

---

# Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements

Andrew D. Mitchell\* and James Munro\*\*

## Abstract

*This article considers whether an international investment agreement (IIA) between two states parties can be interpreted in the light of a 'third-party IIA' (defined as a party's IIA with a third state, a party's model IIA or an IIA between other states parties). A significant number of tribunals have been willing to interpret the IIA before them with reference to third-party IIAs, drawing inferences from differences or similarities in their texts. However, the use of third-party IIAs in this manner often reflects an erroneous application of the customary rules of treaty interpretation set out in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). These conclusions have significant implications for international investment law and state practice. If investment tribunals continue to look to third-party IIAs beyond the parameters of the VCLT, beyond consent of the disputing parties and beyond the common intention of treaty parties, contemporary developments in treaty drafting may have unintended or even perverse consequences.*

## 1 Introduction

In the last five to 10 years, states have become increasingly concerned about investment tribunals' unanticipated and inconsistent interpretations of provisions in

\* Professor, University of Melbourne Law School; Future Fellow, Australian Research Council; Director, Global Economic Law Network, Melbourne, Australia. Email: [a.mitchell@unimelb.edu.au](mailto:a.mitchell@unimelb.edu.au). This research was supported by the Australian Research Council pursuant to the Future Fellowship scheme (Project no. FT130100416). The authors thank Timothy G. Nelson, Tania Voon and the anonymous referees for helpful comments on an earlier draft. The views expressed are the authors' own and are not necessarily shared by any employer or other entity.

\*\* Assistant Director (Legal), Trade Law Branch, Department of Foreign Affairs and Trade, Canberra, Australia; former Dispute Settlement Officer, World Trade Organization, Geneva, Switzerland. Email: [j.munro2@gmail.com](mailto:j.munro2@gmail.com).

international investment agreements (IIAs).<sup>1</sup> These concerns have been particularly acute with respect to investment treaty claims against public policy measures,<sup>2</sup> such as the claims by Philip Morris against tobacco packaging measures of Australia<sup>3</sup> and Uruguay,<sup>4</sup> by Vattenfall against Germany's nuclear phase-out,<sup>5</sup> and by Bilcon against the impact of an environmental review on a development project.<sup>6</sup> States' responses have varied. Several states have withdrawn<sup>7</sup> from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention),<sup>8</sup> while others have terminated their IIAs,<sup>9</sup> refused to recognize awards and pay compensation<sup>10</sup> or adopted a policy of eschewing future investor–state dispute settlement (ISDS) mechanisms.<sup>11</sup> Other responses have instead focused on mitigating uncertainty and unpredictability in ISDS by changing treaty-drafting practices in the negotiation and conclusion of new IIAs, by renegotiating existing IIAs<sup>12</sup> and by creating<sup>13</sup> and renewing individual model IIAs.<sup>14</sup>

<sup>1</sup> See, e.g., Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions', 73 *Fordham Law Review* (2005) 1521; K. Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (2009), at 262; Spear, 'The Quest for Policy Space in a New Generation of International Investment Agreements', 13 *Journal of International Economic Law* (2010) 1037, at 1037–1045; Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties', 13 *Journal of World Investment and Trade (JWIT)* (2012) 928, at 929.

<sup>2</sup> Spear, *supra* note 1, at 1037–1045; Harrison, *supra* note 1, at 929.

<sup>3</sup> UNCITRAL, *Philip Morris v. Australia*, Award on Jurisdiction and Admissibility, 17 December 2015, PCA Case no. 2012-12.

<sup>4</sup> ICSID, *Philip Morris Brands Sàrl, Philip Morris Products, S.A. and Abal Hermanos, S.A. v. Oriental Republic of Uruguay*, Award, 8 July 2016, ICSID Case no. ARB/10/7; *Philip Morris Brands Sàrl, Philip Morris Products, S.A. and Abal Hermanos, S.A. v. Oriental Republic of Uruguay*, Decision on Jurisdiction, 2 July 2013, ICSID Case no. ARB/10/7.

<sup>5</sup> ICSID, *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case no. ARB/12/12 (pending).

<sup>6</sup> UNCITRAL, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Canada*, Award on Jurisdiction and Liability, 17 March 2015, PCA Case no. 2009-04.

<sup>7</sup> See Voon and Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law', 31 *ICSID Review* (2016) 413, at 416–420.

<sup>8</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159.

<sup>9</sup> *Ibid.*, at 423–428.

<sup>10</sup> See, e.g., L.E. Peterson, *Argentina by the Numbers: Where Things Stand with Investment Treaty Claims Arising out of the Argentine Financial Crisis*, 1 February 2011, available at <http://tinyurl.com/pussr5z>.

<sup>11</sup> Australia temporarily adopted such a policy until a change of government ended it. Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, April 2011.

<sup>12</sup> See, e.g., UNCTAD, *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal*, IIA Issues Note no. 4, June 2013, at 1; Voon and Mitchell, *supra* note 7, at 429.

<sup>13</sup> Draft Agreement between the Kingdom of Norway and ... for the Promotion and Protection of Investments, 13 May 2015, available at [www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf](http://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf).

<sup>14</sup> Model Text for the Indian Bilateral Investment Treaty (Indian Model BIT), December 2015, available at [www.mygov.in/sites/default/files/master\\_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf](http://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf).

As various states around the world have sought to improve their IIAs through textual innovations, they have also become concerned to avoid thereby prejudicing the interpretation of previously concluded IIAs. In his commentary on the USA's bilateral investment treaties (BITs), Kenneth Vandeveldel recounts this tension with respect to the USA's 2012 Model BIT:

US negotiators were sometimes reluctant to accept even stylistic changes because of their concern that any modification, even the elimination of redundancy, might be interpreted as a substantive concession. Thus, redundancies originally inserted simply to remove any doubt about the meaning of a BIT provision could complicate negotiations because of a fear that their deletion would appear to be a weakening, rather than a stylistic pruning, of the BIT provision. In effect, the efforts of the BIT drafters to improve earlier language occasionally could prove counterproductive.<sup>15</sup>

The legal implications of modifying and updating the text of IIAs in comparison to pre-existing IIAs or those negotiated with other states in parallel are complex and a source of continuing uncertainty and divergence in investment jurisprudence. Can a given IIA between two states parties be interpreted in the light of a party's IIA with a third state, a party's model IIA, or even an IIA between other states parties? This article considers this question, referring to such IIAs collectively as 'third-party IIAs' (as distinct from IIAs to which all parties to the given IIA are party, which are outside the scope of this article).<sup>16</sup> Numerous awards in ISDS cases have used third-party IIAs to interpret the IIA before them,<sup>17</sup> while a separate stream of ISDS awards has expressly eschewed this use of third-party IIAs.<sup>18</sup> Accordingly, we focus on this question in the context of ISDS, although similar principles would be likely to apply to state–state dispute settlement in an IIA.

<sup>15</sup> K.J. Vandeveldel, *US International Investment Agreements* (2009), at 111–112. US Model Bilateral Investment Treaty (US Model BIT) 2012, Art. 30.1, available at <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>.

<sup>16</sup> On the interpretative relationship between parallel international investment agreements (IIAs) between two parties, see, e.g., Voon and Sheargold, 'Australia, China, and the Co-Existence of Successive International Investment Agreements', in C. Picker, H. Wang and W. Zhou (eds), *The China Australia Free Trade Agreement: A 21st Century Model* (2017).

<sup>17</sup> See, e.g., ICSID, *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, 8 February 2005, ICSID Case no. ARB/03/24, para. 195; ICSID, *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, ICSID Case no. ARB/02/18, paras 34–36; ICSID, *SGS Société Générale de Surveillance, S.A. v. Islamic Republic of Pakistan*, 19 December 2002, ICSID Case no. ARB/01/13, paras 176–177; ICSID, *Churchill Mining PLC v. Republic of Indonesia*, Decision on Jurisdiction, 24 February 2014, ICSID Case no. ARB/12/14, paras 195–197; ICSID, *Metal-Tech Ltd v. Republic of Uzbekistan*, Award, 4 October 2013, ICSID Case no. ARB/10/3, para. 159; UNCITRAL, *ICS v. Argentina*, Award, 10 February 2012, PCA Case no. 2010-9, para. 296.

<sup>18</sup> See, e.g., ICSID, *Mobil Investments Canada Inc. v. Canada*, Decision on Liability and Quantum, 22 May 2012, ICSID Case no. ARB(AF)/07/4, paras 226–230; ICSID, *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, ICSID Case no. ARB/02/8, para. 106; ICSID, *Enron v. Argentina*, Decision on Jurisdiction, 14 January 2004, ICSID Case no. ARB/01/3, para. 46; ICSID, *Rompetrol Group NV v. Romania*, Decision on Jurisdiction, 18 April 2008, ICSID Case no. ARB/06/3, paras 107–108; ICSID, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, Award, 30 April 2014, ICSID Case no. ARB(AF)/11/1, para. 83.

In the second part of the article, we identify a number of overarching principles relevant to the interpretation of IIAs that tend to weigh against using third-party IIAs as interpretative tools. First, we note that the conception of international investment law as a multilateralized system may not be strong enough to justify such an interpretative approach in view of recent developments in IIA treaty practice. Second, we explain how the primacy of consent in investor–state arbitration cautions against using third-party IIAs since they do not form part of the applicable law and have not been agreed to by the disputing parties. Third, we make the related point that the underlying objective of treaty interpretation pursuant to the Vienna Convention on the Law of Treaties (VCLT) is to determine the common intention of the parties, which would generally not be assisted by reference to third-party IIAs.<sup>19</sup>

Against this background, in the third part of the article, we examine the extent to which third-party IIAs can be taken into account in interpreting a given IIA pursuant to the individual interpretative rules of the VCLT. In particular, we survey investment awards that have used third-party IIAs as an aid to identifying the ‘ordinary meaning’ of treaty terms, as relevant ‘context’ or as a ‘supplementary means of interpretation’. We conclude that, while some tribunals have closely followed the particular requirements of the VCLT rules, others have departed from these rules as well as from the broader principles of party consent and the common intention of the parties. Rather than basing an understanding of ‘ordinary meaning’ on a wide survey of relevant third-party IIAs, they have limited themselves to a single or a few third-party IIAs of dubious relevance. Similarly, rather than requiring a nexus between a third-party IIA and the IIA being interpreted (for example, through evidence of the use of the former in negotiating the latter), they have used third-party IIAs with no connection to the IIA as a ‘supplementary means’ for its interpretation. These departures from principles and rules of interpretation are more than matters of semantics or technical breaches. They threaten to undermine states’ progress towards ‘better’ IIAs by using different provisions in unanticipated ways, contrary to the very purpose of recent developments in international investment law and treaty practice.

