some indication [interpretation in line with interpretation as exercised by competent national authorities]	–
CISG	+ Art.7	–	+ Art.8

To conclude, international law offers certain remedies in case of state responsibility that arises in relation to the breach of investment contracts, but this remedial capacity does not offer a set of relevant rules that would turn into a functional substitute to national law regulation for contract interpretation. There is no international law on contract interpretation that would be relevant for investment treaty arbitration.

PART 3

Enabling National Law

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CHAPTER 4

The Power of Treaty-Based Tribunals to Interpret Contracts

It may not be immediately apparent whether there is a need to distinguish contract interpretation in investment treaty arbitration as a separate tribunal's power. One may argue that because the power to consider contractual provisions is implicit in the adjudicative function to decide on a treaty-based claim, no functional justification for separation of contract interpretation as a tribunal's power exists in investment treaty arbitration. According to this logic of indifference, tribunals approach contractual provisions, if necessary, and there is no need to single out contract interpretation as a distinct power.

A closer look would reveal, however, all possible costs of a failure to conceptualise contract interpretation as a separate power of treaty-based tribunals. Facing complexities and uncertainties surrounding the treaty-contract divide,[1]

1 Since the Decision on Annulment of the Annulment Committee dated 3 July 2002 in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), known as Vivendi (I) case, a treaty claim and a contract claim have been regularly distinguished. Tribunals in subsequent cases frequently follow the findings expressed in the Decision on Annulment, para.96. See, for instance, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction dated 8 December 2003, para.79–80; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on the Tribunal on Objections to Jurisdiction dated 6 August 2003, para.186–189; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005, para. 218–219; *Eureko B.V. v. Republic of Poland*, Partial Award dated 19 August 2005, para. 96–114; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 February 2010, para. 171–172, and others. It should be noted that some authors recognise that treaty-based tribunals may consider pure contract-based claims on the basis of a broad dispute resolution clause in a relevant IIA or express reference to investment contracts/agreements in a relevant IIA or even through an umbrella clause – see Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 106, 154; Stanimir Alexandrov and James Mendenhall, 'Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill/Martinus Nijhoff 2014) 30–33. This work takes a more restrictive perspective and looks exclusively at treaty-based claims in investment treaty arbitration. Claims brought under umbrella clauses are considered in this work as being treaty-based claims though closely intertwined with contract claims. For a comprehensive overview of

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tribunals may tend to distance themselves from the visibility of exercising contractual jurisdiction. Contract interpretation may appear to them as a sign of the exercise of contractual jurisdiction. Accordingly, in denying the exercise of contractual jurisdiction, tribunals may attempt either to expressly deny having performed contract interpretation or to relabel their own analytical efforts in relation to contracts as something different from contract interpretation. The resulting stigmatisation of contract interpretation may affect the overall quality of awards. Tribunals may disregard national law as the proper law of a contract and the relevant regulation for contract interpretation. Legal reasoning could become, if not always wrong, then less transparent and predictable as a result.

What makes it important to distinguish and affirm the power of treaty-based tribunals to interpret contracts is precisely the existent *uncertainty* about its very identity and exercise in investment treaty arbitration. This chapter affirms the power of treaty-based tribunals to interpret contracts in investment treaty arbitration. It starts by conceptualising[2] and situating the power to interpret contracts among tribunals' unexpressed powers – inherent, implied or both. The chapter then turns to the exercise of the power to interpret contracts in investment treaty arbitration. To this end the chapter addresses mischaracterisation of the identity of the power to interpret contracts and possible deference to the results of interpretation of other (concurrent) forums. Finally, the chapter compares the power of treaty-based tribunals to interpret contracts with powers similar to those of other international and national courts. To this end, the chapter first aligns the power of contract interpretation of treaty-based tribunals with the similar power of other international courts operating in the public international law framework. The chapter then contrasts the procedural framework surrounding the power of contract interpretation of treaty-based

jurisdictional conflicts in investment treaty arbitration, see Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 96–155.

2 One may align the conceptualisation of the power of treaty-based tribunals to interpret contracts with views on various specific powers connected with decision-making and the application of substantive regulation by international courts and tribunals. For a proposition on the power of regional human rights courts to employ a specific interpretation for human rights treaties, see Dinah Shelton, 'Inherent and Implied Powers of Regional Human Rights Tribunals' in Carla M Buckley and others (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/Martinus Nijhoff 2016) 484–489. For a discussion on the relevance of the inherent powers of tribunals regarding considerations of competition law in international commercial arbitration, see Giuditta Cordero-Moss, 'Inherent Powers and Competition Law' in Franco Ferrari and Friedrich Rosenfeld (eds), *Inherent Powers of Arbitrators* (Juris 2019) 297–326.

tribunals with the existent restrictions on the exercise of contract interpretation dictated by procedural limitations in state courts in various jurisdictions.

4.1 Theory and Foundation

4.1.1 *The Concept and Types of Tribunal Powers*

The powers that international courts and tribunals possess depend upon their function. Some powers are universal. They are shared by a broad spectrum of international courts and tribunals, such as a power to decide on their own competence and the merits of a dispute, or a power to assess evidence.[3] Others may remain rather specific to a particular international court or tribunal, such as, for instance, the power to punish contempt as a specific coercive power for the international criminal courts and tribunals,[4] or the power to monitor the performance of interim measures[5] as well as the power to establish 'interpretative methodology specific to human rights treaties' for the regional human rights courts.[6]

Not all of the powers that international courts and tribunals possess are express. Those which are unexpressed may be in turn categorised as being inherent or implied. The denominator 'inherent' suggests that the powers are rather intrinsic to the judicial identity of a relevant court or a tribunal. These powers are the essential and permanent attribute of the adjudicatory function.

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3 Express confirmation of these powers, with some specificity regarding each type of international adjudication can be illustrated, for instance, for arbitration – by articles 21, 24 and 31 of the UNCITRAL Arbitration Rules 1976, for the ICJ – by articles 36 (6), 48, 55–60 of the ICJ Statute, and for International Criminal Court – by articles 19, 51, 74 of the Rome Statute. See also, Donald and Philip Leach (eds), *Towards Convergence in International Human Rights Law Approaches of Regional and International Systems* (Brill Nijhoff 2016) 455–456; Dinah L Shelton, 'Form, Function, and the Powers of International Courts' (2008–2009) 9 Chicago Journal of International Law 537.

4 Jessica Liang, 'The Inherent Jurisdiction and Inherent Powers of International Criminal Courts and Tribunals: An Appraisal of Their Application' (2012) 15(3) New Criminal Law Review: An International and Interdisciplinary Journal 375, 375–413.

5 For instance, Rule 39 of the Rules of the ECtHR provides a system enabling the Court to monitor the performance of interim measures by a state and to request information from the parties connected with the implementation of the interim measures. For the Inter-American Court of Human Rights, Article 63(2) of the American Convention on Human Rights defines the possibility to issue provisional measures with their character to be determined by the Court '*as it deems pertinent in matters it has under consideration*'.

6 Dinah Shelton, 'Inherent and Implied Powers of Regional Human Rights Tribunals' in Carla M Buckley and others (eds), *Towards Convergence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/Martinus Nijhoff 2016) 484–489.

The denominator 'implied' suggests that these powers reside within specific regulations while not being directly expressed in them. These powers could be drawn from procedural rules and other applicable regulations and, where applicable, from the parties' agreement.

While both terms – inherent and implied powers – are premised on a somewhat distinct foundation and, one may argue, are of different significance, they are not necessarily mutually exclusive. A single power can be both inherent to the adjudicatory function and implied from certain procedural regulation. The distinction receives somewhat more palpable significance in the context of international arbitration, particularly following the adoption of the Recommendations on Inherent and Implied Powers of International Arbitral Tribunals by the International Law Association (ILA) in 2016.[7] The Recommendations draw a distinction between implied and inherent powers and suggest best practice for their exercise. According to the ILA, inherent powers have a heavier burden for invocation than implied powers. Tribunals relying solely upon their inherent power must verify that there is 'a compelling duty to act in order to preserve jurisdiction, maintain the integrity of proceedings, or render an enforceable award'.[8] Invocation of an implied power in turn makes tribunals 'feel safer' than invocation of inherent powers.[9]

Overall, no controversy exists as a matter of principle as to whether international courts and tribunals may have unexpressed powers.[10] The controversy

7 International Law Association, 'Annex to Resolution No.4/2016: Inherent and Implied Powers of International Arbitral Tribunals: Recommendations' adopted at the 77th Conference of the International Law Association, held in Johannesburg, South Africa, 7 – 11 August, 2016. The Recommendations define inherent powers as those that are '*necessary to preserve jurisdiction, maintain the integrity of proceedings, and render an enforceable award*' (para.7 c) and implied powers as those powers that are '*implied by the parties' agreement and the rules and laws governing the arbitration*' (para. 7 a).

8 ILA, 2 (c)(iii).

9 ILA, 2 (c)(ii).

10 Clarence Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons Limited 1964) 182; Paola Gaeta, 'Inherent Powers of International Courts and Tribunals' in Lal Chand Vohrah and others (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Kluwer Law International 2003) 353–372; Elihu Lauterpacht, 'Partial Judgement' and the Inherent Jurisdiction of the International Court of Justice' in Vaughan Lowe and others (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 476–483; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 435–439; Alexander Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal' (2003) 3 The Law and Practice of International Courts and Tribunals 501–550; Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 British Yearbook of International Law 195; Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 55–82;

may merely hinge on the existence of the precise power and on the circumstances that may justify and limit its invocation. So far as an unexpressed power is invoked *legitimately*, it does not really matter for its exercise if it is implied or inherent, or both. Whether contract interpretation in investment treaty arbitration is such an unexpressed power has not received extensive theorisation by now. Among the first who attempted to frame contract interpretation as an adjudicative power of treaty-based tribunals appear to be Stanimir Alexandrov and James Mendenhall.[11] In their joint publication the authors affirm that treaty-based tribunals are empowered to interpret contracts but do not elaborate much on the nature of this power and its precise exercise. After their publication in 2015 not much has been done to clarify the concept or explain its legal foundation and sources on which basis it can be drawn in investment treaty arbitration. What follows below is an attempt to give more thought to the power of treaty-based tribunals to interpret contracts and its characterisation being inherent, implied or both.

4.1.2 *Contract Interpretation as an Inherent Power*

As contract interpretation for contract-based tribunals remains rather undisputed, the assessment has to start from what makes treaty-based tribunals distinct from contract-based tribunals. Given that both contract- and treaty-based tribunals mostly use the same procedural infrastructure – arbitral institutions, arbitration rules, (where relevant) laws of the seat – the only substantial difference between them in terms of the procedural framework appears to lie in the distinct foundation for consent. Consent to the jurisdiction of a contract-based tribunal is premised on a contract, or an arbitration agreement, concluded between the parties in dispute and defining the way a contractual dispute is to be resolved. Consent to the jurisdiction of a treaty-based tribunal is formed through an offer to arbitrate given by a state in IIAs and an acceptance by a foreign investor through the initiation of an arbitration procedure.[12] The first question is accordingly whether the fact that the jurisdiction of a treaty-based tribunal is premised on a *treaty*, but not on a *contract*, bears any

Martins Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Rightly So' in Todd Weiler and Ian Laird (eds), *Investment Treaty Arbitration and International Law: Volume 5* (Juris 2012) 11–43.

11 Stanimir A Alexandrov and James Mendenhall, 'Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill/Martinus Nijhoff 2014) 35–37.

12 Andrea Marco Steingruber, *Consent in International Arbitration* (Oxford University Press 2012) 185–331.

implications for the power of a treaty-based tribunal to interpret contracts. Does it undermine this power in comparison with the rather undisputed power of a contract-based tribunal to interpret contracts? Or not?

If a treaty-based jurisdiction does not exclude the power of contract interpretation, the next question would turn to the precise nature of this power. Does the authority to exercise contract interpretation by a concurrent forum exclusively vested to resolve a contractual dispute, such as a state court or a contract-based tribunal in international commercial arbitration, set any bar for the similar power of a treaty-based tribunal? Or in other words, is the power to interpret contracts exclusive or non-exclusive?

To respond to the first question, one has to take a closer look at consent to the jurisdiction of a treaty-based tribunal and its role for defining and, where relevant, limiting, such tribunal's powers. While treaty provisions addressing consent in investment treaty arbitration appear to be rather detailed, they do not explicitly address all and any aspects of the adjudicative powers of treaty-based tribunals. Most typically, treaty provisions specify the scope of disputes that treaty-based tribunals are authorised to settle. These disputes range from a broad category of 'any dispute arising out of investment'[13] to more qualified[14] and even rather restrictive ones.[15] The treaty provisions also cover various

13 The following IIAs, for instance, contain in various wordings a broad formulation covering any dispute arising out of investment: Argentina – United States of America BIT (1991), Kazakhstan – United States of America BIT (1992), Armenia – United States of America BIT (1992), Kyrgyzstan – United States of America BIT (1993), Estonia – United States of America BIT (1994), Honduras – United States of America BIT (1995), Jamaica – United States of America BIT (1994), Latvia – United States of America BIT (1995), Jordan – United States of America BIT (1997), Lithuania – United States of America BIT (1998); Australia – Poland BIT (1991), Austria – Republic of Korea BIT (1991), Austria – Croatia BIT (1997), Belarus – Croatia BIT (2001), Cambodia – Viet Nam BIT (2001), Croatia – Libya BIT (2002), Bulgaria – Singapore BIT (2003), Bosnia and Herzegovina – Denmark BIT (2004), China – India BIT (2006), Finland – Kazakhstan BIT (2007), Finland – Panama BIT (2009), Bosnia and Herzegovina – San Marino BIT (2011), Belarus – Cambodia BIT (2014), Denmark – The former Yugoslav Republic of Macedonia BIT (2015).

14 The following IIAs, for instance, set the requirement for the legitimacy of investments under the law of the host state or the registration of an investment for the purpose of enabling the protection or other kinds of qualifications: Philippines – United Kingdom BIT (1980), Indonesia – United Kingdom BIT (1976), Netherlands – Philippines BIT (1985), Egypt – Netherlands BIT (1976), Indonesia – Netherlands BIT (1968), Republic of Korea – Netherlands BIT (1974), Netherlands – Uganda BIT (1970).

15 The following IIAs, for instance, reduce jurisdiction to decisions on compensation: Russian Federation – United Kingdom BIT (1989), Finland – Russian Federation BIT (1989), Germany – Russian Federation BIT (1989), Belgium/Luxembourg – Russian Federation BIT (1989), Netherlands – Russian Federation BIT (1989), BLEU (Belgium-Luxembourg Economic Union) – China BIT (1984), Bulgaria – China BIT (1989), China – Denmark BIT

specific aspects of jurisdiction being *ratione materiae* – which claims are covered,[16] *ratione personae* – whose claims are covered,[17] and *ratione temporis* – when a claim can be considered.[18] Further, treaties enumerate dispute resolution options for the settlement of investor-state disputes, such as the ICSID, *ad hoc* arbitration under the UNCITRAL Arbitration Rules, the SCC Arbitration Rules, the ICC Arbitration Rules, or still, some other arbitration rules[19] or their various combinations. Occasionally, some treaties go so far as to curtail the power of treaty-based tribunals to interpret a treaty. This is achieved through entrusting special state-controlled commissions/committees with treaty interpretation and making their interpretation binding upon the tribunals.[20] In sum, other than referring to arbitration rules (to be addressed immediately below in the next section) or limiting the power to interpret a treaty, treaties do not expressly address tribunals' specific adjudicative powers. Among those undefined powers is a power to interpret contracts.

The critical moment accordingly is whether this absence of an express reference to the power to interpret contracts necessarily excludes it. This opens up two possible alternatives. First, consent operates just as a trigger of primary jurisdiction and is not supposed to expressly list all and any adjudicative

(1985), China – Finland BIT (1984), China – Ghana BIT (1989), China – Italy BIT (1985), China – Kuwait BIT (1985).

16 See, for instance, Alejandro A Escobar, '2.5. Requirements *Ratione Materiae*' (UNCTAD/EDM/Misc.232/Add.4 United Nations 2003) <http://unctad.org/en/docs/edmmisc232add4_en.pdf> last accessed 25 June 2021. 4 August 2020.

17 Many Dutch BITs, for instance, treat a company as a Dutch national if it is controlled by a Dutch company – see the Netherlands-Ukraine BIT (1994). The issue of control was discussed in *City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine* (ICSID Case No. ARB/14/9) which was conducted under the Netherlands-Ukraine BIT (1994). See also, for instance, Mona Al-Sharmani, '2.4. Requirements *Ratione Personae*' (UNCTAD/EDM/Misc.232/Add.3, United Nations 2003) <http://unctad.org/en/docs/edmmisc232add3_en.pdf> last accessed 25 June 2021.

18 Cooling-off periods, during which parties try to settle their dispute amicably, through negotiation and consultation, vary from 3 months (for instance, Bahrain – United Kingdom BIT, Netherlands – South Africa BIT, Bosnia and Herzegovina – United Kingdom BIT) to 6 months (for instance, Bulgaria – Singapore BIT, Belarus – India BIT, Bulgaria – Kuwait BIT) and even to 12 months (for instance, Barbados – Switzerland BIT, Pakistan – Switzerland BIT).

19 See Chapter 1 for other arbitration rules used in disputes in investment treaty arbitration where contract interpretation was exercised.

20 The NAFTA, the CETA and some other FTAS. See also, Yuliya Chernykh, 'Assessing Convergence between International Investment Law and International Trade Law through Interpretative Commissions/Committees: A Case of Ambivalence?' in Szilárd Gáspár-Szilágy and others (eds), *Adjudicating Trade and Investment Law: Convergence or Divergence?* (Cambridge University Press 2020) 211–243.

powers. Second, consent necessarily operates as a menu, and a lack of specific powers in it excludes their application. Placed in the concrete framework of existent IIAs, the response appears rather uncontroversial. Treaties in their current shape do not codify adjudicative powers; they just set the basis for the tribunals' jurisdiction and primary procedural framework consisting of existent arbitral institution, *ad hoc* arbitration and to-be-created international courts. The absence of an express reference to the power to interpret contracts without more should not, accordingly, operate to exclude it.

A theoretical substantiation for this proposition lies within the construction called *the consensual principle.*[21] In explaining the consensual principle, Alexander Orakhelashvili specifies that consent operates only as a trigger for fundamental jurisdiction and does not define all and any of its aspects:

> In the material sense, the principle of consent serves not as the basis of the entire judicial jurisdiction, but of one of its elements only, namely the so-called 'primary' or 'substantive' jurisdiction. Only this type of jurisdiction requires a consensual acceptance by States. The existence and operation of other elements of judicial jurisdiction, designated as its inherent or incidental aspects, depends not on the consent of States, but on the mere fact of existence of a given tribunal and its constituent instrument.[22]

Applied to investment treaty arbitration, consent triggers the 'primary' or 'substantive' jurisdiction of a treaty-based tribunal but does not expressly define all relevant powers that treaty-based tribunals possess for the exercise of their jurisdiction. Nor does it limit or otherwise exclude the power to interpret contracts. There is *no direct correlation* between the form of expression of consent being a treaty and an object for interpretative powers being a contract. Treaty-based tribunals are not exclusively engaged with treaty interpretation, but they may be required to engage with other types of legal interpretation, such as contract interpretation, statutory interpretation or interpretation of various other acts. That contracts may be part of a treaty-based dispute makes

21 Alexander Orakhelashvili, 'Consensual Principle' in *Max Planck Encyclopedia of International Procedural Law*, <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3131.013.3131/law-mpeipro-e3131>, accessed 15 June 2021; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 438.

22 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 438.

their ascertainment rather unavoidable for decision-making. Contract interpretation accordingly appears not merely relevant but often necessary for the exercise of treaty-based jurisdiction and goes to the root of adjudication. The fact that public international law is either the only applicable law, such as for disputes under the ECT, or the principal applicable law, makes no difference to the possibility to consider the secondary/ancillary applicability of a relevant national law to contract interpretation. The power accordingly turns inherently to the function of a treaty-based tribunal to resolve a treaty-based dispute, whereas a lack of an express reference to it in the consent does not exclude it.

Accordingly, the *treaty-based* consent to jurisdiction in investment treaty arbitration even when opposed to *contract-based* consent in contractual arbitration does not limit or otherwise exclude the power of treaty-based tribunals to interpret contracts. The only remaining question is whether the existence of a competing power to interpret contracts of a contract-based tribunal, either a state court or a tribunal in international commercial arbitration, should operate to the *exclusion* of a similar power of treaty-based tribunals. Put differently, if a contract defines that a contract-based tribunal possesses an exclusive power to interpret it would that serve as an obstacle to contract interpretation?

The above question brings the contract-treaty divide into focus. Premised on a substantial intertwinement of treaty claims and contracts, the problem with the contract-treaty divide is the lack of an organised theory that would enable one to draw a meaningful and practically oriented distinction between the jurisdiction of contract-based and treaty-based tribunals as well as occasionally invoked waivers or other impediments to the uninterrupted exercise of the respective jurisdictions. As earlier discussed, it may be tempting for treaty-based tribunals to perceive contract interpretation as an exclusive component of the exercise of contractual jurisdiction. This perception of the exclusivity of the power of the contract-based forum to interpret contracts would lead to the conclusion that a treaty-based tribunal is deprived of the power to interpret contracts. The matter could be further complicated if a contract in question were to contain a forum selection clause expressly authorising another forum to decide a contractual claim or, even worse, 'to interpret a contract'.

Understanding that contract interpretation as such/or alone has no role to play in the decision of a treaty-based tribunal, regarding whether to proceed or not with a treaty claim, assists with concentrating on the most critical aspects of the problem. For the contract-treaty divide, the problem is encapsulated in issues concerning the jurisdiction and admissibility of treaty claims, which are substantially intertwined with contracts containing a forum selection clause. To solve this problem of the contract-treaty divide, a *theory* of a treaty

claim needs to be elaborated. Buying a circumstantial way out of the problem through contract interpretation does not assist with solving this complexity. This should be an organising theory that would take a step forward beyond the affirmation of the analytical distinction between a treaty claim and a contract claim to a theoretical investigation of the premises of treaty claims, on the basis of conducting empirical studies of all the intricacies brought about by the contract-treaty divide. The theory should also have answers for those occasions when a distinction between a contract claim and a treaty claim may be artificial and essentially unreasonable. Important steps in this direction have been taken.[23]

A relatively undisputable starting point to solve this conundrum lies in the analytical distinction in the mandates of treaty-based and contract-based tribunals. Both types of tribunal exercise *distinct* mandates and may require somewhat overlapping powers. As contract-based tribunals may need to interpret a treaty, treaty-based tribunals may equally need to ascertain the content of contractual provisions. These powers are not mutually exclusive. That said, it also means that the contract-treaty divide should not create a *specific* bar to the power of contract interpretation, such as with a tribunal's power of decision-making in investment treaty arbitration.

At the same time, a treaty-based tribunal may decline jurisdiction, decide on the inadmissibility[24] of certain claims, and suspend or terminate the proceedings precisely because of a contract claim pending before a contractual forum, and contract interpretation would not be exercised, as a result.[25] All

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23 See an updated systemic overview of possible solutions to the contract-treaty divide – Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 116–140, 151–155; Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 380–397; 541–561. On the theoretical foundation for the doctrine of state responsibility for breach of investment contract, see Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018).

24 The procedural framework, used in investment treaty arbitration, does not expressly mention admissibility, whereas admissibility is expressly referred to in the ICC Statute (Article 53), the ECHR (Article 35) and the ICJ Rules (Article 79). Despite a lack of textual recognition in procedural regulation in investment treaty arbitration, admissibility is firmly conceptualised in doctrinal writings and investment treaty jurisprudence. Non-admissible claims fall within the jurisdiction of a tribunal but cannot be addressed for reasons other than jurisdiction.

25 Chester Brown similarly observes that when an international court has jurisdiction but decides for some valid reasons, including admissibility, not to exercise it '[*s*]*uch limitations on the exercise of inherent powers should properly be understood* ***as bars to the exercise of international judicial jurisdiction generally, rather than limitations to the***

these procedural decisions would lead to a refusal to put into operation the entire *reservoir* of tribunals' adjudicative powers, including the power of contract interpretation. Non-exercise of a power to interpret contracts would result because of what has happened in the proceedings and not *vice versa*.

Despite its simplicity, this distinction between consequences and reasons in relation to the exercise of the power of contract interpretation helps to address a complex problem about the non-exclusivity of contract interpretation exercised by competing contractual forums. Non-exercise of the power to interpret contracts would appear to be a consequence of a decline in jurisdiction, but not a stand-alone reason for its decline. Importantly, even these very decisions causing the tribunal to decline to proceed further with a matter may also necessitate the contract interpretation of forum selection clauses and other contractual provisions, and this 'survival' of the power to interpret contracts would reinforce the idea of it being an inherent adjudicative power of treaty-based tribunals.

Further, one has to verify if an express reference to contract interpretation in a forum selection clause can make any difference to the above reached conclusion. An answer appears again relatively on the surface if one looks at the implications of the reference to contract interpretation for the contractual forum *itself*. Rather than defining the adjudicative *powers* of a contract-based tribunal, a reference to contract interpretation in an arbitration agreement or a forum selection clause is commonly understood as addressing the *scope* of dispute.

The inclusion of 'interpretation' in a forum selection clause, or in an arbitration clause, has indeed gained some popularity in commercial practice. The practice though has not become widespread. Only a few arbitral institutions and arbitration associations refer to 'interpretation' in their model arbitration clauses, necessarily however in combination with other broad categories of disputes arising out of 'formation', 'performance', 'nullification', 'breach', 'termination', and 'invalidation' of a contract.[26] Model arbitration clauses

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exercise of inherent powers specifically.' [emphasis added] – Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 79.

26 The model arbitration clause of the Dubai International Arbitration Centre refers to 'interpretation' in the scope of disputes as follows: '*any dispute arising out of the formation, performance,* ***interpretation,*** *nullification, termination or invalidation of this contract or arising therefrom or related thereto in any manner whatsoever*'; similarly JAMS International lists 'interpretation' in its model arbitration clause: '*any dispute, controversy or claim arising out of or relating to this contract, including the formation,* ***interpretation,*** *breach or termination thereof, including whether the claims asserted are arbitrable*'. [emphasis is added]

recommended by those institutions that are engaged, in addition to contract-based disputes, to various degrees, in the settlement of treaty-based disputes, do not contain a reference to 'interpretation'.[27] Also, the UNCITRAL model arbitration clause recommended for the Arbitration Rules (1976 and 2010) does not define the scope of disputes through 'interpretation'. The caution in respect to inclusion of 'interpretation' in model arbitration clauses is supported by a general recommendation not to limit the scope of a dispute unless it is necessary, as articulated, inter alia, in the IBA Guidelines for Drafting International Arbitration Clauses.[28] Indeed, an isolated reference to 'interpretation' only in a forum selection clause may unduly narrow the scope of disputes and raises natural criticism. In the words of Gary Born:

> Arbitration clauses are sometimes drafted ill-advisedly, to refer only to disputes concerning the "interpretation" or "construction" of the parties' contract. This formulation is sometimes borrowed from the context of choice-of-law clauses, where it also unhappily appears. Some national courts have interpreted clauses referring only to disputes about the "interpretation" of the parties' contract as excluding claims for breach of contract. Other courts and tribunals have reached more expansive conclusions, holding that the parties could not have intended to submit only contract disputes about interpretation (and not performance or the like) to arbitration. Where clauses refer to disputes concerning "performance and interpretation" of the contract, courts are obviously more likely to read the provision expansively.[29]

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27 By way of illustration, institutes such as the American Arbitration Association, Singapore International Arbitration Centre (SIAC), Australian Centre for International Commercial Arbitration, Cairo Regional Centre for International Commercial Arbitration (CRCICA), China International Economic and Trade Arbitration Commission (CIETAC), German Arbitration Institute, Indian Council of Arbitration, Netherlands Arbitration Institute, Swiss Chambers' Arbitration Institution, Vienna International Arbitration Centre, and World Intellectual Property Organization Arbitration and Mediation Center do not contain a reference to 'interpretation' in their model clauses. Neither the ICSID, the SCC Arbitration Institute, the ICC Court of Arbitration, LCIA, Hong Kong International Arbitration Centre as institutions used for investment treaty arbitration provide for 'interpretation' in their model clauses.

28 Guideline 3 of the IBA Guidelines for Drafting International Arbitration Clauses provides: '*Absent special circumstances, the parties should not attempt to limit the scope of disputes subject to arbitration and should define this scope broadly.*'

29 Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1366.

Leaving criticism aside, what is important is that a forum selection clause defines 'what' can be settled in a chosen contractual forum and not 'how' a contract claim shall be addressed. The provision, accordingly, cannot have a direct implication on the inherent power of contract interpretation of a treaty-based tribunal. For the above reasons, as well as the different legal orders in which treaty-based disputes and contract-based disputes are localised, a reference to interpretation in a forum selection clause does not serve as a waiver of the power of a treaty-based tribunal to interpret the contract. While parties may arguably waive treaty jurisdiction,[30] they can waive their right to set aside awards through their contracts,[31] and they can even exclude the necessity to indicate reasons,[32] but they can hardly exclude contract interpretation as an adjudicative power of treaty-based tribunals. Accordingly, a forum selection clause in a contract authorising another forum to interpret it, when deciding on a contract claim, does not amount to 'meaningful limits',[33] or an impediment, on the power of a treaty-based tribunal to interpret the contract when deciding on a treaty claim.

Finding confirmation for its own power for contract interpretation within the text of a forum selection clause is indeed attractive. Its simplicity and possible persuasiveness is based on the express wording of the provisions relied upon – the contractually agreed forum is exclusively competent to decide any dispute arising in relation to interpretation arising out of a contract thus potentially excluding this power of a treaty-based tribunal, whereas the lack of an express reference to 'interpretation' in a forum selection clause, signals

30 S I Strong, 'Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?' (2014) 29(3) ICSID Review 690, 690–700.

31 Matthew Blome, 'Contractual Waiver of Article 52 ICSID: A Solution to the Concerns with Annulment?' (2016) 32 Arbitration International 601, 601–628.

32 See Article 32(3) of the UNCITRAL Arbitration Rules 1976; Article 34(3) of the UNCITRAL Arbitration Rules (as revised in 2010); Article 42(1) of the SCC Arbitration Rules (2017), Article 34 (3) of the PCA Arbitration Rules (2012) that enable parties to agree that no reasons are provided in the award. At the same time, other Arbitration Rules used in investment treaty arbitration do not give this autonomy to parties – see, for instance, Article 47 of the ICSID Arbitration Rules and Article 32(2) ICC Arbitration Rules (2017). Article 31 (2) of the UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006) provides for a possibility to agree that no reasons are provided in the award.

33 The International Law Association recognises 'meaningful limits' that parties may impose on tribunals' powers – International Law Association, 'Annex to Resolution No.4/2016: Inherent and Implied Powers of International Arbitral Tribunals: Recommendations' 77th Conference of the International Law Association (Johannesburg, South Africa, 7–11 August 2016), para. 4.

the absence of any limitation on a treaty-based tribunal to interpret the contract.[34] Despite its attractiveness, this line of reasoning is conceptually flawed and misleading. While a contractually agreed forum may indeed be exclusively competent to decide on disputes in relation to the interpretation of contracts (see section on the inherent nature of the power to interpret contracts above), a reference to 'interpretation' in a forum selection clause or arbitration clause does not affect the adjudicative power of a treaty-based tribunal to interpret the contract for the exercise of its treaty mandate. The inherent power of contract interpretation of a treaty-based tribunal is not limited by exclusive jurisdiction to decide on contractual claims as such.

The complexity can be well demonstrated by *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*.[35] While often cited as authority in arbitral awards and in scholarship for deciding conclusively that a forum selection clause does not in and of itself exclude treaty jurisdiction,[36] the case demonstrates some flaws in the legal analysis in relation to substantiation of the power to interpret contracts.

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34 In the absence of clear guidance, one can find similar attempts as in the *Vivendi* case to substantiate the power of contract interpretation by an argument based on the wording of a forum selection clause. In *Lao Holdings N.V. v. Lao People's Democratic Republic* (*I*), the tribunal relied, inter alia, on the lack of a reference to 'interpretation' in a forum selection clause as a confirmation of its power to interpret the contract: '*The Tribunal wishes also to note that neither Section 42 nor Section 32 refer to a power of interpretation, and there is therefore no textual basis to say that SIAC would have the exclusive power of interpretation of the Deed of Settlement, while this Tribunal would be deprived of any power of interpretation under Section 32, despite its mandate is to determine whether or not there exists a material breach of any of the sections therein identified.*' – see *Lao Holdings N.V. v. Lao People's Democratic Republic* (*I*), ICSID Case No. ARB(AF)/12/6, Interim Ruling on Issues Arising under the Deed of Settlement dated 19 December 2014, para. 67.

35 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 21 November 2000, para. 54, Decision on Annulment dated 3 July 2002, para. 60.

36 For arbitral awards, see *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016, para. 245, 332; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award dated 10 March 2014, para.355; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award dated 21 June 2011, para. 141–142; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award dated 19 December 2008, para. 58. For scholarship, see Stanimir A Alexandrov, '*Vivendi* (*Compañía de Aguas del Aconquija*) *v. Argentina Case*', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1785?prd=EPIL> last updated February 2008, last accessed 4 August 2020; Christoph Schreuer, 'Investment Treaty Arbitration and Jurisdiction over Contract Claims – the Vivendi I Considered' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005) 281–323;

It would have been preferable[37] if in addition to the analytical distinction drawn between contract and treaty claims, the *Vivendi* tribunal could have openly confirmed that the exercise of contract interpretation did not undermine the jurisdiction of the treaty-based tribunal as it is distinct from the exercise of contractual jurisdiction.

In short, the case arose out of a concession agreement concluded by a French company and its Argentine affiliate with Tucuman, a province of Argentina, on the operation of a water and sewage system. The forum selection clause in the concession agreement expressly provided that the Contentious Administrative Tribunals of Tucuman possessed exclusive jurisdiction over its interpretation.[38] In bringing a treaty claim before the ICSID, the claimant accused Argentina of not intervening in the actions of the Province of Tucuman, that were designed to undermine the operation of the concession. In the claimant's view, the actions of the province of Tucuman were attributable to the state. Argentina objected to jurisdiction of a treaty-based tribunal, relying, inter alia, on the forum selection clause, and asserting that the presented claim was substantially a contract claim upon which a treaty-based tribunal did not have jurisdiction.

The dispute went two rounds in the ICSID system and twice resulted in annulment. The first-tier tribunal recognised its jurisdiction but refused to exercise it, referring to the forum selection clause in the concession agreement. Being dissatisfied with that decision, the claimant applied for the annulment of the award in the part where the tribunal failed to exercise its jurisdiction.

Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 119.

37 Though the formulation with reference to 'interpretation' in a forum selection clause or arbitration clause is not omnipresent, it is nevertheless also noticeable in other cases that appear in the context of investment treaty arbitration. Apart from *Vivendi v. Argentine Republic*, an express reference to interpretation in a forum selection clause of the discussed contract can also be found in *Occidental v. Ecuador* (1), *Noble Energy v. Ecuador, TSA Spectrum v. Argentina, Impregilo v. Argentina* (1), *Khan Resources v. Mongolia.* A forum selection clause in *Impregilo v. Argentina* (*I*) serves as a typical illustration of the wording of this kind: '*16.7 JURISDICTION Any dispute arising between the Granting Authority and the Concessionaire related to the* ***interpretation*** *and performance of the Contract shall be resolved by the administrative courts of competent jurisdiction in and for the city of La Plata, and such parties waive any other applicable jurisdiction or venue.*' [emphasis added]– see *Impregilo S.p.A. v. Argentina*(*I*), ICSID Case No. ARB/07/17, Award dated 21 June 2011 para. 15.

38 Article 16.4 of the Concession Contract provided as follows: '*For the purpose of interpretation and application of this Contract the parties submit themselves to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán.*' – *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 21 November 2000, para. 27.

Having considered the arguments of the parties, the *ad hoc* committee found that the tribunal manifestly exceeded its powers by acknowledging jurisdiction and failing to exercise it.[39] A distinction between an exercise of contractual jurisdiction and analytical efforts in relation to a contract in the context of the treaty claim served as a basis for the annulment. The first annulment committee observed:

> [...] it is one thing to exercise contractual jurisdiction (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) and *another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law*, such as that reflected in Article 3 of the BIT.[40] [emphasis is added]

The claim was resubmitted again to another first-tier tribunal, and the tribunal exercised its jurisdiction, affirming the power of contract interpretation. The substantiation in the reasoning, however, raises questions. It appears that the tribunal affirmed the power of contract interpretation on the basis of the wording of the forum selection clause, but not the nature of the power of a treaty-based tribunal to interpret the contract:

> [...] the forum selection clause of the Concession Agreement, the parties submit themselves to the exclusive jurisdiction of the Administrative Courts of Tucumán only "for purposes of interpretation and application of this contract". (emphasis added) *The use of the conjunctive in this clause leaves it open to the Tribunal, should it feel it necessary for its analysis of Treaty breach, to interpret the Concession Agreement* and come to a view as to whether either of the parties failed to live up to its terms. In doing so, the Tribunal would not be applying the contract by deciding a contractual issue, determining the parties' respective rights and obligations or granting relief under the agreement. *It would be doing no more than the Respondent concedes is its right – i.e., taking the contractual background into account in determining whether or not a breach of the Treaty has occurred*.[41] [emphasis added]

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39 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment dated 3 July 2002, para. 115.

40 Ibid. para. 105.

41 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 August 2007, para. 7.3.9.

Substantiating the power of contract interpretation by some limitations within the text of the forum selection clause diminishes the contribution of the decision to clarify the inherent character of the tribunal's power of contract interpretation. The reasoning behind its reliance on the conjunction 'and' may be understood as implicitly acknowledging that a broader reference to interpretation in a forum selection clause could potentially deprive a treaty-based tribunal of the power of contract interpretation. As discussed earlier this shall not take place.

An acknowledged power of contract interpretation in relation to contracts, which do not give a basis for a treaty claim, i.e. which are not at the centre of the contract-treaty divide, may further assist to crystallise contract interpretation as an inherent adjudicative power of a treaty-based tribunal. By way of example, in *Khan Resources v. Mongolia*,[42] no claims were advanced directly under the Minerals Agreement.[43] The Tribunal nevertheless expressly acknowledged its power to 'examine' the agreement upon which it did not have jurisdiction for the purpose of discharging its mandate:

> At this juncture, the Tribunal considers it useful to explain that in its view, in order to achieve a complete understanding of the relationship between the Parties, it is necessary to examine not only the Founding Agreement itself, but also the Minerals Agreement. The fact that no claims are asserted under the Minerals Agreement is irrelevant. While a Tribunal may only give effect to an agreement on which its jurisdiction is based, it *may, however, take into consideration another agreement* (in this case the Minerals Agreement) involving all or some of the same parties for the purpose of interpretation of the first agreement (i.e., the Founding

42 *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL; Lacey Yong, 'Mongolia Seeks to Annul Khan Award' GAR Article dated 17 July 2015 available at <https://globalarbitrationreview.com/article/1034625/mongolia-seeks-to-annul-khan-award> accessed 4 August 2020; Douglas Thomson, 'Mongolia Settles Uranium Mine Dispute' GAR report dated 08 March 2016 available at <https://globalarbitrationreview.com/article/1035364/mongolia-settles-uranium-mine-dispute> accessed 4 August 2020. It is worth noting that a tribunal in *Khan Resources v. Mongolia* possessed a compound jurisdiction that was based on the Energy Charter Treaty, a provision in a Foundation Agreement (another agreement than what was interpreted) and the Foreign Investment Law of Mongolia – see *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, Decision on Jurisdiction of 25 July 2012, para. 3.

43 Agreement on Development of Mineral Deposits in the Eastern Aimak Province, in Mongolia, between WM Mining, Priargunsky, and Erdene, 3rd June 1995.

> Agreement). *The fact that it does not have jurisdiction over all parties to the Minerals Agreement matters not.* [emphasis added]

The Minerals Agreement did not cause much controversy in terms of its content; nevertheless '*taking into consideration*' necessitated some interpretation, which the tribunal had no hesitation to exercise.[44]

Overall, the discussion of the possible effect of a forum selection clause on the powers of treaty-based tribunals may be viewed in investment treaty arbitration as a heritage of the mixed claims commissions and the Calvo clause.[45] Mixed claims commissions played an important role in the resolution of disputes between the nationals of two states, between nationals and a state and between the states in the 19th century and at the beginning of the 20th century.[46] Some mixed claims commissions rule on acute conflicts in more recent times.[47] The number of commissions and the diverse character of their composition, jurisdiction, and applicable regulation, make it difficult to comprehensively summarise their practice in relation to their power to interpret contracts.[48] Mixed claims commissions mostly enabled states to file claims on espousal. Individuals gained direct access to some mixed claims commissions in the interwar period.[49] Contracts fell under the jurisdiction of commissions

44 Ibid. para.335–336, 347–351, 361, 375.

45 Patrick Juillard, 'Calvo Doctrine/Calvo Clause', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689> last updated January 2007, last accessed 4 August.

46 Rudolf Dolzer, 'Mixed Claims Commissions', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e64> last updated May 2011, last accessed 4 August 2020. Survey of International Arbitration, 1794–1989 (3rd edn) edited by Alexander M Stuyt refers to 80 mixed claims commissions in the 19th century; Rudolf Dolzer names about 30 commissions for the 1900–1918 period. See also with further references Lucy Reed, 'Mixed Private and Public International Law Solutions to International Crises' (2003) 306 Recueil des Cours de l'Académie de Droit International 191, 282.

47 For instance, the Bosnia-Herzegovina Commission for Real Property Claims of Displaced Persons and Refugees and the Eritrea-Ethiopia Claims Commission. The IUSCT may also be regarded as a specific example of a mixed claims commission.

48 Rudolf Dolzer, 'Mixed Claims Commissions', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e64> last updated May 2011, last accessed 4 August 2020; Edwin M Borchard, 'The Opinions of the Mixed Claims Commission, United States and Germany' (1925) 19(1) The American Journal of International Law 133.

49 Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011) 47–123.

either directly (as pure contractual claims)[50] or indirectly (as contract-related international claims),[51] while the express exclusion of pure contractual claims only occurred on very rare occasions.[52] The practice of the commissions is instructive regarding many aspects of the contract-treaty divide,[53] and may be relied upon to distil the power to interpret contracts as an inherent adjudicative power of treaty-based tribunals.

Despite some traceable, irreconcilable approaches, the inherent power of mixed claims commissions to interpret contracts was not challenged as such.[54] Some ambiguity appeared only after the steady emergence of a practice of granting effect to the Calvo clause that defines the exclusive jurisdiction of a local forum for deciding on interpretation, validity and the performance of contracts. However, even that practice did not exclude the power to interpret as such; it simply demonstrated a limitation on its exercise because of the inadmissibility of the case which a particular mixed claims commission could find.

Indeed, in 1926, in what became a leading case on the Calvo clause, *North American Dredging Company of Texas (USA) v. United Mexican States*, the United States-Mexican Claims Commissions denied jurisdiction over a contractual dispute because of the exclusive jurisdiction of Mexican courts regarding contract disputes. The commission explained its finding as follows:

> If [the claimant] had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law, committed

50 Currently and as discussed earlier, the IUSCT also has jurisdiction over contractual claims.

51 Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 20–45.

52 For instance, the Claims Convention between the United States and Spain of 12th February 1871 excluded contractual claims – see Edwin M Borchard, 'Contractual Claims in International Law' (1913) 13(6) Columbia Law Review 457, 459, 473.

53 Zachary Douglas, for instance, insists that: '*the Commission's reasoning must apply with greater force to the investment treaty context, where the investor has complete functional control over the prosecution of its treaty claims and any contractual arrangement to which it is privy.*' See Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 370. See also Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 16–19.

54 In an article written in 1913 and covering the period before the formation of more or less uniform practices towards the Calvo clause, Edwin M Borchard recognised that the jurisdiction of mixed claims commissions anticipated the full scope of contract interpretation: '*Where jurisdiction is exercised by mixed commissions, as is the general rule, the contract will be examined as would any other instrument open to judicial construction.*' – see Edwin M Borchard, Contractual Claims in International Law' (1913) 13(6) Columbia Law Review 457, 469.

> by Mexico to its damage, it might have presented such a claim to its government which, in turn, could have espoused it and presented it here. … But where a claimant has expressly agreed in writing … that in all matters pertaining to the execution, fulfilment and interpretation of the contract he will have resort to local tribunals and then wilfully ignores them by applying to his government, he will be bound by his contract and the Commission will not take jurisdiction of such claim.[55]

The case distinguished between pure contractual claims that should be submitted to a contractually agreed forum and international claims that were within the commissions' jurisdiction. Even recognising a lack of jurisdiction because of the forum selection clause, contract interpretation, as part of the adjudicative power of the mixed claims commission, was not denied. It is worth noting that the commission expressly engaged in the interpretation of the forum selection clause.[56]

Similarly, in a subsequent case, *International Fisheries Co. v. United Mexican States*,[57] the mixed claims commission had to address the content of a forum selection clause. Principles which were recognised at the time and established in *North American Dredging Company of Texas* (*USA*) *v. United Mexican States* did not preclude the mixed claims commission in *International Fisheries Co. v. United Mexican States* from interpreting a forum selection clause[58] and the construction of some other contractual provisions.[59]

Rather than attacking the inherent adjudicative power to interpret contracts, the findings of the mixed claims commissions emphasised as a rule the scope of disputes that were to be submitted to a local forum before the commissions could consider them in the case of a denial of justice or similar situations, converting contractual claims into international ones. Indeed, a contractual claim could be espoused, if additional elements, triggering international responsibility, appeared after applying to the exclusive forum. 'Interpretation' was not acknowledged as the exclusive competence of a local forum to which

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55 *North American Dredging Company of Texas* (USA) v. United Mexican States (31 March 1926), reproduced in 20 AJIL (1926), para. 20, 23.

56 Ibid. para. 13–17, 22–23.

57 *International Fisheries Co.* (*USA*) *v. United Mexican States* (1931) 4 Reports of International Arbitral Awards (United Nations).

58 Ibid. 691, 695, 700.

59 Ibid. 698–700 (where the USA-Mexico Mixed Claims Commission interpreted 'termination clause' to distinguish between 'declaration of cancellation' and 'decree of nullification' of the concession).

mixed claims commissions should subsequently adhere. Rather, 'interpretation' was listed among 'matters' or the scope of disputes submitted to a local forum for jurisdiction. Even in deciding in the first place on the lack of jurisdiction, the mixed claims commissions interpreted forum selection clauses (frequently at length).[60] Noteworthy is that majority of commissions operated in the pre-ISDS epoch, when the rules on the exhaustion of local remedies were particularly strong and claims on state responsibility for contract breach on most occasions had to be marked by a denial of justice. Thus, the practice of mixed claims commissions is inapposite to the suggestion that international tribunals possess the inherent power to interpret contracts for the purpose of deciding on and exercising their jurisdiction. At the same time, the practice of the mixed claims commissions is a good illustration of the limitation of the exercise of the power of contract interpretation as a consequence of the decision not to exercise jurisdiction.

To sum up, a power to interpret contracts by treaty-based tribunals is an inherent adjudicative power and cannot be undermined either by the nature of consent being premised on a treaty or a forum selection clause authorising another forum to resolve disputes about contract interpretation.

4.1.3 *Contract Interpretation as an Implied Power*

Having identified contract interpretation as an inherent power of treaty-based tribunals, it is necessary to see if the power may also be implied from some express provisions, primarily those which are incorporated into the consent to investment treaty arbitration. Categorisation of the power to interpret contracts as an implied power may facilitate its application if one follows the ILA Recommendations on Inherent and Implied Powers of International Arbitral Tribunals and extends them to international treaty arbitration. The analysis accordingly turns to arbitration rules and, where appropriate, laws of arbitration seats.

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60 In cases of American-Mexican Mixed Claims Commissions a general approach towards Calvo clauses was rejected, stressing the necessity to interpret each individual forum selection provision. In the *North American Dredging Company of Texas* case, the mixed claims commission acknowledged that each decision on Calvo clauses is individualised. In referring to that explanation *International Fisheries Co. v. United Mexican States* stated: '*In that decision, the Commission stated that it was impossible for it to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, and that each case of this nature must therefore be discussed separately.*' – see *International Fisheries Co.* (*USA*) *v. United Mexican States* (1931) 4 Reports of International Arbitral Awards (United Nations) 694; see also Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 16–19.

To start with it is interesting to observe that some earlier drafts of the arbitration rules designed for inter-state arbitration procedure contained an express reference to the power to interpret a *compromis*. In 1953, and later in 1958, the International Law Commission adopted rules on arbitration procedure that were initially supposed to turn into a convention defining the procedure for inter-state arbitration, but ultimately appeared as Model Rules on Arbitration Procedure.[61] The rules subsequently shaped many provisions of the ICSID Convention.[62] The wording describing the power of a tribunal to interpret was limited to the interpretation of a *compromis*, or an arbitration agreement. A *compromis* could take the form of a contractual arrangement or appear in an international treaty. Article 9 of the Model Rules on Arbitration Procedure accordingly specified the power of interpretation irrespective of the nature of the instrument, being a treaty or a contract, upon which the competence of the tribunal was based: '*The arbitral tribunal, which is the judge of its own competence, has the power* ***to interpret*** *the compromis and the other instruments on which that competence is based*.'[63]

This express power to interpret, albeit limited to the interpretation of an arbitration agreement, did not appear in arbitration rules that emerged after the Model Arbitration Procedure 1958. Neither the ICSID Arbitration Rules (2006) and the UNCITRAL Arbitration Rules (1976, 2010) as most frequently named in IIAs, nor the SCC Arbitration Rules (2017 revised as of 2020), the ICC Arbitration Rules (2017, 2021) or the PCA Arbitration Rules (2012), contain any reference to the power to interpret contracts. The same can be said about some other arbitration rules which either occasionally are referred to in IIAs, such as the arbitration rules of the CRCICA and Istanbul Arbitration Centre (ISTAC), or specifically designed for investment disputes, but which have not yet found

61 International Law Commission, *Yearbook of the International Law Commission*: *1958: vol. II* (A/CN.4/SER.A/1958/Add.l, United Nations Publishing 1958).

62 Convention on the Settlement of Investment Disputes between States and Nationals of other States, Documents concerning the Origin and the Formulation of the Convention, Volume II, Part 1 Documents 1–43, 182, 269, 330, 332, 336, 406–407 available at <https://icsid.worldbank.org/resources/publications/the-history-of-the-icsid-convention>, last accessed 25 June 2021.

63 International Law Commission, *Yearbook of the International Law Commission*: *1958: vol. II* (A/CN.4/SER.A/1958/Add.l, United Nations Publishing 1958).

their way into IIAs,[64] such as the SIAC Investment Arbitration Rules [65] and the CIETAC Investment Arbitration Rules.[66]

Similar to the arbitration rules, the laws of the seat applicable in non-ICSID arbitration proceedings as a rule do not provide for the power to interpret contracts. For instance, the UNCITRAL Model Law on International Commercial Arbitration giving the foundation for national laws in 85 States in a total of 118 jurisdictions,[67] does not single out a power to interpret contracts. In the same vein, some other laws that are not based on the UNCITRAL Model law and that are used in investment treaty arbitration, such as for instance, the English Arbitration Act, the United States Federal Arbitration Act, book 4 of the French Code of Civil Procedure, book 4 of the Dutch Code of Civil Procedure or the Swiss Private International Law Act, do not specify the power to interpret contracts.

The only exception to the above can be found in the Swedish Arbitration Act, which is also occasionally chosen as the law of the seat in investment treaty arbitration. Section 1 of the Act provides: '*In addition to interpreting agreements, the filling of gaps in contracts can be also referred to arbitration*'. Scholars and practitioners commonly understand the phrase 'in addition to interpreting agreements' as affirming a power to interpret contracts by arbitral tribunals without any additional agreement.[68] The drafters of the statutory

64 The author is not aware of any IIA expressly naming the CIETAC Investment Arbitration Rules or the SIAC Investment Arbitration Rules. However, it may be suggested that a broad formulation of some IIAs may open for subsequent agreement of the resolution of disputes under these rules as it is the case, for instance, under the China – Uzbekistan BIT (2011).

65 The SIAC Investment Arbitration Rules 2017 <http://www.siac.org.sg/our-rules/rules/siac-investment-arbitration-rules> and <https://www.siac.org.sg/images/stories/articles/rules/IA/SIAC%20Investment%20Rules%202017.pdf> last accessed 25 June 2021. Of interest, the SIAC Investment Arbitration Rules expressly list among additional powers of the tribunals a far-reaching power '*to order the correction or rectification of any contract, subject to the law governing such contract.*' (Article 24 (a) of the SIAC Investment Arbitration Rules).

66 China International Economic and Trade Arbitration Commission International Investment Arbitration Rules 2017 <http://www.cietac.org/index.php?m=Page&a=index&id=390&l=en> last accessed 25 June 2021.

67 UNCITRAL Model Law on International Commercial Arbitration <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>, last accessed on 24 June 2021.

68 Jernej Sekolec and Nils Eliasson, 'The UNCITRAL Model Law on Arbitration and The Swedish Arbitration Act: A Comparison' in Lars Heuman and Sigvard Jarvin (eds),

provision do not effectively distinguish between the interpretative powers of arbitrators and judges. In their view, both possess an inherent adjudicative power of contract interpretation. Gap filling to the contrary was inserted to enlarge the scope of arbitrators' adjudicative power in comparison with judicial adjudicative power, subjecting it simultaneously to the parties' authorisation/agreement.[69] The recent update of the Swedish Arbitration Act in force as of 1 March 2019 has not changed the regulation.[70]

As the arbitration rules or arbitration laws do not distinguish between the tribunals' exercise of contract-based and treaty-based jurisdiction,[71] the power to interpret contracts in treaty-based disputes can be *implied* in general provisions pertaining to the resolution of disputes and reasoning in awards. The power to interpret contracts may be, for instance, *implied* in the power of the tribunal to decide on its own jurisdiction and for that purpose to interpret a contract, if needed.[72] The power to interpret contracts could be implied in the power and a principal mandate of the tribunal to issue an award and for that purpose to interpret a contract, if needed.[73] The power to interpret contracts

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The Swedish Arbitration Act of 1999 Five Years On: A Critical Review of Strengths and Weakness (Juris Publishing 2006) 177; Finn Madsen, *Commercial Arbitration in Sweden: A Commentary on the Arbitration Act (1999:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (Oxford University Press 2007) 75.

69 Finn Madsen, *Commercial Arbitration in Sweden: A Commentary on the Arbitration Act (1999:116) and the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce* (3rd edn, Oxford University Press 2007) 75.

70 The Swedish Arbitration Act (SFS 1999:116) (updated as per SFS 2018:1954, entry into force 1 March 2019) in the translation of Joel Dahlquist Cullborg, available at <https://sccinstitute.se/media/1773096/the-swedish-arbitration-act_1march2019_eng-2.pdf> last accessed 26 September 2021.

71 In fact, the ICSID was originally created first and foremost for contract-based jurisdiction and continues, albeit to a lesser degree than might be expected, to be used for contract-based disputes. Aron Broches, 'The International Centre for Settlement of Investment Disputes' in Ernst J Cohn and others (eds), *Handbook of Institutional Arbitration in International Trade: Facts, Figures and Rules* (North-Holland Publishing Company 1977) 3–16. A recent report demonstrates an ongoing use of contract-based arbitration with mostly African countries being involved as respondents – see the ICSID, 'Spotlight on Contract-based Disputes at ICSID' dated 30 April 2019 available at <https://icsid.worldbank.org/news-and-events/blogs/spotlight-contract-based-disputes-icsid>, last accessed 26 September 2021.

72 For instance, Articles 41–42 of the ICSID Arbitration Rules, Article 21 of the UNCITRAL Arbitration Rules 1976, Article 6 (9) of the ICC Arbitration Rules 2017, Article 14(4) and 39 of the SCC Arbitration Rules 2017 revised as of 2020.

73 For instance, Article 16 of the ICSID Arbitration Rules, Article 32 (1) of the UNCITRAL Arbitration Rules 1976, Article 32 (1) of the ICC Arbitration Rules 2017, Article 32 (1) of the ICC Arbitration Rules 2021, Article 41 of the SCC Arbitration Rules 2017.

could also be implied in the requirement pertaining to the indication of reasons in awards, by which tribunals may be empowered to interpret contracts, not only for the purpose of reaching a decision, but also to provide the parties with an interpretative justification in the form of the award's reasons.[74]

Apart from the three types of provisions identified above, one may also find a confirmation of the implied power to interpret contracts in other rather peculiar provisions in some of the arbitration rules and laws of the seat, such as the UNCITRAL Arbitration Rules, the ICC Arbitration Rules or arbitration laws based on the UNCITRAL Model Law on International Commercial Arbitration. The provisions in focus oblige arbitrators, in the case of the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, '*to decide in accordance with the terms of the contract, if any*'[75] and in the case of the ICC '[*to*] *take account of the provisions of the contract, if any, between the parties*'.[76] The wording used does not elevate a contract to a dominant status, it just indicates a contract between the parties to a dispute, among *the relevant applicable sources*. The provision in the UNCITRAL Arbitration Rules 1976, ultimately also borrowed by UNCITRAL Model Law on International Commercial Arbitration 1985, originates from the three types of arbitration rules – the ICC Rules of Conciliation and Arbitration 1975, the Rules for International Commercial Arbitration of the UN Economic Commission for Asia and the Far East 1966 (the ECAFE Rules) and the Arbitration Rules of the UN Economic Commission for Europe 1966 (the ECE Rules).[77] The wording was included to give tribunals necessary *latitude* for arriving at a decision and reflecting on the expectations and intentions of the parties. A slight difference to the formulation between the mandatory wording *'shall decide in accordance with'* of the UNCITRAL Arbitration Rules and the *'take account of the provisions of the contract'* of the ICC Arbitration

74 For instance, Article 47 of the ICSID Arbitration Rules, Article 32 (3) of the UNCITRAL Arbitration Rules 1976, Article 32 (2) of the ICC Arbitration Rules 2017, Article 32 (2) of the ICC Arbitration Rules 2021, Article 8 (2) and Article 42 (1) of the SCC Arbitration Rules 2017 revised as of 2020.

75 Article 33 (3) of the UNCITRAL Arbitration Rules 1976, Article 35 (3) of the UNCITRAL Arbitration Rules 2010, Article 28 (3) of the UNCITRAL Model Law on International Commercial Arbitration.

76 Article 21 (2) of the ICC Arbitration Rules 2017, Article 21 (2) of the ICC Arbitration Rules 2021.

77 Ernst J Cohn, 'The Rules of Arbitration of the United Nations Economic Commission for Europe' (1967) 16(4) The International and Comparative Law Quarterly 946, 974; Arthur D Webster, 'UNCITRAL Arbitration Rules: Survey and Comparison' (1978) 3 Maryland Journal of International Law 421–424; *Summary Record of the 17th Meeting of the Committee of the Whole* (*II*), UNCITRAL, 9th session, UN Doc A/CN.9/9/C.2/SR.17, para. 23, 25, 26 (1976).

Rules has its own history, but is of little significance for the general power to interpret contracts. Similar to the ICC Arbitration Rules and the ECE Rules, the earlier version of the UNCITRAL provision referred to the more neutral *'take account of the contract'*.[78] The later draft of the UNCITRAL Arbitration Rules was amended by drawing a distinction between a contract and trade usages as we currently see in the UNCITRAL texts: tribunals should '*decide in accordance with'* the terms of contracts and '*take into account'* trade usage.[79] The ICC chose not to make a similar distinction. While originally crafted and still in use for contract-based disputes, the wording in the arbitration rules and arbitration laws referring to the necessity to consider a contract, may retain some relevance for investment treaty arbitration as well for situations in which the parties in the proceedings have a contract as an underlying factual and legal basis of their dispute.

To sum up, a power to interpret contracts may be implied from some general provisions on the power to decide on jurisdiction, the power to decide on the merits, the duty to give reasons for the decision, as well as from specific provisions identifying contracts among applicable regulation that has to be taken into account.

4.2 Exercise

When international courts and tribunals have to ascertain the content of international treaties, there is no question as to the identity of their analytical efforts and the relevance of the VCLT for an interpretative exercise. Similarly, when domestic courts have to ascertain the content of an international treaty, no complexity arises in recognising their analytical efforts as constituting treaty

78 *Summary Record of the 17th Meeting of the Committee of the Whole* (*II*), UNCITRAL, 9th session, UN Doc A/CN.9/9/C.2/SR.17, para. 23, 25, 26 (1976).

79 The amendment was initiated by the representatives of the USA and Germany and supported by representatives of the UK, Nigeria, Philippines, Ghana, Japan, Bulgaria and Belgium. In introducing an amendment, the representative of the USA, Mr. Holtzmann, explained: '*that the draft rules had been widely discussed in the United States and the words "take into account", in paragraph 3, had frequently been misunderstood. The ECE arbitration rules had not been used by many American corporations precisely because they contained similar wording. Wherever possible, ambiguous wording should be avoided, and the revised text should therefore be amended to read: "In all cases, the arbitrators shall decide in accordance with the terms of the contract and the usages of the trade applicable to the transaction*'. The opposing comments of the Mexican representative referring to the tension between *pacta sunt servanda* and *rebus sic stantibus* were not supported because the provision was not perceived as overriding peculiarities of applicable national legislature. See *Summary Record of the 17th Meeting of the Committee of the Whole* (*II*), UNCITRAL, 9th session, UN Doc A/CN.9/9/C.2/SR.17, para. 29 (1976).

interpretation.[80] In the same vein, when treaty-based tribunals have to ascertain the content of contractual provisions in deciding on a treaty claim, it might also appear rather uncontroversial to recognise those efforts as constituting contract interpretation. In reality, however, treaty-based tribunals may be hesitant to openly acknowledge that they interpret contracts. Tribunals may refer to their own analytical efforts to ascertain the content of contractual provisions as being entirely *fact-finding*,[81] or merely as *taking into account the term of the contracts* and *taking the contractual background into account*,[82] or otherwise distancing themselves from contract interpretation by insisting on the analytical distinction of the inquiries thus exercised. That said, it is of note that there may also be various legitimate reasons for characterising the factual, legal and economic assessment of contractual provisions in the context of a treaty-based claim somewhat differently than exclusively an exercise of the power to interpret contracts.

As hesitation in the exercise of contract interpretation may further lead to a concrete functional shortfall, i.e., a failure to apply national law to contract interpretation, it is important to deal with possible mischaracterisation of the identity of analytical efforts while discussing the exercise of contract interpretation as a power of tribunals. Apart from a failure to apply national law with all its possible consequences, mischaracterisation may also lead, if not to an incorrect answer, then to other deficiencies in the clarity and completeness of the legal reasoning. The problem under scrutiny here is accordingly a *deliberate* choice of a treaty-based tribunal *not* to characterise its own efforts in ascertaining the content of contractual provisions as being contract interpretation as well *as legitimate exercise* of other analytical activity which does not fit neatly or exclusively into what can be perceived as contract interpretation. Finally, the section also considers another important dimension in the exercise of the power to interpret contracts, that is, a possible *deference* to interpretation exercised by other forums.

4.2.1 *Contract Interpretation or Fact-Finding*

No clear demarcation line exists between fact-finding and legal interpretation.[83] Finding their expression in words, contracts appear as a result of certain facts

80 While domestic courts do not have a problem as a rule in acknowledging treaty interpretation, there might still be some issues with the proper application of the VCLT – see, for instance, Michael Waibel, 'Principles of Treaty Interpretation: Developed for and Applied by National Courts?' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (Oxford University Press 2016) 9–33.

81 For instance, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 135.

82 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award dated 20 August 2007, para. 7.3.9.

83 On the complexity of distinguishing legal interpretation and fact-finding from the perspective of legal philosophy and legal theory, see Patrick Nerhot (ed), *Law, Interpretation and*

and bear various factual implications. Words are susceptible to inherent vagueness or ambiguity or might become vague, ambiguous or somehow irrelevant to changed circumstances, and thus necessitate a particular type of legal interpretation – contract interpretation. At the same time, the material forms which contracts encapsulate, its economic implications, the parties' pre-contractual negotiations and post-contractual conduct – all have factual ramifications.

That contracts are routinely described as a part of the factual background in awards does not exclude their interpretation. Recognising a frequently unavoidable factual element in contract interpretation, this work warns against reducing contract interpretation to fact-finding. The facilitation brought about by the characterisation of the efforts of ascertaining the content of contractual provisions as a fact-finding endeavour[84] may come with its own costs. One of the extreme visualisations frequently referred to throughout this book relates to the consideration of the impermissible under the proper law of the contract material (pre-contractual negotiations or post-contractual conduct) for ascertaining the content of contractual provisions. There could also be other

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Reality: Essays in Epistemology, Hermeneutics and Jurisprudence (Springer Science & Business 1990). Patrick Nerhot explains the intertwinement between interpretation and fact-finding in the book introduction in the following words: '*Since the two operations overlap each other so much, speaking about fact and interpretation in legal science separately would undoubtedly be highly artificial. To speak about fact in law already brings in the operation we call interpretation. Equally, to speak about interpretation is to deal with the method of identifying reality and therefore, in large part, to enter the area of the question of fact*', see page 1. Of particular relevance in the book for this section are chapters as follows: William Wilson, 'Fact and Law' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business Media 1990) 11–22, Michel Troper, 'The Fact and the Law' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business 1990) 22–38, Patrick Nerhot, 'The Law and its Reality' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business 1990) 50–73, Patrik Nerhot, 'Interpretation in Legal Science' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business 1990) 193–226, Aleksander Peczenik, 'Coherence, Truth and Rightness in the Law' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business 1990) 275–310.

84 By labelling the activity of ascertaining the content of contractual provisions as fact-finding, tribunals may avoid discussing complex issues relating to the power to interpret contracts in the presence of a forum selection clause in a contract identifying a domestic court or another arbitral tribunal as being competent in relation to a contract-based dispute and even expressly in relation to contract interpretation. Also, tribunals, when ascertaining the content of contractual provisions as fact-finding, would avoid verifying the content of applicable national law – the proper law of a contract – for contract interpretation.

consequences of over-factualisation of contract interpretation, such as a failure to consider the principle of good faith, to which the fact-finding assessment is not responsive. Criticism in this work is accordingly levied against those occasions on which tribunals fail or deliberately avoid to apply national law to their own efforts regarding ascertaining the content of contractual provisions by mischaracterising such task as being entirely or exclusively a fact-finding activity.[85]

In what relates to reducing contract interpretation to fact-finding, tribunals may justify their analysis in different ways. They may emphasise that contracts play exclusively a factual role in investment treaty arbitration. They may find it attractive to align the factual approach to ascertainment of the content of contractual provisions with the treatment of national law as a matter of fact in the public international law setting.[86] They may also consider fact-finding to be a suitable solution for maintaining delimitations between treaty-based jurisdiction and contract-based jurisdiction. Whatever the justifications may be, all of them emphasise the somewhat *diminished regulatory function or normativity* of contracts and national law in investment treaty arbitration. This diminished normativity can also be aligned with the perspective of foreign law before domestic courts.[87]

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85 See, for instance, the recognition by tribunals of their own analytical efforts in relation to contracts as fact-finding in *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award dated 6 May 2016, para. 361.

