TREATY INTERPRETATION IN INVESTMENT ARBITRATION

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D. Customary Status and FIAT Use of the Convention Rules

customary status of those Articles.\textsuperscript{52} One of its most recent statements on the
Convention Rules was made in the \textit{Case Concerning Pulp Mills on the River Uruguay},
in which the ICJ held that in interpreting the terms of a disputed treaty between
Argentina and Uruguay ‘the Court will have recourse to the customary rules on
treaty interpretation as reflected in Article 31 of the Vienna Convention’.\textsuperscript{53} In
addition to the ICJ judgments, a considerable body of other international law
jurisprudence,\textsuperscript{54} as well as domestic court pronouncements from across the globe,\textsuperscript{55}
now provide incontrovertible support for the proposition that Articles 31 to 33
reflect customary rules of international law. Over the past half-decade, a sizable
body of scholarly literature has also been published on treaty interpretation,
containing detailed examinations of the Convention Rules.\textsuperscript{56}

Chapter 1 supra explains that the rules of customary international law expressed in
a treaty bind States that are not parties to that treaty. Accordingly, because the
Convention Rules reflect customary international law, they also bind States that are
not parties to the Vienna Convention.\textsuperscript{57} This aspect of customary law was illustrated
in \textit{Sovereignty over Pulau Ligitan and Pulau Sipadan}, in which Indonesia,
although not a party to the Vienna Convention, did not dispute before the ICJ that
the Convention Rules constituted the applicable rules.\textsuperscript{58}

Scholarly literature relating to international investment law recognized the signifi-
cance of the Convention Rules as far back as 1979. In that year, Amerasinghe, in
commenting on the principles of interpretation applicable to the ICSID
Convention’s jurisdictional clauses, wrote:

\begin{quote}
[i]t is arguable that there are several choices open in the task of interpreting a
convention. But generally it is admitted, and seems to have been the consensus underlying
the Vienna Convention, that the most frequent approach as reflected in Article 31 of
the Vienna Convention requires that the terms of a treaty be given their ordinary
meaning in context and in the light of the object and purpose of the treaty.\textsuperscript{59}
\end{quote}

\textsuperscript{52} See Appendix V infra.
\textsuperscript{53} \textit{Case Concerning Pulp Mills on the River Uruguay} (Argentina v Uruguay), Judgment, 20 April
2010, at para. 65.
\textsuperscript{54} See Appendix VI infra.
\textsuperscript{55} See Appendix VII infra and generally, Gardiner, \textit{Treaty Interpretation} (2008), at 128–38; and
Relations Law of the United States, Third Restatement} at §325(1) replicates Article 31(1) and (3), at
§325(2), with some inconsequential differences. The codification found in the Restatement omits
other provisions of Articles 31 to 33. Nonetheless, most of those omitted provisions are still covered
in the Restatement by way of inclusion in the American Law Institute’s Commentary to §325.
\textsuperscript{56} See, e.g., Wäbel, ‘Demystifying the Art of Interpretation’, 22 European Journal of International
Law 571 (2011), a review of six recently published books on treaty interpretation.
\textsuperscript{57} For FIAT practice on this point see paras 32–33 infra.
\textsuperscript{58} (Indonesia v Malaysia), ICJ Reports (2002), at para. 37.
\textsuperscript{59} Amerasinghe, \textit{The Jurisdiction of the International Centre for the Settlement of Investment
Disputes}, 19 Indian J. Intl Law 166 (1979), at 167.