1

INTRODUCTION

A. Overview

1. Nature of the Subject Matter

Most international adjudications involving States feature disputes that concern the meaning of treaty provisions.[1] This phenomenon is in large measure attributable to the imperfections of language and the ineffable quality of human interaction. Practical necessity has thus dictated that principles or rules[2] of treaty interpretation assume an important role resolving differences between States and, increasingly, between States and private investors. Notwithstanding their practical importance, treaty interpretation rules have not developed—and are unlikely ever to develop—into straightforward formulae that mechanically extract incisive meanings from treaty texts swollen with ambiguity. As the International Law Commission ('ILC') observed in its commentary to the provisions that were eventually to become **1.01**

[1] See, e.g. Jennings and Watts (eds), *Oppenheim's International Law* (1992), at 26 (commenting that the jurisdiction of the ICJ 'has been most frequently invoked for the purpose of interpreting treaties'); and Aust, *Modern Treaty Law and Practice* (2000), at 184 ('there is no treaty which cannot raise some question of interpretation'). See also the ILC Commentary, *YILC* (1966-II), at 218, para. 3 and Sohn, 'Settlement of Disputes Relating to the Interpretation and Application of Treaties', 150 *Recueil des cours* 195 (1976-II).

[2] For a discussion on the differences between principles and rules, see note 1 of Chapter 3 *infra*.

Articles 31 and 32 of the Vienna Convention, interpretation is 'an art, not an exact science'.[3]

1.02 Treaty interpretation rules are often applied without uniformity, if applied at all. They find expression in concise language, yet are deceptively complex. They have helped resolve disputes, but have also created them. They have been credited with upholding the intentions of the parties, but equally have been criticized for ignoring them. While they have helped to clarify treaty provisions, the rules themselves have been accused of lacking clarity.

1.03 Not surprisingly, scholarly literature often recalls with approval the observation of Lord McNair that '[t]here is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation'.[4] It is against this background that we embark upon the present examination of treaty interpretation in investment arbitration.

1.04 The book is divided into seven chapters. This first chapter is introductory in nature. It states the book's objectives, nature and scope and provides a brief description of relevant treaty law and investment treaties. Chapter 2 describes the historical background and current status of international law rules pertaining to treaty interpretation. Chapters 3 and 4 contain a detailed analysis of foreign investment arbitral tribunal ('FIAT') practice concerning the treaty interpretation rules expressed in Articles 31 and 32 of the Vienna Convention (the 'Convention Rules'). Chapter 5 explores other supplementary means of interpretation employed by FIATs but not explicitly specified in the Vienna Convention. Chapter 6 discusses some salient

[3] International Law Commission, Commentary to Draft Articles 27 and 28, para. 4, *YILC* (1966-II), at 218, reprinted in *United Nations Conference on the Law of Treaties, Official Records, Documents of the Conference* (1971), at 38. Similarly, see Amerasinghe, 'The Jurisdiction of the International Centre for the Settlement of Investment Disputes', 19 *Indian J. Int'l Law* 166 (1979), at 167 (treaty interpretation is 'a delicate art rather than a strict science'); Sinclair, *The Vienna Convention on the Law of Treaties* (1984), at 153 ('Interpretation is a process involving the deployment of analytical and other skills: it cannot be reduced to a few propositions capable of purely automatic application in all circumstances.'); and Harvard Law School, Research on International Law, Part III Draft Convention on the Law of Treaties, with Comment, 29 *AJIL (Supplement)* 657 (1935), at 939 (the process of interpretation 'calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolutely and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled.'). See also Jennings and Watts, *supra* note 1, at 1271; and *Generation Ukraine*, at para. 20.29.

[4] McNair, *The Law of Treaties* (1961), at 364. More recently, one scholar has maintained that '[t]he issue of treaty interpretation remains a deeply obscure and subjective process'. French, 'Treaty Interpretation and the Incorporation of Extraneous Legal Rules', 55 *ICLQ* 281 (2006), at 281. In relation to the interpretation of domestic statutes, Justice Frankfurter of the US Supreme Court once noted with illuminating candour that cannons of construction cannot 'save us from the anguish of judgment. Such cannons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements.' Frankfurter J., 'Some Reflections on the Reading of Statutes', 2 *The Record of the Association of the Bar of the City of New York* 213 (1947), at 235. See also Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), at 19 ('The interpretation of treaties is, perhaps, one of the most confused subjects in international law to-day.').

features of FIAT practice that particularly relate to the interpretation of treaties. Chapter 7 draws conclusions from the preceding chapters, addresses the question as to whether the Convention Rules are suitable for application in investment arbitration and assesses the contribution of investment arbitration to the corpus of international law on treaty interpretation.

2. Aim and Scope

1.05 The main endeavour of this work is the examination of treaty interpretation techniques utilized in the field of investment arbitration. By and large, it does not intend to assess the correctness of the substantive conclusions produced by the application of treaty interpretation methods. Any evaluation of substantive issues will be incidental to the book's primary objectives.