86 See the discussion on the controversy that surrounds approaching national law as a matter of fact in the setting of public international law in Chapter 5.

87 For historical reasons foreign national law is typically categorised as a factual matter in common law jurisdictions. Treatment of national law as a factual matter raises certain challenges which helps to clarify the limits of approaching the law exclusively as a factual matter. Even if foreign law is recognised as a matter of fact, in appeal, its peculiar normative role may reappear with new force. There, foreign law becomes a factual question of a 'peculiar kind' that can be reviewed despite the restriction on the reconsideration of factual findings. On approaching foreign national law as a factual matter, see Richard Fentiman, 'Laws, Foreign Laws, and Facts', (2006) 59 (1) Current Legal Problems 391; Richard Fentiman, *Foreign Law in English Courts* (Oxford University Press 1998) 1–60; Arthur Nussbaum, 'The Problem of Proving Foreign law. The Fact Theory. Judicial Notice' (1941) 50 (6) Yale Law Journal 1018; François Rigaux, 'The Concept of Fact in Legal Science' in Patrick Nerhot (ed), *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Springer Science & Business Media 1990) 43–44, Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, Juris Publishing 2014) 684–685; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (Martinus Nijhoff Publishers 1996) 42–50. For a discussion on the retained normative character of foreign law, see Federico Picinali, 'Legal Reasoning

The very same feature – *diminished normativity* – if looked at from another angle as *remaining normativity* is still sufficient to challenge *factualisation.* As discussed in Chapter 1, contracts in investment treaty arbitration have to be ascertained for decisions to be made on a broad variety of aspects. They do not appear merely or exclusively in a factual capacity (for pure contractual facts see also below), or in other words they are not absolutely divested of their normative or regulatory function. Similarly and despite all its difficulties, national law also retains its features as a law in investment treaty arbitration.[88] Providing a necessary legal framework for contract interpretation, national law applicable to a contract defines the extent of admissible factual elements for ascertainment of the content of contractual provisions. The *factualisation* of contracts and national law essentially mingles a tool for understanding the content of the relevant legal text – contract or national law – with the role such contracts and laws have in a given context. International customary law is also determined in international law via evidence on the existence of customs, but the fact that international customary law is supposed to be ascertained through actual analysis does not deprive it of its normative quality,[89] nor does it turn its ascertainment into an exclusively fact-finding activity.[90] Accordingly, neither the specific role that the contracts play in investment treaty arbitration, nor views approaching national law as a matter of fact in the context of public international law in fact justify reducing contract interpretation to fact-finding and disengagement from national law in contract interpretation.

These considerations on the regulatory role of contracts in investment treaty arbitration inform a critical perspective of cases where treaty-based tribunals emphasise ascertainment of the content of contractual provisions exclusively as fact-finding. In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,*[91] for instance, the tribunal had to understand provisions in a construction contract for finding a violation of fair and

as Fact Finding? A Contribution to the Analysis of Criminal Adjudication' (2014) 5(2) Jurisprudence 299.

88 Criticism of approaching national law as a matter of fact using the example of the PCIJ case *Certain German Interests in Polish Upper Silesia* has been addressed in Chapter 5.

89 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 105.

90 Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008); see also an ongoing ERC projects, 'The Rules on Interpretation of Customary International Law' <https://cordis.europa.eu/project/rcn/212805/en> last updated 25 June 2021.

91 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award dated 27 August 2009.

equitable treatment and expropriation. The contract pertaining to the construction of a motorway was concluded between the claimant, a company incorporated in Turkey, and the National Highway Authority (NHA), a public corporation established and controlled by Pakistan. The contract incorporated the FIDIC General Conditions of Contract and was subject to the application of the law of Pakistan as the governing law. In the dispute, the claimant argued that its expulsion from the construction project for motives unrelated to the claimant's contractual performance violated the standards of investment protection. The respondent opposed, stressing, *inter alia*, that it had exercised its legitimate rights under the contract because of numerous violations that led to extensions, undue delays in construction and ultimately, the termination of the contract. Interpretation of contractual provisions became critical in the case. The parties disagreed on the content of contractual provisions concerning the engineer's notice on the lack of progress with contract completion within the agreed time (sub-clause 46.1) and the notice on contract termination (sub-clause 63.1 (b) (ii)), as well as the interrelation of both provisions. Appointed by the NHA, the engineer[92] supervised the company's performance as per the terms of the contract. Some of the engineer's decisions required the approval of the NHA, such as termination under sub-clause 63.1 (b) (ii), while others, such as notice on the lack of progress under sub-clause 46.1, did not. In addition to the function of the engineer, the provision on the 'mobilisation advance' that the claimant provided under the contract as a performance guarantee (sub-clause 60.8) and which the respondent cashed, also appeared central to the dispute.

Approaching contractual provisions, the tribunal chose to emphasise the *factual* side of its own analysis:

> As a threshold matter, the Tribunal recalls that its jurisdiction covers treaty and not contract claims. This does not mean that it cannot consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. *It takes contract matters, including the contract's governing municipal law, into account as facts as far as they are relevant to the outcome of the treaty claims*. Doing so, it exercises treaty not contract jurisdiction.[93] [emphasis is added]

92 As is usually the case in the construction industry, the engineer was a key figure under the contract.

93 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/29, Award dated 27 August 2009, para. 135.

Not only did contractual provisions operate for the tribunal as a factual component for the decision on the violation of FET and expropriation, the way the tribunal assessed the contractual provisions was marked by extensive reliance on evidentiary material in the form of witness statements and expert opinions. Though the national law was expressly spelled out at the very beginning of the analysis as being a proper law of the contract, it is difficult to see how that law informed the tribunal's understanding. In contract interpretation, the tribunal did not expressly rely upon any of the provisions of national law, nor – insofar as one can see from the tribunal's reasoning – did the tribunal look for any clarification of the content of national law relevant to contract interpretation, in the expert opinions. It may accordingly appear that contract interpretation, while exercised autonomously and relying on reasonableness as the standard of assessment, was presented as a fact-finding exercise. This understanding is further reinforced by the summarising observations of the tribunal, again stressing the factual role of its own inquiry:

> While not a contract judge, the Tribunal *must review those facts related to contract interpretation* and performance and here particularly related to the exercise of certain contractual remedies to the extent necessary to rule on the Treaty claim. In this regard, the Tribunal has already discussed at length in paragraphs 240–256 and 351–359 supra that there is a reasonable interpretation of the Contract according to which the mechanisms leading to Bayindir's expulsion as well as those regarding measures subsequent to the expulsion were used in conformity with the Contract. On the basis of such considerations, the Tribunal concluded that there was no breach of the applicable FET standard. For the same reasons, the Tribunal cannot accept that there is a breach of the treaty provision on expropriation.[94] [emphasis is added]

An assessment of '*facts related to contract interpretation*', as indicated in the quote, indeed took place, and should not be seen as a slip of the tongue. The tribunal relied extensively on the witness statement and expert opinions dealing with a proper – in the view of the witness and the experts – understanding of the contractual provisions. In what relates to sub-clause 46.1 of the notice of delay in works, the tribunal considered that '*the issuance of the notices* […] *was based on a reasonable interpretation of the Contract*',[95] agreeing with the

94 Ibid. para. 458.
95 Ibid. para. 252.

witness and expert testimony presented by the respondent regarding the nature of and the relationship between the relevant clauses of the contract. In relation to whether termination under sub-clause 63.1 (b) (ii) was a proper response to the claimant's progress following the sub-clause 46.1 notice, in other words whether 'failure to proceed' should be understood in sub-clause 63.1 (b) (ii) as works coming to a complete stop or whether this merely implied they would be slowing down, the tribunal also sided with the respondent's expert.[96] On this basis, the tribunal came to the conclusion that '*NHA's concerns about Bayindir's performance must be deemed founded, with the result that NHA was entitled to consider termination*',[97] and that the termination was indeed connected with the claimant's performance of the contract rather than with political and financial motives. Similarly, in relation to Pakistan's attempt to call on 'the mobilisation advance', the tribunal agreed with the interpretation of the meaning of the relevant contractual clause and the explanation of the standard practice in the industry, which was offered by the expert witness for the respondent.[98] The tribunal noted that such an interpretation was '*reasonable*'[99] and that the claimant's expert '*offered no specific alternative interpretation of the Contract to counter this*'.[100]

When ascertaining the content of contractual provisions, it is not unusual to rely on witness statements and expert opinions nor is there anything strange in considering other factual evidence to assist in establishing the joint intent of the parties, post-contractual conduct or other aspects that would help to understand the contract. What *is* rather unusual is to expressly or implicitly reduce the whole process of ascertainment of the content of contractual provisions to a fact-finding exercise. If one were to agree that the only analysis that is exercised in respect of the contract's construction is fact-finding, one would have to accept that final questions of investigation were *how the engineer understood the provision* (invited as the witness), or *how provisions are understood by the experts*. An assessment of the presented evidence would lead to these questions being answered, but it is difficult to see how a next step, deciding on violations of the standards of investment protection, could have been made on their basis. Before deciding whether contractual violations took place, and if so, whether they had triggered investment treaty protection, the arbitrators had to understand the contractual provisions themselves. In

96 Ibid. para. 255.
97 Ibid. para. 314.
98 Ibid. para. 371.
99 Ibid. para. 373.
100 Ibid. para. 371.

the given case, the tribunal relied on reasonableness to verify and assess the expert opinion and clarifications received from the witness. The final question for the tribunal, accordingly, was whether understanding of the contractual provisions as explained by the witness and experts *was reasonable* and – importantly – *whether their understanding should be shared by the tribunal*. In other words, the tribunal, while emphasising the fact-finding exercise, actually exercised legal interpretation informed by the standard of reasonableness and entirely disengaged from the applicable national law. Since the tribunal was dealing with the normative content of contractual provisions and their effect in the context of investment treaty arbitration, its reliance on evidence did not turn its analysis into exclusively a fact-finding activity.

Quite similarly, in *Murphy Exploration & Production Company – International v. the Republic of Ecuador*,[101] the tribunal emphasised its attempts to ascertain the content of contractual provisions as being entirely factual. The dispute originated from a series of legislative measures taken by Ecuador in connection with its hydrocarbon industry. Following a significant increase in oil prices, Ecuador attempted to change contractual arrangements in the industry by imposing its own participation in profit distribution and changing participation contracts back into service contracts, thus substantially decreasing the profitability for private investors. In the arbitration, Murphy Exploration & Production Company – International submitted that the legislative measures constituted a unilateral and unlawful modification of the participation contract by Ecuador and had a detrimental effect on the financial performance of the claimant's investment. The claimant also contended that the measures adopted forced it to sell its interest in the Consortium, which it did in March 2009. The claimant submitted among others that Ecuador indirectly expropriated its investment, violated the FET/minimum standard of treatment, including denial of justice claims, full protection and security, and an umbrella clause. Among various defences, the state relied on Murphy Ecuador's settlement of the claim with prejudice in the course of the parallel ICSID proceedings. One of the critical issues thus arose in relation to the precise scope and effect of the settlement agreement (together with the SPA provisions as part of the overall settlement structure).

The tribunal clarified that it would approach the question of the assignment of a claim exclusively as a factual one, refusing to consider at all the Texas law applicable to the SPA.[102] This time the tribunal emphasised only the factual

101 *Murphy Exploration & Production Company International v. Republic of Ecuador*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award dated 6 May 2016.

102 Ibid. para. 361.

role of national law in the context of international law as a reason for its decision, expressly saying that: '*[i]n the Tribunal's view, Texas law is not relevant to its analysis because municipal law in an international law context is treated as a fact. The Tribunal approaches its analysis of whether an assignment took place under the SPA as a factual one*'.[103] Nevertheless and similar to *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, the tribunal went beyond the factual assessment. To that end, the tribunal engaged in ascertaining the *'purpose'* of provisions inserted into the SPA text.[104]

Looking at the complexities of dealing with normative material as pure facts in the contexts of international and national law, and given the inherent normative quality of contracts, it should be easier and more proper to accept fact-finding as an element, but not an overall analysis, of the content of contractual provisions. As seen in the analysed *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, the tribunal's conclusion on treaty breach was dependent on understanding the content of peculiar provisions of the contract. The tribunal had to understand not what the contract said or simply how the witness or the experts understood it, but what its provisions meant and what the consequences of this understanding should be. In other words, the normative quality of the document was still at stake. Similarly, in *Murphy Exploration & Production Company – International v. the Republic of Ecuador,* the jurisdiction depended upon the content and legal implications of the SPA and settlement agreement.

This being said, one no doubt can accept pure contractual facts. While criticising reducing contract interpretation to fact-finding, this work also recognises that there might be a *genuine fact-finding* approach in relation to contracts as evidentiary material in investment treaty arbitration. The burden of proof and standard of proof would operationalise it.[105] In simpler terms, one has to acknowledge that not all forms of contract-related analysis should necessarily or automatically be captured by the notion of contract interpretation in investment treaty arbitration.

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103 Ibid.

104 Ibid. para. 383–384.

105 For a comprehensive account of the burden of proof and standard of proof in investment treaty arbitration, see Frédéric G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018) 23 –108. See also, Lucy Reed, 'Confronting Complexities in Fact-Finding and the Nature of Investor-State Arbitration' (2012) 106 Proceedings of the Annual Meeting (American Society of International Law) 233.

Two groups of examples illustrate fact-finding in relation to contracts for the purpose of this section.

The first group relates to the factual circumstances *of the reality* that surround the contract and its text. Tribunals might need to factually assess whose signature is on a contract, whether a contract contains handwritten statements, and on which date a contract was signed,[106] as well as numerous other elements, including, but not limited to, the various aspects of the parties' conduct in relation to contract performance, etc. The factual finding in relation to a handwritten statement or note may be used, for instance, to decide on the textual scope of a contract for its subsequent interpretation in the context of a treaty claim.[107] The factual finding on the date on which several contracts were signed may become a relevant factual consideration, together with other factors, to accept the consideration of treaty- and contract-based disputes as a single proceeding.[108] According to a general procedural rule, for all these facts, a party alleging their existence would bear the burden of proof. In terms of a standard of proof, the preponderance of evidence or the balance of probabilities would be most typical. Other types of standards of proof could appear as well: a *prima facie* standard of proof would find its application in the course of preliminary screening by an arbitral institution whereas a *heightened standard* of proof could be expected in exceptional circumstances of fraud or corruption.

The second group relates to a more specific factual assessment of the economic parameters of a contract for deciding whether an underlying transaction

106 The question as to when a contract is concluded though is not a factual question but a legal one. In *Mercer International Inc. v. Government of Canada*, for instance, the tribunal expressly recognised the issue of the date of contract conclusion as being a legal one and not factual – see *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award dated 6 March 2018, para. 3.82–3.83.

107 Prior to deciding on the legal effect of handwritten statements on the text of a joint venture agreement, tribunals addressed them factually in *Ioanannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18) and *Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/07/15).

108 In *Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, the tribunal took into account a fact that two contracts (the Concession Contract and the Investment Agreement) were signed on one day as a relevant consideration for deciding to consider treaty- and contract-based disputes arising in relation to these contracts in a single proceeding. The fact that two contracts were signed on one day became an element of analysis of the so-called implied consent of the parties that their disputes arising out of various instruments be resolved in a single proceeding – see *Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad* (ICSID Case No. ARB/05/12), Decision on Jurisdiction dated 5 March 2008, para. 199.

is an investment.[109] This kind of assessment is specific to investment treaty arbitration. It has nothing to do with the widespread and largely misleading view that arbitrators in international commercial arbitration may be sufficiently equipped with *business sense* alone to appropriately address contract interpretation without considering the proper law governing a contract. What features here is an evidentiary assessment of a contract as a commitment of resources (money or assets) to the economy of a host state for the purpose of deciding on jurisdiction. This assessment of the *economic materialisation* of a contract as an investment may take place over the course of the application of the *Salini test*,[110] or its reduced variant,[111] or over the course of establishing the

109 There is a broad recognition that the economic parameters of a contract in the context of its assessment as an investment should be the maximum objective and thus be resolved evidentially before treaty-based tribunals – see Campbell McLachlam, Laurence Shore and Matthew Weininger, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 262; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 189–202; Jan Asmus Bischoff 'Conflict of Laws and International Investment Arbitration' (2018) 7(1) European International Arbitration Review 143, 168–170; Jan Asmus Bischoff and Richard Happ, 'The Notion of Investment' in Marc Bungenberg and others (eds), *International Investment Law: A Handbook* (Hart Publishing 2015) 500–14.

110 The Salini test (named after *Salini Costruttori SpA v. Morocco* ICSID Case No ARB/004) appears as a response to a lack of explicit definition of the criteria used to identify investments under the ICSID Convention. The test is also relevant for non-ICSID cases of investment treaty arbitration. The test refers to four criteria: (1) contribution of money or assets, (2) certain duration, (3) assumption of risk and (4) contribution to the economic development of the host state. For an overview of the test's components and jurisprudence on their application, see Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2012) 265–89. The award in *Bayindir Insaat Turizm Ticaret ve Sanayi AS v. Islamic Republic of Pakistan* ICSID Case No. ARB/03/29 is an example illustrating the factual assessment of the economic materialisation of investment on the basis of the Salini test. The tribunal in particular verified that an investor had committed substantial resources (know-how, personnel and financial resources – all ascertained factually), that the project had run for more than three years and that it involved risks and contributed to the economic development of the host state. A similar assessment took place in *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11 and many others. At the same time, not all elements of the Salini test are always to be assessed factually. For instance, issues of contract duration may not be clear from the face of a contract and may require a construction of the content of contractual provisions and a decision on whether prolongation took place or not. Again, an inherent difficulty of an abstract demarcation between legal interpretation and legal reasoning and fact-finding is difficult to avoid.

111 Not all elements of the Salini test are uncontroversial. In particular, a commitment to the economic development of the state while applied in many awards was denied for instance in *Consortium Groupement L.E.S.I. – DIPENTA v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/8). Zachary Douglas considers the criterion of contribution to

existence of investment under parameters set by a particular IIA in non-ICSID proceedings.[112] It is worth considering that a fact-finding focus on economic materialisation originates from the desire to ensure objectivity and to balance characterisations under national laws. As it is only the economical parameters of a transaction that would be verified through fact-finding, all contract-related *legal* aspects, or legal materialisation, including issues of identification of the proper parties to a contract, assignment, contract validity, scope of protectable rights/assets, etc., would still be assessed with the application of the proper law of a contract.[113] Because the issue of economic materialisation is typically addressed at the jurisdictional stage, it is an investor as a rule who would bear the burden of proof. In terms of standard of proof – the balance of probabilities or the preponderance of evidence would be most typical. When assessed at the screening stage by an arbitral institution[114] a *prima facie* standard of proof would be sufficient.

To conclude on this point, because contracts are frequently part of '*the overall factual and legal matrix*',[115] they may necessitate fact-finding *and* legal interpretation. The precise *configuration* of a contractual role and an appropriate analytical approach would depend upon the tribunal's decision. Even for the identified examples, situating contract analysis as an exclusively fact-finding exercise might be problematic. This is not to say that the distinction is negligent. It is of particular sensitivity in adjudicatory contexts. Whenever a question relates to the meaning of the words used in a contract, i.e., whenever a

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the economic development of the host state to be highly subjective; therefore, in his view, the economic materialisation of an investment requires a commitment of resources to the economy of the host state to be established and entails the assumption of risk in the expectation of a commercial return – see Rule 24 in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 189.

112 IIAs frequently offer a broad definition of investment with a list of various types of assets and contracts which should qualify as an investment. A focus on the economic materialisation of investment nevertheless still takes place – see Campbell McLachlam and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 262.

113 Campbell McLachlam and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 262.

114 The limits of *prima facie* screening of jurisdiction of an arbitral institution were discussed in *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures dated 9 December 2009, para. 43.

115 *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009, para. 127.

question is about ascertaining the content of contractual provisions, contract interpretation becomes inevitable.

4.2.2 *Contract Interpretation or Doctrinal Assessment of Contractual Provisions under International Law*

Contract interpretation should be distinguished from doctrinal analysis or assessment regarding the effect of specific contractual provisions in investment treaty arbitration. Some contractual provisions, such as stabilisation clauses, limited liability clauses and forum selection clauses, *repeatedly* come into a close *interplay* with international law. This interplay results in the development of established views, or doctrines, on the relevance and effect of these provisions on certain issues regulated by international law. The doctrinal perspective concerning the effect of forum selection clauses justifies, for instance, a conclusion that these clauses cannot appear as an impediment to treaty jurisdiction.[116] A doctrinal perspective over the contractual limitation of liability or a contractual waiver of liability, while still somewhat unsettled, tends towards not excluding their effect for the calculation of compensation awarded to a foreign investor for violations of standards of investment protection.[117] The

116 See also Jean Ho suggesting that a general principle of international law has been crystalised in relation to forum selection clauses that affirms '*that contractual forum selection clauses are not jurisdictional bars to international claims*' – Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) 39–41.

117 While it is possible to find awards in which a treaty-based tribunal has found contractual provisions to be irrelevant for the decision on compensation, an increasing number of awards affirm their relevance. For awards in which tribunals did not consider contractual provisions relevant for the calculation of compensation, see *Venezuela Holdings, B.V., et al* (*case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.*) *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of the Tribunal dated 9 October 2014, para. 218, 254; see also *Ionannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award dated 3 March 2010, para. 477–485; *Ron Fuchs v. The Republic of Georgia*, ICSID Case No. ARB/07/15, Award dated 3 March 2010, para. 477–485 (both *Ionannis Kardassopoulos* and *Ron Fuchs* involve stabilisation clauses of a specific character, limiting the state's liability for reimbursement in the case of expropriation, confiscation or nationalisation). For awards in which tribunals found contractual provisions to be relevant for the calculation of compensation, see, for instance, *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award dated 7 June 2012, para. 65–85; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Award dated 7 February 2017, para. 358–359; see *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/30, Award of the Tribunal dated 8 March 2019, para.170–188 (though the award appeared after 31 January 2019 as the date up to which all awards and decisions analysed in this work have been considered, it is cited here as providing the most explicit explanation on the interplay of the provisions limiting liability

doctrinal perspective regarding stabilisation clauses, to be addressed in more detail below, justifies a conclusion on its incapacity to freeze the regulatory power of the state.

Before explaining how doctrinal understanding shall be disassembled from contract interpretation, it is important to clarify what a doctrine is and what is meant by '*doctrinal understanding*' as it is used in this section. There might be various nuances in perceiving what a legal doctrine is. By saying that doctrine is a currency of law, some authors emphasise its omnipresent importance.[118] Others choose to employ a reference to a doctrine for characterising the activity of scholars and the product of their activity.[119] Here, legal doctrine is understood in line with what Martti Koskenniemi suggests when defining international law doctrine as dealing with *a particular legal question*, in contrast to international law theory addressing international law as a whole.[120]

If a doctrine is an established answer to a specific legal question, doctrinal understanding of the effect of contractual provisions implies that such understanding gives an established answer to a specific legal question that is potentially affected by a contractual provision. It would not be incorrect to employ a term of *doctrinal interpretation*, instead of doctrinal analysis, for the effect of contractual provisions. According to Black's Law Dictionary, doctrinal interpretation is a kind of interpretation, that is based on an established answer to a specific legal question, rather than fairly deriving the meaning from the interpreted text (*interpretation doctrinalis*).[121] When treaty-based tribunals establish doctrinal understanding of contractual provisions in investment treaty arbitration, or, in other words, when they exercise *doctrinal interpretation*, they do not spell out, as a rule, the intermediary results of the textual ascertainment

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and the calculation of compensation awarded in investment treaty arbitration). See also the works of Julian Arato, which capture some inconsistency in tribunals' reasoning in respect to contractual provisions and the calculation of compensation for the violation of standards of investment protection – Julian Arato, 'The Logic of Contract in the World of Investment Treaties' (2016) 58 (2) William and Mary Law Review 387–393; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 (1) American Journal of International Law, 22–24.

118 Emerson Tiller and Frank B Cross, 'What is Legal Doctrine', (2005) 100 (1) Northwestern University Law Review, 517, 517.

119 Alexander Peczenik , 'Legal Doctrine and Legal Theory' in E Potaro (ed), *A Treatise of Legal Philosophy and General Jurisprudence: Volume 4: Scientia Juris Legal Doctrine as Knowledge of Law and as a Source of Law* (Springer 2005) 1–2.

120 Martti Koskenniemi, 'International Legal Theory and Doctrine' in *Max Planck Encyclopedia of Public International Law* <https://opil-ouplaw-com.ezproxy.uio.no/view/10.1093/law:epil/9780199231690/law-9780199231690-e1618>, last accessed 25 June 2021.

121 Bryan A Garner (ed), *Black's Law Dictionary* (10th edn Thomson West 2014) 944.

of the content of contractual provisions. Instead, tribunals immediately rely on a doctrinal perspective in relation to the effect of contractual provisions. They perceive a stabilisation clause as not undermining the regulatory function of the state, provisions on limitation or waivers of liability as affecting the calculation of compensation but not substituting the standard of compensation defined by international law, and forum selection clauses as not undermining treaty-based jurisdiction.

The doctrinal understanding does not appear at once; it receives clarification and refinement over time, through growing jurisprudence and via scholarly works. The most illustrative in terms of its evolutionary development appears to be the doctrinal understanding of stabilisation clauses that were first developed in contract-based arbitration and subsequently reincarnated and adjusted in investment treaty arbitration. In contract-based arbitration, the clause appears in early concession contracts in which it serves to ensure protection against legislative changes. If at an early stage, stabilisation clauses could freeze the possibility to amend the legislature, subsequently their effect evolved into signifying the non-application of amended legislature to the specific investor and ultimately, as evidenced by the *Aminoil* award,[122] acknowledging the role of the state to regulate and even to nationalise property, but imposing negative financial consequences for such acts.[123] The textual expression of

122 *The Government of the State of Kuwait v. The American Independent Oil Company* (*AMINOIL*) (Award, 1982) (1982) 21 ILM 976, para. 88–102.

123 The described peculiarities in the doctrinal understanding of the effect of stabilisation clauses in the context of concession agreements are well summarised in Margarita Coale, 'Stabilization Clauses in International Petroleum Transactions' (2002) 30 Denver Journal of International Law and Policy 217 and Christoph Ohler, 'Concessions' in Max Planck Encyclopedia of Public International Law, para.27–28, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1512?prd=EPIL>, February 2013, last accessed on 25 June 2021; on the practical aspects of drafting stabilisation clauses in response to various established views on its operation, see Sam Luttrell and Amanda Murphy, 'Stabilisation Provisions in Long-Term Mining Agreements' available at <https://globalarbitrationreview.com/chapter/1194142/stabilisation-provisions-in-long-term-mining-agreements#footnote-037>, last accessed on 25 June 2021. See also Thomas Wälde and George Ndi, 'Stabilizing International Investment Commitments: International Law versus Contract Interpretation' (1996) 31 Texas Internal Law Journal 215; Francisco Garcia-Amador, 'State Responsibility in Case of "Stabilization Clauses" ' (1993) 2 Journal of Transnational Law and Policy 23; Antony Crockett, 'Stabilisation clauses and Sustainable Development: Drafting for the Future' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 516–538; Andrea Shemberg, 'From Stabilization Clauses and Human Rights to Principles for Responsible Contracts' in N Jansen Calamita and others (eds), *The Future of ICSID and the Place of Investment Treaties in International Law* (British Institute of International and Comparative Law 2013) 61–77; Mario Mansour and Carole Nakhle, 'Fiscal Stabilization in

the clause has also undergone some changes to expressly reflect the shift in the commonly accepted doctrinal understanding. As a result, some new subtypes of stabilising provisions, primarily economic equilibrium clauses, have appeared in addition to the freezing clauses and become dominant.[124]

While in principle, scholarly views may differ,[125] investment treaty tribunals continue to give stabilisation clauses a certain effect rather than to deprive them of any. The effect is a recognition of the legitimate expectations underpinning stabilisation clauses that, coupled with other relevant factors, and more importantly with the level of negative implication or substantial deprivation, may lead to a conclusion on the violation of the applicable standard of investment protection. The discussion on stabilisation clauses accordingly hinges

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Oil and Gas Contracts: Evidence and Implications' (2016) OIES paper: SP 37 <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2016/01/Fiscal-Stabilization-in-Oil-and-Gas-Contracts-SP-37.pdf>, last accessed on 25 June 2021; John Gotanda,'Renegotiation and Adaptation Clauses in Investment Contract (2003) 36 Vanderbilt Journal of Transnational Law 1461.

124 It is interesting to note how this perception has gradually gained prominence in scholarly observations. In 1996, Thomas Wälde and George Ndi captured that the pinnacle doctrinal views surrounding stabilisation clauses were still unsettled: the freezing clauses became a matter of the past and new successors – renegotiation and economic equilibrium provisions – were gaining prominence in contract drafting, although they had yet to be tested. See Thomas Wälde and George Ndi, 'Stabilizing International Investment Commitments: International Law versus Contract Interpretation' (1996) 31 Texas Journal of International Law 215, 243.

125 Katja Gehne and Romulo Brillo argue that '*the best way to deal with stabilization clauses is to make them history – by interpreting them in a harmonizing way when applicable and by not deploying them anymore in investor-state contracts. Investment protection should start with general existing FET stability* (*compensation for unfair treatment*)*, subject to good faith on the side of the state and due diligence on the side of the investor, including social responsibility on the basis of international standards and norms*'. They agree that certain projects may warrant additional safeguards, but argue that it should not be a uniform tool, but rather an individualised commitment: '*[t]here will be no one-size-fits all solution similar to stabilization commitments but a challenge to agree a carefully tailored solution for each individual case, based on specific interests involved.*' – see Katja Gehne, Romulo Brillo, 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' 2013/46 NCCR Trade Working Paper, available at <https://www.wti.org/research/publications/660/stabilization-clauses-in-international-investment-law-beyond-balancing-and-fair-and-equitable-treatment/>, last accessed on 25 June 2021. Somewhat differently, Moshe Hirsch explains that investment treaty tribunals do not use the FET as a substitute for a stabilisation clause because regulatory changes in the absence of stabilisation clauses are not sufficient for finding a breach of the FET – see Moshe Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law' 12 (2011) The Journal of World Investment & Trade 783, 806.

upon its possible interplay with the existing standards of investment protection. Some authors even suggest that a more restrictive approach to understanding stabilisation clauses, which emerged at a later stage, particularly after the *Aminoil* case in contract-based arbitration, resulted in an attempt '*to offset these trends in investment treaty arbitration*'.[126] Even if not automatically generating a conclusion on a breach of international investment law, stabilisation clauses in the context of investment treaties may indeed be viewed as being more responsive to the undertaking to stabilise legal frameworks because of a concept of protectable legitimate expectations. All this leads to an observation about doctrinal understanding of the provision which appears somewhat more sensitive to the undertaking not to amend legislature than merely recognising a function of renegotiation or negative financial consequences as practised in contract-based arbitration.

The emergence and establishment of this doctrinal understanding with regard to the stabilisation clause in investment treaty arbitration can be supported by three examples evidencing the existence of an established view regarding its effect. First, cross-referencing awards, as a reasoning supporting the understanding of the stabilisation clause in other cases, demonstrates its doctrinal conceptualisation. A contractual provision is not understood solely from its wording or in the context of certain normative regulation; it is understood in the context of a 'common' perception, an established view, that gains development in international investment law and finds its way into awards. Second, an established understanding of the stabilisation clause can be demonstrated when disagreement between the parties revolves around whether or not it is proper *to qualify* a certain contractual provision as a stabilisation clause. Whenever one refers to qualification, one anticipates certain legal consequences associated with that qualification. The mere decision that a certain provision is a stabilisation clause demonstrates an expectation of certain legal consequences and shows that stabilisation clauses have reached a sufficient level of doctrinal conceptualisation. Third, legal reasoning in relation to the legal implications of the absence of a stabilisation clause also signals certain established views associated with it, and accordingly the consequence associated with its absence. Examples of cases of investment treaty arbitration below illustrate this point.

126 Muthucumaraswamy Sornarajah, 'Developing Countries in the Investment-Treaty System: A Law for Need or a Law for Greed?' in Stephan W Schill and others (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar Publishing 2015) 59.

In *CMS Gas Transmission Company v. The Republic of Argentina*,[127] relating to a semi-contractual instrument, i.e., a licence, the tribunal found that two provisions[128] in the licence accepted by the foreign investor were stabilisation clauses and had to be enforced in investment treaty arbitration. The tribunal made it clear that the provisions were understood in light of the discussion on stabilisation clauses in the context of treaty protection, that was '*well known in international law*'[129] and that '*the stabilisation ensured a right that the Claimant can properly invoke*'.[130]

The stabilisation clauses subsequently received full protection under umbrella clauses:

> While many, if not all, such interferences are closely related to other standards of protection under the Treaty, there are in particular two stabilisation clauses contained in the License that have significant effect when it comes to the protection extended to them under the umbrella clause. The first is the obligation undertaken not to freeze the tariff regime or subject it to price controls. The second is the obligation not to alter the basic rules governing the License without TGN's [investor] written consent.[131]

In the referred earlier *Burlington Resources Inc. v.Republic of Ecuador*,[132] parties disagreed over whether two provisions on taxation should properly qualify as a tax stabilisation clause or merely as a renegotiation clause. The clause read as follows:

> Modification to the tax system: In the event of a modification to the tax system or the creation or elimination of new taxes not foreseen in this Contract or of the employment contribution, in force at the time of the execution of this Contract and as set out in this Clause, which have an impact on the economy of this Contract, a correction factor will be

127 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.

128 The first stabilisation provision related to the undertaking not to freeze the tariff regime or subject it to price controls and if a licensee would have to accept a lower tariff, compensation had to be provided, and the second stabilisation provision related to the undertaking not to alter the basic rules governing the licence without the investor's consent.

129 *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award dated 12 May 2005, para. 151.

130 Ibid.

131 Ibid. para. 302.

132 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.

> included in the production sharing percentages to absorb the impact of the increase or decrease in the tax or in the employment contribution burden. This correction factor will be calculated between the Parties and will be subject to the procedure set forth in Article thirty-one (31) of the Regulations for Application of the Law Reforming the Hydrocarbons Law.[133]

Before reaching a conclusion as to whether the provisions qualified as a tax stabilisation or merely as a renegotiation clause, the tribunal labelled them in a neutral form as 'tax modification' clauses.[134] Each party put forward their arguments as to why the provisions should or should not qualify as a stabilisation clause.[135] Other arguments in the dispute became dependent on the categorisation of the provisions. The finding of a stabilisation clause would imply the mandatory character of the clauses with all connected consequences, while a finding of a renegotiation clause would not.[136] In ascertaining the content of the provisions, the tribunal turned to extensive reasoning concerning their language in coordination with other contractual provisions,[137] but it is the divide between a mandatory stabilisation clause and a non-mandatory renegotiation clause that ultimately shaped the analysis. Upon finding that the clauses in question were mandatory, the tribunal attached to them the title of 'tax stabilisation clause'. That conclusion, while not self-sufficient for a finding of expropriation, nevertheless when accompanied with the substantial deprivation that the claimant experienced, played a role in the ultimate decision that the state engaged in unlawful expropriation.[138]

Similarly, in *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*,[139] considering a settlement agreement, the tribunal backed up its analysis with a reference to the stabilisation clause concept.[140]

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133 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012, para. 21.

134 Ibid.

135 Ibid. para. 268, 269, 316, 353.

136 The case associated an economic equilibrium clause with the stabilisation clause and distinguished them from a renegotiation clause.

137 *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability dated 14 December 2012, para. 316–335.

138 Ibid. para. 543–545.

139 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22.

140 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award dated 23 September 2010, para. 9.3.25.

The lack of a stabilisation clause led to a conclusion on the absence of any specific commitment '*that could limit its sovereign right to change its law* (*such as a stability clause*) *or that could legitimately have made the investor believe that no change in the law would occur*.'[141] In the same vein, various tribunals have perceived the stabilising effect of FET restrictively in the absence of a stabilisation clause agreed between the parties.[142]

An understanding of the reasoning in relation to the stabilisation clause as being *doctrinal* can also be observed if one looks at it through the six functions of the legal dogmatics identified by Robert Alexy.[143] The table at the end of this chapter summarises each of the functions in the example of a stabilisation clause.

Thus, as has been discussed and illustrated with the example of the stabilisation clause, certain contractual provisions trigger a specific type of analysis in investment treaty arbitration – doctrinal analysis. The doctrinal analysis of the effect of these clauses shall be separated from contract interpretation. When tribunals attempt to ascertain what the parties have agreed to in respect to a contractual provision, they are engaged in contract interpretation. These interpretative efforts precede any other type of analytical effort and are governed by the national law applicable to a contract. When tribunals proceed to finding on the effect of the contractual provisions under international law, they are engaged in specific doctrinal analysis. These analytical efforts are governed by specific rules and principles of international law. The distinction is not easy to draw, merely because interpretation of stabilisation clauses, limited liability clauses and forum selection clauses may not necessarily transcend a textual reading of them. This textual understanding occasionally finds some express demonstration, and is more frequently implicit in the absorbing doctrinal assessment. Despite the difficulties, the conceptual distinction between contract interpretation and doctrinal analysis shall nevertheless be maintained as contributing to the methodology of legal reasoning, based on different sources. *Burlington* demonstrated that explicit forms of contract interpretation may be rather extensive. Furthermore, forum selection clauses and limited liability clauses, and, to a lesser degree, stabilisation clauses, may pose questions

141 Ibid. para. 9.3.31.

142 See, for instance, *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award dated 11 September 2007, para. 332; *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Award dated 31 October 2011, para. 368–374, 404.

143 Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Clarendon Press 1989) 255.

regarding their invalidity, which in turn would require more palpable contract interpretation than just a textual reading before a conclusion is drawn on their (doctrinal) effect.[144]

4.2.3 *Deference*

Another important aspect in the exercise of the power to interpret contracts is possible reliance on a concurrent power of another court or tribunal. That a forum selection clause cannot exclude an inherent power of a treaty-based tribunal to interpret contracts does not mean that interpretation exercised by a state court or in international commercial arbitration as a *contractual forum* is always irrelevant regarding investment treaty arbitration. Treaty-based tribunals may find interpretation exercised by a contractual forum to be persuasive and authoritative. If so, they may choose to rely in part or entirely on the interpretation of a contractual forum. They also possess the authority to refuse to rely on the interpretation exercised by a contractual forum, deeming it irrelevant or otherwise unsuitable.

No clear set of rules exists as to how to approach concurrent powers of a contractual forum and of a tribunal in investment treaty arbitration.[145] Doctrines or principles of *res judicata* and *lis pendens* that are frequently invoked as instruments for the resolution of jurisdictional conflicts may assist in this regard. Yet, their role here is somewhat limited. Concerning *res judicata*, it is almost impossible that the triple test of identity in the subject matter, identity in the cause of action and identity in the parties takes place in disputes before a treaty-based tribunal and a contractual tribunal.[146] The subject

144 National law is particularly critical of problems with validity in relation to the limitation of liability and exemption clauses – Marcel Fontaine and Filip de Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 381–391.

145 By way of exception, one can mention concurrent powers ordering interim measures by state courts and arbitral tribunals to be studied more than other types of concurrent powers. See, for instance, Bernd Ehle, 'Concurrent Jurisdiction: Arbitral Tribunals and Courts Granting Interim Relief' in Anita Alibekova and Robert Carrow (eds), *International Arbitration Mediation – From the Professional's Perspective* (Yorkhill Law Publishing 2007) 157–169; Rachael D Kent and Amanda Hollis, 'Concurrent Jurisdiction of Arbitral Tribunals and National Courts to Issue Interim Measures in International Arbitration' in Diora Ziyaeva (ed), *Interim and Emergency Relief in International Arbitration – International Law Institute Series on International Law, Arbitration and Practice* (Juris 2015) 87–106.

146 In international law, *res judicata* has been rather uncontroversially affirmed as a general principle of international law – Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 336–372. For *res judicata* in international commercial arbitration, see the ILA Final Report on Res Judicata and Arbitration. While the report does not attempt to address *res judicata* in investment treaty arbitration, it may nevertheless be relevant as reflecting fundamental features of the concept – Filip

matter, or relief sought, is different in a contractual forum and in investment treaty arbitration. Being based on a contract and not on a treaty, the cause of action before a contractual forum is not identical to a treaty cause of action either. State enterprises or state-related entities appear as a party to a contract and a dispute in a contract forum much more often than a state does directly, whereas in investment treaty arbitration, the state is a respondent.[147] Regarding *lis pendens*, the fact that proceedings are not before the fora of equal status, or in the same legal order, makes it difficult to argue effectively, if at all, on a stay or a termination of treaty proceedings in favour of a contractual forum.[148] Each doctrine requires revision in order to be able to operate and resolve issues relating to the exercise of competitive powers and their result. Only if revision of the doctrines of *res judicata* and *lis pendens* results in distilling their borders (a rather problematic exercise), one would succeed in overcoming the identified challenges.

In the absence of universally applied coordinating rules that would offer guidance regarding the allocation of the powers to interpret contracts between various adjudicatory bodies and clarify their effect, a combination of common balancing considerations has to be employed. To inform the solution in a credible manner, these considerations should balance between an account of integrity in adjudication, on the one hand, and reasonableness, together

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de Ly (Chairman) and Audley Sheppard (Rapporteur), 'ILA Final Report on *Res Judicata* and Arbitration' (2009) 25(1) Arbitration International 67, 75. For complexities surrounding the concept of *res judicata* in the context of investment treaty arbitration, see Pedro J Martinez-Fraga and Harout Jack Samra, 'The Role of Precedent in Defining *Res Judicata* in Investor–State Arbitration' (2012) 32 Northwestern Journal of International Law & Business 419.

147 For the composition of the parties to contracts which tribunals in investment treaty arbitration have to interpret, in comparison to the parties of a treaty dispute, see Chapter 1.

148 For a view on the reasons leading to *lis pendens* in investment treaty arbitration and for a comprehensive discussion of the concept, see Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 104–105, 108, 112–155; see also Kaj Hobér, '*Res Judicata* and *Lis Pendens* in International Arbitration' (2014) 366 Recueil des Cours de l'Académie de Droit International 99, 331–374; the ILA Final Report on *Lis Pendens* and Arbitration is also of relevance with a valuable overview of the intricacies of *lis pendens* in investment treaty arbitration, though the recommendations are designed for international commercial arbitration. It is noteworthy that the ILA Final Report observed a stay of proceedings in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction dated 29 January 2004, ICSID Case No. ARB/02/6) as not being the approach that has been 'universally approved' – Filip de Ly (Chairman) and Audley Sheppard (Rapporteur), 'ILA Final Report on Lis Pendens and Arbitration' (2009) 25(1) Arbitration International 3, 17–20.

with practicality or pragmatism, on the other hand. Considerations of integrity would invite looking at adjudication exercised by different courts and tribunals as aiming to exhibit some coherence while avoiding conflicting and mutually exclusive solutions. Considerations of reasonableness would enable one to evaluate without rigorously re-examining whether adjudication in a given proceeding does not undermine the basic characteristics of due process. Considerations of pragmatism would guide as to whether and to what extent it is practical to engage in justifying reliance on interpretation exercised by another adjudicatory body instead of autonomously answering a concrete interpretative question which a tribunal is facing.

Guided by considerations of integrity, reasonableness and pragmatism, a treaty-based tribunal may accordingly find various supportive premises for its decision to either uphold the interpretation exercised by a contractual forum or not. A treaty-based tribunal may consider it important that a contractual forum interpret contracts not in passing but as a central part of a contract claim, relating for instance to issues of contract formation, contract validity, contract performance, contract termination, etc. A treaty-based tribunal may further take note of the fact that the parties to a contract dispute before a contractual forum are identical to the contracting parties, and of the implications this identity affords in terms of the thoroughness of their investigation and evidentiary matters. There is apparently less of a possibility to investigate all relevant circumstances when only one or neither of the contracting parties are the parties to a treaty dispute. A treaty-based tribunal may also find it important that the parties to a contract expressly entrust a contractual forum to interpret the contract. As discussed earlier, while this entrustment does not deprive a treaty-based tribunal of the power to interpret contracts as such, it may nevertheless serve as a reason to find the interpretation exercised by the contractual forum to be authoritative. While helpful, the supportive premises do not give a predictable answer towards the role of interpretation exercised by another forum. They exhibit a clear want for an organised theory that would enable treaty-based tribunals to appreciate the boundaries of their own power to interpret contracts and the implications of the concurrent power of a contractual forum. After all, it is a treaty-based tribunal with the power to interpret contracts that is required to make an evaluation of all relevant considerations.

Deference as an evolving doctrine is capable of capturing all these considerations under its umbrella. It provides a conceptual framework that would enable various factors to be considered and various degrees of weight to be given to interpretation exercised by a contractual forum. Deference may also embrace *res judicata* and *lis pendens*, if the principles can be established despite the complexities described above.

The doctrine originates from national administrative laws, in which it is discussed in the context of the weight that state courts should give to decisions from non-judicial national institutions.[149] Complex inter-relations between the European Court of Justice (ECJ) and national courts are also approached from the perspective of deference.[150] For international adjudication, the doctrine appears particularly helpful as a reaction to a necessity to bestow some authority or weight to the findings of national courts or national law authorities in systems deprived of a clear hierarchical structure. The doctrine of margin of appreciation, developed by the ECtHR, is probably among the most discussed examples of deference.[151]

Deference being observed in various adjudicatory contexts does not mean that it can be taken part and parcel from one and transposed to another. For instance, while the margin of appreciation exercised by the ECtHR may serve as an attractive starting point for conceptualising deference in investment treaty arbitration, substantial differences between the ECtHR and investment treaty arbitration impact the relationships of each of these adjudicative bodies with domestic courts and make it inappropriate to conceptualise deference in investment treaty arbitration by exclusively following the ECtHR's model. For the ECtHR, margin of appreciation is not only premised on the proximity to the case at hand by domestic decision makers, or their expertise, but primarily on the flexibility of the conventional standards of human rights protection and subsidiarity of the ECtHR's revision. Overall, margin of appreciation relates not only to judicial decisions, but also to a broad range of administrative decisions. When it relates to judicial decisions, the fact that the ECtHR operates under the requirement of the exhaustion of local remedies makes it exposed

149 On the theory of deference in administrative law with material from three jurisdictions – Canada, the United States and England – see Paul Daly, *A Theory of Deference in Administrative Law*: *Basis, Application and Scope* (Cambridge University Press 2012). Some similarity to deference accorded to contract interpretation may be drawn with judicial deference to statutory interpretation exercised by executive bodies in the USA – see Antonin Scalia, 'Judicial Deference to Administrative Interpretations of Law' (1989) Duke Law Journal 511.

150 Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015); Jan Zglinski, 'The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law' (2018) 55 Common Market Law Review 1341.

151 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012); Shai Dothan, 'Margin of Appreciation and Democracy: Human Rights and Deference to Political Bodies' (2018) 9(2) Journal of International Dispute Settlement 145.

to decisions of domestic courts which are final. Investment treaty arbitration in turn has emerged incrementally without a clear and coherent system of review of domestic decisions. The breadth of issues that are put before investment treaty arbitration, make tribunals exposed not only to the concurrent powers of state courts, but also to overlapping and concurrent powers of other tribunals in international treaty arbitration and international commercial arbitration. Unlike the ECtHR, there is no general requirement regarding the exhaustion of local remedies. Thus, given the specificity of investment treaty arbitration, deference should be rather re-conceptualised anew within the concrete premises of the administration of justice exercised within its particular procedural framework. Because of the breadth of issues and contexts that appear in investment treaty arbitration, it makes sense to start with deference for specific categories of issues before conceptualising an entire umbrella of deference in investment treaty arbitration.

In investment treaty arbitration, deference, as a doctrine, largely remains in its infancy, with discussion primarily focused on its weight or authority, attributed by treaty-based tribunals to governmental measures in relation to foreign investment.[152] No scholarly efforts have been made so far to sharpen the doctrine of deference for investment treaty arbitration in relation to contract interpretation exercised by a contractual forum, though in practice, as will be demonstrated below, treaty-based tribunals have already started to justify the weight they accord to interpretation exercised by a contractual forum through what can be labelled as deference.

Conceptualising deference for contract interpretation primarily means identifying factors that guide decisions on giving weight to contract interpretation exercised by other adjudicatory bodies. These factors or criteria should

152 While Stephan Schill talks about a reference to deference as being a mantra for tribunals in investment treaty arbitration, he recognises a lack of sufficient theoretical basis being developed for the concept and calls for further scholarly efforts to clarify deference with the appropriate standards of review that would balance tribunals' deference and scrutiny in relation to government measures taken in relation to foreign investment – Stephan W Schill, 'Deference in Investment Treaty Arbitration: Re-conceptualising the Standard of Review' (2012) 3(3) Journal of International Dispute Settlement 577. Among other initial steps for conceptualising deference, a monograph of Caroline Henckels can be mentioned – see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press 2015); see also Gebhard Bücheler, *Proportionality in Investor-State Arbitration* (Oxford University Press 2015) and Valentina Vadi, 'Proportionality, Reasonableness and Standards of Review in Investment Treaty Arbitration' in Andrea Bjorklund (ed), *Yearbook on International Investment Law and Policy 2013–2014* (Oxford University Press 2015) 201–228.

enable treaty-based tribunals to embrace the autonomy of their own mandate and, only where appropriate, to pay due regard to the findings of other fora. No deference in principle should be accorded to findings reached through means which international law cannot accept and which in and of themselves constitute a violation of international investment law.[153] The exclusion does not appear as a result of rigorous judicial scrutiny, but primarily out of considerations of denials of justice or other apparently serious miscarriages of justice.

In the absence of factors that exclude deference, treaty-based tribunals still possess some flexibility when deciding whether or not to rely on interpretation and for defining how much weight should be given to the interpretation exercised by a contractual forum. The true reason for manoeuvring is premised on the very nature of contract interpretation and specificity of a treaty-based dispute. Contract interpretation does not appear as a rule among the remedies sought in contractual forums; it mostly appears as part of the reasoning in relation to the contractual remedies sought.[154] Furthermore, unlike contract

153 It may be argued that a failure to follow fundamental principles of due process would undermine the effect of decisions and awards. On the general principles of procedural law, see Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmerman and others (eds), *The Statute of the International Court of Justice: A Commentary* (1st edn, Oxford University Press 2006) 871–908; S I Strong, 'General Principles of Procedural Law and Procedural Jus Cogens' (2018) 122 Penn State Law Review 347; Charles T Kotuby Jr and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 157–203. On due process in international arbitration, see Matti S Kurkela, *Due Process in International Commercial Arbitration* (2nd edn, Oxford University Press 2010). At the same time, the suggestion does not mean that investment treaty arbitration turns into an appellate instance. For an articulated approach on the limited review in investment treaty arbitration, see *Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award of 6 July 2012, para. 261–265.

154 Contract interpretation does not usually appear as a contractual remedy enforced in a state court or in international arbitration – Nili Cohen and Ewan McKendrick (eds), *Comparative Remedies for Breach of Contract* (Hart Publishing 2005). It must also be acknowledged that some jurisdictions, for instance Ukraine, even exclude an application to state courts for contract interpretation alone. Issues of interpretation must be tied to a dispute in relation to the formation, performance, validity or termination of a contract and cannot be used as an independent remedy. Information letter of the Higher Commercial Court of Ukraine of 11 April 2005 № 01-8/344 'On Some Issues of the Practice of Applying the Rules of the Commercial Procedure Code of Ukraine, which were Raised in the Notes on the Work of Commercial Courts in 2004' para.3; Letter of The Higher Specialized Court of Ukraine for the Consideration of Civil and Criminal Cases of 3 June 2016 'On the Legal Positions of the Chamber of Civil Cases of the HSCU for 2015', section IV, para.1; Decision of The Higher Specialized Court of Ukraine for the Consideration of Civil and Criminal Cases of 7 September 2011 in Case № 6-25462ск11.

validity or contract termination, which have a binary answer (valid or invalid, terminated or not terminated), contract interpretation opens up the possibility of there being more options. What matters for a treaty-based dispute would be shaped by the precise contours of the dispute. Accordingly, instead of a contractual forum reaching conclusive findings, in most cases, it would be more appropriate to talk about the *degree of relevance and authority* to be accorded to the interpretation. Further, in addition to relevance, other factors that directly assess quality and clarity of the exercised interpretation by an alternative forum in national law would become determinative. Among relevant factors in this assessment appear the expertise of an alternative forum in the law applicable to a contract, participation of the immediate contracting parties to a dispute, etc. Upon consideration of all relevant circumstances, treaty-based tribunals would be exclusively placed to judge the *degree of relevance* and *authority* of the exercised interpretation by another forum.

A confirmation of deference in contract interpretation can be found in the pronouncement in *Deutsche Telekom v. India* case.[155] A treaty-based tribunal acting under the UNCITRAL Arbitration Rules addressed treaty claims relating to a violation of the FET, expropriation and some other standards of investment protection arising from the government's cancellation of a contract concluded between Antrix, a state-owned enterprise, and Devas, a company in which the claimant holds interests. The contract that appears central to the dispute concerns the provision of broadband services to Indian consumers as part of the overall projects on launching the operation of two satellites.[156] By the time a treaty-based tribunal started to consider the treaty claim, the ICC tribunal as a contractual forum had issued an award in a contract dispute between Devas and Antrix.[157] The ICC tribunal found in favour of Devas, concluding that Antrix was not authorised to terminate the agreement and awarded USD562.5 million to Devas in damages.[158] Ruling on the contractual claim, the ICC tribunal focused particularly on the interpretation of two contractual provisions: Article 7 (c) on termination because of the failure to obtain necessary frequencies and slot coordination required for the operation of a satellite and Article 11 (a) on termination on the basis of force majeure.[159]

155 *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award dated 13 December 2017.

156 Ibid. para.5.

157 Ibid. para.101–103; see also Lacey Yong, 'ICC Satellite Award Challenge to be Heard in Bangalore' dated 08 June 2018 available at <https://globalarbitrationreview.com/article/1170341/icc-satellite-award-challenge-to-be-heard-in-bangalore> accessed 25 June 2021.

158 *Deutsche Telekom v. India*, PCA Case No. 2014-10 Interim Award dated 13 December 2017, para. 101–103.

159 Ibid.

Deciding on the significance of the interpretation exercised by the contractual forum, a treaty-based tribunal explained its approach in the following words:

> [...] none of the Parties contends that the ICC Award has *res judicata* effect for purposes of this arbitration and rightly so. Indeed, the Tribunal's mandate is to resolve a treaty dispute involving the State as a respondent, which dispute is distinct from the contractual dispute brought before the ICC tribunal. That being said, the Parties also agree that the ICC arbitration was the forum chosen by Devas and Antrix to decide "any dispute or difference between the Parties [Devas and Antrix] as to any clause or provision of this Agreement or as to the Interpretation thereof [...]". Hence, *if issues in connection with the interpretation*, performance, or termination *of the Devas Agreement arise in the context of the resolution of the treaty dispute, the Tribunal considers that subject to a compelling reason to the contrary, it should accord deference to the findings of the ICC tribunal, being the forum entrusted with the settlement of contract disputes*.[160] [emphasis added]

Acting under the premise of a declared deference, the treaty-based tribunal did not engage in the independent construction of the contractual provisions while deciding on issues of liability in the Interim Award. It remains to be seen how the tribunal will approach contract interpretation at the stage of deciding on compensation, if any, and the degree of deference that will be accorded to the interpretation exercised by the ICC tribunal. The explanation given however does not specify detailed criteria for deference apart from clarifying a general presumption in favour of a contract-based forum in the absence of compelling reasons to the contrary.

Another confirmation of deference to contract interpretation exercised by a contractual forum was given in the *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* case.[161] Similar to *Deutsche Telekom v. India*, the case was still pending as of 30 December 2019. Similar to *Deutsche Telekom v. India*, a tribunal acting under the ICC Arbitration Rules appeared to be a contractual forum.[162] Unlike in *Deutsche Telekom v. India*, firstly, the treaty-based

160 Ibid. para. 114.

161 *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction dated 1 February 2016, Decision on Liability and Heads of Loss dated 21 February 2017.

162 For a general overview of various parallel proceedings that surrounded the case, see Douglas Thomson, 'Egypt Liable for Gas Supply Termination after Pipeline Attacks' dated

proceeding in *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* was conducted under the ICSID Arbitration Rules and secondly, the treaty-based tribunal found that the ICC award had a force of *res judicata*. As will be explained below, the reasoning exercised, however, evidences that the treaty-based tribunal ultimately hesitated to rely entirely on *res judicata*, and the approach to the interpretation in the ICC award should more appropriately be perceived in larger terms of deference verified by an independent interpretation.

In *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, the treaty-based claim arose out of the long-term General Sale and Purchase Agreement (GSPA) for the purchase of gas from Egypt and its subsequent supply to Israel which was interrupted during the Arab Spring. The claimants directly and indirectly held shares in East Mediterranean Gas (EMG), a company incorporated in Egypt that concluded GSPA and other contracts with the Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company. The claimants alleged that Egypt forced renegotiations of the GSPA, revoked its EMG-tax-exempt status, failed to ensure delivery of the contracted quantities of gas, restricted access to EMG funds and ultimately wrongly purported to terminate the GSPA.[163] In the claimants' view, all actions attributable to Egypt amounted to indirect expropriation, violation of full protection and security, FET and some other standards of investment protection. By the time the ICSID tribunal started to consider a treaty claim, a tribunal constituted under the ICC Arbitration Rules had resolved a contract-based dispute between the contractual parties in respect of the GSPA in *Eastern Mediterranean Gas and Israel Electric Corporation v. Egyptian General Petroleum Corporation and Egyptian Natural Gas Holding Company*.[164]

Interpretation of contractual terms on payment appeared critical for a treaty claim and a treaty-based tribunal had to clarify the significance of the ICC award in that regard. Despite the fact that different parties were involved in the ICC proceedings and the ICSID proceedings, the ICSID tribunal found that the ICC award had *res judicata* for '*those who are of privity of interest with them*',[165]

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28 February 2017 <https://globalarbitrationreview.com/article/1129255/egypt-liable-for-gas-supply-termination-after-pipeline-attacks> accessed on 25 June 2021.

163 *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction dated 1 February 2016, para. 7.

164 Ibid., para. 10–15.

165 *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss dated 21 February 2017, para. 331.

i.e. for the parties involved in the ICSID proceedings. According to the tribunal, the *res judicata* effect extended to all contractual matters resolved in the ICC proceedings.[166] Nevertheless, and most likely because of the pronouncement on *res judicata*, on the basis of the analysis of whether the parties had *'privity of interest'* to each other, which is not a commonly shared approach,[167] the tribunal ultimately chose to make it clear that it also exercised its own interpretative efforts to verify that the interpretative findings in the ICC arbitration were persuasive and to discharge its own mandate in respect of rendering and reasoning the decision. The ICSID tribunal specified:

> Nevertheless, independently of this finding [on res judicata], the present Tribunal has also conducted its own evaluation of the evidence presented to it about the same factual matters. On the basis of this evaluation, the Tribunal is satisfied that the findings of fact of the ICC tribunal set out above are correct and it so finds.[168]

The reasoning thus exercised fits well into a paradigm of deference. The same result could have been less debatable if, instead of entering into an uncertain field as to whether there could be *res judicata* in situations where parties are not identical, the tribunal had only reasoned through deference. No conceptual obstacles to this existed.

Finally, even though more complex questions of deference may appear in cases in which a treaty-based tribunal also acts as a contractual forum, the rationale described above is still valid here. These are situations in which a tribunal possesses a *compound* or hybrid jurisdiction, i.e. a jurisdiction based on a contract *and* on a treaty.[169] The question which appears in this regard is

166 Ibid.

167 A less restrictive approach to parties in respect of *res judicata* in investment treaty arbitration appears in scholarly works as well. One of the arbitrators in *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* Campbell MacLachlan co-authored the second edition of *International Investment Arbitration: Substantive Principles* where an argument for a less stringent approach to *res judicata* in investment treaty arbitration was presented – see Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 143–148, 155.

168 *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss dated 21 February 2017, para. 332.

169 *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 33, 115, 203; *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia*, UNCITRAL, Decision

whether a tribunal holding a compound jurisdiction should be considered a contractual forum for the purpose of deference by other treaty-based tribunals.[170] So far the tribunal exercising a compound jurisdiction considers contractual claims with the application of the proper law of contract, and given that other considerations discussed in this section above are fulfilled, no reason appears to exist that would exclude deference merely on the basis that together with the contractual jurisdiction this tribunal also exercises treaty-based jurisdiction. The question, as it is worded, is not merely theoretical. By way of illustration, a situation quite close to the one described above appeared in practice in relation to *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*)[171] and *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5). The only difference in the situation related to timing and the composition of the parties. The tribunal in *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*) whose jurisdiction was both contract- and treaty-based, refused to consider interpretation exercised by a treaty-based tribunal in *Burlington Resources, Inc. v. Republic of Ecuador*, arguing that its particular contract-based mandate took precedence over exclusive treaty-based jurisdiction exercised by the tribunal in *Burlington*.[172] It would be interesting to consider what might have been the reaction of the treaty-based tribunal had the *Perenco* tribunal considered a contract-based and a treaty-based claim before the *Burlington* tribunal. In particular, it would be interesting to see how the treaty-based tribunal in *Burlington* had to decide on deference, if any. Given that the tribunal in *Burlington* and the tribunal in *Deutsche Telekom v. India* involved two of the same arbitrators (Gabriella Kaufmann-Kohler and Brigitte Stern, with Gabriella Kaufmann-Kohler acting as a presiding arbitrator in

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on Jurisdiction dated 25 July 2012, para. 3, 372; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction dated 9 September 2008, para.10, 97; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6, Decision on Jurisdiction dated 30 June 2011, para.242; Decision on the Remaining Issues of Jurisdiction and on Liability dated 12 September 2014, para. 713.

170 For clarity, it is rather undoubtful, that the findings of a treaty-based tribunal in relation to contract-related legitimate expectations bears no impact on contract interpretation as was expressly confirmed, for instance, in *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award dated 1 November 2013, para. 297.

171 *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability dated 12 September 2014.

172 Ibid, para. 325–326.

both cases), it cannot be excluded that deference would be paid to the findings of the tribunal with compound jurisdiction under the same premises as expressed in *Deutsche Telekom v. India*, though much would depend on the precise angle of interpretative questions and the significance accorded to the identity of parties involved.

To conclude on this point, deference represents a suitable paradigm for approaching concurring powers of a treaty-based tribunal to interpret contracts and similar powers of a contractual forum, be it a state court or an arbitral tribunal acting under international commercial arbitration rules. Whether to accord deference and how to exercise it is up to treaty-based tribunals to decide. The central factors for this decision are the nature of interpretative questions before a treaty-based tribunal and before a contractual forum, the identity of the parties in a treaty claim and before a contractual forum, the absence of denial of justice or other serious violations undermining the binding force and overall persuasiveness of the findings of a contractual forum.

One may question the value of the deference if the decision on contract interpretation still remains largely within the scope of a treaty-based tribunal, with only extreme cases being unambiguously excluded from its scope. Instead of considering it to be a sort of algorithm, deference should be primarily perceived as a paradigm to be clarified and shaped in a given adjudicatory context and under the circumstances of a concrete case. When observed as a paradigm, one quite rightly perceives the observations on ambiguity and opaque character of deference as a call for more efforts in its conceptualisation and not as a criticism against the doctrine as such. With more practice and more focus on deference as a conceptual framework, it is expected that more clarity will arise in terms of differentiations in the degrees of authority being accorded to and the integration of the findings on contract interpretation of a contractual forum into the reasoning regarding a treaty claim. A growing line of scholarship focused on deference in international adjudication, including investment treaty arbitration, [173] should provide more theoretical foundation for treaty-based tribunals in careful reliance on contract interpretation exercised by other forums.

173 See, for instance, Johannes Hendrik Fahner, *Judicial Deference in International Adjudication: A Comparative Analysis* (Hart Publishing 2020); Esmé Shirlow, *Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication* (Cambridge University Press 2021).

4.3 In a Broader Context

In a broader context of the exercise of contract interpretation by other international courts and tribunals and state courts, the power of treaty-based tribunals to interpret contracts becomes further better pronounced. Rather than engaging in an exhaustive comparison of the similar powers exercised by international and state courts, which is itself a subject for a separate book, this section provides a general sketch with some helpful highlights. It does so based on the examples of the ICJ with its predecessor the PCIJ, ECtHR and state courts in some jurisdictions known for the law-fact distinction in relation to contract interpretation.

4.3.1 *Similar Powers*

4.3.1.1 The PCIJ

The absence of international rules for contract interpretation in the example of the jurisprudence of the PCIJ and ICJ has been verified in the preceding chapter. Here the *power* of the PCIJ and in the next sub-section the *power* of the ICJ to interpret contracts is addressed on the examples of the same cases with somewhat more attention to the activity and legal framework of these courts.

The PCIJ, the predecessor of the ICJ, existed between 1922 and 1940, and was attached to the League of Nations. Only states were parties to the proceedings before the PCIJ. The jurisdiction of the Court comprised a large variety of disputes, which states could agree to refer to it, ranging from the interpretation of treaties to the establishment of facts and reparation.[174] During its existence, the PCIJ oversaw 29 contentious cases between States, and delivered 27 advisory opinions.[175]

The fact that the PCIJ dealt with international law matters did not exclude the necessity for it to ascertain the content of contractual provisions. Indeed, the PCIJ ascertained the content and effect of contracts on the transfer of immovable property[176] in *Settlers of German Origin in Poland*,[177] bond agreements in

174 Article 36 of the Statute of the PCIJ.

175 Permanent Court of International Justice, <https://www.icj-cij.org/en/pcij> last accessed on 26 September 2021.

176 The contracts under which former German nationals (who were domiciled in Polish territory that had previously belonged to Germany, and who acquired Polish nationality) were occupying their holdings in Upper Silesia, appeared in particular focus.

177 *Settlers of German Origin in Poland*, (1923) Advisory Opinion of 10 September 1923 [1923] PCIJ Report Series B, No. 6.