## 2 Overarching Principles in Interpreting IIAs

### *A Modern Challenges to International Investment Law as a Multilateralized System*

Unlike in many other spheres of international law, no overarching multilateral agreement on foreign investment exists. Some multilateral rules may apply in particular disputes in relation to matters such as procedure or transparency – for example, pursuant to the ICSID Convention or the transparency rules<sup>20</sup> or arbitral rules<sup>21</sup> of

<sup>19</sup> Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

<sup>20</sup> See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, GA Res. 68/109, 1 April 2014; UN Convention on Transparency in Treaty-based Investor-State Arbitration, UN Doc. A/CN.9/783 (2015).

<sup>21</sup> UNCITRAL Arbitration Rules, GA Res. 65/22, 6 December 2010.

the United Nations Commission on International Trade Law (UNCITRAL). A few limited investment-related obligations apply through the Agreement on Trade-Related Investment Measures<sup>22</sup> and the General Agreement on Trade in Services,<sup>23</sup> both of which form part of the World Trade Organization (WTO) framework. However, most substantive investment obligations are contained in IIAs, comprising primarily BITs, preferential trade agreements containing investment chapters (which are primarily, but not solely, bilateral)<sup>24</sup> and a few plurilateral agreements such as the Energy Charter Treaty.<sup>25</sup> Some commentators, most notably Stephan Schill in his groundbreaking work, have argued that the more than 3,000 IIAs in existence together form a de facto 'multilateral system'<sup>26</sup> or a form of 'shadow multilateralism',<sup>27</sup> with each individual agreement forming an 'integral part of an overall ecosystem' of international investment law.<sup>28</sup>

The notion of IIAs as part of a broader 'system' or 'network' is based on factors such as: the fact that IIAs typically contain the same or similar provisions and are directed at the same object and purpose;<sup>29</sup> the potential for most-favoured-nation (MFN) obligations in IIAs to capture the procedural or substantive protections accorded in other IIAs<sup>30</sup> and the ability of investors to structure their corporate nationality so as to select the 'best' IIA to protect their investment.<sup>31</sup> These features, some argue, blur the lines between individual IIAs, making it both possible and desirable to interpret IIAs in view of one another, while also taking account of the jurisprudence of tribunals interpreting third-party IIAs.<sup>32</sup> Similarly, 'the credibility of the entire dispute resolution system depends on consistency, because a dispute settlement process that produces unpredictable results will lose the confidence of the users in the long term and defeat its own purpose'.<sup>33</sup> On that view, arbitrators should adopt consistent interpretations of the same substantive disciplines across different IIAs.

<sup>22</sup> Agreement on Trade-Related Investment Measures 1994, 1868 UNTS 186.

<sup>23</sup> General Agreement on Trade in Services 1994, 1869 UNTS 183.

<sup>24</sup> See, e.g., North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (ASEAN–Australia–New Zealand FTA) 2009, [2010] ATS 1.

<sup>25</sup> Energy Charter Treaty 1994, 2080 UNTS 95.

<sup>26</sup> S.W. Schill, *The Multilateralization of International Investment Law* (2009), at 278.

<sup>27</sup> J.D. Mortenson, *Snowflakes in a Blizzard: Treaty Interpretation in International Investment Law*, University of Michigan, Public Law and Legal Theory Research Paper no. 504 (2016), at 19–20.

<sup>28</sup> *Ibid.*

<sup>29</sup> Schill, *supra* note 26, at 66, 69, 278, 304–305; Mortenson, *supra* note 27, at 3, 19–20. See also Commission, 'Precedent in Investment Treaty Arbitration', 24 *Journal of International Arbitration* (2007) 129, at 141–142; J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (2012), at 127.

<sup>30</sup> Schill, *supra* note 26, ch. 4. See also M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), at 134.

<sup>31</sup> Schill, *supra* note 26, ch. 5. See also Voon, Mitchell and Munro, 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration', 5 *Journal of International Dispute Settlement* (2014) 41.

<sup>32</sup> Mortenson, *supra* note 27, at 19–20.

<sup>33</sup> Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?', 23 *Arbitration International* (2007) 357, at 378. See also Commission, *supra* note 29, at 141–142.

The thousands of existing IIAs do share similar policy origins and often contain similarly worded provisions covering the same broad subject matter. However, recent examples highlight the deficiencies in the ‘systemic’ perspective advocating integrative interpretative methods taking account of third-party IIAs. For instance, according to the European Commission, the investment chapter in the Comprehensive Economic and Trade Agreement (CETA) between the European Union (EU) and Canada represents a ‘significant break with the past’ by including ‘explicit reference to the right of governments to regulate in the public interest and clearer and more precise investment protection standards [by] removing ambiguities that made these standards open to abuses or excessive interpretations’.<sup>34</sup> Accordingly, the ‘fair and equitable treatment’ standard is codified as an exhaustive list of measures in order to curtail the role of ‘legitimate expectations’ in construing this standard in international law,<sup>35</sup> and the right to regulate in the public interest is either explicitly embedded within the substantive disciplines themselves or applies as an exception or defence.<sup>36</sup> Also under CETA, the treatment under other IIAs is expressly excluded from the MFN obligation,<sup>37</sup> and corporate ‘forum shopping’ for advantageous IIAs is circumscribed by, *inter alia*, requiring investors to have ‘substantial business activities’ in the other party’s territory.<sup>38</sup> These elements of CETA are designed to divorce its interpretation from past experience with other IIAs.

Similarly, the Office of the United States Trade Representative (USTR) previously described the investment chapter of the Trans-Pacific Partnership (TPP),<sup>39</sup> between the United States, Japan, Mexico, Canada, Australia and seven other countries, as including ‘new language underscoring that countries retain the right to regulate in the public interest’ and a ‘separate, explicit recognition of health authorities’ right to adopt tobacco control measures’.<sup>40</sup> The TPP also explicitly clarifies that an investor cannot claim a breach of the minimum standard of treatment merely by showing that its expectations were frustrated and that the conduct of state-owned enterprises and other persons exercising delegated governmental authority can be challenged.<sup>41</sup> The former USTR described these as ‘innovations going beyond previous US [IIAs] to address new and emerging investment issues’.<sup>42</sup>

<sup>34</sup> Comprehensive Economic and Trade Agreement (CETA), signed 30 October 2016, not yet in force.

<sup>35</sup> *Ibid.*, Arts 8.9.2, 8.10.2, 8.10.4.

<sup>36</sup> *Ibid.*, Arts 8.9.1, 28.3.2.

<sup>37</sup> *Ibid.*, Art. 8.7.4.

<sup>38</sup> *Ibid.*, Art. 8.1 (definition of ‘investor’).

<sup>39</sup> Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam (TPP) 2016, [2006] ATNIF 2.

<sup>40</sup> United States Trade Representative (USTR), TPP: Made in America – 9. Investment, at 6, available at <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Investment.pdf>.

<sup>41</sup> *Ibid.*, at 5–6.

<sup>42</sup> *Ibid.*, at 5. See also USTR, TPP: Made in America – The Trans-Pacific Partnership, available at <https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf>; Levesque and Newcombe, ‘The Evolution of IIA Practice in Canada and the United States’, in A. de Mestral and C. Levesque (eds), *Improving International Investment Agreements* (2013) 31, at 31–38.

Similar observations have been made regarding the evolution in drafting practices of other major jurisdictions, such as India and China.<sup>43</sup> Together, these examples challenge the notion that 'bilateral investment treaties are concluded so as to endorse a uniform system of investment protection that can be seen as a substitute for a single multilateral investment treaty'<sup>44</sup> and that 'investment law [is] a multilateral system that exists independently from, and at the same time above, bilateral treaty relations'.<sup>45</sup> They likewise challenge the use of the interpretative principle *in pari materia*<sup>46</sup> – or what Schill calls 'cross-treaty interpretation' – namely, the interpretation of a treaty in the light of another treaty with differing parties on the same or similar subject matter due to 'the existence of a system that overarches and comprises both the treaty for interpretation as well as the third-party treaty'.<sup>47</sup> These modern examples of treaty practice suggest that textual differences between IIAs should not be disregarded on the assumption that they all have the same purpose and meaning. They may instead represent the evolution of past drafting practices or be directed at remedying perceived interpretative errors by tribunals in construing earlier IIAs. They may also simply reflect the peculiarities of the negotiated outcome reached between two parties.<sup>48</sup>

Thus, Christoph Schreuer argues that whether 'another treaty that lacks a [certain] provision was meant to exclude the effects of th[at] provision is difficult to answer in a generalized way with the tools of abstract logic' and that '[t]aken out of its specific context a seemingly similar provision can assume an entirely different meaning'.<sup>49</sup> Thomas Wälde and Todd Weiler also advocate finding 'a balance between common and emerging trends in interpretation, without failing to give sufficient counterweight to the peculiarities of the text, context and purpose of a particular treaty'.<sup>50</sup> Accepting these cautions, if third-party IIAs are relevant in construing a given IIA, how should they be used? For instance, a difference between the text of the IIA being interpreted and that of a third-party IIA could reflect either a substantive difference in meaning or that one clarifies or elaborates on the other. The principles of *in pari materia* and

<sup>43</sup> See, e.g., Liu, 'The Evolution of Chinese Approaches to IIAs', in de Mestral and Levesque, *supra* note 42, 59, at 71–74; J. Dahlquist and L.E. Peterson, In Final Version of Its New Model Investment Treaty, India Dials Back Ambition of Earlier Proposals – But Still Favors Some Big Changes, 3 January 2016, available at <http://tinyurl.com/zqcbtgl>.

