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Contract and Treaty Interpretation in International Arbitration

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56.1 Introduction

Traditionally, the choice of an interpretive method and practice is contingent upon the governing law and the nature of the agreement under scrutiny. The increasing resort to international agreements and instruments other than treaties and the growing role of arbitration as an alternative means to the jurisdiction of domestic courts have raised questions about the sources of interpretive rules. In this respect, international commercial and investment tribunals have significantly contributed to shaping the pivotal role of legal interpretation within the parameters of international adjudication, particularly developing the *competence-competence* principle, expanding upon party autonomy, furthering the identification of the governing law, and delineating the judicial function. This chapter analyses how the methodology of treaty and contract interpretation has evolved with the diversification of international agreements and the inherent flexibility of international arbitration.

The abundant literature on treaty interpretation¹ overshadows the relatively sparse writing on the interpretive practice around international contracts.² Likewise, the principle of confidentiality, largely dominant in commercial arbitration, makes it difficult to look more closely at the techniques used by commercial arbitrators in adjudicating international commercial disputes. At the same time, their counterparts in international investment proceedings are increasingly guided by transparency considerations, and their reasoning, therefore, is subjected to a high level of scrutiny. This marks a significant difference between the interpretive practices of treaties and contracts and is the premise of any comparative study of legal interpretation.

The decision of the Permanent Court of International Justice (PCIJ) in the *Serbian Loans* case offers a good illustration of the traditional distinction made

¹ For a recent study, see T. Gazzini, *Interpretation of International Investment Treaties* (Hart, 2016), 377.

² J. Rosengren, 'Contract Interpretation in International Arbitration', *Journal of International Arbitration*, 30 (2013), 1.

between the spheres of contracts and treaties. The PCIJ stated that ‘any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country’.³ As such, the same court in the *Panevezys-Saldutiskis Railway* case noted that ‘in principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals’.⁴

This distinction between contracts and treaties is, in turn, (*‘par ricochet’*, to use a French expression) relevant to the rules of interpretation; because a treaty is rooted in the international order, the rules of interpretation are to be found in the Vienna Convention on the Law of Treaties (VCLT),⁵ which codifies the canons of interpretation. On the other hand, the applicable rules for contract interpretation largely depend on the law designated by the parties to the contract – if any – or absent an agreement, on the law designated by the rules on the conflict of laws, sometimes in conjunction with international law. As a result, in both commercial and investment arbitration, the issue of interpretation is inherently linked to the issue of applicable law.

It is now undisputed that the internationalization of wide-ranging economic activities (in finance, trade or investment) and the emergence of state contracts⁶ have reshaped the classic distinction between contracts and treaties and softened the sharp dichotomy between national and international orders. For instance, the insertion of compromissory clauses granting jurisdiction to international tribunals has had the effect of elevating to the international plane contracts previously rooted in domestic law. It also became clear that public entities – other than the sovereign – may engage in commercial activities (*acta jure gestionis*) and thus be considered as regular commercial partners. Private entities are granted procedural rights to bring claims before international tribunals governed by treaties to which they are not parties, and state entities are parties to international commercial proceedings. Likewise, two governments may decide to designate the *lex mercatoria* as governing principles for their contract or treaties,⁷ or make a *renvoi* to the host state law in their bilateral investment treaty (BIT). An investor contracting with a non-sovereign public entity may designate the rules of international law in their international contract, thus divorcing their commercial relationship from the host state legal order.⁸ To put it simply, the public

³ PCIJ, *Serbian Loans case (France v. Serbian Croate-Slovene State)*, Judgment, 12 July 1929, *Publications of the Permanent Court of International Justice Series A – No. 20/21* (Sijthoff, 1929), 41.

⁴ PCIJ, *Panevezys-Saldutiskis Railway case (Estonia v. Lithuania)*, Judgment, *Publications of the Permanent Court of International Justice Series A./B. No. 76* (Sijthoff, 1939), 18.

⁵ Vienna Convention on the Law of Treaties (23 May 1969), *United Nations – Treaty Series*, vol. 1155, 331.

⁶ C. Leben, ‘La théorie du contrat d’état et l’évolution du droit international des investissements’, in Académie de Droit International de La Haye (ed.), *Recueil des Cours*, vol. 302 (Brill Nijhoff, 2003), 1.

⁷ J. Verhoeven, ‘Traités ou contrats entre états? Sur les conflits de lois en droit des gens’, *Journal du droit international*, 1 (1984), 5.

⁸ It should be stressed that there is a distinction to be made between interpretation and application, but this has proven more difficult in international arbitration: see R. Gardiner, *Treaty Interpretation*, 2nd ed (Oxford University Press, 2017), 44.

or private nature of a party to an international agreement is not exclusively conducive to the public or private nature of an international agreement.

Although the phenomenon of the convergence between domestic and international legal orders through the increasing recourse to international agreements other than treaties has received much attention, the rules of interpretation for international contracts and treaties have mostly been analysed in isolation.

That said, trust and confidence in international commercial and investment arbitration alike are dependent on respect for interpretive rules. This is because interpretation plays a role in the guarantee of legal security. As such, international arbitrators in both fields are not expected to act with total discretion regarding legal interpretation. It has been explained that '[w]hile arbitral rules of procedure typically leave questions of the admissibility of evidence up to the tribunal's discretion, tribunals should not cite their procedural discretion as a justification for avoiding the governing law's rules on contractual interpretation'.⁹ It is not surprising in this respect that the law of treaties offers more predictable outcomes than the practice around international contracts, given the methodology applicable under the VCLT.

Despite the straightforwardness of the distinction between contract and treaty, it is also evident that the two spheres do not have a clear-cut border, and international arbitral tribunals are commonly asked to resolve disputes involving these two types of instruments. This practice has rendered it more difficult to separate the issue of interpretation from that of applicable law. In a similar way, interpretation can be more complex because 'the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the international legal orders'.¹⁰ In investment arbitration, it can be said that 'treaties and contracts are different things. But they are not clean different things, in the sense of inhabiting worlds: between them there is no great gulf fixed. No doubt distinctions between legal systems should be observed, but not at the expense of appropriate connections between them'.¹¹

Indeed, a dispute could involve both a contract and a treaty, and each instrument may render applicable different bodies of law. Article 42 of the ICSID Convention specifically recognizes this possibility and allows arbitrators to apply the law of the state party or any applicable rules of international law¹² when the parties do not designate a body of law. Likewise, under Article 21(1) of the ICC Rules and Article

⁹ J. Karton, 'The Arbitral Role in Contractual Interpretation', *Journal of International Dispute Settlement*, 6 (2015), 32.

¹⁰ ICSID Tribunal, *SGS Société générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, 6 August 2003, ICISID Case no. ARB/01/13, 352, para. 147.

¹¹ J. Crawford, 'Treaty and Contract in Investment Arbitration', *Arbitration International*, 24 (2008), 351.

¹² International Centre for Settlement of Investment Disputes (ICSID), Convention on the Settlement of Investment Disputes between States and Nationals of other States (18 March 1965), *United Nations - Treaty Series*, vol. 575, 159 (ICSID Convention). Article 42(1) reads as follows: '[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'.

35(1) of the UNCITRAL Rules, arbitrators may apply 'rules of law which it determined to be appropriate'.¹³

On the other hand, when the parties to an international commercial contract agree to submit their dispute to arbitration, the sources for legal interpretation are more apparent. Besides the rules of interpretation included in the governing law of the agreement, there are unified codes and an international restatement of principles whereby applicability is contingent on the subject matter or the nature of the contract. To name a few, the United Nations Convention on Contracts for the International Sales of Goods (CISG),¹⁴ and the UNIDROIT Principles of International Commercial Contracts¹⁵ are non-legislative means of harmonization offering guidance for contract interpretation. Contrary to the VCLT, they are not binding upon the arbitral tribunal unless the parties specifically designate them or the applicable municipal law has adopted them. The UNIDROIT Principles '*may be applied* when the parties have not chosen any law to govern their contract', '*they may be used to interpret or supplement international uniform law instruments*', or '*to interpret or supplement domestic law*'.¹⁶

The increasing number of instruments and rules applicable to a given dispute has reinforced the importance of legal interpretation in contracts and treaties. In the same vein, the interconnections among applicable laws impact the interpretive practices of arbitral tribunals. The emergence of the UNIDROIT Principles is indicative of a trend towards uniformization of the interpretive rules to international contracts. Both arbitration fields have, therefore, used and benefitted from international unification and codification of laws relating to treaties and contracts.