Serbian Loans[178] and *Brazilian Loans*,[179] and concessions in *Lighthouses*[180] and *Mavrommatis.*[181]

Serbian Loans and *Brazilian Loans* are of particular interest because of a direct proclamation of the power of the PCIJ to interpret contracts. Both cases are also frequently discussed in the context of investment treaty arbitration, more so than any other PCIJ decision.[182] *Serbian Loans* and *Brazilian Loans* appeared before the PCIJ on espousal. Jurisdiction in both cases was based on special inter-state agreements (in the case of *Serbian Loans* – the Kingdom of the Serbs, Croats and Slovenes and France, and in the case of *Brazilian Loans* – Brazil and France). Those inter-state agreements authorised the PCIJ to express its opinion on matters tied to the currency clauses in bond agreements. Neither of the contracts in dispute were inter-state. A respective state (the Kingdom of the Serbs, Croats and Slovenes and Brazil) and French bondholders were proper parties to them. The PCIJ found no difficulty in openly recognising its own power to interpret contracts, and the dispute turned essentially to contract interpretation. Rather than demonstrating an exclusive and circumstantial authority, both the *Brazilian Loans* and the *Serbian Loans* cases are more about how a particular dispute configuration, upon which the court has jurisdiction, defines the reservoir of powers it is authorised to apply.[183]

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178 *Payment of Various Serbian Loans Issued in France* (France v. Yugoslavia)*,* 1929, P.C.I.J., Series A, No. 20, para. 242–244 (July 12).

179 *Payment in Gold of Brazilian Federal Loans Contracted in France* (France v. Brazil), (Judgment of 12 July 1929) (1929) PCIJ Series A No 21.

180 *Lighthouses Case between France and Greece* (France v. Greece) (Judgment of 17 March 1934) (1934) PCIJ Series A/B, No. 62.

181 *Mavrommatis Jerusalem Concessions* (Greece *v.* UK) (26 March 1925) PCIJ, Series A, No. 5.

182 In the entry to the Max Planck Encyclopedia of Public International Law regarding the *Brazilian Loans Case* and the *Serbian Loan Case*, Gerald G Sanders refers to both cases as '*a starting point for the development of foreign investment arbitration*' – see Gerald G Sander, 'Brazilian Loans Case and Serbian Loans Case', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e103> updated June 2014, last accessed on 25 June 2021. 4 August 2020. See also, Myres McDougal and others, *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Martinus Nijhoff Publishers 1994) 137; Ivar Alvik, *Contracting with Sovereignty: State Contracts and International Arbitration* (Hart Publishing 2011) 71–72; Thomas Wälde, 'The Serbian Loans Case – A Precedent for Investment Treaty Protection of Foreign Debt?' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron 2005).

183 The PCIJ explained its mandate to interpret contracts in *Serbian Loans* by drawing an analogy with arbitration: '*It must however be considered that the Court has been made cognizant of this case not by unilateral application but by a Special Agreement. The two Sates signing the Special Agreement approach the Court as they would an arbitrator and they ask*

As can also be seen from commentaries of the time on all contractually-related cases of the PCIJ, the issue with contract interpretation was not about *whether* the PCIJ possessed the power to interpret contracts (this authority was beyond any doubt, both for contentious and advisory proceedings), but rather *how* the PCIJ should exercise that power. More precisely, the question for contemporaneous commentators hinged on whether the PCIJ should interpret contracts in the application of national law or based on reasonableness and other (internationalised) rules of construction.[184]

4.3.1.2 The ICJ

In a similar way to the PCIJ, the jurisdiction of its successor established in 1945, the ICJ, covers contentious disputes submitted by states and advisory opinions on legal questions referred by organs and specialised agencies of the United Nations.[185] Having existed far longer than the PCIJ, the ICJ has addressed and continues to address a wider variety of questions, which has enabled it to contribute significantly to the development of international law.[186] Nevertheless, this broad spectrum of issues has not resulted in more frequent contract interpretation, compared to the PCIJ. In fact, due to the emerging necessity to solve somewhat distinct issues in inter-state relations, in contrast to what the PCIJ had faced, the ICJ is less exposed to contract interpretation than the PCIJ.[187]

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it to decide – as they might ask legal experts – upon a question of the interpretation of contracts in regard to which they disagree.' – see *Payment of Various Serbian Loans Issued in France* (*France v. Yugoslavia*) (Judgment of 12 July 1929) PCIJ Series A No. 20.

184 Clarence Wilfred Jenks, 'The Interpretation and Application of National Law by the Permanent Court of International Justice', (1938) 19 British Yearbook of International Law 67, 88.

185 United Nations, *Statute of the International Court of Justice*, 18 April 1946, Articles 36, 65.

186 A large contribution of the ICJ to the development of international law, including the law of state responsibility, the law of territory, the law of sea, the institutional law of the United Nations Organization and international environmental law, are addressed, for instance, in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press 2013). In an encyclopedia entry on the ICJ, Shabtai Rosenne emphasises that the ICJ's caseload is *'markedly different and much more complex'* than the case load of the PCIJ – see Shabtai Rosenne, 'International Court of Justice', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e34?prd=EPIL> updated June 2006, last accessed 25 June 2021, para. 110–112.

187 A relatively larger exposure of the PCIJ to contract interpretation may be explained by a number of contract-related cases submitted by States on behalf of their nationals (for instance, *Panevezys-Saldutiskis Railway Mavrommatis Jerusalem Concessions, Certain German Interests in Polish Upper Silesia*) or pursuant to specific agreement of both states (*Payment of Various Serbian Loans Issued in France, Payment in Gold of Brazilian Federal Loans Contracted in France*). Even those publications that attempt to illustrate an

The emergence of investment treaty arbitration also rendered cases similar to *Serbian* and *Brazilian Loans* less probable to appear before the ICJ, if at all.

Nevertheless, on some occasions, in order to exercise its mandate, the ICJ had to interpret contracts. It is interesting that an example of an attempt to ascertain the content of contractual provisions can be drawn from a non-contentious case. An advisory opinion dated 23rd October 1956, in respect to *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*,[188] is such an example. The Executive Board of UNESCO asked the ICJ to issue an advisory opinion concerning three questions related to the decision of the Administrative Tribunal of the International Labour Organization (referred to below as the Administrative Tribunal) of 5th February 1955. By that decision, the Administrative Tribunal satisfied complaints introduced against UNESCO by four former employees whose fixed-term contracts were not renewed. The ICJ was not to review the decision of the Administrative Tribunal against UNESCO on substance. Its mandate was limited to control of the jurisdiction of the Administrative Tribunal, around which all three questions relating to the advisory opinion were based.

In performing its mandate, the ICJ had to examine the jurisdiction of the Administrative Tribunal that was limited to '*complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations*'.[189] In order to answer the question whether the Administrative Tribunal possessed jurisdiction over complaints made against UNESCO, the ICJ had to establish whether renewals of the fixed-term employment contracts, central to the dispute, were tied to '*the terms of appointment*'. If so, the Administrative Tribunal possessed jurisdiction. If not, the jurisdiction

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inherent power of international courts of contract interpretation limit examples to the practice of the PCIJ – see footnote 42 in Stanimir A Alexandrov and James Mendenhall, 'Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill/Martinus Nijhoff 2014) 24, 42. Earlier, in a similar publication, Stanimir Alexandrov referred again only to the practice of the PCIJ of illustrating the power of international courts to interpret contracts – see footnote 67 in Stanimir A Alexandrov, 'Breach of Treaty Claims and Breach of Contract Claims: Is It Still Unknown Territory' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements: A Guide to Key Issues* (Oxford University Press 2010) 323, 339.

188 *Judgments of the Administrative Tribunal of the International Labour Organization upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization* (1956) Advisory Opinion [1956] ICJ Rep. 77.

189 Ibid. 81.

should have been declined. Since the key terms of appointment were defined first and foremost by contracts of employment, ascertaining the content of contractual terms became critical. The ICJ recognised it as a necessity to interpret contracts by saying that it was '*necessary to ascertain whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connection with the refusal to renew the contracts*'.[190]

Even though the advisory procedure was deprived of contentious features, it was not by any means extravagant.[191] One might argue that the jurisdiction of the ICJ in the matter resembled an appeal in a case on renewal of appointment, albeit limited to issues of jurisdiction, and thus it directly anticipated contractual interpretation of employment contracts and other relevant documents. Contractual interpretation was thus inherent to the ICJ's analysis and incidental for it to discharge its mandate.

Another example even though not evidencing an exercise of contract interpretation, is valuable here as an indication that the power of the ICJ to interpret contracts was not denied in principle. In 1957, in *Case of Certain Norwegian Loans* (*France v. Norway*),[192] the ICJ was close to interpreting a 'golden clause' in loans, similarly to what the PCIJ did in the *Serbian* and *Brazilian Loans* cases. Norway suspended the convertibility of its currency into gold. France argued that the debt should be discharged by the payment of the gold value of the coupons of the bonds and asked the ICJ '*to determine the manner in which the borrower should discharge the substance of his debt*.'[193] Norway objected to the jurisdiction of the ICJ by invoking, on the basis of reciprocity, the French reservation in regard to the compulsory jurisdiction of the ICJ. By that reservation, France excluded the jurisdiction of the ICJ from matters that were within the jurisdiction of its domestic courts. Norway argued that loan agreements were similarly within the exclusive jurisdiction of Norwegian courts. In its judgement, the ICJ declined its jurisdiction and this closed any investigation into the content of the contractual provisions of the loans. At no stage did the ICJ however cast any doubt on its inherent power to interpret loans, should its jurisdiction be confirmed.

190 Ibid. 89.

191 The ICJ exercised one of its major functions on the issuance of an advisory opinion as determined by Article 65 of the statutes of the ICJ. To ensure equality in the situation, in which individuals did not possess a procedural standing, the ICJ decided to adopt a specific procedure: not to hold an oral hearing and enable officials to file observations in written form – ibid 85. See also Mahasen M Aljaghoub, *The Advisory Function of the International Court of Justice 1946–2005* (Springer Law International 2006) 141.

192 *Case of Certain Norwegian Loans* (France *v.* Norway) (Judgment) [1957] ICJ Rep 9.

193 Ibid. 11.

To sum up, though less illustrative in contract interpretation than the practice of the PCIJ, the ICJ's practice demonstrates that the ICJ possesses the power to interpret contracts in the exercise of its diverse mandates.

4.3.1.3 The ECtHR

The ECtHR, as a regional human rights court, considers cases initiated against contracting states by individual(s) or other state(s) for breach of human rights set out in the European Convention of Human Rights (ECHR) and its Protocols. The court is not engaged in the resolution of private contractual disputes. The only concern for the ECtHR is whether states comply with their undertakings with respect to human rights. As some cases demonstrate, this rather broad mandate does not exclude contract interpretation. At the same time, for understandable reasons, contract interpretation is not routinely performed.

Pla and Puncernau v. Andorra[194] is an illustration of an unconventional category of cases in which the ECtHR was engaged in ascertaining the content of private law instruments, to be more precise a will.[195] In the case, the ECtHR had to adjudicate on whether, when interpreting a private contractual arrangement, domestic courts discriminated against applicants. In the case, a widow, having a son and two daughters, left in 1949 a will in favour of her son who was her life tenant. The will specified that the beneficiary was to transfer the estate '*to a son or grandson of a lawful and canonical marriage*'. The beneficiary under the will made his own will in 1995 in favour of his wife and an adopted son. Two granddaughters of the testatrix contested the will of 1995 and asked for all assets received under it to be returned to them. The case went through all instances of Andorra's courts. The High Court of Justice of Andorra ruled in favour of the granddaughters, depriving the adopted son of his benefits under the will of his grandmother. The Constitutional Court of Andorra dismissed the subsequent application.

When addressing whether the interpretation thus exercised had resulted in the discriminatory exclusion of the adopted son from his inheritance, the ECtHR compared its own construction of the will with the interpretation exercised by domestic courts. Before doing so, the ECtHR explained its supervisory function regarding the contract interpretation performed by the Andorran domestic courts as follows:

194 Case of *Pla and Puncernau v. Andorra* (Application No.69498/01) available at <https://hudoc.echr.coe.int/eng#{"itemid":["001-61900"]}>, last accessed on 25 June 2021.

195 Somewhat different rules may be applied to the interpretation of a will compared to the interpretation of a bilateral contract. Nevertheless, the example is anyway helpful for demonstrating engagement with the construction of a private law instrument.

> Admittedly, the Court is not in theory requires to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice *appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination* established by Article 14 and more broadly with the principles underlying the Convention (see Larkos v. Cyprus [GC], no. 29515/95, §§ 30-31, ECHR 1999-I).[196] [emphasis is added]

This clarification was necessary because of the known policy of the ECtHR to defer to national courts on the meaning of national law. In *Pla and Puncernau v. Andorra,* the ECtHR reiterated the principle and extended it beyond an interpretation of national law to include an interpretation of private law instruments, such as a will contract. Familiarity with national law and local legal traditions, as well as a broad margin of appreciation of domestic courts, were the reason for the ECtHR to agree that domestic courts were primarily competent to interpret contractual arrangements. This primary competence, though, does not exclude supervision in the case of unreasonable, arbitrary or blatantly inconsistent interpretation that conflicts with the fundamental principles of human rights.

The ECtHR found that blatant inconsistency of the exercised interpretation of a will, with the prohibition of discrimination in Article 14 of the ECHR, justified its intervention. According to the ECtHR, there was nothing to suggest that the term 'son' in the testatrix will excluded the adopted son (a grandchild). The discrimination that resulted from the judicial deprivation of an adopted child's inheritance rights triggered a construction informed by human rights.

The articulation of the ECtHR's mandate to interpret contracts received criticism. The critics attacked the 'horizontal effect' of the ECHR, namely its potentially unlimited intervention in the private sphere through the extension of fundamental human rights to contract law. Arguably, all private relations could potentially become subject to review before the ECtHR.[197] Furthermore,

196 Case of *Pla and Puncernau v. Andorra* (Application no.69498/01), Judgement dated 13 July 2004, para. 59 available at <https://hudoc.echr.coe.int/eng#{"itemid":["001-61900"]}>, last accessed 25 June 2021.

197 Richard S Kay explains this unlimited intervention as follows: '*Every disappointed litigant could raise a European human rights claim by asserting that the domestic courts committed error by slighting the ubiquitous Convention rights. In theory, every perceived personal wrong could, in the end, find its way to Strasbourg. We would arrive, by a different route,*

commentators criticised the interpretative techniques exercised by the ECtHR in approaching a will and considered it a failure to accord a margin of appreciation to domestic courts.[198] While these critical considerations are no doubt important, it is also vital to see that contract interpretation can appear among powers that the ECtHR assumed for exercising its specific mandate in cases of human rights violations. This mandate might not be primary but it is nevertheless existent under certain circumstances. The ECtHR is another example of an international court for whom contract interpretation may appear as part of the court's inherent power of decision-making.

To conclude on the point, the peculiar mandate of the international courts justifies the occasional need to interpret a contract. That these courts evidence uninterrupted efforts to ascertain the content of contractual provisions for the exercise of their peculiar mandate allows one to appreciate contract interpretation as being a part of their inherent adjudicatory power.

4.3.2 *Unsuitable Analogies*

In addition to differences in substantive regulation of contract interpretation discussed in Chapter 3 of this work, there could be a different *procedural* regulation, or arrangement, in relation to contract interpretation in various countries. It may be the case, for instance, that the power to interpret contracts is labelled in a particular system as a question of fact or a question of law, or as a mixed question that, depending on a dominant component, can become a factual or a legal question. In some states in the USA, for instance, if contract interpretation is perceived as a factual question, it shall be resolved by juries and not by judges and, conversely, if contract interpretation is a legal question it shall be resolved by judges and not juries.[199] In France, the consequences associated with the treatment of contract interpretation, as a factual question, lies in the restrictions on the reassessment of this issue on appeal.[200]

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at the robust version of the state's positive obligation to prevent private interference with protected rights. The unsettling effect on private transactions is not hard to imagine.' – see Richard S Kay, 'The European Convention on Human Rights and the Control of Private Law' (2006) 5 European Human Rights Law Review 466, 479.

198 Ibid. See also, Olha O Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights?' (2006) 13(2) Maastricht Journal of European and Comparative Law 195, 195–218.

199 William C Whitford, 'The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts' [2001] Wisconsin Law Review 931, 931–964.

200 Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer Netherlands 1967) 429; Pierre Legrand Jr, 'The Case for Judicial Revision of Contracts in French Law (and Beyond)' (1989) 34 McGill Law Journal 909; Алан Кемалович Байрамкулов, *Толкование договора в российском и иностранном гражданском праве* (Статут

In Canada, contract interpretation is recognised as a mixed question that, depending on the dominant element, may be a question of fact or a question of law.[201] The reduction of contract interpretation to fact-finding may result in the exclusion of a power of review within the judicial system or even a delegation of a primary authority of interpretation to a jury.

The described procedural limitations on contract interpretation may appear an attractive basis for confronting an understanding of contract interpretation in investment treaty arbitration as an inherent power. Analogies based on national law (primarily substantive, but also procedural) indeed continue to be noticeable in international law.[202] National law often serves as a familiar background for the initial qualification and categorisation exercised in international adjudication.[203] Even a discussion on whether a certain international

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2014) 28–31; Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (2nd edn, Oxford University Press 2015) 497. An interesting observation on a factual perspective on contract interpretation among national courts regardless of a formal categorisation of contract interpretation as a legal or factual question can be found in the words of Jan M Smits, who suggests that '*interpretation is a highly factual exercise*' *and further* '*[t]his explains why the highest courts in Europe have difficulty in providing lower courts with guidance on how to interpret – other than interpretation needs to be objective.*' – see Jan M Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 129.

201 See *Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 SCR 633 and analysis of the case: F Philip Carpenter, 'Supreme Court of Canada on Contractual Interpretation: Not Just a Question of Law, Don't Forget the Facts' (*Lexology*, 29 September 2015) <www.lexology.com/library/detail.aspx?g=2315895d-1635-4dcb-a028-04e32d6a1c2a> accessed on 25 June 2021. On mixed questions, see also Randall H Warner, 'All Mixed up about Mixed Questions' (2005) 7 The Journal of Appellate Practice and Process 101, 101–149; William C Whitford, 'The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts' [2001] Wisconsin Law Review 931, 931–964; Ronald J Allen and Michael S Pardo, 'The Myth of the Law-Fact Distinction' (2003) 97 Northwestern University Law Review 1769, 1800.

202 National law serves as a source for general principles of law – see the classical work of Hersch Lauterpacht about private law sources and analogies–Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longmans, Green and Co. Ltd. 1927; reprinted 2013 by The Lawbook Exchange). For a direct analogy based on national law beyond the 'general principles method', see, for instance, Daniel Peat, 'International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method' (2018) 9(4) Journal of International Dispute Settlement 654.

203 International law may simply lack certain independent categories, whereas in their absence, qualifications exercised by international courts and tribunals may be informed by national law. Regarding contract interpretation, in the discussed *BIVAC v. Paraguay*, the tribunal attempted to find an 'independent standard' that would enable it to ascertain the content of contractual provisions but that would not be framed as contract interpretation. As the treaty-based tribunal was not precluded from exercising contract interpretation,

court *is a court* is largely shaped by the understanding of the distinctive judiciary features of national courts.[204]

Despite it being a potentially attractive premise, there is no room for the allocation of powers within judicial systems to undermine the inherent power of treaty-based tribunals to interpret contracts in investment treaty arbitration. National *procedural* law relating to the scope of authority of national courts and affecting the exercise of the power of contract interpretation by these courts has a very specific scope of application. National courts are organised into systems which ensure control over the decisions of lower courts through appeals and cassation. Some courts in some jurisdictions possess a power of full review, both factual and legal, while others exercise a review only for the correctness of legal findings and are deprived of the possibility to revise the established facts. There could also be other additional requirements for control in the form of requiring permission for an appeal or a cassation in cases in which a uniform practice has to be established, etc. The scope of control varies and is frequently premised on a divide between questions of fact and questions of law. The same divide between legal and factual questions may also affect the scope of powers of a first-instance court. International courts and tribunals, including investment treaty arbitration, exercise their jurisdiction on a different basis. A fact-law distinction known in national contexts and possibly affecting a power of contract interpretation, accordingly, has no role to play in the scope of adjudicative powers of a treaty-based tribunal that encompasses contract interpretation.

Furthermore, even limitations on a power of contract interpretation that find place in a national context shall be assessed, considering the whole context of the organisation of the judicial review vis-à-vis contract interpretation. That in France, for instance, contract interpretation is perceived as a question of fact and is not permitted to undergo reassessment on appeal does not mean that no control exists or that the power of contract interpretation is not exercised as such. The control finds place through other means. Since 1873, the Court of Cassation in France has exercised a revision of contract interpretation if an interpretation

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that search was wrong – see *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction dated 29 May 2009, para.149. Evidentiary matters are also frequently seen as being affected by local national law practices primarily because international courts and tribunals do not have detailed independent rules and those which exist are largely an adaptation of national laws – Anna Riddell, 'Evidence, Fact-Finding and Experts' in Cesare P R Romano and others (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 848–870.

204 Mohamed Shahabuddeen, 'National Law Reasoning in International Law' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 93–96.

distorts clear and precise meaning with a relatively broad margin for revision, thus being retained despite a general categorisation of contract interpretation as a factual exercise on establishment of the parties' joint intent.[205]

To conclude on the fallacy of procedural analogy in relation to the power of contract interpretation, examples from various jurisdictions pertaining to the power of contract interpretation are all but examples of procedural exceptionalism. They have no role to play in undermining the inherent power of contract interpretation. At the same time, affirmative examples of contract interpretation as an inherent power of public international law courts and tribunals at the beginning of this section retain their validity, because similar to investment treaty arbitration, these courts are not organised into a certain system in which a limitation of the power could be justified as it is in the national law context.

4.4 Conclusion

As an essential component of tribunals' adjudicatory function to resolve treaty-based disputes where contracts appear relevant or even central, contract interpretation qualifies as an inherent power. As an implicit component of a tribunal's express power to issue a reasoned award, contract interpretation qualifies as an implied power. The point of connection between settlement of a treaty-based dispute and the power to interpret a contract, whether inherent or implicit, lies in a contract that matters for the exercise of treaty-based jurisdiction. That disputes in investment treaty arbitration are treaty-based and not contract-based does not exclude the power of treaty-based tribunals to exercise contract interpretation for the purposes needed in investment treaty arbitration. Nor does a concurrent power of another tribunal or a court in relation to the same contract of itself exclude the power of a treaty-based tribunal to interpret the very same contract. The power of a treaty-based tribunal to interpret a contract for a decision to be made on a treaty-based claim, on the one hand, and a power of an arbitral tribunal or a state court to interpret a contract for a decision to be made on a contractual (contract-based) claim, on the other hand, are not accordingly mutually exclusive. They can co-exist.

In the exercise of contract interpretation, treaty-based tribunals enjoy a broad autonomy from the concurrent powers of other tribunals and courts. As a rule, this autonomy is not limited by forum selection clauses authorising another tribunal or court to resolve contractual (not treaty-based) disputes arising out of contracts. The forum selection clause in a contract defines only

205 Peter Herzog and Martha Weser, *Civil Procedure in France* (Springer Netherlands 1967) 429.

the scope of a contractual dispute but not the scope of adjudicative powers of a treaty-based tribunal. Even if a forum selection clause contains a reference to 'interpretation', that cannot as a rule or without more exclude the power of treaty-based tribunals to interpret the same contract, nor shall it serve as an impediment to characterising the efforts exerted in ascertaining the content of contractual provisions of a treaty-based tribunal as being contract interpretation. 'Contractual disputes over interpretation' and 'contract interpretation as an adjudicative power' are distinct categories. The former relates to the scope of disputes and the latter relates to a tribunal's arsenal of powers.

Furthermore, a power to interpret contracts shall not be reduced to fact-finding or otherwise mislabelled. Doctrinal assessment of specific contractual provisions, such as stabilisation clause, forum selection clause and limited liability clause, shall be distinguished from contract interpretation. The former relates to assessment of the *effect* of these clauses in the international law context/under international law and follows the latter which relates to ascertaining the content of contractual provisions.

While contract interpretation is not exclusively vested with a contractual forum, treaty-based tribunals may nevertheless accord deference to the interpretation exercised by a contractual forum in international commercial arbitration or before a competent state court. In this engagement with the results of the exercise of a concurrent power, all would depend on the precise interpretative questions that treaty-based tribunals face. Conversely, because treaty-based tribunals do not exercise contract-based jurisdiction, their interpretation would be incidental and would have no effect on the interpretation exercised by a contractual forum.

When placed in a broader context of adjudicative powers of international courts and state courts, contract interpretation as an adjudicative power of treaty-based tribunals may find some similarities and important distinctions. In terms of similarities, contract interpretation exercised by other international courts, which, similar to investment treaty arbitration, do not engage in the resolution of contractual claims, further confirms contract interpretation as an inherent power. In terms of distinctions, procedural limitations on contract interpretation in the context of national law cannot be borrowed to exclude or otherwise limit the power of a treaty-based tribunal to interpret contracts.

Contract interpretation is an inherent and implied power of treaty-based tribunals, but not a *discretionary* power. Treaty-based tribunals cannot exercise it as they please, though the exercise is not algorithmic either. National law applicable to a contract defines a particular manner in which treaty-based tribunals should interpret contracts. The chapter that follows deals with various aspects of the application of national law to contract interpretation in investment treaty arbitration.

TABLE 4 Stabilisation clause in light of the doctrinal reasoning

Function	Alexy's explanation (page number of Alexy's book is identified in parentheses)	Explanation for Stabilisation Clause/ How it works for stabilisation clauses
Stabilisation	*'Practical solutions to practical questions can be retained and thereby reproduces as required with the help of dogmatic propositions. This is possible because legal dogmatics is part of an institutional setting. Because of this, certain ways of deciding can be fixed over long time periods.'* (266–267)	The stabilisation clause represents a practical solution to a practical question on stabilisation of the state intervention into a regulatory legal framework that is retained and reproduced in awards in investment treaty arbitration.
Development	*'The institutionalization of dogmatics, involving the expansion of legal discussion as to times, topics, and persons, makes it possible to differentiate dogmatic propositions to a considerably greater degree and to develop ways of testing them such as would never be possible in ad hoc discussions. This makes possible something like a developmental progress in dogmatics.'* (268–269)	The stabilisation clause evolved from freezing clauses to economic equilibrium clauses in contract-based cases. In treaty-based cases, the development took a more nuanced form of differentiation between mandatory provisions (proper stabilisation clauses) capable of raising legitimate expectations and non-mandatory provisions on renegotiations that do not raise the same degree of protectable legitimate expectations.
Burden-reducing function	*'One can be excused from the discussing afresh every value question in every case. This burden-reducing function is not only indispensable for the work of the courts which takes place under the time constraints, but also of significance for legal scientific discussion. In this sphere too – as in all spheres – it is not possible to discuss everything all over again in every case.'*(269)	Some of the cited awards in this section refer to 'well-known' discussions or understandings of the stabilisation clause, which reduce the burden of investigating its nature vis-à-vis the state's right to regulate. Furthermore, some of the legal reasonings, which are premised on the finding on the absence of the stabilisation clause in a contract, also demonstrate a burden-reducing function in operation.

TABLE 4 Stabilisation clause in light of the doctrinal reasoning (*cont.*)

Function	Alexy's explanation (page number of Alexy's book is identified in parentheses)	Explanation for Stabilisation Clause/ How it works for stabilisation clauses
Technical	'*…dogmatics performs an informational function, enhancing the law's 'teachability', and 'learnability' and thus by the same token its amenability to being handed down. …one must admit that at least one means of mastering a subject area is that of subjecting it to thoroughgoing conceptual analysis.*' (271)	The conceptualisation of the stabilisation clause enabled an intensive scholarly discussion of its effect as demonstrated by the sources cited in this section that would not be possible if the clause was viewed as individualised against the numerous wordings used.
Control	'*…studies in legal dogmatics facilitate the decision of cases not as isolated instances but as considered in the light of a whole line of cases already decided and yet to be decided.*' (272)	The control function is evidenced by the steady emergence of *jurisprudence constante* in respect to the stabilisation clause in investment treaty arbitration that sees the clause as giving specific legitimate expectations protectable by international investment law.
Heuristic	'*Dogmatics contains a great range of problem-solving models, distinctions, and viewpoints which would not readily occur to someone always beginning afresh. Even if this is not sufficient to determine a decision, it is still remains a real help to make use of this apparatus.*' (272)	Discussion of the stabilisation clause does not as a general rule start anew with a discussion about sovereign powers to regulate it. The discussion continues from the current perspective on the effect of stabilisation clauses. If a discussion were to start *de novo*, it might be necessary to revise all previous developments and conclude that the freezing effect is not supported any longer, before landing on the current status of understanding of stabilisation clauses.

CHAPTER 5

Contract Interpretation as the Incidental Issue

While clarifying the tribunals' jurisdiction to interpret contracts (Chapter 4) and the relevance of national law for contract interpretation (Chapters 2 and 3), the preceding chapters did not however answer the question of how treaty-based tribunals should approach contract interpretation. Given that many occasions of interpretation are uninformed by national law (Chapter 1), it appears that investment treaty arbitration is in need of a conceptual framework that would ensure treatment of contract interpretation as a legal issue with due regard to the national law governing it. Drawing on the previous chapters, this chapter accordingly goes a step further and suggests a conceptual paradigm that ensures the proper approach to contract interpretation in investment treaty arbitration. This paradigm is based on the concept of the incidental issue as developed in private international law.[1]

The chapter begins by presenting the essential elements of the concept of *the incidental issue* in private international law. To this end, a number of questions are addressed, including the reasons for conceptualising the incidental issue, the conditions for the incidental issue, the types of incidental issues, the range of approaches for determining the law applicable to incidental issues, and the concept's overall contribution to decision-making in an ordinary context, unrelated to investment treaty arbitration. Prior to engaging in extending the paradigm of the incidental issue to contract interpretation in investment treaty arbitration, the chapter also demonstrates the suitability of approaching a broad range of national law issues as incidental issues in investment treaty arbitration. The observation on the appropriateness and value of the treatment of contract interpretation in investment treaty arbitration as the incidental issue concludes the chapter.

1 In Chapter 3, the international dimension of private international law and international commercial law were relied upon to broaden the scope of international law under investigation. That was necessary to verify whether international law might be viewed as having certain rules capable of substituting national law in contract interpretation. The traditional meaning of private international law used in this chapter relates to a set of primarily national rules regulating conflict of laws and jurisdiction together with some harmonised international rules on the choice of laws and jurisdictions.

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5.1 Incidental Issues in Private International Law

The starting point for understanding the problem of the incidental or preliminary issue[2] in private international law (*'Vorfrage'* in German[3] or *'question préalable'* in France[4]) is the structure of a particular legal rule. If a legal rule links legal consequences exclusively with facts, in principle, no incidental issues arise, and the courts simply fulfil their duty to establish facts through assessing the available evidence and established legal presumptions. However, when a legal rule ties legal consequences not only with purely factual circumstances but also with legal relationships or statuses,[5] this opens up a space for incidental issues. Before ruling on the principal issue, courts dealing with such legal rules frequently have to make decisions about these other subsidiary legal issues. For instance, it might be impossible to resolve a dispute relating to the registration of certain shares before deciding on the validity of the agreement about their transfer. Similarly, it might be impossible to decide on the acquisition of nationality (when the matter appears before the court) before deciding on the validity of a marriage. When deciding, the courts may base their decision on established legal presumptions[6] or in the case of disagreement, they may also need to verify the existence of these legal statuses or relationships.

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2 Laura Carballo Piñeiro and Andrea Bonomi, 'Incidental (Preliminary) Question' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 912–924; Rhona Schuz, *Modern Approach to the Incidental Question* (Kluwer Law International 1997); Torben Svenné Schmidt, 'The Incidental Question in Private International Law' (1992) 233 Recueil des Cours de l'Académie de Droit International 305; Wilhelm Wengler, 'The Law Applicable to Preliminary (Incidental) Questions: Chapter 7, Volume III', *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1987) 7–5 – 60; Allan Ezra Gotlieb, 'The Incidental Question Revisited – Theory and Practice in the Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 734, 734–798.

3 Wilhelm Wengler, 'Die Vorfrage im Kollisionsrecht' (1934) 8 Rabels Zeitschrift für ausländisches und internationale Privatrecht 148.

4 Wilhelm Wengler, 'Nouvelles réfléxions sur les "questions préalables" ' (1966) Revue critique de droit international privé 165.

5 If a distinction is drawn between legal relationship and legal status in this context, questions relating to status are more naturally predisposed to be treated as the incidental issue – see Allan Ezra Gotlieb, 'The Incidental Question Revisited – Theory and Practice in the Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 734, 764; Rhona Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International 1997) 4.

6 Legal presumptions are traditionally addressed from an evidentiary perspective. For a helpful definition of legal presumption, see Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar Publishing 2014) 241–243. For legal presumptions in investment treaty arbitration, see Frédéric G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018) 121–134.

For the latter case, the validity of the contract and the marriage in the examples appear as the *incidental* issues, whereas the decisions on the acquisition of nationality or the registration of shares are the *principal* issues.

Basing the concept of the incidental issue in private international law on the idea of subsidiarity of certain issues is by no means unique. The distinction is primarily premised on a comprehensive idea of looking at legal issues in disputes through the prism of their centrality to the cause of action. Principal issues are the objects of disputes and trigger desirable solutions. Incidental issues are subsidiary issues to which solutions have to be found for decisions to be made on principal issues. If viewed only from the procedural perspective of their centrality to the principal cause of action, issues that are incidental regularly appear in contexts outside private international law. For instance, principal and incidental issues can also be distinguished in purely domestic settings with no international elements. No complexities would normally arise in characterising and determining the applicable law for these incidental issues – the law that is applicable to the principal issue would also apply to the incidental issue. The only aspect that would matter in this purely domestic context is the order or sequence of the decisions – incidental issues have to be decided first.

What makes incidental issues peculiar enough to justify their appearing as both a concept and a pervasive problem in private international law is undoubtedly the fact that different laws can potentially be applied to them. Instead of being static descriptions of the legal issues because of their centrality to the cause of action, incidental issues in private international law serve as dynamic constructions. The very *raison d'être* of the incidental issue in private international law is encapsulated in the dilemma concerning the choice of law. An incidental issue becomes the incidental issue in the sense understood in private international law and used here only when it raises a question about applicable law and triggers competitive approaches. This most frequently happens when a foreign *lex causae* governs the principal issue, upon which *lex fori*, *lex causae* or other considerations start to compete in their role of determining the law applicable to the incidental issue. It is therefore no coincidence that the incidental issue in private international law is frequently referred to as the incidental or preliminary *question* – that is essentially to say, a question about applicable law.

While the 'incidental' in the concept's name may imply a certain peripheral role, in fact it is not uncommon for the choice of applicable law for the incidental issue to influence the final outcome of a case. To use the examples mentioned above, a contract for the sale of shares can be valid under some laws and invalid under others, so the decision to register the shares would be positive or negative. A marriage can be treated as invalid under some laws and valid under

others, so the decision on nationality would again be positive or negative. The choice of applicable law can be justified by various policy considerations: the general prevailing policy in a particular jurisdiction, deference to the particular nature of the incidental issue, the desirability and undesirability of the likely results, and other factors. Accordingly, the discussion of prevailing approaches to applicable law and their justification, which marks the academic coverage of incidental issues in private international law, is not driven merely by theoretical perfection. There are important practical implications in dealing with the incidental issue in a coordinated and predictable way, rather than on an *ad hoc* basis. The incidental issue, accordingly, is a separate legal issue that plays a subsidiary role and raises the question of applicable law to it.

The history behind the theory of the incidental issue, albeit with some disagreement among commentators, can traditionally be traced back to the 1930s. Three German authors are usually named in this context – Wilheim Wengler, George Melchior and Hans Lewald.[7] Some authors also link the concept with

7 Torben Svenné Schmidt names George Melchior as a pioneer in developing the concept of the incidental issue – s*ee* Torben Svenné Schmidt, 'The Incidental Question in Private International Law' (1992) 233 Recueil des Cours de l'Académie de Droit International 305, 342. Melchior's role was also recognised at the time by Walter Breslauer – see Walter Breslauer, *The Private International Law of Succession in England, America and Germany* (Sweet & Maxwell 1937) 18 and more recently by Laura Carballo Piñeiro and Andrea Bonomi in their entry to the Encyclopedia of Private International Law: Laura Carballo Piñeiro and Andrea Bonomi, 'Incidental (Preliminary) Question' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 913. All the commentators mentioned above also praise Wilheim Wengler for the specific focus on the incidental issue that emerged in approximately the same period and continued throughout subsequent years. See also, Friedrich K Juenger, 'General Course on Private International Law' (1983) 193 Recueil des Cours de l'Académie de Droit International 195. Hans Lewald did not concentrate on incidental issues; nevertheless he used the term 'preliminary issue' that enabled Gotlieb to mention him as one of those who contributed to the development of the theory of the incidental issue in addition to the widely recognised role played by George Melchior and Wilheim Wengler – see Allan Ezra Gotlieb, 'The Incidental Questions Revisited – Theory and Practice in the Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 734, 735 (footnote 5). The work of George Melchior covering the incidental issue is George Melchior, *Die Grundlagen des deutschen internationalen Privatrechts* (De Gruyter 1932) 245–265; three works of Wilheim Wengler covering the incidental issue have been mentioned already, and include Wilheim Wengler, 'Die Vorfrage im Kollisionsrecht' (1934) 8 Rabels Zeitschrift für ausländisches und internationale Privatrecht 148; Wilheim Wengler, 'Nouvelles réfléxions sur les "questions préalables" ' (1966) Revue critique de droit international privé 165; Wilheim Wengler, 'The Law Applicable to Preliminary (Incidental) Questions: Chapter 7, Volume III', *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1987); the work of Hans Lewald covering the incidental issue includes Hans Lewald, 'Questions de droit international des successions' (1925) 9 Recueil des Cours de l'Académie de Droit International 1, 72–75.

an Italian scholar and a PCIJ judge, Dionisio Anzilotti,[8] whose particular contribution to the concept of the incidental issue in the context of public international law is discussed in further detail at a later stage in this chapter.[9]

When the concept of the incidental issue first emerged, it mainly revolved around the matrimonial and family issues that defined the statuses of individuals. This area continues to generate a significant number of examples that fall into the paradigm of the incidental issue. More recently, Rhona Schuz added a new type to what are now classic examples of incidental issues in the family and matrimonial field.[10] At the same time, incidental issues are not limited to matrimonial or family matters. As early as 1977, Gottlieb assumed that the overall number of cases involving incidental issues in common law jurisdictions was *'in the thousands'* and suggested a typology that included, *inter alia*, issues relating to property, contract and tort.[11] As the process of the intensification of private relationships with foreign elements continues apace, new examples will inevitably be 'discovered' and 'added to the list' of incidental issues. The sources for this discovery remain inexhaustible, as any type of legal status or legal relationship can potentially become necessary for deciding on the principal issue.

Regardless of the great diversity of incidental issues in private international law, they can all be divided into two large groups – incidental issues of the *first order,* or the first degree*,* and incidental issues of the *second order,* or the second degree.[12] Incidental issues of *the first order* are less remote from the principal

8 Dionisio Anzilotti (1867–1950) – Italian lawyer and scholar. Anzilotti taught international law in Italy (1892–1937), and was a judge (1921–46) and President (1928–30) of the PCIJ . For an overview of Dionisio Anzilotti's academic work and his contribution to international law, see, for instance, Antonio Tanca, 'Dionisio Anzilotti: Biographical Note with Bibliography' (1992) 3 European Journal of International Law 156, 156–162; Jose Maria Ruda, 'The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice' (1992) 3(1) European Journal of International Law 100, 100–122; Giorgio Gaja, 'Positivism and Dualism in Dionisio Anzilotti' (1992) 3(1) European Journal of International Law 123, 123–138.

9 In 1937, Walter Breslauer mentioned Anzilotti's contribution to the development of the incidental issue in private international law (without actually naming the works in which the concept was developed) – see Walter Breslauer, *The Private International Law of Succession in England, America and Germany* (Sweet & Maxwell 1937) 18. Anzilotti's name is not mentioned, however, in any encyclopaedia entry on the incidental issue in private international law.

10 Rhona Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International 1997) 221–242.

11 Allan Ezra Gotlieb, 'The Incidental Question Revisited – Theory and Practice in the Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 734, 761–764.

12 Wilhelm Wengler, 'The Law Applicable to Preliminary (Incidental) Questions: Chapter 7, Volume III', *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1987) 7–5.

issue and their resolution leads directly to the resolution of the principal issue. Incidental issues of the *second order* are more remote from the main cause of action and their resolution leads to the resolution of other incidental issues. The validity of a marriage and the validity of a share transfer would be incidental issues of the first order, as the principal issues – nationality and share registration – would be directly and immediately dependent on the resolution of these issues. Incidental issues of the second order are those that have to be resolved for decisions about incidental issues of the first order to be made. If, for instance, a decision on the validity of a marriage as an incidental issue to a decision on the acquisition of nationality requires a decision on the validity of a previous divorce, the issue of the divorce's validity would be an incidental issue of the second order, whereas the issue related to the validity of marriage would be an incidental issue of the first order. Similarly, if resolving a dispute involving share registration means that it is first necessary to decide on the capacity of the companies who concluded the sales of the shares before the validity of the transfer can be established, not only does the incidental issue of the first order have to be addressed, but the incidental issue of the second order has to be dealt with first. While the order of remoteness may be potentially limitless, the incidental issues that are necessary for other incidental issues to be resolved are traditionally called incidental issues of the second order, i.e. not of the third or fourth order, etc. This distinction between the incidental issue of the first order and the incidental issue of the second order will be useful for locating the place for contract interpretation in the analysis of a treaty claim at a later stage.

With regard to the key question of the incidental issue – the method for determining the applicable law – there is continuous competition between the two major approaches as to which will play the most decisive role – *lex fori* or *lex causae*.[13] *Lex fori*, or an independent connection, is the most commonly applied of the conflict of laws rules, both with regard to the principal and the incidental issues. Relying on *lex fori* removes the need for courts or tribunals to look at conflict of laws rules other than those of the forum. They approach the incidental issue as if it were the principal issue in the forum's jurisdiction; the consistency of an internal domestic order is thus guaranteed because the incidental issue is treated in a similar way in a given jurisdiction, regardless of the context of the proceedings in which it arises. The dependent connection, in contrast, suggests relying on the law applicable to the principal

13 On doctrinal support for *lex fori* and *lex causae* see Torben Svenné Schmidt, 'The Incidental Question in Private International Law' (1992) 233 Recueil des Cours de l'Académie de Droit International 305, 342–367.

issue (*lex causae*), including its conflict of laws rules, and not on the law of the forum (*lex fori*) to decide on the law that is applicable to the incidental issue. By insisting that courts or tribunals apply the law of the principal issue (*lex causae*) to determine the law applicable to the incidental issue, proponents of the dependent connection aim to ensure that courts in different jurisdictions focus on the substance of the principal and incidental issues and not on the forum's conflict of laws rules. Because of this focus on *lex causae*, the question that constitutes the subject of the incidental issue is treated in a similar way, regardless of the jurisdiction in which it appears. As a result, international, but not necessarily national, harmony is achieved.

The chart below illustrates both approaches.

As seen in *Figure 4*, the *lex fori* and *lex causae* approaches share a common initial stage, and the difference between the two only appears during the last and most crucial stage in the choice of law analysis. Both dependent and independent connections rely on *lex fori* as the initial stage for deciding on the law applicable to the principal issue. Where the dependent connection is concerned, the same *lex fori* conflict of laws rules determine the law applicable to the incidental issue, while for the independent connection, it is the *lex causae* conflict of laws rules that establish which law governs the incidental issue.

Alternative solutions to the above methods for choosing the applicable law for the incidental issue have also been put forward. These either aim merely to mediate between the two approaches by emphasising one of them or to mix

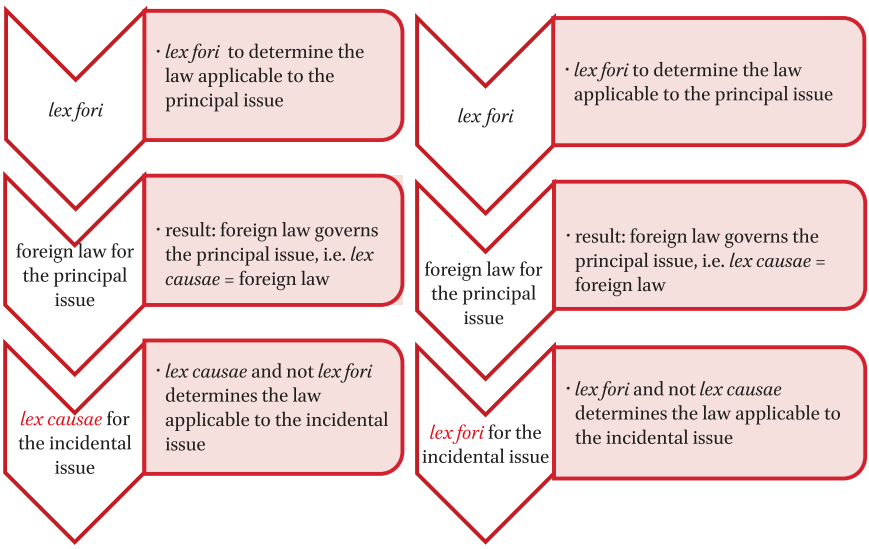


FIGURE 4 *Lex fori* and *lex causae* approaches to the incidental issue

them with various policy-related considerations. The most well-known alternative solution is referred to as a 'result-oriented approach' and advocates a dynamic method instead of a pre-determined single preference for either *lex fori* or *lex causae*.[14] As its name suggests, the result-oriented approach aims to achieve certain outcomes by relying on specific policy reasons[15] and making a cognisant choice between *lex fori* and *lex causae*. Academics disagree as to what constitutes relevant policy: while some authors suggest that the policy can be implied from the substantive rules of *lex causae,*[16] others suggest that the relevant policy should clearly come from the forum's conflict of laws rules and cannot be implied from any substantive rules.[17] Because the prevailing approach is not predetermined, there is a risk of assimilating the result-oriented approach into *ad hoc* determination, which is not appropriate. Relying on policies as criteria for defining the applicable law implies a normativity that ensures similar results in an unlimited number of similar situations, and thus distinguishes the result-oriented approach from random *ad hoc* determinations. Despite the method's attractiveness, it has not been sufficiently researched, nor have all the relevant policies that aim to ensure certain results and avoid others been mapped. Similarly to the result-oriented approach, the *empirical* approach combines and coordinates various approaches, with some preference for *lex fori* as an underlying method.[18] Rather than consisting of a single method, the empirical approach provides for a certain framework of considerations that might be taken into account in determining the law applicable to the incidental issue in situations in which the approach described above has failed to function adequately.

Neither of the approaches to the choice of applicable law has gained dominant support. Depending on the jurisdiction and the type of incidental issue, various approaches or combinations thereof can be observed. Gottlieb's

14 See, for instance, Rhona Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International 1997) 68–77.

15 The approach takes an analogy from the area of parent-child relationships in which there is frequently an alternative choice of law to guarantee the establishment of parent-child relationships or a child's legitimacy – see Laura Carballo Piñeiro and Andrea Bonomi, 'Incidental (Preliminary) Question', in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 920.

16 Rhona Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International 1997) 68.

17 Laura Carballo Piñeiro and Andrea Bonomi, 'Incidental (Preliminary) Question' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 921.

18 Ibid.

comment made in early 1977, on various considerations that may influence decisions on the applicable law for the incidental issues, continues to represent the relevant spectrum of values that affect decisions regarding the law currently applicable to the incidental issue:

> [...] in every case where there is an incidental question, the specific facts must be looked to and an evaluation made of a wide variety of factors that can influence the results. As we have seen, these factors include the policy of the forum, the notion of public order, the need for consistency among decisions of the forum, the interpretation of the forum's statutes and substantive law, the policies and public order of the foreign State or States concerned in an issue, the construction of the foreign laws, the desire to avoid forum-shopping, the purpose behind the potentially applicable choice-of-law rules, the need to promote international harmony in the decision of various courts involved in a problem, the doctrine of renvoi and fairness and equity.[19]

The existent plurality of views on the choice of law reflects the different policies and underlying values that shape the private international law of a particular state.[20]

Being predominantly about the choice of the applicable law, the concept of the incidental issue also involves other important questions of private international law. The dilemmas that courts or tribunals may face are not necessarily only about the choice of *laws*, but may relate to the choice of *rules*. Instead of deciding on the incidental issue, a court or a tribunal may be faced with having to decide on the effect of decisions already made on the incidental issue in a certain jurisdiction.[21] If a decision has come from a non-judicial body, a *recognition rule* may come into play and pose a dilemma along with the considerations regarding applicable laws. If the decision has originated in the judiciary,

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19 Allan Ezra Gotlieb, 'The Incidental Question Revisited – Theory and Practice in the Conflict of Laws' (1977) 26(4) International and Comparative Law Quarterly 734, 797.

20 For instance, in the Czech Republic, overall preference is given to *lex fori*, although *lex causae* may apply under certain conditions if the issue has no relation to the country– see Monika Pauknerová, *Private International Law in the Czech Republic* (Kluwer Law International 2011) 69. Furthermore, the same jurisdiction may take different approaches depending on the nature of the incidental issue – this difference is widely explored by the result-oriented approach.

21 Laura Carballo Piñeiro and Andrea Bonomi, 'Incidental (Preliminary) Question' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar Publishing 2017) 913–914.

the issue will turn on pure recognition and will cease to be the incidental question (but see the discussion on less subordinated deference to decisions and awards on contract interpretation of the competent adjudicatory bodies in the context of investment treaty arbitration in Chapter 4).

While the concept of the incidental issue remains largely based on national perspectives,[22] one can also increasingly observe some inter-state coordination vis-à-vis incidental issues. By way of example, some coordination can be found in intra-EU private international law acts such as Council Regulation (EC) No 44/2001 of 22 December 2000 'On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters'.[23] Another example of a step towards regulating the incidental issue at the inter-state level may be the Convention of 30 June 2005 on Choice of Court Agreements. Entering into force in 2015,[24] the Convention prohibited party agreement on

22 The concept's development in France and Switzerland is illustrative, though less so than in Germany – see, for instance, Phocion Francescakis, 'Les questions préalables de statut personnel dans le droit de la nationalité' (1958) 23 Rabels Zeitschrift für ausländisches und internationale Privatrecht 466; Paul Lagarde, 'La règle de conflit applicable aux questions préalables' (1960) Revue critique de droit international privé 459; Pierre Lalive, 'Tendances et méthodes en droit international privé: cours général' (1977) 155 Recueil des Cours de l'Académie de Droit International 1; Pierre Mayer, 'Le phénomène de la coordination der orders juridiques étatiques en droit privé' (2007) 327 Recueil des Cours de l'Académie de Droit International 1; Andreas Bucher, 'La dimension sociale du droit international privé' (2009) 341 Recueil des Cours de l'Académie de Droit International 9. For an overview of the contribution of French authors to the development of incidental issues as of 1992 see also Torben Svenné Schmidt, 'The Incidental Question in Private International Law' (1992) 233 Recueil des Cours de l'Académie de Droit International 305, 305, 358–362. For a bibliography of incidental issues grouped by states as of 1987 see also Wilhelm Wengler, 'The Law Applicable to Preliminary (Incidental) Questions: Chapter 7, Volume III', *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1987) 36–37. Wilheim Wengler in particular provides examples of academic works from Argentina, Canada, Czechoslovakia (a single country at that time), France, Germany, Italy, Japan, the Netherlands, Portugal, Romania, Spain, Denmark, Sudan, Switzerland, the United Kingdom and the United States.

23 For an extensive overview of publications, albeit only in the German language, see footnote 5 in Susanne L Goessl, 'Preliminary Questions in EU Private International Law', (2012) 8(1) Journal of Private International Law 63. Some enactments in private international law in EU expressly provide for treatment for certain aspects of incidental issues. For instance, Article 33 (3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' provides: '*If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.*'

24 As of 13 June 2021, there are 37 contracting parties to the Convention on Choice of Court Agreements 2005 – Hague Conference on Private International Law, '37: Convention of

the resolution of certain issues as principal objects in courts, while permitting the courts chosen by the parties to deal with these issues whenever relevant as incidental or preliminary issues.[25] Given the broad harmonisation between various states in respect to conflict of laws issues at an international level,[26]

30 June 2005 on Choice of Court Agreements' <www.hcch.net/en/instruments/conventions/status-table/?cid=98> last accessed 25 June 2021.

25 Article 2 (2) of the Convention on Choice of Court Agreements 2005 excludes the following matters from the issues the parties may agree to refer to a chosen court: '(*a*) *the status and legal capacity of natural persons;* (*b*) *maintenance obligations;* (*c*) *other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships;* (*d*) *wills and succession;* (*e*) *insolvency, composition and analogous matters;* (*f*) *the carriage of passengers and goods;* (*g*) *marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage*'. At the same time paragraph 3 enables the courts to deal with the excluded matters as the incidental issue: '*Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings*.' While defining the incidental issues, the Convention on Choice of Courts Agreements 2005 does not clarify how the incidental issues should be addressed, leaving this to the national regulations of the relevant fora. The Convention helpfully clarifies that decisions on the incidental issues do not bear *res judicata* effect.

26 Harmonisation is particularly noticeable in three regions: European Union, Commonwealth of Independent States (CIS) and Latin America. Since 1980, the conflict of laws rules in the EU have experienced serious unification resulting in the Convention 80/934/EEC on the Law Applicable to Contractual Obligations (Rome Convention) (signed 19 June 1980, entered into force 1 April 1991). In 2008, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) superseded the Rome Convention. The Rome I Regulation is applicable to all EU member states apart from Denmark. Denmark is still regulated by the Rome Convention. The conflict of laws regulation of non-contractual obligations also benefited from a harmonised regulation – Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (applicable to all EU member states apart from Denmark). It should be noted that intra-EU regulation on conflict of laws is considered supra-national, and not really international in the strictest sense. For coordination in private international law in the CIS region see the Agreement on Settlement of Disputes Related to Commercial Activity – the Kiev Agreement (signed 20 March 1992, entered into force 19 December 1992); the Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases – the Minsk Convention (signed 22 January 1993, entered into force 19 May 1994) and the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters – the Chisinau Convention (signed 7 October 2002, entered into force 27 April 2004). See also, Eugenia Kurzynsky-Singer, 'Commonwealth of Independent States and Private International Law' in Jürgen Basedow and others (eds), *Encyclopedia of Private International Law* (2017) 397–452. For coordination in private international

other examples of inter-state coordination with respect to incidental issues can be expected.

The ways in which the concept of the incidental issue can be transplanted into investment treaty arbitration in a theoretically stringent, comprehensive and practical manner, as well as its contribution, are discussed later. As far as the incidental issue's contribution to an ordinary (domestic) context beyond investment treaty arbitration is concerned, the concept contributes greater transparency and predictability to decision-making. As recent writings have shown, the conceptualisation of the incidental question in private international law is not (only) a matter of theoretical research, but of practical significance.[27] Rather than ignoring incidental issues or assimilating them into facts or similar domestic legal substitutes, significant value lies in facing and discussing the controversies surrounding the legal issue in ways that fully acknowledge its nature, role and the relevant competing and overarching policies of a given jurisdiction in determining the applicable law. Relying on the concept of the incidental issue gives the courts the possibility of dealing with the principal question regardless of possible tactical attempts aimed at impeding resolutions by challenging all the subsidiary issues and insisting that they are settled by other competent courts. At the same time, incidental issues do not impede justice, as decisions taken on them would lack any *res judicata* effect. Should a competent court dealing with an incidental issue as the principal question later reach a decision contrary to the decision adopted in the proceedings in which the issue was incidental, judicial systems contemplate the possibility of review on the basis of the newly discovered circumstances. The alternative to the paradigm of the incidental issue seems to be unpredictability, reflected in random or uncoordinated *ad hoc* decisions.

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law in Latin America see the Inter-American Convention on the Law Applicable to International Contracts (signed 17 March 1994, entered into force 15 December 1996); the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (signed 24 May 1984, entered into force 26 May 1988); the Inter-American Convention on General Rules of Private International Law (signed 8 May 1979, entered into force 10 June 1981); the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes, and Invoices (signed 30 January 1975, entered into force 16 January 1976); the Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law (signed 24 May 1984, entered into force 9 August 1992); the Inter-American Convention on Domicile of Natural Persons in Private International Law (signed 8 May 1979, entered into force 14 June 1980).

27 Rhona Schuz, *A Modern Approach to the Incidental Question* (Kluwer Law International 1997) 68–77; Susanne L Goessl, 'Preliminary Questions in EU Private International Law' (2012) 8(1) Journal of Private International Law 63, 71–76.

5.2 National Law Incidental Issues in Investment Treaty Arbitration

5.2.1 *The Predisposition to Conceptualise Incidental Issues*

Treaty-based tribunals regularly have to decide on a range of national law issues prior to making any principal decision on a treaty claim. This broad exposure to national law issues has resulted in the shape acquired by international investment law throughout its history, which it still retains today. Rather than directly regulating investment activity, international investment law was intended to create treaty guarantees for foreign investors, with international law remedies for treaty violations.[28] This regime enabled individuals and companies to protect their rights against states at an international level, and thus exposed treaty-based tribunals to thousands of national law issues connected with the status of individuals and companies, their activity and their interaction with state authorities. Although some concepts reached certain autonomy in investment treaty arbitration,[29] and consensus might be achieved on certain requirements aimed at foreign investors,[30] the ongoing discussions

28 For a historical account of the emergence of international investment law and investment treaty arbitration that did not attempt to create uniform international substantive regulation for foreign investment activity, see, for instance, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 1–11; Yuliya Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in Stephan W Schill and others (eds), *International Investment Law and History* (Edward Elgar Publishing 2018) 241–285.

29 For an autonomous concept of nationality of a legal entity under international law see *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Final Award dated 31 May 2017, para. 266–281; for an autonomous concept of nationality of an individual under international law see *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award of the Tribunal dated 18 September 2018, para. 205–215. For interrelations between national and international law in the understanding of the concept of nationality see Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2012) 296–299; Organisation for Economic Co-operation and Development, *International Investment Law: Understanding Concepts and Tracking Innovations: A Companion Volume to International Investment Perspectives* (OECD Publishing 2008) 10–38; Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 77; Engela C Schlemmer 'Investment, Investor, Nationality, and Shareholders' in Peter Muchlinski and others (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 69–86.

30 Requirements for a foreign investor are directly connected with the possibility for the state to raise a counterclaim. A possibility to introduce a right of a host state to raise a counterclaim has been addressed during the ongoing discussion of the reform of investment treaty arbitration in UNCITRAL. See, for instance, various states' positions in favour of introducing counterclaims presented at the Working Group III Investor-State Dispute Settlement Reform 34th and 35th Sessions (the Secretariat made available the audio file

over reforms have so far failed to result in any direct regulation of international investment activity as such.[31] International investment law has made no provision for an entire replacement for national law regulation in any relevant field of foreign investment.[32] Put simply, international investment law was neither intended to be a self-sufficient autonomous regime, completely disengaged from national law considerations, nor has it become one.

While exposure to national law issues may vary, it occurs at literally every step of the analyses undertaken by treaty-based tribunals. By way of illustration, the legitimate expectations of foreign investors that are protected by international investment law cannot be based exclusively on treaty regulation; they are ingrained by specific national law rights to which international investment law is not directly relevant. As discussed earlier, contracts do not come into existence as a matter of international investment law, nor are they directly regulated by it. Ownership rights do not arise as a result of applying international investment law. Accordingly, issues of contract formation, scope of contractual rights and obligations, contract validity, contract termination, validity of ownership title over property, transfer of the title and many other contract- and property-related rights cannot be resolved under the direct application

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but not the transcript) – UNCITRAL, 'Meeting Search' <https://uncitral.un.org/en/working_groups/3/investor-state> last accessed 25 June 2021. For a summary of the discussion of the UNCITRAL Working Group on counterclaims with quotes, see Anthea Roberts and Zeineb Bouraoui, 'UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims' (*EJIL: TALK!*, 6 June 2018) <www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims> last accessed 25 June 2021. See also Eric De Brabandere, who suggests that treaty-based tribunals accept 'in principle' the possibility of counterclaims, although acknowledges a lack of consistency – Eric De Brabandere, 'Human Rights Counterclaims in Investment Treaty Arbitration' (2017) 50(2) Revue Belge de Droit International 591. For earlier material on asymmetry in ISDS and the need for counterclaims, see, for instance, Andrea K Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) Lewis & Clark Law Review 461, 461–480; Christina L Beharry and Melinda E Kuritzky, 'Going Green: Managing the Environment Through International Investment Arbitration' (2013) 30(3) American University International Law Review 383, 407–411.

31 As of 25 June 2021, the reform discussion is still ongoing in UNCITRAL. The efforts are concentrated on procedural aspects of investment treaty arbitration. All updates are available here <https://uncitral.un.org/en/working_groups/3/investor-state> last accessed 25 June 2021.

32 There is, however, an alternative view on the effect of international investment law that is replacing national law regulation. For a recent analysis covering the effect of international investment law on contract law, corporations, property and IP see Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113 (1) American Journal of International Law 1. See also the discussion on the dogmatic understanding of some contractual provisions in investment treaty arbitration in Chapter 4.

of international investment law. Furthermore, administrative, licensing and other state regulatory activities that raise certain legitimate expectations or intervene in them do not come into existence on the basis of treaty provisions either, but are also subject to national law regulation.

In addition to the national law issues that directly trigger investment treaty protection, it is possible to identify infinite other peripheral national law issues that necessarily appear before treaty-based tribunals. As evidenced by Chapter 1, there could be various contract-related aspects that stem not from investment contracts but arise under assignment agreements, settlement agreements, guarantees, suretyship, etc. The questions pertaining to their formation and the scope of rights and obligations under these contracts, as well as their termination and validity, may be equally necessary for a decision on a treaty claim. Investment treaty arbitration also regularly decides on a range of classical incidental issues, the most characteristic examples including determination of the legal regime applicable to immovable property,[33] the legal regime applicable to shares,[34] the legal regime applicable to the calculation of interests[35] and the legal regime applicable to power of attorney.[36]

Treaty-based tribunals' exposure to national law issues is further reinforced by the absence, as a rule, of a general requirement to exhaust local remedies.[37]

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33 *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Decision on Jurisdiction dated 30 July 2018, para. 226–227, 232.

34 *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para. 5–28; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010, para. 5–28; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction dated 19 December 2012, para. 251, 281.

35 *Swembalt AB, Sweden v. The Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration dated 23 October 2000, para. 44–49.

36 *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 February 2013, para. 232–254.

37 See, for instance, Christopher F Dugan and others, *Investor-State Arbitration* (Oxford University Press 2011) 367–395 and Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017) 67–68. Because the absence of a requirement on exhaustion of local remedies is continuously criticised, it is not surprising that reintroducing the requirement on exhaustion local remedies appears on the agenda for the ongoing discussion of the reform in investment treaty arbitration – see, for instance, UNCTAD report on reform options dated 12 June 2017, reproduced in United Nations Commission on International Trade Law, 'Settlement of Commercial Disputes. Investor-State Dispute Settlement Framework Comments from International Intergovernmental Organizations. Addendum' (United Nations Commission on International Trade Law, Fiftieth Session Vienna, 3–21

With a few exceptions,[38] foreign investors are not required to exhaust local remedies before applying to investment treaty tribunals. The fact that there is no such rule not only means that it is possible to obtain investment protection at an international level when there has been no denial of justice – a natural outcome of the requirement for exhausting local remedies – but also that treaty-based tribunals themselves primarily make decisions on a broad range of national law issues that the local legal system does not resolve conclusively. The broader protection that is not limited to the denial of justice provided to foreign investors thus implies greater autonomy for treaty-based tribunals in dealing with relevant national law issues. At the same time, even if there were a requirement of exhaustion of local remedies, it could not exclude a necessity for a treaty-based tribunal to decide on various subsidiary issues.

The concept of the incidental issue, if modelled on the parallel concept in private international law, inevitably has to deal with a question or dilemma regarding the law applicable to such issues. Treaty-based tribunals' intensive engagement with national law issues naturally and inevitably poses this question on the choice of applicable law to them. However, the question that arises in investment treaty arbitration is of a somewhat different complexity from that in the private international law context. Two factors affect it. Firstly, the very question about the choice of applicable law is conditioned by the initial recognition or denial of the normative applicability of national law because it is IIA/public international law which is primarily applicable. Secondly, and more to the point when the choice of applicable law is concerned, international investment law lacks a set of conflict of laws rules that would assist to determine the law applicable to incidental issues, if one accepts the concept.

Indeed, neither of the two sub-systems of the procedural frameworks in which investment treaty arbitration operates – localised and delocalised – provide an easy answer in relation to relevance and the choice of conflict of laws rules. Both systems recognise party autonomy to choose the applicable law[39] and both encourage an explanation for any tribunal's choice in the absence of

July 2017, A/CN.9/918/Add.7) <https://uncitral.un.org/en/commission> last accessed 26 September 2021.

38 For examples, see Article 8 (2) of Albania-Lithuania BIT (2007) or Article 7 (2) of Romania-Sri Lanka BIT (1981).

39 Article 42 of the ICSID Convention; Article 27 (1) of the SCC Arbitration Rules 2017 as revised in 2020; Article 21 (1) of the ICC Arbitration Rules 2017 and 2021; Article 33 (1) of the UNCITRAL Arbitration Rules 1976; Article 35 (1) of the UNCITRAL Arbitration Rules (2010).

the parties' designation through a requirement regarding a reasoned award.[40] Neither, however, has *lex fori* in the strict sense, and thus no predetermined gravity towards certain domestic conflict of laws regulations exists. Regarding *lex causae* as another alternative typically applied in the context of private international law for defining the choice for the incidental issue, it is *primarily* a relevant IIA that applies to investment treaty arbitration.[41] IIAs are typically silent on the choice of law applicable to incidental issues with exceptions to some of them which essentially mirrors Article 42 of the ICSID Convention.[42]

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40 Article 47 (1) (i) of the ICSID Arbitration Rules (2006), Article 42 (1) of the SCC Arbitration Rules 2017 as revised in 2020; Article 32 (2) of the ICC Arbitration Rules 2017 and 2021; Article 32 (3) of the UNCITRAL Arbitration Rules 1976, Article 34 (3) of the UNCITRAL Arbitration Rules (2010).

41 For a comprehensive overview of *lex causae* in investment treaty arbitration in the form of a book essay see Jean Ho, 'Unraveling the *Lex Causae* in Investment Claims' (2014) 15(3–4) Journal of World Investment & Trade 757.

