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Conflict of Treaty Norms and Subsequent Agreements in Relation to the Interpretation of Treaties in International Investment Law

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1 Introduction

There are several provisions in the Vienna Convention of the Law of Treaties (VCLT), reflecting customary law. Already in 1969, the VCLT was considered to be a partial codification of customary international law (CIL). Other rules of the VCLT constituted then developed into customary law.[1] Indeed, according to the commentaries to the VCLT the large majority of its provisions currently reflects custom.[2] As international investment law is a branch of international law based primarily on treaties[3] it is not surprising that the provisions of the VCLT and corresponding customary rules have been often interpreted and applied by investment

[1] DB Hollis, 'Introduction' in DB Hollis (ed), *The Oxford Guide to Treaties* (2nd edn, OUP 2020) 2; In general this phenomenon was identified by ICJ in North Sea Continental Shelf cases by stating that treaties 'may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them', *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3, 27, 29–30; see also, Conclusion 11 of ILC, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10, reproduced in [2018/II – Part Two] YBILC 122.

[2] According to the authors of the commentary prepared under edition of Oliver Dörr and Kirsten Schmalenbach at least following provision of the VCLT can be considered as of customary character: Art. 11–18, certain elements of Articles 19–34, certain elements 35, 38, certain elements of Arts 39–41, 43, 46–8, 51–2, 56–63, O Dörr & K Schmalenbach (eds), *Vienna Convention on the Law of Treaties A Commentary* (2nd edn, Springer 2018); a similar position is presented by Mark Villiger: 'Since 1969, States, courts and authors have increasingly relied on the Convention, even before its entry into force, as an authoritative guide to the customary law of treaties. All in all, there is a certain probability that the Convention rules are declaratory', ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 27; a similar position can be found in O Corten & P Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011).

[3] According to UNCTAD there are 2558 international investment agreements in force – UNCTAD, 'World Investment Report 2022' (9 June 2022) UN Doc UNCTAD/WIR/2022, 65;

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tribunals. Considering that the total number of investor-State dispute settlement (ISDS) cases had reached 1,190 by the end of 2021,[4] investment arbitration[5] has the potential to significantly influence the interpretation of the law of treaties, both in the rules contained in the VCLT as well as those confirmed by CIL.

The situation of parallel existence between treaty and customary rules demonstrates that it is not only a treaty's rules, but also the customary ones, that in practice can be, and in fact are, interpreted.[6] Furthermore, this scenario in particular proves that the content determination of customary rules can be, and is, accomplished through a different approach than the ascertainment of two classical elements of custom, that is, State practice and *opinio juris*.[7]

This chapter will focus on two issues discussed broadly by investment tribunals: rules on conflicts of treaty norms (Article 30 of the VCLT and corresponding CIL) and rules relating to subsequent agreements in relation to the interpretation of treaties (Article 31(3)(a) of the VCLT and corresponding CIL). Emphasis on these two examples of the interpretation of customary law in investment arbitration seems to be particularly pertinent as, in these two areas, tribunal's decisions seem to diverge from the approach, as reflected in the works of the International Law Commission (ILC), traditionally taken in general international law. Why do investment tribunals deviate from agreed understanding of rules on conflicts of norms? How they define the scope of these rules? And with respect to subsequent agreements, can they influence the CIL concerning the interpretation of treaties which envisage rights for individuals? These issues certainly call for a study on the matter.

The aim of this chapter is not to provide an extensive and exhaustive list of all such cases where the interpretation of the customary rules codified in Articles 30 and 31(3)(a) of the VCLT has occurred but rather to

nevertheless, custom remains an important source of international investment law – P Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (CUP 2016) 351–68.

[4] UNCTAD (n 3) 73.

[5] By investment arbitration this contribution understands arbitration to be governed under international investment agreements, that is, bilateral investment treaties, investment chapters in Free Trade Areas treaties and other agreement regulating rights both substantive and procedural rights of investors.

[6] P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration – Normative Shadows in Plato's Cave* (Brill 2015) 246.

[7] P Merkouris, *Interpretation of Customary International Law: of Methods and Limits* (Brill 2023).

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highlight some most interesting examples which demonstrate the general approach of investment tribunals to these norms.

2 Interpreting Rules on Conflicts of Treaty Norms in Investment Arbitration

The issue of resolving conflicts of norms originating from different legal acts is central to every legal order.[8] In international law it is regulated in Article 30 of the VCLT and corresponding CIL. From the perspective of international investment law, the main issue that has arisen in the interpretation of this legal norm relates to the material scope of the entirety of Article 30, ie the reference in the title and paragraph 1 of this provision to treaties 'relating to the same subject matter'.[9]

The jurisprudence of investment arbitral tribunals has mainly referred to Article 30 VCLT in cases concerning the relationship between intra-EU investment treaties, or the intra-EU application of the Energy Charter Treaty[10] in relation to the Treaty on the Functioning of the European Union[11] (TFEU, or its predecessor – the Treaty Establishing the European Community[12]). In the former case, Article 30 of the VCLT was invoked by

[8] 'Conflict must be equated with breach. Hence, there is conflict of norms in case one norm breaches, has led or may lead to breach of another norm', J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP 2003) 489; similarly, see W Jenks, 'Conflict of Law-Making Treaties' (1953) 30 BYBIL 401; It is to be noted that in its report concerning fragmentation ILC proposed also broader definition of this term – ILC, 'Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalised by Martti Koskenniemi' (13 April 2006) UN Doc A/CN.4/L.682, 24.

[9] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Art 30(1).

[10] The Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95; this case law, due to the volume limitations of this contribution, will not be analysed here. However, it does not lead to different conclusions from the case law on intra-EU investment treaties. It is worth noting the key decisions in this area *Electrabel v Hungary* (Decision on Jurisdiction and Liability of 30 November 2012) ICSID Case No ARB/07/19 [4.176.]; *Sevilla Beheer & ors v Spain* (Decision on Jurisdiction, Liability and the Principles of Quantum of 11 Feb 2022) ICSID Case No ARB/16/27 [647]; *Masdar Solar v Spain* (Award of 16 May 2018) ICSID Case No ARB/14/1; *Vattenfall AB & ors v Germany* (Decision on the Achmea Issue of 31 August 2018) ICSID Case No ARB/12/12 [194], *Landesbank Baden–Würtemberg & ors v Spain* (Decision on the Intra-EU Jurisdictional Objection of 25 February 2019) ICSID Case No ARB/15/45 [178].