1.06 For present purposes, the term FIAT refers to arbitral tribunals constituted to determine investment disputes under investor–State agreements, bilateral investment treaties ('BITs'), the North American Free Trade Agreement ('NAFTA'), the Energy Charter Treaty ('ECT'), and other investment treaties or free trade agreements ('FTAs'). It does not include the Iran–US Claims Tribunal or a Chamber thereof, and it covers only awards rendered after the 1990 *AAP* award.[5] To support or illustrate many of the points addressed in this work, reference has necessarily been made to relevant decisions issued by a wide range of courts and tribunals that function outside the realm of international investment law but nonetheless apply and interpret treaties.

1.07 Topics that generally lie outside the scope of the present work include (1) the interpretation of treaties by domestic courts,[6] (2) the interpretation of international commercial agreements,[7] investor–State agreements, awards, commercial documents, or domestic legislation, (3) Overseas Private Investment Corporation ('OPIC') decisions, (4) the use of different language versions to interpret treaties, including application of Article 33 of the Vienna Convention, and (5) the rules of

[5] The temporal significance of this award is that it was the first award resulting from an investment claim made under a BIT. Prior investment arbitration awards were by and large based on claims made pursuant to investor–State agreements, with little need to interpret treaties except when (rarely) provisions of the ICSID Convention were at issue. See, e.g. *Klöckner (Annulment)*, at para. 58, which was a decision issued in 1985 relating to an investment arbitration instituted on the basis of an investor-State contract. See generally Chapter 2, Section D *infra*.

[6] With specific regard to domestic court interpretations of investment treaties, see, e.g. *Guinea v Maritime International Nominees Establishment*, Court of First Instance, Antwerp, 27 September 1985, 4 ICSID Reports 32; *Guinea v Maritime International Nominees Establishment*, Swiss Federal Tribunal, 4 December 1985, at 4 ICSID Reports 35; *Czech Republic v CME Czech Republic BV*, Svea Court of Appeal (Sweden), at pp. 6–7; *Mexico v Metalclad*, Supreme Court of British Columbia, 2 May 2001, Tysoe J., at paras 63, 70–2; *Ecuador v Occidental Exploration & Production Co (No. 2)*, English High Court, [2006] EWHC 345 (Comm), para. 90; and *Czech Republic v European Media Ventures SA*, English High Court, [2007] EWHC 2851 (Comm), para. 14 *et seq*.

[7] For FIAT practice in this regard, see *Mobil Oil*, 4 ICSID Reports, at 187–9, paras 6.6–6.9; and *Tanzania Electric (Award)*, Appendix B, para. 40; and *Amco (Jurisdiction)*, at para. 14(i).

treaty interpretation applicable in disputes between States and international organizations.

1.08 The work has attempted to be current up until the end of June 2011. However, given the rapid growth of investment law over the last few years, a shortcoming of the work will be that coverage of all relevant awards or decisions, scholarly work, treaties, or other developments is difficult to guarantee. Responsibility for any omission in this regard lies solely with the author. Where awards of high relevance have been issued subsequent to the end of June 2011, an attempt has been made to incorporate them in the text to the extent that this was possible.

3. Research Methodology

1.09 The primary body of material used for the research undertaken for this book was the burgeoning mass of FIAT awards in the public domain. Materials extrinsic to these awards, such as decisions of other international courts and tribunals, academic commentary, and the texts of the hundreds of bilateral investment treaties, while important, played a background or supportive role.

1.10 One of the problems encountered in examining the FIAT awards was that many did not refer to or otherwise indicate that they have applied the Convention Rules.[8] In these instances, the tribunals appeared to be using notions of common sense or logic rather than any structured or established rule.[9] Further study on this failure to utilize the Convention Rules would be insightful. At other times, FIATs used but did not delve into the Convention Rules in any great detail. But this also is not an uncommon occurrence in the practice of other international law courts and tribunals.[10]

B. Relevant Treaty Law

1.11 This section discusses the Vienna Convention, which contains the rules of interpretation that are a major focus of this work. It also introduces other treaties that are relevant to understanding the legal bases of treaty interpretation and investment arbitration.[11]

[8] See also Fauchald, 'The Legal Reasoning of ICSID Tribunals—An Empirical Analysis', 19(2) *European Journal of International Law* 301 (2008), at 308.

[9] On this issue, see also Chapter 6, Section B *infra*.

[10] See, e.g. Gardiner, *International Law* (2003), at 79 (noting that 'international courts and tribunals do not indicate at every step when interpreting a treaty which principle of the Vienna Convention they are applying. General references may make explicit that the court or tribunal intends to apply the rules, but particular references are more likely to be made only when some uncertainty arises whether a particular element of interpretation is admissible.').

[11] For a further discussion of the major aspects of investment arbitration, its advantages and disadvantages, and references to major monographs on the subject, see Greenberg, Kee, and Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (2011), at 477–504.