42 Verifying the IIAs of the countries whose model BITs contain a reference to conflict of laws and thereafter all BITs of their counterparties with a similar reference to conflict of laws, I have been able to identify 372 IIAs with reference to conflict of laws of the host state (Annex X). See, for instance, Article 8 of the Argentina – United Kingdom BIT (1990), Article 8 of the Argentina – France BIT (1991), Article 8 of the Argentina – Sweden BIT (1991), Article 8 of the Albania – China BIT (1993), Article 10 of the Chile – Ecuador BIT (1993), Article 9 of the Argentina – Jamaica BIT (1994), and Article 8 of the Brazil – Chile BIT (1994). Apart from the apparent similarity in the wording, another two factors point to ties of the analysed exceptional provisions in IIAs with the one used by the ICSID Convention. First, the geographical coverage of the analysed BITs enabling application of conflict of laws rules of the host state reflects the coverage of the ICSID Convention. Secondly, over 90% of IIAs with provisions referring to conflict of laws rules of the host state identify the ICSID as a competent adjudicatory organ for dispute resolution between an investor and a state. The history behind Article 42 of the ICSID Convention confirms its limited operation in enabling another law than the law of the host state. The provision is not normally used as a starting universal point of analysis of conflict of laws in investment treaty arbitration entirely based on domestic conflict of laws regulation of the host state – see the International Centre for Settlement of Investment Disputes, 'History of the ICSID Convention' (Volume 1, 1970) 190–191 <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf> last accessed 26 September 2021; International Centre for Settlement of Investment Disputes, 'History of the ICSID Convention', (Volume 2-1, ICSID Publication 1968, reprinted in 2009) 569–570 <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> last accessed 26 September 2021; International Centre for Settlement of Investment Disputes, 'History of the ICSID Convention' (Volume 2-2, ICSID Publication 1968, reprinted in 2006) 801–803 <https://icsid.worldbank.org/sites/default/files/publications/History%20of%20the%20ICSID%20Convention/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf>

Host state conflict of laws, to which Article 42 of the ICSID Convention and some of the IIAs refer, do not have universal application. The provisions of this kind relate only to the principal claim triggered only in situations in which the parties fail to agree on the applicable law for the principal issue. In the absence of a choice being made by the parties, the host state law may be determined as applicable *in its totality*, including its conflict of laws provisions; however, this does not automatically give host state conflict of laws provisions any predetermined authority (of the kind similar to *lex fori*) to provide guidance on the choice of law for each and every subsidiary issue that emerges outside the principal claim. Instead of being a universal mechanism for the choice of applicable laws in delocalised proceedings, its DNA was limited to *transmission to a third law*, i.e. to *renvoi*, for the principal claim, or *lex causae*, which as jurisprudence of investment treaty arbitration demonstrates, does not really happen that often, if at all. If a lack of *lex fori* brings problems with the choice of applicable law comparable with international commercial arbitration,[43] the public international law nature of investment treaty arbitration poses questions on the choice of applicable law familiar to other public international law courts and tribunals.[44]

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last accessed 26 September 2021; Christoph H Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 601.

43 Gary Born, for instance, singles out eight categories of various approaches to the choice of applicable law, which include (1) application of the conflicts rules that the tribunal considers 'appropriate'; (2) application of the conflicts rules of the arbitral seat; (3) 'cumulative' application of all conflicts rules of states with a meaningful connection to the dispute; (4) 'international' or 'general' conflicts rules; (5) the conflict of laws rules of the state with the 'closest connection' to the underlying dispute; (6) the substantive law of the state with the 'closest connection' to the underlying dispute; (7) 'direct' application of a substantive law, purportedly without any choice-of-law analysis; and (8) application of the conflicts rules of the parties' nationalities, the place where enforcement of an award may be required, or other *sui generis* alternatives – see Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2643.

44 The works of Kurt Lipstein, Wilfred Jenks, and Edvard Hambro appear among the most noticeable studies in respect to conflict of laws analysis in international adjudication in the middle of the last century. For the works of Kurt Lipstein see Kurt Lipstein, 'Conflict of Laws before International Tribunals (A Study in the Relation between International Law and Conflict of Laws)' (1941) 27 Transactions of the Grotius Society 142; Kurt Lipstein, 'Conflict of Laws before International Tribunals (ii)' (1943) 29 Transactions of the Grotius Society 51; Kurt Lipstein, 'The General Principles of Private International Law' (1972) 135 Recueil des Cours de l'Académie de Droit International 9, 97–229; Kurt Lipstein, 'Conflict of Laws before International Tribunals Sixty Years Later' in Jürgen Basedow others (eds), *Aufbruch nach Europa. 75 Jahre Max-Plank-Institut für Privatrecht* (Mohr Siebeck 2001) 713–723. For the works of Wilfred Jenks relevant for conflict of laws in international adjudication see Clarence Wilfred Jenks, 'The Interpretation and

The contrast between the nature and regulation of the principal and incidental issues further facilitates singling out national law issues into a separate category. The principal issues are all treaty-centred. They concern the jurisdiction of investment treaty tribunals, the attribution of liability or violations of investment protection standards, and are primarily governed by public international law – international investment law.[45] The subsidiary national law issues discussed in this section – the legal status of companies, shareholder rights, property rights and contractual rights – are all governed by national law. While many subsidiary issues – depending on a claim – can also under different circumstances appear as the principal issue in the pure private international law context of domestic or cross-border litigation, incidental national law issues will never appear as the principal issue in the investment treaty arbitration context. It is this contrast that further facilitates conceptualising national law issues in investment treaty arbitration.

Application of Domestic Law by the Permanent Court of International Justice', (1938) 19 British Year Book of International Law 67, 95–97; Clarence Wilfred Jenks, *The Common Law of Mankind* (Stevens 1958) 1414. For the work of Edvard Hambro see Edvard Hambro, 'The Relations between International Law and Conflict Law' (1962) 105 Recueil des Cours de l'Académie de Droit International 1, 48. For early inquiry on interrelations between private international law and public international law viewed primarily from conflict of laws rules, see John R Stevenson, 'The Relationship of Private International Law to Public International Law' (1952) 52(5) Columbia Law Review 561, 561–588; for a recognition of the limits in national rules on conflict of laws and a call for public international law solutions for conflict of laws rules in 1975, see Fausto Pocar, 'Public International Law Solutions for Conflict of Laws Problems', (1975) 1 Italian Yearbook of International Law 179, 179–191. For a fuller and more up-to-date picture of the role of the PCIJ and the ICJ in developing conflict of laws rules, see Hans van Loon and Stéphanie De Dycker, 'The Role of the International Court of Justice in the Development of Private International Law' in Randall Lesaffer and others (eds), *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht – Nr. 140 – One Century Peace Palace, from Past to Present* (T.M.C. Asser Press 2013) 73–119.

45 As discussed in Chapter 4, some authors, like Anthony Sinclair, Stanimir Alexandrov, James Mendenhall, Campbell McLachlan, Laurence Shore and Matthew Weiniger recognise that treaty-based tribunals may consider pure contract-based claims on the basis of a broad dispute resolution clause in a relevant IIA or express reference to investment contracts/agreements in a relevant IIA. See Anthony Sinclair, 'Bridging the Contract/Treaty Divide' in Christina Binder and others (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 94–95; Campbell McLachlan and others, *International Investment Arbitration: Substantive Principles* (2nd edn, Oxford University Press 2017) 106, 154; Stanimir Alexandrov and James Mendenhall, 'Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence' in Arthur W Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill/Martinus Nijhoff 2014) 30–33.

Finally, the suitability of any concept depends on how well it can be integrated into a particular framework. The fact that the incidental issue paradigm can be smoothly integrated into the investment treaty arbitration framework creates further natural predispositions for conceptualising national law issues as incidental issues in investment treaty arbitration. In the context of private international law, the concept of the incidental issue contemplates incidental or preliminary jurisdiction to rule on these issues. If it is assumed that no incidental issues exist in investment treaty arbitration, investment treaty tribunals would be deprived of their incidental or preliminary jurisdiction to decide on the peripheral issues of varying importance that are necessary for a treaty claim, and treaty-based tribunals would therefore have to wait for the competent forums to decide on a wide range of incidental issues. They would be unable to consider whether a certain property had been expropriated because they would first have to establish whether the property came into existence as a matter of national law. They would also be unable to consider whether violations of certain contractual rights triggered standards of investment protection, as they would first have to ascertain whether these contractual rights existed. Finally, they would be unable to ascertain a claimant's legal personality, as that would entail deeming the issue incidental. If focused exclusively on treaty claims, the whole exercise of treaty jurisdiction would be paralysed; in reality, however, investment treaty arbitration works. There is information about numerous pending and concluded proceedings[46] but substantially fewer about suspended proceedings.[47] Likewise problematic would be an assumption that treaty-based tribunals consider various national law issues not as the

46 For a regular update see UNCTAD Investment Policy Hub at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

47 Suspension because domestic courts' exclusive jurisdiction over certain issues is not common. As a rare example, see, for instance, *SGS Société Générale de Surveillance S.A.* (*Claimant*) *v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13*, in which the tribunal stayed proceedings to enable the competent court to decide first on the contractual dispute and the scope of contractual rights (the amount due). The most common grounds for suspension are non-payment of advance payments for costs (43(4) of the UNICTRAL Arbitration Rules; 36 (6) of the ICC Arbitration Rules; 24.3 of the LCIA Arbitration Rules; 14(3)(d) of the ICSID Administrative and Financial Regulations), and suspensions peculiar to ICSID arbitration (truncated tribunals, challenges and bifurcation). See also a relevant discussion on an anti-suit injunction, where Emmanuel Gaillard argued that arbitral tribunals should have inherent power to decide how to proceed in the presence of competing proceedings and anti-suit injunctions – Emmanuel Gaillard, 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration' in Loukas A Mistelis and Julian D M Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 203–213.

incidental issue but as an appeal instance, for as discussed in Chapter 1, a claim before a treaty-based tribunal is an international law claim based on a relevant IIA, and not on the national law as such.

The conceptualisation of incidental issues in investment treaty arbitration is not only supported by arguments that revolve around the subsidiary role of national law issues for the treaty cause of action and a related question on the choice of applicable national law; it is also essentially supported by the concept's smooth integration into the overall investment treaty arbitration framework.

5.2.2 *Scholar Attempts to Conceptualise National Law Issues as Incidental Issues*

Despite the natural predisposition to conceptualise incidental issues in international investment law on the basis of the model of the incidental issue in private international law, this has not been (widely) advocated to date. This does not mean that there is no recognition of certain elements for conceptualising national law issues as incidental issues in academic writings and jurisprudence. There seems to be a broad consensus among scholars that national law matters for certain issues in investment treaty arbitration and that treaty-based tribunals should resolve these issues prior to reaching a decision on a treaty claim. While the views may vary as to the precise approach or standard of review for national law issues, scholars working in the international investment law field have no trouble acknowledging that to resolve treaty claims tribunals may need to make preliminary decisions on various contract and property rights, for instance, that have emerged as national law issues. Scholars routinely refer to the questions related to these rights as 'preliminary' or 'incidental' issues,[48] but it is hard to see if they draw any analogy with the concept of the incidental issue known in a private international law context. That is to say that the incidental issues in their analyses do not form a conceptual category that creates a significant choice of law dilemmas and requires a certain coordinated (pre-determined) approach/decision as to the choice of applicable law. Remoteness from the principal issue, priority in decision-making and the applicability of national law seem to serve as the only criteria for these

48 For instance, Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1(1) McGill Journal of Dispute Resolution 17, 17–18; Eric De Brabandere, *Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications* (Cambridge University Press 2014) 44–45; Ole Spiermann 'Applicable Law' in Peter Muchlinski and others (eds), *Oxford Handbook of International Investment Law* (Oxford University Press 2008) 112.

authors' separation of the incidental or preliminary issues. The criteria they use are certainly important, but not sufficiently so as to conceptualise national law issues as incidental issues as understood in private international law. As discussed in the preceding section, the incidental issue raises a question or dilemma in terms of applicable law, and the fact that this component requires a conflict of laws analysis for reoccurring patterns is largely overlooked in academic works.

The scarcity of academic research in the field of conflict of laws analysis in relation to national law in investment treaty arbitration may be attributed to the dominant focus on the role of national law and its interrelations with international investment. The complexity which such interrelations reveal takes all attention and rather a private international law question on the choice of national law is left aside.[49] Among these works, one can nevertheless distinguish some which may be deemed to endorse the conceptualising of the incidental issue in investment treaty arbitration even without formally distinguishing between principal and incidental issues. In this respect, the works of Monique Sasson and Hege Elisabeth Kjos appear as good examples of an initial step in the direction of conceptualising national law issues as incidental issues in international investment arbitration.

In addressing certain national law rights – such as property rights, shareholder rights and contractual rights – that are protected in investment treaty arbitration, Sasson does not apply the term 'incidental' or 'preliminary' issue to describe their role in the investment treaty context. At the same time, Sasson undoubtedly acknowledges that these rights are subsidiary legal issues subject to national law that must be resolved prior to any decision on the treaty cause of action. To characterise the way national law becomes applicable to these issues, Sasson introduces her own term – *renvoi*. She borrows the term from private international law, where, as discussed, the concept of the incidental issue also originates, but fills it with a specific meaning. Unlike in private international law, Sasson's *renvoi* does not contemplate a conflict of laws analysis, but functions as a mechanism that is embedded in the application of

49 Taida Begic, *Applicable Law in International Investment Disputes* (Eleven International Publishing 2005); Jeswald W Salacuse, *The Three Laws of International Investment: National, Contractual and International Frameworks for Foreign Capital* (Oxford University Press 2013); Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013); Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Domestic Law* (2nd edn, Kluwer Law International 2017); Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017).

international law.[50] It is this application of international law, or international investment law to be precise, that 'sends back', or requires the direct application of national law. Nor does *renvoi* complete any analysis of applicable law, as the content of national law has to be '*tested against international law*'.[51] Because Sasson focuses exclusively on interrelations between international and national law and the application of national law required by the international law framework of the investment dispute, her argument does not cover the question of which national laws are relevant. At the same time her *renvoi* is an important move towards focusing on the choice of law problem and in denoting the direct and immediate application of a relevant national law to the issues defined here as incidental issues.[52] In other words, even though the exact choice from among the relevant national laws is not a central issue for Sasson, the need to choose, nevertheless, may be viewed as being implicit in Sasson's *renvoi* proposition. Given the entire operation of *renvoi*, it appears that Sasson locates the solution to conflict of laws problems to such incidental issues in public international law.

Like Sasson, Hege Elisabeth Kjos does not use the concept of the 'incidental' or 'preliminary' issue when investigating national law's role in regulating a wide range of issues for investment treaty arbitration. At the same time, Kjos attempts to map a broad variety of occasions on which national law applies independently or in coordination with international law. She anchors her view in relation to the choice-of-law methodology in the distinction between localised (in her words, 'territorialised') and delocalised (in her words, 'internationalised') tribunals.[53] Kjos acknowledges that delocalised tribunals base their

50 Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Domestic Law* (2nd edn, Kluwer Law International 2017) 3.

51 Ibid. 11.

52 In this context, it is interesting to observe that a distinction drawn by Torben Svenné Schmidt between a theory of *renvoi* and the incidental issue, as understood in private international law, in fact demonstrates that Sasson's *renvoi* is closer to the incidental issue than *renvoi* properly understood in private international law. Schmidt connects *renvoi* with the choice of law to the *principle* issues whereas the problem of the incidental issue is focused on the choice of applicable law to the subsidiary issues: '*… the renvoi theory presupposes that the judge applies the foreign choice-of-law rule to the same main question to which he has already applied his own choice-of-law rule, whereas the incidental question concerns another legal question than the one which was the object of the choice-of-law rule of the lex fori*' – see Torben Svenné Schmidt, 'The Incidental Question in Private International Law' (1992) 233 Recueil des Cours de l'Académie de Droit International 305, 334–335.

53 For a clarification regarding the distinction, see Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford

conflict of laws analysis in the international legal order and '*are not bound to apply the choice-of-law rules of the seat*'.[54] For localised tribunals, she affirms that choice-of-law methodology is based on the domestic legal order,[55] primarily on the law regulating arbitration. Engaging with many of the possibilities and limitations of national conflict of laws methodology with respect to the identified national law issues,[56] Kjos's scholarship also essentially embraces the conceptualising of national law issues as the incidental issue.

The only author who has so far directly acknowledged the relevance of the concept of the incidental issue as developed in private international law for investment treaty arbitration appears to be Zachary Douglas.[57] To point to a theoretical basis for the concept in private international law, Douglas refers to the cited here works on the incidental issue of Wilheim Wengler and Rhona Schuz as well as on works on categorisation by Arthur Robertson and François Rigaux.[58] Albeit concisely, Douglas invokes the concept of 'the incidental issue' for property, contract and other private law issues, not only to discuss their subsidiary role vis-à-vis a treaty cause of action as the principal issue, but primarily to deal systematically with a question on applicable law encapsulated in the concept of the incidental issue. To this end, Douglas attempts to formulate specific rules for the choice of applicable national law for these issues. A simple taxonomy of the most common national law incidental issues in investment treaty arbitration can be drawn up on the basis of these rules:

University Press 2013) 18–19. Kjos's distinction between territorialised and internationalised proceedings may raise questions because Kjos attributes a tribunal with a seat – the Iran-USA Claims Tribunal – to a category of internationalised tribunal together with the ICSID on the basis that their mandate is founded in the international legal order. This attribution, it may be suggested, ignores public international law as a foundation for other treaty-based tribunals, conducted under the arbitration rules of international commercial arbitration, which, similarly to the Iran-USA Claims Tribunal, also have a seat.

54 Ibid. 63.

55 Among various considerations, Kjos points to Articles 4 and 5 of the Resolution of the Institute of International Law on Arbitration between States, States Enterprises or State Entities, and Foreign Enterprises dated 12 September 1989 which provide that if parties have not chosen an applicable law, the tribunal shall identify it, taking into consideration various sources including '*the law that would be applied by the courts of the territory in which the tribunal has its seat*' – available at <http://www.idi-iil.org/app/uploads/2017/06/1989_comp_01_en.pdf> last accessed on 25 June 2021.

56 Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013) 60–105.

57 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 39–150 (of immediate relevance 50–52).

58 Ibid. footnote 34 at 50.

– the capacity of a legal entity to prosecute the claim is to be decided by *lex societatis* (Rule 8 in Douglas's book);[59]
– the existence of property or the scope of property rights is to be decided by the national law of the host state,[60] including its private international law rules (Rule 4 in Douglas's book);[61]
– issues relating to contractual obligations, torts or restitutionary obligations are to be approached from the position of the law governing the contract, tort or restitutionary obligation in '*accordance with generally accepted principles of private international law*' (Rule 11 in Douglas's book).[62]

Douglas does not seem to view the concept of the incidental issue of private international law as being foreign to international investment law; he regards conceptualising national law issues as the incidental issues in investment treaty arbitration as a result of the direct and rather natural interaction between private international law and public international law. In this regard, private international law does not consist solely of national conflict of laws rules, but also of commonly accepted conflict of laws rules or *generally accepted principles of private international law*. In the absence of 'generally accepted principles of private international law', Douglas suggests using a comparative approach to try to find common ground in conflict of laws analysis of relevant national laws.[63] In other words, for Douglas private international law does not serve

59 Ibid. 78–79.

60 This rule was not drafted for all property-related issues that appear in investment treaty arbitration, but only for property rights that go to the heart of the dispute and come into existence as a matter of host state national law.

61 Ibid. 52–72.

62 Ibid. 90–94.

63 Ibid. 90. A comparative approach suggested by Douglas can be traced back to 1941, when conflict of laws before international tribunals received their first substantial discussion. Reacting to Lipstein's paper 'Conflict of Laws before International Tribunals: A Study in the Relation between International Law and Conflict of Laws', émigré German professor Ernst Wolff raised sceptical concerns regarding the capacity of international courts and tribunals to develop an independent set of conflict of laws rules. Instead of a system of rules concerning conflict of laws created by the decisions of international tribunals, Wolff suggested among others that a comparison among potentially relevant conflict of laws considerations in national laws could be a way out of the difficulty generated by a lack of *lex fori* for international courts and tribunals and a real workable alternative to international rules for conflict of laws – see discussions published together with Lipstein's paper – Kurt Lipstein, Conflict of Laws before International Tribunals: A Study in the Relation between International Law and Conflict of Laws' (1941) 27 Transactions of the Grotius Society 142, 178. (Ernst Wolff should not be confused with another German scholar – Martin Wolff, who published extensively on questions of private international law – Martin Wolff, *Private International Law* (Clarendon 1945).

as a source for transplant or analogy, but in its broadest sense, which encompasses national and international dimensions, coordinates directly with public international law to answer the question about the law applicable to incidental issues. This stepping outside the exclusive dominance of public international law (paradigm) and recognising the usefulness of the (possibility for) coordination between private international law and public international law enabled Douglas to arrive at the concept of the incidental issue for investment treaty arbitration. It therefore comes as no surprise that James Crawford praised Douglas's book for displaying '*fluency not only in public international law but also in private international law*' and for the author's '*desire to comprehend individual cases and disputes within some overall frame and matrix*'.[64]

Slowly but steadily, considerations pertaining to conflict of laws begin to appear on the agendas of scholars focused on both contract- and treaty-based investment arbitration. Early works on conflict of laws for international adjudication bodies of Wilfred Jenks,[65] Kurt Lipstein,[66] and Edvard Hambro[67] to name but a few create a necessary foundation for them. In addition to the mentioned contemporary works engaging with conflict of laws consideration for investment treaty arbitration of Douglas and Kjos, one can name, for instance, the work of Jan Asmus Bischoff.[68] A recent initiative of the Institute of International Law may further enhance understanding of conflict of laws in the setting on the international courts and tribunals, including investment treaty arbitration.[69] The dominance of the public international law perspective

64 James Crawford, Foreword in Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) xxi.

65 Clarence Wilfred Jenks, *The Common Law of Mankind* (Stevens 1958) 1414; Clarence Wilfred Jenks, 'The Interpretation and Application of Domestic Law by the Permanent Court of International Justice' (1938) 19 British Yearbook of International Law 67, 95–97.

66 Kurt Lipstein, 'Conflict of Laws before International Tribunals (A Study in the Relation between International Law and Conflict of Laws)' (1941) 27 Transactions of the Grotius Society 142; Kurt Lipstein, 'Conflict of Laws before International Tribunals (ii)' (1943) 29 Transactions of the Grotius Society 51, Kurt Lipstein, 'The General Principles of Private International Law' (1972) 135 Recueil des Cours de l'Académie de Droit International 9, 97–229; Kurt Lipstein, 'Conflict of Laws before International Tribunals Sixty Years Later' in Jürgen Basedow and others (eds), *Aufbruch nach Europa. 75 Jahre Max-Plank-Institut für Privatrecht* (Mohr Siebeck 2001) 713–723.

67 Edvard Hambro, 'The Relations between International Law and Conflict Law' (1962) 105 Recueil des Cours de l'Académie de Droit International 1, 48.

68 Jan Asmus Bischoff, 'Conflict of Laws and International Investment Arbitration' (2018) 7(1) European International Arbitration Review 143.

69 In 2017, the Institute of International Law created a commission focused on the choice of law in international courts and tribunals – the Sixth Commission. As of 30 June 2021, the work of the commission is still pending.

for scholarship on international investment law and investment treaty arbitration and frequent engagement of private international law practitioners in investment treaty arbitration,[70] may go some way towards explaining the scarcity of academic conceptualisation and the ease one may see in which some of the treaty-based tribunals implement the concept of the incidental issue in their reasoning.

5.2.3 *Other Supporting Considerations (1): Direct Conceptualisation – National Law Incidental Issues before Other Public International Law Courts*

National law issues as incidental issues appear not only in investment treaty arbitration but also in the broader context of international adjudication – in the practice of the ICJ (and previously the PCIJ), the ECtHR and various regional international human rights courts, etc. Exclusively applying international law as a principal applicable law, these courts regularly recognise the relevance of national law to certain categories of questions that have a subsidiary role to the principal claim. This engagement with national law comes as a natural consequence of their international jurisdiction and the limited regulatory coverage of international law regulation[71] and is not opposed to either monist or dualist views on international law or a mixture of the two. The engagement with national law entails a question about the choice of applicable law at various levels and makes the concept of the incidental issue's appearance in

70 On a clash between private and public law perspectives in investment treaty arbitration, see, for instance, Stephan W Schill, 'Public or Private Dispute Settlement? The Culture Clash in Investment Treaty Arbitration and Its Impact on the Role of the Arbitrator' in Todd Weiler and Freya Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Martinus Nijhoff Publishers 2011) 23–44; Stephan W Schill, 'The Public Law Paradigm in International Investment Law' (*EJIL: Talk!*, 3 December 2013) <https://www.ejiltalk.org/the-public-law-paradigm-in-international-investment-law> last accessed 25 June 2021; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107(1) American Journal of International Law 45.

71 It may be interesting to observe that in 1938 prior to the emergence of investment treaty arbitration, Clarence Wilfred Jenks noted that the PCIJ engagement with national law was an inescapable natural consequence of its international jurisdiction: '*... recourse to domestic law has been a common feature of the experience of other international tribunals to create a strong presumption that the extent to which the Court has been called upon to consider domestic law has not been the result of any unusual series of accidents, but has been simply the inevitable reflection of the complexity of the legal relationships with which international tribunals are ordinarily required to deal*' – see Clarence Wilfred Jenks, 'The Interpretation and Application of Domestic Law by the Permanent Court of International Justice', (1938) 19 British Year Book of International Law 67, 89.

public international law context, if not absolutely natural, then at least unsurprising. Broadly speaking, the incidental issues encountered by public international law courts and tribunals relate to status,[72] legality[73] and validity[74] under national law. While the degree to which incidental issues and their precise content are dealt with may vary according to the jurisdictional design of international courts,[75] their particular historical context,[76] as well as the factual shape and other peculiarities of an individual case, none of the international courts mentioned above have ever been completely immune from the need to decide on them. This application of the incidental issue paradigm in the pure public

72 *Barcelona Traction, Light and Power Company, Limited* (*Belgium/Spain*), Second Phase, ICJ Reports 1970, 33–34, para.38; *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Judgment on Preliminary Objections dated 24 May 2007, para. 64–67.

73 For instance, Article 7(1) of the ECHR directly points to the necessity to consider national law: '*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.*' Clarifying operation of the provision, Giulia Pinzauti points, among others, to the national-law incidental questions which are necessary to resolve prior to the decision on violation of Article 7: '*The Court's ruling on the alleged violation of the legality principle laid down in Article 7* (*principal or primary question*)*, is conditional upon the solution of another question, which is preliminary in nature* (*question prejudicielle*)*: did the offence of which the applicant was convicted constitute a crime under either national or international law at the time of its commission? To solve that preliminary question the Court obviously has to take into consideration the relevant criminal provisions of the respondent state or, if need be, any international treaty or customary rules on international crimes, depending on the specific substance of the petitum.*' – see Giulia Pinzauti, 'The European Court of Human Rights' Incidental Application of International Criminal Law and Humanitarian Law: A Critical Discussion of Kononov v. Latvia' (2008) 6 Journal of International Criminal Justice 1043, 1047. It may be interesting to observe that Wilhelm Wengler, who, as discussed, was among the first to address the incidental issue in a pure private international law context, in 1987 already recognised a (limited) possibility for the incidental issue to trigger application of criminal law. The category of cases which Wengler thus identified related to *contract validity, the performance of which may lead to a criminal responsibility* – see Wilhelm Wengler, 'The Law Applicable to Preliminary (Incidental) Questions: Chapter 7, Volume III', *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1987) 4.

74 *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) 1925 PCIJ (ser.A) No.6 (Aug.25), p.18 (the case is addressed in more detail below).

75 The extent of exposure to national law issues correlates with the possibility for an individual or company to initiate proceedings. National law issues appear more frequently in the practice of international courts that enable individual standing than in the practice of such courts that solely settle inter-state claims.

76 The nature of national law issues that appear in international court practice can be linked to a particular historical period. For instance, the PCIJ considered more contract-related national law issues than the ICJ.

international law context accordingly demonstrates its viability as a concept, and thus supports the consideration that reinforces conceptualising national law issues in investment treaty arbitration.

Two early PCIJ judgments in connected cases, one contentious – *Certain German Interests in Polish Upper Silesia*[77] – and the other interpretative – *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*)[78] – are of particular interest here. Not only are these cases among the first that help to illustrate the incidental issue paradigm in a public international law context, but they are both also linked with the name of Anzilotti who served as a judge in both of these cases.[79] While not attempting to extend Anzilotti's role in enhancing the concept of the incidental issue beyond the private international law context into a public international law setting, it is very tempting to see a connection between his contribution relating to the incidental issue in private international law[80] and the appearance of the concept, together with its own terminology, in the PCIJ's reasoning in a public international law context. Furthermore, viewing both cases together makes it possible to provide a meaningful response to possible criticism of conceptualising the incidental issue on the basis of national law's role in international law as a question of fact.

Both cases arose from an inter-state dispute between Germany and Poland over the latter's actions regarding German property in Upper Silesia, which Germany claimed contravened the Geneva Convention concerning Upper Silesia. Because the Geneva Convention guaranteed that German *nationals*' property would not be 'liquidated', Germany, among others, argued that a 1920 Polish law and actions of the Polish treasury replacing Oberschlesische Stickstoffwerke Company as the owner of the *Chorzów Factory* in the land

77 *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) 1925 PCIJ (ser.A) No.6 (Aug.25); see also Matthias Hartwig and Ignaz Seidl-Hohenveldern, 'German Interests in Polish Upper Silesia Cases', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e137> last updated May 2011, last accessed 25 June 2021; see also Monique Sasson discussing the case in the context of property rights – Monique Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International and Domestic Law* (2nd edn, Kluwer Law International 2017) 111.

78 *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*) (Judgment of 16 December 1927) (1927) PCIJ Series A. No.13.

79 Dionisio Anzilotti joined the majority in the *Certain German Interests in Polish Upper Silesia* (*Germany v. Poland*) (*Merits*) and dissented in *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*).

80 See the discussion on the emergence of the concept of the incidental issue in private international law at the beginning of this chapter and acknowledgement of Anzilotti's role by Walter Breslauer.

register breached the Convention. Overall, Germany insisted that Poland had undermined Oberschlesische Stickstoffwerke Company's control over the factory and Bayerische Stickstoffwerke Company's possession of licences and patents in breach of the Geneva Convention. Poland explained its actions by insisting that the transfer of factory ownership from the Reich to Oberschlesische Stickstoffwerke Company, on the basis of which Oberschlesische Stickstoffwerke Company became the alleged owner, violated international law, and Poland was therefore entitled by its own law to assume ownership of the factory. Establishing who owned the nitrate factory in *Chorzów* under the relevant German national law before the 1920 Polish law took effect became critical for the dispute. In other words, to find out whether public international law – the Geneva Convention concerning Upper Silesia – had been breached, the PCIJ first had to ascertain who owned the *Chorzów Factory* – the Reich or *Oberschlesische Stickstoffwerke Company* – and when this ownership had come into existence. The public international law question depended on the national law question – the incidental question on the existence of property rights.

It is noteworthy that the PCIJ began its consideration by expressly marking analysis as being tied with incidental considerations. The Court observed that it '*will not examine save as incidental or preliminary point, the possible existence of* [*ownership*] *rights under German domestic law …*'[81] That verification implied the consideration of *Auflassung* as a specific instrument on the transfer of property rights under German law and routines of recording it in the land register together with verification of peculiarities connected to company registration as well. Having ascertained that the factory had been owned by a German company and not the state, the PCIJ ultimately found that Poland had violated the Geneva Convention.

Conceptualising national law as the incidental issue in the context of public international law may face a challenge connected with the treatment of national law as fact. By diminishing the normative implication of national law, the 'traditional' public international law approach essentially *factualises* not only national law but also issues to which that law applies. The 'factual' approach towards national law coincidentally originated from the respective statement in *Certain German Interests in Polish Upper Silesia* (*Merits*) that *'municipal laws are merely facts'*.[82] And while *Certain German Interests in Polish Upper Silesia* (*Merits*) is associated with the 'factual' approach towards national

81 *Certain German Interests in Polish Upper Silesia* (*Merits*) (Judgment No.7 of 25 May 1926) (1926) PCIJ Series A No. 7.

82 Ibid. 19.

law, viewed together with the subsequent *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*) and through the prism of ownership ascertainment, the cases actually support the normative and not the 'factual' approach to national law.

Indeed, if the PCIJ statement is reconciled with the concept of the incidental issue, it becomes clear that the Court did not intend to deprive national law of its normative applicability for each and every aspect of international disputes. By first acknowledging that property rights were to be dealt with as the incidental issue through due regard to German law, and then by reconfirming this approach in the interpretative decision, the PCIJ cannot be perceived as supporting the position that national law is a question of fact in international law. Approaching ownership rights as the incidental issue, on the one hand, and treating national law as a question of fact on the other, are mutually exclusive; the former recognises the normative role of national law and the latter denies it.

The statement regarding national law's factual role should therefore be perceived in the narrow context of the role played by the 1920 Polish law in the case, and not as a universal statement. In *Certain German Interests in Polish Upper Silesia* (*Merits*), the PCIJ was not required to apply Polish law; instead the court was asked to assess its implication as a factual matter – whether in breach of international law, or not. The full statement incorporating the 'classical formula' fits this perception:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[83]

Likewise, if the decision on the transfer of the ownership of *Chorzów* were taken as a government decision instead of a legal decision, the PCIJ statement cited would be equally applicable. What the Court had to do in that context was simply to address the factual side of the matter, and it was therefore quite natural to say that legislative or government decisions, whichever applied,

83 Ibid.

were to be perceived as questions of fact for the purpose of assessing their compliance with international law obligations. In that context, national law was certainly not viewed through its normative character, but rather through its factual implication for the international law claim.

At the same time, as discussed above, the decision as to whether Polish law complied with its international law obligations under the Geneva Convention was premised on determining the owner of the factory – the Reich or the German company – prior to the adoption of the Polish law. If it was the Reich, the Polish law had complied with its international law obligations; if it was a German company, Poland had violated these obligations. The decision required application of German law, so German law was not treated as a question of fact in this respect; on the contrary, it was approached and applied normatively.

Addressing the case in 1938, Wilfred Jenks already warned against overemphasising the declared approach in *Certain German Interests in Polish Upper Silesia* on national law as facts. According to Jenks:

> The Court has not drawn from this remark the conclusion that municipal laws must be proved as facts in the manner in which foreign law is generally required to be proved in an English court, and in subsequent cases it has clearly passed beyond the line which separates exposition from interpretation.[84]

National law's normative, rather than simply factual, role in respect to the question of ownership, as the incidental issue became crystal clear at a later stage when Germany asked the Court to interpret the judgment. The PCIJ voted by eight to three to support Germany's request and make it clear that recognition of the ownership of the Oberschlesische of the factory in *Chorzów* was conclusive in the *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*). While Anzilotti felt compelled to dissent,[85] the heart of the disagreement between the majority in the PCIJ and Anzilotti lay in the appropriateness of the interpretation and the consequences of a decision on the incidental issue, but not in German law's normative role. One may speculate on the reasons why the PCIJ made the decision on the incidental issue conclusive,[86] but what is most

84 Clarence Wilfred Jenks, 'The Interpretation and Application of Domestic Law by the Permanent Court of International Justice' (1938) 19 British Yearbook of International Law 67, 68.

85 Anzilotti perceived the request for interpretation as going beyond interpretation of the operative part of Judgments No. 7 and 8 and thus impermissible.

86 Among possible reasons for the decision one may potentially name a connected case on indemnity which was pending before the PCIJ at the time – *Factory at Chorzów* (*Merits*)

important is understanding that the need to conceptualise the incidental or preliminary issue and to recognise the relevance of national law to them was rather unquestioned.

Treatment of national law as the incidental issue by other public international law courts and tribunals accordingly demonstrates the suitability of the concept of the incidental issue. Discomfort about approaching national law as a matter of fact and as a result having a more differentiated view on national law beyond merely factual penetrate nowadays various works in the field of public international law and directly or indirectly support the idea of the national law incidental issue.[87] In investment treaty arbitration the view on the normative role of the national law receives further strength due to the special nature of disputes more intervened in by national law.[88]

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with the judgment rendered only on 13 September 1928. Of particular interest are also observations of Bin Cheng who suggests that one has to differentiate between the roles of the incidental issue. If the incidental issue is an essential condition in relation to the principal question then the decision of the court on it retains a binding force for that decision: '*… when preliminary and incidental questions, which do not normally come within the competence of tribunal, fall within its competence because they are necessary for the determination of the principal question, decisions on these questions are not conclusive and binding unless they are an essential condition to the judgement on the principal suit. Such binding force is, however, limited to that judgment. The same question may be the subject of dispute between the same parties again either as an incidental question in another suit, or as a principal question before the competent tribunal. But whatever the outcome of these subsequent proceedings, the force of res judicata of the previous decisions can in no way be affected.*' – Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons 1953) 353.

87 See, for instance, Humphrey Waldock, 'General Course on Public International Law' (1962) 106 Recueil des Cours de l'Académie de Droit International 1, 124; Pierre-Marie Dupuy, 'International Law and Domestic (Municipal) Law' para.33, *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1056> last updated April 2011, last accessed 25 June 2021; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) para. 28–37; Andreas Zimmermann and Christian J Tams (eds), *The Statute of International Court of Justice: A Commentary* (1st edn Oxford University Press 2006) 776–779; Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge University Press 2011) 208.

88 See, for instance, Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013) 253–258; Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas and others (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) 222–223; Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 105; Ole Spiermann, 'Applicable Law' in Peter Muchlinski and others (eds), *Oxford Handbook of International Investment Law* (Oxford University Press 2008) 110–116; Jorge E Viñuales, 'Sources of International Investment Law: Conceptual Foundations of Unruly Practices' in Jean D'Aspremont and

5.2.4 *Other Supporting Considerations* (2)*: Reverse Conceptualisation – Public International Law Incidental Issues in Domestic Contexts*

Using the model of the concept of the incidental issue in private international law, this chapter proposes to conceptualise the incidental issue governed by national law in a public international law setting, or more precisely in investment treaty arbitration (referred to below as *direct* conceptualisation). In this context, the question may arise as to whether a reverse attempt to distinguish incidental issues in a domestic context that are governed directly by public international law instead of foreign national laws is appropriate (referred to below as *reverse* conceptualisation – see the table below). *Reverse* conceptualisation of the incidental issue is certainly not in itself of interest for this chapter, but because it opens up an important perspective on the usefulness of *direct* conceptualisation as a paradigm, it deserves the brief account below. Firstly, it might be worth looking at an attempt at *reverse* conceptualisation as an indicator of the concept's viability. Secondly, it might be interesting to explore the possible complexities of *reverse* conceptualisation in more general terms and whether the same or similar complexities appear in the case for *direct* conceptualisation.

A course exploring the public–private law divide given by Burkhard Hess for the Hague Academy of International Law may serve as an example of an attempt to introduce an issue governed by public international law as the incidental issue. Using the term 'public interests', but referring essentially to the

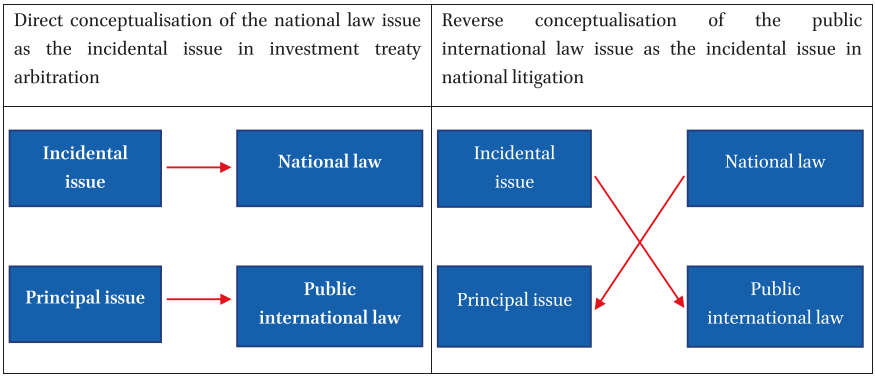


FIGURE 5 Direct and reverse conceptualisations

Samantha Besson (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press 2017) 1074; Jan Ole Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors* (Martinus Nijhoff Publishers 2011) 110–111.

mandatory overriding provisions that domestic courts are required to take into account to decide on contract validity, Hess states that the origin of these 'public interests' may stem directly from public international law. Referring to the *Nikiforidis* case (ECJ case C-135/15)[89] as an example, Hess suggests that 'public interests' deriving from public international law can be considered as the incidental issue in domestic proceedings.[90]

Of course, Hess's note on public international law as the origin of overriding mandatory provisions requires further explanation and exploration together with the suggested paradigm of the incidental issue. At the same time, there is nothing unusual as a matter of principle for international law to inform certain concepts, including the concept of public order.[91] Extending the sources for overriding mandatory rules in domestic litigation beyond national law to public international law, Hess opens the door to public international law in domestic proceedings under the premises of the incidental issue, and thus overcomes challenges connected with the implementation and application of international law in domestic legal systems. Despite its novelty and a need for further thorough theorisation and (importantly enough) concrete examples, the attempt (to frame public international law as a core element of the incidental issue in domestic litigation) itself demonstrates the appeal of the theoretical frame that distinguishes between principal and incidental issues that are subject to different regulation to achieve uniformity in their treatment.

While it is true that domestic courts actively engage with public international law, and that this engagement is no less intensive than it is with foreign national laws, Hess identified a fundamental problem for reverse conceptualisation. Domestic courts regularly deal with numerous public international law issues ranging from human rights and environmental obligations to the law of the sea. These rules of international law frequently reflect international treaty obligations that states have undertaken to implement in their domestic legal systems ('inward looking' rules in the words of the International Law Association Preliminary Report) and are received and applied in many

89 *Nikiforidis* case (ECJ in the case C-135/15) <http://curia.europa.eu/juris/documents.jsf?num=C-135/15>, last accessed 25 June 2021.

90 Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des Cours de l'Académie de Droit International 49, 232–233.

91 On various sources for the Norwegian public order including public international law see Giuditta Cordero-Moss, 'Innholdet i *ordre public*-forbeholdet' in Giuditta Cordero-Moss (ed), *Norsk ordre public som skranke for partsautonomi i internasjonale kontrakter* (Universitetsforlaget 2018) 163–186.

different ways by domestic courts.[92] However, whenever public international law is given effect, it is inevitably premised on national law. As a result, the regulatory distinctness of issues that are primarily governed by public international law is diluted, so in this sense public international law loses its 'foreign nature' in relation to national law and is assimilated by it before being applied. Precisely because the application of public international law in domestic contexts is rarely, if ever, completely disengaged from the domestic legal system, it is not surprising that *reverse* conceptualisation has not gained wide support. In contrast, this difficulty is not found in *direct* conceptualisation, as national law in public international law contexts retains its regulatory distinctiveness and exclusivity (at least with regard to subsidiary issues), and this, in contrast, serves as a basis for conceptualising the national law incidental issue in public international law contexts.

Reverse conceptualisation thus makes a two-fold contribution to this discussion. Firstly, an attempt at *reverse* conceptualisation demonstrates the legal paradigm's appeal and viability in addressing certain issues that are subject to different legal regimes separately, i.e. the concept of the incidental issue. Secondly, the obstacles to *reversing* conceptualisation in national law contexts, if contrasted with the lack of similar difficulties in public international law contexts (the differences between national law regulation and treaty regulation), assist in achieving a better understanding of existing predispositions for the *direct* conceptualisation of national law issues in public international law contexts, and adds to the argument for *direct* conceptualisation.

5.2.5 *Contribution of Conceptualising National Law Issues as Incidental Issues*

As the preceding discussion has demonstrated, investment treaty arbitration tribunals are exposed to the need to decide on legal issues that are governed by national laws. As these issues are not directly regulated by international investment agreements (IIAs)[93] and may potentially be connected to various

92 The Preliminary Report of the International Law Association on Principles on the Engagement of Domestic Courts with International Law reveals, for instance, a wide range of ways in which domestic courts engage with international law. For more details see Antonios Tzanakopoulos, 'Preliminary Report: Principles of the Engagement of Domestic Courts with International Law (2011 – 2016)' <www.ila-hq.org/index.php/study-groups?study-groupsID=57> last accessed 25 June 2021.

93 While the interrelation between the public international law and national law as *lex causae* is an area for constant disagreement in investment treaty arbitration, what matters here is a sharp delineation between the principal and incidental issues that lies

jurisdictions, they pose a question about the applicable national law. As a result, distinguishing between the principal and subsidiary issue in investment treaty arbitration is neither simply a reflection of the mechanical separation of the issues on the basis of their remoteness from the principal cause of action, nor of a different applicable regulation. The distinction contains more than that – a question about the relevant approaches or methodology for deciding on the law applicable to the issue that has to be resolved prior to any decision on a treaty cause of action. Investment treaty arbitration has therefore good ground for conceptualising the incidental issue in the same way as in private international law.

It is regrettable that there is not much done on conceptualisation of national law issues in investment treaty arbitration. In a similar way to the concept of the incidental issue in private international law, distinguishing between the principal and incidental issues in international investment law enables more structured reasoning and predictability. If we agree that certain issues are to be resolved *ab initio* with due regard to governing national laws before treaty standards of investment protection are decided on, we do not risk mistreating or unduly assimilating the incidental issues that are governed by national laws. In this respect, decision-making algorithms based on premises that recognise incidental issues seem to be more coherent and stable in a conceptual sense. At the same time, the distinction does not erect a wall between international law's corrective role, which still has a place and for whose proper application national law's impact must first be considered. Nor does the distinction create any obstacles for investment treaty arbitration courts which are authorised to apply exclusively international law. The concept of the incidental issue frequently helps to remove unnecessary tension between international and national laws as *lex causae* introducing the *relevance* of national law consideration instead of the debatable *applicability*. While national law is *applicable* to the incidental issue, in the larger scale of the overall treaty dispute it may well be simply *relevant*. Treaty-based tribunals that are authorised by the NAFTA or the ECT, for instance, exclusively to apply international law to disputes may therefore retain their consistency and decide on incidental issues *giving effect* to national law applicable to them.

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precisely on the border between international and national laws and reflects the nature of the questions involved. Whether national law applies to *lex causae* or not in investment treaty arbitration does not itself impact incidental issues which lie in full gravity of applicable national law.

In the words of cognitive scientists, Mark Turner and Mathew McCubbins, concepts in law appear precisely as a result of the lack of mental capacity to deal with an infinity of various dependencies, which we tend to compress into 'tractable, much smaller, and more compact concepts that we can hold onto, manipulate, and develop'.[94] A legal concept's overall function is 'the compression of a messy reality into a simple logic that can be expanded again to guide decision-making in other messy environments'.[95] The concept of the incidental issue precisely compresses a messy reality of broad exposure to national law issues into an organised concept that requires a clear set of analytical efforts: identification, a question of the applicable national law and a decision under the applicable national law. It is better to face the problems of characterisation and conflict of laws and to look at how these questions are and should be resolved, instead of hiding and (mis)treating national law in isolation through idiosyncratic approaches or assimilation into other issues. Better-informed considerations can benefit both international and domestic systems, and can show that there is more unity than might be suggested. Once a decision on a national law issue is reached, it is easy to introduce it into the greater analytical effort of deciding on a treaty claim. The concept's appeal for investment treaty arbitration is further reconfirmed by the *direct* conceptualisation of the incidental national law issues of other public international courts and *indirect* conceptualisation of public international law issues in domestic settings.

While the boundaries identified in the nature of the issues and applicable regulations facilitate conceptualisation of the incidental issues, the issues themselves constitute important links between public and private international law. The fact that the very same issue pertaining to the legal status of companies, shareholder rights, property rights or contractual rights may appear as the incidental issue both in a pure private international law context and a public international law context demonstrates the complementary nature of both systems as units of a whole. The possibility of the same incidental issue appearing in a private international law context and a public international law context reinforces the value of conceptualisation in the increasingly connected world, ensuring intellectual discipline and the coherence of the internal (domestic) and international legal systems.

94 Mathew D McCubbins and Mark Turner, 'Concepts of Law' (2013) 86 Southern California Law Review 517, 568.

95 Ibid.

5.3 Contract Interpretation as the Incidental Issue in Investment Treaty Arbitration

Having examined the requirements for the incidental issue in private international law and the reasons for conceptualising incidental issues in investment treaty arbitration, it is time to look at whether contract interpretation in investment treaty arbitration fits the incidental issue paradigm as developed in private international law and applied in public international law contexts. The section that follows explores in more detail the appropriateness of conceptualising contract interpretation as the incidental issue in investment treaty arbitration and this analytical approach's benefits for legal analysis.

To begin with, the discussion will concentrate on the fundamental parameters of the concept of the incidental issue in private international law that require an issue to be a separable legal question of subsidiary significance for the principal cause of action, with some dilemma regarding the applicable law.

5.3.1 *A Legal Issue*

Contract interpretation falls into the category of legal issue. Contract interpretation's legal nature, which has been already discussed in Chapter 2, is a fundamental element of the argument put forward here. Briefly, contract interpretation frequently entails assessing facts, and these facts often turn out to play a decisive role in understanding the content of contractual provisions. At the same time, reducing contract interpretation to fact-finding is an inappropriate oversimplification. Tribunals can ascertain the content of contractual provisions without resorting to fact assessment, as national law provides the necessary legal framework for this analysis. When fact assessment is needed for interpretative analysis, it is the law that defines its role and how it is carried out, either by allowing or excluding certain types of evidence or allocating evidence to specific stages in the process of ascertaining the content of contractual provisions, etc. Even jurisdictions that, due to the peculiarities of the judicial system's internal organisation mark contract interpretation as a factual matter for the purpose of limiting its review in the upper instances, nevertheless approach contract interpretation as a separate legal issue in legal doctrine and legislature. If carried out during interpretative analysis, fact-finding is therefore just one element of the process as a whole. In the law-fact dichotomy, ascertaining the content of contractual provisions is thus undoubtedly a legal issue and not a purely factual one.

5.3.2 *A Separable Legal Issue*

Where the requirement to be a separable issue is concerned, contract interpretation, while compliant, brings a certain complexity and requires clarification. In the preceding section, it was not difficult to conceptualise contract formation, termination or validity as contract-related incidental issues in investment treaty arbitration because, in addition to other requirements, the issues were clearly distinguishable or separable. Instead of constituting a distinct ascertainable relationship or status, contract interpretation serves as the *way* to ascertain the content of contractual relationships, and in this sense, belongs to the field of legal interpretation,[96] the category that depending on the object of interpretation also includes statutory interpretation, treaty interpretation, etc. No decisions can be made in relation to the contract-related incidental issue in investment treaty arbitration without a previous understanding of the contractual provisions. Accordingly, independent questions on contract interpretation are not usually raised unless there is a further question that is tied to more specific contract-related aspects, such as contract formation, contract termination, contract validity or contract rights and obligations. As a result, contract interpretation, whenever raised, is often confined to the shadows cast by other specific contract-centred legal issues, and this makes it more diffuse and 'less tangible', or separable.

Despite the diffuseness of its instrumental role in understanding other contract-related issues, contract interpretation is nevertheless traditionally treated as a separable legal issue in legal doctrine, national laws and transnational non-state instruments.

Legal doctrines in various jurisdictions traditionally define contract interpretation as an area of contract law that focuses on the approaches and

96 For locating contract interpretation among the various types of legal interpretation, see, for instance, Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 3–61; Jacques H Herbots, 'Interpretation of Contracts', Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 325–348 and Stefan Vogenauer 'Statutory Interpretation' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 677–689. Contract interpretation has two facets: one that is *inward* looking aimed at ascertaining the content of contractual provisions for decision-making and another that is outward looking and related to the persuasion reflected in the legal reasoning for an award. The inward looking ascertaining of the content of contractual provisions is not necessarily shown by lengthy reasoning and may be somewhat hidden (though still open to investigation by cognitive neurologists, etc.). Legal reasoning to varying extents represents the outward looking ascertainment of the content of contractual provisions. It is this aspect of contract interpretation that this book aims to investigate. See also Jaap Hage, 'Legal Reasoning' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing 2006) 407–422.

methods used to ascertain the content of contractual provisions. The origin of treating contract interpretation separately has historical roots; in the European contract tradition those roots essentially come from Roman Law and have subsequently been shaped by other historical and socio-cultural peculiarities in each country.[97] Roman law paid particular attention to interpretative rules as essential elements of legal reasoning. As discussed in Chapter 2, certain jurisdictions choose not to have express specific provisions on contract interpretation which has not however impeded the development of contract interpretation in legal doctrine. On the contrary, contract interpretation in these jurisdictions receives elaboration through legal doctrine, judicial practice and other contract law rules.

With regard to national laws, again as discussed in Chapter 2, quite a few jurisdictions contain separate provisions on contract interpretation. Furthermore, private international laws in various jurisdictions list contract interpretation as one of the *partial* elements of a contractual relationship, along with other contract-related issues like contract formation, content of contractual rights and obligations, contract termination or contract invalidation.[98]

The legal distinctness of contract interpretation as a legal issue is not only accepted by legal doctrine and in national laws, including national conflict of laws rules, but is also reflected by the final texts of various international documents aiming to harmonise international commercial law and private international law: the UPICC, the PECL and the DCFR, for instance, contain separate provisions on contract interpretation. Similarly, while defining the scope of applicable law for commercial contracts, the 2015 Principles on Choice of Law in International Commercial Contracts drafted by the Hague Conference on Private International Law expressly stipulate that contract interpretation falls into the sphere of the governing law.[99]

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97 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (2nd edn Oxford University Press 2011) 30–230.

98 See, for example, Article 12 of Rome I, Article 33 of the Law of Ukraine on Private International Law, Article 1215 of the Civil Code of the Russian Federation, Article 1115 of the Civil Code of Kazakhstan, Article 35 of the Private International Law of Georgia, and Article 1612 of the Civil Code of Moldova.

99 Other issues defined by Article 9 of the Hague Conference on Private International Law which fall within the scope of applicable law are as follows: rights and obligations arising from contracts; performance and the consequences of non-performance, including assessment of damages; the various ways of extinguishing obligations, and prescription and limitation periods; validity and the consequences of invalidity, burden of proof and legal presumptions, and pre-contractual obligations.

In other words, while contract interpretation is neither a completely autonomous legal issue, nor does it refer to status or legal relationships *per se,* as the most frequent types of incidental issues in private international law, it is nevertheless a distinguishable and separable legal issue.

5.3.3 *Playing a Subsidiary Role to the Principal Cause of Action*

Contract interpretation can certainly be said to play a subsidiary role in resolving the principal issue. Having defined its specific nature as somewhat *diffuse* if compared with other distinct contract-related issues, this in fact refers to contract interpretation's subsidiary role vis-à-vis the principal issue. As discussed in Chapters 1 and 4, contract interpretation is frequently needed before a decision on a treaty claim can be made. Tribunals may need to interpret contracts for contract-based treaty claims when a contract-related right directly triggers treaty protection under standards of investment protection such as FET, expropriation or umbrella clauses. Contract interpretation may be equally important because of another contract-related function in investment treaty arbitration that does not necessarily lead directly to a contract-centred treaty claim but may influence the overall decision on a treaty claim. It may therefore be necessary to interpret the contract to decide whether an investment has taken place or to define procedural aspects of the case or establish more peripheral aspects, etc. The ancillary role of contract interpretation is clearly shown by the multiple functions of contracts in investment treaty arbitration and the ultimate impossibility on many occasions to decide on a principal claim without first ascertaining the content of a contract.

This instrumental role of contract interpretation for understanding contract-related issues is not an obstacle to conceptualising the incidental issue. On the contrary, the role of contract interpretation is directly captured by a specific sub-type of the incidental issue in private international law – the incidental issue of *the second order*. This refers to a subsidiary question that has to be dealt with before any other incidental issue of primary relevance for the principal issue can be resolved. Indeed, the content of relevant contractual provisions often has to be ascertained before a decision on termination, validity or any other contract-related incidental issue in investment treaty arbitration is reached. Contract interpretation's *relevance* for resolving these other incidental questions in investment treaty arbitration is thus a necessary precondition for conceptualising contract interpretation as the incidental question of *the second order*. Two subsections below illustrate type of occasions where contract interpretation shall fit well as the incidental issue of the second order in the structure of the tribunals decision-making.

5.3.3.1 The Case of Contract Termination

The expropriation of contractual rights as a breach of international law was on the agenda for academics and in jurisprudence well before investment treaty arbitration emerged. With investment treaty arbitration, the expropriation of contractual rights as a breach of international investment law has received further development. While there may be numerous ways for a state to expropriate contractual rights, contract termination will be used here for illustration for simplicity and clarity. In this category of cases of expropriation of contractual rights via termination, the principal issue is whether the state has committed *expropriation* by terminating a contract and has thus violated international law. The answer to this public international law question depends on the responses to several other questions, including some that are contract-related and governed by national law. The question as to whether the state terminated the contract *by exercising its contractual right* must be among the national law questions to be asked, and tribunals have to ascertain the content of the contract provisions to answer this incidental question of *the first order*, and thus interpret the contract to some extent, where necessary.

Malicorp v. Egypt[100] and *Vigotop v. Hungary*[101] present two major patterns or tests for deciding on the expropriation of contractual rights via contract termination in investment treaty arbitration. As shown below, the tests differ as to when the question about contract termination should be asked, but contract termination plays a central role in both patterns, differences notwithstanding. The extent to which the tribunal engages with the contractual provisions varies from one case to another; as the parties did not disagree on the contract's precise content in *Malicorp v. Egypt*, its interpretation was less visible – mainly as part of the tribunal's analytical *rational activity*. By contrast, the parties in *Vigotop v. Hungary* disagreed vigorously over the content of the contract, calling expert witnesses and putting forward lengthy arguments on the contract's precise meaning to justify their positions. As a result, the interpretation of the contract became a hotly debated issue in the *reasoning* for the award and received extensive express coverage.[102] What follows is a brief overview of how the contract termination question was dealt with as the contract-related incidental issue of *the first order*, and the role of contract interpretation was addressed as the incidental issue of *the second order*.

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100 *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18.

101 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22.

102 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 516–519, 535–538.

In *Malicorp v. Egypt*, the tribunal dealt with the build-operate-transfer concession contract for the construction, management, operation and transfer of the Ras Sudr International Airport in Egypt agreed between a UK-registered company and the Government of the Arab Republic of Egypt.[103] The concessionaire undertook to build and operate the airport on the land provided and subsequently to transfer it to the state. The general period of the contract was 41 years. The parties agreed that the contract was governed by Egyptian law and that CRCICA was the competent forum for contractual disputes arising under the concession. Less than a year after the contract was concluded, it was suddenly terminated by the Egyptian state, which referred, *inter alia*, to the failure on the part of the foreign investor, Malicorp, to open the company in Egypt and to fulfil other contractual undertakings.[104] In its treaty-based claim before the ICSID, Malicorp claimed compensation for alleged treaty violations – the expropriation of contractual rights.[105]

By the time the treaty-based ICSID tribunal had started to deal with the issue, Malicorp had already obtained an award in a (parallel) commercial arbitration case before the CRCICA in relation to the contract's termination. The CRCICA tribunal found that the state had rightly terminated the contract, but because the termination had partly been due to a mistake on the state's part, Malicorp was nevertheless entitled to compensation of US$14.7 million.[106] While Malicorp tried to enforce the CRCICA award in France,[107] the state initiated proceedings to set it aside in Egypt, which were still pending at the time of the ICSID claim.

The treaty-based tribunal approached the expropriation issue fairly straightforwardly. It stated that the solution essentially depended on a single issue regarding the validity of the termination of the contract.[108] To reach a decision

103 *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award dated 7 February 2011, para.93 (includes a summary of the content of the contract).

104 Ibid. para. 127 (cites the letter of rescission).

105 Since another claim on full protection and security had no other substantiation than the expropriation of contractual rights through premature termination, the tribunal dealt only with the expropriation claim.

106 Ibid. para. 58.

107 Enforcement in France was refused at the time the ICSID case was being considered.

108 For completeness, it should be noted that a careful reading of the award shows that the test could have included another question on termination capacity that was redundant under the circumstances: '*The first question, therefore, is whether the Republic had the right to discharge itself from the Contract pursuant to the private law rules governing it .... If that is the case, it is unnecessary to examine whether the Respondent also took a measure under its public powers (*"*measures de puissance publique*"*), not as a party to the Contract but as a State, the effectiveness and conformity with the Agreement of which would have to be examined. Indeed, the rescission of the Contract would not leave any subsisting breach of the*

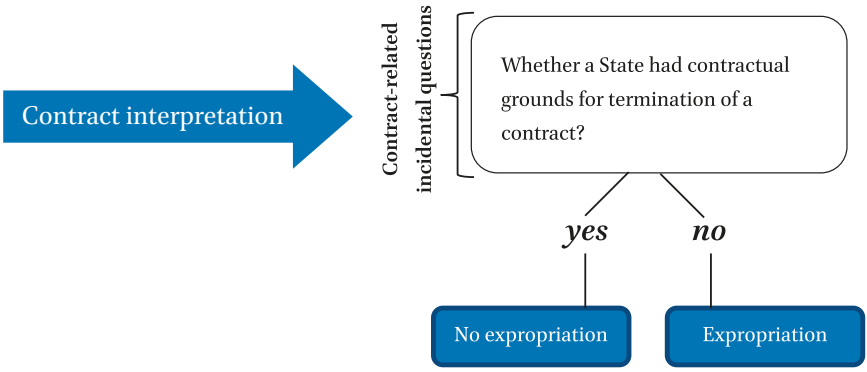


FIGURE 6 The *Malicorp* test

on the expropriation as a violation of an investment protection standard, the tribunal therefore had to decide whether the state had terminated the contract in compliance with its terms and the applicable national law. If it had, no issue of expropriation arose; if not – expropriation could have potentially taken place. In turn, the question on the correctness of the termination entailed investigating the obligations the parties had undertaken vis-à-vis each other under the contract, whether the parties had complied with their contractual obligations and whether the investor's failure to comply with contractual obligations was sufficient to justify its termination.[109] Contract interpretation accordingly became part of the analysis aimed at establishing the content and significance of the undertakings agreed to by the parties under the contract. Figure 6 above shows the structure of the test.

Addressing the same contract provisions, the CRCICA award posed a serious question as to the effect of its reasoning and its finding in the treaty-based proceedings. The treaty-based tribunal decided to retain independence in its assessment of the contractual obligations. At the same time the reluctance to treat the CRCICA award as having *res judicata* effects did not prevent the treaty-based tribunal from selectively relying on some of the parts in which the CRCICA tribunal established the content of applicable Egyptian law. This approach enabled the tribunal to retain sufficient independence on the question of contract termination while selectively benefiting from the CRCICA award. In the annulment proceedings, the claimant attempted to argue that

umbrella clause nor, moreover, in the absence of a protected investment, of other clauses of the Agreement.' – see ibid. para. 126.

109 Another connected aspect of the case related to validity and mistake – see ibid. para. 130–137.

the treaty-based tribunal had failed to apply national law. The annulment committee found no violations amounting to a reason for setting the award aside in this form of ascertaining the content of national law.

In considering the weight of each contractual obligation, the treaty-based tribunal paid particular attention to the overall legal nature of the fact that the contract was concluded on BOT terms.[110] Build-operate-transfer schemes entail a serious input on the part of a foreign investor, starting as soon as the contract is concluded. The investor should have possessed sufficient financial, operational and technical capacity to begin building on the land provided by the state. From this perspective the tribunal understood that it was crucial for the foreign investor to provide due documentation of financial capacity, as well as readiness to carry out the project at its own cost and risk (Article 2.1), and, overall, demonstrate that there was a 'realistic prospect' of fulfilling the contract.[111] The failure to set up the company in time to be able to fulfil contractual obligations (Article 3.1), which could potentially be less important in other contractual contexts, became crucial in the build-operate-transfer concession framework, and clearly showed unpreparedness on the part of the foreign investor in respect to this demanding contractual arrangement. Against this background the tribunal found that the state had terminated the concession contractually and rejected any attempts to justify or minimise the failures by referring to the failure on the part of the state to provide a site for the investor's use (Article 7.1).[112] The findings also led the tribunal to conclude that the termination of the contract did not amount to expropriation because '*termination justified in fact and in law, could not be interpreted as an expropriatory measure*'.[113]

In *Vigotop v. Hungary*, the tribunal dealt with a concession agreement for setting up and running one of the largest casinos in Europe on Hungarian territory. The concession agreement was concluded for 20 years with the option of a 10-year extension.[114] The state terminated the contract after just over a year, alleging two major failures on the part of the foreign investor to fulfil the contract. One failure related to the obligation to possess the required property for

110 Ibid. para. 132.

111 Ibid. para. 141.

112 Ibid. para. 140. The tribunal recognised that the state had indeed failed to provide a plot of land. At the same time, the tribunal explained that the investor's argument could only have succeeded under different contractual arrangements if '*that land could have served as security for the company's founders to obtain loans for funds they did not have*'.

113 Ibid. para. 143.

114 *Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 142–153.

the running of a casino (clause 9.3 of the contract)[115] and another to the obligation to provide payment security (clause 12.1 of the contract).[116] The parties disagreed on the precise content of these contractual obligations and these became the object of heated debate in the course of the proceedings, which involved expert witnesses on both sides.

In contrast to the essentially one-step analysis in *Malicorp v. Egypt*, the tribunal in *Vigotop v. Hungary* offered a more nuanced algorithm to deal with the question of the expropriation of contractual rights. As can be seen from Figure 7 on the next page, the test consists of three major steps. The question as to whether the contract was terminated in accordance with the terms appears as a single step in the analysis, and then only if the first question as to whether the state acted in its sovereign capacity when terminating the contract receives an affirmative answer (Question 1 in Figure 7). If the state acted in its sovereign capacity, the next question is whether there were contractual grounds for terminating the contract (Question 2 in Figure 7). If the termination is contractual, there is no case for expropriation. If the termination is not contractual, the analysis moves on to the reasons for the termination and a possible finding of expropriation (Question 3 in Figure 7).