<sup>44</sup> Schill, *supra* note 26, at 69.

<sup>45</sup> *Ibid.*, at 278.

<sup>46</sup> Latin, meaning 'upon the same subject'.

<sup>47</sup> Schill, *supra* note 26, at 294–295. See also P. Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration* (2015), at 79, 96–100; Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules' (2010), at 5–7, 28, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1697835](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697835).

<sup>48</sup> See, e.g., European Commission, Towards a Comprehensive European International Investment Policy, Doc. COM(2010)343 final, 7 July 2010, at 6.

<sup>49</sup> Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration', 3 *Transnational Dispute Management (TDM)* (2006) 1, at 8. See also Weeramantry, *supra* note 29, at 129.

<sup>50</sup> Wälde and Weiler, 'Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation', 1 *TDM* (2004) 1, n. 19.

systemic legitimacy tend to promote integrative interpretive approaches,<sup>51</sup> while the *expressio unius* principle emphasizes the significance of textual differences.<sup>52</sup> Either approach might be appropriate in particular contexts,<sup>53</sup> but the criteria for deciding which to adopt are difficult to discern. To elucidate the appropriate interpretative methods, we now turn to the function of investment tribunals and the underlying objective of treaty interpretation in the context of ISDS.

### **B The Primacy of Consent in Investment Treaty Arbitration**

The possibility of interpreting a given IIA in an ISDS proceeding by reference to a third-party IIA raises questions about the function of investment treaty tribunals. Rather than using judicial or standing bodies to resolve investor–state disputes,<sup>54</sup> arbitration is the predominant means of dispute settlement in IIAs. The notion of consent between the disputing parties forms the cornerstone of this form of dispute settlement. Generally, parties engaged in arbitration must consent to their dispute being resolved in this manner, to the arbitrators appointed to hear the dispute and to the procedural and substantive law applicable to the arbitration. Arbitrations then produce outcomes binding only between the disputing parties. Thus, arbitrators perform the basic function of providing an impartial and binding resolution to a dispute between consenting parties, including by interpreting the relevant law in context.<sup>55</sup>

Investor–state arbitrations exhibit some qualities that set them apart from more orthodox commercial arbitrations. For example, the host state’s offer of consent to investor–state arbitration usually consists of a unilateral offer to investors through the IIA itself, and the substantive law on which a claim may be brought is usually predetermined by the states parties to the IIA without the involvement of the investor subsequently bringing the claim. Further, ISDS often involves a public dimension because it necessarily impugns the conduct of the host state.

Nonetheless, investor–state arbitrations are widely recognized as being modelled on and akin to commercial arbitration in terms of the primacy of party consent, procedure and enforcement.<sup>56</sup> Disputing parties must consent – pursuant to the procedure in a given IIA – to the arbitrators appointed to hear the dispute.<sup>57</sup> The claimant

<sup>51</sup> See, e.g., Merkouris, *supra* note 47, at 76–78; Paparinskis, *supra* note 47; Commission, *supra* note 29, at 141–142; Kaufmann-Kohler, *supra* note 33, at 376–378.

<sup>52</sup> See, e.g., Mortenson, *supra* note 27, at 17.

<sup>53</sup> See, e.g., Schill *supra* note 26, at 308, 319.

<sup>54</sup> But see ICSID Convention, *supra* note 8, Art. 12; European Commission, Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations, 16 September 2015, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>.

<sup>55</sup> O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012), at 529.

<sup>56</sup> C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2008), para. 3.65; A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration* (2015); G.B. Born, *International Arbitration: Law and Practice* (2nd edn, 2015), at 420–422, 432; R.D. Bishop, J. Crawford and W.M. Reisman (eds), *Foreign Investment Disputes: Cases, Materials and Commentary* (2nd edn, 2014), at 3; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012), at 236, 241.

<sup>57</sup> See, e.g., NAFTA, *supra* note 24, Art. 1125.

investor may enforce an adverse award against a host state in the same way as in commercial arbitration, through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>58</sup> (or through a separate enforcement procedure for awards issued under the ICSID Convention).<sup>59</sup> Further, under the rules of procedure applicable to most investor–state disputes, the applicable law is, at first instance, the ‘rules of law as may be agreed by the parties’ under the ICSID Convention<sup>60</sup> or the ‘rules of law designated by the parties as applicable to the substance of the dispute’ under the UNCITRAL Arbitration Rules.<sup>61</sup> Thus, the disputing parties’ consent is paramount in determining the law applicable in an investor–state dispute.

In principle, therefore, arbitrators must interpret IIAs in accordance with the law to which the parties have consented. Accordingly, third-party IIAs should be used in the process of interpretation only to the extent that the disputing parties have consented to their use. Purposes other than those to which the parties have consented – for instance, to address a perceived fragmentation of international law or to protect the systemic legitimacy of the investment treaty system – would not provide a sufficient legal basis for considering third-party IIAs. In the broader context of international law, Anne-Marie Carstens suggests that, ‘by minimizing the risk of divergent interpretations, transplanted treaty rules can serve as an effective tool to promote the systematic integration of international law’.<sup>62</sup> However, in our view, using third-party IIAs to interpret an IIA for such purposes extraneous to the IIA would involve derogating from the basic function of arbitrators in ISDS.

## C Identifying the Common Intention of the Parties in Interpreting IIAs

### 1 The VCLT as Applicable Law in Interpreting IIAs

The customary rules of interpretation in public international law reflected in the VCLT provide the applicable rules for the interpretation of IIAs as international treaties.<sup>63</sup> This conclusion flows from the character of IIAs as treaties<sup>64</sup> as

<sup>58</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 3.

<sup>59</sup> ICSID Convention, *supra* note 8, Art. 53.

<sup>60</sup> *Ibid.*, Art. 42.1.

<sup>61</sup> UNCITRAL Arbitration Rules, *supra* note 21, Art. 35.1.

<sup>62</sup> Carstens, ‘Interpreting Transplanted Treaty Rules’, in A. Bianchi *et al.* (eds), *Interpretation in International Law* (2015) 230, at 231.

<sup>63</sup> McLachlan, Shore and Weiniger, *supra* note 56, at 66; Born, *supra* note 56, at 434; N. Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (6th edn, 2015); A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 85; Dolzer and Schreuer, *supra* note 56, at 28–29. Cf. Fauchald, ‘The Legal Reasoning of ICSID Tribunals: An Empirical Analysis’, 19 *European Journal of International Law* (2008) 301, at 313.

<sup>64</sup> See, e.g., Reisman and Arsanjani, ‘Applicable Law under the ICSID Convention: The Tortured History of the Interpretation of Article 42’, in M.N. Kinnear *et al.* (eds), *Building International Investment Law: The First 50 Years of ICSID* (2015) 3, at 9; Crawford, ‘The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect’, 96 *American Journal of International Law (AJIL)* (2002) 874, at 887.

well as from the inclusion in more recent IIAs of provisions explicitly providing that they be interpreted in accordance with ‘applicable rules of international law’.<sup>65</sup> Thus, the customary rules of interpretation in public international law apply as the agreed choice of law of the parties to an investor–state dispute, either implicitly through the nature of the IIA as a treaty or expressly in the relevant IIA.<sup>66</sup> The law of the host state could also play an interpretative role – for instance, where a claim under an ‘umbrella clause’ concerns breach of a contract governed by domestic law.<sup>67</sup> Pursuant to the principle of party consent in arbitration, the disputing parties might also agree to other rules of interpretation.<sup>68</sup> However, absent such agreement, the customary rules of interpretation in public international law apply.

The customary rules of interpretation in public international law are widely understood as being reflected in Articles 31–33 of the VCLT.<sup>69</sup> Therefore, when an investor avails itself of the unilateral offer of a host state contained in an IIA to settle disputes through arbitration, this generally also includes the agreement to the application of Articles 31–33 of the VCLT in interpreting the IIA. This, in turn, circumscribes the arbitrators’ function in resolving the dispute. Specifically, the arbitrators must apply Articles 31–33 of the VCLT in interpreting the IIA. To do otherwise would be to deviate from their function to resolve the dispute in accordance with the applicable law agreed to by the disputing parties, counter to the principle of party consent.

## 2 Common Intention of Treaty Parties as the Objective of Interpretation

The underlying objective of the rules of interpretation in Articles 31–33 of the VCLT is to arrive at the common intention of the parties to the treaty.<sup>70</sup> This objective flows from the principle of consent in international law.<sup>71</sup> IIAs are negotiated outcomes between consenting states. Although the VCLT does not refer explicitly to the parties’ ‘common intention’, Richard Gardiner notes that this concept is contained in

<sup>65</sup> See, e.g., US Model BIT (n. 15), Art. 30.1; CETA, *supra* note 34, Art. 8.1; Indian Model BIT, *supra* note 14, Art. 14.9(iii); ASEAN–Australia–New Zealand FTA, *supra* note 24, Art. 27.1; Energy Charter Treaty 1994, 2080 UNTS 95, Art. 26.6.

<sup>66</sup> See Reisman and Arsanjani, *supra* note 64, at 9.

<sup>67</sup> See J. Hepburn, *Domestic Law in International Investment Arbitration* (2017); M. Sasson, *Substantive Law in Investment Treaty Arbitration: The Unsettled Relationship between International Law and Municipal Law* (2010); Kaufmann-Kohler, ‘Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties?’, in L. Mistelis and J. Lew (eds), *Pervasive Problems in International Arbitration* (2006) 257, at 261–271.

<sup>68</sup> See ICSID Convention, *supra* note 8, Art. 42.1; Art. 35.1, UNCITRAL Arbitration Rules, *supra* note 21. See also Bishop, Crawford and Reisman, *supra* note 56, at 13.

<sup>69</sup> R. Gardiner, *Treaty Interpretation* (2015), at 7; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 439–440; Dörr and Schmalenbach, *supra* note 55, at 523; McLachlan, Shore and Weiniger, *supra* note 56, at 222. But see McLachlan, Shore and Weiniger, *supra* note 56, at 68.

<sup>70</sup> Villiger, ‘The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission’, in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 107, at 109; Gardiner, *supra* note 69, at 5–6; A. Aust, *Modern Treaty Law and Practice* (3rd edn, 2013), at 209; Dörr and Schmalenbach, *supra* note 55, at 522; I. Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009), at 42.