1. Vienna Convention of 1969 on the Law of Treaties

1.12 The Convention Rules form an integral part of the Vienna Convention. It is therefore instructive to provide a brief description of its background. Prior to the ILC's formulation of the Vienna Convention, a number of codifications of treaty law had been attempted. None of them attained any degree of universal acceptance.[12] Given this background, an early priority of the ILC since its establishment in 1947 was to codify the law of treaties.[13] Between 1950 and 1966, sixteen reports were prepared by ILC special rapporteurs on the topic.[14] From these reports emerged a set of final draft articles, which were submitted to the General Assembly of the United Nations in 1966 with a recommendation that it should convene a conference to study those articles and conclude a convention on the subject.[15] In response, the General Assembly convened a conference on the law of treaties in Vienna ('Vienna Conference') to consider those draft articles.[16] The Vienna Conference was held in two sessions in 1968 and 1969.[17] On 22 May 1969, the Vienna Conference adopted the Vienna Convention, the text of which in large measure mirrored the ILC's final draft articles.[18] The Convention was opened for signature on the following day.

[12] See, e.g. the Appendices to the First Report on the law of treaties by ILC Special Rapporteur Brierly, *YILC* 222 (1950-II), at 243–8, which reproduce relevant sections of the Convention on Treaties adopted in Havana (1928) and other treaty law codifications by the International Commission of American Jurists (Rio de Janeiro, 1927), Field (1876), Bluntschli (1881), and Fiore (1919). See generally, Wetzel and Rauschning, *The Vienna Convention on the Law of Treaties: Travaux Préparatoires* (1978), at 20. See also the Harvard Draft Convention of 1935 on the Law of Treaties, prepared by the Harvard Research on International Law, reprinted in 29 *AJIL (Supplement)* 657 (1935).

[13] See GA Resolution 174 (II) of November 1947. The task of the ILC was to promote the progressive development of international law and its codification.

[14] A helpful list of these reports is contained in Watts, *The International Law Commission 1949–1998,* Vol. II: *The Treaties* (1999), at 617. The Special Rapporteurs were as follows: Brierly (three reports, 1950–52); Lauterpacht (two reports, 1953–54); Fitzmaurice (five reports, 1956–60); and Waldock (six reports, 1962–66). Fitzmaurice's reports differed from the others in that, somewhat controversially, they proceeded to restate the law in the form of an expository code. He considered the topic unsuitable for codification in the form of a convention. See *YILC* (1966-II), at 176, para. 23. As regards the activities of the ILC concerning the law of treaties, see generally Rosenne, *The Law of Treaties: A Guide to the Legislative History of the Vienna Convention* (1970), at 32–41; and Sinclair, *The International Law Commission* (1987), at 56–8.

[15] The final draft articles are contained in 'Report of the International Law Commission on the work of its eighteenth session', 4 May–19 July 1966, UN Doc. A/6309/Rev.1, *YILC* (1966-II), at 177; reprinted in 61 *AJIL* 263 (1967). As for the recommendation to convene a conference, see *YILC* (1966-I), at 322, paras 17–8 (892nd meeting); and *YILC* (1966-II), at 177, para. 36.

[16] See GA Resolution 2166 (XXI) of 5 December 1966, reprinted in 61 *AJIL* 656 (1967); and GA Resolution 2287 (XXII) of 6 December 1967.

[17] The sessions were held at the Neue Hofburg in Vienna. The first session was held from 26 March to 24 May 1968 (at which 103 States were represented) and the second session from 9 April to 22 May 1969 (at which 110 States were represented). See Final Act of the United Nations Conference on the Law of Treaties, 23 May 1969, UN Doc. A/CONF.39/26, at paras 2 and 3, reprinted in VCOR (Documents), at 283. As regards the procedure and work of the conference, see Rosenne, *supra* note 14, at 63–91.

[18] See Watts, *supra* note 14, at 611. The Vienna Convention was adopted by 79 votes to 1 with 19 abstentions. France was the lone State to vote against the Convention. VCOR (Second Session), 206–7, paras 51–3 (36th plenary meeting). See Appendix II for changes made to the ILC draft articles on treaty interpretation at the Vienna Conference.

It entered into force on 27 January 1980 in accordance with Article 84 following Togo's deposit of the thirty-fifth instrument of ratification. By July 2011, the Convention had been ratified by 111 State parties.[19]

1.13 The Vienna Convention has codified the greater part of treaty law. Its scope covers, *inter alia*, the rules relating to the formation, entry into force, interpretation, invalidity, and termination of treaties.[20] Save for a few exceptions, the Vienna Convention applies to both bilateral and multilateral treaties.[21] It does not apply to agreements between States and private entities, even if such agreements provide that they shall be interpreted by reference to rules of international law.[22] Aside from the requirement that the treaties it covers are to be in writing, the Convention does not specify other requirements of form. This leaves open the possibility that documents such as a joint communiqué may constitute a treaty within the meaning of the Vienna Convention.[23]

1.14 The majority view prevailing today considers that the Vienna Convention, as a whole, is reflective of customary international law.[24] By way of background,

[19] See 'Multilateral Treaties Deposited with the Secretary-General' at <http://treaties.un.org/pages/ParticipationStatus.aspx> (accessed 26 July 2011).