Despite occupying second place in the algorithm [for the *Vigotop* test], the question on the contractual grounds for contract termination nevertheless retains similar significance to the question in the *Malicorp* test. To find expropriation, it is not sufficient for the state to exercise its public powers. There should be no contractual grounds that would justify termination; if, in addition to its public functions, the state terminates a contract because the terms allow it to do so, no expropriation can be found. The question on contract termination in turn entails the need to ascertain the content of the contract provisions, i.e. contract interpretation. Depending on the provisions' clarity, the parties' arguments, and the circumstances of the particular case, the contract interpretation may be more detailed or less, but in any event it is unavoidable

115 Ibid. para.147. Clause 9.3 of the Concession Contract says: '*Starting from January 1, 2011 up to expiry of the concession period, the Concession Company shall continuously hold the legitimate right to possession of the real properties for establishment of the Casino, to performance of the activities subject to Concession and the Supplementary Activities and/or the portion of those real properties suitable for performance of the activity subject to Concession and the Supplementary Activities and the right to encroachment of the necessary superstructures within the settlement where the activity subject to concession is exercised.*'

116 Ibid. para.148. Clause 12.1 of the Concession Contract says: '*As a security for any of its payment obligations arising from this Contract, the Concession Receiver shall ensure from January 1, 2010 for the full concession period without interruption a bank guarantee, security deposit or cash surety.*'

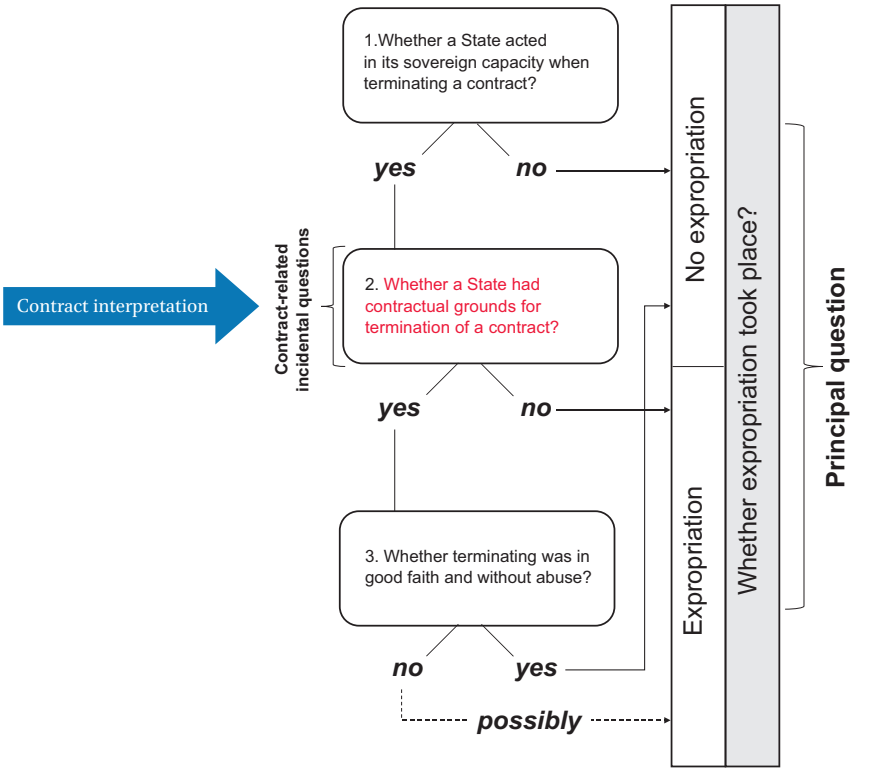


FIGURE 7 The *Vigotop* test

for deciding on the contractual validity of termination and ultimately on the expropriation of contractual rights.

Due to the acute disagreement between the parties on the precise content of the contractual provisions, it is no surprise that the tribunal in *Vigotop v. Hungary* engaged in interpreting the contract more intensively than the tribunal in *Malicorp v. Egypt*. With regard to the foreign investor's undertakings to secure property for the casino, the tribunal accepted the respondent's interpretation of the foreign investor's duty to secure property for the project and found no justification for Vigotop's failure in this regard.[117] Where payment security was concerned, the tribunal also endorsed the respondent's interpretation of the relevant contract provision and found that the foreign investor

117 The fact that the land swap transaction by which an investor had previously obtained rights over a (valuable lakeside) property was cancelled led to the investor's failure to comply with the contract deadline for securing an alternative site; this served as relevant background to the tribunal's findings. The matter relating to the land swap cancellation

had breached the contract in this aspect by failing to provide it. If the failure to provide security did not in itself amount to sufficient grounds for contract termination, in the tribunal's reading of the termination provision, the failure to secure possession of property was sufficient grounds for termination. This understanding of the contractual obligations led the tribunal to conclude that the termination was contractual and accordingly that no expropriation took place in relation to the concession agreement.

5.3.3.2 The Case of Implied Terms

Another example where contract interpretation plays a subsidiary role to the principal issue relates to analysis in disputes premised on the necessity to verify if there are *implied* terms in a contract. The question of implied terms typically appears in the context of discussion of FET or in umbrella clauses, or both. Tribunals face the question of whether an investor under a contract acquires certain legitimate expectations that are protectable in investment treaty arbitration.[118] While some tribunals attempt to analytically divorce the establishment of legitimate expectations on the basis of contracts from contract interpretation,[119] little doubt remains nowadays that legitimate expectations drawn on the basis of contractual undertakings necessitate the construction of the contractual undertakings of the parties in the first place.[120] It is not uncommon for tribunals, instead of using national law to substantiate their reasoning by pointing to a contract as a whole, to analyse the economic underpinning and/or reasonableness of the alleged undertaking under the circumstances, as well as other contextual evidence – negotiations, exchanges, other contract-related documents, etc.

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went through all the instances in the Hungarian court system, with Hungary's Supreme Court ultimately deciding that the land swap was null and void.

118 *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24 Award dated 30 March 2015, para. 648; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia,* ICSID Case No. ARB/12/39, Award dated 25 July 2018, para.440–457, 946; *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/10/16, Award dated 1 November 2013, para. 297, 336, 374.

119 See for instance, *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/10/16, Award dated 1 November 2013, para. 297.

120 James Crawford, 'Treaty and Contract in Investment Treaty Arbitration' (2008) 24 (3) Arbitration International 351, 374; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia,* ICSID Case No. ARB/12/39, Award dated 25 July 2018, para.965, where the tribunal concluded: '*… there can be no legitimate expectation in respect to the Properties to which the Claimants have no property or* ***contractual right****.*' [emphasis added].

Save on some occasions,[121] tribunals predominantly keep the contracts to their express terms.

For instance, in the case of the relocation of the investment in *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*,[122] the tribunal refused to imply an undertaking on the use of port facilities for a long-term lease contract concluded 20 years beforehand. The claimant substantiated its position by the economic rationale that the whole idea of having a lease is to ensure stability for its investment, whereas the decision to build and operate a tank farm in the port was all about being able to use the port facilities.[123] The tribunal found more persuasive a mismatch between the significance of the alleged undertaking for the whole transaction and a failure to address it in the exchanges and documents surrounding the deal, such as in its business plan.[124] Furthermore, the tribunal took into consideration the fact that the nominal price agreed in the lease agreement was too small to cover the undertaking that the claimant attempted to imply.[125] A refusal to imply a term appeared to be an important part of the decision denying the claim of violation of FET.[126] While factual considerations of the surrounding context and economic underpinning of the transaction in question are relevant, it is national law that gives shape to the analysis. At no stage, however, had the tribunal considered the law governing the lease agreement (it is unclear from the analysis which law was applicable to the lease agreement though the tribunal

121 While it may be open to debate, one may consider the tribunal's statement in relation to the choice of applicable law for the settlement agreement concluded between *Joseph Charles Lemire and Ukraine* as being a finding on implied terms: '*When negotiating the Settlement Agreement, the parties evidently gave thought to the issue of applicable law, and were apparently unable to reach an agreement to apply either Ukrainian or US law. In this situation, what the parties did was to incorporate extensive parts of the UNIDROIT Principles into their agreement, and to include a clause which authorises the Tribunal either to select a municipal legal system, or to apply the rules of law the Tribunal considers appropriate. Given the parties' implied negative choice of any municipal legal system, the Tribunal finds that the most appropriate decision is to submit the Settlement Agreement to the rules of international law, and within these, to have particular regard to the UNIDROIT Principles.' – Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (Lemire II) Decision on Jurisdiction and Liability dated 14 January 2010, para. 111.

122 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania* ICSID Case No.ARB/11/24.

123 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania,* ICSID Case No.ARB/11/24, Award dated 30 March 2015, para. 647.

124 Ibid. para. 648.

125 Ibid.

126 Ibid. para. 663.

applied Albanian law[127] to decide on other issues, in particular regarding the legality of the investment). The decision was adopted with a dissenting voice. The dissenting arbitrator disagreed with the majority, arguing that they had ignored '*the factual record, including evidence that the parties understood that the ability to discharge tankers at Claimant's facility was essential to the viability of Claimant's investment*'.[128]

Similarly, when dealing with implications of terms through preambles and best efforts clauses applicable national law shall be considered. Depending on their content, preambles (or recitals) may serve as an important tool for contract interpretation.[129] Their interpretative capacity lies in their individualised character. Unlike boilerplate clauses, preambles are not standardised.[130] Parties negotiate them individually to reflect a common intent and considerations that have led them to conclude a contract.[131] Preambles may contain

127 Under the Albanian Civil Code, interpretation is to be exercised with full effect given to the parties' '*common and real*' intent without being limited to the literal meaning of the words and evaluating with due regard given to the parties' conduct (Article 681). As a rule of last resort Article 689 of the Civil Code of Albania empowers an interpreter to adopt an interpretation for '*non-gratuitous*' contracts which would *equitably reconcile the interests of the parties*.

128 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania,* ICSID Case No.ARB/11/24, Dissenting opinion of Steven A Hammond dated 20 March 2015, para.21.

129 In addition to interpretation, Marcel Fontaine and Filip De Ly name eight other legal effects of preambles which are not necessarily entirely independent from interpretation – see Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 87–100.

130 It may be illustrative that standard contracts prepared by various associations and organisations do not have preambles. This is the case, for instance, with ICC model contracts for sale, agency, distributorship and others – see Fabio Bortolotti, *Drafting and Negotiating International Commercial Contracts* (3rd edn, ICC 2017) 151–254. This is also the case with numerous GAFTA and FOSFA standard contracts on the sale of soft commodities, available at <https://www.gafta.com/All-Contracts> and at <https://www.fosfa.org/contracts/>, last accessed 27 August 2020. As an exception to the general trend, some FIDIC contracts have introduced preambles which essentially move the content of certain annexes into the text of the principal contract. For instance, the 1987 edition of the Yellow Book, on mechanical and electric work, introduced a preamble to insert information within the principal text of a contract instead of an Appendix to Tender – see Peter L Booen, 'The Four FIDIC 1999 Contract Condition: Their Principles, Scope and Details' available at <http://fidic.org/node/6159>, last accessed on 27 August 2020.

131 A limitation of considering the parties' intent beyond its textual expression in a common law tradition, particularly under English law, may be viewed as a historic and most probably the primary reason for the emergence of voluminous preambles in contractual practice. See, for instance, an article from 1935 in which recitals are explained as follows: *'[T]he introduction of contract recitals may have been induced by certain characteristics of early English law. Thus, the common law prohibition against the testimony of interested parties*

various narratives of factual and legal contexts preceding and surrounding the deal.[132] Definitions of terms are frequently also located in preambles. Put figuratively, preambles frequently store important contractual DNA that might become critical to understanding the content of contractual provisions. The interpretative role of preambles, however, shall not be overstated in isolation from applicable legal frameworks. As with boilerplate clauses,[133] the precise operation of preambles depends not only on their wordings and the interpretative task they help to solve, but also and primarily on the applicable national law governing a contract. The differences in approaching preambles under national law *mimic* the fundamental distinctions across jurisdictions in contract interpretation summarised in Chapter 2 as a tension between predictability and fairness which national laws solve somewhat differently. As a consequence of this tension and other distinctions, national laws may accord a greater or lesser role to the interpretative function of preambles.[134] They may also set certain prerequisites for the preambles to control and qualify contractual provisions in the operative part of a contract.[135] National laws may differ

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may have provided a strong incentive for this admissible registering of mutual intent.' – 'The Effect of Recitals in Contracts' (1935) 35 (4) Columbia Law Review 565, 568.

132 It is interesting to note that some authors see preambles not as an introduction to the study of more context, but as indirect textualist clauses that are aimed at limiting contextual evidence by the precise content that became an integral part of it – see Uri Benoliel, 'The Interpretation of Commercial Contracts: An Empirical Study' (2017) 69 (2) Alabama Law Review 469, 484–485.

133 As discussed in Chapter 2, one of the most revealing visualisations of differences in contract interpretation across jurisdictions comes via the examples of commonly used contractual provisions – boilerplate clauses. Comparative studies demonstrate that entire agreement (merger) clauses, no oral amendment clauses, severability clauses and some other standard clauses may be understood differently and produce a different legal effect depending on the governing law. See, for instance, Giuditta Cordero-Moss (ed), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law* (Cambridge University Press 2011).

134 The UNCITRAL Guide on Construction of Industrial Works, cited by Marcel Fontaine and Filip De Ly to support a proposition on a different role being attributed to preambles under national laws, expressly specifies that: '*The extent to which recitals are used in the interpretation of a contract varies under different legal systems, and their impact on interpretation may be uncertain. Accordingly, if the contents of recitals are intended to be significant in the interpretation or implementation of the contract, it may be preferable to include those contents in contract provisions.*' – The UNCITRAL Guide on Construction of Industrial Works 1988, available at <https://www.uncitral.org/pdf/english/texts/procurem/construction/Legal_Guide_e.pdf>, last accessed 27 August 2020. See also Edward Allan Farnsworth, 'The Interpretation of International Contracts and the Use of Preambles' (2002) 3/4 International Business Law Journal 271.

135 For instance, under English law, the use of preambles to control, cut down or qualify contractual provisions may only be possible in cases when the respective provisions are

in accepting preambles as an independent source for substantive contractual undertakings.[136]

Likewise, undertakings of due care and diligence in the operative part of a contract cannot be understood in isolation from applicable national law. Save for potential exceptions, these obligations do not result from the parties' failure to express themselves more clearly. The provisions are rather a consequence of a dilemma faced by the parties between an impossibility, for various reasons, to agree on an obligation in its absolute terms, on the one hand, and a desire to attribute to an obligation a certain binding force to facilitate its future fulfilment, on the other hand. Absolute obligations, or obligations of results,[137] are not as a rule framed as a best efforts undertaking. One can hardly imagine an obligation to pay the price or deliver the goods as a best efforts undertaking, but one can easily accept an obligation of best effort in situations where an undertaking is conditioned by external forces or where an undertaking is dependent upon the performance of the other party. Unsurprisingly, undertakings of due care and diligence are frequently discussed in the literature, and in practice in the context of what would be a reasonable effort for a particular industry or field, for instance, in research, distributorship, joint venture, etc. While the industry or field is essential to understanding the nature of an

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ambiguous – see Kim Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) 525–530. Under French law, there is arguably more possibility for the use of recitals in interpretation of the operative part regardless of whether the clauses are ambiguous, because Article 1188 of the Civil Code of France provides that a contract is to be interpreted according to the common intention of the parties rather than stopping at the literal meaning of its terms. See also, Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 89.

136 For instance, Lewison, while giving examples when courts applying English contract law treated undertakings in recitals as binding obligations, observed that the courts would be cautious in doing so and even reluctant if the contract in the operative part already has obligations on the same subject – Kim Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) 531–533. In the same vein, Marcel Fontaine and Filip De Ly recommend that: '*[t]he appropriate place for operative provisions is the body of the contract and it is suggested that such provisions should not be contained in recitals.*' – Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 102.

137 For instance, 'obligations de moyens' and 'obligations de résultat' in French contract doctrine and jurisprudence on the basis of the old Article 1147 in the Civil Code of France, prior to the 2016 revision (currently in Article 1231–1 of the revised Civil Code of France) also informed the 'obligation of best efforts' and 'obligation to achieve a specific result' in Article 5.1.4 of the UPICC – see Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (*PICC*) (Oxford University Press 2009) 548–552.

undertaking and the degree of efforts in the best efforts undertaking,[138] they are not self-sufficient. Because national laws differ in recognising good faith as a duty of the parties in contract performance, their role should not be ignored. Due care, diligence, best efforts undertaking, best endeavours, commercially reasonable efforts, reasonable care, and good faith efforts, are all variations, and are not necessarily identical,[139] of a behavioural standard essentially based on the principle of good faith and fair dealing in contract performance. That some laws contain an implied duty of good faith for contracting parties and others[140] may become an important consideration for understanding the precise content of the contractual provision referencing one of these variations of due care undertaking.

In the same vein, when both types of provisions – preambles and undertakings on best efforts – are invoked simultaneously to solve an interpretative question, their assessment cannot be exercised in entire disengagement from applicable national law. While no doubt dependent on the wording, principles and concepts of the underlying contract law would nevertheless inform understanding of these provisions and of the contract overall. Apparently, the similar wording of preambles and best efforts undertakings may receive different legal effects depending on the applicable national law.[141]

Eureko B.V. v. Poland[142] illustrates a tribunal's failure to consider the applicable national law in the interpretation of a preamble and an obligation of due

138 In the context of the role of certain industries for understanding the parties' contractual undertakings, it is interesting to observe a recent view of some scholars on the global fragmentation in transnational contract laws as a phenomenon – see Joshua Karton, 'Sectoral Fragmentation in Transnational Contract Law' (2018) 21 (1) University of Pennsylvania Journal of Business Law 142.

139 Definitions of the terms may vary – for a comprehensive account, see Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 187–230 and Christine Chappuis, 'Les clauses de best efforts, reasonable care, due diligence et les règles de l'art dans les contrats internationaux' (2002) 3/4 Revue de Droit des Affaires Internationales 281.

140 See, for instance, Giuditta Cordero-Moss, 'Lectures on Comparative Law of Contracts' (2004) 166 Publications Series of the Department of Private Law, 124–136, University of Oslo. See also, Jeannie Marie Paterson, 'Good Faith Duties in Contract Performance' (2014) 14 (2) Oxford University Commonwealth Law Journal 283, 283–309 and Martijn W Hesselink, 'The Concept of Good Faith' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (3rd fully rev. and exp. edn, Kluwer Law International 2004), 630–634.

141 See Marcel Fontaine and Filip De Ly, *Drafting International Contracts* (Martinus Nijhoff Publishers 2009) 207–222.

142 *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment, Partial Award dated 19 August 2005.

care and diligence. A dispute arose out of the privatisation of a large, state-owned insurance company, Powszechny Zaklad Ubezpieczen S.A. ("PZU"), in Poland. To resolve the dispute, the tribunal had to interpret precisely what the parties had undertaken in relation to the IPO. The tribunal had to decide, in particular, whether Poland unequivocally promised to sell shares to Eureko B.V. and whether, as a result, Eureko B.V. had acquired enforceable rights in respect of shares and subsequently in relation to corporate governance in this regard. Interpreting the SPA, the majority of the tribunal concluded that the initially signed SPA did not reflect a definite undertaking on the part of Poland in relation to the IPO, but just an intention. Reverting however to the First Addendum, the majority found that the text of the preamble and substantive provisions '*demonstrate clearly that the statement of intent which had been agreed by the parties in the SPA had now crystallized and become a firm commitment of the State Treasury*'.[143]

The text of the preamble to the First Addendum became instrumental to the interpretation and was relied upon to find an obligation '*to exercise due care and diligence in order to have the IPO concluded before December 31, 2001*' in the operative part of the First Addendum, a firm undertaking equivalent to the acquired right of an investor. This observation led the majority to find that Eureko B.V. possessed an investment that, when assessed together with the shares it had purchased, constituted a controlling share in PZU. Failing to carry out the IPO, together with other factual circumstances, was ultimately deemed Poland's failure to grant fair and equitable treatment, and a violation of an umbrella clause in relation to contractual rights to the IPO that formed the basis of the legitimate expectations of the foreign investor. Nowhere in the reasoning did the majority consider Polish law regulations pertaining to contract interpretation in general, or in relation to contractual preambles and due care and diligence undertakings.[144]

The exercised interpretation of the majority raised a dissenting opinion[145] of the only arbitrator on the panel qualified in Polish law – Jerzy

143 Ibid. para. 152.

144 The parties to the SPA and the First Addendum to the SPA made Polish law expressly applicable (paragraph 6 of the SPA and Article 6.1 of the First Addendum to the SPA).

145 Dissenting opinions are rather common in investment treaty arbitration. Some scholars question their significance, noting, on the basis of empirically studied dissenting opinions, that if an arbitrator should dissent on the basis of principles only, '*few … seem warranted*' – Albert van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010) 842. For a view supporting dissenting opinions in investment treaty arbitration, see, for instance, Pedro J Martinez-Fraga and Harout Jack Samra, 'A Defense

Rajski.[146] The dissenter disagreed with the majority, who characterised the undertaking 'of due care and diligence' on the IPO as a firm undertaking. He pointed to another obligation of the parties in the First Addendum by which they were to undertake to adopt a new schedule if the IPO was not concluded before 31 December 2001.

Furthermore, Rajski specified the limited role of preambles for contract interpretation under Polish law:

> In Polish contract law and practice (as in the law and practice of many other countries) it is beyond any doubt that the parties to a contract do not create contractual rules in its preamble (unless otherwise expressly stipulated by the parties). The preamble to a contract simply serves other purposes (to declare the parties intentions and expectations, to describe their objectives, etc.)[147]

In his view, this failure led to the undue stretching of undertakings of 'due care and diligence' in the operative part of the First Addendum by inferring, on the basis of its preamble, a binding commitment. The dissenter became rather categorical in characterising the interpretation exercised by the majority as: *'bordering on manipulation, incompatible with basic rules applicable under Polish law'*.[148] According to Rajski, more was required under Polish law for the preambles to become a source of binding undertaking in the presence of an express undertaking 'of due care and diligence' that the parties had agreed to.

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of Dissents in Investment Arbitration' (2012) 43 (3) University of Miami Inter-American Law Review 445, 445–477. As will be demonstrated below, the dissenting opinion of Jerzy Rajski was warranted at least in what relates to the interpretation of the SPA.

146 Professor Jerzy Rajski was a member of the commission entrusted to develop the Civil Code of Poland and participated in the work on the UPICC from 1983–1989 as well as in the Study Group on a European Civil Code. He has authored a number of publications in Polish contract law, including for instance, Jerzy Rajski, 'European Initiatives and Reform of Civil Law in Poland' (2008) 14 Juridica International 151; Jerzy Rajski, 'On the Need for A Progressive Harmonisation of Private Law in The European Union: The Role of Legal Science and Education' (2006) 11 Juridica International 20. A list of publications and a biographic note for Jerzy Rajski is available here – Beate Gessel-Kalinowska vel Kalisz (ed), *The Challenges and the Future of Commercial and Investment Arbitration* (Lewiatan Court of Arbitration 2015) 7–29.

147 *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment, Partial Award dated 19 August 2005, Dissenting opinion, para 5.

148 Ibid.

That the tribunal has not cited an entire text of the SPA and the First Addendum in the Partial award makes it difficult to confront the analysis of the majority with a more reliable analysis, but even the cited provisions in the award are sufficient to question the reasoning of the majority. Reading Article 65 of the Polish Civil Code, one can no doubt see that the common intention of the parties and the contract purpose take priority over the literal meaning of the contractual wording.[149] This means that, in an abstract way, one may accept that preambles, as repositories of the parties' intent and purpose, can assist in a teleological interpretation and that such interpretation should be sanctioned under Polish law. When one attempts to construe the concrete text of the SPA and the First Addendum, one becomes puzzled as to how an expression of intent in the preamble of the First Addendum could have transformed an undertaking that parties expressly framed as being of '*due care and diligence*' in the operative part into a firm obligation, and *de facto* into an obligation of result. If one were to take the reasoning of the majority to its extreme, one could conclude that any undertaking on *due care and diligence* in the operative part can be (relatively easily) transformed into a firm obligation if the parties in the preamble spell their *intent to achieve* what, in the operative part, had carefully remained an obligation of *due care and diligence*. Furthermore, the exercised interpretation does not fit well with another express undertaking under the First Addendum, by which the parties agreed that in case no IPO is possible within the stipulated timeframe, they would '*unconditionally undertake to adopt a new schedule*' but failed to specify the precise framing for agreeing this new schedule and for conducting the IPO. One may accordingly argue that should the parties have wanted the IPO unconditionally to have taken place within the set deadline, they could easily have spelt out their undertaking in more absolute terms. Inspired by the method of diagramming interpretation,[150] Figure 8 visualises the tribunal's reasoning.

Even though the case was ultimately settled, it would not be unreasonable to conclude that the dissenting arbitrator was right on at least two accounts:

(1) the majority should have ascertained the approach to contract interpretation under Polish law prior to engaging in ascertaining the content of the SPA;

149 On the so-called 'combined' objective-subjective Polish method see, for instance, Zygmunt Tobor and Tomasz Pietrzykowski, 'Does Theory of Contractual Interpretation Rest on a Mistake' in Bettina Heiderhoff and Grzegorz Zmij (eds), *Interpretation in Polish, German and European Private Law* (Verlag Dr Otto Schmidt 2011) 16.

150 James Durling, 'Diagramming Interpretation' (2018) 35 (1) Yale Journal on Regulation 325.

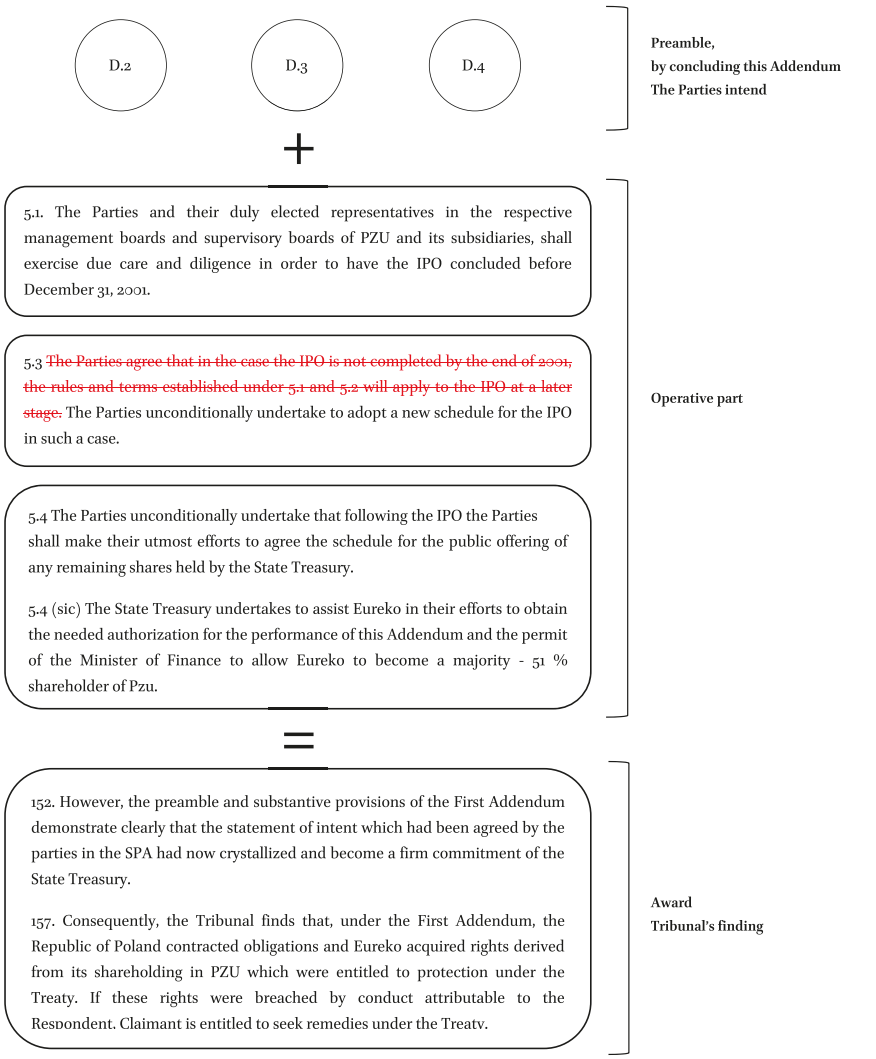


FIGURE 8 Diagramming contract interpretation

(2) when interpreting the undertaking of *due care and diligence* in the operative part, as an enforceable, firm obligation, protected under international law, more reasoning was needed than merely enumerating excerpts from the preamble's text in which the parties had expressed their intent. The majority should have taken a clearer position by saying whether the preamble text served as a source of independent undertakings or how the undertaking of due care and diligence in the operative part should have been strengthened and qualified.

Rajski's accusation, that the majority in *Eureko B.V. v. Poland* approached the SPA as a contract '*sans loi*',[151] appears to be correct. Given that the majority consisted of Stephen Schwebel and Louis Yves Fortier, the failure to consider applicable Polish law for contract interpretation was hardly surprising. Stephen Schwebel not only participated in cases where contract interpretation was exercised in disengagement from applicable national law[152] but has also clearly stated in publications that international law could be the proper law for investment contracts.[153] Louis Yves Fortier somewhat later acted as an arbitrator in the *Eurotunnel* case discussed in Chapter 3 in which the tribunal, instead of considering applicable national law, relied on the VCLT to interpret the concession agreement. Instead of being informed by international law,[154] the approach of the tribunal in *Eureko B.V. v. Poland* could be indeed tied to some practices observable in international commercial arbitration where arbitrators may interpret international contracts in isolation from their proper law.[155] In this context it is also interesting to observe that in another case,

151 *Eureko B.V. v. Republic of Poland*, *Ad Hoc* Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment, Partial Award dated 19 August 2005, Dissenting opinion, para. 5.

152 Stephen Schwebel acted as a counsel in a contract-based Aramco case representing the claimant, whose arguments on contract interpretation, disengaged from applicable national law, were shared by the tribunal. Stephen Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement' (2010) 3 (3) Journal of World Energy Law & Business 245, 245–256.

153 Stephen Schwebel observed, for instance, in one of his publications: '*There are many examples of contracts between States and aliens having international law as their proper law, or having international law as one of the systems of law that may govern aspects of the contract. International law may be expressly denominated as the, or a, governing law, or it may be found to be the proper law by the intent of the parties as reflected in less explicit but cumulatively determinative contractual provisions*' – Stephen Schwebel, *Justice in International Law: Further Selected Writings* (Cambridge University Press 2011) 176.

154 Reliance on preambles for implying undertakings is not sustainable under public international law. Makane Moïse Mbengue, for instance, observes: '*Generally, in international law preambles are not capable of creating binding legal effects upon parties. Preambles are part of the narratio, not of the dispositio, ie they do not have the function of laying down legal obligations. Thus, preambular provisions are formulated in general wording and are usually not intended to constitute substantive stipulations. As such, preambles contain only exhortative clauses and do not create any legal commitment above and beyond the actual text of a treaty*.'– Makane Moïse Mbengue, 'Preamble', *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456> last updated September 2006, last accessed 27 August 2020.

155 Joshua Karton, 'The Arbitral Role in Contract Interpretation' (2015) 6 Journal of International Dispute Settlement 4, 10–17. See also the discussion in Chapter 2.

Lemire v. Ukraine (*II*), the tribunal also disengaged from national law but was nevertheless hesitant to infer some binding obligation of result from an undertaking of best efforts to provide a radio licence[156] in the settlement agreement.

At the same time, it is not certain that the conclusion would necessarily have been different if the majority had considered Polish law.[157] The case, while primarily based on the SPA and its First Addendum, involved a complex factual background, and various governmental decisions in relation to whether the privatisation of PZU could provide a relevant framework for forming legitimate expectations from a foreign investor *in addition* to the SPA.

To sum up, even though tribunals in the cases cited do not formally refer to contract interpretation as the incidental issue, the conceptualising of contract interpretation as the incidental issue of *the second order* nevertheless fit well in the structure of the analyses carried. The structure of the decision-making in relation to the expropriation of contractual rights in the *Malicorp* and *Vigotop* tests shows that resolving a treaty claim requires deciding on a separate legal question that is subject to the terms of the contract and the applicable national law – contract termination. This question in turn requires ascertaining the content of the contract provision to some extent – contract interpretation. Similarly, tribunals may need to decide first if a contract contains implied terms that may give rise to protectable legitimate expectations under the standards of investment protection.

Furthermore, contract interpretation may be needed in contract-based proceedings to decide on a principal claim such as contract termination, contract validity, etc. In treaty-based proceedings, contract interpretation is always the incidental issue of *the second order* that precedes certain contract-related incidental issues. Even when applying the umbrella clause and engaging directly with contractual provisions, the treaty-based tribunal looks at contractual rights and obligations and legitimate expectations that arise in this regard, thus injecting intermediate concepts between contract interpretation and

156 An obligation was worded in the settlement agreement as '*best possible efforts to consider in a positive way the application of Gala Radio to provide it with the licences for radio frequencies*' – *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 153–159.

157 Criticising the failure to apply national law to the SPA and its addendum, Zachary Douglas also expresses some doubts as to whether the result would have necessarily been different. He does not provide much clarification, though, as to how Polish law could have contributed to the reasoning of the majority or lead to the same result – Zachary Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration: *Occidental, Eureko* and *Methanex*' (2006) 22 (1) Arbitration International 27, 44.

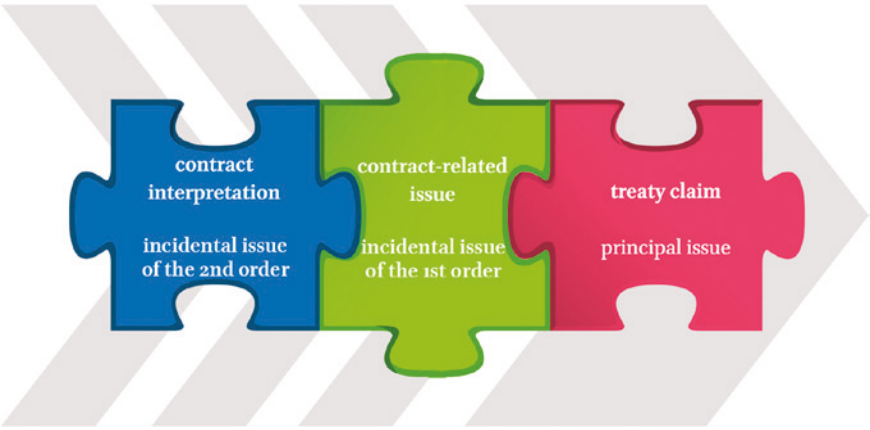


FIGURE 9 (Contract-related) decision-making in treaty-based claims

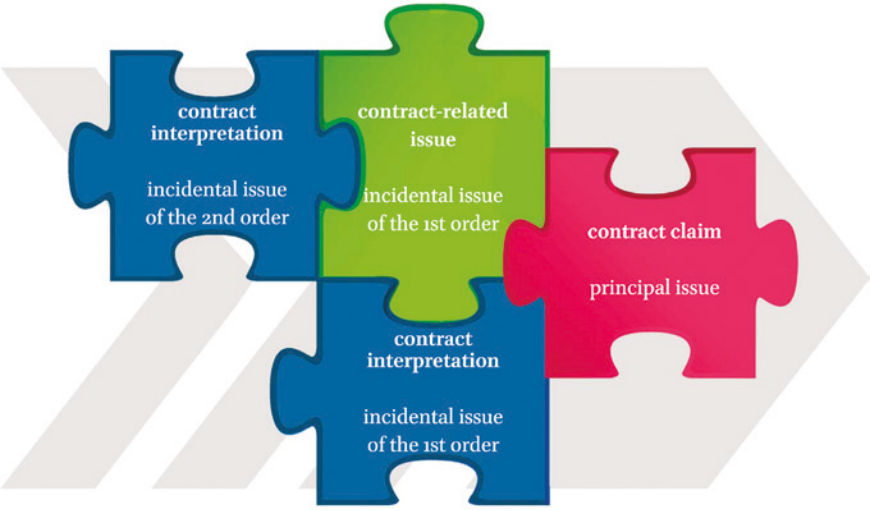


FIGURE 10 (Contract-related) decision-making in contract-based claim

the principal treaty claim. The two diagrams above summarise this point by showing that interpreting investment treaty arbitration contracts is always the incidental issue of *the second order* that precedes certain contract-related incidental issues, whereas in contract claims contract interpretation may be needed to solve a contractual claim and thus becomes the incidental issue of the *first order*.

5.3.4 *Posing a Question about the Applicable Law*

The remaining element for conceptualising contract interpretation as the incidental issue is the requirement for some kind of a dilemma or a question regarding the applicable law. If the parties have expressly agreed on the law that is to govern their contract, the choice is generally upheld on the grounds of party autonomy, which is also recognised in the context of investment treaty arbitration. Major problems arise when the parties fail to choose the applicable law.

As discussed previously, investment treaty arbitration gives rise to a complexity that is somewhat different in nature in this regard. In a purely private international law context, the question as to which law is applicable to the incidental issue arises because of uncertainty as to which approach should prevail for incidental issues – *lex fori* or *lex causae*.[158] Investment treaty arbitration does not operate with exactly the same methodological anchors for the choice of law. The problem with choosing the applicable national law for contract interpretation in investment treaty arbitration is not the outcome of indeterminacy as to which of several clearly defined alternatives should prevail (as is the case with *lex fori* and *lex causae* in private international law), but rather the result of more general and complex indeterminacy on the role and choice of national law in the context of public international law. There is no *lex fori* in the strict sense. Arbitration regulation creates a procedural frame for treaty claims, whether they are delocalised proceedings or have a venue. *Lex causae* consists primarily of public international law and, with a few limited exceptions discussed before, there is no guidance on the choice of national law. This difficulty is further aggravated by indecisiveness regarding conflict of laws rules in this public international law setting – either national, and thus part of national law, or international and harmonised, and thus part of private international law in a broad sense. Above all, the precise interrelation between public international law and national laws creates its own complexity. The complexity surrounding the choice of the applicable law accordingly is more than sufficient to justify conceptualising contract interpretation as the incidental issue.

That governing law is frequently chosen by the parties in their contracts may explain the reasons why there is no plenty of analysis available of the awards made in conflict of laws cases in relation to contractual matters as a matter of practice in investment treaty arbitration. Be that as it may, even a

158 As discussed, the question or dilemma with applicable law appears in the situation where *lex fori* leads to the application of foreign *lex causae* to the principal issue in the first place thus opening the door to a competition between the two principal approaches *lex fori* and *lex causae*.

scarce number of available awards that evidence conflict of laws analysis in relation to contracts enables one to trace some preferences for conflict of laws analysis in relation to contract interpretation in investment treaty arbitration.

William Nagel v. The Czech Republic[159] is one of the relevant illustrations. The Cooperation agreement for the creation and operation of a GSM cellular telephone network in the Czech Republic is central to the tribunal's analysis. The three-partite agreement concluded between Mr Nagel (the claimant), Millicom International Cellular S.A. (a third party) and *Sprava Radiokomunikaci Praha* (an entity wholly owned by the state) did not contain a choice of applicable law. The failure to choose applicable law was not the only omission in the contract. The overall ambiguity of the text spanned many aspects, so the tribunal had to consider whether the Cooperation Agreement was even valid and binding for the parties at all and if so, what kind of undertakings the parties assumed vis-à-vis each other. The ultimate purpose for the tribunal to define the law applicable to the Cooperation Agreement and its interpretation was tied with issues of jurisdiction. To affirm jurisdiction, assuming that other obstacles to jurisdiction were to be overcome, the tribunal had to establish that the rights that Mr Nagel acquired under the Cooperation Agreement related to assets and investment.[160] If not, the tribunal had to decline jurisdiction. This analysis would not be possible without defining and thereafter applying the governing national law.

As all roads lead to Rome, convincing all parties that Czech law was applicable to the Cooperation agreement was neither difficult, nor controversial. Both the claimant and the respondent relied on Czech law in parallel in their submissions while addressing the validity, character and content of the Cooperation Agreement. To the extent summarised in the award, the claimant has not clarified the reason for its reliance upon Czech law.[161] The respondent argued that the Cooperation Agreement had to be subjected to the law of the Czech Republic because of the 'general conflict of laws principles', by which the respondent understood the overall connection of the contract with the Czech Republic, confirmed by the two connecting factors – the place of conclusion and the place of performance of the contract.[162]

Even in the absence of any disagreement on applicable law, the tribunal nevertheless had to cement certain connecting factors to explain the choice.

159 *William Nagel v. The Czech Republic,* SCC Case No. 049/2002, Final Award dated 9 September 2003.

160 Ibid, para. 316.

161 Ibid. para. 68–69, 313–315.

162 Ibid. para. 152.

A blend of the connecting factors that the tribunal chose to emphasise included the nationality of a party and place of performance. A lack of disagreement between the parties on the points of applicable law also served as an argument for the tribunal in deciding that Czech law applies, though the tribunal did not interpret a lack of disagreement on applicable law as a subsequent agreement on it *per se*. The overall conflict of laws analysis featuring the Czech Republic as a centre of gravity for the contract took up several lines, as follows:

> The Cooperation Agreement had strong links with the Government of the Czech Republic. One of the parties was a Czech State enterprise and the Agreement concerned cooperation in order to obtain rights to operate a GSM system in the Czech Republic. The Arbitral Tribunal therefore considers that Czech law should be regarded as the applicable law of the contract. Indeed, this view seems to be shared by both parties.[163]

Regrettably, but rather comprehensibly, the tribunal has not elaborated more and has not given more guidance that could be used for further analysis on conflict of laws in the context of investment treaty arbitration. The tribunal was more than qualified to do so given its high-profile composition, which also included a renowned expert in conflict of laws.[164] It would have been helpful

163 Ibid. para. 303.

164 The tribunal consisted of Martin Hunter (appointed by the claimant), former Justice Hans Danelius (appointed by the institution) and Herbert Kronke (appointed by the respondent). Being a Director of the Institute for Comparative Law, Conflict of laws and International Business Law of the University of Heidelberg and Former Secretary-General of *UNIDROIT*, Herbert Kronke is known for his work in the field of private international law and conflict of laws regulation, including as follows: Herbert Kronke, 'Capital Markets and Conflict of Laws' (2000) 286 Recueil des Cours de l'Académie de Droit International 245; Herbert Kronke, 'Applicable Law in Torts and Contracts in Cyberspace' in Katharina Boele-Woelki and Catherine Kessedjian (eds), *Internet – Which Court Decides, Which Law Applies? Quel tribunal décide? Quel droit s'applique?* (Kluwer Law International 1998) 64–87; Herbert Kronke, 'Connecting Factors and Internationality in Conflict of Laws and Transnational Commercial Law' in Katharina Boele-Woelki and others (eds), *Convergence and Divergence in Private International Law – Liber amicorum Kurt Siehr* (Eleven International Publishing 2010) 57–70; Herbert Kronke, 'Transnational Commercial Law and Conflict of Laws: Institutional Co-operation and Substantive Complementarity, Inaugural Lecture, Private International Law Session, 2013' (2014) 369 Recueil des Cours de l'Académie de Droit International 9. It remains to be seen whether the issue of conflict of laws analysis will appear in another currently pending case in which Herbert Kronke sits as an arbitrator – see *Itochu v. Spain*, ICSID ARB/18/25 <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/865/itochu-v-spain>, last accessed 26 September 2021.

to have a more instructive assessment which would explain with more clarity that other factors have to be considered for the Cooperation Agreement as a collaborative contract where none of the parties exercise characteristic performance. Those factors are to be assessed on a balance of their relevance with place of performance being a decisive consideration.

Absence of generalised regulation on the choice of law makes the *individualised* approach exercised in *William Nagel v. The Czech Republic* an appropriate option as arbitrators exercising it have to make an individual assessment regarding the peculiarities of the given cases and existing links to a particular law. The individualised approach is not entirely unfamiliar for the domestic context, especially for those jurisdictions which do not have codified statutory regulation on conflict of laws rules.[165] Rather than designating the relevant law as the tribunal wishes, the individualised approach attempts to justify the most connected law for a particular question by objective criteria. The latter distinguishes the approach from a discretionary *ad hoc* identification of the applicable law. The nationality of the parties, the place of contract conclusion, the place of contract performance, and the contract's nature may all appear among relevant considerations. Each of the connecting factors are to be assessed cumulatively in the context of the circumstances of a particular case. While distinguished from the discretionary determination of applicable law, the *individualised* approach inevitably bears an element of uncertainty and unpredictability. At the same time, it offers a flexibility which may be needed for the conflict of laws in investment treaty arbitration as the field that undergoes formation and where detailed conflict of laws regulation does not always deliver.

An individualised approach may take the Rome Convention as guidance.[166] The Rome Convention addresses the choice of applicable law in relation to contracts' characteristic performance and captures the idea of the *most closely connected law* for a contract. That the Rome Convention and not the Rome I Regulation is used for this guidance is primarily explained by a preference for a general framework involving characteristic performance and overriding considerations of the most closely connected law, without restrictions tied to

165 Giuditta Cordero-Moss, 'New Trends in the Norwegian Practice on the Choice of Law Applicable to Contracts' (2012) 57 Scandinavian Studies in Law 45–61.

166 On the matter of contracts, Douglas seems to be positive that intra-EU unification, in relation to the choice of law for contracts, may point to the existence of general principles on the choice of law in relation to contractual matters – see Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 90–91.

the concrete, enumerated contractual types in the Rome I Regulation.[167] To this end, one has to acknowledge an increasing recognition of the concept of *characteristic performance*[168] with the acknowledgement of the controlling consideration of *the most connected law*. These two considerations, while not uniformly accepted, are nevertheless being met with increasing consensus, not only in the EU, but beyond its borders too. In this respect, the proposal in this book draws upon and adjusts *the closest connection test* that Benjamin Hayward[169] suggests for international commercial arbitration.

If one were to determine the law applicable to these contracts based on what the most closely connected law would be, without looking at hard presumptions of characteristic performance, it is quite likely that the result would lead to the host state law. Place of performance on the territory of the host state and resulting close intertwinement with the administrative and other background law regulation of the host state, as well as the overall purpose to contribute to the development of the host state make ties of investment contracts and state contracts so close that these considerations taken together can override any other considerations for the choice of applicable law in the absence of the parties' choice. For instance, construction contracts, as a classical example of

167 Because the Inter-American Convention on Choice of Law in International Commercial has deliberately chosen not to specify concrete presumptions for characteristic performance or otherwise guiding the choice of the most closely connected law, the approach based on the Rome Convention may be more acceptable for countries in Latin America. For analysis of the approach to the choice of applicable law in the Inter-American Convention on Choice of Law in International Commercial see Friedrich K Juenger, 'The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons' (1994) 42 American Journal of Comparative Law 381, 386–393.

168 Likewise, many national laws of the states who are not EU members attempt to clarify characteristic performance – see, for instance, Article 1125 of the Civil Code of the Republic of Belarus; Article 1211 of the Civil Code of the Russian Federation; Article 1113 of the Civil Code of the Republic of Kazakhstan; Article 1190 of the Civil Code of Uzbekistan.

169 Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press 2017). Peter Nygh can be also viewed as being supportive of the closest connection test based on Article 4(2) of the Rome Convention as a fallback residual rule for conflict of laws which should be favoured over *lex fori* – see Peter E Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 Recueil des Cours de l'Académie de Droit International 269, 345. For examples of the reliance on the Rome I Regulation in international commercial arbitration for contracts between parties coming from the member states and for examples of commentaries pointing to the application of Rome I even for those arbitrations that do not have seats in the contracting parties see also Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer International Law 2014) 2627.

collaborative contracts, may necessitate equally significant performance from both parties, making it impossible to identify the characteristic performance. For this situation, the place of construction would create the most proximity. Even if, depending on the parties' undertakings, it would be possible to identify the constructor as undertaking a characteristic performance, the place of construction being the host state may nevertheless become decisive for the choice of applicable law as the most closely connected anyway. Even stronger considerations go to concession contracts because of their administrative nature.[170]

Overal, the most closely connected law, or the closest connected test, appears to be a widely accepted paradigm in modern regulation of conflict of laws. The paradigm may be shaped somewhat differently in various jurisdictions. Hard presumption rules relating to characteristic performance may appear in relation to some types of contracts in some jurisdictions and be unseen in others. The split in regulation would not necessarily lead to different results. The most closely connected law, or the closest connected test, determined without a look at hard presumptions, accordingly appear to be particularly suitable for the determination of the applicable law in the absence of the parties' choice for the contracts that appear in investment treaty arbitration, many of which are either entirely uncovered, or not commonly or expressly covered by the hard presumptions in the existing national and international conflict of laws regulation.

This being said a significant question remains regarding the nature of conflict of laws analysis for treaty-based tribunals. Should *all* treaty-based tribunals be viewed as international courts and tribunals exercising an autonomous conflict of laws analysis? Should treaty-based tribunals instead be considered in the same vein as arbitration tribunals, similarly to tribunals in international commercial arbitration and, if so, which, of numerous approaches on the choice of applicable law exercised in international commercial arbitration, is to be preferred? Furthermore and in connection with the above, what approach and which rules should treaty-based tribunals use to find out which law is applicable to a contract – international, national or both? All these questions essentially indicate the absence of *the organising theory* that would clarify the precise mandate of treaty-based tribunals in relation to conflict of laws and a necessity to have an agreement on specific rules or approaches for identifying the law that governs a contract. The solution proposed in this chapter

170 None of the analysed cases demonstrate that concession was subject to other laws than the law of the host state. But even if the choice is not spelled out, the host state law would most likely be applicable anyway because of the very close intertwinement of concession into the regulatory framework of the host state.

on reliance on the Rome Convention is adjusted to contract interpretation as the incidental issue. For investment contracts, the suggested solution would rather result in the host state law.

5.3.5 *Additional Consideration: Cases with Compound Jurisdiction*

Appropriateness of treating contract interpretation as the incidental issue raises particular value for cases with *compound* jurisdiction and as a result evidences the viability of the concept.

As earlier discussed, this work refers to a case as 'the case with compound jurisdiction' when consent to jurisdiction in the case is *both* treaty-based and contract-based.[171] When two types of consent appear in one proceeding, the distinctions which each of them brings are still present. The differences pertain to the jurisdictional foundation and substantive basis for the claims. When considering contract- and treaty-based claims, tribunals with compound jurisdiction apply different regulations to each of them. Each type may necessitate contract interpretation. Because contracts are not directly enforced for treaty-based claims and are directly enforced for contract-based claims, contract interpretation, it may be argued, plays a somewhat different role for each claim.[172] At the same time, it is difficult to understand why the *methodology* used to address the same issue – contract interpretation – should differ in principle from one system to another, especially when both claims meet in a single proceeding and both depend on interpretation of the same contract or even

171 Of the analysed cases with elements of contract interpretation, tribunals have compound jurisdiction in the cases as follows: *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL*; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19; *Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (*II*), ICSID Case No. ARB/06/11; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6.

172 The distinction in the treatment of contract interpretation in treaty-based proceedings from treating it as the principal issue or along with the principal contract-centred issues in domestic litigation or in international commercial arbitration lies in the level of the subsidiarity. Whenever contract interpretation is conclusively decided in proceedings in which contract-centred issues constitute the principal issues, contract interpretation would most likely have *res judicata* status. However, when contract interpretation is decided as the incidental issue *of the second order* in investment treaty arbitration, this would not be mandatory for other proceedings.

the same contractual provisions. Furthermore, in addition to bringing consistency in methodology, the concept of the incidental issue may enhance procedural economy. Tribunals may find it inappropriate to 'redo' interpretation for a treaty-based claim, once it is exercised in the framework of contract-based claims.[173]

In other words, contract interpretation remains the same phenomenon despite the different basis for the tribunal's jurisdiction – a contract or a treaty.[174] Treating contract interpretation as the incidental issue both in the framework of considering contract-based claims and treaty-based claims would achieve uniformity and predictability associated with the application of national law to contract interpretation. In fact, of the identified cases with elements of contract interpretation where tribunals possessed compound jurisdiction, national law informed contract interpretation in the majority of them.[175]

5.4 National Law in Operation through the Concept of an Incidental Issue

5.4.1 *Jura Novit Curia*

When approaching contract interpretation through the concept of an incidental issue, treaty-based tribunals have to ascertain the content of national law applicable to the contract. Various scenarios may arise. Parties to a dispute

173 See, for instance, *Joseph Charles Lemire v. Ukraine,* Decision on Jurisdiction and Liability dated 14 January 2010, para.487–489. At the same time the approach to interpretation adopted in the contract-related part of the claim and thereafter relied on in a treaty-related part is open to criticism. The criticism though does not change the point made here, namely that there are no grounds for treating contract interpretation differently in cases with compound jurisdiction, and contract interpretation exercised in relation to contractual claims may well be relied on in the part where a treaty claim is considered.

174 See also the discussion in Chapter 4 on distinctions between contract interpretation and other peculiar types of analysis in investment treaty arbitration.

175 Of eight cases with compound jurisdiction, national law informed contract interpretation in six of them: *Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL*; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5; *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (*II*), ICSID Case No. ARB/06/11; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador* (*Petroecuador*), ICSID Case No. ARB/08/6.

may build their arguments in relation to contract interpretation on national law, and provide sufficient elucidation of the relevant content of national law. Parties may also misrepresent the content of national law or entirely omit references to national law and be silent on its potentially critical capacity to overcome literal interpretation. For all of these scenarios, in order to discharge their adjudicatory function, treaty-based tribunals need to be in a position to make their own legal inferences from the factual basis proven by the parties, to verify the parties' submissions in relation to the content of national law applicable to contract interpretation, to invoke national law independently, where needed, and to apply it to contract interpretation.

The absence of direct normative regulation of the principle in investment treaty arbitration[176] opens a possibility for different opinions on its content. Of the various facets of *jura novit curia*, the most controversial power is not relevant for contract interpretation in investment treaty arbitration. This power relates to ordering, independently from the parties' pleadings, remedies that were not asked for but that follow from the applicable sources of law.[177] The irrelevance of this power for the context of contract interpretation in investment treaty arbitration, however, does not render the principle of *jura novit curia* entirely uncontroversial. Opposing views reflect the existent disagreements over the content of the principle *jura novit curia* and ongoing debate on the role of national law in investment treaty arbitration. One may perceive the principle quite literally as '*arbitrators know the law*' and on that basis reject the extension of the principle to national law. This perspective would be premised on the understanding that the only law which arbitrators are supposed '*to know*' is international law. Alternatively, one may perceive the principle as a power to invoke, ascertain and apply national law within the restrictions imposed by the requirements of due process, and on that basis acknowledge

176 *Jura novit curia* does not find textual expression in the IIAs. Laws of the seat for localised arbitration and procedural regulation for delocalised ICSID proceedings do not directly and explicitly address the principle either. Similarly, arbitration rules are equally silent on the principle (with a rare exception in Article 22 (1) (iii) of the LCIA Arbitration Rules). While not addressing the principle explicitly, procedural regulation remains nevertheless of relevance for shaping the principle of *jura novit curia* – see national reports on *jura novit curia* assembled and analysed in Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Curia in International Arbitration* (Juris Publishing 2018).

177 See, for instance, *Bogdanov v. Moldova* (*I*), where the sole arbitrator concluded that the tribunal '*remains free, within the borders of the applicable law … to give the legal qualifications and determine the legal consequences that it deems appropriate, even if they were not pleaded by the parties.*' – *Bogdanov v. Moldova* (*I*), SCC Case 93/2004, Award dated 22 September 2005, para. 69.

its extension to national law in investment treaty arbitration. This perspective would not expect arbitrators 'to know' the law, but would rather accept that they may invoke it, ascertain its content and apply it under the condition of giving the parties the opportunity to present their case and of treating the parties equally.[178] In what relates to the role of national law in investment treaty arbitration, one may align treaty-based tribunals exclusively with international courts, and on that basis deny extension of *jura novit curia* to national law.[179]

178 Friedrich Rosenfeld, '*Iura Novit Curia* in International Law' in Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Curia in International Arbitration* (Juris Publishing 2018) 427–428; Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (3rd edn, Juris Publishing 2014) 684–685. Rather exceptionally, newly developed guidance on the conduct of international arbitration – the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) – explicitly address *jura novit curia* in Article 7.

179 For instance, in *Murphy Exploration & Production Company International v. Republic of Ecuador* (*II*) the tribunal expressly acknowledged that *'municipal law in an international law context is treated as fact'* and on that basis denied an extension of the principle of *jura novit curia* to national law – *Murphy Exploration & Production Company – International v. The Republic of Ecuador* (*II*), PCA Case No. 2012-16, Partial Final Award dated 6 May 2016, para. 361. In doing so, the tribunal relied upon Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 824. The case is also discussed in the section on distinctions between contract interpretation and fact-finding. See also Sourgens, who by referring to *Fraport AG Airport Services Worldwide v. Phillipines* suggests that annulment committees support the proposition that *jura novit curia* does not apply to national law – Frédéric Gilles Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes Between States and Foreign Investors* (Brill/Martinus Nijhoff 2015) 94. It appears though that what was unacceptable for the annulment committee in the *Fraport* case was rather procedural violations associated with the exercise of the tribunal's efforts on the ascertainment of the content of national law. By citing para.117 of the Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide dated 23 December 2010, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines,* and characterising it as a blank denial of the principle of *jura novit curia* in respect to national law, Frédéric Gilles Sourgens does not include the final sentence in the same statement of the decision. The sentence in fact clarifies that the annulment committee did not consider that the original tribunal was deprived of the right to invoke and ascertain the content of national law; the committee was rather concerned about procedural aspects of the exercise of this power: '***How** the Tribunal proceeded on this issue is the subject of the Committee's analysis in the next section of this Decision*.' [emphasis added] – see *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide dated 23 December 2010, para.119–247. A distinction between the principle of *jura novit curia* and the principle of due process together with their close interplay have been helpfully clarified in another decision of an annulment committee in *Caratube v. Kazakhstan* – see *Caratube International Oil Company LLP v. Republic*

Alternatively, one may accept treaty-based tribunals as being tribunals applying national law to various questions along with international law, and on this basis recognise that *jura novit curia* equally extends to national law.[180]

This study supports the extension of the principle of *jura novit curia* to national law in investment treaty arbitration. The extension is premised on a flexible understanding of the content of the principle as a kind of normative frame for the allocation of the *joint responsibility* between the tribunal and the parties on the ascertainment of the content of the relevant national law. By saying that treaty-based tribunals should act under the principle of *jura novit curia* and that the principle extends to national law, one does not suggest that treaty-based tribunals should *know* national law. The suggestion merely enables the tribunals to retain judicial integrity by recognising their power to independently invoke and investigate any issue of national law which is *relevant* for the verification and exercise of their mandate.[181] As a result, treaty-based tribunals are not constrained by parties' elucidation and may exercise their own efforts for invoking, ascertaining and applying national law to contract interpretation. Their power is not unlimited. Principles of due process control the exercise of *jura novit curia.*

The extension of the principle of *jura novit curia* to national law in investment treaty arbitration is also premised on the understanding that the existing debate about the status of national law does not impede it. While certain investment regimes (for instance, the ECT or the NAFTA) expressly recognise only international law as being applicable as *lex causae*, that in and of itself does not exclude the relevance of national laws to those questions which are governed by them. Rather than focusing on the primary applicable law in investment treaty arbitration, this work suggests that one should look at the tribunal's mandate to resolve disputes which have a substantial national law

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of Kazakhstan, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP dated 21 February 2014, para. 90–96.

180 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 70, Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press 2017) 104–138; Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press 2013) 213–271.

181 The tribunals have explicitly acknowledged their right to ascertain the content of national law in, for instance, *Garanti Koza v. Turkmenistan*, ICSID Case No. ARB/11/20, Award dated 19 December 2016, para. 331; *Metal-Tech Ltd. v Uzbekistan*, ICSID Case No. ARB/10/3, Award dated 4 October 2013, para. 287; *Anglo American PLC v. Bolivarian Republic of Venezuela,* ICSID Case No.ARB(AF)/14/1, Final Award dated 18 January 2019, para.217–218*; Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award dated 15 April 2016, para. 118.

component. Interpreting contracts *incidentally* by applying national law is but a part of this mandate.

Further, internal controversy or unsettled character of the national regulation on certain issue shall not impede reliance on *jura novit curia*.[182] As investment treaty arbitration does not have a system of referral that would enable tribunals to delegate decisions on these issues to the competent domestic body,[183] they have to engage with these issues first. Because such an ascertainment would be done in the context of the incidental issue, its results would bear limited consequences, if at all, for the subsequent application of national law in the respective jurisdiction. In other words, the authority of treaty-based tribunals to form an opinion on the content of national law would be the role of a *dispute-settlement* function. In exercising it, tribunals would not perform the *law-development* function in any respect. Accordingly, their findings on the unsettling or controversial issue under national law would not be decisive

182 This section deals with available but for some reason controversial or unsettled regulation, but not with lacunae, in national law. Chapter 2 has established that there is no and could not be lacunae in national law in relation to contract interpretation. In what relates to lacunae, there is a common perception in the context of ICSID arbitration and more generally that international law may fill lacunae in national law regulation or exercise a supplementary function – W Michael Reisman, 'The Regime for Lacunae in the ICSID Choice of Law Provision and the Question of Its Threshold' (2000) 15(2) ICSID Review – Foreign Investment Law Journal 362; Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 620–627. The corrective function of international law is addressed below.

183 A system of referral or preliminary ruling is well-established in the EU – see Mads Andenas (ed), *Article 177 References to the European Court: Policy and Practice* (Butterworth 1994). The idea of referral has been suggested by some authors as a model for the ISDS reform, though the subject of referral was limited to international law and has not been covered with regards to national law – see Christoph Schreuer, 'Preliminary Rulings in Investment Arbitration' in Karl P Sauvant and Michael Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (Oxford University Press 2008) 207–212; Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill Nijhoff 2017). In a domestic context, one can find some peculiar forms of resolving controversy between certain acts. For instance, under Article 10 (6) of the Code of Civil Procedure of Ukraine, if the court finds that a certain law or other regulation contradicts the Constitution of Ukraine, the court can avoid applying this law or regulation and apply the Constitution as an act of direct force. In this situation, the court then has to ask the Constitutional Court of Ukraine to address the issue of the validity of that law or regulation which the court decided not to apply. On the interaction between constitutional and civil procedures under Ukrainian law, see, for instance, Ірина Берестова, 'Форми взаємозв'язку конституційного провадження і цивільного судочинства' (2018) 10 Підприємництво, господарство і право 160 [Iryna Berestova, 'The Forms of Interactions between Constitutional and Civil Procedures' (2018) Entrepreneurship, Property and Law 160].

regarding elaborating a resolution of the same controversy within the domestic legal order. Quite the opposite: the way national law is construed and applied by the high judicial authority in a given country, or clarified by the competent domestic authority, frequently guides treaty-based tribunals, sometimes even leading them to be decisive about their conclusions.[184]

Two cases illustrate this last point. In *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*,[185] the tribunal had to deal with the Constitution of the Republic of Ecuador to decide whether the settlement agreement[186] finally resolved all possible collective environmental claims against two investors. Interpretation of the release provisions in the settlement agreement appeared central to the decision and had to be decided in light of the interpretation of the constitutional provisions.[187] In another case, *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic*,[188] the tribunal had to deal with a complex interplay between the Civil Code and the Commercial Code of the Czech Republic.[189] Not only did the tribunal have to find out

184 Some FTAs may even expressly state that when interpreting national law tribunals have to give deference to domestic interpretation exercised in that jurisdiction. See, for instance, Article 3.42 of EU-Vietnam FTA which provides: '*For greater certainty, the Tribunal and the Appeal Tribunal shall be bound by the interpretation given to the domestic law by the courts or authorities which are competent to interpret the relevant domestic law, and any meaning given to the relevant domestic law made by the Tribunal and the Appeal Tribunal shall not be binding upon the courts and the authorities of either Party*.'

185 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA No.2009-23, First Partial Award on Track I dated 17 September 2013.

186 The settlement agreement was executed between Ecuador, the state-owned enterprise Petroecuador, and one of the investors/claimants in the TexPet proceedings on 4 May 1995, which provided that the parties undertook to release all of its obligations and liability for environmental impact arising out of the operation of their consortium.

187 Technically, the tribunal based its analysis on the content of the release clause in the part dealing with the 'Legal Effect' of the contractual provision and not in the part on 'Legal Interpretation'. Nevertheless, the analysis construed the content of the release provision and thus captured contract interpretation as an analytical effort. (*Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA No.2009-23, First Partial Award on Track I dated 17 September 2013, para. 92–110). In the part labelled 'contract interpretation', the tribunal dealt with the interpretation of the reference to 'principal' in the settlement agreement. The tribunal, in particular, considered whether Chevron could benefit from the settlement agreement as a principal (Ibid. para. 62–91).

188 *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic,* ICSID Case No.ARB/97/4. The jurisdiction of the tribunal was indeed based on the Czech Republic-Slovak Republic BIT, but the claim on the merits was contract-based.

189 The complexity of relations between civil and commercial regulation is also known for other jurisdictions. In Ukraine, since the adoption in 2003 of the Commercial Code of Ukraine (adopted 16 January 2003, entered into force 1 January 2004), and the Civil Code of Ukraine No. 435-IV (entered into force on 1 January 2004), there is an ongoing

which act applied to the situation at stake, but it also had to take a view on the relevance and possible interplay of the specific regulation on contract interpretation in both acts (Section 35 of the Civil Code and Section 266 of the Commercial Code). Furthermore, if the tribunal in *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* did not find the issue of construing the content of the constitutional provisions particularly burdensome or complicated,[190] the tribunal in *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic* openly recognised that the interplay between the interpretative provisions of the Civil Code and the Commercial Code was '*a delicate and debated matter under Czech law*.'[191] Yet that did not stop the tribunal from analysing the provisions in light of the parties' submissions, and the expert opinions and practices of the high courts in the Czech Republic in relation to the matter. Belonging to incidental construction of the national law, these findings do not have any bearing on domestic legal orders and merely enable the tribunals to discharge their treaty mandates.

5.4.2 *Expert Testimony*

While this work suggests that tribunals may rely on the principle of *jura novit curia* in their approach to contract interpretation as the incidental issue, one has to recognise that parties' clarification still appears as a primary source for construing the content of relevant national law. This, in turn, leads to the consideration of diverse material ranging from counsels' clarification to expert opinions and summaries of judicial practice. Recognising that tribunals may act on the basis of *jura novit curia* in respect to national law, this study was unable to identify a single case in which, in the absence of the parties' arguments on the relevance of national law for contract interpretation, tribunals have independently invoked national law. Similarly, this study was unable to identify a single case in which tribunals chose themselves to appoint an expert on points of national law in relation to contract interpretation. A lack of examples

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debate on various aspects of the interrelations between the two. See, for instance, The Highest Commercial Code of Ukraine, Clarifying Letter as of 7 April 2008 No.01-8-211 'On Some Questions on Application of Civil and Commercial Code of Ukraine' (Вищий Господарський Суд України, Інформаційний лист від 07 квітня 2008 N 01-8/211 "Про деякі питання практики застосування норм Цивільного та Господарського кодексів України.")

190 The tribunal characterised its task as being 'relatively short and uncomplicated' – see *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL, PCA No.2009-23, First Partial Award on Track I dated 17 September 2013, para. 34, 62.

191 *Ceskoslovenska obchodni banka, a.s. v. Slovak Republic,* ICSID Case No.ARB/97/4, Award dated 29 December 2004, para. 88.

does not overturn though the powerful potential that *jura novit curia* gives to tribunals as a matter of principle within the safeguards set by due process.