In practice, therefore, the question is not so much where to find the rules of interpretation, but which rules may be applied by international arbitrators, and how? The issue of interpretation is one of methodology: '[h]owever much care parties may take to express their commitments with precision and to anticipate the various factual scenarios to which those commitments will relate, the predictability of the application of those commitments depends upon two things: first, upon a commonly accepted canon of interpretation and, second, upon the faithful application of that canon by those called upon to construe the commitments in question, whether they

¹³ Article 21(1) and (2) of the 2012 International Chamber of Commerce (ICC) Rules of Arbitration (ICC Rules): '(1) [t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. (2) The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages'. Article 35(1) of the 2010 UNCITRAL Arbitration Rules (UNCITRAL Rules): '[t]he arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate'.

¹⁴ United Nations Convention on Contracts for the International Sales of Goods (11 April 1980), *United Nations – Treaty Series*, vol. 1489, 255–67.

¹⁵ UNIDROIT Principles of International Commercial Contracts 2010, 3rd ed. (UNIDROIT Principles).

¹⁶ Preamble of the UNIDROIT Principles.

be the parties in the course of performance or decision makers resolving a dispute about that performance'.¹⁷

The purpose of this chapter is to see whether the growing overlap between legal orders has led to a diversification of interpretive practices applicable to international agreements such as treaties and international commercial contracts. With this in mind, this chapter analyses the issue of legal interpretation from three different angles: analytical (section 56.2), methodological (section 56.3), and functionalist (section 56.4).

56.2 The Scope of Application of the Rules of Interpretation

While the VCLT is widely referred for treaty interpretation before international courts,¹⁸ the interpretive rules for international contracts are more disparate. The possibility that the same instrument may involve the application of several legal rules or that the same dispute may involve a contract and a treaty raises the question of the scope of application of interpretive methods that commercial and investment tribunals may follow. As this section will show, in both arbitration fields, the scope of interpretation rules is not rigid, for it allows an arbitrator to (section 56.2.1) detach the rules from the legal nature of the instrument under an arbitrator's scrutiny and (section 56.2.2) detach the rules of interpretation from the governing law.

56.2.1 *Detaching the Rules of Interpretation from the Nature of the Agreement Under Scrutiny*

The UNIDROIT Principles do not precisely define the notion of an 'international commercial contract'. In their preamble, the Principles state that 'the concept of "international" contracts should be given the broadest possible interpretation' and 'exclude[s] only those situations where no international element at all is involved'. As can be seen, neither the nature of the parties nor the applicable law is used as a criterion to define the notion of international commercial contracts. Preferring an organic criterion, Article 2 of the VCLT also favours a very broad definition of a treaty insofar as it may include 'any kind of agreement between two States'. Read in isolation, there is little to distinguish between a treaty and an international commercial contract.

Secondly, transnational principles, such as the UNIDROIT Principles, adopt the broadest possible definition of commercial activities 'so as to include not only trade transactions . . . but also other types of economic transactions, such as investment and/or concession agreements'.¹⁹ As a result, from a formal standpoint the

¹⁷ M. H. Arsanjani and W. M. Reisman, 'Interpreting Treaties for the Benefit of Third Parties: The "Salvors Doctrine" and the Use of Legislative History in Investment Treaties', *American Journal of International Law*, 104 (2010), 598.

¹⁸ C. Schreuer, 'The Interpretation of Treaties by Domestic Courts', *British Yearbook of International Law*, 45 (1971), 255.

¹⁹ UNIDROIT Principles, 2.

distinction between a treaty and a contract only rests upon the organic criteria since the same instrument, such as a concession agreement, may be subjected to national, international, or even transnational rules of interpretation.

When it comes to treaty and contract interpretation, investment tribunals are at the forefront of evolving practice. The likelihood that an investment proceeding will involve at the same time different internationally binding instruments is a reason why an integrationist approach to contract and treaty interpretation should be favoured.²⁰ Others have favoured a contractual approach to investment law.²¹ Overall, it is important to point out that the distinguishing lines between contracts and treaties are moving and the distinction between *traité loi et traité contrat*²² appears to be becoming relevant for legal interpretation purposes. Since contracts and treaties are not impermeable to each other, the scope of interpretation rules must be adjusted to the *sui generis* nature of the instrument at hand.²³ State contracts and concession contracts are typical examples of legal instruments with both contractual and treaty features giving room to arbitrators to stretch the rules of interpretation within the boundaries of their mandate.

International commercial arbitrators and international investment arbitrators share the view that the quality of the parties (public or private) is not the triggering factor to determine the nature of an agreement and the interpretive rules. International commercial tribunals have explained that not every contract involving a public institution is to be seen as administrative, and even less as international:

The Arbitral Tribunal is not convinced by (respondent)'s contention that contracts relate to the functions of a public utility or service whenever one of the contracting parties is an administrative authority intending to spend the revenue for public purposes. Such an understanding would lead to the conclusion that, notwithstanding the private parties' intention, practically every contract entered into by an administrative authority would perforce be considered an administrative contract.²⁴

In addition to the qualities of the parties, one may look at the applicable law and subject matter of the agreement to determine the most appropriate rules of interpretation. The *Eurotunnel Arbitration* made it clear that international canons of interpretation may find application for the interpretation of an administrative contract:

First, it was agreed that, although the Concession Agreement is not a treaty, it is an agreement governed by international law, an 'international contract', and that

²⁰ Crawford, 'Treaty and Contract in Investment Arbitration' (2008).

²¹ R. C. Chen, 'A Contractual Approach to Investor-State Regulatory Disputes', *Yale Journal of International Law*, 40 (2015), 294.

²² P. Daillier *et al.*, *Droit international public*, 8th ed. (L.G.D.J., 2009), 136.

²³ See, in particular, Chen, 'A Contractual Approach to Investor-State Regulatory Disputes' (2015), 294.

²⁴ ICC Tribunal, Final Award (November 1999), ICC Case no. 8843, *ICC International Court of Arbitration Bulletin*, 15 (2004), 110 (Extract).

international law principles of interpretation are to be applied . . . The Parties agreed that the principles of interpretation laid down in the Vienna Convention on the Law of Treaties ('Vienna Convention') are declaratory also for agreements between States and private parties under international law and should be applied to resolve any discrepancies.²⁵

Likewise, investment tribunals have applied the VCLT canons of interpretation by analogy to other instruments than treaties. This is because a variety of instruments are capable of binding states at the international level. For instance, the International Court of Justice (ICJ) has recognized that 'declarations made by way of unilateral acts may have the effect of creating legal obligations'.²⁶ With respect to the method of interpretation applicable to domestic investments laws, qualified as unilateral acts under international law,²⁷ the tribunal in the *CEMEX* decision on jurisdiction applied the canons of treaty interpretation by analogy, stating that '[a]lthough the law of treaties as codified by the Vienna Convention on the Law of Treaties is not relevant in the interpretation of unilateral declarations, the provisions of the Vienna Convention may "apply analogously to the extent compatible with the *sui generis* character" of such declarations'.²⁸ Consequently, the canons of interpretation initially meant to apply to a traditional state-to-state relationship can be extended and are useful in the interpretation of legal instruments other than inter-state treaties.²⁹ Whether the application of rules 'by analogy' can be construed as an interpretive method by itself remains unclear.

²⁵ PCA, *The Eurotunnel Arbitration (The Channel Tunnel Group Limited, France-Manche S.A v. The Secretary of State for Transport of the Government of the United Kingdom of Great Britain and Northern Ireland, Le Ministre de l'équipement, des transports, de l'aménagement du territoire, du tourisme et de la mer du Gouvernement de la République française)*, Partial Award, 30 July 2007, PCA Case no. 2003-06, para. 92.

²⁶ ICJ, *Case Concerning Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, *ICJ Reports* (1974), 253, para. 34 ('When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding'). See also PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 September 1933, *Publications of the Permanent Court of International Justice Series A./B. No. 53* (Sijthoff, 1933), 71 ('It considers it beyond all dispute that "a reply of this nature given by the Ministry for Foreign Affairs on behalf of his government . . . is binding upon the country to which the Minister belongs"').

²⁷ ICSID Tribunal, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, 30 December 2010, ICSID Case no. ARB/08/15, para. 79 ('Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States.')

²⁸ ICSID Tribunal, *CEMEX v. Venezuela*, ICSID Case no. ARB/08/15, para. 89.

²⁹ On this point, see Y. Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions', *Arbitration International*, 27 (2011), 131.

In the *Railway Land Arbitration* case, a Permanent Court of Arbitration (PCA) tribunal offered the insight that an arbitrator may find inspiration in treaty law to interpret a contract provision and vice versa:

In applying these principles it is important not to lose sight of the object of the exercise. This is to identify the common intention of the Parties at the time that the treaty was concluded as to its meaning and effect. We are in this case concerned with a treaty that dealt in part with a commercial activity – the development of land – by a private company, and with the implications of the treaty on tax liability under the municipal law of Singapore. In the course of argument Lord Goldsmith observed that there was no particular difference between the principles governing the interpretation of a treaty and what would be the principles for commercial interpretation, with the possibility that treaty interpretation would actually be more generous about the extraneous materials that can be brought into account. In the context of this case we are inclined to agree, subject to the additional comment that the principle of good faith is an important aspect of the interpretation of a treaty, as recognized by Article 31 of the Vienna Convention.³⁰

As can be seen, the diversity of legal instruments capable of creating obligations has fostered a discussion about the scope of application of the rules of interpretation to be applied. In international arbitration, the detachment of interpretation rules from the nature of the agreement is also evident in respect of the governing law.