[20] Areas not covered by the Convention's scope include treaties between States and international organizations, agreements and effects on treaties in circumstances of State succession or on the outbreak of hostilities between States. See Articles 3 and 73 of the Vienna Convention. See also, Rosenne, *supra* note 14, at 41–6; Watts, *supra* note 14, at 612; and *The International Law Commission Fifty Years After: An Evaluation*, Proceedings of the Seminar held to commemorate the fiftieth anniversary of the ILC, 21–22 April 1998 (New York: United Nations 2000), Ch. IV '"Law of Treaties": Questions Remain Open', at 73–110; Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), at 1–84. Treaties to which international organizations are parties are addressed in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, *ILM* 543 (1986).

[21] Article 60(1) is limited to bilateral treaties and Articles 40, 41, 58, and 60(2) expressly relate to multilateral treaties. See Aust, *supra* note 1, at 9.

[22] See Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations', (1982) 53 *BYBIL* 27.

[23] See *Aegean Sea Continental Shelf* case (Greece v Turkey), ICJ Reports 3 (1978), at para. 96; *Maritime Delimitation*, (Qatar v Bahrain) ICJ Reports 112 (1994), at 121, at para. 25; and *Salini v Jordan* (Award), at paras 76–100. See generally Shabtai Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), at 85–134.

[24] As to Vienna Convention provisions the ICJ has specifically indicated as expressive of customary international law, see the *Namibia* case, ICJ Reports (1971), at 47, para. 94 (concerning Article 60(3)); *Fisheries Jurisdiction* case, Judgment (UK v Iceland), ICJ Reports 3 (1973), at 14 and 18, paras 24 and 36, (concerning Articles 52 and 62); *Fisheries Jurisdiction* case (F.R.G. v. Iceland), Judgment, ICJ Reports 49 (1973), at 63, para. 36, (concerning Article 62); *Aegean Sea* case, ICJ Reports (1978), at 39, para. 95 (concerning Articles 2, 3, and 11); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980), at 94–5, para. 47 (concerning Article 56(2)); *Frontier Dispute*, ICJ Reports (1986), at 563, para. 17 (concerning Article 62); *Border and Transborder Armed Actions*, ICJ Reports (1988), at 85, para. 35 (concerning reservations); and *Gabčíkovo-Nagymaros Project* case, Judgment, ICJ Reports 7 (1997), at 38 and 62, paras 46 and 99 (concerning Articles 60–2). For pronouncements by the ICJ on the customary nature of Articles 31 to 33 of the Vienna Convention, see Chapter 2, Section D *infra*.

Concerning FIAT jurisprudence on the status of the Vienna Convention as a whole, the *Eureko* tribunal had occasion to observe that the Vienna Convention represented '[t]he authoritative

customary international law requires (1) a general convergence in the practice of States from which a settled practice can be extracted, and (2) a subjective element or *opinio juris*. They were described by the ICJ in the *North Sea Continental Shelf* cases as follows:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[25]

1.15 An important aspect of a customary rule expressed in a treaty (and this is important for the discussion on the customary international law status of the Convention Rules in Chapter 2 *infra*) is that it generally binds all States, including those not party to that treaty. As Malcolm Shaw has succinctly explained: 'where treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law'.[26] The authoritative nature of the Vienna Convention is demonstrated by the following remark by Aust:

> When questions of treaty law arise during negotiations, whether for a new treaty or about one concluded before the entry into force of the [Vienna Convention], the rules set forth in the [Vienna Convention] are invariably relied upon even when the states are not parties to it. The writer can recall at least three bilateral treaty negotiations when he had to respond to arguments of the other side which relied heavily on specific articles of the [Vienna Convention], even though the other side had not ratified it.[27]

codification of the law of treaties . . . a treaty in force among the very great majority of the States of the world community'. *Eureko*, at para. 247.

[25] (Germany v Denmark/Germany v Netherlands) ICJ Reports 3 (1969), at 44, para. 77. See also Pellet, 'Article 38', in Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* 677 (2006), at 748–64; and Jennings and Watts, *supra* note 1, at 25–31.

In *Pope & Talbot (Damages)*, at para. 59, the tribunal observed that '[i]t is a fact of international law that customary international law evolves through state practice. International agreements constitute practice of states and contribute to the grounds of customary international law.' See also *Mondev*, at para. 111 (as to *opinio juris*) and para. 117 (as to the influence of the considerable number of BITs). Annex A of the 2004 US Model BIT defines customary international law in the following terms: '[t]he Parties confirm their shared understanding that "customary international law" . . . results from a general and consistent practice of States that they follow from a sense of legal obligation'.

[26] Shaw, *International Law* (2003), at 90.