<sup>71</sup> See VCLT, *supra* note 19, second preambular recital.

the requirement to interpret a treaty with respect to its 'object and purpose', which he conceives as 'an objective repository of the collective intentions of the parties'.<sup>72</sup> The aim of arriving at the common intention of the treaty parties is also reflected in Article 33(3) of the VCLT, which provides that the terms of treaties in different languages 'are presumed to have the same meaning'. Further, in its commentaries on draft versions of Articles 31–33 of the VCLT, the International Law Commission (ILC) 'stressed' that 'in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms'.<sup>73</sup> These ILC commentaries may be regarded as 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law', pursuant to Article 38(1)(d) of the Statute of the International Court of Justice.<sup>74</sup> The objective of arriving at the common intention of the parties has also been acknowledged in international jurisprudence more generally.<sup>75</sup>

Different views exist on ascertaining the common intention of the parties, from formalistic approaches prioritizing the treaty text to teleological approaches prioritizing its object and purpose.<sup>76</sup> Both 'subjective' and 'objective' methods could be used to derive the parties' common intention.<sup>77</sup> The VCLT privileges 'the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties'.<sup>78</sup> Therefore, the text of the treaty is treated as the authentic expression of the parties' common intentions, with only a secondary role for the common intentions of the parties as a subjective element distinct from the text.<sup>79</sup> Not all rules of treaty interpretation are codified in the VCLT.<sup>80</sup> Martins Paparinskis concludes that certain 'special rules of interpretation', such as 'acquiescence and estoppel' or reliance on pre-VCLT rules, cannot provide legal support for current approaches to third-party treaties and case law.<sup>81</sup> A key difficulty with relying on such rules to introduce third-party IIAs is

<sup>72</sup> Gardiner, *supra* note 69, at 6.

<sup>73</sup> International Law Commission, Draft Articles on the Law of Treaties with Commentaries (ILC Draft Articles), UN Doc. A/6309/Rev. 1 (1966), Art. 27, paras 4–5.

<sup>74</sup> Statute of the International Court of Justice 1945, 1 UNTS 993.

<sup>75</sup> See, e.g., *Mavrommatis Palestine Concessions*, 1924 PCIJ Series A, No. 2, at 19; WTO, *EC and Certain Member States – Large Civil Aircraft – Report of the Appellate Body*, 18 May 2011, WT/DS316/AB/R, para. 845; ICSID, *Agua del Tunari SA v. Republic of Bolivia*, Decision on Jurisdiction, 21 October 2005, ICSID Case no. ARB/02/3, para. 91. See generally E. Bjørge, *Evolutionary Interpretation and the Intention of the Parties*, University of Oslo Faculty of Law, Legal Studies Research Paper no. 2012-33 (2012), at 3.

<sup>76</sup> I. Brownlie, *Principles of Public International Law* (6th edn, 2003), at 602–607; Herdegen, 'Interpretation in International Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. 6 (March 2013) 260, paras 11–21.

<sup>77</sup> ILC Draft Articles, *supra* note 73, Art. 27, para. 2; Sbloci, 'Supplementary Means of Interpretation', in Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011) 145, at 148; Weeramantya, *supra* note 29, at 44.

<sup>78</sup> ILC Draft Articles, *supra* note 73, Art. 27, para. 11; Sbloci, *supra* note 77, at 148.

<sup>79</sup> ILC Draft Articles, *supra* note 73, Art. 28, para. 19; Gardiner, *supra* note 69, at 373–375.

<sup>80</sup> Van Damme, *supra* note 70, at 49, 380; Gardiner, *supra* note 69, at 7.

<sup>81</sup> Paparinskis, *supra* note 30, at 112, 135–142.

that none has a clear nexus to the common intention of the parties to the IIA being interpreted.

### 3 Significance of the Common Intention of IIA Parties in ISDS

The underlying objective in interpreting an IIA of ascertaining the common intention of its states parties tends to undermine the role of third-party IIAs. Third-party IIAs represent the negotiated outcome between other sets of parties and thus reflect those other parties' intentions.<sup>82</sup> A number of tribunals in investor–state disputes have therefore eschewed the use of third-party IIAs in interpreting the IIA before them on the basis that this approach would depart from the common intention of the parties. For example, the tribunal in *Rompetrol Group NV v. Romania* stated that 'nothing in the Vienna Convention ... would authorize an interpreter to bring in as interpretative aids when construing the meaning of one bilateral treaty the provisions of other treaties concluded with other partner states'.<sup>83</sup> The tribunal concluded that, 'in the absence of any specific evidence offered to it by the Respondent as to what the two states had in mind when negotiating the BIT, the only safe guide as to their *intentions* must be the unequivocal terms of the treaty text on which they formally agreed'.<sup>84</sup> The tribunal in *Enron v. Argentina* likewise concluded that '[t]he fact that a treaty may have provided expressly for certain rights of shareholders does not mean that a treaty not so providing has *meant* to exclude such rights if this can be reasonably inferred from the provisions of such treaty'.<sup>85</sup> The tribunal thus refused to infer from the provision of certain rights in a third-party IIA (namely, the US Model BIT) that the IIA in question was intended to exclude the coverage of such rights.

Some scholars that have emphasized the underlying objective of the parties' common intention under the VCLT have nevertheless contemplated the possibility of taking third-party treaties into account in interpretation.<sup>86</sup> In the following sections, we evaluate the extent to which third-party IIAs can be taken into account in the interpretation of a given IIA pursuant to the VCLT, without sacrificing the consent of the disputing parties or the common intention of the treaty parties.

## 3 Applying the Customary Rules of Interpretation to IIAs: Back to Basics

Using a case study from the International Court of Justice, Carstens suggests that a treaty interpreter may refer to the 'source' of 'transplanted treaty rules' in public international law only if the VCLT rules (specifically, Articles 31(3)(c) or 31(4)) are

<sup>82</sup> VCLT, *supra* note 19, Art. 34.

<sup>83</sup> ICSID, *Rompetrol Group NV v. Romania*, Decision on Jurisdiction, 18 April 2008, ICSID Case no. ARB/06/3, paras 107–108.

<sup>84</sup> *Ibid.* (emphasis added).

<sup>85</sup> *Enron*, *supra* note 18, para. 46 (emphasis added).

<sup>86</sup> See, e.g., Aust, *supra* note 70, at 209, 220; Gardiner, *supra* note 69, at 5–6, 324, 400.

incrementally developed and refined.<sup>87</sup> Paparinskis suggests in the context of the fair and equitable treatment obligation in international investment law that the VCLT rules alone do not allow reference to *pari materia* materials including third-party IIAs and case law on such treaties. Rather, 'it is the *customary* minimum standard that provides the interpretative unity of fair and equitable treatment'.<sup>88</sup> Our examination below builds on this existing literature. Our focus on international investment law is narrower than Carstens' and broader than Paparinskis'. At the same time, we examine references to third-party IIAs whether or not their rules have been 'transplanted' (in Carstens' terminology) into the IIA in question. Unlike Paparinskis, we exclude from consideration the interpretative role of extraneous material other than third-party IIAs (thus, omitting both (i) the interpretative role of jurisprudence with respect to third-party treaties and (ii) customary international law except to the extent embodied in such IIAs).

In this section, we explain our view that third-party IIAs may be relevant to interpretation in limited circumstances pursuant to the VCLT rules as they exist today (specifically in relation to the ordinary meaning under Article 31(1) or as a supplementary means under Article 32), even where those IIAs do not necessarily reflect customary international law. However, several tribunals have gone beyond these circumstances to use third-party IIAs in the absence of sufficient evidence justifying such an approach. A careful examination of the relevant VCLT rules and their application to date by investment tribunals reveals not only inconsistency between awards but also significant departures from the requirements of the rules as well as the broader principles outlined in the earlier sections of this article. This finding in the investment law context is consistent with Carstens' broader conclusion that treaty interpreters often fail to explain their use of 'source rules' in interpreting transplanted treaty rules within the VCLT framework.<sup>89</sup>

### ***A Hierarchies in Articles 31 and 32 of the VCLT***

Article 31 of the VCLT (headed '[g]eneral rule of interpretation') requires in its first paragraph the interpretation of a treaty 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 31(2) clarifies the meaning of 'context' to include 'the text, including its preamble and annexes' and certain other instruments, while Article 31(3) requires that the treaty interpreter also take account of subsequent agreements, subsequent practice, and relevant rules of international law. Under Article 31(4), a special meaning is to be given to a term if it is established that the parties so intended. We view the constituent elements of this general rule of treaty interpretation (for example, 'ordinary meaning', 'context' and 'object and purpose') as non-hierarchical<sup>90</sup> (although, as mentioned above, some approaches tend to prioritize certain

<sup>87</sup> Carstens, *supra* note 62, at 230–231, 238, 240.

<sup>88</sup> Paparinskis, *supra* note 30, at 153 (emphasis added).

<sup>89</sup> Carstens, *supra* note 62, at 230.

<sup>90</sup> ILC Draft Articles, *supra* note 73, Art. 27, paras 8–9.

elements over others).<sup>91</sup> These constituent elements are also intended to be applied as a ‘single combined operation’ in the process of treaty interpretation.<sup>92</sup> Nonetheless, in practice, the separate consideration of each element is often unavoidable before drawing an overall, integrated conclusion.<sup>93</sup> In the following sections, we assess how third-party IIAs could be taken into account with respect to each of these elements.

We then turn to the potential for third-party IIAs to be used as a ‘supplementary means of interpretation’ under Article 32 of the VCLT. Unlike the constituent elements of Article 31 of the VCLT, Article 32 and its constituent elements are secondary in character. Article 32 permits ‘[r]ecourse ... to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion’ only for particular purposes. Thus, the elements of treaty interpretation reflected in Article 31 of the VCLT sit above those of Article 32 in the analytical hierarchy.