56.2.2 *Detaching the Rules of Interpretation from the Governing Law*

Unless the parties have carved out specific rules for the interpretation of their contract, it is fair to say that adjudicators are bound by the interpretive rules of the governing law, be it domestic or international.³¹ While it is well-established that the rules of interpretation of the VCLT apply to treaties, the rules of interpretation for contracts require knowledge of the contract provisions. The peculiarities of international commercial contracts have fostered a need for harmonization and the creation of the UNIDROIT Principles. These non-binding articles are readily transposing principles common to major systems of law into the field of international commercial contracts.

The expanding scope of interpretation rules is primarily the result of the parties' choice in terms of applicable law in dispute resolution. For instance, the dispute resolution provision of the concession contract in the *Eurotunnel Arbitration* offers an interesting combination of applicable rules. In clause 40.4, the parties agreed that:

In accordance with Article 19(6) of the Treaty, in order to resolve any disputes regarding the application of this Agreement, the relevant provisions of the Treaty and of this Agreement shall be applied. The rules of English law or the rules of the French law may, as appropriate, be applied when recourse to those

³⁰ PCA, *Railway Land Arbitration (Malaysia v. The Republic of Singapore)*, Award, 30 October 2014, PCA Case no. 2012-01, 14, para. 43.

³¹ Karton, 'The Arbitral Role in Contractual Interpretation' (2015), 31.

rules is necessary for the implementation of particular obligations under English law or French law. In general, recourse may also be had to the relevant principles of international law and, if the parties in dispute agree, to the principles of equity.³²

The 'detachment' of certain contracts from their *natural* legal environment has affected the interpretive process. In particular, the phenomenon of the internationalization of investment agreements, as described by Charles Leben, and the possibility that a tribunal may resolve a dispute by applying different sets of rules (domestic and international law), are examples of the detachment of contractual instruments from the application of domestic canons of interpretation. In fact, by separating state contracts from the application of domestic law, parties also agree to detach the interpretation of a contract from its original set of rules of interpretation. Thus, it can be the case that public international law finds application regardless of the choice-of-law provision placed in a contract.³³

The interpretation of the concession agreement in the *Aramco Arbitration* is one of the first awards in which arbitrators applied domestic law to the concession contract 'interpreted and supplemented by the general principles of law'.³⁴

The migration in the interpretation of certain agreements towards the international legal order is also evident in the *Cambodia Power Company* case. Despite the designation of English law by the parties to the contract under scrutiny, the tribunal retained jurisdiction over claims based on customary international law on the basis of the common law doctrine of incorporation.³⁵ For the tribunal, the choice-of-law provision did not impede the application of public international law in an investment contract dispute. Endorsing claimant's argument that pursuant to Article 42(1) ICSID Convention, claims under customary international law may still be pleaded when the parties expressly designated a specific law, the tribunal stated:

Customary international law is inevitably relevant in the context of foreign investment (and ICSID arbitration), given that it comprises a body of norms that establish minimum standards of protection in this field. It is simply unrealistic to assume that the parties to a foreign investment contract such as those in question here would have intended to exclude such inherent protection by simply choosing an applicable national law.³⁶

³² PCA, *The Eurotunnel Arbitration*, PCA Case no. 2003-06, 22, para. 86.

³³ C. C. Daigremont, 'L'arbitrage international des contrats d'investissement, entre droit international public et droit international privé', *Mélanges offerts à Charles Leben: Droit international et culture juridique* (Pedone, 2015), 285.

³⁴ *Ad Hoc Tribunal, Aramco Arbitration (Saudi Arabia v. Arabian American Oil Company)*; Award, 23 August 1958, *International Law Reporter*, 27 (1963), 117.

³⁵ ICSID Tribunal, *Cambodia Power Company v. Cambodia*, Decision on Jurisdiction, 22 March 2011, ICSID Case no. ARB/09/18, para. 333: 'the express choice of English law itself has the effect of including (rather than displacing) at least a body of customary international law, since customary international law (i.e. general practices of states followed by them from a sense of legal obligation) constitutes part of the Common law by a well-established doctrine of incorporation'.

³⁶ ICSID Tribunal, *Cambodia Power Company v. Cambodia*, ICSID Case no. ARB/09/18, para. 334.

In other words, customary international law applies regardless of a choice-of-law provision, unless the parties 'consented to exclude its application from the scope of their dispute resolution clause'.³⁷

International commercial arbitrators have distanced themselves from the interpretive rules deriving from the governing law, drawing extensively on their inherent latitude to separate contracts from a domestic legal order: '[t]he interpretation of contracts is one of the fields in which international commercial arbitrators are most inclined to free themselves of national laws and refer to general principles of law'.³⁸ The contractual nature of the arbitral mandate gives more latitude to depart from the governing law of the instrument under scrutiny.

For instance, international commercial tribunals have also interpreted contractual provisions by analogy with the prescriptions of the ICSID Convention on applicable law stating that two bodies of law (international and domestic) may find application:

Obviously the specific proviso of art. 42 only applies to investment agreements and disputes that may arise thereunder. However, we take the view that 'in the world today, there is no reason why this solution should be limited to a particular category of state contracts. In other words, the rule formulated in article 42 can be considered as illustrative of a principle of wider application'.³⁹

Harmonization of commercial rules applicable to international contracts such as the UNIDROIT Principles or the *lex mercatoria* constitutes another means of separation from the domestic legal order. Due to their broad scope of application (to 'any kind of international agreement') and the wide international consensus around them, the UNIDROIT Principles are often referred to in commercial arbitration:

The Tribunal concludes that the reasonable intention of the parties regarding the substantive law applicable to the Contracts was to have all of them governed by general legal rules and principles in matter of international contractual obligations such as those arising out of the Contracts, which, though not necessarily enshrined in any specific national legal system, are specially adapted to the needs of international transactions like the Contracts and enjoy wide international consensus . . . This Tribunal finds that general legal rules and principles enjoying wide international consensus, applicable to international contractual obligations and relevant to the Contracts, are primarily reflected by the . . . Unidroit principles . . . In consequence, without prejudice to taking into account the provisions of the Contracts and relevant trade usage, this Tribunal finds that the Contracts are governed by, and shall be interpreted in accordance [with], the Unidroit Principles

³⁷ ICSID Tribunal, *Cambodia Power Company v. Cambodia*, ICSID Case no. ARB/09/18, para. 335.

³⁸ ICC Tribunal, 1993, ICC Case no. 7920, J.-J. Arnaldez et al. (eds.), *Collection of ICC Arbitral Awards 1996–2000* (Kluwer, 2003), vol. III, 229. See also ICC Tribunal, 1995, ICC Case no. 7710, *Journal du droit international*, 4 (2001), 1155: 'il est pertinent de souligner que les parties et les arbitres jouissent d'une plus grande autonomie pour délocaliser le contrat et déterminer les lois ou les règles applicables quand les litiges naissant en matière de contrats d'Etat sont soumis à l'arbitrage international qu'autrement'.

³⁹ ICC Case no. 3493, S. Jarvin and Y. Derains (eds.), *Collection of ICC Arbitral Awards 1974–1985* (1994, Kluwer), vol. I, 130.

with respect to all matters falling within the scope of such Principles, and for all other matters, by such other general legal rules and principles applicable to international contractual obligations enjoying wide international consensus.⁴⁰

Somewhat more surprisingly, investment tribunals have also referred to the UNIDROIT Principles to confirm the existence of a rule or reinforce the interpretation given. The ICSID tribunal in *El Paso v. Argentina* held:

That there is a general principle on the preclusion of wrongfulness in certain situations can hardly be doubted, as is confirmed by the UNIDROIT Principles on International Commercial Contracts, a sort of international restatement of the law of contracts reflecting rules and principles applied by the majority of national legal systems⁴¹

International commercial awards have referred to investment case law to assess the binding nature of a compromissory clause. In both arbitration fields, a defendant state may invoke the nullity of the arbitration agreement inserted in an agreement on the ground that the public entity lacked the capacity to compromise under national law. Interestingly, an ICC tribunal has borrowed the well-known principle of public international adjudication that a state cannot appeal to its national law as a justification for a breach or non-compliance with its international commitments. Behind this interpretation, one can see the application of Article 27 of the VCLT by analogy:

[T]he award refers to a long line of arbitral decisions from which it follows that international public policy does not allow a State organ to invoke its own internal law in order to nullify or avoid the effects of arbitration agreements . . . One may argue whether this principle is related to the concept of good faith, or of abuse of right, or of '*venire contra factum proprium*', or even to the concept of 'estoppel' . . . but it is undisputable today that it belongs to international public policy. The present Arbitral Tribunal, in keeping with a long line of precedents, fully agreed with the ideas just expressed⁴²

As this first section has demonstrated, commercial and investment tribunals alike have stretched the personal and material scope of interpretation rules. In both fields, arbitrators went beyond the prescriptions of applicable law to interpret an international agreement, using general principles or reasoning 'by analogy'. The introduction of the UNIDROIT Principles provides further illustration of a will to detach certain economic transactions from the national legal order: '[t]he objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied'.⁴³ This is not to say, however, that arbitrators can act *à la carte* and ignore the methodology of legal interpretation.