[27] Aust, *supra* note 1, at 10–11. It has been suggested that the Convention's influence on the practice of foreign ministries throughout the globe is to some extent attributable to the participation of most of their international law experts at the Vienna Conference. Wetzel and Rauschning, *supra* note 12, at 12.

1.16 Aust takes the point further by observing that while the ICJ in the *Gabčíkovo-Nagymaros Project* case[28] applied Articles 60 to 62 of the Vienna Convention as customary law,

> it is reasonable to assume that the Court will take the same approach in respect of virtually all of the substantive provisions of the [Vienna] Convention. There has been as yet no case where the Court has found that the Convention does not reflect customary law.
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> . . .
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> [t]o attempt to determine whether a particular provision of the Convention represents customary international law is now usually a rather futile task. As Sir Arthur Watts has said in the foreword to this book, the modern law of treaties is now authoritatively set out in the Convention.[29]

1.17 Although the Vienna Convention has gained wide acceptance, as mentioned earlier in the chapter, a number of nations are still not signatories to it.[30] In this regard, the requirement of consent in international law mandates that States not party to a treaty are not bound by its terms.[31] However, as also mentioned earlier, this principle of treaty law is generally inapplicable to those parts of treaties that express rules of customary international law. Consequently, because most, if not all, of the Vienna Convention provisions are viewed as reaffirming customary international law, the content of those provisions bind States that are not parties to the Vienna Convention.

2. The ICSID Convention

1.18 The prodigious rise of foreign investment arbitration (also known as investment treaty arbitration or investor–State arbitration) owes a great deal to the ICSID Convention[32] and its dispute resolution mechanism. The ICSID Convention also

[28] ICJ Reports 7 (1997).

[29] Aust, *supra* note 1, at 11. Notwithstanding this, reference must be made to Sinclair, *supra* note 3, at 12–18, in which attention is drawn to a number of the Vienna Convention's provisions that appeared to him—at the time he wrote—to involve a progressive development of international law rather than a codification of customary law. To examine whether the provisions pointed out by Sinclair have in the intervening period become accepted into the fold of customary international law rules is beyond the scope of this book, save to note that more recent publications, such as Aust's, indicate that those provisions have been accepted as such.

[30] See, *supra* note 19. It has been suggested that the major reason for a State not to have ratified the Vienna Convention is 'the requirement for the acceptance of compulsory procedures for the settlement of disputes, rather than any fundamental disagreement with the Convention's provisions'. McDade, 'The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969', 35 *ICLQ* 499 (1986), at 503.

[31] See Articles 26 and 34 of the Vienna Convention. See also the obligation set out in Article 18 of the Vienna Convention not to defeat the purpose of a treaty signed but not yet entered into force.

[32] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted 18 March 1965, entered into force 14 October 1966; 575 *UNTS* 159; 4 *ILM* 532 (1965); 60 *AJIL* 892 (1966); 22 *Annuaire Suisse de Droit International* 221 (1965); 93 *Journal du Droit International* 50 (1966); and 1966 *Naciones Unidas Anuario Juridico* 211.

established the International Centre for Settlement of Investment Disputes ('ICSID'), which among other things administers ICSID arbitrations.

1.19 The World Bank was responsible for the negotiation and formulation of the ICSID Convention. Aron Broches, the World Bank's General Counsel and later ICSID's first Secretary-General, has been considered as the ICSID Convention's principal architect.[33] He set out the basic idea of the Convention in a note to the World Bank's executive directors in August 1961. The drafting of the Convention took place during the years 1961 to 1965.[34] On 18 March 1965, the final text of the Convention was approved by the World Bank executive directors and transmitted to all member governments of the World Bank. It entered into force on 14 October 1966.[35]

1.20 It is well accepted that '[t]he purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and host States alike'.[36] In pursuit of this goal, ICSID was established to provide facilities that would assist in the process of settling investment disputes between an ICSID State and nationals of other ICSID States.[37] The Convention offers a procedural framework pursuant to which these disputes may be resolved but does little to determine substantive legal issues involved in such disputes.

1.21 The Convention alone does not enable an investor to bring a claim against the host State. By virtue of Article 25 of the ICSID Convention, both the investor and the host State must have consented to the jurisdiction of the Centre. In practical terms, this often means that there must be—in addition to the Convention—consent provided either under an investor–State arbitration agreement or through a treaty or domestic legislation that makes a standing offer to investors wishing to pursue a claim against a host State under ICSID's dispute settlement mechanism. Where such a standing offer is made, an investor in effect accepts this offer by lodging a

[33] See Schreuer, *The ICSID Convention: A Commentary* (2001), at 2.

[34] A considerable portion of the preparatory work has been documented by ICSID in the following four volumes: *History of the ICSID Convention* (Washington, DC: International Centre for Settlement of Investment Disputes 1968–1970) Vol. I: *Analysis of Documents Concerning the Origin and the Formulation of the Convention* (1970); Vol. II (in two parts): *Documents Concerning the Origin and the Formulation of the Convention* (in English) (1968); Vol. III: *Documents Relatifs à l'Origine et à l'Élaboration de la Convention* (in French) (1968); Vol. IV: *Documentos Relativos al Origen y a la Formulación del Convenio* (in Spanish) (1969).

