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TREATY  
INTERPRETATION  
IN INVESTMENT  
ARBITRATION

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#### D. Customary Status and FIAT Use of the Convention Rules

customary status of those Articles.<sup>52</sup> One of its most recent statements on the Convention Rules was made in the *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'.<sup>53</sup> In addition to the ICJ judgments, a considerable body of other international law jurisprudence,<sup>54</sup> as well as domestic court pronouncements from across the globe,<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup> This aspect of customary law was illustrated in *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.<sup>58</sup> 2.25

Scholarly literature relating to international investment law recognized the significance 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: 2.26

[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.<sup>59</sup>

<sup>52</sup> See Appendix V *infra*.

<sup>53</sup> *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay), Judgment, 20 April 2010, at para. 65.

<sup>54</sup> See Appendix VI *infra*.

<sup>55</sup> See Appendix VII *infra* and generally, Gardiner, *Treaty Interpretation* (2008), at 128–38; and Frankowska, 'The Vienna Convention on the Law of Treaties before United States Courts', 28 *Virginia Journal of International Law* 281 (1987–8). The American Law Institute's *Restatement of the Foreign 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.

<sup>56</sup> See, e.g. Waibel, 'Demystifying the Art of Interpretation', 22 *European Journal of International Law* 571 (2011), a review of six recently published books on treaty interpretation.

<sup>57</sup> For FIAT practice on this point see paras 32–33 *infra*.

<sup>58</sup> (Indonesia v Malaysia), ICJ Reports (2002), at para. 37.

<sup>59</sup> Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 167.