⁴⁰ ICC Case no. 7110, *ICC International Court of Arbitration Bulletin*, 10 (1999), 50.

⁴¹ ICSID Tribunal, *El Paso Energy International Company v. The Argentine Republic*, Award, 31 October 2011, ICSID Case no. ARB/03/15, para. 623.

⁴² ICC Tribunal, March 1992, ICC Case no. 6474, *ICC International Court of Arbitration Bulletin*, 15 (2004), 102 (Extract).

⁴³ UNIDROIT Principles, 22.

56.3 Aids to Interpretation and Use of Extrinsic Evidence in Contract and Treaty Interpretation

This section assesses the arbitrators' gap-filling power in pursuing the comparison of interpretation in contracts and treaties when they face an ambiguous term or silence in a treaty or contract. The first section focuses on international arbitral tribunals' use of aids to interpretation (section 56.3.1), and then we turn to consider the weight given to extrinsic evidence or 'supplementary means' to interpretation (section 56.3.2).

56.3.1 *Approaches and Guiding Principles to Interpretation*

When it comes to legal interpretation, it is common to distinguish the subjective approach from the objective approach. The objective approach favours a textual and literal interpretation focusing on the text and the terms of an agreement. Under the subjective approach to interpretation, priority is given to the intent of the parties. The different methods of legal interpretation are factors of distinction between common law and civil law jurisdictions. Comprehending the distinction between the objective and subjective approaches to interpretation is relevant since the designation of state law to govern a contract includes a choice of its rules of interpretation. At the international level, the distinction has proven to be important during the codification of international canons of interpretation such as the VCLT or transnational principles such as the UNIDROIT Principles.

For the sake of clarity, the respective provisions applicable to the interpretation of treaties under the VCLT and international commercial contracts under the UNIDROIT Principles are reproduced hereinafter.

VIENNA CONVENTION ON THE LAW OF TREATIES 1969

Article 31 *General Rule of Interpretation*

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

UNIDROIT PRINCIPLES ON INTERNATIONAL COMMERCIAL CONTRACTS 2010

Article 4.1 *Intention of the Parties*

- (1) A contract shall be interpreted according to the common intention of the parties
- (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

(cont.)

**VIENNA CONVENTION ON THE LAW OF
TREATIES 1969**

**UNIDROIT PRINCIPLES ON INTERNATIONAL
COMMERCIAL CONTRACTS 2010**

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

**Aids to Interpretation for Treaties
Article 31.3 31.4**

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

**Aids to Interpretation for International
Commercial Contracts**
Article 4.3 'Relevant Circumstances'

In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including

- (a) preliminary negotiations between parties;
- (b) practices which the parties have established between themselves;
- (c) the conduct of the parties subsequent to the conclusion of the contract;
- (d) the nature and purpose of the contract;
- (e) the meaning commonly given to terms and expressions in the trade concerned,
- (f) usages.

In public international law, the VCLT has reconciled both approaches under Article 31 and Article 32. Article 31 of the VCLT is the starting point of treaty interpretation. It establishes a step-by-step method aimed at identifying the ordinary meaning of a term and the original intent behind a treaty provision. From the text, Article 31 requires arbitrators to use the following aids to interpretation: *inter alia*, context, object, and purpose, any agreement made in connection with the treaty, any subsequent practice in the application of the treaty, and any relevant rules of international law applicable in the relations between the parties. As such, no doctrine of restrictive or extensive interpretation of the text of the treaty should prevail.⁴⁴ In line with the canons of the VCLT, ICSID case law dealing with the interpretation of BITs has followed an objective method of interpretation.⁴⁵

⁴⁴ ICJ, *Fisheries Jurisdiction Case (Spain v. Canada)*, Judgment – Jurisdiction of the Court, 4 December 1998, *ICJ Reports* (1998), 451–2, paras. 37–8; *Ad Hoc Tribunal* established under UNCITRAL Rules, *Austrian Airlines v. The Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, paras. 119–21; Arbitral Tribunal established under NAFTA Chapter 11/ICSID Additional Facility Rules, *Mondev International Ltd. v. United States of America*, Award, 11 October 2002, ICSID Case no. ARB (AF)/99/2, para. 43.

⁴⁵ C. Fauchald, 'The Legal Reasoning of ICSID Tribunals – an Empirical Analysis', *European Journal of International Law*, 19 (2008), 315.

Whereas the VCLT general rule of interpretation dictates that the 'ordinary meaning' of a term should be sought, the starting point of interpretation under Article 4.1 of the UNIDROIT Principles follows a subjective approach aimed at finding the 'common intention' of the parties. When this intention cannot be found, the UNIDROIT Principles urge interpreters to select 'the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances'.⁴⁶ It allows international commercial tribunals to 'decide based on what they see as the most commercially reasonable outcome rather than on strict application of the law'.⁴⁷ It should be noted that both instruments refer to the 'ordinary meaning' or the 'common intention of the parties' placed within their 'context' or 'circumstances'. However, circumstantial (or contextual) evidence is significantly different between the VCLT and the UNIDROIT Principles.

In order to determine the circumstances in which the parties engaged in an international commercial contract find themselves, recourse can be made to the following instruments: (a) preliminary negotiations between parties, (b) practices which the parties have established between themselves, (c) the conduct of the parties subsequent to the conclusion of the contract, (d) the nature and purpose of the contract; (e) the meaning commonly given to terms and expressions in the trade concerned, and (f) usages. However, under the UNIDROIT Principles, aids to interpretation are not equally relevant. As a result, preliminary negotiations, practices, and subsequent conduct between the parties to an international commercial contract take priority.⁴⁸ Thus, in determining the circumstances and common intention of the parties, the nature and purpose of the contract is given lesser weight than other pre-text instruments such as the preliminary negotiations and practices that the parties have established between themselves.

On the contrary, the various aids to interpretation listed in Article 31 of the VCLT aimed at finding the ordinary meaning of a term are mainly contemporaneous or posterior to the adoption of the text (object and purpose, preambles, annexes, subsequent agreements, and practices). They are equally valuable and should be viewed as 'an integral whole, the constituent elements of which cannot be separated'.⁴⁹ This means that 'a term may be implied only when it is clear beyond peradventure, from the overall text of the relevant instrument, its negotiating history or its actual implementation by the parties, that *all* Contracting States would have had no hesitation to include that term'.⁵⁰

⁴⁶ UNIDROIT Principles, Art. 4.1(2).

⁴⁷ Karton, 'The Arbitral Role in Contractual Interpretation' (2015), 57.

⁴⁸ UNIDROIT Principles, 140 ('Although in principle all the circumstances listed may be relevant in a given case, the first three are likely to have greater in the application of the "subjective" test.').

⁴⁹ PCA, *Case concerning the Auditing Accounts between the Kingdom of The Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands v. France)*, Award, 12 March 2004, PCA Award Series no. 4 (T.M.C. Asser Press, 2008), 43, para. 62.

⁵⁰ ICSID Tribunal, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, Individual Opinion of Jan Paulsson, 12 June 2009, ICSID Case no. ARB/05/24, para. 64 (emphasis in original).

The apparent resemblances between the notions of 'object and purpose', 'nature and purpose', 'ordinary meaning' and 'meaning commonly given', 'subsequent practice in the application of the treaty' and 'conduct of the parties subsequent to the conclusion of the contract' should not overshadow the inherent differences and peculiarities of contracts and treaties as reflected in the rules of interpretation. First, the 'nature and purpose' of a contract are intrinsically narrower than the 'object and purpose' of treaties, as the former organize a *mercantile* relationship between the parties. While both a treaty and a contract may contain annexes, it is less likely to find preambular language in a contract than in a treaty. Secondly, under treaty law, the 'ordinary meaning of a term' is the starting point to a contextual interpretation, whereas the 'meaning commonly given' to a contractual term is secondary circumstantial evidence. Thus, under the UNIDROIT Principles, pre-eminence is given to the standard 'reasonable person of the same kind as the parties',⁵¹ which would be very problematic to import into treaty law. Indeed, the notion of statehood is not only unsuited to the standard of reasonableness (what would be a reasonable state?) but would also circumvent the possibility of comparing two sovereigns 'of the same kind' since state intent cannot be presumed. This explains why, in treaty interpretation, the text is said to be the best expression of the parties' intention.

