> national court litigation of international investment and commercial disputes, (2) the basic procedures required for fair and effective international dispute resolution, (3) the role that states must play in creating an international and national legal environment that fosters effective arbitration, and (4) the need for a reciprocally supporting relationship between national courts and arbitral tribunals.[12]

If this more progressive paradigm is to be maintained, states must continue to perceive the benefits of international arbitration, both for their foreign investors and for themselves. A key way to ensure continued state support for investment arbitration is to afford states the opportunity to make their views known on treaty interpretation questions, and then to give those views appropriate consideration and effect. To ignore or second-guess the treaty parties could seriously undermine the existing paradigm.

Interpretational Methods as an Instrument of Control in International Investment Law

By Anne van Aaken[*]

Investor-state dispute settlement (ISDS) is much discussed and criticized.[1] It is under pressure also in policymaking, e.g., in the Transatlantic Trade and Investment Partnership, in Australia, Indonesia, and some South American countries. Some states want to discard ISDS altogether, but throwing out the baby with the bathwater is never optimal. Thus, more fine-grained proposals should be considered.

ISDS delegates interpretational power from states to arbitrators to an unusual extent: it is the most far-reaching delegation of interpretation in international law. Many international investment agreements (IIAs) are broadly and vaguely formulated (especially the European ones); there is in principle no exhaustion of local remedies; there are no diplomatic considerations since investors do not need their home states to take up their case; and it is well-enforced in comparison with other areas of international law. States have several means at their disposal to control this delegation if they want to retain more control over the interpretation of their treaties. Proposals for reform can be grouped in three broad areas: institutional control (''Who?''), controlling substantive law (''What?''), and controlling interpretational methods (''How?''). Institutional reform proposals include, for example, appeal mechanisms, standing investment courts, appointment mechanisms for arbitrators, joint commissions of states,[2] alternative dispute settlement mechanisms, and binding authoritative interpretations by states. Control of substantive law focuses on the mode of formulating IIAs (using standards (broadly formulated terms, concretized *ex post* in a dispute), rules (more precise norms), or principles)[3] as well as the substantive content of the treaties. The more vaguely formulated a treaty is,

[12] *Id.* at 647.

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[1] For an overview of the recent discussion, see *Reform of Investor-State Dispute Settlement: In Search of a Roadmap* (special issue), 11 Transnat'l Disp. Mgmt. (2014).

[2] Anne van Aaken, *Delegating Interpretative Authority in Investment Treaties: The Case of Joint Commissions*, 11 Transnat'l Disp. Mgmt. (2014).

[3] For an application to IIAs, see Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis*, 12 J. Int'l Econ. L. 507 (2009). *See also* Federico Ortino, *Refining the Content and Role of Investment 'Rules' and 'Standards': A New Approach to International Investment Treaty Making*, 28 ICSID Rev. 152 (2013), as well as the remarks of Friedrich Rosenfeld, *supra* at 191.

the higher the delegation to arbitrators. Furthermore, definitions of certain terms (including the preamble) and exceptions (e.g., security exceptions) can be explicitly included. States can also explicitly clarify the relationship between non-investment, law such as environmental treaties or human rights treaties, and the IIA.

All the issues have been widely discussed and are partially implemented by states when (re)negotiating their IIAs. Since most IIAs were concluded before the surge in arbitral decisions in the mid-1990s, it was difficult for states to predict judicial outcomes of disputes with any degree of certainty. This made it difficult to know how rigidly the states' commitments would be interpreted. Interpretative methods are especially crucial if the treaty is incomplete or if there is no settled or coherent jurisprudence. These methods have been deemed to be an instrument of power:[4] they are not neutral, but they may be decisive for the outcome of a case. To paraphrase Emanuel Kant: ''Substantive law without interpretational methods is blind; interpretational methods without substantive law are empty.'' Thus, although both are deeply intertwined, the focus has hitherto been on substantive law, with only a few exceptions.[5] The question is therefore whether states can control the interpretation of IIAs via mandating interpretational methods to be applied in ISDS. Although all methods subsequently discussed could be used by the investment tribunals, they are usually not. Thus, a stricter guidance of tribunals by prescribing interpretative methods in more detail in IIAs would strengthen states' control over interpretation to a considerable extent.

Although interpretative methods are determined by Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT),[6] the VCLT does not prescribe how exactly these methods are used. Thus, tribunals can and do use them selectively. I focus on three methods neglected by arbitral tribunals: first, the object and purpose of the treaty (VCLT Art. 31(1)); second, subsequent agreement and practice (VCLT Art. 31(3)(a) and (b)); and third, other international law to be taken into account (VCLT Art. 31(3)(c)). The context mentioned in Art. 31(1) is specified by Art. 31(2) and (3) (the latter using extrinsic means of interpretation[7]).[8]

First, the object and purpose of a treaty must be distinguished; conflating them creates a pleonasm.[9] States use treaties with rights and obligations (the object of the treaty) in order to attain certain goals or solve problems (the purpose of the legal instrument). The more vague the IIA is, the more important a teleological interpretation becomes; that is, the purpose becomes more important than the object. In the view of some tribunals, IIAs are instruments for the maximization of investor protection (conflating object and purpose);[10] accordingly, uncertainties concerning ambiguous treaty provisions should be resolved in favor of foreign

[4] Dieter Grimm, *Methode als Machtfaktor*, *in* Recht und Staat der bürgerlichen Gesellschaft 347 (Dieter Grimm ed. 1987).