[11] Treaty on the Functioning of the European Union (adopted 13 December 2007, entered into force 1 December 2009) [2016] OJ C202/1.

[12] Treaty Establishing the European Community (adopted 25 March 1957, entry into force 1 January 1958) [1997] OJ C340/173.

the respondent, most often a Central-Eastern European State, as an argument emphasising the priority of the EU Treaties – subsequent treaties, over investment treaties – earlier treaties, ie dating back to the 1990s. At times, arbitral tribunals have also commented on the concept of the 'same subject matter' against the background of the applicability of Article 59 VCLT, which is also considered to reflect a customary rule, and then referred their conclusions to the applicability of Article 30 of the VCLT, even if they noticed differences between the purposes of these provisions.[13]

As the ILC indicated in its report on fragmentation, adopting a narrow interpretation of this formulation could result in a number of potential treaty conflicts not being covered at all by this provision.[14] The Commission emphasised that:

> If conflict were to exist only between rules that deal with the "same" subject-matter, then the way a treaty is applied would become crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes.[15]

The ILC, therefore, opted for a flexible approach to the formulation of 'same subject matter'. Support for this position can be found in the Commission's commentary to the 1966 Draft Articles on the Law of Treaties,[16] where the view was expressed that this formulation was intended to broadly cover cases of incompatibility between treaty norms. This issue has rarely been a subject of consideration by international courts and tribunals. Similar reasoning to the position of the ILC can be found in GATT/WTO decisions. In *EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil* the panel stated that on the basis of analysis of a single of provision of the Multifibre Arrangement (MFA), the Anti-Dumping Agreement and the MFA were treaties 'relating to the same subject-matter'.[17] In the

[13] 'While Article 30 is, therefore, focused on particular provisions, the question under Article 59 is whether the entire treaty should be terminated by reason of the adoption of a later treaty relating to the same subject-matter. The very fact that these situations are treated separately in the VCLT points to the need under Article 59 for a broader overlap between the earlier and later treaties than would be needed to trigger the application of Article 30', *Achmea (I) v Slovakia* (Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010) PCA Case No 2008–13 [240].

[14] ILC (n 8) [253].

[15] ibid [22].

[16] ILC, 'Draft Articles on the Law of Treaties with Commentaries' (4 May–19 July 1966) UN Doc A/CN.4/191, reproduced in [1966/II] YBILC 187, 214.

[17] WTO, *European Communities – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil – Report of the Panel* (4 July 1995) ADP/137 [540].

China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum the Appellate Body acknowledged that all multilateral trade agreements annexed to the Marrakesh Agreement relate to the same subject matter without detailed examination.[18]

Arbitration decisions, however, have adopted a narrower understanding of Article 30 VCLT and, consequently, of the customary norm that this provision codifies. As was stated by the *Eastern Sugar* Tribunal, '[w]hile it is true that European Union law deals with intra-EU cross border investment, say between the Netherlands and the Czech Republic, as does the BIT, the two regulations do not cover the same precise subject-matter'.[19] The Tribunal underlined *inter alia* the existence of fair and equitable standard,[20] as well as the possibility for an investor to sue the host-State directly, as grounds to reject the 'equivalence argument'.[21] This approach has been upheld in many subsequent arbitration awards relating to intra-EU bilateral investment treaties (BITs).[22] In *EURAM*, the Tribunal rejected the interpretation that the 'same subject matter' can be

[18] WTO, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, AB-2014–3, AB-2014–5, AB-2014–6 – Reports of the Appellate Body* (7 August 2014) WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R [5.53].

[19] *Eastern Sugar BV (Netherlands) v Czech Republic* (Partial Award of 27 March 2007) SCC Case No 88/2004 [160].

[20] ibid [164].

[21] ibid [180]; this argumentation related to lack of 'access to an international and neutral dispute resolution forum in the form of international arbitration' was emphasised, ie by tribunals in *JSW Solar & Wirtgen v Czech Republic* (Final Award of 11 October 2017) PCA Case No 2014–03 [253]; *Anglia v Czech Republic* (Final Award of 10 March 2017) SCC Case No 2014/181 [116]; *Busta v Czech Republic* (Final Award of 10 March 2017) SCC Case No 2015/01 [116]; *Strabag & ors v Poland* (Partial Award on Jurisdiction 4 March 2020) ICSID Case No ADHOC/15/1 [8.138].

[22] *Binder v Czech Republic* (Award on Jurisdiction of 6 June 2007) UNCITRAL [63–5]; *Oostergetel v Slovakia* (Decision on Jurisdiction 30 April 2010) UNCITRAL [72–9, 86–7, 104]; *Achmea (I)* [239–42, 245–63, 273–7]; *European American Investment Bank AG (Austria) v Slovakia* (Award on Jurisdiction of 22 October 2012) UNCITRAL, PCA Case No 2010–17 [155–85, 213–34, 268–78]; *A11Y v Czech Republic* (Decision on Jurisdiction 9 February 2017) ICSID Case No UNCT/15/1 [177]; *Anglia v Czech Republic* [113–16 & 126]; *Busta v Czech Republic* [113–16 & 126]; *JSW Solar & Wirtgen* [241, 259–61]; *GPF GP Sàrl v Poland* (Award on Jurisdiction (Not Public) of 15 February 2017) SCC Case No V 2014/168 – see P Treder & W Sadowski, 'Poland', in C Nagy (ed), *Investment Arbitration In Central And Eastern Europe* (Elgar 2019) 283–367; *Marfin v Cyprus* (Award of 26 July 2018) ICSID Case No ARB/13/27 [584–91]; *United Utilities (Tallinn) v Estonia* (Award of 21 June 2019) ICSID Case No ARB/14/24 [545–59]; *Juvel & Bithell v Poland* (Partial Final Award 26 February 2019) ICC Case No 19459/MHM [368–89]; *Magyar Farming v Hungary* (Award of 13 November 2019) ICSID Case No ARB/17/27; *Strabag* [8.129–139]; *Muszynianka v Slovakia* (Award 7 of October 2020) PCA Case No 2017–08 [231–8].