### B Ordinary Meaning: Article 31(1) of the VCLT

The ‘ordinary meaning’ of the terms of an IIA tend to be the starting point for tribunals<sup>94</sup> because the specific terms used by the parties to a treaty are understood to provide the most reliable indication of their common intention.<sup>95</sup> Dictionaries have been recognized as a basis for identifying the ordinary meaning.<sup>96</sup> Despite not being dispositive and often limited in their ability to resolve complex questions of interpretation, they provide to some extent an objective touchstone of the ordinary meaning.<sup>97</sup> Third-party IIAs could be used in a similar manner to dictionaries, as evidence of the ordinary meaning of a given term.<sup>98</sup> Gardiner states that ‘reference to other treaties may simply be part of the history of the law on the subject or part of the facts relating to an issue, ‘thus shedding light on the ordinary meaning of a given term in an IIA.’<sup>99</sup> Campbell McLachlan similarly considers that:

<sup>91</sup> See note 76 above and corresponding text.

<sup>92</sup> ILC Draft Articles, *supra* note 73, Art. 27, para. 8. See also Dolzer and Schreuer, *supra* note 56, at 30.

<sup>93</sup> ILC Draft Articles, *supra* note 73, Art. 27, para. 9.

<sup>94</sup> Weeramantry, *supra* note 29, at 51–52; Newcombe and Paradell, *supra* note 63, at 109–112.

<sup>95</sup> Villiger, *supra* note 70, at 109.

<sup>96</sup> Weeramantry, *supra* note 29, at 54–55.

<sup>97</sup> Z. Douglas, *The International Law of Investment Claims* (2009), at 82. See also WTO, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body*, 7 April 2005, WT/DS285/AB/R, para. 164, n. 191.

<sup>98</sup> For examples of using third-party treaties other than IIAs, see, e.g., UNCITRAL, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, Final Award, 18 July 2014, PCA Case no. AA 228, para. 765; ICSID, *Southern Pacific Properties (Middle East) Limited v. Egypt*, Award, 20 May 1992, ICSID Case no. ARB/84/3, paras 78, 154, 191; UNCITRAL, *Chemtura Corporation v. Canada*, Award, 2 August 2010 (NAFTA), paras 135–136. See generally S. Di Benedetto, *International Investment Law and the Environment* (2013), at 90–93, 140–149. On using third-party treaties in interpreting WTO law, see, e.g., WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products – Report of the Panel*, 29 September 2006, WT/DS291/R, paras 7.92–7.93; WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body*, 12 October 1998, WT/DS58/AB/R, paras 130–132.

<sup>99</sup> Gardiner, *supra* note 69, at 324.

each state brings to the negotiating table a lexicon which is derived from prior treaties (bilateral and multilateral) into which it has entered with other states. The resulting text in each case may be different. It is, after all, the product of a specific negotiation. But it will inevitably share common elements with what has gone before.<sup>100</sup>

For McLachlan, therefore, 'reference may properly be made to other treaties' where they comprise 'evidence of the common understanding of the parties as to the meaning of the term used', regardless of whether such third-party treaties are in force as between the parties to the IIA in question.<sup>101</sup>

As Carstens explains, an over-reliance on 'ordinary meaning' threatens to 'swallow ... the remaining framework of treaty interpretation'.<sup>102</sup> Put differently, according to Paparinskis, to establish the ordinary meaning of a term in an IIA based on a third-party treaty (or related case law), the latter treaty must be already in existence and the meaning of the term well established.<sup>103</sup> Since the underlying objective of treaty interpretation is to elucidate the common intention of the parties, we contend that the evidentiary value of a third-party IIA in identifying the ordinary meaning of a treaty term depends on its relevance to the parties' intention in the IIA at issue. The existence of a nexus between the third-party IIA and the common intention of the parties to the IIA in question enhances its probative value and reduces the risk of using ordinary meaning to overwhelm the interpretative process or to make it contrary to the qualifications noted by Paparinskis. For instance, a large sample of the parties' own IIAs with other states could shed light on the meaning intended by those parties in their own IIA.

In this connection, the tribunal in *Nova Scotia v. Venezuela* stated:

[W]ere prior treaty making practice to be examined as a factual matter, there would need to be substantial prior treaty practice and complete symmetry with regard to the particular treaty provision between Canada and Venezuela's practice, sufficient to evidence a 'meeting of the minds' and a common and continuous understanding. This may justifiably shed light on a bilateral investment treaty.<sup>104</sup>

In this case, however, the tribunal considered that the disputing parties did not provide sufficient evidence to facilitate the 'kind of comprehensive review of Canada and Venezuela's prior substantial treaty-making practice which would enable it to discern such symmetry' with respect to the intended scope of the IIA's definition of 'investment'.<sup>105</sup>

Similarly, despite considering that third-party IIAs could be useful in revealing the ordinary meaning, the tribunal in *Plama v. Bulgaria* found evidence of Bulgaria's treaty practice 'not particularly relevant in the present case since subsequent negotiations

<sup>100</sup> McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International Comparative Law Quarterly* (2005) 279, at 283.

<sup>101</sup> *Ibid.*, at 315.

<sup>102</sup> Carstens, *supra* note 62, at 236.

<sup>103</sup> Paparinskis, *supra* note 30, at 121. However, Paparinskis emphasizes in ch. 6 that the ordinary meaning of a treaty term may refer explicitly or implicitly to customary international law.

<sup>104</sup> *Nova Scotia Power*, *supra* note 18, para. 83.

<sup>105</sup> *Ibid.*

between Bulgaria and Cyprus indicate that these contracting parties did not intend the MFN provision to have the meaning that otherwise might be inferred from Bulgaria's subsequent treaty practice'.<sup>106</sup> Thus, the probative value of evidence afforded by third-party IIAs was displaced by more pertinent evidence concerning the treaty parties' common intention.

The tribunal in *Aguas del Tunari, S.A. v. Bolivia* espoused views similar to that in *Nova Scotia v. Venezuela*, albeit in different terms. It acknowledged that the 'practice of a state as regards the conclusion of BITs other than the particular BIT involved in a dispute is not of direct value to the task of interpretation under Article 31 of the Vienna Convention'.<sup>107</sup> It considered that the 'practice of a state as regards the negotiation of BITs may be helpful, however, in testing the assertions of parties as to the general policies of either Bolivia or the Netherlands concerning BITs, and in testing assumptions a tribunal may make regarding BITs'.<sup>108</sup> Thus, the tribunal considered that the parties' practice with respect to IIAs with third parties could have evidentiary value – in regard to their 'general policies'<sup>109</sup> – in identifying the ordinary meaning of IIA terms at issue. The tribunal reviewed dozens of IIAs concluded by each party contemporaneously to their own IIA but, ultimately, concluded that they were of 'limited probative value to the task of interpreting the BIT between the Netherlands and Bolivia'.<sup>110</sup>

A more questionable approach to third-party IIAs arose in *Tokios Tokelés v. Ukraine*.<sup>111</sup> The tribunal inferred from the inclusion of denial-of-benefits provisions in third-party IIAs that the 'absence of such a provision [w]as a deliberate choice of the Contracting Parties'.<sup>112</sup> This, in turn, affected the tribunal's interpretation of the scope of 'investors' protected by the IIA in question.<sup>113</sup> The tribunal was willing to look at IIAs to which neither Ukraine nor the USA were party as evidence of the ordinary meaning of terms in their IIA. In our view, consideration of such evidence deviates from the underlying objective of treaty interpretation to identify the common intention of the parties to the relevant IIA. The tribunal's analysis of third-party IIAs reveals no nexus between those IIAs and the common intention of the parties to the IIA before them, falling short of the 'meeting-of-the-minds' evidentiary standard referred to in *Nova Scotia v. Venezuela*.

Similarly, the tribunal in *SGS v. Pakistan* noted that the IIA between Pakistan and Switzerland 'does not contain a "fork in the road" provision akin to Article 8(3) of the France–Argentina BIT' and '[n]either does the BIT set out a provision like Article 1121 of the NAFTA [North American Free Trade Agreement] which requires that the

<sup>106</sup> *Plama Consortium*, *supra* note 17, para. 195.

<sup>107</sup> *Aguas del Tunari*, *supra* note 75, para. 291.

<sup>108</sup> *Ibid.*, para. 292.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, para. 314. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Bolivia, 10 March 1992.

<sup>111</sup> *Tokios Tokelés*, *supra* note 17.

<sup>112</sup> *Ibid.*, paras 34–36.

<sup>113</sup> *Ibid.*, para. 30.

would-be claimant must waive its [rights]'.<sup>114</sup> It concluded that, '[i]n the absence of such treaty language, we are not free to read into the Swiss–Pakistan BIT a requirement that would preclude a would-be claimant from resorting to other remedies in respect of contract claims prior to the exercise of its BIT rights'.<sup>115</sup> As with the tribunal in *Tokios Tokeles v. Ukraine*, this tribunal was therefore willing to consider third-party IIAs to which neither party had consented as evidence in construing the ordinary meaning of the terms of the IIA in question.

The tribunal in *Berschader v. Russia* also used evidence from third-party IIAs to determine whether Belgium and the Soviet Union had intended to cover indirect investments made via companies incorporated in the investors' home states. It stated that '[d]efinitions in certain other BITs expressly provide for protection of investments "owned or controlled directly or indirectly" by the party concerned (see, e.g., Argentina–United States BIT)' and that '[s]uch is not the case under the present Treaty'.<sup>116</sup> The tribunal also 'noted that a large number of the BITs concluded by Belgium and Luxembourg provide express protection for indirect investments', whereas 'the large majority of ... BITs concluded by the Soviet Union and the Russian Federation contain no express reference to indirect investments'.<sup>117</sup> The tribunal considered that 'such contrasting approaches do render it unlikely that, in the absence of specific evidence to the contrary, both Contracting Parties intended that the Treaty would encompass the kind of indirect investments relied upon [by] the Claimants'.<sup>118</sup> Accordingly, the tribunal imparted meaning – by reference to third-party IIAs – to the parties' omission of an express mention of indirect investments in their IIA. In our view, the fact that one party tends to refer explicitly to indirect investments, while the other party tends not to, does not necessarily mean that indirect investments must be expressly mentioned to be covered by an IIA between them. For example, both parties' practices might have a common intention of including indirect investments, either implicitly or through other provisions. In that case, either party's approach could arguably be adopted to the same effect. Further, the tribunal left unexplained how third-party IIAs to which neither party was a party, such as the Argentina–USA BIT, could shed light on the intentions of Belgium and the Soviet Union.<sup>119</sup>

The tribunal in this case also imparted meaning by reference to third-party IIAs in determining whether its MFN provision encompassed arbitration clauses. In particular, in view of the 'highly uncertain state of the law' on that issue when the IIA was

<sup>114</sup> *SGS Société Générale*, *supra* note 17, paras 176–177. NAFTA, *supra* note 24. Agreement between Republic of France and the Republic of Argentina on the Encouragement and Reciprocal Protection of Investments, 3 July 1991.

