# International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?

Comments by *Christoph Schreuer*:

## *A. Uniformity and Coherence in Treaty Interpretation*

Much of what we have heard from Michael Waibel was focused on the capacity of the Vienna Convention on the Law of Treaties (VCLT) to achieve coherence in the interpretation of investment treaties. In this context, it is already a major achievement that the principles of interpretation contained in Articles 31-33 of the VCLT are today practically universally accepted. Let us not forget that these principles were at one time hotly contested not least during their drafting in Vienna in 1969.

At the same time, I have rather limited confidence in the capacity of the VCLT to produce predictable results and hence to contribute to uniformity in the interpretation of treaties. Different tribunals, even if they faithfully apply Articles 31-33 of the VCLT, are likely to reach different results. Therefore, the usefulness of the VCLT as a tool for the harmonization of practice in the application of investment treaties is limited. But there is no doubt that the VCLT's provisions on treaty interpretation are a useful starting point. Perhaps they should be regarded not so much as rules that will lead to inescapable results but rather as an intellectual checklist that should be used when applying treaties. Treaty interpretation is not a mechanical process that will automatically lead to the correct result if only the right method is applied. The old adage that treaty interpretation is not a science but an art is still very true today.

## *B. Effective and Restrictive Interpretation*

The term «effective interpretation» is somewhat ambivalent. It can mean two quite different things. One meaning is that every treaty provision should be interpreted so as to give it some meaning. In other words it should not be deprived of all effect. This is a perfectly sensible maxim. The other meaning of «effective interpretation» is a purported principle of extensive or expansive

interpretation. Under this maxim treaties should be interpreted so as to give them maximum effect. Such a suggestion is of doubtful value and has not been widely accepted in practice.

In international investment law «restrictive» or «effective» methods of interpretation have a particular connotation. Since investment treaties are focused on the rights of investors their restrictive interpretation will tend to favour host States. Conversely, their effective interpretation will typically favour investors. Although tribunals have at times subscribed to one or the other method of interpretation[1] the prevalent and clearly better view appears to be a balanced approach that rejects both these methods. The Tribunal in *Mondev* v. *United States*[2] said:

> 43. In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties.[3]

### *C. Object and Purpose*

A related issue is the use of a treaty's object and purpose as reflected in its preamble.[4] This method is often seen as favouring the investor.[5] But if we take a closer look at preambles of investment treaties we see that their object and purpose extends beyond the simple protection of investments to the improvement of economic cooperation between States and, perhaps most importantly, to economic development. These different goals are entirely compatible. The Tribunal in *Amco* v. *Indonesia*[6] pointed out that investment protection was also in the longer term interest of host States:

1 For examples of tribunals subscribing to a restrictive method of interpretation see: *SGS* v. *Pakistan*, Decision on Jurisdiction, 6 August 2003, 8 ICSID Reports 406, para. 171; *Noble Ventures* v. *Romania*, Award, 12 October 2005, para. 55. For examples of tribunals favouring an interpretation that gives full effect to investor rights see: *SGS* v. *Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, para. 116; *Eureko* v. *Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335, para. 248.

2 *Mondev* v. *United States of America*, Award, 11 October 2002, 6 ICSID Reports 192.

3 At para. 43. Footnote omitted.

4 *Plama* v. *Bulgaria*, Decision on Jurisdiction, 8 February 2005, para. 193.

5 *Noble Ventures* v. *Romania*, Award, 12 October 2005, para. 52; *Siemens* v. *Argentina*, Decision on Jurisdiction, 3 August 2004, para. 81.

6 *Amco* v. *Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 389.

> ...to protect investments is to protect the general interest of development and of developing countries.[7]

From the perspective of the principles of interpretation as enshrined in the VCLT there is no reason to criticize tribunals for relying on a treaty's object and purpose. The basic rule, as reflected in the first paragraph of Article 31, lists object and purpose as a primary principle of treaty interpretation together with good faith, ordinary meaning and context.

### *D. Official Interpretations*

I am a bit more sceptical than Michael Waibel of the role of States officially interpreting treaties in pending disputes between investors and host States. Obviously, a unilateral assertion by a disputing State party is of limited value. Apart from the fact that the State is likely to have an evident interest in the acceptance of a particular interpretation by the tribunal, arguments presented in litigation are typically drafted by the State's counsel. They do not necessarily reflect the meaning that the States Parties had in mind when concluding the treaty. It is an interesting question whether pleadings on behalf of a State put forward by a private law firm may be regarded as State practice in the sense of the VCLT[8] or for purposes of developing customary international law.

In most cases there will be no available information concerning the circumstances of a BIT's conclusion. BITs are frequently based on model texts with limited negotiations. There are typically no records that can be used by way of *travaux préparatoires*.

In *Aguas del Tunari* v. *Bolivia*[9] the Tribunal sought information from the investor's home State on certain aspects of the BIT's interpretation. But it did not find the information thus obtained helpful.[10] In *CME* v. *The Czech Republic* the two States, parties to the BIT, issued a joint, statement on a question of interpretation pending before the tribunal.[11] It is unclear to what extent that statement had an influence on the Tribunal's decision.

7 At para. 23. See also Award, 20 November 1984, 1 ICSID Reports 413, at para. 249.
8 Article 31(3)(b) VCLT refers to subsequent practice in the application of a treaty.
9 *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, 21 October 2005.
10 At paras. 47, 249-263.
11 In *CME v The Czech Republic* the BIT between the Czech Republic and the Netherlands provided for «consultations» with a view to resolving any issue of interpretation and application of the Treaty. Pursuant to this procedure, the Netherlands and the Czech Republic issued «Agreed Minutes» containing a «common position» on the BIT's

The NAFTA has a mechanism whereby the Free Trade Commission (FTC), a body composed of representatives of the three States parties, can adopt binding interpretations of the treaty.[12] The FTC has made use of this method in July 2001 in interpreting the concepts of «fair and equitable treatment» and «full protection and security» under Article 1105 of the NAFTA.[13]

Some BITs offer an institutional mechanism to obtain authentic interpretations of their meaning.[14] But this method has serious drawbacks. States are prone to attempt to influence proceedings to which they are parties or are likely to become parties. A mechanism whereby a party to a dispute is able to influence the outcome of judicial proceedings by issuing an official interpretation to the detriment of the other party is incompatible with principles of a fair procedure and is hence undesirable. This is true even if the official interpretation requires also the assent of the other party or parties to the treaty. In addition, a system involving hundreds of separate treaties each with its own mechanism for an official interpretation is unlikely to lead to a harmonization of interpretations and to systemic integration.

interpretation, after the Tribunal had issued a Partial Award. See Final Award, 14 March 2003, 9 ICSID Reports 264 at paras. 87-93, 437, 504.

12 NAFTA Article 2001(1): «The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.»
NAFTA Article 1131(2): «An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.»

13 FTC Note of Interpretation of 31 July 2001.

14 See Article 30(3) of the US Model BIT of 2004.