The concept of the incidental issue assists in safeguarding the quality of reasoning also in those situations where there is a strong temptation to delegate a decision on contract interpretation to experts.[192] Overall, there is nothing wrong with a tribunal relying entirely or in part on expert conclusions to ascertain the content of contractual provisions if all procedural requirements are safeguarded.[193] This it actually what the parties aim to achieve when they involve experts in proceedings, and this is what the role of experts is all about – the facilitation of the tribunal's task. Problems may arise when tribunals substantially reduce their own analytical efforts in relation to the ascertainment of the content of contractual provisions and essentially substitute it with observations on the reasonableness and persuasiveness of expert findings. There is

192 Somewhat abbreviated reasoning which relied upon expert opinions can be found in two conjoined ICSID arbitrations, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* and *Talsud S.A. v. The United Mexican States*, and are further contrasted with *Gambrinus, Corp. v. Bolivarian Republic of Venezuela.* See *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No.ARB(AF)/04/3, Award dated 16 June 2010, para 5–28; *Talsud S.A. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010, para 5–28; *Gambrinus Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award of the Tribunal dated 15 June 2015, para. 265–277. (Subsequent attempts to annul an award on the basis that the tribunal failed to consider the parties' intent, and therefore to apply the proper law that mandated consideration of the parties' intent, were not successful.)

193 In admitting expert opinions and in assessing evidentiary value, tribunals have to ensure due process, the fair treatment of parties, etc. For a detailed discussion of various procedural implications that appear in connection with the use of experts in investment treaty arbitration, see Frédéric G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press 2018) 225–233; Kate Parlett, 'Parties' Engagement with Experts in International Litigation' (*2018*) 9 (3) Journal of International Dispute Settlement 440; Brendan Plant, 'Expert Evidence and the Challenge of Procedural Reform in International Dispute Settlement'(2018) 9 (3) Journal of International Dispute Settlement 464; Mélida Hodgson and Melissa Stewart, 'Experts in Investor-State Arbitration: The Tribunal as Gatekeeper'(2018) 9 (3) Journal of International Dispute Settlement 453. See also, Laurence Boisson de Chazournes, Makane Moise Mbengue, Rukmini Das and Guillaume Gros observing differences in the role of experts in various types of international litigation, at the same time acknowledging that due process requirements impose and shape '*some universal characteristics of the functions, qualities and mode of functioning of experts*'– Laurence Boisson de Chazournes and others, 'One Size does not Fit All – Uses of Experts before International Courts and Tribunals: An Insight into the Practice' (2018) 9 (3) Journal of International Dispute Settlement 477, 504.

high risk in this as so far as awards permit one to ascertain,[194] none of the expert opinions invoked by parties and assessed by tribunals stop exclusively at clarifying the interpretative rules or establishing trade usages, experts rather give their opinions on the content of specific contractual provisions and their effect.[195] Falling short in terms of reasoning can accordingly be viewed as a *delegation* of the adjudicatory function to experts, in relation to contract interpretation. While not necessarily leading to an annullable error, delegation in the form of abbreviated reasoning based on expert opinions may undermine the quality of a tribunal's legal reasoning.[196] Treating contract interpretation as the incidental issue in turn assists in keeping focus on the adjudicatory function of the tribunal. The tribunals, not experts, are ultimately entrusted to discharge their adjudicatory function which in the context of investment treaty arbitration also means construing the content of contractual provisions and integrating it into a bigger analytical effort in relation to a treaty claim.

Rather exceptionally to the above, when an expert opinion relates to the establishment of trade usages or other aspects related to a certain industry (oil exportation, construction, etc.), which tribunals are not expected to know or ascertain independently and to which *jura novit curia* does not extend, tribunals may well assess the persuasiveness of the confirmations of the trade usages without being expected to demonstrate the same degree of independent reasoning in comparison to the interpretation on the basis of national law. At the same time, the precise role of trade usages and industry practices

194 Not all awards list all questions that were put to experts, not all awards cite expert opinions *in extenso* or otherwise make a clear summary of what experts had to clarify.

195 See discussion of the expert opinions in *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, *ACP Axos Capital GmbH v. Republic of Kosovo*, ICSID Case No. ARB/15/22; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3; *Talsud S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/4; *William Nagel v. The Czech Republic*, SCC Case No. 049/2002; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29.

196 On the theoretical account of what a proper role of an expert implies in litigation, see James Flett, 'When is an Expert not an Expert?' in (2018) 9 (3) Journal of International Dispute Settlement 352, 352–356.

for contract interpretation are still to be determined by the relevant national law.[197]

5.4.3 *Why Does It Matter?*

A limited, if any, review of the application of national laws to contract interpretation at the setting aside and enforcement stage calls for more efforts to be made *within* the proceedings. Approaching contract interpretation as an incidental issue assists in not omitting the relevance of national law to contract interpretation and its application. Ultimately, it assists in getting it right in the first place.

While procedures on annulment, setting aside or vacation of arbitral awards do not encompass a full scope of appeal as to the correctness of contract interpretation, it nevertheless is not entirely blind to it. A failure to apply national law to contract interpretation may potentially fall into a category of excess of the tribunal's power or mandate and thus serves as a ground for annulment,[198] setting an award aside[199] or the vacation of an award.[200] Furthermore, an exercise of contract interpretation may trigger other grounds for annulment, setting aside or vacation, which pertain to due process[201] and the reasoning in the award.[202]

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197 See *Chevron Corporation* (*USA*) *and Texaco Petroleum Company* (*USA*) *v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits dated 30 March 2010, para. 450–451 and discussion of *Garanti Koza v. Turkmenistan* (ICSID Case No. ARB/11/20) Award dated 19 December 2016, para.150, 333–337. Some laws expressly enable trade usages to be considered as a supporting argument in cases where the literal reading of a contract is not sufficient. Article 213 (4) of the Civil Code of Ukraine No. 435-IV (entered into force on 1 January 2004) <https://zakon.rada.gov.ua/laws/show/435-15?lang=ru>, last accessed on 25 June 2021, recognises trade usages among factors to be considered for contract interpretation as a last resort including post-contractual conduct and practice established between the parties.

198 Article 52 (1) (b) of the ICSID Convention.

199 Article 1065 (1) (c) of the Dutch Code of Civil Procedure 2015; Article 1520 (3) of the French Code of Civil Procedure, Section 34 (3) of the Swedish Arbitration Act; Section 68 (2) (e) and Section 69 (appeal on point of law) of the English Arbitration Act 1996.

200 Section 10 (a) (4) of the United States Federal Arbitration Act.

201 Article 52 (1) (d) of the ICSID Convention, Section 34 (7) of the Swedish Arbitration Act, Article 1520 (4) of the French Code of Civil Procedure, Section 10 (a) (3) of the United States Federal Arbitration Act, Article 1065 (1) (d) of the Dutch Code of Civil Procedure 2015; Section 68 (2) (a), Section 68 (2) (c), Section 68 (2) (i) of the English Arbitration Act 1996.

202 Article 52 (1) (e) of the ICSID Convention, Article 1065 (1) (d) of the Dutch Code of Civil Procedure 2015; Section 68 (2) (d), Section 68 (2) (f) of the English Arbitration Act 1969.

The threshold for the revision, in respect to contract interpretation, is necessarily high for all the described grounds, regardless of whether the revision is conducted by the ICSID annulment committee (as is the case for delocalised proceedings), or by state courts (as is the case for proceedings with a seat). Only those violations which amount to a manifest excessive exercise of mandate or power, a violation of due process, or with no reasons given in an award, justify award cancellation. It is, accordingly, not surprising that none of the analysed cases with elements of contract interpretation in fact evidence a successful annulment, setting aside or vacation of an award because of the irregularities connected to contract interpretation.[203]

The reasoning of the ICSID annulment committees cited below assists to clarify the high threshold for annulment, and thus valuably reinforces the importance of getting contract interpretation right, from the very beginning. In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, the annulment committee was clear enough to identify that analysis of FET in respect to rights and expectations arising under the contract, also necessitated an analysis of national law.[204] Rejecting the argument of the manifest excessive exercise of

203 Out of 91 analysed cases with elements of contract interpretation conducted under the ICSID Convention (identified from Annex IV), annulment proceedings took place in 42 cases. Only six awards were either fully or partially annulled: *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (II), ICSID Case No. ARB/06/11; *Venezuela Holdings, B.V., et al* (*case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.*) *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27. Except for *Vivendi* (*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3) discussed in Chapter 4, neither award was annulled because of the irregularities tied to contract interpretation. In remaining proceedings, that is, 36 cases with elements of contract interpretation which were conducted in arbitration proceedings with a seat (including those conducted under the ICSID Additional Facility Rules), only one award was annulled (*Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*), for reasons unrelated to contract interpretation. Even for *Eureko B.V. v. Republic of Poland* discussed earlier in this chapter, the tribunal's failure to consider Polish law applicable to contract interpretation was not sufficient to set an award aside on the ground of the abuse of power in the competent state court of Belgium – see Judgment of the Court of First Instance of Brussels of 23 November 2006, excerpts of the translation available at <https://www.italaw.com/sites/default/files/case-documents/ita0304_0.pdf>, last accessed on 25 June 2021.

204 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment dated 21 March 2007, para. 72.

its power by the original tribunal, the committee elucidated that it was only the *application* of the national law to the contract that fell within the scope of revision in the annulment procedure, but not the *correctness* of its application.[205] Similarly, in *Malicorp Limited v. Arab Republic of Egypt*[206] and *Adem Dogan v. Turkmenistan*,[207] the annulment committees agreed that the application of national law to a contract was subject to review in the annulment proceedings, whereas verification of the correctness of its application was not. In *Malicorp Limited v. Arab Republic of Egypt*, the annulment committee additionally specified that verification of the application of national law could not stop at mere assurances of the original tribunal. The annulment committee had to verify that the original tribunal in fact applied the law it claimed to be applicable.[208] While being sceptical about the significance of the national law for the annulment in the first place,[209] the annulment committee in *Azurix Corp. v. Argentina* also affirmed that the correctness of the application of national law pertained to the merits of the case and thus could not be subjected to the annulment review.[210] In *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary* (*II*), being dissatisfied with the tribunal's findings, the investors failed to persuade the annulment committee that the allegedly frivolous reasons relating to interpretation of the settlement agreement[211] amounted to no reasons at all.[212] The annulment committee specified that its task was to verify

205 Ibid. para. 75.

206 *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited dated 3 July 2013, para.154–155.

207 *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment dated 15 January 2016, para. 150.

208 *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited dated 3 July 2013, para.157 (the committee found the reliance of the original tribunal on the reasoning of another arbitral tribunal based on national law in respect to the same contract to be a proper confirmation that the original tribunal '*in fact applied Egyptian law without performing de novo the entire review and analysis of Egyptian law.*').

209 *Azurix Corp. v. The Argentine Republic* (*I*), ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic dated 1 September 2009, para. 146–153.

210 Ibid. 169.

211 The investors essentially attacked the tribunal's interpretation of the provision on 'change in law' in the settlement agreement which, coupled with the conclusion on the lack of a stabilisation clause, led the tribunal to a finding on the lack of legitimate expectations of foreign investments.

212 *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (II), ICSID Case No. ARB/07/22), Decision of the *Ad Hoc* Committee on the Application for Annulment dated 29 June 2012, para. 54.

that the original tribunal gave reasons, but not to check that those reasons were '*convincing*' or '*good*'.[213]

In what relates to enforcement, this stage enables even less possibility for control over the exercise of contract interpretation than the annulment stage, the setting aside stage and the vacation stage. Of the two regimes for enforcement of awards rendered in investment treaty arbitration, in fact only awards rendered in the proceedings with a seat are subject to control at the enforcement stage. Awards rendered in delocalised arbitration have to be enforced without any control whatsoever '*as if it were a final judgment of a court in that State'* pursuant to Article 54 (1) of the ICSID Convention. The grounds for non-enforcement of awards with a seat are defined by the New York Convention or other applicable regional treaties. Article V of the New York Convention specifies grounds for non-enforcement because of the most fundamental violations pertaining to the tribunal's jurisdiction, due process, arbitrability and public policy. Contract interpretation does not appear independently as a protectable value and may only fall within the scope of review at the enforcement stage indirectly when the grounds for non-enforcement under the New York Convention or a relevant regional treaty are triggered. One may, for instance, attempt to resist enforcement of an award pertaining to the application of national law to contract interpretation if a tribunal unjustifiably excludes evidence in this regard, depriving a party of the opportunity of presenting its case and thus triggering a violation of due process. Similarly to annulment and setting aside procedures, the threshold for non-enforcement is necessarily high, making it absolutely important to be correct from the very beginning with regard to the determination and application of national law to contract interpretation in investment treaty arbitration.

In order to verify the limits of the control that domestic courts exercise in relation to contract interpretation at the enforcement stage, it may be interesting to look at all occasions of enforcement procedures in investment treaty arbitration. This is not feasible, however, within the framework of this work.[214] At the same time, not as a substitution to full-scope research, but as

213 Ibid. para. 48.

214 A study of all occasions of award enforcement in investment treaty arbitration requires substantial time, familiarity with legal regulation in various jurisdictions and in the absence of translations of the awards, proficiency in the language of the proceedings before the state courts, etc. It is not surprising that the broadest research to date in the field is conducted at the invitation of the local experts – see Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Globe Law and Business 2015).

an illustration, it is possible to verify the limits on the example of one state. For this purpose, Ukraine may serve as a good case study.[215] Out of the completed cases in which treaty-based tribunals have attempted to ascertain the content of contractual provisions to various extents, six cases involved Ukraine.[216] Three of these cases – *Inmaris Perestroika v. Ukraine, Alpha Projektholding v. Ukraine, Joseph Charles Lemire v. Ukraine* – resulted in awards being rendered against Ukraine and thus potentially motivating the state to consider all possible grounds for non-enforcement. Of the three cases, only *Inmaris Perestroika v. Ukraine* was conducted in the proceedings with the seat and thus subject to the New York Convention at the stage of enforcement. The tribunal interpreted various contracts pertaining to a bareboat charter. The state, however, chose not to oppose enforcement.[217] In *Joseph Charles Lemire v. Ukraine* the state abandoned all attempts to oppose the irregularities in contract interpretation demonstrated in the annulment stage and performed the award voluntarily,[218]

215 With 23 cases in which Ukraine appears as a respondent at the time of this study, the country has become among the most sued in investment treaty arbitration. See the statistics at UNCTAD Investment Policy Hub available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>, last accessed 27 August 2020. Not least relevant for the choice of Ukraine is the fact that the author of this work is admitted to practise law in Ukraine and can therefore verify all publicly available information on the enforcement of arbitral awards.

216 *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine,* ICSID Case No. ARB/08/8, Excerpts of Award dated 1 March 2012, para. 400–410; Decision on Jurisdiction dated 8 March 2010, para. 37–44; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award dated 8 November 2010, para. 149–514; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 14 January 2010, para. 61, 65, 73–83, 105–196; Award dated 28 March 2011, para. 81–91, 184–185, Excerpts of Decision on Annulment dated 8 July 2013, para. 201, 220–230; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003 para. 18.23–18.42; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine*, ICSID Case No. ARB/08/11, Award dated 25 October 2012, para. 253–259; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16; Award dated 31 March 2011, para. 145–164.

217 *Inmaris Perestroika v. Ukraine*, Decision of the Pechersky District Court of Kyiv 26 September 2012, Case № 2-к-14/12 available at <http://www.reyestr.court.gov.ua/Review/26148630>, last accessed 25 June 2021.

218 The excerpts of the Decision on Ukraine's Application for Annulment of the Award that are available in *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18 enable one to understand the arguments raised in respect to interpretation of the settlement agreement at the annulment. On Ukraine's voluntary performance of the award, see Tatyana Slipachuk and Olesia Gontar, 'Investment Treaty Arbitration in Ukraine' available at <https://www.lexology.com/library/detail.aspx?g=52c75c3a-e528-4832-ad2f-141b3f8c9e47>, last accessed on 25 June 2021.

and in *Alpha Projektholding v. Ukraine*, the state did not oppose enforcement proceedings that were executed via the decision of the state court.[219]

5.5 Conclusion

An approach to contract interpretation that is built on a theory of the incidental issue in private international law provides an essential theoretical framework for answering the question of not only *whether* treaty-based tribunals can decide on subsidiary matters in relation to the principal question, such as contract interpretation, but also *how* they should exercise their jurisdiction and what the *ultimate effects* of decisions on incidental issues are. Rather than being just a mechanical separation of the issues because of their role with respect to the cause of action, the incidental issue appears as an essential theoretical framework capable of safeguarding its distinguishable legal nature and ensuring application of the proper law to it.

By proposing a theoretical paradigm that recognises the legal nature of contract interpretation and focuses on the choice of national law that is applicable to it, this chapter gives a comprehensive response to the challenges surrounding ascertaining the content of contractual provisions in investment treaty arbitration. It is not sufficient to have incidental jurisdiction or power to ascertain the content of contractual provisions; it is also important to exercise this jurisdiction by acknowledging the legal nature of contract interpretation as embedded in the law governing the contract, and to choose and apply the right national law to the analysis. Treating contract interpretation as the incidental issue ensures that the relevant national law will be applied, and all the necessary conditions are thus created for a correct outcome that is consistent with approaching the contract in the jurisdiction in which it was drafted and concluded.

No doubt, treating contract interpretation as the incidental issue is not the only precondition for finding the right solution. When tribunals ascertain the content of contractual provisions through instrumentalities other than the primary application of national law, such as fact-finding or via selective reliance on canons of interpretation that are not expressly linked with the national law applicable to the contract, the result can be the same as if national law had duly been applied. For instance, a contractual duty to make certain payments

219 *Alpha Projektholding v. Ukraine*, Decision of the Pechersky District Court of Kyiv 23 July 2011, Case № 2-к-7/11 available at <http://www.reyestr.court.gov.ua/Review/16679895>, last accessed on 25 June 2021.

can acquire a similar effect in investment treaty arbitration if tribunals justify reasoning based on fact-finding by simply stating '*what stands in the contract*'. They may achieve a similar effect by relying on the *effet utile* canon without any substantiation based on the applicable national law by simply saying that words in the contract are to be valued and not ignored. They can also expressly refer to the applicable national law and emphasise that their interpretation is mainly shaped by an ordinary understanding of the text as a primary source for its interpretation. Also, it is highly likely that the same result will be achieved when approaches that are not informed by the relevant national law endorse *textualism* or *literalism*, and when the text itself is sufficiently detailed.

The results may differ dramatically, however, on extreme occasions. By extreme occasions one may understand those situations when the text alone is not sufficient and the tribunal requires a broader context or when the tribunal has to deal with internal controversy within the contractual text, etc. In these situations, various interpretative paths may lead to different results and it would be crucial to rely on the applicable national law. Conceptualising contract interpretation as the incidental issue would ensure correct interpretation.

Even when the same result can be achieved without applying national law, there is still value in approaching contract interpretation as the incidental issue. Without the analytical paradigm of the incidental issue, treaty-based tribunals inevitably seek to *anchor* their decisions to the most convenient approach in the circumstances. Disengaged from national law canons of interpretation, fact-finding, business practices, trade usages – all may arise during tribunals' attempts to understand contracts. Even if authorised by national law and occasionally or predominantly leading to a correct outcome, these approaches will still lack the necessary *predictability* ensured by the primary or *ab initio* application of national law, with its normative legal frame for contract interpretation. The most important contribution of the concept of the incidental issue to decision-making in investment treaty arbitration is thus *methodological clarity and predictability* for understanding the content of contractual provisions that is based on due regard to its legal nature and the applicable national law.

Furthermore, conceptualising contract interpretation as the incidental issue enables justice to be done without blocking a procedure in investment treaty arbitration. Generally viewed, the concept of the incidental issue ensures that a court or a tribunal can decide on the issue for the purpose of its jurisdiction without waiting for the issue to be conclusively resolved as a *principal* one before another competent adjudicatory body. For investment treaty arbitration, an approach to contract interpretation as the incidental issue means that the jurisdiction of treaty-based tribunals is not blocked until the issue is resolved as the *principal issue* in the relevant contract-based procedures. The

tribunals' decision on the content of contractual provisions thus rendered would not have the same final effect as the decisions of courts or tribunals that exercise contract interpretation in the framework of contractual claims as the *principal* issue.[220] The differences in effect of contract interpretation decided as the incidental issue or a part of the principal issue opens a possibility for deference discussed in Chapter 4.

Finally, the theoretical frame of the incidental issue fits well into the public-private divide in investment treaty arbitration and enhances more structured decision-making that is informed by a comprehensive account of increasing interrelations and coordination between private law and public law as well as between private international law and public international law.[221]

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220 The tribunal in *Vigotop* explained this by saying that *'any findings that this Tribunal may make in respect of the Concession Contract are relevant only as a part of the Tribunal's analysis of Claimant's expropriation claim'* – see *Vigotop Limited v. Hungary,* ICSID Case No. ARB/11/22, Award dated 1 October 2014, para. 313.

221 On various aspects of distilling frontiers between private and public as well as between private international law and public international law *see* Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart Publishing 2018); Horatia Muir Watt and others (eds), *Global Private International Law Adjudication without Frontiers* (Edward Elgar Publishing 2019); Roxana Banu, *Nineteenth Century Perspectives on Private International Law* (Oxford University Press 2018); Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des Cours de l'Académie de Droit International 49; Julian Arato, 'The Private Law Critique of International Investment Law' (2019) 113(1) American Journal of International Law 1; Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009).

General Conclusion

This work started by defining contract interpretation neutrally and unrestrictedly. The approach led to the consideration of a broad variety of cases in which the tribunals ascertained the content of contractual provisions for various purposes in investment treaty arbitration. Not only was a neutral definition required to observe the phenomena in full, but also to investigate what the competing considerations are in relation to the legal regime that shapes contract interpretation. As the work developed, more affirmations were found that international law does not regulate contract interpretation *as such* and that national laws govern contract interpretation. Accordingly, this work has recognised contract interpretation as a *national law concept* in investment treaty arbitration and has put forward a *normative* argument on the role of national law for contract interpretation in investment treaty arbitration.

At the same time, recognising the role of national law in contract interpretation and enabling its application through the concept of the incidental issue, while essential, would not in and of itself ensure transparent and predictable reasoning. More is needed. The study has attempted to provide for this by addressing occasions pertaining to a wrongful non-application, improper application and legitimate non-application of national law to contract interpretation. The work accordingly has *reconceptualised the concept* of contract interpretation in investment treaty arbitration by exploring its normative foundation and by distinguishing it from the borderline concepts of legal reasoning in investment treaty arbitration.

More specifically, this work has reached the following conclusions:

1. *Tribunals have to ascertain a broad spectrum of contracts and contractual provisions to decide on a range of issues in investment treaty arbitration*.

   The world of contracts in investment treaty arbitration is much broader and richer than what is traditionally viewed as such. While concessions, joint investment activity, joint ventures, privatisation agreements, participation, and similar contracts, on the basis of which investors enter into cooperation with the host state, including its constituting subdivisions or state enterprises, understandably constitute the central part of all disagreements surrounding contracts and trigger contract interpretation, other contractual arrangements may also necessitate interpretation. Contracts on construction, share purchase agreements, and settlement agreements appear on a reoccurring basis. Furthermore, on some occasions, bareboat charter, lease agreements, loans, and many other instruments may

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necessitate interpretation. In terms of the parties to contracts apart from quite a traditional composition of those concluded between a foreign investor and a state or a state-related entity, contracts concluded between the parties neither of which are the parties to the treaty dispute appear as the object for interpretation.

As the precise roles of contracts vary in a particular configuration of a treaty claim, so may the role of contract interpretation also differ. Tribunals may need to interpret contracts when deciding on jurisdiction, admissibility, merits, as well as on other substantive and procedural issues. Interpretation may be merged with reasoning on traditional contractual concepts – formation, termination, validity, prolongation, assignment, etc., or it may be directly used for deciding on specific concepts of international investment law, like legitimate expectations.

2. *The law applicable to a contract, or the proper law of the contract, governs contract interpretation. National laws of various jurisdictions may govern contract interpretation differently.*

Contracts come into existence as a matter of national laws that define various questions regarding their formation, validity, termination, performance, and interpretation. The differences in national laws on contract interpretation are not just variations in interpretative rules; they are the products of historical, cultural, and legal developments that have shaped contract law in a particular jurisdiction. In addition to contract law, some specialised areas of law often become relevant for contract interpretation as *background* law. They include regulations in the field of privatisation, bidding, concession, broadcasting, construction, etc.

3. *International law in its current shape does not regulate contract interpretation*.

The conclusion does not negate the capacity of international law to govern contract interpretation, in principle. One cannot exclude that IIAs in the future could specify some principles and presumptions relevant for contract interpretation in investment treaty arbitration. What is emphasised in this work is that international law, in its present form, does not substitute national law in contract interpretation.

The modest examples of the possible relevance of public international law to contract interpretation – general principles of law and uniform treaties – all have limitations. General principles of law (including the principles of *pacta sunt servanda* and good faith) do not entirely cover all the challenges that contract interpretation may pose. One can weaponise

these principles and see their role in various instances of reasoning in relation to contracts, simply because they mimic the most fundamental principles in national laws. At the same time, it would be extremely difficult, if possible at all, to answer, on their basis, rather concrete and nuanced interpretative questions that tribunals may face in relation to contracts. For instance, these questions include whether to consider pre-contractual negotiations or post-contractual conduct, when to affirm certain contractual terms as being implied into the contractual text, whether to permit reliance on certain presumptions, etc. In what relates to private uniform treaties, the book has identified the CISG as containing some regulation in Article 8 on contract interpretation. However, sales of goods are not as a rule at stake in investment treaty interpretation. Furthermore, the provision itself raises doubts about its autonomy and capacity to substitute applicable national law entirely.

Finally, because international law does not solve interpretative questions in relation to contracts, *internationalisation*, as a debatable theory or a set of various views attempting to make international law directly applicable to contracts, cannot solve contract interpretation problems, in principle.

4. *Tribunals in investment treaty arbitration possess an implied and inherent power to interpret contracts*.

So long as decisions about jurisdiction, admissibility, merits or other related substantive or procedural aspects necessitate ascertaining the content of contractual provisions, treaty-based tribunals are authorised to interpret these contracts. This power is *implicit* to the requirements on the tribunals' mandate to decide on their own jurisdiction and various aspects of a treaty claim, as well as to the requirement on reasoned awards. This power is also *inherent* to the adjudicatory function regarding the treaty claim that treaty-based tribunals possess. Attempts of treaty-based tribunals to distance themselves from the exercise of contract-based jurisdiction shall not undermine the power's identity or role being contract interpretation.

At the same time, not all contract-related analysis in investment treaty arbitration is necessarily contract interpretation requiring the application of national law. Some other analytical efforts connected to contracts are not governed by national laws. Contract interpretation should be, accordingly, distinguished from pure fact-finding and from deciding on the well-established doctrinal effect of specific contractual provisions.

Because treaty-based tribunals do not solve contractual claims, their reasoning or findings on the content of contractual provisions do not bear a *res judicata* effect on other forums legitimately dealing with the same contract.

In what relates to the effect of interpretation exercised by the forums competent to decide contractual claims, as a rule, treaty-based tribunals should accord *deference* to them. At the same time, the different foundation of claims before treaty-based tribunals and connected distinctions in interpretative questions can justify autonomous interpretation for treaty-based tribunals. The same contractual provision may raise entirely different interpretative questions before a contractual forum and a treaty-based tribunal.

5. *Treating contract interpretation as an incidental issue provides a valuable theoretical construction for dealing with it in investment treaty arbitration.*

The theoretical framework of an incidental issue solves several challenges. First, it resists the improper assimilation of contract interpretation with, or its substitution by, other analytical exercises. Second, it ensures that an interpreter defines relevant national law and applies it to ascertaining contractual provisions. Third, it enables an interpreter to delineate clearer borders between issues governed by national laws and issues governed by international law, ultimately facilitating a smooth integration of national law findings into the decision on a treaty-based claim driven by international investment law.

Application of the theoretical framework of an incidental issue is also premised on *jura novit curia* principle. The principle does not oblige the tribunal to know the law applicable to a contract, but it certainly requires the tribunal to acquire knowledge of that law through available means. Paying lip service to national law should be avoided. When expert opinions are used for establishing the content of national law applicable to contract interpretation and when these opinions contain views on the meaning of contractual provisions, treaty-based tribunals retain the power of independent investigation and shall neither delegate nor be viewed as delegating their power to interpret contracts to experts. *Jura novit curia* also extends directly to contract interpretation, enabling tribunals to invoke interpretative justifications which were not raised by the parties to the dispute. Principles of due process control how treaty-based tribunals exercise their interpretative powers.

Overall, this book builds a theoretical framework for contract interpretation in investment treaty arbitration. Such a theoretical framework permits, on the one side, to keep contract interpretation as analytically distinct exercise governed by national law applicable to contracts, and on the other side, to incorporate the reasoning into the overall structure of decision-making in investment treaty arbitration. The resulting interpretation and reasoning in relation to contracts becomes explicit, transparent, predictable, and correct.

Future Research

Over the course of this research, it became apparent that treaty-based tribunals feature *textualism* among their most noticeable interpretative preferences. As there was no opportunity to step out from the normative perspective and concentrate on mapping and explaining all interpretative preferences in more detail, this work concludes by indicating them as a *future area* of research.

The future studies would draw on what has been done in this work empirically and normatively. Their epicentre, however, would rather move to the boundaries of law with other disciplines. *Institutional* and *inter-disciplinary* explanations of the interpretative preferences could prove most revealing in this respect.

An institutional perspective would concentrate on how the organisational structure and existent social context influence the tribunals' approaches towards contract interpretation in investment treaty arbitration. It would be particularly revealing to find institutional explanations for prevailing preferences. A full-scale analysis of the tribunals' composition and background, together with the dominant expertise of party representatives, would be central to this future research.

The inter-disciplinary study of contract interpretation in investment treaty arbitration would explain interpretative preferences from the perspectives of *law & economics*,[1] *language &*

1 Law & economics perspective on contract interpretation results in a constantly growing corpus of literature focused on maximisation of the efficiency of the parties' bargaining through interpretation. I wish to thank Professor Henrik Lando (Copenhagen Business School) for the discussion and suggestions on the perspective of law & economics during the course on Collaborative Contracts and Knowledge Share conducted on 27 May 2019 at the Centre for Enterprise Liability (CEVIA) Faculty of Law of the University of Copenhagen. On the law & economics perspective on contract interpretation which is of relevance for approaching contract interpretation in investment treaty arbitration, see Steven Shavell, 'On the Writing and the Interpretation of Contracts' (2006) 22(2) Journal of Law, Economics, and Organization 289; Richard A Posner, 'The Law and Economics of Contract Interpretation' (2004) John M Olin Program in Law and Economics Working Paper No 229 <https://pdfs.semanticscholar.org/06e6/7942c8fb7a43d1b48908f3b727bf9228a8b4.pdf> accessed 20 October 2020; Eric A Posner, 'The Parole Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation' (1998) 146(2) University of Pennsylvania Law Review 533; Lisa Bernstein, 'Merchant Law in a Modern Economy' in Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (Oxford University Press 2014) 239–271; Juliet P Kostritsky, 'Interpretive Risk and Contract Interpretation: A Suggested Approach for Maximizing Value' (2011) 2(2) Elon Law Review 109; Juliet P Kostritsky, 'The Promise Principle and Contract Interpretation' (2012) 45 Suffolk University Law Review 843; Juliet

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law,[2] *law & cognitive science*[3] and possibly others. Each of the disciplines has a unique perspective that helps to understand, justify or confront the existing interpretative preferences in the context of investment treaty arbitration. *Law & economics* looks at contract interpretation – as a process and a result – from the perspective of economic efficiency, essentially frequently justifying the textual or formalistic interpretation of contracts between sophisticated parties. *Language & law* looks at contract interpretation from the perspective of what language can deliver to generally support context-dependent interpretative techniques because of the context-dependent nature of the language. *Law & cognitive science*, instead of focusing on economic efficiency or the nature of the language, explains interpreters' cognitive paths. And while *common* basic mental operations for all humans may be potentially relied upon to diminish the role of national law as the proper legal framework for the interpretative analysis, *law & cognitive science* puts particular emphasis on the role of the culturally-dependent conceptual framework that impacts human interpretation, and which includes national laws. It would be particularly interesting to see if findings of an inter-disciplinary perspective would be somehow different

P Kostritsky, 'The Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation' (2007) 96(1) Kentucky Law Journal 43; Peter M Gerhart and Juliet P Kostritsky, 'Efficient Contextualism' (2015) 76(4) University of Pittsburgh Law Review 509; Adam B Badawi, 'Interpretive Preferences and the Limits of the New Formalism' (2011) 6(1) Berkeley Business Law Journal 1; Avery Wiener Katz, 'The Economics of Form and Substance in Contract Interpretation' (2003) 104 Columbia Law Review 496. On law & economics as a methodological approach, see also Robert Cryer and others, *Research Methodologies in EU and International Law* (Oregon 2011) 83–86.

2 I wish to thank to Professor Lawrence M Solan (Brooklyn Law School) for suggestions on linguistic approaches given in the course of the First International Language and Law Association (ILLA) Focus Workshop 'Computers, Language, and Law: Spotlight on Blind Spots' in Copenhagen, 7–8 September 2018. For a language & law perspective, see Lawrence M Solan, Terri Rosenblatt and Daniel Osherson, 'False Consensus Bias in Contract Interpretation' (2008) 108(5) Columbia Law Review 1268; Lawrence M Solan, 'Patterns in Language and Law' (2017) 6 International Journal of Language & Law 46; Peter M Tiersma and Lawrence M. Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012).

3 I wish to thank to Professor Mark Turner (Case Western Reserve University) for a supportive and encouraging discussion of the cognitive perspective of law more generally, and contract interpretation in particular, that followed his lecture on Cognitive Textual Interpretation in the framework of the Interdisciplinary Research School 'Authoritative Texts and Their Reception' (AATR) in Trondheim on 23 October 2018. For a cognitive perspective on contract interpretation, see, for instance, Beverly Horsburgh and Andrew Capper, 'Cognition and Common Sense in Contract Law' (2016) 16(4) Touro Law Review 1091; Melvin A Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47(2) Stanford Law Review 211.

for investment treaty arbitration compared to what these disciplines observe in domestic perspectives of contract interpretation.

In other words, future efforts may contribute to further unpacking contract interpretation by mapping and explaining existing interpretative preferences and confronting or supporting reliance on national law in contract interpretation in investment treaty arbitration. All this would enable a better understanding of contract interpretation as legal reasoning in investment treaty arbitration for which this work has hopefully provided a necessary empirical and normative foundation.

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Annexes

Annex 1 All Known Treaty-Based Cases as of 30 January 2019

1. (DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar, ICSID Case No. ARB/17/18 (BLEU (Belgium – Luxembourg Economic Union) – Madagascar BIT)
2. 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15 (Energy Charter Treaty)
3. A11Y LTD. v. Czech Republic, ICSID Case No. UNCT/15/1 (United Kingdom of Great Britain and Northern Ireland – Czech Republic BIT)
4. Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT/13/2 (CAFTA)
5. Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (Argentina – Italy BIT)
6. Abed El Jaouni v. Lebanese Republic, ICSID Case No. ARB/15/3 (Germany – Lebanon BIT)
7. Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2 (Mexico – Spain BIT)
8. Abertis Infraestructuras S.A. v. Government of Bolivia, PCA (Bolivia – Spain BIT)
9. Abertis Infraestructuras, S.A. v. Argentine Republic, ICSID Case No. ARB/15/48 (Spain – Argentina BIT)
10. AbitibiBowater Inc., v. Government of Canada, ICSID Case No. UNCT/10/1 (NAFTA)
11. ABN Amro N.V. v. Republic of India (India – Netherlands BIT)
12. Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary, ICSID Case No. ARB/12/3 (Hungary – United Kingdom BIT)
13. ACF Renewable Energy Limited v. Republic of Bulgaria (ICSID Case No. ARB/18/1) (The Energy Charter Treaty)
14. Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (Netherlands – Slovak Repubic BIT)
15. Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-12 (Number 2) (Netherlands – Slovak Repubic BIT)
16. ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22 (Germany – Federal Republic of Yugoslavia BIT)
17. ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16 (Cyprus – Hungary BIT)
18. Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37 (Austria – Croatia BIT)

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19. Addiko Bank AG v. Montenegro, ICSID Case No. ARB/17/35 (Austria – Montenegro BIT)
20. Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33 (Oman – United States FTA)
21. Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9 (Germany – Turkmenistan BIT)
22. ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1 (NAFTA)
23. Adria Beteiligungs GmbH v. The Republic of Croatia, UNCITRAL (Austria – Croatia BIT)
24. Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation, PCA Case No. 2015-07 (Russian Federation – Ukraine BIT)
25. AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16 (Energy Charter Treaty (ECT), Kazakhstan – United States BIT)
26. AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17 (Argentina – United States BIT)
27. AES Solar and others v. Spain, UNCITRAL (Energy Charter Treaty (ECT))
28. AES Summit Generation Limited and AES – Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22 (Energy Charter Treaty (ECT))
29. AES Summit Generation Ltd. v. The Republic of Hungary, ICSID No. ARB/01/04 (Energy Charter Treaty (ECT))
30. African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21 (Dominican Republic of Congo – United States BIT)
31. African Petroleum Gambia Limited (Block A1) v. Republic of The Gambia, ICSID Case No. ARB/14/6 (Australia – Gambia BIT)
32. African Petroleum Gambia Limited (Block A4) v. Republic of The Gambia, ICSID Case No. ARB/14/7 (Australia – Gambia BIT)
33. Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8 (Kuwait – Pakistan BIT)
34. Agility for Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID (Iraq – Kuwait BIT)
35. Agroinsumos Ibero-Americanos, S.L. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/16/23 (Spain – Venezuela, Bolivarian Republic of BIT)
36. Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/18 (Argentina – France BIT, Argentina – Spain BIT)
37. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Bolivia – Netherlands BIT)

38. Ahmonseto, Inc. and others v. Arab Republic of Egypt, ICSID Case No. ARB/02/15 (Egypt – United States BIT)
39. AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6 (Kazakhstan – United States BIT)
40. Air Canada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/17/1 (Canada – Venezuela, Bolivarian Republic of BIT)
41. Airbus Helicopters S.A.S. i Airbus S.E. v. Republic of Poland (Netherlands – Poland BIT)
42. Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan, ICSID Case No. ARB/15/8 (Kazakhstan – Turkey BIT, The Energy Charter Treaty)
43. Al Jazeera Media Network v. Arab Republic of Egypt, ICSID Case No. ARB/16/1 (Egypt – Qatar BIT)
44. Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13 (Energy Charter Treaty (ECT))
45. ALAS International Baustoffproduktions AG v. Bosnia and Herzegovina, ICSID Case No. ARB/07/11 (Bosnia and Herzegovina – Austria BIT)
46. Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3 (Canada – Costa Rica BIT)
47. Albacora, S.A. v. La República del Ecuador, PCA Case No. 2016-11 (Ecuador – Spain BIT)
48. Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania, ICSID Case No. ARB/14/26 (The Energy Charter Treaty)
49. Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia, PCA Case No. 2018-56 (Colombia – United States Trade Promotion Agreement)
50. Alcor Holdings Ltd. v. The Czech Republic (Czech Republic – United Arab Emirates BIT)
51. Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2 (Estonia – United States BIT)
52. Alhambra Resources Ltd. and Alhambra Coöperatief U.A. v. Republic of Kazakhstan, ICSID Case No. ARB/16/12 (Kazakhstan – Netherlands BIT)
53. Ali Allawi v. Islamic Republic of Pakistan, PCA Case NO. 2012-23 (Pakistan – United Kingdom BIT)
54. Ali Alyafei v. Hashemite Kingdom of Jordan (I), ICSID Case No. ARB/15/24 (Arab Investment Agreement)
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56. Alimenta S.A. v. Republic of The Gambia, ICSID Case No. ARB/99/5 (Switzerland – Gambia BIT)
57. Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait, ICSID Case No. ARB/18/2 (Egypt – Kuwait BIT)

58. Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16 (Austria – Ukraine BIT)
59. Alpiq AG v. Romania, ICSID Case No. ARB/14/28 (Romania – Switzerland BIT, Energy Charter Treaty)
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62. Alten Renewable Energy Developments BV v. Kingdom of Spain, SCC Case No. 2015/036 (The Energy Charter Treaty)
63. Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14 (Netherlands – Panama BIT and Central America – Panama FTA)
64. Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic) (Argentina – Italy BIT)
65. América Móvil S.A.B. de C.V. v. Republic of Colombia, ICSID Case No. ARB(AF)/16/5 (Canada – Colombia FTA)
66. American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1 (Dominican Republic of Congo – United States BIT)
67. AMF Aircraftleasing Meier & Fischer GmbH & Co. KG v. the Czech Republic (Czech Republic – Germany BIT)
68. Amlyn Holding B.V. v. Republic of Croatia, ICSID Case No. ARB/16/28 (The Energy Charter Treaty)
69. Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11 (Egypt – United States BIT, Egypt – Germany BIT)
70. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. V 116/2010 (Energy Charter Treaty (ECT)
71. Anglia Auto Accessories Ltd. v. Czech Republic, SCC Case No. V 2014/181 (Czech Republic – UK BIT)
72. Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1 (United Kingdom – Venezuela BIT)
73. Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25 (China – Republic of Korea BIT)
74. Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01 (Energy Charter Treaty (ECT), Germany – Slovakia BIT)
75. Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31 (Energy Charter Treaty)
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78. ANZEF Ltd. v. Republic of India (India – United Kingdom BIT)
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82. ArcelorMittal S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/15/47 (BLEU (Belgium – Luxembourg Economic Union) – Egypt BIT)
83. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5 (NAFTA)
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86. Artashes Rafikovich Amalyan v. Russian Federation (Greece – Russian Federation BIT)
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89. Ashok Sancheti v. United Kingdom, UNCITRAL (India – United Kingdom BIT)
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107. Barmek Holding A.S. v. Republic of Azerbaijan, ICSID Case No. ARB/06/16 (Turkey – Azerbaijan BIT)
108. Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt, ICSID Case No. ARB/11/6 (Egypt – Kuwait BIT)
109. Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda, ICSID Case No. ARB/18/21 (Rwanda – United States of America BIT)
110. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29 (Pakistan – Turkey BIT)
111. Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (NAFTA)
112. BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16 (The Energy Charter Treaty)
113. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21 (Canada – Peru Free Trade Agreement)
114. Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, PCA Case No. 2010-20 (China – Mongolia BIT)
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128. B-Mex, LLC and others v. United Mexican States, ICSID Case No. ARB(AF)/16/3 (NAFTA)
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130. Booker plc v. Co-operative Republic of Guyana, ICSID Case No. ARB/01/9 (Guyana – United Kingdom of Great Britain and Northern Ireland BIT)
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164. Cem Selçuk Ersoy v. Republic of Azerbaijan, ICSID Case No. ARB/18/6 (Azerbaijan – Turkey BIT)
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166. Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2 (Energy Charter Treaty ECT)
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185. City-State N.V., Praktyka Asset Management Company LLC, Crystal – Invest LLC and Prodiz LLC v. Ukraine, ICSID Case No. ARB/14/9 (Netherlands – Ukraine BIT)
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749. ST – AD GmbH v. Republic of Bulgaria, UNCITRAL, PCA Case No. 2011-06 (Bulgaria – Germany BIT)
750. Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain, ICSID Case No. ARB/15/1 (The Energy Charter Treaty)
751. Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12 (Tanzania – United Kingdom BIT)
752. Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic (I), MCCI Case No. A-2013/29 (Convention on the Protection of the Rights of the Investor)
753. Stans Energy Corp. and Kutisay Mining LLC v. The Kyrgyz Republic, PCA Case No 2015-32 (Convention on the Protection of the Rights of the Investor)
754. State Enterprise "Energorynok" (Ukraine) v. The Republic of Moldova, SCC Arbitration V 2012/175 (Energy Charter Treaty ECT)
755. State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria, ICSID Case No. ARB/15/43 (Bulgaria – Oman BIT)
756. Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia, ICSID Case No. ARB/16/38 (Latvia – Norway BIT)
757. STEAG GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/4 (The Energy Charter Treaty)
758. Stephane Benhamou v. Uruguay (France – Uruguay BIT)
759. Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1 (Austria – Libya BIT)
760. Strategic Infrasol Foodstuff LLC and The Joint Venture of Thakur Family Trust UAE with Ace Hospitality Management DMCC UAE v. India, UNCITRAL (United Arab Emirates – India Bilateral Investment Treaty)
761. Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17 (Argentina – France BIT, Argentina – Spain BIT)

762. Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 (Argentina – France BIT, Argentina – Spain BIT)
763. Sun Reserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016 (The Energy Charter Treaty)
764. Sun – Flower Olmeda GmbH & Co KG and others v. Kingdom of Spain, ICSID Case No. ARB/16/17 (The Energy Charter Treaty)
765. Sunlodges Ltd (BVI) and Sunlodges (T) Limited v. The United Republic of Tanzania, PCA Case No. 2018-09 (Italy – United Republic of Tanzania BIT)
766. Supervision y Control S.A. v. Republic of Costa Rica, ICSID Case No. ARB/12/4 (Costa Rica – Spain BIT)
767. Surfeit Harvest Investment Holding Pte Ltd v. Republic of China (Taiwan), PCA (Agreement between Singapore and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu on Economic Partnership ASTEP)
768. Swembalt AB, Sweden v. The Republic of Latvia, UNCITRAL (Latvia – Sweden BIT)
769. Swiss Investor v. Republic of South Africa, UNCITRAL (South Africa – Switzerland BIT)
770. Swissbourgh Diamond Mines (Pty) Limited, Josias Van Zyl, The Josias Van Zyl Family Trust and others v. The Kingdom of Lesotho, PCA Case No. 2013-29 (First Case) (Finance and Investment Protocol (FIP) for the Southern African Development Community SADC)
771. Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16 (Macedonia (former Yugoslav Republic of Macedonia) – Swiss BIT)
772. Talsud S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/04/4 (Argentina – Mexico BIT, France – Mexico BIT)
773. Tanmiah v. Tunisia, Arab Investment Court (Arab Investment Agreement)
774. Tantalum International Ltd. and Emerge Gaming Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/18/22) (Australia – Egypt BIT)
775. Tariq Bashir and SA Interpétrol Burundi v. Republic of Burundi, ICSID Case No. ARB/14/31 (BLEU (Belgium – Luxembourg Economic Union) – Burundi BIT)
776. TCW Group, Inc and Dominican Energy Holdings, L.P. v. The Dominican Republic, UNCITRAL (CAFTA)
777. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2 (Mexico – Spain BIT)
778. Técnicas Reunidas, S.A. and Eurocontrol, S.A. v. Republic of Ecuador, ICSID Case No. ARB/06/17 (Ecuador – Spain BIT)
779. TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23 (CAFTA)
780. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1 (Argentina – Spain BIT)

781. Tekfen, TML, Tekfen – TML joint venture v. Libya (Libya – Turkey BIT)
782. Telefónica S.A. v. The Argentine Republic, ICSID Case No. ARB/03/20 (Argentina – Spain BIT)
783. Telefónica S.A. v. United Mexican States, ICSID Case No. ARB(AF)/12/4 (Mexico – Spain BIT)
784. Telefónica, S.A. v. Republic of Colombia, ICSID Case No. ARB/18/3 (Colombia – Spain BIT)
785. Telekom Malaysia Berhad v. The Republic of Ghana, Case No. HA/RK 2004, 667 (Ghana – Malaysia BIT)
786. Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15 (Hungary – Norway BIT)
787. Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26 (Luxembourg – Venezuela BIT, Portugal – Venezuela BIT)
788. Tennant Energy, LLC v. Government of Canada, PCA Case No. 2018-54 (NAFTA)
789. Ternium S.A. and Consorcio Siderurgia Amazonia S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/19 (Luxembourg – Venezuela BIT, Spain – Venezuela BIT)
790. Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1 (Australia – Pakistan BIT)
791. The Canadian Cattlemen for Fair Trade v. United States of America, UNCITRAL (NAFTA)
792. The Lopez – Goyne Family Trust and others v. Republic of Nicaragua, ICSID Case No. ARB/17/44 (CAFTA)
793. The PV Investors v. Spain, PCA Case No. 2012-14 (The Energy Charter Treaty (1994))
794. The Renco Group, Inc. v. Republic of Peru (Second Case) (Peru – United States Trade Promotion Agreement)
795. The Renco Group, Inc. v. The Republic of Peru, ICSID Case No. UNCT/13/1 (Peru – United States Trade Promotion Agreement)
796. The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3 (Netherlands – Romania BIT)
797. The Williams Companies, International Holdings B.V., WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/10 (Netherlands – Venezuela, Bolivarian Republic of BIT)
798. Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49 (Cyprus – Greece BIT (1992), BLEU (Belgium-Luxembourg Economic Union) – Cyprus BIT)

799. Thomas Gosling and others v. Republic of Mauritius, ICSID Case No. ARB/16/32 (Mauritius – United Kingdom BIT)
800. Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5 (Barbados – Venezuela BIT)
801. Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18 (Lithuania – Ukraine BIT)
802. Tomasz Częścik and Robert Aleksandrowicz v. Cyprus, SCC Case No. V 2014/169 (Cyprus – Poland BIT)
803. Total E&P Uganda BV v. Republic of Uganda, ICSID Case No. ARB/15/11 (Netherlands – Uganda BIT)
804. Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01 (Argentina – France BIT)
805. Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12 (Italy – Lebanon BIT)
806. TRACO Deutsche Travertinwerke GmbH v. The Republic of Poland, UNCITRAL (Germany – Poland BIT)
807. Transban Investments Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/24 (Barbados – Venezuela BIT)
808. TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America, ICSID Case No. ARB/16/21 (NAFTA)
809. Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama, ICSID Case No. ARB/13/28 (Panama – United States of America BIT)
810. Trans – Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/07/25 (Jordan – United States BIT)
811. Trinh Vinh Binh v. Vietnam, UNCITRAL (Netherlands – Vietnam BIT)
812. Triodos SICAV II v. Kingdom of Spain, SCC Case No. 2017-194 (The Energy Charter Treaty)
813. Trustees of the Gabourel Family Trust v. Honduras (Honduras – United States of America BIT)
814. TS Investment Corp. v. Republic of Armenia, LCIA (Armenia – United States BIT)
815. TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5 (Argentina – Netherlands BIT)
816. TSI Kinvest LLC v. Republic of Moldova, SCC Emergency Arbitration No. EA (2014/053) (Moldova – Russian Federation BIT)
817. Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28 (Netherlands – Turkey BIT)
818. Tullow Uganda Operations PTY LTD v. Republic of Uganda, ICSID Case No. ARB/12/34 (Uganda – United Kingdom BIT)

819. Turkcell İletişim Hizmetleri A.Ş. v. The Islamic Republic of Iran, UNCITRAL (Iran – Turkey BIT)
820. Türkiye Petrolleri Anonim Ortaklığı v. Republic of Kazakhstan, ICSID Case No. ARB/11/2 (Kazakhstan – Turkey BIT, The Energy Charter Treaty)
821. Tvornica Šećera Osijek d.o.o. v. Republic of Serbia (Croatia – Serbia BIT (1998))
822. U.S. Steel Global Holdings I B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-6 (Netherlands – Slovak Repubic BIT)
823. UAB "ARVI" ir ko and UAB "SANITEX" v. Republic of Serbia, ICSID Case No. ARB/09/21 (Lithuania – Serbia BIT (2005), Lithuania – Montenegro BIT (2005))
824. UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33 (Latvia – Lithuania BIT)
825. Ulemek v. Croatia, UNCITRAL (Canada – Croatia BIT)
826. Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL (Ecuador – United States BIT)
827. UniCredit Bank Austria AG and Zagrebačka Banka d.d. v. Republic of Croatia, ICSID Case No. ARB/16/31 (Austria – Croatia BIT)
828. Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4 (Egypt – Spain BIT)
829. Unisys Corporation v. Argentine Republic, ICSID Case No. ARB/03/27 (Argentina – United States BIT)
830. United Parcel Service of America Inc. v. Government of Canada, ICSID Case No. UNCT/02/1 (NAFTA)
831. United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24 (Netherlands – Estonia BIT)
832. Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela, ICSID Case No. Arb/10/9 (Spain – Venezuela BIT)
833. UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35 (France – Hungary BIT)
834. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26 (Argentina – Spain BIT)
835. Ustay Yapi Taahhut ve Ticaret AS v. Libya (Libya – Turkey BIT)
836. Utsch M.O.V.E.R.S. International GmbH, Erich Utsch Aktiengesellschaft, and Helmut Jungbluth v. Arab Republic of Egypt, ICSID Case No. ARB/13/37 (Egypt – Germany BIT)
837. Valeri Belokon v. Kyrgyz Republic, UNCITRAL (Kyrgyzstan – Latvia BIT)
838. Valle Esina S.p.A. v. The Russian Federation (Italy – Russian Federation BIT)
839. Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18 (Spain – Venezuela BIT)

840. Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/13/11 (Spain – Venezuela BIT)
841. Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6 (Canada – Venezuela BIT)
842. Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (Energy Charter Treaty ECT)
843. Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (Energy Charter Treaty ECT)
844. VC Holding II S.a.r.l. and others v. Italian Republic, ICSID Case No. ARB/16/39 (The Energy Charter Treaty)
845. Vedanta Resources plc v. India, UNCITRAL (UK BIT claim) (India – United Kingdom BIT)
846. Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (Netherlands – Venezuela BIT)
847. Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela, PCA Case No. 2013-34 (Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments)
848. Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22 (Netherlands – Venezuela BIT)
849. Vento Motorcycles, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/17/3 (NAFTA)
850. Veolia Propreté SAS v. Italian Republic, ICSID Case No. ARB/18/20 (The Energy Charter Treaty)
851. Veolia Propreté v. Arab Republic of Egypt, ICSID Case No. ARB/12/15 (Egypt – France BIT)
852. Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4 (United Kingdom – Venezual BIT)
853. Veteran Petroleum Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 228 (Energy Charter Treaty ECT)
854. Viaduct d.o.o. Portorož, Vladimir Zevnik and Boris Goljevšček v. Bosnia and Herzegovina, ICSID Case No. ARB/16/36 (Energy Charter Treaty, Slovenia – Bosnia and Herzegovina BIT)
855. VICAT v. Republic of Senegal, ICSID Case No. ARB/14/19 (France – Senegal BIT 2007)
856. Victims of the Stanford Ponzi Scheme v. The Government of the United States of America (CAFTA)
857. Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2 (Chile – Spain BIT)
858. Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22 (Cyprus – Hungary BIT)

859. Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland, ICSID Case No. ARB(AF)/11/3 (Poland – United States BIT)
860. Vito G. Gallo v. The Government of Canada, UNCITRAL, PCA Case No. 55798 (NAFTA)
861. Vitosha Resort 2000 OOD, Ram Investments OOD and Mordechai Ramot v. Republic of Bulgaria (Bulgaria – Israel BIT)
862. Vivendi v. Republic of Poland, UNCITRAL (France – Poland BIT)
863. Vladimir Antonov v. Republic of Lithuania (Lithuania – Russian Federation BIT)
864. Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004 (Belgium – Russian Federation BIT)
865. Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6 (Uzbekistan – Kazakhstan BIT)
866. Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. Government of India [II], UNCITRAL (UK BIT Claim) (India – United Kingdom BIT)
867. Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. India (II) (India – United Kingdom BIT)
868. Vodafone International Holdings BV v. Government of India [I], PCA Case No. 2016-35 (Dutch BIT Claim) (India – Netherlands BIT)
869. Voltaic Network GmbH v. Czech Republic, UNCITRAL (Czech Republic – Germany BIT; ECT)
870. WA Investments – Europa Nova Limited v. The Czech Republic (Cyprus – Czech Republic BIT (2001), The Energy Charter Treaty)
871. Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 (Egypt – Italy BIT)
872. Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3 (NAFTA)
873. Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (NAFTA)
874. Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44 (Energy Charter Treaty)
875. WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic (Cyprus – Czech Republic BIT)
876. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 (Egypt – United Kingdom BIT)
877. Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand, UNCITRAL (Germany – Thailand BIT)
878. Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2 (Ukraine – United States BIT)

879. White Industries Australia Limited v. The Republic of India, UNCITRAL (Australia – India BIT)
880. William Jay Greiner and Malbaie River Outfitters Inc. v. Government of Canada (NAFTA)
881. William Nagel v. The Czech Republic, SCC Case No. 049/2002 (Czech Republic – United Kingdom BIT)
882. Windoor v. Republic of Kazakhstan, ICSID (Estonia – Kazakhstan BIT)
883. Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22 (NAFTA)
884. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14 (Argentina – Germany BIT)
885. WNC Factoring Limited v. The Czech Republic, PCA Case No. 2014-34 (Czech Republic – United Kingdom BIT)
886. World Wide Minerals v. Republic of Kazakhstan, UNCITRAL (Case 2) (Canada – USSR BIT)
887. Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1 (ASEAN Agreement for the Promotion and Protection of Investments)
888. Yukos Capital SARL v Russian Federation, UNCITRAL (Geneva Tribunal) (Energy Charter Treaty)
889. Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227 (Energy Charter Treaty ECT)
890. Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova, SCC Case No. V091/2012 (Moldova – Russian Federation BIT)
891. Yury Bogdanov v. Republic of Moldova, SCC Arbitration No. V (114/2009) (Moldova – Russian Federation BIT)
892. Zamora Gold Corporation v. Ecuador (Canada – Ecuador BIT)
893. Zbigniew Piotr Grot and others v. Republic of Moldova, ICSID Case No. ARB/16/8 (Moldova – United States of America BIT)
894. Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia, ICSID Case No. ARB/14/27 (BLEU (Belgium-Luxembourg Economic Union) – Serbia BIT)

Annex II Cases Excluded from Assessment (Publicly Unavailable Awards and Decisions, or Available Awards and Decisions in Languages Other than English or Russian)

1. (DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar, ICSID Case No. ARB/17/18 (BLEU (Belgium-Luxembourg Economic Union) – Madagascar BIT)

2. 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15 (Energy Charter Treaty)
3. Abed El Jaouni v. Lebanese Republic, ICSID Case No. ARB/15/3 (Germany – Lebanon BIT)
4. Abengoa S.A. y COFIDES S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2 (Mexico – Spain BIT)
5. Abertis Infraestructuras S.A. v. Government of Bolivia, PCA (Bolivia-Spain BIT)
6. Abertis Infraestructuras, S.A. v. Argentine Republic, ICSID Case No. ARB/15/48 (Spain – Argentina BIT)
7. ABN Amro N.V. v. Republic of India (India – Netherlands BIT)
8. ACF Renewable Energy Limited v. Republic of Bulgaria (ICSID Case No. ARB/18/1) (The Energy Charter Treaty)
9. Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia, ICSID Case No. ARB/17/37 (Austria – Croatia BIT)
10. Addiko Bank AG v. Montenegro, ICSID Case No. ARB/17/35 (Austria – Montenegro BIT)
11. Adria Beteiligungs GmbH v. The Republic of Croatia, UNCITRAL (Austria – Croatia BIT)
12. Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation, PCA Case No. 2015-07 (Russian Federation – Ukraine BIT)
13. AES Solar and others v. Spain, UNCITRAL (Energy Charter Treaty (ECT))
14. AES Summit Generation Ltd. v. The Republic of Hungary, ICSID No. ARB/01/04 (Energy Charter Treaty (ECT))
15. African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21 (Dominican Republic of Congo – United States BIT)
16. African Petroleum Gambia Limited (Block A1) v. Republic of The Gambia, ICSID Case No. ARB/14/6 (Australia – Gambia BIT)
17. African Petroleum Gambia Limited (Block A4) v. Republic of The Gambia, ICSID Case No. ARB/14/7 (Australia – Gambia BIT)
18. Agility for Public Warehousing Company K.S.C. v. Islamic Republic of Pakistan, ICSID Case No. ARB/11/8 (Kuwait – Pakistan BIT)
19. Agility for Public Warehousing Company K.S.C. v. Republic of Iraq, ICSID (Iraq – Kuwait BIT (1964))
20. Agroinsumos Ibero-Americanos, S.L. and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/16/23 (Spain – Venezuela, Bolivarian Republic of BIT)
21. Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/18 (Argentina – France BIT, Argentina – Spain BIT)

22. Ahmonseto, Inc. and others v. Arab Republic of Egypt, ICSID Case No. ARB/02/15 (Egypt – United States BIT)
23. Air Canada v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/17/1 (Canada – Venezuela, Bolivarian Republic of BIT)
24. Airbus Helicopters S.A.S. i Airbus S.E. v. Republic of Poland (Netherlands – Poland BIT)
25. Aktau Petrol Ticaret A.Ş. v. Republic of Kazakhstan, ICSID Case No. ARB/15/8 (Kazakhstan – Turkey BIT (1992), The Energy Charter Treaty)
26. Al Jazeera Media Network v. Arab Republic of Egypt, ICSID Case No. ARB/16/1 (Egypt – Qatar BIT)
27. ALAS International Baustoffproduktions AG v. Bosnia and Herzegovina, ICSID Case No. ARB/07/11 (Bosnia and Herzegovina – Austria BIT)
28. Albacora, S.A. v. La República del Ecuador, PCA Case No. 2016-11 (Ecuador – Spain BIT)
29. Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania, ICSID Case No. ARB/14/26 (The Energy Charter Treaty)
30. Alberto Carrizosa Gelzis, Enrique Carrizosa Gelzis, Felipe Carrizosa Gelzis v. Republic of Colombia, PCA Case No. 2018-56 (Colombia – United States Trade Promotion Agreement)
31. Alcor Holdings Ltd. v. The Czech Republic (Czech Republic – United Arab Emirates BIT)
32. Alhambra Resources Ltd. and Alhambra Coöperatief U.A. v. Republic of Kazakhstan, ICSID Case No. ARB/16/12 (Kazakhstan – Netherlands BIT)
33. Ali Allawi v. Islamic Republic of Pakistan, PCA Case NO. 2012-23 (Pakistan – United Kingdom BIT)
34. Ali Alyafei v. Hashemite Kingdom of Jordan (I), ICSID Case No. ARB/15/24 (Arab Investment Agreement)
35. Ali Alyafei v. Hashemite Kingdom of Jordan (II) (OIC Investment Agreement)
36. Alimenta S.A. v. Republic of The Gambia, ICSID Case No. ARB/99/5 (Switzerland – Gambia BIT)
37. Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait (ICSID Case No. ARB/18/2) (Egypt – Kuwait BIT)
38. Alpiq AG v. Romania, ICSID Case No. ARB/14/28 (Romania – Switzerland BIT, Energy Charter Treaty)
39. Alstom Power Italia SpA and Alstom SpA v. Republic of Mongolia, ICSID Case No. ARB/04/10 (Italy – Mongolia BIT)
40. Alten Renewable Energy Developments BV v. Kingdom of Spain, SCC Case No. 2015/036 (The Energy Charter Treaty)
41. Álvarez y Marín Corporación S.A. and others v. Republic of Panama, ICSID Case No. ARB/15/14 (Netherlands – Panama BIT (2000) and Central America-Panama FTA)

42. América Móvil S.A.B. de C.V. v. Republic of Colombia, ICSID Case No. ARB(AF)/16/5 (Canada – Colombia FTA)
43. AMF Aircraftleasing Meier & Fischer GmbH & Co. KG v. the Czech Republic (Czech Republic – Germany BIT)
44. Amlyn Holding B.V. v. Republic of Croatia, ICSID Case No. ARB/16/28 (The Energy Charter Treaty)
45. Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi, ICSID Case No. ARB/01/2 (Belgium-Luxembourg – Burundi BIT)
46. Antoine Goetz et consorts v. République du Burundi, ICSID Case No. ARB/95/3 (Belgium-Luxembourg – Burundi BIT)
47. ANZEF Ltd. v. Republic of India (India – United Kingdom BIT)
48. APCL Gambia B.V. v. Republic of The Gambia, ICSID Case No. ARB/17/40 (Gambia – Netherlands BIT)
49. ArcelorMittal S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/15/47 (BLEU (Belgium-Luxembourg Economic Union) – Egypt BIT)
50. Ares International S.r.l. and MetalGeo S.r.l. v. Georgia, ICSID Case No. ARB/05/23 (Italy – Georgia BIT)
51. Arin Capital & Investment Corp. and Edmond Khudyan v. Republic of Armenia, ICSID Case No. ARB/17/36 (Armenia – United States of America BIT)
52. Artashes Rafikovich Amalyan v. Russian Federation (Greece – Russian Federation BIT)
53. AS PNB Banka and others v. Republic of Latvia, ICSID Case No. ARB/17/47 (United Republic of Tanzania – United Kingdom BIT)
54. ASA International S.p.A. v. Arab Republic of Egypt, ICSID Case No. ARB/13/23 (Egypt – Italy BIT)
55. Ashok Sancheti v. United Kingdom, UNCITRAL (India – United Kingdom BIT)
56. Asset Recovery Trust S.A. v. Argentine Republic, ICSID Case No. ARB/05/11 (Argentina – United States BIT)
57. Astro All Asia Networks and South Asia Entertainment Holdings Limited v. India (India – United Kingdom BIT (1994), India – Mauritius BIT)
58. Attila Dogan Construction and Installation Co. v. The Sultanate of Oman (Oman – Turkey BIT)
59. Axiata Group v. India (India – Mauritius BIT)
60. Ayoub-Farid Saab and Fadi Saab v. Cyprus (Cyprus – Lebanon BIT)
61. B.V. Belegging-Maatschappij "Far East" v. Republic of Austria, ICSID Case No. ARB/15/32 (Austria – Malta BIT)
62. B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia, ICSID Case No. ARB/15/5 (Croatia – Netherlands BIT)
63. Baggerwerken Decloedt En Zoon NV v. Republic of the Philippines, ICSID Case No. ARB/11/27 (Philippines – Belgium-Luxembourg BIT)