<sup>115</sup> *SGS Société Générale*, *supra* note 17. Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments, 11 July 1995.

<sup>116</sup> Arbitration Institute of the Stockholm Chamber of Commerce, *Berschader v. Russia*, Award, 21 April 2006, Case no. 080/2004, para. 137.

<sup>117</sup> *Ibid.*, paras 145–146.

<sup>118</sup> *Ibid.*, para. 147.

<sup>119</sup> Treaty between United States of America and Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991.

concluded, the tribunal determined that the parties would have included an express clarification to cover arbitration clauses in the MFN provision if that was their intention.<sup>120</sup> For the tribunal, the ‘consistent practice [in other BITs] on the part of the Soviet Union strongly suggests that the Soviet Party did not intend the MFN provision in Article 2 of the Treaty to extend to dispute resolution issues’, regardless of the ‘fewer available facts concerning the intentions on the Belgian side’.<sup>121</sup> The drawing of inferences from the omission of the parties to clarify a point on a contemporaneously ‘highly uncertain state of the law’ seems somewhat dubious, particularly when corroborated by only one party’s practice in third-party IIAs.

The tribunals in *Tokios Tokeles v. Ukraine*, *SGS v. Pakistan* and *Berchader v. Russia* used evidence from third-party IIAs to engage in an *a contrario* reading of the IIA in question. The omission or inclusion of certain elements as compared to third-party IIAs, including those to which neither party had consented, was taken to mean that the concomitant omission or inclusion of the same elements was a deliberate drafting decision by the parties to the IIA in question.<sup>122</sup> By contrast, the tribunal in *El Paso v. Argentina* used evidence of the inclusion of a certain element in the 2004 US Model BIT as a clarification of the meaning of the IIA between Argentina and the USA as opposed to an *a contrario* difference.<sup>123</sup> In particular, when construing the scope of the ‘umbrella clause’ in the IIA, the tribunal stated:

The view that it is essentially from the State as a sovereign that the foreign investors have to be protected through the availability of international arbitration is confirmed, in the Tribunal’s opinion, by the language in the new 2004 US Model BIT, which clearly elevates only the contract claims stemming from an investment agreement *stricto sensu*, that, is an agreement in which the State appears as a sovereign, and not all contracts signed with the State or one of its entities to the level of treaty claims, as results from its Article 24(l)(a).<sup>124</sup>

While the use of only one instrument in this regard – especially one to which only one party to the IIA had consented – is questionable in evidencing the ‘ordinary meaning’ of the IIA in question, this example also exposes the challenge of using differences in third-party IIAs to shed light on the meaning of an IIA. If the tribunal had followed the logic of those in *Tokios Tokeles v. Ukraine* and *SGS v. Pakistan*, it would likely have read the difference between the 2004 US Model BIT and the IIA at issue as a deliberate drafting choice on which meaning should be imparted, as opposed to a mere clarification in interpreting the scope of the IIA’s umbrella clause.<sup>125</sup>

<sup>120</sup> *Berchader*, *supra* note 116, para. 202.

<sup>121</sup> *Ibid.*, paras 204–205.

<sup>122</sup> Further examples of tribunals using third-party IIAs as evidence of ordinary meaning include: ICSID, *Azurix v. Argentina*, Award, 14 July 2006, ICSID Case no. ARB/01/12, para. 363; ICSID, *CGE v. Argentina*, Annulment, 3 July 2002, ICSID Case no. ARB/97/3, para. 55; UNCITRAL (Ad Hoc Arbitration), *BG Group v. Argentine Republic*, Award, 24 December 2007, paras 385–387; ICSID, *CMS v. Argentina*, Award, 12 May 2005, ICSID Case no. ARB/01/8, paras 368–370.

<sup>123</sup> ICSID, *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, ICSID Case no. ARB/03/IS, para. 80. US Model Bilateral Investment Treaty 2004, available at [https://ustr.gov/archive/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf).

<sup>124</sup> *El Paso*, *supra* note 123.

<sup>125</sup> See also Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’, 104 *AJIL* (2010) 179, at 221, n. 200, 201.

### C Context: Articles 31(1) and 31(2) of the VCLT

Pursuant to Article 31(1) of the VCLT, the ordinary meaning of treaty terms must be assessed 'in their context'.<sup>126</sup> Article 31(2) elaborates on the meaning of the word 'context', which includes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

August Reinisch notes that some tribunals have identified third-party IIAs as relevant 'context': 'When ascertaining the proper meaning of IIA clauses via contextual consideration, tribunals often take a comparative approach by looking at the wording of other IIAs concluded by one of the parties with third states or between third states.'<sup>127</sup> For instance, in *Mobil Investments Canada v. Canada*, the respondent provided third-party IIAs as 'contextual support for the purposes of the [VCLT]', with the tribunal agreeing that such 'treatises and materials can provide relevant context for the NAFTA'.<sup>128</sup>

This view of the IIA in question as operating within a broader 'context' of other third-party IIAs evokes the perspective discussed in section 2.A above that individual IIAs collectively comprise some sort of multilateralized system. We have already identified difficulties with that perspective in connection with third-party IIAs in treaty interpretation. Moreover, this understanding of 'context' under Articles 31(1) and 31(2) of the VCLT does not appear to accord with the plain language of those provisions. In particular, these provisions posit the relevant 'context' as integral components of the treaty or certain agreements or instruments made by one or more parties to the treaty in connection with its conclusion. Oliver Dörr and Kirsten Schmalenbach set out four criteria for determining when related material extrinsic to the treaty qualifies as 'context' under Article 31(2): (i) when there is a general consensus; (ii) when all parties participate; (iii) when there is a relationship between the material and the substance of the treaty and (iv) when there is temporal proximity to the conclusion of the treaty.<sup>129</sup>

Among other reasons, as the parties to the IIA at issue have not all consented to extraneous third-party IIAs (pursuant to our definition), such IIAs do not qualify as 'context' under Articles 31(1) and 31(2) of the VCLT. Reinisch and Paparinskis reach the same conclusion.<sup>130</sup> Similarly, the tribunal in *Nova Scotia v. Venezuela* stated that 'the prior treaty making practice of two States does not fit within the "context" outlined in Article 31(2) of the [VCLT]'.<sup>131</sup>

<sup>126</sup> See also Weeramantry, *supra* note 29, at 51–52; Douglas, *supra* note 97, at 82.

<sup>127</sup> Reinisch, 'The Impact of International Law on IIA Interpretation', in de Mestral and Levesque, *supra* note 42, 323, at 323, 332.

<sup>128</sup> *Mobil Investments Canada*, *supra* note 18, paras 226–230.

<sup>129</sup> Dörr and Schmalenbach, *supra* note 55, at 550.

<sup>130</sup> Reinisch, *supra* note 127, at 333; Paparinskis, *supra* note 30, at 127.

<sup>131</sup> *Nova Scotia Power*, *supra* note 18, para. 83, n. 137.

## D Other Factors: Article 31(3) of the VCLT

Article 31(3) of the VCLT provides that ‘there shall be taken into account, together with the context’ certain other elements in the process of interpreting the terms of a treaty. These include, in relevant part, ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, as reflected in Article 31(3)(b), and ‘any relevant rules of international law applicable in the relations between the parties’, as reflected in Article 31(3)(c). We turn now to whether and how third-party IIAs could be taken into account through these elements in the interpretation of an IIA in dispute.

### 1 Subsequent Practice: Article 31(3)(b)

Some commentators have postulated that Article 31(3)(b) of the VCLT provides a basis for taking into account third-party IIAs in the interpretation of an IIA in dispute. For instance, Anthea Roberts suggests that ‘[c]larifications and explanations in the treaty parties’ model BITs are [an] example of subsequent practice from which an agreement on interpretation may be inferred’.<sup>132</sup> When considering whether certain shareholders’ rights were covered by the IIA at issue, the tribunal in *Enron v. Argentina* expressed a similar view:

[T]he interpretation of a bilateral treaty between two parties in connection with the text of another treaty between different parties will normally be the same, unless the parties express a different intention in accordance with international law. A similar logic is found in Article 31 of the Vienna Convention in so far as subsequent agreement or practice between the parties to the same treaty is taken into account regarding the interpretation of the treaty. There is no evidence in this case that the intention of the parties to the Argentina–United States Bilateral Treaty might be different from that expressed in other investment treaties invoked.<sup>133</sup>

However, this understanding of Article 31(3)(b) does not appear to accord with its plain text. In particular, this provision refers to ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.<sup>134</sup> Its scope is thus confined to the particular treaty that is the subject of interpretation<sup>135</sup> and to the extent to which the agreement of the parties to that treaty is demonstrated. Third-party IIAs are not related to the application of the IIA in question and do not establish the agreement of the parties to that IIA regarding its interpretation.<sup>136</sup> Indeed, in its commentaries on what ultimately became Article 31(3)(b) of the VCLT, the ILC stated:

The value of subsequent practice varies according as it shows the common understanding of the parties as to the meaning of the terms. ... The text provisionally adopted in 1964 spoke of a practice which ‘establishes the understanding of all the parties’. By omitting the word ‘all’ the

<sup>132</sup> Roberts, *supra* note 125, at 211.

<sup>133</sup> *Enron*, *supra* note 18, para. 47.

<sup>134</sup> *Ibid.* (emphasis added).

<sup>135</sup> See Dörr and Schmalenbach, *supra* note 55, at 554.

<sup>136</sup> See Paparinskis, *supra* note 30, at 129.

Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice.<sup>137</sup>

Particularly having regard to this clarification by the ILC, it would be anomalous to take account of third-party IIAs as subsequent practice within the meaning of Article 31(3)(b) because not 'all' parties to the IIA in question are party to any third-party IIA as we have defined them.

## 2 Relevant Rules of International Law: Article 31(3)(c)

Panos Merkouris postulates that Article 31(3)(c) provides a legitimate basis for taking third-party treaties into account where at least one party to the treaty being interpreted is also a party to the third-party treaty.<sup>138</sup> Merkouris emphasizes, in this regard, that 'Article 31(3)(c) is held to enshrine the principle of systemic integration and as such is a tool of integration'.<sup>139</sup> The ILC has also posited Article 31(3)(c) as a key tool in achieving systematic integration across different regimes in international law.<sup>140</sup> For this purpose, Carstens proposes the development and refinement of Article 31(3)(c) (or Article 31(4))<sup>141</sup> to provide greater access for consideration of 'source rules' in interpreting 'transplanted treaty rules'.<sup>142</sup> However, these comments arose in debates about whether the word 'parties' in Article 31(3)(c) denotes all of the parties to the treaty or, for example, the disputing parties, which is of particular relevance to multilateral treaties with large memberships,<sup>143</sup> such as the WTO.<sup>144</sup> As the ILC has also recognized, bilateral (or smaller membership) treaties do not engage in this debate, which remains unresolved.<sup>145</sup>

IIAs are typically bilateral or relatively small plurilateral agreements (at least to date), meaning that different considerations may apply, even if the ILC approach to systemic integration under Article 31(3)(c) is accepted. Moreover, ISDS also provides a different context. A third-party IIA cannot constitute a relevant rule applicable in the relations between the parties to the IIA raised in the dispute because at least one of those parties is not a party to the third-party IIA. Similarly, a third-party IIA cannot constitute a relevant rule applicable in the relations between the disputing parties because the claimant investor is not a party to the third-party IIA (or, indeed, the IIA under which the dispute is brought). Papparinkis reaches a similar conclusion.<sup>146</sup>

<sup>137</sup> ILC Draft Articles, *supra* note 73, Art. 27, para. 15.

<sup>138</sup> Merkouris, *supra* note 47, at 97–99; cf. 100.

<sup>139</sup> *Ibid.*, at 90.

<sup>140</sup> ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Explanation of International Law, UN Doc. A/CN.4/L.682, 13 April 2006, at 244.

<sup>141</sup> But see Papparinkis, *supra* note 30, at 127.

<sup>142</sup> Carstens, *supra* note 62, at 240.

<sup>143</sup> ILC, *supra* note 140, at 237.

<sup>144</sup> See, e.g., WTO, *Peru – Additional Duty on Imports of Certain Agricultural Products – Report of the Appellate Body*, 20 July 2015, WT/DS457/AB/R, paras 5.105–5.106. See also Carstens, *supra* note 62, at 239–240.

<sup>145</sup> ILC, *supra* note 140, at 237, 250.

<sup>146</sup> Papparinkis, *supra* note 30, at 129–130.

Nevertheless, to the extent that a third-party IIA reflects customary international law, it could be taken into account pursuant to Article 31(3)(c) as a rule of international law applicable in the relations between the treaty parties<sup>147</sup> (for example, in relation to the customary minimum standard of treatment as Paparinskis has concluded).<sup>148</sup> Gardiner describes many IIAs as ‘common form treaties’ that are derived from certain parties’ pre-existing model IIAs, suggesting that third-party IIAs can assist in identifying what qualifies as customary international law on a particular matter.<sup>149</sup> However, as discussed in section 2.A above, changes or developments in more recent IIAs often represent attempts to remedy textual deficiencies or erroneous interpretations by investment tribunals of earlier IIAs. In this context, a cautious approach is warranted in characterizing earlier IIAs as reflecting customary international law.<sup>150</sup>

### E *Supplementary Means of Interpretation: Article 32 of the VCLT*

As noted above, the elements of interpretation contained in Article 32 of the VCLT are supplementary, if not subsidiary,<sup>151</sup> to those in Article 31.<sup>152</sup> This characterization flows from the text of Article 32, which circumscribes the specific circumstances under which ‘[r]ecourse may be had to supplementary means of interpretation’. Such recourse may be had only ‘to confirm the meaning resulting from the application of article 31’<sup>153</sup> or to ‘determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable’. Thus, if the meaning of the terms of an IIA yielded by the application of Article 31 is not ambiguous or obscure, or is not manifestly absurd or unreasonable, then Article 32 could be used only to ‘confirm’ the meaning that was otherwise derived through the application of Article 31, as opposed to comprising a primary tool of interpretation. This distinction is significant because any interpretative role for third-party IIAs through Article 32 would be merely secondary to the application of the primary elements of interpretation reflected in Article 31 of the VCLT.

In the specified scenarios, Article 32 permits recourse to ‘supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion’. Its function is to assist in deriving the common intention of the

<sup>147</sup> Gardiner, *supra* note 69, at 324–325; Merkouris, *supra* note 47, at 95–96.

<sup>148</sup> Paparinskis, *supra* note 30, at 166–167. This approach is an alternative to his preferred approach (noted on the same pages) of recognizing the ordinary meaning of fair and equitable treatment as a reference to customary international law under the VCLT, *supra* note 19, Art. 31(1).

<sup>149</sup> Gardiner, *supra* note 69, at 324–325.

<sup>150</sup> See McLachlan, Shore and Weiniger, *supra* note 56, at 223; Paparinskis, *supra* note 47.

<sup>151</sup> Although the ILC appeared to frame what became Art. 32 as a ‘subsidiary means of interpretation’ (see ILC Draft Articles, *supra* note 73, Art. 28, para. 18), this characterization has since been challenged in academic literature. See, e.g., Villiger, *Commentary*, *supra* note 69, at 446–448; Gardiner, *supra* note 69, at 358–359.

<sup>152</sup> Villiger, *supra* note 69, at 446–448; Gardiner, *supra* note 69, at 358–359; Aust, *supra* note 70, at 217.

<sup>153</sup> Emphasis added.

parties through extrinsic material as to the meaning of the terms of the treaty in question.<sup>154</sup> As long as the 'supplementary means' assist in discharging this function, the types of material that could be used appear unbounded. According to Dörr and Schmalenbach, the determinative factor is 'whether the material in question can reasonably be thought to assist in establishing the meaning of the treaty under consideration, and if it does, there are no limits'.<sup>155</sup> For instance, the 'circumstances' of a treaty's conclusion could refer to both contemporary circumstances and the historical context in which the treaty was concluded.<sup>156</sup>

Third-party IIAs could comprise 'supplementary means of interpretation' if they assist in establishing the common intention of the parties as to the meaning of the IIA at issue. However, since third-party IIAs reflect the intentions of other sets of parties, their utility in this regard is extremely limited. Absent evidence connecting a third-party IIA to the common intention of the parties to the IIA in question, the third-party IIA could not constitute a supplementary means under Article 32.<sup>157</sup> Paparinskis similarly questions the general relevance of third-party treaties or cases under Article 32.<sup>158</sup> In the context of transplanted treaty rules in international law in general, Carstens also cautions against referring to the *travaux préparatoires* of the source rule if those materials were not used by, or even available to, the parties to the treaty being interpreted.<sup>159</sup>

The key question is not whether third-party IIAs necessarily comprise a 'supplementary means of interpretation' but, rather, whether they assist in identifying the common intention of the parties in particular circumstances. Their potential role in this regard could be manifested in a variety of ways. For instance, evidence might be presented that the parties in negotiating the primary IIA took into account each other's model IIAs, each other's past treaty practice or concurrent treaty negotiations with third parties. Such evidence could form part of the preparatory work of the IIA and thereby warrant consideration under Article 32, especially where it indicates that the parties drafted aspects of their own IIA in order to distinguish or clarify elements with respect to those of other instruments. Gardiner likewise contemplates that:

[i]f ... the comparable treaty provisions were part of a line of treaties in some sense linked such as by subject matter, and even more so if reference was made to them in the preparatory work, they may be treated as part of the history and warrant consideration as part of the circumstances of conclusion.<sup>160</sup>

Thus, only where there is some nexus between the common intention of the parties to the IIA in question and third-party IIAs – such as through reference to those IIAs

<sup>154</sup> Dörr and Schmalenbach, *supra* note 55, at 581; Sbloci, *supra* note 77, at 154–156; McLachlan, Shore and Weiniger, *supra* note 56 at, 224.

<sup>155</sup> Dörr and Schmalenbach, *supra* note 55, at 581.

<sup>156</sup> Sbloci, *supra* note 77, at 157.

<sup>157</sup> Cf. Aust, *supra* note 70, at 209, 220.

<sup>158</sup> Paparinskis, *supra* note 30, at 130.

<sup>159</sup> Carstens, *supra* note 62, at 233–234.

<sup>160</sup> Gardiner, *supra* note 69, at 400.

in the preparatory work of the IIA in question – is their consideration under Article 32 warranted.

The tribunal in *HICEE v. Slovak Republic* considered, as ‘supplementary material’ under Article 32,<sup>161</sup> certain ‘Explanatory Notes submitted by the Netherlands as part of its domestic ratification of’ the IIA between the Netherlands and Czechoslovakia (the Czech and Slovak Federal Republic).<sup>162</sup> Importantly, the Netherlands also submitted to the Dutch Parliament a contemporaneous set of explanatory notes concerning the Netherlands–USSR BIT.<sup>163</sup> While both IIAs contained in the definition of ‘investments’ the phrase ‘directly or through an investor of a third State’,<sup>164</sup> their respective explanatory notes indicated opposite intentions concerning that provision. In the case of the IIA with Czechoslovakia, the notes indicate the intention of excluding a ‘sub-subsidiary’ – that is, a subsidiary of a Dutch company already established in Czechoslovakia,<sup>165</sup> but, in the case of the IIA with the Soviet Union, they indicate the intention of including investors already established in the Soviet Union.<sup>166</sup> The Slovak Republic – the respondent in the dispute as a successor state to Czechoslovakia – successfully invoked the Dutch explanatory notes in support of its interpretation that the investments that were the subject of the claim were not covered by the Netherlands–Czechoslovakia BIT.<sup>167</sup> For the tribunal, the interpretation put forward by the Slovak Republic and the Dutch explanatory notes ‘represent[ed] a concordance of views between the two Contracting Parties to the treaty obligation in question’.<sup>168</sup> On this basis, the tribunal ascribed little probative value to the Netherlands–USSR BIT and its diverging explanatory note and considered evidence of the possibility of an alternative interpretation.<sup>169</sup> In our view, given that other evidence of the common intention of the parties was inconsistent with the purported inferences to be drawn from third-party IIAs, the tribunal was correct in disregarding those other IIAs.