equated to being applicable to 'the same facts', or having 'the same goal'.[23] The decision then subsequently elaborated that '[t]he subject matter of a treaty, in the Tribunal's understanding, therefore differs both from the concrete situations in which it will be applicable and from its goal'.[24] For this Tribunal, the crucial argument was that prior to the Lisbon Treaty the EU had no competence in relation to direct investment.[25] A narrow interpretation was also presented by the *Strabag* Tribunal which 'under[stood] the precondition of "same subject matter" as requiring the subject matters of the two treaties in question to be "identical"'.[26] Again, a similar position was expressed by the *Juvel* Tribunal: '[t]wo different treaties may apply simultaneously to the same set of facts without them having the same subject-matter. Further, if two treaties have the same goal but approach the achievement of that goal from two different perspectives, the treaties do not have the same subject-matter'.[27] The negative position of these tribunals, towards the applicability of the conflict of norms provisions, was primarily related to the far-reaching consequences that States could derive from the arguments in this regard, ie lack of jurisdiction of those tribunals to examine the case.[28]

It is significant that in most of the aforementioned decisions, the arbitral tribunals did *de facto* interpret CIL, as the VCLT was inapplicable. In the overwhelming majority of these cases, tribunals seemed to be unaware of this legal situation, as evidenced by the awards, which clearly indicate that they were applying the VCLT. This issue typically did not explicitly appear in the proceedings, as usually both the respondents and claimants seemed to also presume that the VCLT did apply after all.[29] This was the

[23] *European American Investment Bank AG (Austria)* [168].

[24] ibid [171].

[25] ibid [183]. A similar position was presented by Austria in an amicus curiae: 'the EU treaties and the BIT "have different objectives and a different content" with the former aiming at establishing a monetary and economic union in the wider context of a political union, while the latter is a specific treaty aiming solely at the promotion and protection of investments' [125].

[26] *Strabag* [8.135].

[27] *Juvel* [380].

[28] 'More importantly, it is difficult to see how Article 30 could deprive the Tribunal of jurisdiction based upon the Parties' consent derived from Article 8 of the BIT (whether operating the first stage, second stage or both), even if there may be circumstances in which a true incompatibility between the BIT and EU law arises. Any such incompatibility would be a question of the effect of EU law as part of the applicable law and, as such, a matter for the merits and not jurisdiction', *Achmea (I)* [272].

[29] 'Respondent has been a State Party to the VCLT since 28 May 1993; and the Netherlands since 9 April 1985. While the VCLT does not apply retrospectively, it is widely regarded as

case in disputes against Slovakia or the Czech Republic brought on the basis of 1990 BIT with the UK[30] (*A11Y*, *Anglia*, *Busta*), the 1990 BIT with Germany[31] (*Binder*, *JSW Solar*), or the 1992 BIT with the Netherlands[32] (*Eastern Sugar*, *Oostergetel*, *Achmea*), as the Czech and Slovak Republics were only bound by the VCLT in 1993. The same issue related to the disputes against Poland (which acceded to the VCLT in 1990) on the basis of the 1988 BIT with Austria[33] (*Strabag*) and 1987 BIT with Belgium and Luxembourg[34] (*GPF*[35]).

Conversely, the only cognizant approach in this respect in the cases involving intra-EU BITs was applied by the tribunal in *EURAM* on the basis of the 1990 Czechoslovakia-Austria BIT.[36] Considering the argument of Slovakia that the VCLT was not applicable and that only the corresponding CIL, with respect to Articles 30 and 59 VCLT (but not Article 65), being applicable, the Tribunal referred to the exchange of diplomatic notes between the States concerned confirming the succession of the BIT in 1994. This assertion allowed it to recognise that the BIT was concluded in 1994.[37] It is to be noted that the approach formulated by the tribunals on the same subject matter issue, where they decide incognizantly on the

reflecting customary international law. Respondent has argued on the basis of the provisions of the VCLT, and neither Party has suggested that the rules set out in the provisions which it discusses are not applicable to the BIT', *Achmea (I)* [231].

[30] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments (UK & Czech Republic) (adopted 10 July 1990, entered into force 26 October 1992).

[31] Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic Concerning the Promotion and Reciprocal Protection of Investments (Germany & Czech Republic) (adopted 2 October 1990, entered into force 2 August 1992).

[32] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (Netherlands & Czech Republic) (adopted 29 April 1991, entered into force 1 October 1992).

[33] Agreement between the Polish People's Republic and Republic of Austria on Promotion and Protection of Investments (Austria & Poland) (adopted 24 November 1988, entered into force 1 November 1989, terminated 16 October 2019).

[34] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People's Republic for the Promotion and Reciprocal Protection of Investments (UK & Poland) (adopted 8 December 1987, entered into force 14 April 1988).

[35] *GPF GP Sàrl v Poland* (Final Award of 29 April 2020) SCC Case No 2014/168.

[36] Agreement between the Republic of Austria and the Czech and Slovak Federal Republic on the Promotion and Protection of Investments (Austria & Czech Republic) (adopted 15 October 1990, entered into force 1 October 1991).