[5] Anthea Roberts, Subsequent Agreements and Practice: The Battle Over Interpretive Power, in Georg Nolte ed., *Treaties and Subsequent Practice,* (Oxford, Oxford University Press 2013), p. 95.

[6] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[7] Oliver Dörr, *Article 31*, *in* Vienna Convention on the Law of Treaties: A Commentary 523 (Oliver Dörr & Kirsten Schmalenbach eds., 2012).

[8] For details, see Richard K. Gardiner, Treaty Interpretation (2008).

[9] ''Object'' (l'objet) can be read to mean the substantive content of a treaty (rights and obligations), whereas the purpose (le but) refers to the general result which the parties want to achieve. Isabelle Buffard & Karl Zemanek, *The ''Object and Purpose'' of a Treaty: An Enigma?*, 3 Austrian Rev. Int'l & Eur. L. 311, 318 (1998) (extensively reviewing jurisprudence and scholarly literature).

[10] *E.g.,* Siemens A.G. v. Argentine Rep., ICSID Case No. ARB/02/8, Decision on Jurisdiction, Aug. 3, 2004, para. 81.

investors.[11] It is not only questionable whether the (only) purpose of IIAs is the protection of investment, but also whether it is actually a purpose at all. As most preambles reveal, the protection and promotion of investment is the means to an end, the end being the maximization of welfare, development, or prosperity of the home and host states.[12] If states are not satisfied with the prevailing interpretation, they can clarify the preamble. If, for example, the treaty also contains environmental or sustainable development goals (as in the WTO), these may be used in a teleological interpretation of the treaty itself. States can also clarify what the treaty's object and purpose are.

Second, states can insist that subsequent practice enter the interpretation of the IIAs, thereby rendering them more dynamic by taking into account states' learning processes, making authoritative statement provisions less important.[13] Subsequent agreements can be formal treaties or informal understandings concerning the meaning of an IIA provision. Thus, even if an IIA does not contain a provision on authoritative interpretation by states, this ''omission'' could be remedied by tribunals (but currently is not). Furthermore, subsequent practice, that is, objective evidence of the understanding of the parties, could be accounted for (being often used by international courts but not in ISDS). One example would be the observable tendency of states to restrict the scrutiny of national security clauses reacting to the strict scrutiny currently used by tribunals. Had this development been taken into account early on, states might not have reacted by transforming those clauses into entirely self-judging clauses (creating moral hazard problems), but might have settled instead with good-faith review.

Third, if a treaty norm is unclear, another public international norm could be used to clarify the meaning with the interpretational means of VCLT Art. 31(3)(c), which commands that interpreters should take into account ''any relevant rules of international law applicable in the relations between the parties.'' Its use has been widely discussed,[14] but not extensively for investment law.[15] Investment tribunals do not resort to it when interpreting IIA clauses. But even if the IIA is silent, the correct means of taking into account non-investment law is to apply Article 31(3)(c). Commentators have viewed it as having the ''status of a constitutional norm within the international legal system.'' In this role, it serves ''a function analogous to that of a master-key in a large building.''[16] No international law norm can be considered in isolation, and it must be interpreted in light of other international law. Treaty-makers can push arbitrators to consider non-investment law by mandating the use of Article 31(3)(c).

In sum, instead of exiting IIAs or ISDS, states can use the prescription of interpretive methods in IIAs to constrain arbitrators and control their treaties and the outcome of cases. Interpretative methods are a hitherto neglected means for controlling delegation.

[11] SGS Société Générale de Surveillance SA v. Phil., ICSID Case No. ARB/02/6, Jan. 29, 2004, para. 116; Noble Ventures v. Rom., ICSID Case No. ARB/01/11, Award, Oct. 12, 2005, para. 52.

[12] *Cf.* Jeswald W. Salacuse, The Law of Investment Treaties 114 (2010).

[13] For details, see Anthea Roberts, *Subsequent Agreements and Practice: The Battle over Interpretive Power*, *in* Treaties and Subsequent Practice 95 (Georg Nolte ed., 2013).

[14] Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (by Martti Koskenniemi), A/CN.4/L.682 (Apr. 13, 2006).

[15] Anne van Aaken, *Fragmentation of International Law: The Case of International Investment Law*, 17 Fin. Y.B. Int'l L. 91 (2008).

[16] Campbell MacLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 Int'l & Comp. L.Q. 279, 281 (2005).