The function assigned to each instrument in its legal order is probably more appropriate for grasping the different approaches to interpretation for contracts and treaties. Despite numerous social and economic functions, the legal effects of a contract are mainly limited to the parties. Contracts are not a source of law. Treaties, however, serve a double legal function: they are a primary source of international law⁵² and, by application of Article 31(3)(c) of the VCLT, also qualify as 'any relevant rules of international law applicable in the relations between the parties'. Investment tribunals have repeated in this regard that 'the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles'.⁵³ The VCLT Preamble also recognizes the 'ever-increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems'.

One direct consequence of this double function ascribed to treaties in international adjudication is that 'reference to other rules of international law in the course of interpreting a treaty is an everyday, often unconscious part of the interpretation process'.⁵⁴ Indeed, that investment arbitrators refer to other treaties such as BITs or free trade agreements is much more likely than their reference to other commercial contracts to determine the intent of the parties.

⁵¹ UNIDROIT Principles, Comment on Art. 4.2, p. 139. ⁵² Statute of the ICJ, Art. 38.

⁵³ ICSID Tribunal, *Phoenix Action v. Czech Republic*, Award, 15 April 2009, ICSID Case no. ARB/06/5, para. 78; ICSID Tribunal, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Final Award, 27 June 1990, ICSID Case no. ARB/87/3, para. 21; ICSID Tribunal, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Decision on Annulment, 21 March 2007, ICSID Case no. ARB/31/7, para. 61.

⁵⁴ C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', *International & Comparative Law Quarterly*, 54 (2005), 280.

That said, other sources of international law listed in Article 38 of the ICJ Statute have increasingly been used by investment tribunals as aids to interpretation. In particular, references to other international courts' and tribunals' decisions have become common in ascertaining the true meaning of a treaty term. This 'house of cards'⁵⁵ phenomenon may be construed as introducing subjectivity into the VCLT's objective method of interpretation, providing a further illustration of the divergent approach to interpretation.⁵⁶ With the growing use of uniform rules, it is not excluded that those interpreting contracts will increasingly refer to other tribunals awards to the extent that they are not subject to confidentiality.

In both arbitration fields, the choice of a certain method of interpretation – liberal, textual or restrictive, objective or subjective – may be insufficient to overcome a difficulty as to the clarification of an ambiguous term. The VCLT, the UNIDROIT Principles and, more generally, rules of interpretation should not be seen as exhaustive. Other interpretative methods may find application to clarify the meaning of a term of a treaty⁵⁷ or find the common intent of the parties. Interestingly, both investment and commercial tribunals use these methods.

56.3.2 Other Canons of Interpretation

56.3.2.1 The Good Faith Principle

In both treaty and contractual interpretation, the principle of good faith serves as a guide in assessing the performance of an obligation:

The Tribunal has already noted that there is common ground that good faith is also a fundamental principle of public international law for the performance of international obligations. It is applicable in assessing whether the State's exercise of a legal right, *whether arising out of a contract or another source of law*, is legitimate or amounts to an abuse of such right in order to avoid liability to compensate . . . However, the Tribunal agrees with Respondent that the principle of good faith, whether under Hungarian law or under international law, informs

⁵⁵ A. Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', *American Journal of International Law*, 104 (2010), 179.

⁵⁶ See, for instance, ICSID Tribunal, *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, 14 December 2012, ICSID Case no. ARB/08/5, para. 187 ('It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It further believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.').

⁵⁷ M. K. Yaseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités', in Académie de Droit International de La Haye (ed.), *Recueil des Cours*, vol. 151 (Brill Nijhoff, 1976), 10 ('La méthode d'interprétation peut ne pas être la même, elle peut varier selon une série de considérations, elle est commandée surtout par la conception qu'on a de l'interprétation, la nature de l'instrument à interpréter et les caractéristiques de l'ordre juridique dont il s'agit.').

the manner in which an international or, in the case of Hungarian law a contractual, obligation is to be performed, but it is not in itself an independent source of obligations.⁵⁸

A generally recognized principle of international adjudication, expressed in Article 31(1) of the VCLT, compels international tribunals to interpret a treaty in good faith, although priority should be given to the text of the treaty:

In this context, the Tribunal emphasises that it fully recognises the fundamental role of good faith and how it dominates the interpretation and application of the entire body of international law, not only the interpretation of treaties. The fundamental role of *pacta sunt servanda* rests on the principle of good faith. This does not alter the fact that when interpreting a treaty, the text must always be taken as the starting point. It is the duty of the Tribunal here.⁵⁹

The good faith principle is also used as a complementary means of interpretation to fill gaps if there is a *lacuna* in the governing law. Under Article 4.8 of the UNIDROIT Principles,⁶⁰ good faith intervenes as a guiding principle when arbitrators are asked to exercise gap-filling to its fullest extent and supply the term of a contract. Similarly, Article 5.1.2 of the UNIDROIT Principles lists good faith as an element to determine the implied obligations of a contract providing that 'implied obligations stem from . . . good faith and fair dealing'.

The ICC tribunal in the *Framatome* case made ample reference to the good faith principle in order to assess the performance of the parties in their execution of a contract. The tribunal stated that the good faith and *pacta sunt servanda* principles are 'the basis of every contractual relation, as recognized by international trade usages and international law'.⁶¹

Besides the similarities in the use of the good faith principle, the risks associated with an abusive use are common to both contractual and treaty regimes: i.e., the rewriting of an agreement against the common will of the parties. Authors have pointed out that commercial arbitrators are more inclined to do so in order to reach a commercially fair result.⁶²

⁵⁸ ICSID Tribunal, *Vigotop Limited v. Hungary*, Award, 1 October 2014, ICSID Case no. ARB/11/22, paras. 584–5.

⁵⁹ PCA, *Netherlands v. France*, Award, 12 March 2004, *PCA Award Series no. 4* (T.M.C. Asser Press, 2008), 43, para. 65.

⁶⁰ UNIDROIT Principles, Art. 4.8(2)(c): '[s]upplying an omitted term: Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to . . . c) good faith and fair dealing'.

⁶¹ B. Oppetit, 'L'arbitrage et contrats d'état, l'arbitrage *framatome* et autres c/ Atomic Energy Organization of Iran', *Journal du droit international*, 111 (1984), 40.

⁶² Karton, 'The Arbitral Role in Contractual Interpretation' (2015), 5; O. Lando, 'The *Lex Mercatoria* in International Commercial Arbitration', *International & Comparative Law Quarterly*, 34 (1985), 750.

56.3.2.2 The *Effet Utile* and *Contra Proferentem* Principles

The *effet utile* principle can be brought into play to adjust – without altering – the result of a restrictive interpretation.⁶³ In international commercial arbitration, the *effet utile* principle is applied by reference to the maxim *ut res magis valeat quam pereat*.⁶⁴ It has also been classified as a guiding principle to contractual interpretation in the *lex mercatoria* framework.⁶⁵

For investment tribunals, the *effet utile* principle serves a similar purpose as in contract interpretation:⁶⁶ '[i]t is a cardinal rule of the interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless[. It] does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible'.⁶⁷

The *Urbaser* tribunal in adjudicating a state counterclaim recalled the importance of this principle in international law. The tribunal stated:

Interpretation must serve the goal of providing provisions with a meaning. As stated in the Decision on Jurisdiction (para. 52), when considering the purpose either of the BIT as a whole or of a particular provision, the Tribunal has to give such purpose an understanding that comports with the equally important principle of effectiveness (or principle of *effet utile*). Any treaty rule is to be interpreted in respect of its purpose as a rule with an effective meaning rather than as a rule having no meaning and effect. This principle is one of the main features of the law of treaties and a standard of continuous application for ICSID Tribunals. It is given effect within Article 31(1) of the Vienna Convention by virtue of the requirement to interpret in good faith. Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effect.⁶⁸

In contrast to the VCLT, the UNIDROIT Principles dedicate a provision to the *effet utile* principle in the chapter on interpretation. Article 4.5 provides: '[c]ontract terms

⁶³ Yaseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités' (1976), 72 ('Il est surtout invoqué contre la partie qui réclame une interprétation restrictive. Il peut ainsi être considéré comme une garantie contre une interprétation restrictive sans toutefois justifier une interprétation extensive.').

⁶⁴ 'So that the matter may flourish rather than perish.'

⁶⁵ M. Mustill, 'The New *Lex Mercatoria*: The First Twenty-Five Years', *Arbitration International*, 4 (1988), 114.