[35] See generally, Schreuer, *supra* note 33, at 2–4, and for the role of the World Bank, see Sutherland, 'The World Bank Convention on the Settlement of Investment Disputes', 28 *ICLQ* 367 (1979), at 373–8.

[36] Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 *Recueil des Cours* 331 (1972-II), at 348. See also the Executive Directors' Report, para. 12 ('adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention').

[37] See, e.g. Article 1 of the ICSID Convention.

claim with ICSID against the host State, which creates the requisite consensual bond between the investor and that State.

1.22 Although the ICSID Convention entered into force in 1966, the first ever registration of an ICSID case did not take place until 1972. From that year up to 1986, only twenty-one arbitrations were registered with ICSID. In contrast to this slow start, there have now been 225 concluded cases and 130 cases are currently pending before ICSID.[38] As this book demonstrates, an enormous body of arbitral jurisprudence on treaty interpretation has been generated by these cases.

3. Bilateral Investment Treaties

1.23 Bilateral treaties that touch upon commerce and foreign investments are not, in general, a recent development. The United States, for example, entered into a Treaty of Amity and Commerce with France in 1778.[39] During the last century, friendship, commerce and navigation ('FCN') treaties were a common form of bilateral agreement between States. FCN treaties tended to address a variety of different matters, including consular rights, the freedom of navigation of vessels, and the protection of nationals of one contracting State in the territory of the other. However, in the 1960s and 1970s, they seemed to lose favour as developing States appeared to become sceptical as to the benefits to be derived from them.[40]

1.24 Bilateral investment treaties, in contrast to FCN treaties, focus specifically on foreign investment. On the whole, BITs aim to create a stable legal environment for the protection of foreign investment and seek to increase the amount of foreign capital flowing into host States by utilizing international legal rules and effective enforcement mechanisms provided under the legal framework established by the ICSID Convention and other international dispute settlement mechanisms.[41]

[38] See 'Cases' at <www.worldbank.int/icsid/cases/cases.htm> (accessed 26 July 2011). See generally, Alexandrov, 'The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" and Jurisdiction *ratione temporis*', 4 *Law and Practice of International Courts and Tribunals* 19 (2005). With respect to early concerns as to the under-utilization of ICSID, see, e.g. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (1990), at 253.

[39] See Walker, 'Modern Treaties of Friendship, Commerce and Navigation', 42 *Minnesota Law Review* 805 (1958), at 805.

[40] Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries', 24 *International Lawyer* 655 (1990), at 657. In relation to British post-Second World War treaty practice, Professor Schwarzenberger has identified seven types of treaty that covered to some degree foreign investment protection. These included peace settlements, general economic and commerce treaties, and nationalization agreements. Schwarzenberger, *Foreign Investments and International Law* (1969), at 30 *et seq*.

[41] Salacuse, *supra* note 40, at 661.

Germany and Pakistan share the distinction of signing the first BIT in 1959.[42] Germany took the lead in developing this new type of investment treaty as a result of the loss of all its foreign investments in the wake of the Second World War and the need to generate a new investment programme.[43] After a relatively slow start to such investment programmes by other nations, the conclusion of BITs began to accelerate in the 1970s. Several European States and some non-Western capital-exporting States started to conclude BITs in that decade.[44] The United States signed its first BIT—the US–Egypt BIT—in 1982.[45] In the 1990s, another wave of BIT negotiations occurred as a result of the collapse of the Soviet Union.[46] The dramatic rise in the popularity of BITs becomes apparent when the average of approximately seven BITs signed per year between 1959 through 1968 is contrasted with the average signature of 146 BITs per year in the 1990s.[47] By the end of 2009, the total number of BITs amounted to 2,700.[48] **1.25**

The proliferation of BITs in the past two decades is a remarkable phenomenon. Not only are the treaties by sheer weight of numbers beginning to influence and shape international law,[49] they have been the instruments out of which dozens of **1.26**

[42] Pakistan and Federal Republic of Germany: Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), 457 *UNTS* 23 (1963). This was signed at Bonn on 25 November 1959 and entered into force on 28 November 1962. See Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', 92 *AJIL* 621 (1998), at 627. The first BIT to enter into force was between Germany and the Dominican Republic, signed on 19 December 1959 and entered into force on 3 June 1960. *Ibid*.

[43] Salacuse, *supra* note 40, at 657. See also Vandevelde, 'A Brief History of International Investment Agreements', 12 *U. C. Davis Journal of International Law and Policy* (2005), at 157.

[44] See Vandevelde, *supra* note 42, at 628, and Salacuse, *supra* note 40, at 658.