[37] *European American Investment Bank AG (Austria)* [77–81]. The Tribunal also confirmed the customary character of the VCLT's provisions [316].

basis of CIL (such as *Eastern Sugar*, *Oostergetel*, *Binder*, or *Achmea (I)*), has been recognised and followed by arbitral tribunals directly adjudicating under the VCLT.[38]

When reaching the conclusion that the conflict of norms provisions do not apply as prerequisite of 'the same subject matter' is not fulfilled – arbitral tribunals most often did not offer any suggestions on how to solve the problem of a conflict of such norms. Initially, this approach was a consequence of not perceiving existence of such a conflict at all. Tribunals have also continued to maintain such a position after the judgment of the Court of Justice of the European Union (CJEU) in the *Achmea* case, despite the fact that the CJEU unequivocally confirmed the existence of such a conflict.[39] Regardless, it is noticeable that since this judgment, arguments concerning the different material scope of the treaties has been increasingly and more clearly evoked by tribunals.[40] Significantly, arbitral tribunals have pointed to the lack of ISDS in the EU Treaties as the main argument for the difference, while the CJEU explicitly stated that ISDS is contrary to the EU Treaties. A culmination of this legal reasoning was the 2019 ruling in *Magyar Farming Company v Hungary* in which the Tribunal, while noting that Article 30 VCLT was inapplicable due to the treaties' differing subject matter,[41] determined:

> [The] [t]ribunal is not aware of the existence of, provisions in the VCLT or of norms of customary international law that would govern the resolution of possible conflicts between successive treaties that do not share the same subject matter.[42]

In conclusion, the case law of arbitral tribunals makes it necessary to analyse Article 30 VCLT's 'same subject matter' formulae in more detail. As it turns out, an element of this provision, overlooked even in the commentaries to the Convention,[43] may be a key argument for rejecting application of this rule. This position, if comprehensively applied, could prevent

[38] See, for example, *Muszynianka v Slovakia*.

[39] Case C-284/16, Slowakische Republik *v* Achmea BV, Judgment of the Court (Grand Chamber) of 6 March 2018, EU:C:2018:158.

[40] *Marfin v Cyprus* [587–8, 595]; *United Utilities (Tallinn) v Estonia* [545–59]; *Strabag* [8.139].

[41] In this respect the approach was taken that Article 30 of the VCLT could be applied with respect to relation between BIT concerned and the treaty which would cover all provision of the BIT in similar fashion, see the logic presented in *Magyar Farming v Hungary* [232].

[42] *Magyar Farming v Hungary* [237]. Similarly, in *Muszynianka v Slovakia* [237]: 'The Parties have not invoked any principle or customary norm of international law that would govern a possible conflict between treaties that do not share the same subject matter'.

[43] Villiger (n 2).

any practical application of Article 30 VCLT and its corresponding CIL. Thus, from a systemic perspective, this line of interpretation should not be upheld,[44] as it is difficult to assert that this potential interpretation of CIL presented by the arbitral tribunal would be followed by States or other international court and tribunals. The fact that approach of investment arbitration was clearly linked with the defense of its own jurisdiction by the tribunals has created circular or, perhaps, opportunistic lines of argumentation. This position, however, has been poorly embedded in general international law, which leads to a conclusion that its significance outside the framework of international investment law is limited. An alternative position would be recognising that this line of interpretation has led to significant gaps in conflict of rules under general international law.[45]

3 Subsequent Agreements in Relation to the Interpretation of Treaties

The second point under scrutiny concerns the subsequent agreements in relation to the interpretation of treaties regulated by Articles 31 (3)(a) VCLT. This issue was recently elaborated by the ILC in its 2018 Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties.[46] Articles 31(3)(a) VCLT provide:

> 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.[47]

[44] EW Vierdag, 'The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions' (1988) 59 BYBIL 100; AA Ghouri, *Conflict of Treaties in Investment Arbitration* (Kluwer 2015) 166; ILC (n 8) 23, see also 117 & 254.

[45] Compare with '[i]t is doubtful, however, whether a narrow construction of the scope of article 30 is all that plausible to begin with. Such a conception finds no support in the drafting history of article 30 and, moreover, makes fairly little sense in any case. Surely, the drafters could not have intended to leave the important category of overlapping commitments in treaties relating to different subject matters completely out of the scope of the Vienna Convention, and merely to satisfy themselves with an article that would not even aspire to help resolve conflicts between overlapping commitments', J Klabbers, *Treaty Conflict and the European Union* (CUP 2010) 93.

[46] ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (30 April–1 June and 2 July–10 August 2018) UN Doc A/73/10.

[47] See ibid, Conclusion 4, which defines subsequent agreement and subsequent practice: '1. A subsequent agreement as an authentic means of interpretation under article 31, paragraph 3 (a), is an agreement between the parties, reached after the conclusion of a treaty, regarding the interpretation of the treaty or the application of its provisions'.

As has been stated by the ILC,[48] and previously by international courts,[49] tribunals,[50] and investment tribunals,[51] the abovementioned rules also apply under customary law. Thus, these norms regarding interpretation could also be the object of interpretation as customary rules.[52] Such an approach has been applied by the WTO, where Article 31(3)(c) VCLT was considered to be custom in the *Measures Affecting the Production and Sale of Clove Cigarettes* case.[53] Concerning the most-favoured nation (MFN) clause, the whole of Article 31 VLCT as a customary rule has also been scrutinised in investment arbitration jurisprudence.[54]

Already in 1966, the ILC had confirmed that the joint intention of parties, which underpins the conclusion of a treaty, has a particular authority when identifying the meaning of that treaty, even after its conclusion.[55] This was in line with the ICJ's jurisprudence.[56] Regarding the legal effects

[48] ILC (n 46) Conclusion 2.

[49] See, for example, *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [65]; *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Judgment) [2009] ICJ Rep 213 [47]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 [160].

[50] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) 2011 ITLOS Rep 10 [57]; *Award in Arbitration Regarding the Iron Rhine Railway Between the Kingdom of Belgium and the Kingdom of the Netherlands* (Decision of 24 May 2005) XXVII UNRIAA 35, 45.