64. Bank Melli Iran and Bank Saderat Iran v Bahrain, PCA Case No. 2017-25 (Bahrain – Iran BIT (2002))
65. Bank of Cyprus Public Company Limited v. Hellenic Republic, ICSID Case No. ARB/17/4 (Cyprus – Greece BIT)
66. Bank of Nova Scotia v. Argentine Republic (Argentina – Canada BIT)
67. Barmek Holding A.S. v. Republic of Azerbaijan, ICSID Case No. ARB/06/16 (Turkey – Azerbaijan BIT)
68. Bawabet Al Kuwait Holding Company v. Arab Republic of Egypt, ICSID Case No. ARB/11/6 (Egypt – Kuwait BIT)
69. Bay View Group LLC and The Spalena Company LLC v. Republic of Rwanda, ICSID Case No. ARB/18/21 (Rwanda – United States of America BIT)
70. BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/16 (The Energy Charter Treaty)
71. Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia, PCA Case No. 2010-20 (China – Mongolia BIT)
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73. Bidzina Ivanishvili v. Georgia, ICSID Case No. ARB/12/27 (France – Georgia BIT)
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75. Big Sky Energy Corporation v. Republic of Kazakhstan, ICSID Case No. ARB/17/22 (Kazakhstan – United States of America BIT)
76. BM Mühendislik ve İnşaat A.Ş. v. United Arab Emirates, ICSID Case No. ARB/17/20 (Turkey – United Arab Emirates BIT)
77. B-Mex, LLC and others v. United Mexican States, ICSID Case No. ARB(AF)/16/3 (NAFTA)
78. BNP Paribas v. Republic of India (France – India BIT)
79. Booker plc v. Co-operative Republic of Guyana, ICSID Case No. ARB/01/9 (Guyana – United Kingdom of Great Britain and Northern Ireland BIT)
80. Boonsom Boonyanit v. Malaysia (ASEAN Agreement for the Promotion and Protection of Investments)
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82. Bryan Cockrell v. The Socialist Republic of Viet Nam, PCA Case No. 2015-03 (US – Viet Nam Trade Relations Agreement)
83. Bursel Tekstil Sanayi Ve Diş Ticaret A.Ş., Burhan Enuştekin and Selim Kaptanoğlu v. Republic of Uzbekistan, ICSID Case No. ARB/17/24 (Turkey – Uzbekistan BIT)

84. Bycell (Maxim Naumchenko, Andrey Polouektov and Tenoch Holdings Ltd) v. India (Cyprus – India BIT, India – Russia BIT)
85. Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India, PCA Case No. 2016-7 (India – United Kingdom BIT)
86. Camuzzi International S.A. v. República Argentina, ICSID Case No. ARB/03/7 (Argentina – Belgium-Luxembourg BIT)
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88. Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18 (BLEU (Belgium – Luxembourg Economic Union) – Cameroon BIT)
89. Capital Global and Kaif Investment v. India (Cyprus – India BIT, India – Russia BIT)
90. Carissa Investments LLC v. India (India – Mauritius BIT)
91. Carlos Ríos and Francisco Ríos v. Republic of Chile, ICSID Case No. ARB/17/16 (Chile – Colombia BIT)
92. Cascade Investments NV v. Republic of Turkey, ICSID Case No. ARB/18/4 (BLEU (Belgium-Luxembourg Economic Union) – Turkey BIT)
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94. CEF Energia BV v. Italian Republic, SCC Case No. 158/2015 (Energy Charter Treaty)
95. Cem Selçuk Ersoy v. Republic of Azerbaijan, ICSID Case No. ARB/18/6 (Azerbaijan – Turkey BIT)
96. Cementos La Union S.A. and Aridos Jativa S.L.U v. Arab Republic of Egypt, ICSID Case No. ARB/13/29 (Egypt – Spain BIT)
97. Cementownia "Nowa Huta" S.A. v. Republic of Turkey, UNCITRAL (Poland – Turkey BIT)
98. Cemusa – Corporación Europea de Mobiliario Urbano, S.A. and Corporación Americana de Equipamientos Urbanos, S.L. v. United Mexican States, ICSID Case No. ARB(AF)/13/2 (Mexico – Spain BIT)
99. Cengiz İnşaat Sanayi ve Ticaret A.S. v. Libya (Libya – Turkey BIT)
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101. Cesare Galdabini SpA v. Russian Federation, UNCITRAL (Italy – Russian Federation BIT)
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105. CIT Group Inc. v. Argentine Republic, ICSID Case No. ARB/04/9 (US – Argentina BIT)
106. City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine, ICSID Case No. ARB/14/9 (Netherlands – Ukraine BIT)
107. Clorox Spain S.L. v. Bolivarian Republic of Venezuela (Spain – Venezuela BIT)
108. Club Hotel Loutraki S.A. and Casinos Austria International Holding GMBH v. Republic of Serbia, ICSID Case No. ARB/11/4 (Austria – Serbia BIT, Greece – Serbia BIT)
109. CMC Muratori Cementisti CMC Di Ravenna SOC. Coop., CMC MuratoriCementisti CMC Di Ravenna SOC. Coop. A.R.L. Maputo Branch and CMC Africa, and CMC Africa Austral, LDA v. Republic of Mozambique, ICSID Case No. ARB/17/23 (Italy – Mozambique BIT)
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111. Compagnie Minière Internationale Or S.A. v. Republic of Peru, ICSID Case No. ARB/98/6 (France – Peru BIT)
112. Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/2 (Argentina – Chile BIT)
113. ConocoPhillips and Perenco v. Viet Nam (United Kingdom – Viet Nam BIT)
114. Consolidated Exploration Holdings Ltd. and others v. Kyrgyz Republic, ICSID Case No. ARB(AF)/13/1 (Kazakhstan – Kyrgyz Republic BIT)
115. Consorcio GLP Ecuador v. Republic of Ecuador (Ecuador – Spain BIT)
116. Consortium RFCC v. Royaume du Maroc, ICSID Case No. ARB/00/6 (Italy – Morocco BIT)
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119. Convial Callao S.A. and CCI – Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru, ICSID Case No. ARB/10/2 (Argentina – Peru BIT)
120. Corcoesto, S.A. v. Kingdom of Spain, PCA Case No. 2016-26 (Panama – Spain BIT)
121. Corporación América S.A. and Sociedad Aeroportuaria Kuntur Wasi S.A. v. Republic of Peru, ICSID Case No. ARB/18/27 (Argentina – Peru BIT)
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127. Crespo and others v. Poland, ICC (Poland – Spain BIT)
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130. Cunico Resources N.V. v. Republic of North Macedonia, ICSID Case No. ARB/17/46 (Macedonia, The former Yugoslav Republic of – Netherlands BIT)
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132. D.S. Construction FZCO v. Libya (OIC Investment Agreement)
133. Darley Energy Plc v. Republic of Poland (Poland – United Kingdom BIT)
134. DCM Energy GmbH & Co. Solar 1 KG and others v. Kingdom of Spain, ICSID Case No. ARB/17/41 (The Energy Charter Treaty)
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136. Diag Human SE and Josef Šťáva v. The Czech Republic (Czech Republic – Switzerland BIT)
137. Dialasie SAS v. Socialist Republic of Viet Nam (France – Viet Nam BIT)
138. Dirk Herzig (Insolvency Administrator of Unionmatex Industrieanlagen) v Turkmenistan (Germany – Turkmenistan BIT)
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142. Dow AgroSciences LLC vs. Government of Canada (NAFTA)
143. DP World Callao S.R.L., P&O Dover (Holding) Limited, and The Peninsular and Oriental Steam Navigation Company v. Republic of Peru, ICSID Case No. ARB/11/21 (Peru – United Kingdom BIT)
144. DP World Limited v. Kingdom of Belgium, ICSID Case No. ARB/17/21 (BLEU (Belgium-Luxembourg Economic Union) – United Arab Emirates BIT)
145. E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/35 (The Energy Charter Treaty)
146. E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia, ICSID Case No. ARB/07/28 (Bolivia – Netherlands BIT)
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148. EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania, ICSID Case No. ARB/17/33 (Sweden – United Republic of Tanzania BIT)

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161. ENGIE SA, GDF International SAS and ENGIE International Holdings BV v. Hungary, ICSID Case No. ARB/16/14 (The Energy Charter Treaty)
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163. Erbil Serter v. French Republic, ICSID Case No. ARB/13/22 (Turkey – France BIT)
164. Erhas and others v. Turkmenistan, UNCITRAL (Turkey – Turkmenistan BIT)
165. Erste Bank Der Oesterreichischen Sparkassen AG v. Republic of India (Austria – India BIT)
166. Erste Group Bank AG and others v. Republic of Croatia, ICSID Case No. ARB/17/49 (Austria – Croatia BIT)
167. ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic, ICSID Case No. ARB/16/5 (The Energy Charter Treaty)
168. Etrak İnşaat Taahut ve Ticaret Anonim Sirketi v. Libya (Libya – Turkey BIT)
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170. EuroGas GmbH v. Slovak Republic (Austria – Slovak Republic BIT)

171. Eurus Energy Holdings Corporation v. Kingdom of Spain, ICSID Case No. ARB/16/4 (The Energy Charter Treaty)
172. Eutelsat S.A. v. United Mexican States, ICSID Case No. ARB(AF)/17/2 (France – Mexico BIT)
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181. France Telecom v. Lebanon, UNCITRAL (France – Lebanon BIT)
182. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25 (Germany – Philippines BIT)
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184. Future Pipe International B.V. v. Arab Republic of Egypt, ICSID Case No. ARB/17/31 (Egypt – Netherlands BIT)
185. Fynerdale Holdings BV v. The Czech Republic (Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic)
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189. Gas Natural SDG S.A. and Gas Natural Fenosa Electricidad Colombia S.L. v. Republic of Colombia, ICSID Case No. UNCT/18/1 (Colombia – Spain BIT)
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192. Georg Nepolsky v. Czech Republic, UNCITRAL (Czech Republic – Germany BIT)
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196. Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, PCA Case No. 2016-39 (Bolivia – United Kingdom BIT)
197. Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6 (Colombia – Switzerland BIT)
198. Global Energy Consulting OU v. Lithuania (Estonia – Lithuania BIT)
199. Global Gold Mining LLC v. Republic of Armenia, ICSID Case No. ARB/07/7 (Armenia – United States of America BIT)
200. Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16 (Canada – Egypt BIT)
201. Globalnet – Únete Telecomunicaciones S.A. and Clay Pacific S.R.L. v. The Republic of Ecuador (Bolivia – Ecuador BIT)
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203. Görkem Inşaat Sanayi ve Ticaret Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/16/30 (Turkey – Turkmenistan BIT)
204. GPF GP S.à.r.l v. Republic of Poland, SCC Case No. V 2014/168 (BLEU (Belgium – Luxembourg Economic Union) – Poland BIT)
205. GRAD Associates, P.A. v. Bolivarian Republic of Venezuela, Case No. ARB/00/3
206. Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. Republic of Peru, ICSID Case No. UNCT/18/2 (US – Peru Trade Promotion Agreement)
207. Gran Colombia Gold v. Colombia (Canada–Colombia Free Trade Agreement)
208. GRAND EXPRESS Non-Public Joint Stock Company v. Republic of Belarus, ICSID Case No. ARB(AF)/18/1 (Treaty on Eurasian Economic Union, Eurasian Investment Agreement)
209. Grand Torg SRL v. Moldova (Moldova – Russian Federation BIT)
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211. Grupo Francisco Hernando Contreras v. Republic of Equatorial Guinea, ICSID Case No. ARB(AF)/12/2 (Equatorial Guinea – Spain BIT)
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214. Hela Schwarz GmbH v. People's Republic of China, ICSID Case No. ARB/17/19 (China – Germany BIT)
215. Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/14/10 (Netherlands – Venezuela BIT)
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218. Hortensia Margarita Shortt v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/30 (United Kingdom – Venezuela BIT)
219. Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Poland, PCA Case No. 2014-31 (Netherlands – Poland BIT))
220. Houston Industries Energy, Inc. and others v. Argentine Republic, ICSID Case No. ARB/98/1 (Argentina – United States BIT)
221. Hussain Sajwani, Damac Park Avenue for Real Estate Development S.A.E., and Damac Gamsha Bay for Development S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/16 (Egypt – United Arab Emirates BIT)
222. I&I Beheer B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/05/4 (Netherlands – Venezuela BIT)
223. I.C.W. Europe Investments Limited v. The Czech Republic (Czech Republic – United Kingdom BIT (1990), The Energy Charter Treaty)
224. Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5 (Guatemala – Spain BIT)
225. Iberdrola Energía, S.A. v. The Republic of Guatemala (II), PCA Case No. 2017-41 (Guatemala – Spain BIT)
226. Iberdrola, S.A. and Iberdrola Energía, S.A.U. v. Plurinational State of Bolivia, PCA Case No. 2015-05 (Bolivia – Spain BIT)
227. IBT Group LLC., Constructor, Consulting and Engineering (Panamá), S.A., and International Business and Trade, LLC. v. Republic of Panama, ICSID Case No. ARB/14/33 (Panama – United States of America BIT)
228. ICL Europe Coöperatief U.A. v. Ethiopia, UNCITRAL (Netherlands – Ethiopia BIT)
229. ICS Inspection and Control Services Limited v. The Argentine Republic (Argentina – United Kingdom BIT)

230. Igor Boyko v. Ukraine, UNCITRAL (Russian Federation – Ukraine BIT)
231. Ilya Levitis v. The Kyrgyz Republic, UNCITRAL (Kyrgyz Republic – United States BIT)
232. Impresa Grassetto S. p. A., in liquidation v. Republic of Slovenia, ICSID Case No. ARB/13/10 (Italy – Slovenia BIT)
233. Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia, PCA Case No. 2015-40 (India – Indonesia BIT)
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236. Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18 (The Energy Charter Treaty)
237. InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12 (The Energy Charter Treaty)
238. Interbrew Central European Holding B.V. v. Republic of Slovenia, ICSID Case No. ARB/04/17 (Slovenia – Netherlands BIT)
239. International Company for Railway Systems (ICRS) v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/09/13 (Jordan – Kuwait BIT)
240. Intersema Bau AG v. Libya (UNCITRAL) (Libya – Switzerland BIT)
241. Invenergy LLC v. Republic of Poland (Poland – United States of America BIT)
242. Inversión y Gestión de Bienes, IGB, S.L. and IGB18 Las Rozas, S.L. v. Kingdom of Spain, ICSID Case No. ARB/12/17 (Spain – Venezuela BIT)
243. Ipek Investment Limited v. Republic of Turkey, ICSID Case No. ARB/18/18 (Turkey – United Kingdom BIT)
244. Iskandar Safa and Akram Safa v. Hellenic Republic, ICSID Case No. ARB/16/20 (Greece – Lebanon BIT)
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248. Itochu Corporation v. Kingdom of Spain, ICSID Case No. ARB/18/25 (The Energy Charter Treaty)
249. iZee Enterprises LLC, Lazer-2 Tbilisi Ltd., and Cafe Rustaveli Ltd. v. Georgia, UNCITRAL (Georgia – United States BIT)
250. J&P-AVAX S.A. v. Lebanese Republic, ICSID Case No. ARB/16/29 (Greece – Lebanon BIT)
251. JacobsGibb Limited v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/12 (Jordan – United Kingdom of Great Britain and Northern Ireland BIT)

252. James Falgout, Barbara Falgout, Clarence Johnson and Retire in Chiriqui, S.A v. The Republic of Panama (Panama – United States of America BIT, United States – Panama Trade Promotion Agreement)
253. JGC Corporation v. Kingdom of Spain, ICSID Case No. ARB/15/27 (The Energy Charter Treaty (1994))
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255. JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company JV v. Ukraine, SCC (Energy Charter Treaty (ECT))
256. JML Heirs LLC and J.M. Longyear LLC v. Canada (NAFTA)
257. Jochem Bernard Buse v. Republic of Panama, ICSID Case No. ARB/17/12 (Netherlands – Panama BIT)
258. John R. Andre v. Government of Canada (NAFTA)
259. Joseph Houben v. Republic of Burundi, ICSID Case No. ARB/13/7 (Belgium – Burundi BIT)
260. Josias Van Zyl, The Josias Van Zyl Family Trust & The Burmilla Trust v. The Kingdom of Lesotho, PCA Case No. 2016-21 (Second Case) (SADC Investment Protocol)
261. JSC BTA Bank v. Kyrgyz Republic, UNCITRAL (Kazakhstan – Kyrgyz Republic BIT)
262. Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia, Case No. 2018-39 (Bolivia – US BIT)
263. Juvel Ltd and Bithell Holdings Ltd. v. Poland (Cyprus – Poland BIT)
264. K+ Venture Partners v. Czech Republic (Czech Republic – Netherlands BIT)
265. Kaliningrad Region v. Lithuania, ICC (Lithuania – Russian Federation BIT)
266. Karmer Marble Tourism Construction Industry and Commerce Limited Liability Company v. Georgia, ICSID Case No. ARB/08/19 (Georgia – Turkey BIT)
267. KazTransGas JSC v. Georgia (The Energy Charter Treaty, Georgia – Kazakhstan BIT)
268. KBR, Inc. v. United Mexican States, ICSID Case No. UNCT/14/1 (NAFTA)
269. Khaitan Holdings (Mauritius) Limited v. Republic of India, PCA Case No 2018-50 (India – Mauritius BIT)
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479. Vodafone International Holdings BV v. Government of India (I), PCA Case No. 2016-35 (Dutch BIT Claim) (India – Netherlands BIT)
480. Voltaic Network GmbH v. Czech Republic, UNCITRAL (Czech Republic – Germany BIT, Energy Charter Treaty)
481. WA Investments-Europa Nova Limited v. The Czech Republic (Cyprus – Czech Republic BIT (2001), The Energy Charter Treaty)
482. Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44 (Energy Charter Treaty)
483. WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. The Czech Republic (Cyprus – Czech Republic BIT)
484. Western NIS Enterprise Fund v. Ukraine, ICSID Case No. ARB/04/2 (Ukraine – United States BIT)
485. William Jay Greiner and Malbaie River Outfitters Inc. v. Government of Canada (NAFTA)
486. Windoor v. Republic of Kazakhstan, ICSID (Estonia – Kazakhstan BIT)
487. World Wide Minerals v. Republic of Kazakhstan, UNCITRAL (Case 2) (Canada – USSR BIT)
488. Yukos Capital SARL v Russian Federation, UNCITRAL (Geneva Tribunal) (Energy Charter Treaty (ECT))
489. Zamora Gold Corporation v. Ecuador (Canada – Ecuador BIT)
490. Zbigniew Piotr Grot and others v. Republic of Moldova, ICSID Case No. ARB/16/8 (Moldova – United States of America BIT)
491. Zelena N.V. and Energo-Zelena d.o.o Inđija v. Republic of Serbia, ICSID Case No. ARB/14/27 (BLEU (Belgium-Luxembourg Economic Union) – Serbia BIT)
492. United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia, ICSID Case No. ARB/14/24 (Netherlands – Estonia BIT)

Annex III Cases with Publicly Available Awards and Decisions in English or Russian Language (the Basis for Assessment)

1. A11Y LTD. v. Czech Republic, ICSID Case No. UNCT/15/1 (United Kingdom of Great Britain and Northern Ireland – Czech Republic BIT)
2. Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT/13/2 (CAFTA)
3. Abaclat and Others v. Argentine Republic, ICSID Case No. ARB/07/5 (Argentina – Italy BIT)
4. AbitibiBowater Inc. v. Government of Canada, ICSID Case No. UNCT/10/1 (NAFTA)

5. Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary, ICSID Case No. ARB/12/3 (Hungary – United Kingdom BIT)
6. Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (Netherlands – Slovak Repubic BIT)
7. Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2013-12 (Number 2) (Netherlands – Slovak Repubic BIT)
8. ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22 (Germany – Federal Republic of Yugoslavia BIT)
9. ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16 (Cyprus – Hungary BIT)
10. Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33 (Oman – United States FTA)
11. Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9 (Germany – Turkmenistan BIT)
12. ADF Group Inc. v. United States of America, ICSID Case No. ARB (AF)/00/1 (NAFTA)
13. AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16 (Energy Charter Treaty (ECT), Kazakhstan – United States BIT)
14. AES Corporation v. The Argentine Republic, ICSID Case No. ARB/02/17 (Argentina – United States BIT)
15. AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22 (Energy Charter Treaty)
16. Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3 (Bolivia – Netherlands BIT)
17. AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan, ICSID Case No. ARB/01/6 (Kazakhstan – United States BIT)
18. Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13 (Energy Charter Treaty (ECT))
19. Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3 (Canada – Costa Rica BIT)
20. Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia, ICSID Case No. ARB/99/2 (Estonia – United States BIT)
21. Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16 (Austria – Ukraine BIT)
22. Alps Finance and Trade AG v. The Slovak Republic, UNCITRAL (Slovak Republic – Switzerland BIT)
23. Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic) (Argentina – Italy BIT)

24. American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1 (Dominican Republic of Congo – United States BIT)
25. Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11 (Egypt – United States BIT, Egypt – Germany BIT)
26. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. V 116/2010 (Energy Charter Treaty (ECT))
27. Anglia Auto Accessories Ltd. v. Czech Republic, SCC Case No. V 2014/181 (Czech Republic – UK BIT)
28. Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1 (United Kingdom – Venezuela BIT)
29. Ansung Housing Co., Ltd. v. People's Republic of China, ICSID Case No. ARB/14/25 (China – Republic of Korea BIT)
30. Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01 (Energy Charter Treaty (ECT), Germany – Slovakia BIT)
31. Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain, ICSID Case No. ARB/13/31 (Energy Charter Treaty (ECT))
32. Apotex Holdings Inc. and Apotex Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1 (NAFTA)
33. Apotex Inc. v. The Government of the United States of America, ICSID Case No. UNCT/10/2 (NAFTA)
34. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5 (NAFTA)
35. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3 (Sri Lanka – United Kingdom BIT)
36. ATA Construction, Industrial and Trading Company v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/08/2 (Jordan – Turkey BIT)
37. Austrian Airlines v. The Slovak Republic, UNCITRAL (Austria – Slovak Republic BIT)
38. AWG Group Ltd. v. The Argentine Republic, UNCITRAL (Argentina – United Kingdom BIT)
39. Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15 (Energy Charter Treaty (ECT))
40. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (Argentina – United States BIT)
41. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29 (Pakistan – Turkey BIT)
42. Bayview Irrigation District et al. v. United Mexican States, ICSID Case No. ARB(AF)/05/1 (NAFTA)
43. Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21 (Canada – Peru FTA)

44. Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen, ICSID Case No. ARB/14/30 (China – Yemen BIT)
45. Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, ICSID Case No. ARB/05/6 (Netherlands – Zimbabwe BIT)
46. Bernhard von Pezold and Others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15 (Germany – Zimbabwe BIT, Switzerland – Zimbabwe BIT)
47. BG Group Plc. v. The Republic of Argentina, UNCITRAL (Argentina – United Kingdom BIT)
48. Bilcon of Delaware et al v. Government of Canada, PCA Case No. 2009-04 (NAFTA)
49. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22 (Tanzania – United Kingdom BIT)
50. Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB 12/20 (Barbados – Venezuela BIT)
51. Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3 (Energy Charter Treaty)
52. Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, ICSID Case No. ARB/10/25 (Switzerland – Zimbabwe BIT)
53. Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11 (Ukraine – United States BIT)
54. BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic (Argentina – United States BIT)
55. Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34 (U.S. – Panama Trade Promotion Agreement)
56. British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18 (Belize – United Kingdom BIT)
57. Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9 (Netherlands – Paraguay BIT)
58. Burimi SRL and Eagle Games SH.A v. Republic of Albania, ICSID Case No. ARB/11/18 (Albania – Italy BIT)
59. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 (Ecuador – United States BIT)
60. Camuzzi International S.A. v. The Argentine Republic, ICSID Case No. ARB/03/2 (Argentina – Belgium-Luxembourg BIT)
61. Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America, UNCITRAL (NAFTA)
62. Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13 (Kazakhstan – United States BIT)

63. Caratube International Oil Company LLP v. The Republic of Kazakhstan, ICSID Case No. ARB/08/12 (Kazakhstan – United States BIT)
64. Cargill, Incorporated v. Republic of Poland, ICSID Case No. ARB(AF)/04/2 (Poland – United States Business and Economic Relations Treaty)
65. Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA)
66. Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32 (Argentina – Austria BIT)
67. CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India, PCA Case No. 2013-09 (India – Mauritius BIT)
68. CCL v. Republic of Kazakhstan, SCC Case 122/2001 (Kazakhstan – United States BIT)
69. Cem Cengiz Uzan v. Republic of Turkey, SCC Case No. V 2014/023 (Energy Charter Treaty)
70. Cementownia "Nowa Huta" S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/06/2 (Energy Charter Treaty (ECT))
71. CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15 (Netherlands – Venezuela BIT)
72. Central European Aluminium Company (CEAC) v. Montenegro, ICSID Case No. ARB/14/8 (Cyprus – Serbia and Montenegro BIT)
73. Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4 (Czech Republic – Slovak Republic BIT)
74. Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9 (Egypt – United States BIT)
75. Charanne and Construction Investments v. Spain, SCC Case No. V 062/2012 (Energy Charter Treaty (ECT))
76. Chemtura Corporation v. Government of Canada, UNCITRAL (NAFTA)
77. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877 (Ecuador – United States BIT)
78. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23 (Ecuador – United States BIT)
79. Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia, ICSID Case No. ARB/12/14 and 12/40 (Australia – Indonesia BIT, Indonesia – United Kingdom BIT)
80. CME Czech Republic B.V. v. The Czech Republic, UNCITRAL (Czech Republic – Netherlands BIT)
81. CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8 (Argentina – United States BIT)

82. Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. The Republic of El Salvador, ICSID Case No. ARB/09/17 (CAFTA)
83. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3 (Argentina – France BIT)
84. Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1
85. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30 (Netherlands – Venezuela BIT)
86. Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08 (Algeria – Italy BIT)
87. Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9 (Argentina – United States BIT)
88. Copper Mesa Mining Corporation v. Republic of Ecuador, PCA No. 2012-2 (Canada – Ecuador BIT)
89. Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1 (NAFTA)
90. Corona Materials LLC v. Dominican Republic, ICSID Case No. ARB(AF)/14/3 (CAFTA)
91. Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29 (Kenya – United Kingdom BIT)
92. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2 (Canada – Venezuela BIT)
93. Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1 (Argentina – Germany BIT)
94. Dan Cake S.A. v. Hungary, ICSID Case No. ARB/12/9 (Hungary – Portugal BIT)
95. David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1 (Poland – United States Business and Economic Relations Treaty)
96. David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3 (CAFTA)
97. Dawood Rawat v. The Republic of Mauritius, PCA Case 2016-20 (France – Mauritius BIT)
98. Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17 (Oman – Yemen BIT)
99. Detroit International Bridge Company v. Government of Canada, UNCITRAL, PCA Case No. 2012-25 (NAFTA)
100. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2 (Germany – Sri Lanka BIT)
101. Deutsche Telekom v. India, PCA Case No. 2014-10 (Germany – India BIT)

102. Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19 (Ecuador – United States BIT)
103. Dunkeld International Investment Ltd. v. The Government of Belize (Number 1), PCA Case No. 2010-13, UNCITRAL (Belize – United Kingdom BIT)
104. Dunkeld International Investment Ltd. v. The Government of Belize (Number 2), PCA Case No. 2010-21 (Belize – United Kingdom BIT)
105. East Cement for Investment Company v. Poland, ICC (Jordan – Poland BIT)
106. Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004 (Czech Republic – Netherlands BIT)
107. ECE Projektmanagement v. The Czech Republic, UNCITRAL, PCA Case No. 2010-5 (Czech Republic – Germany BIT)
108. EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13 (Romania – United Kingdom BIT)
109. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23 (Argentina – Belgium-Luxembourg BIT, Argentina – France BIT)
110. Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36 (Energy Charter Treaty (ECT))
111. El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15 (Argentina – United States BIT)
112. Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19 (Energy Charter Treaty (ECT))
113. Eli Lilly and Company v. The Government of Canada, UNCITRAL, ICSID Case No. UNCT/14/2 (NAFTA)
114. Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7 (Argentina – Spain BIT)
115. Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2 (Hungary – Netherlands BIT, Hungary – Switzerland BIT)
116. Empresa Eléctrica del Ecuador, Inc. v. Republic of Ecuador, ICSID Case No. ARB/05/9 (Ecuador – United States BIT)
117. Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4 (Chile – Peru BIT)
118. EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL (Canada – Ecuador BIT)
119. Energoalians TOB v. Republic of Moldova, UNCITRAL (Energy Charter Treaty (ECT), Moldova – Ukraine BIT)
120. Enkev Beheer B.V. v. Republic of Poland, PCA Case No. 2013-01 (Netherlands – Poland BIT)

121. Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3 (Argentina – United States BIT)
122. Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50 (Energy Charter Treaty)
123. Ethyl Corporation v. The Government of Canada, UNCITRAL (NAFTA)
124. Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5 (Paraguay – Peru BIT)
125. Eureko B.V. v. Republic of Poland (Netherlands – Poland BIT)
126. EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic, ICSID Case No. ARB/14/14 (Canada-Slovak Republic BIT, US – Slovak Republic BIT)
127. Europe Cement Investment & Trade S.A. v. Republic of Turkey, ICSID Case No. ARB(AF)/07/2 (Energy Charter Treaty (ECT))
128. European American Investment Bank AG (EURAM) v. Slovak Republic, UNCITRAL (Austria – Slovak Republic BIT)
129. European Media Ventures SA v. The Czech Republic, UNCITRAL (Belgium-Luxembourg – Czech Republic BIT)
130. EVN AG v. The former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10 (Austria-Macedonia (former Yugoslav Republic of Macedonia) BIT, Energy Charter Treaty (ECT))
131. Evrobalt LLC v. The Republic of Moldova, SCC Case No. 2016/082 (Moldova, Republic of – Russian Federation BIT)
132. Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/21 (United States – Venezuela BIT)
133. Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3 (Netherlands – Venezuela BIT)
134. Fireman's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/1 (NAFTA)
135. Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL (India – Poland BIT)
136. Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain, SCC Case No. 2015/150 (Energy Charter Treaty)
137. Forminster Enterprises Limited (Cyprus) v. Czech Republic, UNCITRAL (Czech Republic – Cyprus BIT)
138. Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/13/38 (Jordan – Kuwait BIT)
139. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/11/12 (Germany – Philippines BIT)

140. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25 (Germany – Philippines BIT)
141. Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL (Canada – Czech Republic BIT)
142. F-W Oil Interests, Inc. v. The Republic of Trinidad and Tobago, ICSID Case No. ARB/01/14 (Trinidad and Tobago – United States BIT)
143. Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania, ICSID Case No. ARB/15/31 (Canada – Romania BIT, UK – Romania BIT)
144. Gambrinus, Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/31 (Barbados – Venezuela, Bolivarian Republic of BIT)
145. Gami Investments, Inc. v. The Government of the United Mexican States, UNCITRAL (NAFTA)
146. Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20 (Turkmenistan – United Kingdom BIT)
147. Gas Natural SDG, S.A. v. The Argentine Republic, ICSID Case No. ARB/03/10 (Argentina – Spain BIT)
148. GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16 (Germany – Ukraine BIT)
149. Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3 (Argentina – Mexico BIT, France – Mexico BIT)
150. Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9 (Ukraine – United States BIT)
151. Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39 (Austria – Croatia BIT)
152. Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/8 (Argentina – Italy BIT)
153. Glamis Gold, Ltd. v. The United States of America, UNCITRAL (NAFTA)
154. Global Trading Resource Corp. and Globex International, Inc. v. Ukraine, ICSID Case No. ARB/09/11 (Ukraine – United States BIT)
155. Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1 (Canada – Venezuela BIT)
156. Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL (NAFTA)
157. Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095 (Energy Charter Treaty)
158. Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, UNCITRAL, PCA Case No. 2011-17 (Bolivia – United Kingdom BIT, Bolivia – United States BIT)

159. Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of, ICSID Case No. ARB/12/31 (Netherlands – Macedonia BIT)
160. Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24 (Germany – Ghana BIT)
161. H&H Enterprises Investments, Inc. v. Arab Republic of Egypt, ICSID Case No. ARB 09/15 (Egypt – United States BIT)
162. Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19 (Denmark – Egypt BIT)
163. Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL (Organisation of Islamic Cooperation Investment Agreement)
164. HICEE B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2009-11 (Netherlands – Slovak Repubic BIT)
165. Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31 (Argentina – Germany BIT)
166. Hrvatska Elektroprivreda d.d. v. Republic of Slovenia, ICSID Case No. ARB/05/24 (Energy Charter Treaty (ECT))
167. Hulley Enterprises Limited (Cyprus) v. The Russian Federation, UNCITRAL, PCA Case No. AA 226 (Energy Charter Treaty (ECT))
168. Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7 (Italy – United Arab Emirates BIT)
169. Hydro S.r.l. and others v. Republic of Albania, ICSID Case No. ARB/15/28 (BIT Albania – Italy)
170. Iberdrola Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5 (Guatemala – Spain BIT)
171. IBM World Trade Corporation v. República del Ecuador, ICSID Case No. ARB/02/10 (Ecuador – United States BIT)
172. İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24 (Turkey – Turkmenistan BIT)
173. ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina, UNCITRAL, PCA Case No. 2010-9 (Argentina – United Kingdom BIT)
174. Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (Argentina – Italy BIT)
175. Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3 (Italy – Pakistan BIT)
176. Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26 (El Salvador – Spain BIT)
177. Infinito Gold Ltd. v. Costa Rica, ICSID Case No. ARB/14/5 (Canada – Costa Rica BIT)

178. Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8 (Germany – Ukraine BIT)
179. International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL (NAFTA)
180. InterTrade Holding GmbH v. The Czech Republic, UNCITRAL, PCA Case No. 2009-12 (Czech Republic – Germany BIT)
181. Invesmart v. Czech Republic, UNCITRAL (Czech Republic – Netherlands BIT)
182. Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20 (Romania – Sweden BIT)
183. Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18 (Energy Charter Treaty (ECT), Georgia – Greece BIT)
184. Italba Corporation v. Oriental Republic of Uruguay, ICSID Case No. ARB/16/9 (BIT United States of America – Uruguay)
185. Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/08/7 (Georgia – Netherlands BIT, Georgia – United States BIT)
186. Iurii Bogdanov, Agurdino – Invest Ltd. and Agurdino – Chimia JSC v. Republic of Moldova, SCC (Moldova – Russian Federation BIT)
187. Ivan Peter Busta and James Peter Busta v. Czech Republic, SCC Case No. V 2015/014 (Czech Republic – UK BIT)
188. Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13 (Belgium-Luxembourg – Egypt BIT)
189. Jan Oostergetel and Theodora Laurentius v. The Slovak Republic, UNCITRAL (Netherlands – Slovak Repubic BIT)
190. Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB(AF)/98/1 (Ukraine – United States BIT)
191. Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18 (Ukraine – United States BIT)
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220. Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1 (Costa Rica – Germany BIT)
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246. Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13 (Romania – United States BIT)
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261. Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC (Energy Charter Treaty (ECT))
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284. Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01 (Belgium-Luxembourg – South Africa BIT, Italy – South Africa BIT)
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308. Rupert Joseph Binder v. Czech Republic, UNCITRAL (Czech Republic – Germany BIT)
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349. Telefónica S.A. v. The Argentine Republic, ICSID Case No. ARB/03/20 (Argentina – Spain BIT)
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374. Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/18 (Spain – Venezuela BIT)
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378. Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (Energy Charter Treaty (ECT))
379. Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27 (Netherlands – Venezuela BIT)
380. Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela, PCA Case No. 2013-34 (Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments)
381. Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4 (United Kingdom – Venezual BIT)
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383. Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2 (Chile – Spain BIT)
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385. Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland, ICSID Case No. ARB(AF)/11/3 (Poland – United States BIT)
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387. Vladimir Berschader and Moïse Berschader v. The Russian Federation, SCC Case No. 080/2004 (Belgium – Russian Federation BIT)
388. Vladislav Kim and others v. Republic of Uzbekistan, ICSID Case No. ARB/13/6 (Uzbekistan – Kazakhstan BIT)
389. Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15 (Egypt – Italy BIT)
390. Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3 (NAFTA)
391. Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2 (NAFTA)
392. Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 (Egypt – United Kingdom BIT)

393. Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand, UNCITRAL (Germany – Thailand BIT)
394. White Industries Australia Limited v. The Republic of India, UNCITRAL (Australia – India BIT)
395. William Nagel v. The Czech Republic, SCC Case No. 049/2002 (Czech Republic – United Kingdom BIT)
396. Windstream Energy LLC v. Government of Canada, PCA Case No. 2013-22 (NAFTA)
397. Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14 (Argentina – Germany BIT)
398. WNC Factoring Limited v. The Czech Republic, PCA Case No. 2014-34 (Czech Republic – United Kingdom)
399. Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar, ASEAN I.D. Case No. ARB/01/1 (ASEAN Agreement for the Promotion and Protection of Investments)
400. Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227 (Energy Charter Treaty (ECT))
401. Yuri Bogdanov and Yulia Bogdanova v. Republic of Moldova, SCC Case No. V091/2012 (Moldova – Russian Federation BIT)
402. Yury Bogdanov v. Republic of Moldova, SCC Arbitration No. V (114/2009) (Moldova – Russian Federation BIT)

Annex IV Cases with Elements of Contract Interpretation

1. Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary, ICSID Case No. ARB/12/3
2. ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22
3. ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16
4. Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33
5. Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/
6. AES Summit Generation Limited and AES – Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22
7. AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16
8. Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16
9. Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan, SCC Case No. V 116/2010

10. Ampal – American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11
11. Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1
12. AWG Group Ltd. v. The Argentine Republic, UNCITRAL
13. Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15
14. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12
15. Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29
16. Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22
17. Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine, ICSID Case No. ARB/08/11
18. British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18
19. Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9
20. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5
21. Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13
22. Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32
23. CCL v. Republic of Kazakhstan, SCC Case 122/2001
24. Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4
25. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877
26. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23
27. CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8)
28. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3
29. ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30
30. Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2
31. Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1
32. David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1

33. Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17
34. Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2
35. Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19
36. EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13
37. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23
38. Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2
39. Energoalians TOB v. Republic of Moldova, UNCITRAL
40. Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3
41. Eureko B.V. v. Republic of Poland
42. Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL
43. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II), ICSID Case No. ARB/11/12
44. Gambrinus, Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/31
45. Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20
46. GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16
47. Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3
48. Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9
49. Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39
50. Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24
51. Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31
52. Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7
53. IBM World Trade Corporation v. República del Ecuador, ICSID Case No. ARB/02/10
54. Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17
55. Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine, ICSID Case No. ARB/08/8
56. Ioannis Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18
57. Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18
58. Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11
59. Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1

60. Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL
61. Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19
62. Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6
63. Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6
64. Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic
65. Luigiterzo Bosca v. Lithuania, UNCITRAL
66. M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6
67. Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia, ICSID Case No. ARB/05/10
68. Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18
69. Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24
70. Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1
71. Mercer International Inc. v. Government of Canada, ICSID Case No. ARB(AF)/12/3
72. Murphy Exploration & Production Company International v. Republic of Ecuador, PCA Case No. 2012-16 (formerly AA 434)
73. Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal, ICSID Case No. ARB/08/20
74. MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8
75. Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/04/16
76. Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23
77. Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13
78. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7
79. National Grid plc v. The Argentine Republic, UNCITRAL
80. Noble Energy, Inc. and Machalapower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad, ICSID Case No. ARB/05/12
81. Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11
82. Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/1
83. Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC
84. Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467

85. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (II), ICSID Case No. ARB/06/11
86. Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia, ICSID Case No. ARB/04/6
87. Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/35
88. Oxus Gold v. Republic of Uzbekistan, UNCITRAL
89. Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6
90. Peter Franz Vocklinghaus v. Czech Republic
91. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24
92. PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5
93. Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2
94. Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23
95. Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20
96. Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB/07/15
97. Ronald S. Lauder v. The Czech Republic, UNCITRAL
98. RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, ICSID Case No. ARB/10/6
99. Saluka Investments B.V. v. The Czech Republic, UNCITRAL
100. Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL
101. SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13
102. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6
103. SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29
104. Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8
105. Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1
106. ST – AD GmbH v. Republic of Bulgaria, UNCITRAL, PCA Case No. 2011-06
107. Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17
108. Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic (II), ICSID Case No. ARB/03/19
109. Swisslion DOO Skopje v. The former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16

110. Talsud S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/04/4
111. Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1
112. Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26
113. Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12 (Italy – Lebanon BIT)
114. TSA Spectrum de Argentina S.A. v. Argentine Republic, ICSID Case No. ARB/05/5
115. Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28
116. UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33
117. Ulysseas, Inc. v. The Republic of Ecuador, UNCITRAL
118. Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4
119. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26
120. Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/04/6
121. Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27
122. Vestey Group Ltd v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/06/4
123. Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22
124. Vincent J. Ryan, Schooner Capital LLC, and Atlantic Investment Partners LLC v. Republic of Poland, ICSID Case No. ARB(AF)/11/3
125. Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15
126. Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3
127. Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand, UNCITRAL
128. William Nagel v. The Czech Republic, SCC Case No. 049/2002

Annex V Cases with the Application of National Law to Contract Interpretation (interpretative rules of national laws)

1. Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö Zrt. v. Hungary, ICSID Case No. ARB/12/3
2. ACP Axos Capital GmbH v. Republic of Kosovo, ICSID Case No. ARB/15/22

3. Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan, ICSID Case No. ARB/06/15
4. Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13
5. Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4
6. Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2009-23
7. CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8
8. Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1
9. Gambrinus, Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/31
10. Lao Holdings N.V. v. Lao People's Democratic Republic, ICSID Case No. ARB(AF)/12/6
11. Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6
12. William Nagel v. The Czech Republic, SCC Case No. 049/2002

Annex VI Cases with the Application of National Law to Contract Interpretation (interpretation in light of various other rules of national laws)

1. Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33
2. Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/
3. Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16
4. Ampal – American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11
5. Anglo American PLC v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/14/1
6. AWG Group Ltd. v. The Argentine Republic, UNCITRAL
7. Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12 (Argentina – United States BIT)
8. British Caribbean Bank Limited v. The Government of Belize, PCA Case No. 2010-18
9. Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9 (Netherlands – Paraguay BIT)
10. Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5
11. CCL v. Republic of Kazakhstan, SCC Case 122/2001
12. Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador, UNCITRAL, PCA Case No. 34877

13. Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19 (Ecuador – United States BIT)
14. EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13
15. EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23 (Argentina – Belgium-Luxembourg BIT, Argentina – France BIT)
16. Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary, ICSID Case No. ARB/12/2
17. Energoalians TOB v. Republic of Moldova, UNCITRAL
18. Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3
19. Flemingo DutyFree Shop Private Limited v the Republic of Poland, UNCITRAL
20. Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23
21. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (II), ICSID Case No. ARB/11/12
22. Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20
23. Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39 (Austria – Croatia BIT)
24. Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States, ICSID Case No. ARB(AF)/04/3
25. Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31
26. Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7
27. Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17
28. Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine,ICSID Case No. ARB/08/8
29. Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1
30. Khan Resources Inc., Khan Resources B.V., and Cauc Holding Company Ltd. v. The Government of Mongolia, UNCITRAL
31. Lanco International Inc. v. The Argentine Republic, ICSID Case No. ARB/97/6
32. Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic
33. Malicorp Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/08/18
34. Mercer International Inc. v. Government of Canada, ICSID Case No. ARB(AF)/12/3
35. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7
36. National Grid plc v. The Argentine Republic, UNCITRAL
37. Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11
38. Nykomb Synergetics Technology Holding AB v. The Republic of Latvia, SCC

39. Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467
40. Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador (II), ICSID Case No. ARB/06/11
41. Peter Franz Vocklinghaus v. Czech Republic
42. Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24
43. PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5
44. Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23
45. Reinhard Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/09/20
46. Ronald S. Lauder v. The Czech Republic, UNCITRAL
47. RSM Production Corporation and others v. Grenada, ICSID Case No. ARB/10/6, ICSID Case No. ARB/10/6
48. Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia, UNCITRAL
49. SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6
50. SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay, ICSID Case No. ARB/07/29
51. Talsud S.A. v. The United Mexican States, ICSID Case No. ARB(AF)/04/4
52. UAB E energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33
53. Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4
54. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26
55. Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22
56. Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand, UNCITRAL

Annex VII Model BITs as of 30 January 2019

1. Austria Model BIT 2008
2. Azerbaijan Model BIT 2016
3. Belgium-Luxembourg Economic Union Model BIT 2019
4. Benin Model BIT 2002
5. Bolivia Model BIT
6. Brazil Model BIT 2015
7. Burkina Faso Model BIT 2012

8. Burundi Model BIT 2002
9. Cambodia Model BIT
10. Canada Model BIT 2004
11. Chile Model BIT 1994
12. Colombia Model BIT 2011
13. Croatia Model BIT 1998
14. Czech Republic Model BIT 2016
15. Denmark Model BIT 2000
16. Egypt Model BIT
17. Finland Model BIT 2001
18. Former Yugoslav Republic of Macedonia Model BIT 2009
19. France Model BIT 2006
20. Germany Model BIT 2008
21. Ghana Model BIT 2008
22. Greece Model BIT 2001
23. India Model BIT 2015
24. Indonesia Model BIT
25. Iran Model BIT
26. Israel Model BIT 2003
27. Italy Model BIT 2003
28. Jamaica Model BIT
29. Kenya Model BIT 2003
30. Malaysia Model BIT 1998
31. Mauritius Model BIT 2002
32. Mexico Model BIT 2008
33. Mongolia Model BIT 1998
34. Netherlands Model BIT 2019
35. Norway Model BITs 2015 (draft), 2007 (draft)
36. Peru Model BIT 2000
37. Senegal Model BIT
38. Serbia Model BIT 2014
39. South Africa Model BIT 1998
40. Sri Lanka Model BIT
41. Sudan Model BIT
42. Sweden Model BIT 2002
43. Switzerland Model BIT 1995
44. Thailand Model BIT 2002
45. U.S. Model BIT 2012
46. Uganda Model BIT 2003
47. United Kingdom Model BIT 2008

Annex VIII List of Analysed BITs[1]

No.	Short title
1	Afghanistan – Germany BIT (2005)
2	Afghanistan – Turkey BIT (2004)
3	Albania – Bosnia and Herzegovina BIT (2008)
4	Albania – Bulgaria BIT (1994)
5	Albania – China BIT (1993)
6	Albania – Croatia BIT (1993)
7	Albania – Cyprus BIT (2010)
8	Albania – Czech Republic BIT (1994)
9	Albania – Denmark BIT (1995)
10	Albania – Egypt BIT (1993)
11	Albania – Finland BIT (1997)
12	Albania – Greece BIT (1991)
13	Albania – Hungary BIT (1996)
14	Albania – Israel BIT (1996)
15	Albania – Korea, Republic of BIT (2003)
16	Albania – Lithuania BIT (2007)
17	Albania – Malaysia BIT (1994)
18	Albania – Moldova, Republic of BIT (2004)
19	Albania – Netherlands BIT (1994)
20	Albania – Macedonia, The former Yugoslav Republic of BIT (1997)
21	Albania – Poland BIT (1993)
22	Albania – Romania BIT (1995)
23	Albania – Serbia BIT (2002)
24	Albania – Slovenia BIT (1997)
25	Albania – Spain BIT (2003)
26	Albania – Turkey BIT (1992)
27	Albania – Ukraine BIT (2002)

1 The date of signature is indicated in parentheses according to UNCTAD Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements>. The status of treaties may change as of the date of publication of this book.

No.	Short title
28	Albania – United Kingdom BIT (1994)
29	Albania – United States of America BIT (1995)
30	Algeria – Jordan BIT (1996)
31	Algeria – Korea, Republic of BIT (1999)
32	Algeria – Serbia BIT (2012)
33	Andorra – United Arab Emirates BIT (2015)
34	Antigua and Barbuda – Germany BIT (1998)
35	Antigua and Barbuda – United Kingdom BIT (1987)
36	Argentina – Armenia BIT (1993)
37	Argentina – Australia BIT (1995)
38	Argentina – Bulgaria BIT (1993)
39	Argentina – Canada BIT (1991)
40	Argentina – China BIT (1992)
41	Argentina – Croatia BIT (1994)
42	Argentina – Denmark BIT (1992)
43	Argentina – Finland BIT (1993)
44	Argentina – Israel BIT (1995)
45	Argentina – Jamaica BIT (1994)
46	Argentina – Korea, Republic of BIT (1994)
47	Argentina – Netherlands BIT (1992)
48	Argentina – Philippines BIT (1999)
49	Argentina – Romania BIT (1993)
50	Argentina – Sweden BIT (1991)
51	Argentina – Thailand BIT (2000)
52	Argentina – United Kingdom BIT (1990)
53	Argentina – United States of America BIT (1991)
54	Armenia – Austria BIT (2001)
55	Armenia – BLEU (Belgium-Luxembourg Economic Union) BIT (2001)
56	Armenia – Canada BIT (1997)
57	Armenia – Egypt BIT (1996)
58	Armenia – Finland BIT (2004)
59	Armenia – Israel BIT (2000)
60	Armenia – Latvia BIT (2005)

No.	Short title
61	Armenia – Lebanon BIT (1995)
62	Armenia – Lithuania BIT (2006)
63	Armenia – Netherlands BIT (2005)
64	Armenia – Romania BIT (1994)
65	Armenia – Sweden BIT (2006)
66	Armenia – Switzerland BIT (1998)
67	Armenia – United Kingdom BIT (1993)
68	Armenia – United States of America BIT (1992)
69	Australia – China BIT (1988)
70	Australia – Czech Republic BIT (1993)
71	Australia – Egypt BIT (2001)
72	Australia – Hong Kong, China SAR BIT (1993)
73	Australia – Hungary BIT (1991)
74	Australia – Indonesia BIT (1992)
75	Australia – Lao People's Democratic Republic BIT (1994)
76	Australia – Lithuania BIT (1998)
77	Australia – Pakistan BIT (1998)
78	Australia – Papua New Guinea BIT (1990)
79	Australia – Peru BIT (1995)
80	Australia – Philippines BIT (1995)
81	Australia – Poland BIT (1991)
82	Australia – Romania BIT (1993)
83	Australia – Sri Lanka BIT (2002)
84	Australia – Turkey BIT (2005)
85	Australia – Uruguay BIT (2001)
86	Austria – Azerbaijan BIT (2000)
87	Austria – Bangladesh BIT (2000)
88	Austria – Belarus BIT (2001)
89	Austria – Belize BIT (2001)
90	Austria – Bosnia and Herzegovina BIT (2000)
91	Austria – Bulgaria BIT (1997)
92	Austria – Chile BIT (1997)
93	Austria – Croatia BIT (1997)

No.	Short title
94	Austria – Cuba BIT (2000)
95	Austria – Egypt BIT (2001)
96	Austria – Ethiopia BIT (2004)
97	Austria – Georgia BIT (2001)
98	Austria – Guatemala BIT (2006)
99	Austria – Hong Kong, China SAR BIT (1996)
100	Austria – Iran, Islamic Republic of BIT (2001)
101	Austria – Jordan BIT (2001)
102	Austria – Kazakhstan BIT (2010)
103	Austria – Korea, Republic of BIT (1991)
104	Austria – Kuwait BIT (1996)
105	Austria – Lebanon BIT (2001)
106	Austria – Libya BIT (2002)
107	Austria – Lithuania BIT (1996)
108	Austria – Malaysia BIT (1985)
109	Austria – Malta BIT (2002)
110	Austria – Mexico BIT (1998)
111	Austria – Mongolia BIT (2001)
112	Austria – Montenegro BIT (2001)
113	Austria – Namibia BIT (2003)
114	Austria – Macedonia, The former Yugoslav Republic of BIT (2001)
115	Austria – Oman BIT (2001)
116	Austria – Philippines BIT (2002)
117	Austria – Saudi Arabia BIT (2001)
118	Austria – Serbia BIT (2001)
119	Austria – Slovenia BIT (2001)
120	Austria – Tajikistan BIT (2010)
121	Austria – United Arab Emirates BIT (2001)
122	Austria – Uzbekistan BIT (2000)
123	Austria – Yemen BIT (2002)
124	Azerbaijan – BLEU (Belgium-Luxembourg Economic Union) BIT (2004)
125	Azerbaijan – China BIT (1994)
126	Azerbaijan – Croatia BIT (2007)

No.	Short title
127	Azerbaijan – Czech Republic BIT (2011)
128	Azerbaijan – Estonia BIT (2010)
129	Azerbaijan – Finland BIT (2003)
130	Azerbaijan – Greece BIT (2004)
131	Azerbaijan – Hungary BIT (2007)
132	Azerbaijan – Israel BIT (2007)
133	Azerbaijan – Kazakhstan BIT (1996)
134	Azerbaijan – Korea, Republic of BIT (2007)
135	Azerbaijan – Latvia BIT (2005)
136	Azerbaijan – Lithuania BIT (2006)
137	Azerbaijan – Montenegro BIT (2011)
138	Azerbaijan – Romania BIT (2002)
139	Azerbaijan – Serbia BIT (2011)
140	Azerbaijan – Switzerland BIT (2006)
141	Azerbaijan – Syrian Arab Republic BIT (2009)
142	Azerbaijan – Turkey BIT (2011)
143	Azerbaijan – United Arab Emirates BIT (2006)
144	Azerbaijan – United Kingdom BIT (1996)
145	Azerbaijan – United States of America BIT (1997)
146	Bahrain – Belarus BIT (2002)
147	Bahrain – China BIT (1999)
148	Bahrain – Czech Republic BIT (2007)
149	Bahrain – Germany BIT (2007)
150	Bahrain – Italy BIT (2006)
151	Bahrain – Jordan BIT (2000)
152	Bahrain – Malaysia BIT (1999)
153	Bahrain – Mexico BIT (2012)
154	Bahrain – Netherlands BIT (2007)
155	Bahrain – Pakistan BIT (2014)
156	Bahrain – Singapore BIT (2003)
157	Bahrain – Thailand BIT (2002)
158	Bahrain – United Kingdom BIT (1991)
159	Bahrain – United States of America BIT (1999)

No.	Short title
160	Bangladesh – BLEU (Belgium-Luxembourg Economic Union) BIT (1981)
161	Bangladesh – Denmark BIT (2009)
162	Bangladesh – Germany BIT (1981)
163	Bangladesh – India BIT (2009)
164	Bangladesh – Indonesia BIT (1998)
165	Bangladesh – Iran, Islamic Republic of BIT (2001)
166	Bangladesh – Italy BIT (1990)
167	Bangladesh – Japan BIT (1998)
168	Bangladesh – Korea, Republic of BIT (1986)
169	Bangladesh – Malaysia BIT (1994)
170	Bangladesh – Netherlands BIT (1994)
171	Bangladesh – Philippines BIT (1997)
172	Bangladesh – Poland BIT (1997)
173	Bangladesh – Romania BIT (1987)
174	Bangladesh – Singapore BIT (2004)
175	Bangladesh – Switzerland BIT (2000)
176	Bangladesh – Thailand BIT (2002)
177	Bangladesh – Turkey BIT (1987)
178	Bangladesh – United Kingdom BIT (1980)
179	Bangladesh – United States of America BIT (1986)
180	Bangladesh – Uzbekistan BIT (2000)
181	Barbados – Canada BIT (1996)
182	Barbados – China BIT (1998)
183	Barbados – Cuba BIT (1996)
184	Barbados – Germany BIT (1994)
185	Barbados – Mauritius BIT (2004)
186	Barbados – Switzerland BIT (1995)
187	Barbados – United Kingdom BIT (1993)
188	Barbados – Venezuela, Bolivarian Republic of BIT (1994)
189	Belarus – Croatia BIT (2001)
190	Belarus – Czech Republic BIT (1996)
191	Belarus – Denmark BIT (2004)
192	Belarus – Egypt BIT (1997)

No.	Short title
193	Belarus – Finland BIT (2006)
194	Belarus – Iran, Islamic Republic of BIT (1995)
195	Belarus – Israel BIT (2000)
196	Belarus – Jordan BIT (2002)
197	Belarus – Korea, Republic of BIT (1997)
198	Belarus – Kuwait BIT (2001)
199	Belarus – Lebanon BIT (2001)
200	Belarus – Libya BIT (2000)
201	Belarus – Mexico BIT (2008)
202	Belarus – Netherlands BIT (1995)
203	Belarus – Macedonia, The former Yugoslav Republic of BIT (2001)
204	Belarus – Oman BIT (2004)
205	Belarus – Qatar BIT (2001)
206	Belarus – Saudi Arabia BIT (2009)
207	Belarus – Serbia BIT (1996)
208	Belarus – Singapore BIT (2000)
209	Belarus – Slovakia BIT (2005)
210	Belarus – Sweden BIT (1994)
211	Belarus – Switzerland BIT (1993)
212	Belarus – Syrian Arab Republic BIT (1998)
213	Belarus – United Arab Emirates BIT (2000)
214	Belarus – United Kingdom BIT (1994)
215	BLEU (Belgium-Luxembourg Economic Union) – Bosnia and Herzegovina BIT (2004)
216	BLEU (Belgium-Luxembourg Economic Union) – Cameroon BIT (1980)
217	BLEU (Belgium-Luxembourg Economic Union) – China BIT (2005)
218	BLEU (Belgium-Luxembourg Economic Union) – Croatia BIT (2001)
219	BLEU (Belgium-Luxembourg Economic Union) – Cyprus BIT (1991)
220	BLEU (Belgium-Luxembourg Economic Union) – Guatemala BIT (2005)
221	BLEU (Belgium-Luxembourg Economic Union) – Hong Kong, China SAR BIT (1996)
222	BLEU (Belgium-Luxembourg Economic Union) – Kazakhstan BIT (1998)
223	BLEU (Belgium-Luxembourg Economic Union) – Lebanon BIT (1999)

No.	Short title
224	BLEU (Belgium-Luxembourg Economic Union) – Libya BIT (2004)
225	BLEU (Belgium-Luxembourg Economic Union) – Malaysia BIT (1979)
226	BLEU (Belgium-Luxembourg Economic Union) – Malta BIT (1987)
227	BLEU (Belgium-Luxembourg Economic Union) – Mauritius BIT (2005)
228	BLEU (Belgium-Luxembourg Economic Union) – Mozambique BIT (2006)
229	BLEU (Belgium-Luxembourg Economic Union) – Macedonia, The former Yugoslav Republic of BIT (1999)
230	BLEU (Belgium-Luxembourg Economic Union) – Pakistan BIT (1998)
231	BLEU (Belgium-Luxembourg Economic Union) – Philippines BIT (1998)
232	BLEU (Belgium-Luxembourg Economic Union) – Qatar BIT (2007)
233	BLEU (Belgium-Luxembourg Economic Union) – Rwanda BIT (1983)
234	BLEU (Belgium-Luxembourg Economic Union) – Saudi Arabia BIT (2001)
235	BLEU (Belgium-Luxembourg Economic Union) – Serbia BIT (2004)
236	BLEU (Belgium-Luxembourg Economic Union) – Singapore BIT (1978)
237	BLEU (Belgium-Luxembourg Economic Union) – Sri Lanka BIT (1982)
238	BLEU (Belgium-Luxembourg Economic Union) – Thailand BIT (2002)
239	BLEU (Belgium-Luxembourg Economic Union) – Tunisia BIT (1997)
240	BLEU (Belgium-Luxembourg Economic Union) – United Arab Emirates BIT (2004)
241	Belize – Cuba BIT (1998)
242	Belize – Netherlands BIT (2002)
243	Belize – United Kingdom BIT (1982)
244	Benin – Canada BIT (2013)
245	Benin – Germany BIT (1978)
246	Benin – United Kingdom BIT (1987)
247	Bolivia, Plurinational State of – China BIT (1992)
248	Bolivia, Plurinational State of – Korea, Republic of BIT (1996)
249	Bolivia, Plurinational State of – Paraguay BIT (2001)
250	Bolivia, Plurinational State of – Switzerland BIT (1987)
251	Bolivia, Plurinational State of – United Kingdom BIT (1988)
252	Bosnia and Herzegovina – China BIT (2002)
253	Czech Republic BIT – Bosnia and Herzegovina (2002)
254	Denmark BIT – Bosnia and Herzegovina (2004)

No.	Short title
255	Egypt BIT – Bosnia and Herzegovina (1998)
256	Finland BIT – Bosnia and Herzegovina (2000)
257	Germany BIT – Bosnia and Herzegovina (2001)
258	Greece BIT – Bosnia and Herzegovina (2000)
259	Hungary BIT – Bosnia and Herzegovina (2002)
260	India BIT – Bosnia and Herzegovina (2006)
261	Iran, Islamic Republic of BIT – Bosnia and Herzegovina (1996)
262	Italy BIT – Bosnia and Herzegovina (2000)
263	Kuwait BIT – Bosnia and Herzegovina (2001)
264	Lithuania BIT – Bosnia and Herzegovina (2007)
265	Malaysia BIT – Bosnia and Herzegovina (1994)
266	Moldova, Republic of BIT – Bosnia and Herzegovina (2003)
267	Netherlands BIT – Bosnia and Herzegovina (1998)
268	Macedonia – Bosnia and Herzegovina (2001)
269	Pakistan BIT – Bosnia and Herzegovina (2001)
270	Portugal BIT – Bosnia and Herzegovina (2002)
271	Qatar BIT – Bosnia and Herzegovina (1998)
272	Romania BIT – Bosnia and Herzegovina (2001)
273	San Marino BIT – Bosnia and Herzegovina (2011)
274	Serbia BIT – Bosnia and Herzegovina (2001)
275	Slovakia BIT – Bosnia and Herzegovina (2008)
276	Slovenia BIT – Bosnia and Herzegovina (2001)
277	Spain BIT – Bosnia and Herzegovina (2002)
278	Sweden BIT – Bosnia and Herzegovina (2000)
279	Switzerland BIT – Bosnia and Herzegovina (2003)
280	Turkey BIT – Bosnia and Herzegovina (1998)
281	Ukraine BIT – Bosnia and Herzegovina (2002)
282	United Kingdom BIT – Bosnia and Herzegovina (2002)
283	Brunei Darussalam – Germany BIT (1998)
284	Brunei Darussalam – India BIT (2008)
285	Brunei Darussalam – Korea, Republic of BIT (2000)
286	Brunei Darussalam – Ukraine BIT (2004)
287	Bulgaria – China BIT (1989)

No.	Short title
288	Bulgaria – Croatia BIT (1996)
289	Bulgaria – Cyprus BIT (1987)
290	Bulgaria – Czech Republic BIT (1999)
291	Bulgaria – Denmark BIT (1993)
292	Bulgaria – Egypt BIT (1998)
293	Bulgaria – Finland BIT (1997)
294	Bulgaria – Germany BIT (1986)
295	Bulgaria – Greece BIT (1993)
296	Bulgaria – Hungary BIT (1994)
297	Bulgaria – Israel BIT (1993)
298	Bulgaria – Korea, Republic of BIT (2006)
299	Bulgaria – Kuwait BIT (1997)
300	Bulgaria – Latvia BIT (2003)
301	Bulgaria – Lebanon BIT (1999)
302	Bulgaria – Lithuania BIT (2005)
303	Bulgaria – Malta BIT (1984)
304	Bulgaria – Netherlands BIT (1999)
305	Bulgaria – Oman BIT (2007)
306	Bulgaria – Poland BIT (1994)
307	Bulgaria – Portugal BIT (1993)
308	Bulgaria – Romania BIT (1994)
309	Bulgaria – Singapore BIT (2003)
310	Bulgaria – Slovakia BIT (1994)
311	Bulgaria – Sweden BIT (1994)
312	Bulgaria – Thailand BIT (2003)
313	Bulgaria – Tunisia BIT (2000)
314	Bulgaria – Turkey BIT (1994)
315	Bulgaria – United Kingdom BIT (1995)
316	Bulgaria – United States of America BIT (1992)
317	Bulgaria – Viet Nam BIT (1996)
318	Burkina Faso – Canada BIT (2015)
319	Burkina Faso – Korea, Republic of BIT (2004)
320	Burkina Faso – Malaysia BIT (1998)

No.	Short title
321	Burundi – Germany BIT (1984)
322	Burundi – Kenya BIT (2009)
323	Burundi – United Kingdom BIT (1990)
324	Cape Verde – China BIT (1998)
325	Cambodia – China BIT (1996)
326	Cambodia – Croatia BIT (2001)
327	Cambodia – Czech Republic BIT (2008)
328	Cambodia – Germany BIT (1999)
329	Cambodia – Japan BIT (2007)
330	Cambodia – Korea, Republic of BIT (1997)
331	Cambodia – Malaysia BIT (1994)
332	Cambodia – Netherlands BIT (2003)
333	Cambodia – Singapore BIT (1996)
334	Cambodia – Switzerland BIT (1996)
335	Cambodia – Thailand BIT (1995)
336	Cambodia – Viet Nam BIT (2001)
337	Cameroon – Canada BIT (2014)
338	Cameroon – Korea, Republic of BIT (2013)
339	Cameroon – United Kingdom BIT (1982)
340	Cameroon – United States of America BIT (1986)
341	Canada – China BIT (2012)
342	Canada – Costa Rica BIT (1998)
343	Canada – Côte d'Ivoire BIT (2014)
344	Canada – Croatia BIT (1997)
345	Canada – Czech Republic BIT (2009)
346	Canada – Egypt BIT (1996)
347	Canada – Guinea BIT (2015)
348	Canada – Hong Kong, China SAR BIT (2016)
349	Canada – Hungary BIT (1991)
350	Canada – Jordan BIT (2009)
351	Canada – Kuwait BIT (2011)
352	Canada – Latvia BIT (2009)
353	Canada – Lebanon BIT (1997)

No.	Short title
354	Canada – Mali BIT (2014)
355	Canada – Mongolia BIT (2016)
356	Canada – Panama BIT (1996)
357	Canada – Peru BIT (2006)
358	Canada – Philippines BIT (1995)
359	Canada – Poland BIT (1990)
360	Canada – Romania BIT (2009)
361	Canada – Russian Federation BIT (1989)
362	Canada – Senegal BIT (2014)
363	Canada – Serbia BIT (2014)
364	Canada – Slovakia BIT (2010)
365	Canada – United Republic of Tanzania BIT (2013)
366	Canada – Thailand BIT (1997)
367	Canada – Trinidad and Tobago BIT (1995)
368	Canada – Ukraine BIT (1994)
369	Canada – Uruguay BIT (1997)
370	Canada – Venezuela, Bolivarian Republic of BIT (1996)
371	Chile – China BIT (1994)
372	Chile – Croatia BIT (1994)
373	Chile – Czech Republic BIT (1995)
374	Chile – Denmark BIT (1993)
375	Chile – Finland BIT (1993)
376	Chile – Greece BIT (1996)
377	Chile – Norway BIT (1993)
378	Chile – Philippines BIT (1995)
379	Chile – Poland BIT (1995)
380	Chile – Romania BIT (1995)
381	Chile – Sweden BIT (1993)
382	Chile – Switzerland BIT (1999)
383	Chile – Ukraine BIT (1995)
384	Chile – United Kingdom BIT (1996)
385	China – Colombia BIT (2008)
386	China – Croatia BIT (1993)