The tribunal in *Mobil Investments Canada v. Canada* rejected the proposition that evidence pertaining to third-party IIAs could be considered, as ‘preparatory works for the purposes of Article 32 of the [VCLT]’ because ‘[t]hese agreements and sources are not the NAFTA, they did not involve entirely the same parties to the negotiation, at times raise inter-temporal discontinuities, and the extent to which they did or did not influence the NAFTA parties in the preparation of the NAFTA text is not well established’.<sup>170</sup> Thus, given the absence of evidence linking the third-party IIAs to the

<sup>161</sup> UNCITRAL, *HICEE v. Slovak Republic*, Partial Award, 23 May 2011, PCA Case no. 2009-11, paras 117, 136.

<sup>162</sup> *Ibid.*, para. 37.

<sup>163</sup> Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Union of Soviet Socialist Republics, 5 October 1989.

<sup>164</sup> *HICEE*, *supra* note 161, paras 34, 142.

<sup>165</sup> *Ibid.*, para. 38.

<sup>166</sup> *Ibid.*, para. 142.

<sup>167</sup> *Ibid.*, paras 127, 136, 150. Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Republic, 29 April 1991.

<sup>168</sup> *HICEE*, *supra* note 161, para. 136.

<sup>169</sup> *Ibid.*, paras 142–144.

<sup>170</sup> *Mobil Investments Canada*, *supra* note 18, paras 226–230.

common intentions of the parties to the IIA in question regarding the scope of exemptions for training and research from its prohibition on performance requirements, the tribunal in *Mobil Investments* considered that those third-party IIAs could not be taken into account pursuant to Article 32. In our view, this represents a correct understanding of the extent to which third-party IIAs may form part of the interpretative process under Article 32. However, a review of investment awards reveals that several other tribunals have been willing to take account of third-party IIAs pursuant to Article 32 without any such nexus.

In *Churchill Mining PLC v. Indonesia*, the tribunal stated that '[t]reaties on the same subject matter concluded respectively by the United Kingdom and Indonesia with third States can legitimately be considered as part of the supplementary means of interpretation', and it proceeded to consider 'a selection of BITs of either the United Kingdom or Indonesia and third parties' in order to 'pursue its interpretation of the words "shall assent" in Article 7(1) of the UK–Indonesia BIT'.<sup>171</sup> The tribunal concluded:

[T]he United Kingdom's practice is to secure advance consent to international arbitration, including during the 1970s. Indonesia follows a similar practice but clauses adopted in the 1970s show considerable variations. As a result, third party treaty practice does not allow one to reach a conclusion on the meaning of 'shall assent' thus leading the Tribunal to review the preparatory materials that are on the record.<sup>172</sup>

Although the tribunal did not ultimately reach a conclusion on the basis of the parties' past treaty-making practice with third states, its analysis shows that it was nonetheless willing to take such third-party IIAs into account under Article 32 without any evidence that those IIAs informed the common intention of Indonesia and the United Kingdom in their own IIA.

The tribunal in *Metal-Tech Ltd v. Uzbekistan* was likewise willing to consider third-party IIAs under Article 32 without necessarily having any evidence connecting those IIAs to the common intentions of the parties to the IIA in question.<sup>173</sup> In particular, it stated:

While the Tribunal does not benefit from any travaux préparatoires of the BIT, it notes that other investment treaties entered into by Israel confirm the meaning of Article 7(c) as it results from the foregoing analysis. ... [T]hese other treaties on the same subject matter can be taken into account as supplementary means of interpretation pursuant to Article 32 of the [VCLT].<sup>174</sup>

On this basis, the tribunal considered that '[a] number of Israeli BITs contain a provision similar to Article 7(c) of the Treaty' and that 'these BITs clearly indicate that the reference to "investment" and "reinvestment" is meant in the limited context of the repatriation provisions of the pre-1992 treaties'.<sup>175</sup> It therefore concluded:

<sup>171</sup> *Churchill Mining*, *supra* note 17, paras 195–197. Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, 27 April 1976.

<sup>172</sup> *Ibid.*, para. 207.

<sup>173</sup> *Metal-Tech*, *supra* note 17, para. 159.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Ibid.*

This rationale confirms the Tribunal’s understanding of the Israel-Uzbekistan BIT. It is clear that Article 7(c) of the Treaty is to be limited to the repatriation provisions in the pre-1992 Israeli BITs. Thus, contrary to what the Claimant suggests, the reference to ‘definition of “investment”’ in Article 7(c) does not have a life of its own ... [T]he Claimant cannot rely on Article 3(2) of the Treaty to avoid the express requirement of compliance with host state law provided in Article 1(1) of the Treaty.<sup>176</sup>

Thus, the tribunal used Israel’s IIAs with third states as a ‘supplementary means of interpretation’ in its interpretation of Israel’s IIA with Uzbekistan, without any evidence that those IIAs with third states informed the common intentions of Israel and Uzbekistan in negotiating their own IIA.<sup>177</sup> For instance, the tribunal made no reference to whether the negotiating history indicated that Israel and Uzbekistan based their IIA on Israel’s other IIAs with third states or whether they took those third-party IIAs into account at all.

The tribunal in *Camuzzi v. Argentina* considered it ‘unnecessary to resort to supplementary means’ in its interpretation of the IIA at issue<sup>178</sup> but nonetheless commented:

[E]ven if that were necessary, the negotiating history of the Treaty does not show that the intention asserted today by the Argentine Republic was that the other party had in signing the Treaty. Rather to the contrary, the clear intention was to provide full protection for investors. A sizeable number of treaties were concluded by the Argentine Republic with the specific intent of encouraging the interest of foreign investors in the privatization program. It is to this end that the terms of the Treaty discussed above were included.<sup>179</sup>

Thus, although these considerations did not affect its ultimate conclusion as to whether the IIA in question was intended to afford automatic consent to arbitration, the tribunal appeared to equate Argentina’s IIAs with third states to the negotiating history of the IIA between Argentina and the Belgo-Luxembourg Economic Unit. It did so in the absence of evidence that Argentina and the Belgo-Luxembourg Economic Unit actually intended their IIA to be based on Argentina’s other IIAs that apparently had the ‘specific intent of encouraging the interest of foreign investors in the privatization program’.<sup>180</sup>

## 4 Conclusion

Our survey of relevant investment awards reveals that the fear of US negotiators about the legal implications of even stylistic modifications to the text of their Model BIT in negotiations with third states was not without foundation.<sup>181</sup> A significant number of tribunals have been willing to interpret the IIA before them with reference

<sup>176</sup> *Ibid.*, paras 160–163.

<sup>177</sup> Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, 4 July 1994.

<sup>178</sup> ICSID, *Camuzzi v. Argentina*, Decision on Jurisdiction, 11 May 2005, ICSID Case no. ARB/03/2.

<sup>179</sup> *Ibid.*, paras 133–134.

<sup>180</sup> *Ibid.*

<sup>181</sup> Vandeveld, *supra* note 15, at 111.

to third-party IIAs, including model IIAs. Our analysis also demonstrates that the use of third-party IIAs in this manner often reflects an erroneous application of the customary rules of treaty interpretation set out in Articles 31–33 of the VCLT. Although third-party IIAs could in some circumstances be relevant in identifying ordinary meaning under Article 31(1) or as a supplementary means of interpretation under Article 32, such use must not undermine the fundamental objective of respecting the common intention of the treaty parties and the limits of the disputing parties' consent to arbitration. In using third-party IIAs as context under Article 31(1)–(2), subsequent practice under Article 31(3)(b) or relevant rules of international law under Article 31(3)(c) (where the IIAs do not represent customary international law), investment tribunals not only misapply rules of interpretation but also deviate from their function as arbitrators to resolve the dispute in accordance with the law to which the parties have consented. Similarly, extraneous purposes to the dispute, such as consolidating the multilateralization of investment law, promoting the systemic legitimacy of ISDS or addressing the fragmentation of international law, provide no basis for an arbitrator to interpret an IIA by reference to third-party IIAs where the disputing parties have consented to the application of the VCLT.

These conclusions have significant implications for international investment law and state practice. If investment tribunals continue to look to third-party IIAs beyond the parameters of the VCLT, beyond party consent and beyond the common intention of the parties, changes in treaty drafting may have unintended or even perverse consequences. For example, could a tobacco company point to the novel inclusion of a 'carve-out' for tobacco control measures from ISDS in the TPP to defeat arguments that the parties to another IIA, which were omitting such a carve-out, nevertheless intended to exclude such measures from ISDS (similar to Uruguay's jurisdictional arguments in its dispute with Philip Morris)?<sup>182</sup> Could an investor invoke clarifications to the obligation of fair and equitable treatment or expropriation in CETA in a dispute involving an 'old-style' IIA, lacking such clarifications to suggest that the latter IIA lacks such regulatory protections? To what extent does the use of words such as 'for the avoidance of doubt' or 'for greater certainty'<sup>183</sup> assist in avoiding such attacks? States should be concerned about creeping departures from the VCLT rules because these rules underline the importance of party autonomy and consent (within the broader context of consent as a touchstone of public international law). If not tethered to those rules, tribunals will be left with discretionary interpretative choices about what is 'good policy' or 'reasonable' in the circumstances.

<sup>182</sup> See note 4 above. See also Voon, 'Philip Morris v. Uruguay: Implications for Public Health', 18 *JWIT* (2017) 320.

<sup>183</sup> See, e.g., TPP, *supra* note 39, Art. 9.6.2.