⁶⁶ L. Boisson de Chazournes, 'Rules of Interpretation and Investment Arbitration – *CEMEX v. Venezuela*, ICSID Case no. ARB/08/15', in M. Kinnear *et al.* (eds.), *Building International Investment Law – the First 50 Years of ICSID* (Kluwer, 2015), 13.

⁶⁷ ICSID Tribunal, *CEMEX v. Venezuela*, ICSID Case no. ARB/08/15, para. 107; *Ad Hoc* Tribunal, *Eureko B.V. v. Republic of Poland*, Partial Award (by Majority), 19 August 2005, para. 248; See also ICSID Tribunal, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, Decision on Preliminary Objections, 27 July 2006, ICSID Case no. ARB/03/13, para. 132; ICSID Tribunal, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, Decision on Jurisdiction, 29 November 2004, ICSID Case no. ARB/02/13, para. 95.

⁶⁸ ICSID Tribunal, *Urbaser S.A., Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Award, 8 December 2016, ICSID Case no. ARB/07/26, para. 1190.

shall be interpreted so as to give effect to all terms rather than to deprive some of them of effect'.⁶⁹

An ICC tribunal tasked with finding the meaning of a provision inserted in an international commercial contract stated that 'the principle of effectiveness is a principle for the interpretation of international contracts which embodies a universal truth: it requires that when two different interpretations of the terms of a contract are possible, the interpretation to be preferred is that which gives some effect to these terms'.⁷⁰

Going a step further than the VCLT, Article 4.6 of the UNIDROIT Principles provides an additional interpretive tool, namely the *contra proferentem* rule. It holds that '[i]f contract terms supplied by one party are unclear, an interpretation against that party is preferred'. The application of the principle allows an interpretation of a provision against the party that included the said provision if it can be interpreted in more than one way. It presumes that the party drafting the provision of a treaty or a contract is better positioned to draft the term clearly and bears the burden of its ambiguity.

An ICC tribunal faced with the ambiguity of a term used in nine different contracts applicable between a state and a private party overcame the ambiguity of the expressions 'natural justice' and 'laws of natural justice' contained in the choice-of-law provision of the contracts by confirming that it was a general principle of interpretation commonly used by international tribunals.⁷¹

Unless the claimant based their claim on a contract with a state, the *contra proferentem* interpretive rule is of limited use in international investment arbitration as the parties to the BIT are not the same as the parties to the investment proceedings. Thus, there is no reason to place the burden of an ambiguous BIT provision on the respondent state.

Because the principles involve an exercise of gap-filling authority, international courts and tribunals are very cautious in the application of these interpretative principles. This is, for example, the case when there is a need to ascertain the terms of states' unilateral declarations and reservations to treaties. In the *Fisheries Jurisdiction* case, the ICJ set the limits to the application of the effectiveness and *contra proferentem* principles depending on the nature of the instrument subject to interpretation and declared:

The *contra proferentem* rule may have a role to play in the interpretation of contractual provisions. However, it follows from the foregoing analysis that the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute. The Court was addressed by both Parties on the principle of

⁶⁹ UNIDROIT Principles, Art. 4.5.

⁷⁰ ICC Tribunal, 1993, ICC Case no. 7920, J.-J. Arnaldez *et al.* (eds.), *Collection of ICC Arbitral Awards 1996-2000* (Kluwer, 2003), vol. II, 228.

⁷¹ ICC Case no. 7710, *Journal du droit international*, 4 (2001), 1152: '[c]'est un principe général d'interprétation largement accepté par les systèmes juridiques nationaux et par la pratique des tribunaux internationaux, y compris les tribunaux CCI, qu'en cas de doute ou d'ambiguïté, les dispositions, termes ou clauses contractuelles doivent être interprétés à l'encontre de la partie qui les a rédigées'.

effectiveness. Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State.⁷²

When the chosen method of interpretation does not resolve the ambiguity of a term, adjudicators are allowed recourse to an extrinsic approach. Although the VCLT and the UNIDROIT Principles do not have the same approach to extrinsic evidence, they respond to a similar rationale: extrinsic evidence and ‘supplementary means of interpretation’ enter into play only after direct evidence of a common intention and aids to interpretation have been exhausted.

56.3.3 *Recourse to Extrinsic Evidence in Contract and Treaty Interpretation*

Common law jurisdictions are said to be more restrictive than civil law jurisdictions when it comes to using external evidence to determine the true meaning of a term. In many common law jurisdictions, the remaining ambiguity in the text is a prerequisite to recourse to extrinsic evidence. Under many legal systems, the use of extrinsic evidence as an interpretive tool appears problematic because it reflects the most subjective intent of the parties. ‘There can be no doubt that . . . a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations – or to modify a contract – unless that right is conferred upon it by law, or by the express consent of the parties.’⁷³

Article 32 of the VCLT allows international tribunals to use ‘supplementary means of interpretation’ only when a term is left ‘ambiguous or obscure’ when the result is ‘manifestly absurd and unreasonable’ or simply to confirm the result reached by the application of Article 31. In those cases only, ‘[r]ecourse may be had to . . . the preparatory work of the treaty and the circumstances of its conclusion’. This exclusionary rule requires – like some common law jurisdictions – that the interpretation aids of Article 32 shall be applied *after* Article 31.⁷⁴

⁷² ICJ, *Fisheries Jurisdiction Case*, 4 December 1998, *ICJ Reports* (1998), 432, para. 51–2: ‘[t]he *contra proferentem* rule may have a role to play in the interpretation of contractual provisions. However, it follows from the foregoing analysis that the rule has no role to play in this case in interpreting the reservation contained in the unilateral declaration made by Canada under Article 36, paragraph 2, of the Statute. The Court was addressed by both Parties on the principle of effectiveness. Certainly, this principle has an important role in the law of treaties and in the jurisprudence of this Court; however, what is required in the first place for a reservation to a declaration made under Article 36, paragraph 2, of the Statute, is that it should be interpreted in a manner compatible with the effect sought by the reserving State’.

⁷³ *Ad Hoc Tribunal, Kuwait v. The American Independent Oil Company (AMINOIL)*, Award, 24 March 1982, *International Legal Materials*, 21 (1982), 976, 1015.

⁷⁴ P. Reuter, *Introduction to the Law of Treaties* (Routledge, 1995), 97 (‘It is from these elements [Article 31], since they primarily incorporate the parties’ intention, that the meaning of the treaty should normally be derived. Recourse to supplementary means of interpretation (article 32). . . is only admissible at a later stage, either to confirm the results of the interpretation or to avoid reaching ambiguous or manifestly absurd or unreasonable results on the sole basis of the primary

The premature use of supplementary means of interpretation may cause disagreement among arbitrators. In the *Eurotunnel Arbitration*, the arbitral tribunal agreed to use the preliminary negotiations because both parties relied on them. In so doing, the tribunal recalled the importance of the supplementary function of Article 32 and declared:

As to the drafting history of the Concession Agreement, there is no coherent record of the negotiations, but all Parties referred for their own purposes to correspondence and other records of the negotiations, and the Tribunal considers that they may be referred to, with due caution, by analogy with *travaux préparatoires* under Article 32 of the Vienna Convention, and for the purposes there set out.⁷⁵

The UNIDROIT Principles do not provide a list of extrinsic evidence with a supplementary function, and a lot rests upon the law designated by the parties to their commercial contract. In the above-mentioned *Railway Land Arbitration* case, the tribunal said in this respect that, compared to contract interpretation, 'treaty interpretation would actually be more generous about the extraneous materials that can be brought into account'.⁷⁶

Interpretations of contracts and treaties alike face the same risks and 'contingencies' associated with the use of extrinsic evidence because they may alter the true meaning of a term and result in a rewriting of the agreement. Until the parties reach an agreement by contract or by treaties, they are in a bargaining position that is hardly reflective of a *common* intent. In fact, some common law jurisdictions exclude prior negotiations,⁷⁷ which is 'in marked contrast to international law where the *travaux préparatoires* of a treaty are a well-recognized aid to interpretation'.⁷⁸ An ICC tribunal has said in this regard that:

[P]reliminary negotiations can only be taken into account as part of the surrounding circumstances in which the contracts were made. The wisdom of this rule is exemplified in the present case since the negotiations show the position of the parties changing and each trying to obtain the best bargain from its own point of view.⁷⁹

In international law, several authors have warned against the abusive use of Article 32, recalling that 'failure to apply the rules of interpretation properly may distort the resulting elucidation of the agreement made by the parties and do them an injustice by retroactively changing the legal regime under which they had arranged and managed their affairs. . . There are especially compelling reasons for a primary emphasis on

elements.'). See also ICJ, *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Reports (1994), para. 41.

⁷⁵ PCA, *The Eurotunnel Arbitration*, PCA Case no. 2003-06, 22, para. 94.