No.	Short title
387	China – Cuba BIT (1995)
388	China – Cyprus BIT (2001)
389	China – Czech Republic BIT (2005)
390	China – Denmark BIT (1985)
391	China – Egypt BIT (1994)
392	China – Estonia BIT (1993)
393	China – Ethiopia BIT (1998)
394	China – Finland BIT (2004)
395	China – Georgia BIT (1993)
396	China – Germany BIT (2003)
397	China – Ghana BIT (1989)
398	China – Greece BIT (1992)
399	China – Guyana BIT (2003)
400	China – Hungary BIT (1991)
401	China – Iceland BIT (1994)
402	China – Iran, Islamic Republic of BIT (2000)
403	China – Israel BIT (1995)
404	China – Italy BIT (1985)
405	China – Jamaica BIT (1994)
406	China – Japan BIT (1988)
407	China – Korea, Dem. People's Rep. of BIT (2005)
408	China – Korea, Republic of BIT (2007)
409	China – Kuwait BIT (1985)
410	China – Lao People's Democratic Republic BIT (1993)
411	China – Latvia BIT (2004)
412	China – Lebanon BIT (1996)
413	China – Lithuania BIT (1993)
414	China – Malaysia BIT (1988)
415	China – Malta BIT (2009)
416	China – Mauritius BIT (1996)
417	China – Mexico BIT (2008)
418	China – Mongolia BIT (1991)
419	China – Myanmar BIT (2001)

No.	Short title
420	China – Netherlands BIT (2001)
421	China – New Zealand BIT (1988)
422	China – Nigeria BIT (2001)
423	China – Macedonia, The former Yugoslav Republic of BIT (1997)
424	China – Norway BIT (1984)
425	China – Oman BIT (1995)
426	China – Pakistan BIT (1989)
427	China – Papua New Guinea BIT (1991)
428	China – Peru BIT (1994)
429	China – Philippines BIT (1992)
430	China – Poland BIT (1988)
431	China – Portugal BIT (2005)
432	China – Qatar BIT (1999)
433	China – Romania BIT (1994)
434	China – Russian Federation BIT (2006)
435	China – Saudi Arabia BIT (1996)
436	China – Serbia BIT (1995)
437	China – Singapore BIT (1985)
438	China – Slovakia BIT (1991)
439	China – Slovenia BIT (1993)
440	China – South Africa BIT (1997)
441	China – Spain BIT (2005)
442	China – Sri Lanka BIT (1986)
443	China – Sweden BIT (1982)
444	China – Switzerland BIT (2009)
445	China – Syrian Arab Republic BIT (1996)
446	China – United Republic of Tanzania BIT (2013)
447	China – Thailand BIT (1985)
448	China – Trinidad and Tobago BIT (2002)
449	China – Tunisia BIT (2004)
450	China – Turkey BIT (1990)
451	China – United Arab Emirates BIT (1993)
452	China – United Kingdom BIT (1986)

No.	Short title
453	China – Uruguay BIT (1993)
454	China – Uzbekistan BIT (2011)
455	China – Viet Nam BIT (1992)
456	China – Zimbabwe BIT (1996)
457	Colombia – Japan BIT (2011)
458	Colombia – Switzerland BIT (2006)
459	Colombia – United Kingdom BIT (2010)
460	Congo – United Kingdom BIT (1989)
461	Congo – United States of America BIT (1990)
462	Congo, Democratic Republic of the – United States of America BIT (1984)
463	Costa Rica – Czech Republic BIT (1998)
464	Costa Rica – Korea, Republic of BIT (2000)
465	Costa Rica – Netherlands BIT (1999)
466	Costa Rica – Switzerland BIT (2000)
467	Costa Rica – Taiwan Province of China BIT (1999)
468	Côte d'Ivoire – United Kingdom BIT (1995)
469	Croatia – Czech Republic BIT (1996)
470	Croatia – Denmark BIT (2000)
471	Croatia – Egypt BIT (1997)
472	Croatia – Finland BIT (1999)
473	Croatia – Greece BIT (1996)
474	Croatia – Hungary BIT (1996)
475	Croatia – Iran, Islamic Republic of BIT (2000)
476	Croatia – Israel BIT (2000)
477	Croatia – Jordan BIT (1999)
478	Croatia – Korea, Republic of BIT (2005)
479	Croatia – Kuwait BIT (1997)
480	Croatia – Latvia BIT (2002)
481	Croatia – Libya BIT (2002)
482	Croatia – Lithuania BIT (2008)
483	Croatia – Malaysia BIT (1994)
484	Croatia – Malta BIT (2001)
485	Croatia – Moldova, Republic of BIT (2001)

No.	Short title
486	Croatia – Netherlands BIT (1998)
487	Croatia – Macedonia, The former Yugoslav Republic of BIT (1994)
488	Croatia – Poland BIT (1995)
489	Croatia – Portugal BIT (1995)
490	Croatia – Romania BIT (1994)
491	Croatia – San Marino BIT (2004)
492	Croatia – Serbia BIT (1998)
493	Croatia – Slovakia BIT (1996)
494	Croatia – Slovenia BIT (1997)
495	Croatia – Spain BIT (1997)
496	Croatia – Sweden BIT (2000)
497	Croatia – Switzerland BIT (1996)
498	Croatia – Thailand BIT (2000)
499	Croatia – Turkey BIT (1996)
500	Croatia – Ukraine BIT (1997)
501	Croatia – United Kingdom BIT (1997)
502	Croatia – United States of America BIT (1996)
503	Cuba – Greece BIT (1996)
504	Cuba – Hungary BIT (1999)
505	Cuba – Indonesia BIT (1997)
506	Cuba – Lao People's Democratic Republic BIT (1997)
507	Cuba – Lebanon BIT (1995)
508	Cuba – Malaysia BIT (1997)
509	Cuba – Mongolia BIT (1999)
510	Cuba – Mozambique BIT (2001)
511	Cuba – Netherlands BIT (1999)
512	Cuba – Paraguay BIT (2000)
513	Cuba – Romania BIT (1996)
514	Cuba – Slovakia BIT (1997)
515	Cuba – South Africa BIT (1995)
516	Cuba – Spain BIT (1994)
517	Cuba – Switzerland BIT (1996)
518	Cuba – Trinidad and Tobago BIT (1999)

No.	Short title
519	Cuba – Turkey BIT (1997)
520	Cuba – United Kingdom BIT (1995)
521	Cuba – Viet Nam BIT (1995)
522	Cyprus – Czech Republic BIT (2001)
523	Cyprus – Egypt BIT (1998)
524	Cyprus – Hungary BIT (1989)
525	Cyprus – Iran, Islamic Republic of BIT (2009)
526	Cyprus – Israel BIT (1998)
527	Cyprus – Lebanon BIT (2001)
528	Cyprus – Libya BIT (2004)
529	Cyprus – Moldova, Republic of BIT (2007)
530	Cyprus – Montenegro BIT (2005)
531	Cyprus – Poland BIT (1992)
532	Cyprus – Qatar BIT (2008)
533	Cyprus – Romania BIT (1991)
534	Cyprus – San Marino BIT (2006)
535	Cyprus – Serbia BIT (2005)
536	Cyprus – Syrian Arab Republic BIT (2007)
537	Czech Republic – Egypt BIT (1993)
538	Czech Republic – El Salvador BIT (1999)
539	Czech Republic – Finland BIT (1990)
540	Czech Republic – Georgia BIT (2009)
541	Czech Republic – Greece BIT (1991)
542	Czech Republic – Guatemala BIT (2003)
543	Czech Republic – Hungary BIT (1993)
544	Czech Republic – Indonesia BIT (1998)
545	Czech Republic – Israel BIT (1997)
546	Czech Republic – Jordan BIT (1997)
547	Czech Republic – Korea, Dem. People's Rep. of BIT (1998)
548	Czech Republic – Korea, Republic of BIT (1992)
549	Czech Republic – Kuwait BIT (1996)
550	Czech Republic – Latvia BIT (1994)
551	Czech Republic – Lebanon BIT (1997)

No.	Short title
552	Czech Republic – Lithuania BIT (1994)
553	Czech Republic – Malaysia BIT (1996)
554	Czech Republic – Mauritius BIT (1999)
555	Czech Republic – Mexico BIT (2002)
556	Czech Republic – Moldova, Republic of BIT (1999)
557	Czech Republic – Mongolia BIT (1998)
558	Czech Republic – Montenegro BIT (1997)
559	Czech Republic – Netherlands BIT (1991)
560	Czech Republic – Macedonia, The former Yugoslav Republic of BIT (2001)
561	Czech Republic – Norway BIT (1991)
562	Czech Republic – Panama BIT (1999)
563	Czech Republic – Paraguay BIT (1998)
564	Czech Republic – Peru BIT (1994)
565	Czech Republic – Philippines BIT (1995)
566	Czech Republic – Portugal BIT (1993)
567	Czech Republic – Romania BIT (1993)
568	Czech Republic – Saudi Arabia BIT (2009)
569	Czech Republic – Serbia BIT (1997)
570	Czech Republic – Singapore BIT (1995)
571	Czech Republic – Spain BIT (1990)
572	Czech Republic – Sri Lanka BIT (2011)
573	Czech Republic – Sweden BIT (1990)
574	Czech Republic – Switzerland BIT (1990)
575	Czech Republic – Syrian Arab Republic BIT (2008)
576	Czech Republic – Thailand BIT (1994)
577	Czech Republic – Tunisia BIT (1997)
578	Czech Republic – Turkey BIT (2009)
579	Czech Republic – Ukraine BIT (1994)
580	Czech Republic – United Arab Emirates BIT (1994)
581	Czech Republic – United Kingdom BIT (1990)
582	Czech Republic – United States of America BIT (1991)
583	Czech Republic – Uruguay BIT (1996)
584	Czech Republic – Venezuela, Bolivarian Republic of BIT (1995)

No.	Short title
585	Czech Republic – Viet Nam BIT (1997)
586	Czech Republic – Yemen BIT (2008)
587	Denmark – Egypt BIT (1999)
588	Denmark – Ethiopia BIT (2001)
589	Denmark – Ghana BIT (1992)
590	Denmark – Hong Kong, China SAR BIT (1994)
591	Denmark – Hungary BIT (1988)
592	Denmark – Indonesia BIT (2007)
593	Denmark – Korea, Dem. People's Rep. of BIT (1996)
594	Denmark – Korea, Republic of BIT (1988)
595	Denmark – Kuwait BIT (2001)
596	Denmark – Lao People's Democratic Republic BIT (1998)
597	Denmark – Latvia BIT (1992)
598	Denmark – Lithuania BIT (1992)
599	Denmark – Malaysia BIT (1992)
600	Denmark – Mexico BIT (2000)
601	Denmark – Mongolia BIT (1995)
602	Denmark – Montenegro BIT (2009)
603	Denmark – Morocco BIT (2003)
604	Denmark – Nicaragua BIT (1995)
605	Denmark – Macedonia, The former Yugoslav Republic BIT (2015)
606	Denmark – Pakistan BIT (1996)
607	Denmark – Peru BIT (1994)
608	Denmark – Philippines BIT (1997)
609	Denmark – Russian Federation BIT (1993)
610	Denmark – Slovenia BIT (1999)
611	Denmark – Sri Lanka BIT (1985)
612	Denmark – United Republic of Tanzania BIT (1999)
613	Denmark – Tunisia BIT (1996)
614	Denmark – Turkey BIT (1990)
615	Denmark – Uganda BIT (2001)
616	Denmark – Ukraine BIT (1992)
617	Denmark – Venezuela, Bolivarian Republic of BIT (1994)

No.	Short title
618	Denmark – Viet Nam BIT (1993)
619	Denmark – Zimbabwe BIT (1996)
620	Dominica – Germany BIT (1984)
621	Dominica – United Kingdom BIT (1987)
622	Dominican Republic – Finland BIT (2001)
623	Dominican Republic – Italy BIT (2006)
624	Dominican Republic – Korea, Republic of BIT (2006)
625	Dominican Republic – Morocco BIT (2002)
626	Dominican Republic – Netherlands BIT (2006)
627	Dominican Republic – Spain BIT (1995)
628	Dominican Republic – Switzerland BIT (2004)
629	Ecuador – Italy BIT (2001)
630	Ecuador – Netherlands BIT (1999)
631	Egypt – Ethiopia BIT (2006)
632	Egypt – Finland BIT (2004)
633	Egypt – Germany BIT (2005)
634	Egypt – Greece BIT (1993)
635	Egypt – Hungary BIT (1995)
636	Egypt – Iceland BIT (2008)
637	Egypt – Italy BIT (1989)
638	Egypt – Japan BIT (1977)
639	Egypt – Jordan BIT (1996)
640	Egypt – Kazakhstan BIT (1993)
641	Egypt – Korea, Dem. People's Rep. of BIT (1997)
642	Egypt – Korea, Republic of BIT (1996)
643	Egypt – Latvia BIT (1997)
644	Egypt – Malawi BIT (1997)
645	Egypt – Malaysia BIT (1997)
646	Egypt – Malta BIT (1999)
647	Egypt – Mauritius BIT (2014)
648	Egypt – Mongolia BIT (2004)
649	Egypt – Netherlands BIT (1996)
650	Egypt – Poland BIT (1995)

No.	Short title
651	Egypt – Portugal BIT (1999)
652	Egypt – Romania BIT (1994)
653	Egypt – Russian Federation BIT (1997)
654	Egypt – Serbia BIT (2005)
655	Egypt – Singapore BIT (1997)
656	Egypt – Slovakia BIT (1997)
657	Egypt – Slovenia BIT (1998)
658	Egypt – Sri Lanka BIT (1996)
659	Egypt – Sweden BIT (1978)
660	Egypt – Switzerland BIT (2010)
661	Egypt – Syrian Arab Republic BIT (1997)
662	Egypt – Thailand BIT (2000)
663	Egypt – Turkey BIT (1996)
664	Egypt – Turkmenistan BIT (1995)
665	Egypt – Ukraine BIT (1992)
666	Egypt – United Kingdom BIT (1975)
667	Egypt – United States of America BIT (1986)
668	Egypt – Uzbekistan BIT (1992)
669	Egypt – Viet Nam BIT (1997)
670	El Salvador – Finland BIT (2002)
671	El Salvador – Israel BIT (2000)
672	El Salvador – Korea, Republic of BIT (1998)
673	El Salvador – Morocco BIT (1999)
674	El Salvador – Netherlands BIT (1999)
675	El Salvador – United Kingdom BIT (1999)
676	Eritrea – Italy BIT (1996)
677	Estonia – Finland BIT (1992)
678	Estonia – Greece BIT (1997)
679	Estonia – Israel BIT (1994)
680	Estonia – Jordan BIT (2010)
681	Estonia – Kazakhstan BIT (2011)
682	Estonia – Moldova, Republic of BIT (2010)
683	Estonia – Morocco BIT (2009)

No.	Short title
684	Estonia – Netherlands BIT (1992)
685	Estonia – Norway BIT (1992)
686	Estonia – Poland BIT (1993)
687	Estonia – Sweden BIT (1992)
688	Estonia – Switzerland BIT (1992)
689	Estonia – Turkey BIT (1997)
690	Estonia – Ukraine BIT (1995)
691	Estonia – United Arab Emirates BIT (2011)
692	Estonia – United Kingdom BIT (1994)
693	Estonia – United States of America BIT (1994)
694	Estonia – Viet Nam BIT (2009)
695	Eswatini – Germany (1990)
696	Eswatini – United Kingdom (1995)
697	Ethiopia – Finland BIT (2006)
698	Ethiopia – France BIT (2003)
699	Ethiopia – Germany BIT (2004)
700	Ethiopia – Iran, Islamic Republic of BIT (2003)
701	Ethiopia – Israel BIT (2003)
702	Ethiopia – Kuwait BIT (1996)
703	Ethiopia – Libya BIT (2004)
704	Ethiopia – Malaysia BIT (1998)
705	Ethiopia – Netherlands BIT (2003)
706	Ethiopia – Sudan BIT (2000)
707	Ethiopia – Sweden BIT (2004)
708	Ethiopia – Switzerland BIT (1998)
709	Ethiopia – Tunisia BIT (2000)
710	Ethiopia – Turkey BIT (2000)
711	Ethiopia – Yemen BIT (1999)
712	Finland – Georgia BIT (2006)
713	Finland – Guatemala BIT (2005)
714	Finland – Hong Kong, China SAR BIT (2009)
715	Finland – Hungary BIT (1988)
716	Finland – India BIT (2002)

No.	Short title
717	Finland – Indonesia BIT (2006)
718	Finland – Iran, Islamic Republic of BIT (2002)
719	Finland – Jordan BIT (2006)
720	Finland – Kazakhstan BIT (2007)
721	Finland – Kenya BIT (2008)
722	Finland – Korea, Republic of BIT (1993)
723	Finland – Kuwait BIT (1996)
724	Finland – Kyrgyzstan BIT (2003)
725	Finland – Latvia BIT (1992)
726	Finland – Lebanon BIT (1997)
727	Finland – Lithuania BIT (1992)
728	Finland – Malaysia BIT (1985)
729	Finland – Mauritius BIT (2007)
730	Finland – Mexico BIT (1999)
731	Finland – Moldova, Republic of BIT (1995)
732	Finland – Mongolia BIT (2007)
733	Finland – Montenegro BIT (2008)
734	Finland – Morocco BIT (2001)
735	Finland – Mozambique BIT (2004)
736	Finland – Namibia BIT (2002)
737	Finland – Nepal BIT (2009)
738	Finland – Nigeria BIT (2005)
739	Finland – Macedonia, The former Yugoslav Republic of BIT (2001)
740	Finland – Oman BIT (1997)
741	Finland – Panama BIT (2009)
742	Finland – Peru BIT (1995)
743	Finland – Philippines BIT (1998)
744	Finland – Poland BIT (1996)
745	Finland – Qatar BIT (2001)
746	Finland – Romania BIT (1992)
747	Finland – Russian Federation BIT (1989)
748	Finland – Serbia BIT (2005)
749	Finland – Slovakia BIT (1990)

No.	Short title
750	Finland – Slovenia BIT (1998)
751	Finland – South Africa BIT (1998)
752	Finland – Sri Lanka BIT (1985)
753	Finland – United Republic of Tanzania BIT (2001)
754	Finland – Thailand BIT (1994)
755	Finland – Tunisia BIT (2001)
756	Finland – Turkey BIT (1993)
757	Finland – Ukraine BIT (2004)
758	Finland – United Arab Emirates BIT (1996)
759	Finland – Uzbekistan BIT (1992)
760	Finland – Viet Nam BIT (2008)
761	France – Malta BIT (1976)
762	France – Mexico BIT (1998)
763	France – Trinidad and Tobago BIT (1993)
764	Gabon – Korea, Republic of (2007)
765	Gambia – Morocco BIT (2006)
766	Gambia – Netherlands BIT (2002)
767	Gambia – Qatar BIT (2002)
768	Gambia – Switzerland BIT (1993)
769	Gambia – Taiwan Province of China BIT (2010)
770	Georgia – Greece BIT (1994)
771	Georgia – Iran, Islamic Republic of BIT (1995)
772	Georgia – Israel BIT (1995)
773	Georgia – Kazakhstan BIT (1996)
774	Georgia – Kyrgyzstan BIT (1997)
775	Georgia – Latvia BIT (2005)
776	Georgia – Lithuania BIT (2005)
777	Georgia – Netherlands BIT (1998)
778	Georgia – Romania BIT (1997)
779	Georgia – Switzerland BIT (2014)
780	Georgia – United Kingdom BIT (1995)
781	Georgia – United States of America BIT (1994)
782	Botswana – Germany BIT (2000)

No.	Short title
783	Germany – Guatemala BIT (2003)
784	Germany – Guyana BIT (1989)
785	Germany – Haiti BIT (1973)
786	Germany – Hong Kong, China SAR BIT (1996)
787	Germany – Iran, Islamic Republic of BIT (2002)
788	Germany – Jamaica BIT (1992)
789	Germany – Jordan BIT (2007)
790	Germany – Kenya BIT (1996)
791	Germany – Korea, Republic of BIT (1964)
792	Germany – Kuwait BIT (1994)
793	Germany – Lao People's Democratic Republic BIT (1996)
794	Germany – Lebanon BIT (1997)
795	Germany – Lesotho BIT (1982)
796	Germany – Liberia BIT (1961)
797	Germany – Libya BIT (2004)
798	Germany – Malaysia BIT (1960)
799	Germany – Mali BIT (1977)
800	Germany – Malta BIT (1974)
801	Germany – Mexico BIT (1998)
802	Germany – Moldova, Republic of BIT (1994)
803	Germany – Montenegro BIT (1989)
804	Germany – Namibia BIT (1994)
805	Germany – Nepal BIT (1986)
806	Germany – Nigeria BIT (2000)
807	Germany – Oman BIT (2007)
808	Germany – Pakistan BIT (1959)
809	Germany – Papua New Guinea BIT (1980)
810	Germany – Philippines BIT (1997)
811	Germany – Poland BIT (1989)
812	Germany – Qatar BIT (1996)
813	Germany – Russian Federation BIT (1989)
814	Germany – Saint Lucia BIT (1985)
815	Germany – Senegal BIT (1964)

No.	Short title
816	Germany – Serbia BIT (1989)
817	Germany – Sierra Leone BIT (1965)
818	Germany – Singapore BIT (1973)
819	Germany – Somalia BIT (1981)
820	Germany – Sri Lanka BIT (2000)
821	Germany – State of Palestine BIT (2000)
822	Germany – Sudan BIT (1963)
823	Germany – Syrian Arab Republic BIT (1977)
824	Germany – United Republic of Tanzania BIT (1965)
825	Germany – Thailand BIT (2002)
826	Germany – Trinidad and Tobago BIT (2006)
827	Germany – Turkey BIT (1962)
828	Germany – Uganda BIT (1966)
829	Germany – United Arab Emirates BIT (1997)
830	Germany – Viet Nam BIT (1993)
831	Germany – Yemen BIT (2005)
832	Germany – Zambia BIT (1966)
833	Germany – Zimbabwe BIT (1995)
834	Ghana – Malaysia BIT (1996)
835	Ghana – Netherlands BIT (1989)
836	Ghana – Serbia BIT (2000)
837	Ghana – Switzerland BIT (1991)
838	Ghana – United Kingdom BIT (1989)
839	Greece – Hungary BIT (1989)
840	Greece – Iran, Islamic Republic of BIT (2002)
841	Greece – Jordan BIT (2005)
842	Greece – Korea, Republic of BIT (1995)
843	Greece – Latvia BIT (1995)
844	Greece – Lebanon BIT (1997)
845	Greece – Lithuania BIT (1996)
846	Greece – Mexico BIT (2000)
847	Greece – Moldova, Republic of BIT (1998)
848	Greece – Montenegro BIT (1997)

No.	Short title
849	Greece – Poland BIT (1992)
850	Greece – Russian Federation BIT (1993)
851	Greece – Serbia BIT (1997)
852	Greece – Slovakia BIT (1991)
853	Greece – Slovenia BIT (1997)
854	Greece – South Africa BIT (1998)
855	Greece – Syrian Arab Republic BIT (2003)
856	Greece – Turkey BIT (2000)
857	Greece – United Arab Emirates BIT (2014)
858	Greece – Uzbekistan BIT (1997)
859	Greece – Viet Nam BIT (2008)
860	Grenada – United Kingdom BIT (1988)
861	Grenada – United States of America BIT (1986)
862	Guatemala – Israel BIT (2006)
863	Guatemala – Korea, Republic of BIT (2000)
864	Guatemala – Netherlands BIT (2001)
865	Guatemala – Switzerland BIT (2002)
866	Guatemala – Trinidad and Tobago BIT (2013)
867	Guinea – Malaysia BIT (1996)
868	Guinea – United Arab Emirates BIT (2011)
869	Guinea-Bissau – Portugal BIT (1991)
870	Guyana – Korea, Republic of BIT (2006)
871	Guyana – Switzerland BIT (2005)
872	Guyana – United Kingdom BIT (1989)
873	Haiti – United Kingdom BIT (1985)
874	Honduras – Korea, Republic of BIT (2000)
875	Honduras – Netherlands BIT (2001)
876	Honduras – United Kingdom BIT (1993)
877	Honduras – United States of America BIT (1995)
878	Hong Kong, China SAR – Italy BIT (1995)
879	Hong Kong, China SAR – Japan BIT (1997)
880	Hong Kong, China SAR – Korea, Republic of BIT (1997)
881	Hong Kong, China SAR – Netherlands BIT (1992)

No.	Short title
882	Hong Kong, China SAR – New Zealand BIT (1995)
883	Hong Kong, China SAR – Sweden BIT (1994)
884	Hong Kong, China SAR – Switzerland BIT (1994)
885	Hong Kong, China SAR – Thailand BIT (2005)
886	Hong Kong, China SAR – United Kingdom BIT (1998)
887	Hungary – Jordan BIT (2007)
888	Hungary – Kazakhstan BIT (1994)
889	Hungary – Korea, Republic of BIT (1988)
890	Hungary – Kuwait BIT (1989)
891	Hungary – Latvia BIT (1999)
892	Hungary – Lebanon BIT (2001)
893	Hungary – Lithuania BIT (1999)
894	Hungary – Malaysia BIT (1993)
895	Hungary – Moldova, Republic of BIT (1995)
896	Hungary – Mongolia BIT (1994)
897	Hungary – Netherlands BIT (1987)
898	Hungary – Macedonia, The former Yugoslav Republic of BIT (2001)
899	Hungary – Norway BIT (1991)
900	Hungary – Paraguay BIT (1993)
901	Hungary – Poland BIT (1992)
902	Hungary – Romania BIT (1993)
903	Hungary – Russian Federation BIT (1995)
904	Hungary – Serbia BIT (2001)
905	Hungary – Singapore BIT (1997)
906	Hungary – Slovakia BIT (1993)
907	Hungary – Slovenia BIT (1996)
908	Hungary – Spain BIT (1989)
909	Hungary – Sweden BIT (1987)
910	Hungary – Switzerland BIT (1988)
911	Hungary – Thailand BIT (1991)
912	Hungary – Turkey BIT (1992)
913	Hungary – Ukraine BIT (1994)
914	Hungary – United Kingdom BIT (1987)

No.	Short title
915	Hungary – Uzbekistan BIT (2002)
916	Hungary – Viet Nam BIT (1994)
917	Hungary – Yemen BIT (2004)
918	Iceland – India BIT (2007)
919	Iceland – Lithuania BIT (2002)
920	Iceland – Mexico BIT (2005)
921	India – Jordan BIT (2006)
922	India – Latvia BIT (2010)
923	India – Libya BIT (2007)
924	India – Lithuania BIT (2011)
925	India – Mexico BIT (2007)
926	India – Mozambique BIT (2009)
927	India – Myanmar BIT (2008)
928	India – Philippines BIT (2000)
929	India – Saudi Arabia BIT (2006)
930	India – Senegal BIT (2008)
931	India – Serbia BIT (2003)
932	India – Sudan BIT (2003)
933	India – Syrian Arab Republic BIT (2008)
934	India – Turkey BIT (1998)
935	India – United Arab Emirates BIT (2013)
936	Indonesia – Jordan BIT (1996)
937	Indonesia – Korea, Republic of BIT (1991)
938	Indonesia – Mauritius BIT (1997)
939	Indonesia – Mongolia BIT (1997)
940	Indonesia – Morocco BIT (1997)
941	Indonesia – Mozambique BIT (1999)
942	Indonesia – Sri Lanka BIT (1996)
943	Indonesia – Sweden BIT (1992)
944	Indonesia – Syrian Arab Republic BIT (1997)
945	Indonesia – Thailand BIT (1998)
946	Indonesia – Tunisia BIT (1992)
947	Indonesia – Ukraine BIT (1996)

No.	Short title
948	Indonesia – United Kingdom BIT (1976)
949	Indonesia – Uzbekistan BIT (1996)
950	Iran, Islamic Republic of – Italy BIT (1999)
951	Iran, Islamic Republic of – Japan BIT (2016)
952	Iran, Islamic Republic of – Kazakhstan BIT (1996)
953	Iran, Islamic Republic of – Korea, Dem. People's Rep. of BIT (2002)
954	Iran, Islamic Republic of – Libya BIT (2006)
955	Iran, Islamic Republic of – Macedonia, The former Yugoslav Republic of BIT (2000)
956	Iran, Islamic Republic of – Oman BIT (2001)
957	Iran, Islamic Republic of – Pakistan BIT (1995)
958	Iran, Islamic Republic of – Romania BIT (2003)
959	Iran, Islamic Republic of – Singapore BIT (2016)
960	Iran, Islamic Republic of – Slovakia BIT (2016)
961	Iran, Islamic Republic of – Spain BIT (2002)
962	Iran, Islamic Republic of – Sri Lanka BIT (2000)
963	Iran, Islamic Republic of – Sudan BIT (1999)
964	Iran, Islamic Republic of – Sweden BIT (2005)
965	Iran, Islamic Republic of – Switzerland BIT (1998)
966	Iran, Islamic Republic of – Tunisia BIT (2001)
967	Iran, Islamic Republic of – Turkey BIT (1996)
968	Iraq – Japan BIT (2012)
969	Israel – Japan BIT (2017)
970	Israel – Kazakhstan BIT (1995)
971	Israel – Korea, Republic of BIT (1999)
972	Israel – Latvia BIT (1994)
973	Israel – Lithuania BIT (1994)
974	Israel – Moldova, Republic of BIT (1997)
975	Israel – Mongolia BIT (2003)
976	Israel – Montenegro BIT (2004)
977	Israel – Poland BIT (1991)
978	Israel – Romania BIT (1998)
979	Israel – Serbia BIT (2004)

No.	Short title
980	Israel – Slovakia BIT (1999)
981	Israel – Slovenia BIT (1998)
982	Israel – Thailand BIT (2000)
983	Israel – Turkey BIT (1996)
984	Israel – Turkmenistan BIT (1995)
985	Israel – Ukraine BIT (2010)
986	Israel – Uruguay BIT (1998)
987	Israel – Uzbekistan BIT (1994)
988	Italy – Lebanon BIT (1997)
989	Italy – Malta BIT (1967)
990	Italy – Mexico BIT (1999)
991	Italy – Mongolia BIT (1993)
992	Italy – Mozambique BIT (1998)
993	Italy – Nicaragua BIT (2004)
994	Italy – Nigeria BIT (2000)
995	Italy – Macedonia, The former Yugoslav Republic of BIT (1997)
996	Italy – Oman BIT (1993)
997	Italy – Pakistan BIT (1997)
998	Italy – Philippines BIT (1988)
999	Italy – Qatar BIT (2000)
1000	Italy – United Republic of Tanzania BIT (2001)
1001	Italy – Turkey BIT (1995)
1002	Italy – United Arab Emirates BIT (1995)
1003	Italy – Yemen BIT (2004)
1004	Jamaica – Korea, Republic of BIT (2003)
1005	Jamaica – Netherlands BIT (1991)
1006	Jamaica – Switzerland BIT (1990)
1007	Jamaica – United Kingdom BIT (1987)
1008	Jamaica – United States of America BIT (1994)
1009	Japan – Kazakhstan BIT (2014)
1010	Japan – Kenya BIT (2016)
1011	Japan – Korea, Republic of BIT (2002)
1012	Japan – Kuwait BIT (2012)

No.	Short title
1013	Japan – Lao People's Democratic Republic BIT (2008)
1014	Japan – Mozambique BIT (2013)
1015	Japan – Myanmar BIT (2013)
1016	Japan – Oman BIT (2015)
1017	Japan – Pakistan BIT (1998)
1018	Japan – Papua New Guinea BIT (2011)
1019	Japan – Peru BIT (2008)
1020	Japan – Russian Federation BIT (1998)
1021	Japan – Saudi Arabia BIT (2013)
1022	Japan – Sri Lanka BIT (1982)
1023	Japan – Turkey BIT (1992)
1024	Japan – Ukraine BIT (2015)
1025	Japan – Uruguay BIT (2015)
1026	Japan – Uzbekistan BIT (2008)
1027	Japan – Viet Nam BIT (2003)
1028	Jordan – Korea, Republic of BIT (2004)
1029	Jordan – Kuwait BIT (2001)
1030	Jordan – Lebanon BIT (2002)
1031	Jordan – Lithuania BIT (2002)
1032	Jordan – Malaysia BIT (1994)
1033	Jordan – Morocco BIT (1998)
1034	Jordan – Netherlands BIT (1997)
1035	Jordan – Poland BIT (1997)
1036	Jordan – Portugal BIT (2009)
1037	Jordan – Romania BIT (1992)
1038	Jordan – Singapore BIT (2004)
1039	Jordan – Slovakia BIT (2008)
1040	Jordan – Sudan BIT (2000)
1041	Jordan – Switzerland BIT (2001)
1042	Jordan – Syrian Arab Republic BIT (2001)
1043	Jordan – Thailand BIT (2005)
1044	Jordan – Tunisia BIT (1995)
1045	Jordan – Turkey BIT (1993)

No.	Short title
1046	Jordan – United Kingdom BIT (1979)
1047	Jordan – United States of America BIT (1997)
1048	Jordan – Yemen BIT (1996)
1049	Kazakhstan – Korea, Republic of BIT (1996)
1050	Kazakhstan – Kuwait BIT (1997)
1051	Kazakhstan – Lithuania BIT (1994)
1052	Kazakhstan – Malaysia BIT (1996)
1053	Kazakhstan – Netherlands BIT (2002)
1054	Kazakhstan – Macedonia, The former Yugoslav Republic of BIT (2012)
1055	Kazakhstan – Pakistan BIT (2003)
1056	Kazakhstan – Romania BIT (2010)
1057	Kazakhstan – Serbia BIT (2010)
1058	Kazakhstan – Sweden BIT (2004)
1059	Kazakhstan – Switzerland BIT (1994)
1060	Kazakhstan – Tajikistan BIT (1999)
1061	Kazakhstan – Turkey BIT (1992)
1062	Kazakhstan – United Kingdom BIT (1995)
1063	Kazakhstan – United States of America BIT (1992)
1064	Kazakhstan – Uzbekistan BIT (1997)
1065	Kenya – Korea, Republic of BIT (2014)
1066	Kenya – Kuwait BIT (2013)
1067	Kenya – Netherlands BIT (1970)
1068	Kenya – Switzerland BIT (2006)
1069	Kenya – United Kingdom BIT (1999)
1070	Korea, Dem. People's Rep. of – Malaysia BIT (1998)
1071	Korea, Dem. People's Rep. of – Macedonia, The former Yugoslav Republic of BIT (1997)
1072	Korea, Dem. People's Rep. of – Singapore BIT (2008)
1073	Korea, Dem. People's Rep. of – Slovakia BIT (1998)
1074	Korea, Dem. People's Rep. of – Switzerland BIT (1998)
1075	Korea, Dem. People's Rep. of – Thailand BIT (2002)
1076	Korea, Republic of – Kuwait BIT (2004)
1077	Korea, Republic of – Kyrgyzstan BIT (2007)

No.	Short title
1078	Korea, Republic of – Lao People's Democratic Republic BIT (1996)
1079	Korea, Republic of – Latvia BIT (1996)
1080	Korea, Republic of – Lebanon BIT (2006)
1081	Korea, Republic of – Libya BIT (2006)
1082	Korea, Republic of – Lithuania BIT (1993)
1083	Korea, Republic of – Malaysia BIT (1988)
1084	Korea, Republic of – Mauritania BIT (2004)
1085	Korea, Republic of – Mauritius BIT (2007)
1086	Korea, Republic of – Mexico BIT (2000)
1087	Korea, Republic of – Mongolia BIT (1991)
1088	Korea, Republic of – Morocco BIT (1999)
1089	Korea, Republic of – Myanmar BIT (2014)
1090	Korea, Republic of – Netherlands BIT (2003)
1091	Korea, Republic of – Nicaragua BIT (2000)
1092	Korea, Republic of – Nigeria BIT (1998)
1093	Korea, Republic of – Oman BIT (2003)
1094	Korea, Republic of – Pakistan BIT (1988)
1095	Korea, Republic of – Panama BIT (2001)
1096	Korea, Republic of – Paraguay BIT (1992)
1097	Korea, Republic of – Philippines BIT (1994)
1098	Korea, Republic of – Poland BIT (1989)
1099	Korea, Republic of – Portugal BIT (1995)
1100	Korea, Republic of – Qatar BIT (1999)
1101	Korea, Republic of – Russian Federation BIT (1990)
1102	Korea, Republic of – Rwanda BIT (2009)
1103	Korea, Republic of – Saudi Arabia BIT (2002)
1104	Korea, Republic of – Slovakia BIT (2005)
1105	Korea, Republic of – South Africa BIT (1995)
1106	Korea, Republic of – Spain BIT (1994)
1107	Korea, Republic of – Sri Lanka BIT (1980)
1108	Korea, Republic of – Sweden BIT (1995)
1109	Korea, Republic of – Switzerland BIT (1971)
1110	Korea, Republic of – Tajikistan BIT (1995)

No.	Short title
1111	Korea, Republic of – Thailand BIT (1989)
1112	Korea, Republic of – Trinidad and Tobago BIT (2002)
1113	Korea, Republic of – Turkey BIT (1991)
1114	Korea, Republic of – Ukraine BIT (1996)
1115	Korea, Republic of – United Arab Emirates BIT (2002)
1116	Korea, Republic of – United Kingdom BIT (1976)
1117	Korea, Republic of – Uzbekistan BIT (1992)
1118	Korea, Republic of – Viet Nam BIT (2003)
1119	Kuwait – Latvia BIT (2001)
1120	Kuwait – Lithuania BIT (2001)
1121	Kuwait – Malaysia BIT (1987)
1122	Kuwait – Mauritius BIT (2013)
1123	Kuwait – Mexico BIT (2013)
1124	Kuwait – Netherlands BIT (2001)
1125	Kuwait – Pakistan BIT (2011)
1126	Kuwait – Poland BIT (1990)
1127	Kuwait – Portugal BIT (2007)
1128	Kuwait – Romania BIT (1991)
1129	Kuwait – Singapore BIT (2009)
1130	Kuwait – Slovakia BIT (2009)
1131	Kuwait – Spain BIT (2005)
1132	Kuwait – Sweden BIT (1999)
1133	Kuwait – Switzerland BIT (1998)
1134	Kuwait – Turkey BIT (2010)
1135	Kyrgyzstan – Latvia BIT (2008)
1136	Kyrgyzstan – Sweden BIT (2002)
1137	Kyrgyzstan – Switzerland BIT (1999)
1138	Kyrgyzstan – Turkey BIT (1992)
1139	Kyrgyzstan – United Kingdom BIT (1994)
1140	Kyrgyzstan – United States of America BIT (1993)
1141	Lao People's Democratic Republic – Mongolia BIT (1994)
1142	Lao People's Democratic Republic – Myanmar BIT (2003)
1143	Lao People's Democratic Republic – Netherlands BIT (2003)

No.	Short title
1144	Lao People's Democratic Republic – Pakistan BIT (2004)
1145	Lao People's Democratic Republic – Singapore BIT (1997)
1146	Lao People's Democratic Republic – Sweden BIT (1996)
1147	Lao People's Democratic Republic – Thailand BIT (1990)
1148	Lao People's Democratic Republic – United Kingdom BIT (1995)
1149	Lao People's Democratic Republic – Viet Nam BIT (1996)
1150	Latvia – Netherlands BIT (1994)
1151	Latvia – Norway BIT (1992)
1152	Latvia – Portugal BIT (1995)
1153	Latvia – Romania BIT (2001)
1154	Latvia – Singapore BIT (1998)
1155	Latvia – Sweden BIT (1992)
1156	Latvia – Switzerland BIT (1992)
1157	Latvia – Turkey BIT (1997)
1158	Latvia – United Kingdom BIT (1994)
1159	Latvia – United States of America BIT (1995)
1160	Latvia – Viet Nam BIT (1995)
1161	Lebanon – Malaysia BIT (1998)
1162	Lebanon – Netherlands BIT (2002)
1163	Lebanon – Pakistan BIT (2001)
1164	Lebanon – Romania BIT (1994)
1165	Lebanon – Russian Federation BIT (1997)
1166	Lebanon – Slovakia BIT (2009)
1167	Lebanon – Spain BIT (1996)
1168	Lebanon – Sweden BIT (2001)
1169	Lebanon – Switzerland BIT (2000)
1170	Lebanon – Turkey BIT (2004)
1171	Lebanon – Ukraine BIT (1996)
1172	Lebanon – United Kingdom BIT (1999)
1173	Lesotho – Switzerland BIT (2004)
1174	Lesotho – United Kingdom BIT (1981)
1175	Liberia – Switzerland BIT (1963)
1176	Libya – Singapore BIT (2009)

No.	Short title
1177	Libya – Switzerland BIT (2003)
1178	Libya – Turkey BIT (2009)
1179	Lithuania – Moldova, Republic of BIT (1999)
1180	Lithuania – Mongolia BIT (2003)
1181	Lithuania – Montenegro BIT (2005)
1182	Lithuania – Macedonia, The former Yugoslav Republic of BIT (2011)
1183	Lithuania – Norway BIT (1992)
1184	Lithuania – Poland BIT (1992)
1185	Lithuania – Romania BIT (1994)
1186	Lithuania – Russian Federation BIT (1999)
1187	Lithuania – Serbia BIT (2005)
1188	Lithuania – Slovenia BIT (1998)
1189	Lithuania – Sweden BIT (1992)
1190	Lithuania – Switzerland BIT (1992)
1191	Lithuania – Turkey BIT (1994)
1192	Lithuania – Ukraine BIT (1994)
1193	Lithuania – United Kingdom BIT (1993)
1194	Lithuania – United States of America BIT (1998)
1195	Lithuania – Venezuela, Bolivarian Republic of BIT (1995)
1196	Lithuania – Viet Nam BIT (1995)
1197	Macao, China SAR – Netherlands BIT (2008)
1198	Malawi – Netherlands BIT (2003)
1199	Malaysia – Mongolia BIT (1995)
1200	Malaysia – Namibia BIT (1994)
1201	Malaysia – Netherlands BIT (1971)
1202	Macedonia, The former Yugoslav Republic of – Malaysia BIT (1997)
1203	Malaysia – Poland BIT (1993)
1204	Malaysia – Romania BIT (1996)
1205	Malaysia – Saudi Arabia BIT (2000)
1206	Malaysia – Slovakia BIT (2007)
1207	Malaysia – Sri Lanka BIT (1982)
1208	Malaysia – Sweden BIT (1979)
1209	Malaysia – Switzerland BIT (1978)

No.	Short title
1210	Malaysia – Syrian Arab Republic BIT (2009)
1211	Malaysia – Turkey BIT (1998)
1212	Malaysia – United Arab Emirates BIT (1991)
1213	Malaysia – United Kingdom BIT (1981)
1214	Malaysia – Uzbekistan BIT (1997)
1215	Malaysia – Viet Nam BIT (1992)
1216	Malta – Montenegro BIT (2010)
1217	Malta – Netherlands BIT (1984)
1218	Malta – Serbia BIT (2010)
1219	Malta – Slovenia BIT (2001)
1220	Malta – Sweden BIT (1999)
1221	Malta – Turkey BIT (2003)
1222	Malta – United Kingdom BIT (1986)
1223	Mauritania – Morocco BIT (2000)
1224	Mauritius – Mozambique BIT (1997)
1225	Mauritius – Pakistan BIT (1997)
1226	Mauritius – Portugal BIT (1997)
1227	Mauritius – Romania BIT (2000)
1228	Mauritius – Singapore BIT (2000)
1229	Mauritius – South Africa BIT (1998)
1230	Mauritius – Sweden BIT (2004)
1231	Mauritius – Switzerland BIT (1998)
1232	Mauritius – United Republic of Tanzania BIT (2009)
1233	Mauritius – United Kingdom BIT (1986)
1234	Mexico – Netherlands BIT (1998)
1235	Mexico – Portugal BIT (1999)
1236	Mexico – Slovakia BIT (2007)
1237	Mexico – Spain BIT (2006)
1238	Mexico – Sweden BIT (2000)
1239	Mexico – Switzerland BIT (1995)
1240	Mexico – United Kingdom BIT (2006)
1241	Moldova, Republic of – Montenegro BIT (2014)
1242	Moldova, Republic of – Netherlands BIT (1995)

No.	Short title
1243	Moldova, Republic of – Slovakia BIT (2008)
1244	Moldova, Republic of – Spain BIT (2006)
1245	Moldova, Republic of – Switzerland BIT (1995)
1246	Moldova, Republic of – Turkey BIT (1994)
1247	Moldova, Republic of – United Kingdom BIT (1996)
1248	Moldova, Republic of – United States of America BIT (1993)
1249	Mongolia – Netherlands BIT (1995)
1250	Mongolia – Philippines BIT (2000)
1251	Mongolia – Poland BIT (1995)
1252	Mongolia – Romania BIT (1995)
1253	Mongolia – Singapore BIT (1995)
1254	Mongolia – Sweden BIT (2003)
1255	Mongolia – Switzerland BIT (1997)
1256	Mongolia – Turkey BIT (1998)
1257	Mongolia – United Kingdom BIT (1991)
1258	Mongolia – United States of America BIT (1994)
1259	Mongolia – Viet Nam BIT (2000)
1260	Montenegro – Netherlands BIT (2002)
1261	Montenegro – Macedonia, The former Yugoslav Republic of BIT (2010)
1262	Montenegro – Poland BIT (1996)
1263	Montenegro – Qatar BIT (2009)
1264	Montenegro – Romania BIT (1995)
1265	Montenegro – Slovakia BIT (1996)
1266	Montenegro – Spain BIT (2002)
1267	Montenegro – Switzerland BIT (2005)
1268	Montenegro – United Arab Emirates BIT (2012)
1269	Morocco – Netherlands BIT (1971)
1270	Macedonia, The former Yugoslav Republic of – Morocco BIT (2010)
1271	Morocco – Slovakia BIT (2007)
1272	Morocco – Spain BIT (1997)
1273	Morocco – United Kingdom BIT (1990)
1274	Morocco – United States of America BIT (1985)
1275	Mozambique – Netherlands BIT (2001)

No.	Short title
1276	Mozambique – Sweden BIT (2001)
1277	Mozambique – Switzerland BIT (2002)
1278	Mozambique – United Kingdom BIT (2004)
1279	Mozambique – United States of America BIT (1998)
1280	Myanmar – Philippines BIT (1998)
1281	Myanmar – Thailand BIT (2008)
1282	Namibia – Netherlands BIT (2002)
1283	Namibia – Spain BIT (2003)
1284	Namibia – Switzerland BIT (1994)
1285	Nepal – United Kingdom BIT (1993)
1286	Netherlands – Nicaragua BIT (2000)
1287	Netherlands – Nigeria BIT (1992)
1288	Macedonia, The former Yugoslav Republic of – Netherlands BIT (1998)
1289	Netherlands – Oman BIT (1987)
1290	Netherlands – Pakistan BIT (1988)
1291	Netherlands – Panama BIT (2000)
1292	Netherlands – Paraguay BIT (1992)
1293	Netherlands – Peru BIT (1994)
1294	Netherlands – Philippines BIT (1985)
1295	Netherlands – Poland BIT (1992)
1296	Netherlands – Romania BIT (1994)
1297	Netherlands – Russian Federation BIT (1989)
1298	Netherlands – Serbia BIT (2002)
1299	Netherlands – Singapore BIT (1972)
1300	Netherlands – Slovakia BIT (1991)
1301	Netherlands – Slovenia BIT (1996)
1302	Netherlands – Sri Lanka BIT (1984)
1303	Netherlands – Sudan BIT (1970)
1304	Netherlands – Suriname BIT (2005)
1305	Netherlands – Tajikistan BIT (2002)
1306	Netherlands – United Republic of Tanzania BIT (2001)
1307	Netherlands – Thailand BIT (1972)
1308	Netherlands – Tunisia BIT (1998)

No.	Short title
1309	Netherlands – Turkey BIT (1986)
1310	Netherlands – Ukraine BIT (1994)
1311	Netherlands – Uruguay BIT (1988)
1312	Netherlands – Uzbekistan BIT (1996)
1313	Netherlands – Viet Nam BIT (1994)
1314	Netherlands – Yemen BIT (1985)
1315	Netherlands – Zambia BIT (2003)
1316	Netherlands – Zimbabwe BIT (1996)
1317	Nicaragua – Switzerland BIT (1998)
1318	Nicaragua – United Kingdom BIT (1996)
1319	Nigeria – Romania BIT (1998)
1320	Nigeria – South Africa BIT (2000)
1321	Nigeria – Spain BIT (2002)
1322	Nigeria – United Kingdom BIT (1990)
1323	Macedonia, The former Yugoslav Republic of – Poland BIT (1996)
1324	Macedonia, The former Yugoslav Republic of – Romania BIT (2000)
1325	Macedonia, The former Yugoslav Republic of – Serbia BIT (1996)
1326	Macedonia, The former Yugoslav Republic of – Slovenia BIT (1996)
1327	Macedonia, The former Yugoslav Republic of – Spain BIT (2005)
1328	Macedonia, The former Yugoslav Republic of – Sweden BIT (1998)
1329	Macedonia, The former Yugoslav Republic of – Switzerland BIT (1996)
1330	Macedonia, The former Yugoslav Republic of – Taiwan Province of China BIT (1999)
1331	Macedonia, The former Yugoslav Republic of – Turkey BIT (1995)
1332	Macedonia, The former Yugoslav Republic of – Ukraine BIT (1998)
1333	Norway – Peru BIT (1995)
1334	Norway – Poland BIT (1990)
1335	Norway – Romania BIT (1991)
1336	Norway – Russian Federation BIT (1995)
1337	Norway – Slovakia BIT (1991)
1338	Norway – Sri Lanka BIT (1985)
1339	Oman – Pakistan BIT (1997)
1340	Oman – Singapore BIT (2007)

No.	Short title
1341	Oman – Sweden BIT (1995)
1342	Oman – Switzerland BIT (2004)
1343	Oman – Turkey BIT (2007)
1344	Oman – Ukraine BIT (2002)
1345	Oman – United Kingdom BIT (1995)
1346	Oman – Uzbekistan BIT (2009)
1347	Pakistan – Portugal BIT (1995)
1348	Pakistan – Romania BIT (1995)
1349	Pakistan – Singapore BIT (1995)
1350	Pakistan – Sri Lanka BIT (1997)
1351	Pakistan – Sweden BIT (1981)
1352	Pakistan – Switzerland BIT (1995)
1353	Pakistan – Syrian Arab Republic BIT (1996)
1354	Pakistan – Tajikistan BIT (2004)
1355	Pakistan – Turkey BIT (1995)
1356	Pakistan – United Arab Emirates BIT (1995)
1357	Pakistan – United Kingdom BIT (1994)
1358	Pakistan – Uzbekistan BIT (1992)
1359	Panama – United Kingdom BIT (1983)
1360	Panama – United States of America BIT (1982)
1361	Papua New Guinea – United Kingdom BIT (1981)
1362	Paraguay – Switzerland BIT (1992)
1363	Paraguay – United Kingdom BIT (1981)
1364	Peru – Switzerland BIT (1991)
1365	Peru – Thailand BIT (1991)
1366	Peru – United Kingdom BIT (1993)
1367	Philippines – Romania BIT (1994)
1368	Philippines – Switzerland BIT (1997)
1369	Philippines – Thailand BIT (1995)
1370	Philippines – Turkey BIT (1999)
1371	Philippines – United Kingdom BIT (1980)
1372	Philippines – Viet Nam BIT (1992)

No.	Short title
1373	Poland – Romania BIT (1994)
1374	Poland – Serbia BIT (1996)
1375	Poland – Singapore BIT (1993)
1376	Poland – Sweden BIT (1989)
1377	Poland – Switzerland BIT (1989)
1378	Poland – Thailand BIT (1992)
1379	Poland – Turkey BIT (1991)
1380	Poland – United Arab Emirates BIT (1993)
1381	Poland – United Kingdom BIT (1987)
1382	Poland – United States of America BIT (1990)
1383	Poland – Viet Nam BIT (1994)
1384	Portugal – Qatar BIT (2009)
1385	Portugal – Romania BIT (1993)
1386	Portugal – Serbia BIT (2009)
1387	Portugal – Slovenia BIT (1997)
1388	Portugal – Turkey BIT (2001)
1389	Portugal – United Arab Emirates BIT (2011)
1390	Portugal – Uzbekistan BIT (2001)
1391	Qatar – Romania BIT (1996)
1392	Qatar – Switzerland BIT (2001)
1393	Qatar – Turkey BIT (2001)
1394	Romania – Senegal BIT (1980)
1395	Romania – Serbia BIT (1995)
1396	Romania – Slovakia BIT (1994)
1397	Romania – Slovenia BIT (1996)
1398	Romania – Sri Lanka BIT (1981)
1399	Romania – Sweden BIT (2002)
1400	Romania – Switzerland BIT (1993)
1401	Romania – Thailand BIT (1993)
1402	Romania – Turkey BIT (2008)
1403	Romania – United Arab Emirates BIT (1993)
1404	Romania – United Kingdom BIT (1995)

No.	Short title
1405	Romania – United States of America BIT (1992)
1406	Romania – Viet Nam BIT (1994)
1407	Russian Federation – Singapore BIT (2010)
1408	Russian Federation – Sweden BIT (1995)
1409	Russian Federation – Turkey BIT (1997)
1410	Russian Federation – Turkmenistan BIT (2009)
1411	Russian Federation – United Arab Emirates BIT (2010)
1412	Russian Federation – United Kingdom BIT (1989)
1413	Russian Federation – Venezuela, Bolivarian Republic of BIT (2008)
1414	Rwanda – United States of America BIT (2008)
1415	Saint Lucia – United Kingdom BIT (1983)
1416	Saint Vincent and the Grenadines – Taiwan Province of China BIT (2009)
1417	Saudi Arabia – Singapore BIT (2006)
1418	Saudi Arabia – Sweden BIT (2008)
1419	Saudi Arabia – Turkey BIT (2006)
1420	Senegal – South Africa BIT (1998)
1421	Senegal – United Kingdom BIT (1980)
1422	Senegal – United States of America BIT (1983)
1423	Serbia – Slovakia BIT (1996)
1424	Serbia – Spain BIT (2002)
1425	Serbia – Sweden BIT (1978)
1426	Serbia – Switzerland BIT (2005)
1427	Serbia – Turkey BIT (2001)
1428	Serbia – United Arab Emirates BIT (2013)
1429	Serbia – United Kingdom BIT (2002)
1430	Sierra Leone – United Kingdom BIT (2000)
1431	Singapore – Slovakia BIT (2006)
1432	Singapore – Slovenia BIT (1999)
1433	Singapore – Switzerland BIT (1978)
1434	Singapore – Taiwan Province of China BIT (1990)
1435	Singapore – Turkey BIT (2008)
1436	Singapore – Ukraine BIT (2006)

No.	Short title
1437	Singapore – United Kingdom BIT (1975)
1438	Singapore – Uzbekistan BIT (2003)
1439	Singapore – Viet Nam BIT (1992)
1440	Slovakia – Slovenia BIT (1993)
1441	Slovakia – Switzerland BIT (1990)
1442	Slovakia – Syrian Arab Republic BIT (2009)
1443	Slovakia – Tajikistan BIT (1994)
1444	Slovakia – Turkey BIT (2009)
1445	Slovakia – Ukraine BIT (2007)
1446	Slovakia – United Kingdom BIT (1990)
1447	Slovakia – United States of America BIT (1991)
1448	Slovenia – Sweden BIT (1999)
1449	Slovenia – Switzerland BIT (1995)
1450	Slovenia – Thailand BIT (2000)
1451	Slovenia – Turkey BIT (2004)
1452	Slovenia – United Kingdom BIT (1996)
1453	South Africa – Sweden BIT (1998)
1454	South Africa – Zimbabwe BIT (2009)
1455	Spain – Syrian Arab Republic BIT (2003)
1456	Spain – Turkey BIT (1995)
1457	Spain – Uruguay BIT (1992)
1458	Spain – Uzbekistan BIT (2003)
1459	Sri Lanka – Sweden BIT (1982)
1460	Sri Lanka – Switzerland BIT (1981)
1461	Sri Lanka – Thailand BIT (1996)
1462	Sri Lanka – United Kingdom BIT (1980)
1463	Sri Lanka – United States of America BIT (1991)
1464	Sudan – Switzerland BIT (1974)
1465	Sweden – United Republic of Tanzania BIT (1999)
1466	Sweden – Thailand BIT (2000)
1467	Sweden – Turkey BIT (1997)
1468	Sweden – Ukraine BIT (1995)

No.	Short title
1469	Sweden – United Arab Emirates BIT (1999)
1470	Sweden – Uzbekistan BIT (2001)
1471	Sweden – Venezuela, Bolivarian Republic of BIT (1996)
1472	Sweden – Viet Nam BIT (1993)
1473	Sweden – Yemen BIT (1983)
1474	Switzerland – Botswana BIT (1998)
1475	Switzerland – Tajikistan BIT (2009)
1476	Switzerland – United Republic of Tanzania BIT (2004)
1477	Switzerland – Thailand BIT (1997)
1478	Switzerland – Trinidad and Tobago BIT (2010)
1479	Switzerland – Tunisia BIT (2012)
1480	Switzerland – Turkey BIT (1988)
1481	Switzerland – Turkmenistan BIT (2008)
1482	Switzerland – Uganda BIT (1971)
1483	Switzerland – Ukraine BIT (1995)
1484	Switzerland – United Arab Emirates BIT (1998)
1485	Switzerland – Uruguay BIT (1988)
1486	Switzerland – Uzbekistan BIT (1993)
1487	Switzerland – Venezuela, Bolivarian Republic of BIT (1993)
1488	Switzerland – Zambia BIT (1994)
1489	Switzerland – Zimbabwe BIT (1996)
1490	Syrian Arab Republic – Turkey BIT (2004)
1491	Taiwan Province of China – Thailand BIT (1996)
1492	Tajikistan – Turkey BIT (1996)
1493	United Republic of Tanzania – United Kingdom BIT (1994)
1494	Thailand – Turkey BIT (2005)
1495	Thailand – United Arab Emirates BIT (2015)
1496	Thailand – United Kingdom BIT (1978)
1497	Thailand – Viet Nam BIT (1991)
1498	Tonga – United Kingdom BIT (1997)
1499	Trinidad and Tobago – United Kingdom BIT (1993)
1500	Trinidad and Tobago – United States of America BIT (1994)

No.	Short title
1501	Tunisia – Turkey BIT (1991)
1502	Tunisia – United Kingdom BIT (1989)
1503	Tunisia – United States of America BIT (1990)
1504	Turkey – Turkmenistan BIT (1992)
1505	Turkey – United Arab Emirates BIT (2005)
1506	Turkey – United Kingdom BIT (1991)
1507	Turkey – United States of America BIT (1985)
1508	Turkey – Uzbekistan BIT (1992)
1509	Turkey – Yemen BIT (2000)
1510	Turkmenistan – United Arab Emirates BIT (1998)
1511	Turkmenistan – United Kingdom BIT (1995)
1512	Turkmenistan – Uzbekistan BIT (1996)
1513	Uganda – United Kingdom BIT (1998)
1514	Ukraine – United Arab Emirates BIT (2003)
1515	Ukraine – United Kingdom BIT (1993)
1516	Ukraine – United States of America BIT (1994)
1517	United Arab Emirates – United Kingdom BIT (1992)
1518	United Kingdom – Eswatini BIT (1995)
1519	United Kingdom – Uruguay BIT (1991)
1520	United Kingdom – Uzbekistan BIT (1993)
1521	United Kingdom – Venezuela, Bolivarian Republic of BIT (1995)
1522	United Kingdom – Viet Nam BIT (2002)
1523	United Kingdom – Yemen BIT (1982)
1524	United States of America – Uruguay BIT (2005)
1525	Uruguay – Venezuela, Bolivarian Republic of BIT (1997)

Annex IX Provisions of Some Relevance for Contract Interpretation in the Selected Uniform Private Law Conventions

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
Hague Rules on Bills of Lading (1924)	2 June 1931	Article 3. […] 7. After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and *when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3, shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.* 8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. *A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.*
Warsaw Convention on Air Carriage (1929)	13 February 1933	Article 23 *Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void*, but the nullity of any such provision *does not involve the nullity of the whole contract*, which shall remain subject to the provisions of this Convention.

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
Geneva Convention on Bill of Exchange and Promissory Notes (1930)	1 January 1934	Article 5 When a bill of exchange is payable at sight, or at a fixed period after sight, the drawer may stipulate that the sum payable shall bear interest. In the case of any other bill of exchange, *this stipulation is deemed not to be written*. The rate of interest must be specified in the bill; in default of such specification, *the stipulation shall be deemed not to be written* […] Article 6 *When the sum payable by a bill of exchange is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. Where the sum payable by a bill of exchange is expressed more than once in words or more than once in figures, and there is a discrepancy, the smaller sum is the sum payable.* Article 9 The drawer guarantees both acceptance and payment. He may release himself from guaranteeing acceptance-*every stipulation by which he releases himself from the guarantee of payment is deemed not to be written.* Article 12 An endorsement must be unconditional. *Any condition to which it is made subject is deemed not to be written.* A partial endorsement is null and void. An endorsement `to bearer' is equivalent to an endorsement in blank. Article 20 An endorsement after maturity has the same effects as an endorsement before maturity. Nevertheless an endorsement after protest for non-payment, or after the expiration of the limit of time fixed for drawing up the protest, operates only as an ordinary assignment.

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
		Failing proof to the contrary, an endorsement without date is deemed to have been placed on the bill before the expiration of the limit of time fixed for drawing up the protest. Article 26 An acceptance is unconditional, but the drawee may restrict it to part of the sum payable. *Every other modification introduced by an acceptance into the tenor of the bill of exchange operates as a refusal to accept.* Nevertheless, the acceptor is bound according to the terms of his acceptance. *Article 36* *Where a bill of exchange is drawn at one or more months after date or after sight, the bill matures on the corresponding date of the month when payment must be made. If there be no corresponding date, the bill matures on the last day of this month.* *When a bill of exchange is drawn at one or more months and a-half after date or sight, entire months must first be calculated. If the maturity is fixed at the commencement, in the middle (mid-January or mid-February, etc.,) or at the end of the month, the first, fifteenth or last day of the month is to be understood.* *The expressions `eight days' or `fifteen days' indicate not one or two weeks, but a period of eight or fifteen actual days.* *The expression `half-month' means a period of fifteen days.* *Article 37* *When a bill of exchange is payable on a fixed day in a place where the calendar is different from the calendar in the place of issue, the day of maturity is deemed to be fixed according to the calendar of the place of payment.*

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
		When a bill of exchange drawn between two places having different calendars is payable at a fixed period after date, the day of issue is referred to the corresponding day of the calendar in the place of payment, and the maturity is fixed accordingly. *The time for presenting bills of exchange is calculated in accordance with the rules of the preceding paragraph.* These rules do not apply if a stipulation in the bill or even the simple terms of the instrument indicate an intention to adopt some different rule. Bills of exchange at other maturities or payable by instalments are null and void.
UN Convention on Independent Guarantees and Stand-by Letters of Credit (1995)	1 January 2000	Article 13. Determination of rights and obligations (1) The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention. (2) *In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.*
CISG (1980)	1 January 1988	Article 8 (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
		(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.
UNIDROIT Convention on Agency in the International Sales of Goods (1983)	Not entered into force	*Article 7* (1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.
UNIDROIT Convention on International Financial Leasing (1988)	01 May 1995	*Article 10* 1. – The duties of the supplier under the supply agreement shall also be owed to the lessee *as if it were a party to that agreement* and as if the equipment were to be supplied directly to the lessee. However, the supplier shall not be liable to both the lessor and the lessee in respect of the same damage. 2. – Nothing in this article shall entitle the lessee to terminate or rescind the supply agreement without the consent of the lessor.

Convention	Date of entry into force	Provisions of some relevance for contract interpretation
UNIDROIT Convention on International Factoring (1988)	01 May 1995	*Article 5* As between the parties to the factoring contract: (a) a provision in the factoring contract for the assignment of existing or future receivables shall not be rendered invalid by the fact that the contract does not specify them individually, if at the time of conclusion of the contract or when they come into existence they can be identified to the contract; (b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act of transfer.

Annex X IIAs with Reference to Conflict of Laws of the Host State[2]

No.	Short title
1.	Congo – Spain BIT (2008)
2.	Mauritania – Spain BIT (2008)
3.	Bahrain – Spain BIT (2008)
4.	Spain – Yemen BIT (2008)
5.	Libya – Spain BIT (2007)
6.	Angola – Spain BIT (2007)
7.	Moldova, Republic of – Spain BIT (2006)
8.	Spain – Viet Nam BIT (2006)
9.	China – Spain BIT (2005)
10.	Equatorial Guinea – Spain BIT (2003)
11.	Spain – Syrian Arab Republic BIT (2003)

2 The date of signature is indicated in parentheses. The status of treaties may change as of the date of publication of this book.

No.	Short title
12.	Albania – Spain BIT (2003)
13.	Namibia – Spain BIT (2003)
14.	Spain – Uzbekistan BIT (2003)
15.	Guatemala – Spain BIT (2002)
16.	Nigeria – Spain BIT (2002)
17.	Montenegro – Spain BIT (2002)
18.	Serbia – Spain BIT (2002)
19.	Bosnia and Herzegovina – Spain BIT (2002)
20.	Bolivia, Plurinational State of – Spain BIT (2001)
21.	Jordan – Spain BIT (1999)
22.	Spain – Trinidad and Tobago BIT (1999)
23.	Slovenia – Spain BIT (1998)
24.	Spain – Ukraine BIT (1998)
25.	Estonia – Spain BIT (1997)
26.	Panama – Spain BIT (1997)
27.	India – Spain BIT (1997)
28.	Costa Rica – Spain BIT (1997)
29.	Lebanon – Spain BIT (1996)
30.	Spain – Venezuela, Bolivarian Republic of BIT (1995)
31.	Latvia – Spain BIT (1995)
32.	Bulgaria – Spain BIT (1995)
33.	Dominican Republic – Spain BIT (1995)
34.	Gabon – Spain BIT (1995)
35.	Spain – Turkey BIT (1995)
36.	El Salvador – Spain BIT (1995)
37.	Algeria – Spain BIT (1994)
38.	Peru – Spain BIT (1994)
39.	Pakistan – Spain BIT (1994)
40.	Lithuania – Spain BIT (1994)
41.	Cuba – Spain BIT (1994)
42.	Kazakhstan – Spain BIT (1994)
43.	Honduras – Spain BIT (1994)
44.	Nicaragua – Spain BIT (1994)

No.	Short title
45.	Korea, Republic of – Spain BIT (1994)
46.	Paraguay – Spain BIT (1993)
47.	Egypt – Spain BIT (1992)
48.	Poland – Spain BIT (1992)
49.	Chile – Spain BIT (1991)
50.	Czech Republic – Spain BIT (1990)
51.	Belarus – Spain BIT (1990)
52.	Azerbaijan – Spain BIT (1990)
53.	Kyrgyzstan – Spain BIT (1990)
54.	Russian Federation – Spain BIT (1990)
55.	Indonesia – Morocco BIT (1997)
56.	Argentina – Indonesia BIT (1995)
57.	Egypt – Georgia BIT (1999)
58.	Bulgaria – Egypt BIT (1998)
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