[51] *National Grid plc v Argentina* (Decision on Jurisdiction of 20 June 2006) UNCITRAL [51]; *Canfor Corporation v USA* and *Tembec et al v USA* and *Terminal Forest Products Ltd v USA* (Order of the Consolidation Tribunal of 7 September 2005) UNCITRAL [59]; *Renco (I) v Peru* (Partial Award on Jurisdiction of 15 July 2016) ICSID Case No UNCT/13/1 [69]; *Venezuela US v Venezuela* (Interim Award on Jurisdiction of 26 July 2016) PCA Case No 2013–34 [49]; *Saluka Investments BV v Czech Republic* (Partial Award of 17 March 2006) UNCITRAL [296].

[52] P Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 ICLR 154–5.

[53] WTO, *United States – Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body* (4 April 2012) WT/DS406/AB/R [267]; similar approach with respect to Art 31(3)(c) was applied in WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel* (21 November 2006) WT/DS291R, WT/DS292R & WT/DS293R [7.68–7.72].

[54] N Piracha, *Toward Uniformly Accepted Principles for Interpreting MFN Clauses: Striking a Balance Between Sovereignty and the Protection of Investors* (Kluwer 2021) 183–255.

[55] ILC (n 16) 221–2; a similar position was taken by the ILC in its work on reservations: 'The interpretation resulting from an interpretative declaration made in respect of a bilateral treaty by a State or an international organization party to the treaty and accepted by the other party constitutes an authentic interpretation of that treaty', ILC, 'Guide to Practice on Reservations to Treaties' (26 April–3 June and 4 July–12 August 2011) UN Doc A/66/10, reproduced in [2011/II] YBILC 26 [1.6.3].

[56] *Ambatielos (Greece v UK)* (Preliminary Objection) [1952] ICJ Rep 28 [43 & 75].

of subsequent agreements, it is worth noting, first of all, Conclusion 7(1) adopted by the ILC, which states that

> Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.[57]

In the commentary to this provision, the Commission recognised, *inter alia*, the possibility for the parties to depart, by a subsequent agreement, from the ordinary meaning of the words of a treaty and to give them special meaning within the context of Article 31(4) VCLT. A departure from the ordinary meaning of words may be particularly justified if it is considered that the parties, in concluding the treaty, intentionally wished to give them an evolving meaning or content, by using general expressions, to take account of developments in international law.[58]

The ILC's interpretation of Article 31(3)(a)-(b) VCLT can be compared to the position of arbitral tribunals on declarations or joint interpretations formulated by the parties to the treaty. One of the most famous examples of a subsequent agreement in international investment law is the interpretative note by the North American Free Trade Agreement (NAFTA) Commission,[59] which narrowed the scope of Article 1105 NAFTA. In particular, the arbitral tribunal in *Pope & Talbot* v *Canada* stated that 'were the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter'.[60] However, the tribunal found that this issue was not relevant as, regardless of the legal qualification of the note, its previous decision was consistent with it.[61] In the *Methanex* case, by contrast, the arbitral tribunal cited Oppenheim's position according to which

[57] ILC (n 46) Conclusion 7(1).

[58] *Dispute regarding Navigational and Related Rights* [64].

[59] NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (*NAFTA FTC*, 31 July 2001) <https://2009-2017.state.gov/documents/organization/38790.pdf> accessed 30 July 2022.

[60] *Pope & Talbot Inc v Canada* (Award in Respect of Damages of 31 May 2002) UNCITRAL [47].

[61] ibid [56–64]. Other tribunals considered to be bound by the interpretative note: *ADF Group Inc v USA* (Award 9 January 2003) ICSID Case No ARB(AF)/00/1 [177]; *Waste Management v Mexico (Number 2)* (Award of 30 April 2004) ICSID Case No ARB(AF)/00/3 [91–3]; *Glamis Gold, Ltd v USA* (Award 8 June 2009) UNCITRAL [559].

authentic interpretation of the parties to the treaty 'overrides the ordinary principles of interpretation'.[62]

Besides the NAFTA Tribunal's approach, which was based on an explicit clause in NAFTA, the issue of joint interpretation as a subsequent agreement has featured significantly in disputes concerning intra-EU BITs and intra-EU applications of the ECT.[63] What is striking in the practice of tribunals in intra-EU disputes is that the readiness to accept any significance of such an interpretation is very limited, which differs from the position of the NAFTA tribunals. In the fundamental *Eskosol decision*, the Tribunal evaluated whether the *Declaration of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union of 22 EU-Member States* (EU Declaration)[64] was a subsequent agreement under Article 31(3)(a) VCLT.[65]

The Tribunal criticised the lack of detailed justification in the EU Declaration, although it did not explain its source for such a requirement.[66] It referred to the ILC's works, although, surprisingly, not to those related to subsequent agreements, but instead its work related to reservations.[67] Consequently, the Tribunal decided that the EU Declaration cannot be considered as a subsequent agreement as it does not refer to any particular provision of the ECT.[68] Following the judgment of Singapore

[62] *Methanex v USA* (Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005) UNCITRAL [23], citing R Jennings & A Watts (eds), *Oppenheim's International Law*, Vol 1 (9th edn, OUP 2008) 630.

[63] However, there were also other cases related to this issue – see, for example, *Canadian Cattlemen v USA* (Award on Jurisdiction of 28 January 2008) UNCITRAL [186–9]; *El Paso Energy International Company v Argentina* (Award of 31 October 2011) ICSID Case No ARB/03/15 [601–2]; *Telefónica SA v Argentina* (Decision of the Tribunal on Objections to Jurisdiction of 25 May 2006) ICSID Case No ARB/03/20 [111]; see also jurisprudence cited by K Magraw, 'Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties' (2015) 30 ICSID Rev 142, 161–6.

[64] EU Member States, 'Declaration of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union of 22 EU-Member States' (*European Commission*, 15 January 2019) <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 30 July 2022; Ł Kułaga, 'Implementing Achmea: The Quest for Fundamental Change in International Investment Law' (2019) 39 Polish YBInt'l Law 227, 227–50.

[65] *Eskosol v Italy* (Decision on Termination Request and Intra-EU Objection of 7 May 2019) ICSID Case No ARB/15/50.

[66] ibid [215–6].

[67] ibid [220 & 224].

[68] ibid [222].