[45] Various explanations are offered for the delay of the United States to commence its BIT program. Vandevelde, *supra* note 42, at 627–8, explains that the United States launched its programme in 'direct response' to the United Nations General Assembly debates on the measure of compensation for expropriation (full compensation being asserted by developed nations, less than full by developing nations and some Marxist nations even claiming no compensation should be due). In contrast, Salacuse, *supra* note 40, at 657, indicates that the US programme was commenced because it was encouraged by the experience of European States.

[46] Vandevelde, *supra* note 42, at 628. That commentator suggests BITs were a relatively easy means to for Central and Eastern European economies to renounce Marxist economics and to introduce liberal economic practices. See also *Plama (Jurisdiction)*, at para. 195 ('[i]n the 1990s, after Bulgaria's communist regime changed, it began concluding BITs with much more liberal dispute resolution provisions, including resort to ICSID arbitration').

[47] See UNCTAD, *World Investment Report 2010*, at 81.

[48] See UNCTAD, 'Recent Developments in International Investment Agreements', IAA Monitor No. 3 (2009), at 2, UN Doc. UNCTAD/WEB/DIAE/IA/2009/8 and UNCTAD, 'Investor–State Dispute Settlement and Impact on Investment and Rulemaking', UN Doc. UNCTAD/ITE/IIA/2007/3 (2007), at 3. See also *Eureko*, at para. 258.

[49] See, e.g. *Eureko*, at para. 258 (indicating that contemporary customary international law 'has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties'); Lowenfeld, 'Investment Agreements and International Law', 42 *Columbia Journal of Transnational Law* 123 (2003–04), at 128 ('the mass of almost identical bilateral investment treaties constitutes international legislation, though it does not quite fit the traditional classification of international law into two categories—customary law and treaty law') and at 130 ('the undertaking of legal obligations by a large group of states, even from a mixture of motives, has resulted in something

investment arbitrations have spawned. In turn, the jurisprudence emerging from these arbitrations is making (as this work will show) a significant contribution to international law.

4. Multilateral Treaties[50]

1.27 Perhaps the best known multilateral treaty that contains investment protection provisions is the 1992 North American Free Trade Agreement[51] between Canada, Mexico, and the United States. It is a multilateral treaty that deals with a broad range of subjects, including intellectual property and trade in services, much of which has no direct relevance to foreign investment disputes. Investment arbitration is addressed in Chapter 11 of the NAFTA, which deals with measures relating to foreign investment and establishes a regime for the settlement of investor–State disputes that fall within the scope of its provisions.[52]

1.28 The dispute resolution provisions in NAFTA have been invoked to institute numerous investment arbitrations. A growing number of investment arbitrations are also being instituted under another important multilateral treaty involving investment protection: the 1994 Energy Charter Treaty. Over fifty States are parties to the ECT, which relates to the investment protection in the energy sector.[53] Investment claims are now also starting to be brought under the Central American Free Trade Agreement ('CAFTA'), among the United States, Costa Rica, El Salvador,

like customary international law'); and Rubins and Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (2005), at 190 ('the contours of customary international law have evolved through the enactment and application of investment treaties'). See also Schwebel, 'The Reshaping of the International Law of Foreign Investment by Concordant Bilateral Investment Treaties', in Charnovitz, Steger, and van den Bossche (eds), *Law in the Service of Human Dignity—Essays in Honour of Florentino Feliciano* (2005), at 241.

[50] For a general summary of this topic see Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (2004), at 63–70.

[51] Signed 12 December 1992, entered into force 1 January 1994, 32 *ILM* 296 and 605.

[52] See generally Alvarez, 'Arbitration under the North American Free Trade Agreement', 16 *Arbitration International* 393 (2000); and Trakman, 'Arbitrating Investment Disputes under the NAFTA', 18 *Journal of International Arbitration* 385 (2001). It should be noted that some of the NAFTA claims that fall within the Chapter 11 investment provisions could also be seen as falling within the ambit of the trade-in-goods provisions. See Wälde and Weiler, 'Investment Arbitration under the Energy Charter Treaty in the Light of the New NAFTA Precedents: Towards a Global Code of Conduct for Economic Regulation', in Kaufmann-Kohler and Stucki (eds), *Investment Treaties and Arbitration*, Swiss Arbitration Association Conference, 25 January 2002 (ASA Special Series No. 19), 159, at 184.

[53] As at 26 July 2011, the Energy Charter Secretariat listed 29 ECT investor–State dispute settlement cases on its website. See <www.encharter.org>. See generally, Wälde, 'Investment Arbitration under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation', 12 *Arbitration International* 429 (1996); and Wälde and Weiler, *supra* note 52, at 183.

Guatemala, Honduras, and Nicaragua.[54] It was renamed DR–CAFTA in 2004, after the Dominican Republic joined.