⁷⁶ PCA, *Railway Land Arbitration*, PCA Case no. 2012-01, 14, para. 43.

⁷⁷ Karton, 'The Arbitral Role in Contractual Interpretation' (2015), 26.

⁷⁸ ICSID Tribunal, *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Republic of Azerbaijan*, Award, 8 September 2009, ICSID Case No. ARB/06/15, para. 63.

⁷⁹ ICC Case no. 4975, S. Jarvin *et al.* (eds.), *Collection of ICC Arbitral Awards 1986-1990* (Kluwer, 1994), vol. II, 171.

a text-methodology as the proper legal mode of treaty interpretation'.⁸⁰ Investment tribunals' use of Article 32 has occasionally been inappropriate, and this has prompted a re-emphasis that Article 32 is only a *supplementary* means of interpretation and does not serve the same function as *subsidiary* sources of international law listed in Article 38(c) of the ICJ Statute.⁸¹

From a methodological point of view, international arbitral practice is to act in accordance with the letter of the treaty or international contract, taking into account the limits ascribed to the nature of the agreement subject to interpretation.

However, the binding nature of the interpretation rules, such as those contained in the VCLT, is not a pledge to uniform outcomes of interpretation. Tailor-made tools for international contracts (UNIDROIT Principles) and treaties (VCLT) give a mask of objectivity to legal interpretation.⁸² However, in reality, there are divergences in interpretative techniques because unified or codified sets of interpretive principles cannot guarantee a uniform outcome. In both fields, 'the interpretive process cannot be reduced to a mere application of legal rules or principles; it is to a great extent a matter of the arbitrator's experience or skilled intuition. This intuition will necessarily be influenced by the arbitrator's legal, cultural and commercial background'.⁸³

Arbitral decisions may further illustrate diverging approaches to adjudication,⁸⁴ and legal interpretation then turns from an issue of methodology into one of arbitral power and function.

56.4 Legal Interpretation: A Means to an End?

The interpretation of arbitration rules⁸⁵ as part of the *competence-competence* principle constitutes another aspect in the interpretive mission assigned to international commercial and investment tribunals that has undergone significant development in the past few decades. Situated at the crossroads of the consensual nature of arbitration and the judicial function of arbitral tribunals, this third component⁸⁶ of legal interpretation in international arbitration indirectly affects the interpretation of contracts and treaties. As will be shown, legal interpretation of arbitration rules has offset the perception that '[t]he consensual nature (or basis) of international adjudication has often overshadowed the

⁸⁰ ARSANJANI AND REISMAN, *INTERPRETING TREATIES FOR THE BENEFIT OF THIRD PARTIES* (2010), 601.

⁸¹ M. M. Mbengue, 'Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)', *ICSID Review*, 31 (2016), 398.

⁸² F. Latty, 'Les techniques interprétatives du CIRDI', *Revue générale de droit international public*, 115 (2011), 471.

⁸³ Rosengren, 'Contract Interpretation in International Arbitration' (2013), 5.

⁸⁴ ICSID Tribunal, *Burlington v. Ecuador*, ICSID Case no. ARB/08/5.

⁸⁵ Such as the ICC Rules, the UNCITRAL Rules, the ICSID Convention and the Rules of Procedure for Arbitration Proceedings.

⁸⁶ The two other components in the arbitral context are the interpretation of the agreement (contract or treaty) and the interpretation of the arbitral agreement.

autonomy of the international judicial function'.⁸⁷ Through this means, arbitral interpretation has offered interpretation beyond the parties' interests (section 56.4.1) and international arbitral tribunals have expanded their incidental jurisdiction (section 56.4.2).

56.4.1 *The Function of Interpretation Beyond the Parties' Interests*

It is well known that the task of interpretation is not an exact science, especially when the case at hand involves public and political issues. The focus and attention that the parties dedicate to the appointment of arbitrators confirm that legal interpretation is not only about law as an exact science. Interestingly, in the agreement leading to the *Eurotunnel Arbitration*, the parties agreed to exclude their appointed arbitrator from any decision involving issues of interpretation. The provision reads as follows:

The arbitral tribunal shall be constituted for each case in the following manner: ... (f) In any case to which the Concessionaires are parties they shall be entitled to appoint two additional arbitrators. The two arbitrators appointed by the Governments shall appoint the chairman of the tribunal by agreement with the two arbitrators appointed by the Concessionaires. In default of agreement within the time limit specified in subparagraph (b), the chairman shall be appointed in accordance with the procedure prescribed in sub-paragraphs (c), (d) and (e) of this paragraph. *The arbitrators appointed by the Concessionaires shall not participate in that part of any decision relating to the interpretation or application of the Treaty.*⁸⁸

The potential reproach of subjectivity from the parties has fostered abundant references in arbitral awards to the rules of interpretation contained in the VCLT. Such references give a mask of objectivity and serve for some as something of a 'cosmetic function'.⁸⁹ This said, legal interpretation, especially in the investment field, serves other functions.

For instance, taking into account the object and purpose of a treaty, investment tribunals have opted for a balanced approach to treaty interpretation, recalling that the 'power of interpretation' was stemming from the ICSID Convention:

In exercising our powers under the ICSID Convention, we are bound to interpret the provisions of that Convention and the Netherlands-Paraguay BIT. In carrying out that task we will, in accordance with established practice, be guided by the principles of interpretation that are set forth in Articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties. These provisions are now broadly recognized to reflect general international law. The principles set forth by these provisions point to a balanced approach to interpretation, one that, in the case of

⁸⁷ L. Boisson de Chazournes, 'The Principle of *Compétence de la Compétence* in International Adjudication and its Role in an Era of Multiplication of Courts and Tribunals', in M. Arsanjani *et al.* (eds.), *Looking to the Future: Essays in Honour of W. Michael Reisman* (Martinus Nijhoff, 2010), 1028.

⁸⁸ PCA, *The Eurotunnel Arbitration*, PCA Case no. 2003-06, 22, para. 76.

⁸⁹ Latty, 'Les Techniques Interprétatives du CIRDI' (2011), 471.

investment treaties governed by a BIT such as the Netherlands-Paraguay BIT, recognises the equally legitimate interests of the State and of the investor.⁹⁰

Investment tribunals have also used legal interpretation to temper certain types of results going against the general purpose of the investment dispute system as a whole:

The Tribunal wishes to point out that the consequence of an automatic and wholesale elevation of any and all contract claims into treaty claims risks undermining the distinction between national legal orders and international law. In the Tribunal's view, this is not a result that is in line with the general purpose of the ICSID/BIT mechanism for the international protection of foreign investments.⁹¹

Alternatively, to avoid negative repercussions over the investment community and its actors, tribunals have refused to exercise jurisdiction over fraudulent investments made in violation of domestic law:

The Tribunal agrees with El Salvador and notes that an interpretation of the Agreement that would afford protection to investments made fraudulently would have enormous repercussions for those States which signed agreements for reciprocal protection of investments and included the clause 'in accordance with law,' in order to exclude from the protection of said treaties the investments not made in accordance with the laws and other norms of the State that receives the investment.⁹²

At first blush, international commercial arbitration is not concerned with the same interests as those behind investor-state arbitration. It should be stressed, however, that the adoption of uniform instruments, such as the UNIDROIT Principles and *lex mercatoria*, inevitably brings to light the interests of a commercial community. Moreover, investment disputes have made their way into other arbitration forums with a commercial nature that are nonetheless competent to adjudicate such disputes. In this context, how might an arbitral tribunal interpret an international agreement involving public concerns? Of course, this largely depends on the arbitration agreement, but the arbitration rules may have a say as well.

56.4.2 *Incidental Jurisdiction and Legal Interpretation*

Under many arbitration rules, arbitrators retain broad discretion and latitude in the conduct of a dispute. In addition to being the judge of their competence, tribunals 'determine the admissibility, relevance, materiality and weight of any evidence';⁹³ they shall 'decide any question that is not covered by the arbitration rules'⁹⁴ or 'may

⁹⁰ ICSID Tribunal, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. The Republic of Paraguay*, Decision on Jurisdiction, 29 May 2008, ICSID Case no. ARB/07/9, para. 59.

⁹¹ ICSID Tribunal, *Gustav F W Hamester GMBH & Co KG v. Republic of Ghana*, Award, 18 June 2010, ICSID Case no. ARB 07/24, para. 349.

⁹² ICSID Tribunal, *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, Award, 2 August 2006, ICSID Case no. ARB/03/26, para. 250.