Court of Appeal in the *Sanum* case,[69] the *Eskosol* Tribunal cited an excerpt from the 1966 Commentary of the Draft Articles on the Law of Treaties to assert that subsequent agreements are only intended to clarify the findings of the treaty negotiations.[70] This element requires closer inspection as it has been repeated on several occasions by arbitral tribunals interpreting Article 31(3)(a) VCLT.[71]

As a matter of fact, a broader citation of the ILC's commentary in this respect does not in any way prejudge the accuracy of this position but rather (contrary to the conclusions drawn by the arbitral tribunals) emphasises in particular the significant nature of the subsequent agreements.[72] Furthermore, it is worth noting another extract from this decision: 'VCLT Article 31(3)(a) is not, however, a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used'.[73] This interpretation was subsequently cited by arbitral tribunals as rationale of their position in this respect, even when evaluating different legal situations.[74] Thus, in the view of the Tribunal in *Eskosol*, a subsequent agreement 'may "corroborate" or "support an interpretation that has already been determined by other methods," such as "the objective elements listed in articles 31 and 32 of the Vienna Convention,"

[69] *Sanum Investments (I) v Laos* (Judgment of the Court of Appeal of Singapore of 29 September 2016) PCA Case No. 2013–13, [2016] SGCA 57 [77].

[70] 'As the ILC's 1966 Commentaries on the Draft VCLT Articles discuss regarding this provision, "[a] question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation"', *Eskosol v Italy* [222].

[71] Similarly, *Muszynianka v Slovakia* [203]; *Addiko Bank v Croatia* (Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis of 12 June 2020) ICSID Case No ARB/17/37 [289]; *GPF GP Sàrl v Poland* (Final Award) [352].

[72] 'A question of fact may sometimes arise as to whether an understanding reached during the negotiations concerning the meaning of a provision was or was not intended to constitute an agreed basis for its interpretation [134] But it is well settled that when an agreement as to the interpretation of a provision is established as having been reached before or at the time of the conclusion of the treaty, it is to be regarded as forming part of the treaty. Thus, in the Ambatielos case the Court said: "…the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty…". Similarly, an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation' ILC (n 16) 221.

[73] *Eskosol v Italy* [223].

[74] *Muszynianka v Slovakia* [223].

but it cannot override the application of those elements'.[75] Finally, when the rights of individuals are impacted purportedly on the basis of general principles of law or CIL, the *Eskosol* decision supports the need for limitations upon the interpretative influence of subsequent agreements.[76] This position had already been presented by the *Enron* tribunal; according to which, no new interpretation of an International Investment Agreement (IIA) can 'affect rights acquired under the Treaty by investors or other beneficiaries'.[77]

Following the *Eskosol* decision, this restrained approach to subsequent agreements concerning the EU question (or so-called intra-EU objection) has been presented by other tribunals. According to the *Addiko Bank* Tribunal, EU member States do not have the right to interpret the TFEU, as this competence has been entrusted exclusively to the Court of Justice of the EU.[78] The *Strabag* Tribunal stated that '[f]rom the text of Article 31(3) VCLT, it is evident that such "extrinsic" elements, while informative to the context of a treaty, cannot be used to rewrite the ordinary meaning of the text of the treaty under interpretation'.[79]

In *Muszynianka*, subsequent agreements relating to interpretation, although recognised as CIL,[80] were considered as 'merely one element' that '[is] not an exclusive and dispositive method of treaty interpretation'.[81] Thus, the influence of subsequent agreements upon interpretation could be ruled out when, in the opinion of tribunal, it explicitly flows from the ordinary meaning.[82] The *Muszynianka* decision is extraordinary in this context as it totally ignored the bilateral declaration of the BIT's State Parties, which the Tribunal justified by the fact the declaration was linked to the EU Declaration. Analysis of the latter was sufficient according to the tribunal.[83]

[75] *Eskosol v Italy* [224]; similarly, *GPF GP Sàrl v Poland* [354].

[76] '[I]t would be inconsistent with general notions of acquired rights under international law to permit States effectively to non-suit an investor part-way through a pending case, simply by issuing a joint document purporting to interpret longstanding treaty text so as to undermine the tribunal's jurisdiction to proceed', *Eskosol v Italy* [226]; similarly, *Addiko Bank v Croatia* [290].

[77] *Enron v Argentina* (Award of 22 May 2007) ICSID Case No ARB/01/3 [33]; similarly, *Sempra Energy v Argentina* (Award of 28 September 2007) ICSID Case No ARB/02/16 [385–6]. See also, Opinion 1/17 *Accord ECG UE-Canada* [2019] ECLI:EU:C:2019:341 [236]; *Sanum (I) v Laos* [116].

[78] *Addiko Bank v Croatia* [286].

[79] *Strabag* [8.125].

[80] *Muszynianka v Slovakia* [225].

[81] ibid [222].

[82] ibid [223].

[83] *Muszynianka v Slovakia* [225].

With regard to the relationship between the rights of individuals and interpretation on the basis of Articles 31 (3)(a) VCLT, the Tribunal in *Green Power* noted that the competence of States in this respect can induce inequality between parties of an arbitral proceeding, as one of them could change – with retroactive effect – the text of the ECT. Nevertheless, in this monumental decision, the Tribunal acknowledged that no such situation arises with respect to the EU Declaration in the context of the relationship between ECT and the EU law.[84] Thus, what was crucial for the *Green Power* Tribunal was the interpretations made by the respondent and the investor's home-State, and not that this interpretation was not confirmed by all the parties of both applicable multilateral treaties.[85] Furthermore, the Tribunal, on one hand, seemed to support the position that subsequent agreements could not be applied retroactively if they related to the rights of individuals, but, on the other hand, stated that 'Spain's offer to arbitrate under the ECT is not applicable in intra-EU relations' without indicating any concrete moment in time when this offer's non-applicability took effect.[86]

As in the case of Article 30 VCLT – investment arbitration, in several cases, has interpreted Articles 31 (3)(a) VCLT and its customary counterpart. At least in one case (*Strabag*), only CIL was the subject of interpretation, as the VCLT was not applicable in the case. In this context it is to be noted that investment arbitration informs possible interpretations of Articles 31 (3)(a) in at least two areas – retroactive application and, connected with it, the impact on the rights of individuals.[87] Thus, although

[84] *Green Power Partners & SCE Solar v Spain* (Award of 16 June 2022) SCC Case No V2016/13 [380].