1.29 The negotiation and conclusion of other free trade agreements between two or more States are starting to grow in numerical terms as well. They, like the NAFTA and CAFTA, are wide ranging in subject matter and include provisions on investment protection. Examples include the 2008 New Zealand–China FTA and the 2003 Singapore–United States FTA. It is said that FTA numbers have been increasing due to the failure of trade negotiations at the World Trade Organization ('WTO').[55]

1.30 The ASEAN Agreement for the Promotion and Protection of Investments[56] also requires mention as a relevant multilateral treaty because two investment arbitrations have been instituted under it, one of which settled before an award on the merits was issued.[57] More recently, ASEAN states have signed among themselves the 2009 ASEAN Comprehensive Investment Agreement, which provides significant investment arbitration rights to investors. ASEAN as a group has also concluded FTAs, which include investment arbitration provisions, with other States such as the 2010 ASEAN–Australia–New Zealand Free Trade Agreement.

5. Law Applicable to the Interpretation of Treaties

1.31 On the international plane, the law applicable to interpret a treaty is international law. It is not contractual or statutory interpretation rules or other such domestic rules, laws, or techniques deployed to construe documents.[58] Of the awards reviewed for this book, it was exceedingly rare that domestic concepts of contractual or statutory interpretation were used.

[54] See, e.g. *Pac Rim Cayman LLC v Republic of El Salvador*, ICSID Case No. ARB/09/12; and *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v Republic of El Salvador*, ICSID Case No. ARB/09/17.

[55] See Mitsuo Matsushita, 'Proliferation of Free Trade Agreements and Development Perspectives', paper delivered at Law and Development Institute Inaugural Conference, Sydney, Australia, October 2010, available at <www.lawanddevelopment.net/img/matsushita.pdf> (last accessed 25 June 2011).

[56] 15 December 1987, 27 *ILM* 612 (1988) and amended by the Protocol to Amend the Agreement for the Promotion and Protection of Investments, Jakarta, 12 September 1996.

[57] *Yaung Chi Oo Trading v Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1); and *Cemex Asia Holdings Ltd v Republic of Indonesia* (ICSID Case No. ARB/04/3). The latter case settled on 28 February 2007.

[58] See, e.g. *Exchange of Greek and Turkish Populations*, PCIJ, Ser. B, No. 10 (1925), at 17 ('the difference of opinion which has arisen regarding the meaning and scope of the word "established", is a dispute regarding the interpretation of a treaty and as such involves a question of international law. It is not a question of domestic concern . . .'); and the *Van Bokkelen* case (1888) ('for the interpretation of treaty language and intention, whenever controversy arises, reference must be made to the law of nations and to international jurisprudence'). See also *AAP*, at para. 39; and *Amco (Annulment)*, at para. 18.

1.32 As an illustration of this position, it is helpful to explore briefly the law applicable to claims brought under the ICSID Convention. This issue is dealt with in Article 42(1) of the ICSID Convention:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

1.33 The provision grants a foreign investor and a State wide latitude to choose the substantive rules of law that shall govern their dispute.[59] However, based on the principle stated in paragraph 1.31 *supra*, where Article 42 applies and the investor–State agreement selects domestic law to govern a dispute, this choice will not operate to exclude the application of international law rules on treaty interpretation in interpreting the ICSID Convention.

1.34 The link between international law as the applicable law and the Convention Rules was made clear in *Waste Management*. The tribunal there examined Article 1131 of NAFTA, which identifies the applicable law for investment arbitration disputes under Chapter 11. It states that a 'Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. On this basis, the tribunal held:

> The thrust of this Article permits this Arbitral Tribunal to be guided, in matters of interpretation, by the rules laid down by the Vienna Convention on the Law of Treaties signed on 23 May 1969, which establishes the general rule of interpretation of treaties at Article 31. . . .[60]

1.35 In a case where an ICSID claim is based not on an investor–State agreement but on a BIT, that treaty itself as well as international law would generally be considered the primary sources of the applicable legal rules.[61] And to the extent that there may be any inconsistency between the domestic law and public international law, the latter is considered to prevail.[62] The international law on treaty interpretation would thus govern that BIT's interpretation, taking into account any provisions the treaty itself may contain on how it should be interpreted.

[59] As to the scope of the reference in Article 42(1) to 'rules' of international law rather than simply 'international law', see Blasé, 'Proposing a New Road Map for an Old Minefield: The Determination of the Rules Governing the Substance of the Dispute in International Commercial Arbitration', 20 *Journal of International Arbitration* 267 (2003), at 269 (contending that this reference extends to 'general principles of law' and 'rules of national justice').

[60] *Waste Management (Award)*, at para. 9. See also *Methanex (Partial Award)*, at para. 100.

[61] See, *AAP*, at 4 ICSID Reports at 256.

[62] See, e.g. *Santa Elena (Award)*, at para. 64. See generally, Schreuer, *supra* note 33, at 622–31; Chukwumerije, 'International Law and Article 42 of the ICSID Convention', 14 *Journal of International Arbitration* 79 (1997); and Weiler, 'Good Faith and Regulatory Transparency: The Story of Metalclad v. Mexico', in Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), at 720–2.