⁹³ Article 25(6) 1976 UNCITRAL Rules. ⁹⁴ Article 44 ICSID Convention.

adopt such procedural measures as [they consider] appropriate, provided that they are not contrary to any agreement of the parties'.⁹⁵

In arbitration in general, the designation of a specific set of rules or an arbitration centre is a manifestation to be bound by rules specific to each international arbitration institution (ICSID, ICC, London Court of International Arbitration (LCIA)). The choice of an arbitral forum, therefore, lies not exclusively in the parties' wish to escape the jurisdiction of domestic courts but more so in their desire to opt for a tailored way of resolving their dispute. For instance, the parties may prefer confidentiality over transparency. The rules governing arbitral disputes, therefore, supplement the parties' initial consent and provide solutions for issues arising during the conduct of a proceeding that the parties did not anticipate in their agreement. Such is the case with the category of incidental claims such as consolidation, *amicus curiae* and counterclaims, the success of which is contingent on the interpretation of the arbitration rules and/or convention by the tribunal. An international tribunal's interpretation of its own competence has prompted further changes in the conduct of international proceedings,⁹⁶ and the cross-fertilization between international commercial and investment tribunals with regard to incidental claims should not be underestimated.

It is now beyond question that civil society and non-state actors want to have a say when a dispute involves public interests. Until 2010, however, ICSID Convention Arbitration Rules (ICSID Rules), UNCITRAL Rules, and ICC Rules required the consent of both parties to allow the 'public' to submit or access hearings. In the investment field, the *Methanex* award⁹⁷ paved the way for third parties' submissions. The interpretation of arbitration rules offered by that UNCITRAL tribunal has helped greater transparency permeate the investment realm,⁹⁸ and, ever since, the role of transparency in international arbitration has benefitted from something of a 'snowball effect'. One aspect of this effect is the 2006 amendment of Rule 37(2) of the ICSID Rules that enabled greater public participation in the proceedings by requiring tribunals to consider third-party requests to file *amicus* briefs. What was

⁹⁵ Article 22(2) ICC Rules.

⁹⁶ For instance, the introduction of Art. 80 to the Rules of the ICJ, which serves to allow counterclaims, was an adaptation of the interstate adjudication practice before the ICJ as counterclaims were not previously permitted under the ICJ Statute.

⁹⁷ Arbitral Tribunal established under NAFTA Chapter 11/UNCITRAL Rules, *Methanex Corp. v. United States of America*, Decision on Petition from Third Persons to Intervene as *Amici Curiae*, 15 January 2001, paras. 24–5: '[i]n the Tribunal's view, there is nothing in either the UNCITRAL Arbitrations Rules or Chapter 11 . . . that either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power. It follows that the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers. In the Tribunal's view, the Petitioners' requests must be considered against Article 15 (1) of the UNCITRAL Arbitration Rules'.

⁹⁸ L. Boisson de Chazournes and R. Baruti, 'Transparency in Investor-State Arbitration: An Incremental Approach', *Bahrain Chamber for Dispute Resolution International Arbitration Review*, 2 (2015), 59, available at <https://archive-ouverte.unige.ch/unige:73723> (last accessed 2 December 2019).

then subjected to both parties' consent is transferred today to the tribunal's powers under the arbitration rules.

Similarly, in 2013, the UNCITRAL Rules were amended by the insertion of a new Article 1(4), which expressly incorporates the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration, 1 April 2014 (UNCITRAL Rules on Transparency).⁹⁹ The amendment indicates to users that the UNCITRAL Rules now include the UNCITRAL Rules on Transparency that will apply automatically to treaty-based investor-state arbitrations pursuant to a treaty concluded on or after 1 April 2014, unless the parties to the treaty have expressly 'opted out'.¹⁰⁰ Articles 4 and 5 of the UNCITRAL Rules on Transparency allow *amicus curiae* submissions, as well as non-disputing party submissions.¹⁰¹ The UNCITRAL Rules on Transparency can also apply to other investor-state arbitration forums dealing with treaty-based arbitration (such as ICSID, LCIA).¹⁰²

The role of transparency in investment arbitration has also influenced the field of international commercial arbitration. The traditional predominance of confidentiality has been tempered with the introduction of exceptions aimed at rendering the arbitral process less obscure to the public. Publications of abstracts and information about cases are more common. When revising its procedural rules in 2012, the ICC did not formally recognize the principle of confidentiality. Therefore, nothing excludes the possibility that an ICC tribunal could accept *amicus curiae* submissions using an extensive interpretation of Article 19.¹⁰³ The interpretation of arbitration rules also appears to have influenced the admissibility of counterclaims.¹⁰⁴

In the alternative, investment arbitration could benefit from the perspective of commercial arbitration. Indeed, contrary to interstate arbitration and commercial arbitration, counterclaims have appeared problematic in treaty-based arbitration and led to diverging approaches. Reisman's dissenting opinion in the *Spyridon*

⁹⁹ UNCITRAL Rules (2013), Art. 1(4) ('For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency"), subject to article 1 of the Rules on Transparency.')

¹⁰⁰ UNCITRAL Rules on Transparency, Art. 1(1) ('The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty") concluded on or after 1 April 2014 unless the Parties to the treaty have agreed otherwise' (note omitted)).

¹⁰¹ UNCITRAL Rules on Transparency, Art. 5(2).

¹⁰² UNCITRAL Rules on Transparency, Art. 1(9). *See also* the Mauritius Convention on Transparency in which parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency.

¹⁰³ Article 19 of the ICC Rules reads as follows: '[t]he proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration'.

¹⁰⁴ The majority of arbitral rule systems, including the ICSID Convention recognize the defendant's right to submit a counterclaim: for example, ICSID, ICC, LCIA, Stockholm Chamber of Commerce, PCA, UNCITRAL.

*Roussalis*¹⁰⁵ case is illustrative of the tension between the scope of the parties' agreement and arbitrators' judicial powers stemming from the governing arbitration rules.

Departing from the dominant and overly restrictive interpretation of the criteria of consent and *connexité*,¹⁰⁶ the ICSID tribunal in *Urbaser v. Argentina* offered another vision of Article 46 ICSID Convention, resting on an interpretation favouring a balance between the rights at stake:

The legal connection is also established to the extent the Counterclaim is not alleged as a matter based on domestic law only. Respondent argues indeed that Claimants' failure to provide the necessary investments caused a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT. It would be wholly inconsistent to rule on Claimants' claim in relation to their investment in one sense and to have a separate proceeding where compliance with the commitment for funding may be ruled upon in a different way. Reasonable administration of justice cannot tolerate such a potential inconsistent outcome.¹⁰⁷

Commercial arbitration may be seen as an influencing practice that has helped overcome difficulties associated with the admissibility of counterclaims in investment arbitration. Indeed, commercial tribunals have exercised jurisdiction over counterclaims even when the ICC Rules have not provided for a specific provision.¹⁰⁸ Quite different from the interpretation offered by some investment tribunals, international commercial arbitration has opted for an all-embracing jurisdiction as long as the arbitration agreement is broad enough to encompass claims related to the primary claim.¹⁰⁹ It can be argued that in the future, arbitrators may also analyse the admissibility of the counterclaim through the lens of the principle of equality of the parties, only recently conceptualized in investment arbitration.¹¹⁰

¹⁰⁵ ICSID Tribunal, *Spyridon Roussalis v. Romania*, Award, W. M. Reisman's Declaration, 7 December 2011, ICSID Case no. ARB/06/1.

¹⁰⁶ Arbitral Tribunal established under Art. 8 of the Agreement on Encouragement and Reciprocal Protection of Investments between The Netherlands and the Czech and Slovak Federal Republic/UNCITRAL Rules, *Saluka Investments BV v. The Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim, 7 May 2004; Arbitral Tribunal established under Art. 6 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Russian Federation and Mongolia/UNCITRAL Rules, *Sergei Paushok et al. v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 694.

¹⁰⁷ ICSID Tribunal, *Urbaser v. Argentina*, ICSID Case no. ARB/07/26, para. 1151.

¹⁰⁸ See for instance, ICC Case no. 12161, *Journal du droit international*, 134 (2007), 1270.

¹⁰⁹ See Art. 9 of the ICC Rules, which provides the possibility for respondents to raise a counterclaim on the basis of another arbitration agreement than the primary claim: '[s]ubject to the provisions of Articles 6(3)-6(7). . . , claims arising out of or in connection with more than one contract may be made in a single arbitration irrespective of whether such claims are made under one or more arbitration agreement under the Rules'.

¹¹⁰ See Institute of International Law, Resolution 'Equality of the Parties before International Investment Tribunals', adopted at the session of The Hague (31 August 2019).

The reference to counterclaims in international arbitration offers a helpful angle for concluding this chapter on treaty and contract interpretation. Indeed, whereas an investor may bring a treaty claim against a state, the state may base its counterclaim on a violation of a contract signed with the investor and/or a violation of domestic law. If successful, the counterclaim would include both a treaty and a contract for the arbitral tribunal to scrutinize. As a consequence, although the treaty and the contract constitute different causes of action, both sets of interpretative rules could find application to ensure a proper resolution of the dispute.