[85] 'Yet, being non-binding instruments and not reflecting a consensus of all EU Member States – let alone, and more importantly, all ECT Contracting Parties – the EU Member States Declarations cannot change the clear terms of the ECT or guide the Tribunal in seeking a harmonious interpretation', *RENERGY v Spain* (Award of 6 May 2022) ICSID Case No ARB/14/18 [371]; similarly, *Sevilla Beheer & ors v Spain* [670].

[86] *Green Power Partners & SCE Solar v Spain* [445 & 461] – compare '[w]ith a view to the arguments of amendment, suspension, or regarding the alleged effects of the EU Member States Declarations, the Tribunal further adds and recalls that even if suspension or amendment was the argued effect of either the EU Member States Declarations or the Achmea and Komstroy Judgments, any such effect would come too late in this case to affect or invalidate the consent perfected by the Parties at the relevant time, ie the date of the Request', *RENERGY v Spain* [348].

[87] G Zarra, 'Uses and Abuses of Authentic Interpretations of International Investment Agreements: Reflections on the Role of Arbitral Tribunals as Masters of the Judicial Function' (*EJIL:Talk!*, 28 August 2020) <www.ejiltalk.org/uses-and-abuses-of-authentic-interpretations-of-international-investment-agreements-reflections-on-the-role-of-arbitral-tribunals-as-masters-of-the-judicial-function/> accessed 4 July 2022.

'the parties to a treaty own the treaty and can interpret it',[88] their freedom in respect to international investment law is met with significant scrutiny and reticence from the arbitral tribunals. In fact: '[t]he only situations in which tribunals have been bound to follow the interpretive directions of the state parties are where the relevant treaty goes beyond the general VCLT rules and specifically provides for joint interpretations to be binding'.[89]

Such an approach tends to look at IIAs not only as a transaction between the parties,[90] which have full discretion as to how to apply the mutually agreed upon provisions, but as an agreement which relates also to other beneficiaries. As Anthea Roberts puts it:

> Instead of privileging the rights and powers of states and state-to-state tribunals (as in the first era) or investors and investor-state tribunals (as in the second era), we should move into a third era based on the ideas that investment treaty rights are granted to investors and home states on an interdependent basis.[91]

The problem with this line of reasoning is twofold. First, under international law, the State parties have the principal competence in the interpretation of treaties. This is not in any way changed by the fact that the interpretation can have a positive influence on their position in a dispute. It is still 'their' treaty.[92] Second, certainly, there is an accepted domestic practice of retroactive change in the interpretation of statutes[93]

[88] J Crawford, 'A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties' in G Nolte (ed), *Treaties and Subsequent Practice* (OUP 2013) 31; A Kulick (ed), *Reassertion of Control over the Investment Treaty Regime* (CUP 2017) 15 & 18–20.

[89] KN Gore & E Shirlow (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future* (Kluwer 2022) 26; see also, L Marotti, 'The Proliferation of Joint Interpretation Clauses in New International Investment Agreements: A Mixed Blessing?' (2020) 35 ICSID Rev 63, 63–81; Ł Kułaga, 'Interpretative Declarations as an Instrument of Transformation of International Investment Law: Measures for Restraining Judicial Activism' (author's translation) (2019) 81(3) Ruch Prawniczy, Ekonomiczny I Socjologiczny 53, 53–69.

[90] For such an approach see Opinion 1/17, Opinion of Advocate General Bot delivered on 29 January 2019 [107].

[91] A Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55(1) HarvILJ 69.

[92] 'If the Contracting Parties interpret their BITs in one manner or another, this interpretation applies to the investors of both Parties', *Adamakopoulos & ors v Cyprus* (Statement of Dissent of Professor Marcelo Kohen of 3 February 2020) ICSID Case No ARB/15/49 [59].

[93] A van Aaken, 'Control Mechanisms in International Investment Law', in Z Douglas, J Pauwelyn & JE Viñuales (eds), *The Foundations of International Investment Law – Bringing Theory into Practice* (OUP 2014) 435.

or retroactive application of new precedents. The latter point has been evaluated by domestic constitutional and international courts and was, in principle, not found as violating the rule of law.[94] Thus, domestic law does not have to justify its departure from the VCLT or customary law rules on interpretation. The powers of State parties to interpret 'their' treaties is well-represented in the China–Australia Free Trade Agreement (ChAFTA)[95] which allows parties, in certain situations, to agree on whether the case pending before arbitral tribunal can be adjudicated due to the treaty constraints in this respect.[96] As a result, there is an evident tension between the right of State parties regarding treaty interpretation under general international law and the emerging tendency for this competence to be limited with respect to rights of investors.

4 Conclusions

The two mentioned rules, on the conflict of norms and the influence of subsequent agreements regarding the interpretation of treaties, exemplify that investment arbitration can not only impact the interpretation of

[94] 'Prospective overruling is not yet a principle known in English law', *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1996] UKHL 19; Case C-292/04 *Wienand Meilicke, Heidi Christa Weyde, Marina Stöffler v Finanzamt Bonn-Innenstadt* [2007] ECLI:EU:C:2007:132.

[95] China–Australia Free Trade Agreement (ChAFTA) (China & Australia) (adopted 24 October 2003, entered into force 20 December 2015).

[96] A Roberts & R Braddock, 'Protecting Public Welfare Regulation Through Joint Treaty Party Control: A ChAFTA Innovation' (*EJIL:Talk!*, 21 June 2016) <www.ejiltalk.org/protecting-public-welfare-regulation-through-joint-treaty-party-control-a-chafta-innovation/> accessed 30 July 2022; a similar solution, although not decisive for the tribunal, can be found in the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (adopted 27 February 2009, entered into force 10 January 2010) 2672 UNTS 3, ch 11, Art 25(6), which provides: 'Where an investor claims that the disputing Party has breached Article 9 (Expropriation and Compensation) by the adoption or enforcement of a taxation measure, the disputing Party and the non-disputing Party shall, upon request from the disputing Party, hold consultations with a view to determining whether the taxation measure in question has an effect equivalent to expropriation or nationalisation. Any tribunal that may be established pursuant to this Section shall accord serious consideration to the decision of both Parties under this Paragraph'; and the Free Trade Agreement between the Government of the Republic of Korea and the Government of the Socialist Republic of Viet Nam (Korea & Vietnam) (adopted 5 May 2015, entered into force 20 December 2015) Art 9.24, which provides that an interpretation issued by the treaty's Joint Committee 'shall be binding on a Tribunal … and an award … shall be consistent with that interpretation'; and ASEAN–Australia–New Zealand FTA Ch 11, Art 27(2): 'The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute'.

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general international law concerning the responsibility of States, but they also have the potential to influence the law of treaties.

With respect to the first issue, it is to be noted that there exists a coherent line of tribunals decisions concerning relations between international investment agreements and EU treaties, which narrowly interpret the issue of 'the same subject matter' for possible conflicting treaty norms. Such an approach is particularly remarkable as it differs from the position taken by the ILC both in its work on the law of the treaties as well as in its study on the fragmentation of international law. Such a position differs also from the interpretations contained in two GATT/WTO decisions. Nevertheless, as this issue has not generally been the subject of scrutiny in international courts and tribunals in inter-State cases, investment awards cannot be disregarded as they represent the most extensive jurisprudence in this area. Still, from a systemic perspective, investment tribunals' line of argumentation leads clearly to fragmentation as they approach investment treaties as almost self-contained regimes, which are resilient to a conflict of rules analysis unless the two applicable treaties are almost identical. It is remarkable that even a year after publication of the ILCs report on fragmentation, whose main message was 'that the emergence of special treaty-regimes (which should not be called "self-contained") has not seriously undermined legal security, predictability or the equality of legal subjects',[97] investment tribunals, at least with respect to the application of conflict of norms rules, have initiated a process leading towards the opposite direction. In this respect, in my view, investment awards which interpret not only rules of the VCLT, but also their corresponding CIL rules, seem to have *pro futuro* limited value and should rather be considered to have incidental significance for general international law.[98] It seems that this approach taken by investment tribunals has been largely dictated by the need to defend their jurisdiction. What is striking is the number of cases in which tribunals were convinced that they could apply the VCLT when, in fact, only CIL was applicable in the respective case. This approach can also prove that at least with respect to rules with double force (treaty – customary) under international law, the method of interpretation can be similar to a large extent.

[97] ILC (n 8) 24, 248–9.

[98] This criticism was reflected by Hai Yen Trinh: 'arbitral tribunals have disregarded all or the basic interpretive tools required under international law, overrelied on supplementary means of interpretation, judicial decisions and scholarly writings, and liberally found a solely pro-investor object and purpose', TH Yen, *The Interpretation of Investment Treaties* (Martinus Nijhoff 2014) 4.

Regarding the VCLT and CIL rules on subsequent agreements several observations can be made. First, the ease with which arbitral tribunals reject interpretations formulated by States through subsequent agreements is striking. The analysis of these agreements is often rudimentary, absent, or the tribunal simply refers to other rulings – indicating that it considers these interpretations as their own – without sometimes paying attention to the difference in legal situations between the cases whose jurisprudence it cites. Second, tribunals have set out detailed requirements for the formulation of a declaration, without explaining the source for these requirements. Third, there is a considerable difference between tribunals referring to joint interpretations of State Parties, as envisaged by the treaty as binding (such as with NAFTA), and the tribunal assessing such interpretations through the lens of the VCLT or corresponding customary rules. With respect to the latter, tribunals tend to diminish the role of subsequent agreements by underlining the 'taken into account' formulae of Article 31(3) VCLT. Due to the laconic nature of the provisions of most of the investment agreements[99] (in particular so called 'old-generation' treaties),[100] this approach enables investment tribunals, through the interpretation of the 'ordinary meaning' of terms and the 'object and purpose' of a treaty, to maintain its far-reaching interpretative power.

What follows from these observations is, to my mind, the necessity of bringing consistency between the case law of international investment arbitration tribunals and general international law, both as regards conflict of norms as well as of the role subsequent agreement and subsequent practices. Thus, there is a continuous need for more grounding of investment jurisprudence in the realm of general international law.[101]

Still, investment arbitration can inform general international law in at least in two areas, which were not explicitly articulated by the ILC in its 2018 Conclusions, the retroactive application of interpretations and, connected with it, the impact on the rights of individuals. Certainly, in this respect, investment arbitration leans towards interpretations which

[99] '[A]s judge-made law and deeply imbued with the functional logic pervading the investment protection regime', A von Bogdandy & I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23(1) EJIL 7, 9.

[100] 'Old treaties abound: more than 2,500 IIAs in force today (95 per cent of all treaties in force) were concluded before 2010' UNCTAD, 'Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties' (2017) (2) IIA Issues Note 1, 1.

[101] Such as with the Most Favoured Nation clause, see ILC, 'Final Report of the Study Group on the Most-Favoured-Nation Clause' (29 May 2015) UN Doc A/CN.4/L.852 [153 & 157].

restrain the rights of State parties as the 'masters' of treaties.[102] However, the line between rights of State parties and rights of the individual beneficiaries of the treaties (ie investors) has not yet crystallised. Thus, this trend coming from investment arbitration should be juxtaposed with the approach of other international tribunals and domestic constitutional courts' jurisprudence.

[102] E Methymaki & A Tzanakopoulos, 'Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation' in A Kulick (ed), *Reassertion of Control Over the Investment Treaty Regime* (CUP 2017) 173.