

GOODNIGHT VIENNA?

RETHINKING TREATY INTERPRETATION

The 3 Verulam Buildings/Queen Mary Lecture

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Introduction

I see a day when artificial intelligence will enable treaties to think and interact with their users. These smart treaties will be asked what certain terms mean, how they should be applied in specific situations and they will generate a reasoned answer in seconds.

We are not there yet. And I venture to suggest that we will be applying treaty interpretation rules which date back to the mid-20th century or even earlier for some time to come. Until AI or something else takes over the process of interpreting treaties, we will still need to rely on those mid-20th century rules. While many of these rules are functional and useful and have stood the test of time, it seems to me that – especially in the context of investor-State disputes – these rules need to be subject to more regular improvement and the practices surrounding treaty interpretation can be made better.

In the next 45 minutes, I will outline some of the problems inherent in the applicable international law on treaty interpretation and then propose three solutions.

At the outset, some background on the title of my address is required. "Goodnight Vienna", depending on the context, could relate to many things. There is a cinematic connection, such as the 1932 British musical film ...



Equally, the music industry may associate it with Ringo Starr's fourth studio album, released in 1974 ...



Unfortunately, "Goodnight Vienna" in these two contexts will not be discussed this evening. But I do look forward to hearing from anyone after this address if they know whether Daft Punk was inspired by that alien robot on Ringo's album cover.

Instead, the reference to "Vienna" in the title of this address relates not to the city but to the Vienna Convention on the Law of Treaties particularly to Articles 31 and 32 of the Convention. I will call these two provisions the "Vienna Rules".

And the exclamation "Goodnight" relates to that phrase's colloquial usage. For our purposes "Goodnight Vienna means "we have reached the end, that's it, it's all over".

So are we at a juncture when it can (and should) be asked whether we need to consider saying goodnight to the Vienna Rules because they are beginning to show indications in practice that they may not be fully fit for purpose, particularly in ISDS, and therefore whether they need a rethink as to their future role in investment treaty disputes.

The comments made in McLachlan, Shore and Weiniger's second edition of *International Investment Arbitration: Substantive Principles* provide a good picture of the criticism levelled against the Vienna Rules:

"3.144 In practice, the VCLT is often of limited use in giving guidance to a tribunal in its interpretive task. Problems arise because the VCLT's rules of construction are capable of supporting a wide range of potential interpretations. The fact that both parties to a dispute usually rely on its provisions is a good indication of its inherent flexibility."

And they conclude that "the principles contained in the VCLT are not sufficient in resolving difficult questions of BIT interpretation. The guidance they provide is insufficiently concrete."

I. History of treaty interpretation rules

A. Prior to the Vienna Rules

Prof David Bederman's research reveals that the Ancient Greeks had developed rules of treaty interpretation as far back as 700BC. This indicates that we have inherited a system that dates back thousands of years. But despite this long history and up until the 1960s, a great deal of uncertainty still prevailed. It was at this time that the Vienna Rules were being drafted by the ILC. Lord McNair, in his monumental work on the law of treaties in 1961, described treaty interpretation law as 'a wilderness of conflicting decisions of tribunals and opinions of writers.'

This problem had been around for a long time in the modern era. In 1904, the Chair of International Law at Cambridge, Professor John Westlake, wrote that "[t]he interpretation of treaties has been considered at much length by many writers on international law, and rules on it have been suggested which in our opinion are not likely to be of much practical use." [*International Law* (1904) p. 282]

Therefore, by the time the ILC began to examine the subject of treaty interpretation in the 1960s, the call for an authoritative and binding set of generally applicable treaty interpretation rules was strong.

No new rules of treaty interpretation were drafted by the ILC. The ILC "confined itself to trying to isolate and codify the comparatively few general principles [that] appear to constitute general rules for the interpretation of treaties." [YILC, 1966-II, at 218-9, para. 5] The task was not an easy one. They were required to forge a set of rules that were acceptable to all States and applicable to a wide range of circumstances from an unwieldy and diverse body of jurisprudence.

B. The Vienna Convention

Vienna Convention was adopted on 22 May 1969 by the Conference on the law of treaties convened by the UN General Assembly. The text of the Convention in large measure mirrored the draft articles on the law of treaties formulated by the ILC. The Convention entered into force on 27 January 1980 upon the deposit of the 35th instrument of ratification by Togo.

To give some temporal context to the Vienna Rules, we need to keep in mind that the Vienna Rules were drafted over 50 years ago. Interestingly, when the ICSID Convention entered into force in 1966, the Vienna Convention had not yet come into existence. Nor had the overwhelming majority of treaties with modern investment protections, including BITs and FTAs.

There is no controversy in stating that the Vienna Rules are recognised as expressing rules of customary international law. This position has been accepted by the ICJ, the WTO Appellate body and numerous other courts and tribunals, including investment treaty tribunals.

II. Problems with the Vienna Rules

The simplicity of the Vienna Rules conceals their complexity. For example, the way the 35 words of Article 31(1) interact among themselves as well as with Art 31's other paragraphs, with Article 32 and with other Articles of the Vienna Convention, and with general rules of international law, makes the process complex.

As to the other Articles of the Vienna Convention, I note that outside of Arts 31-33, there are provisions that may be critical in conducting a proper interpretation. These types of provisions relate to rules on the observance of treaties (Arts 26 and 27), the application of treaties (Arts 28 to 30), treaties and third states (Arts 34 to 38), the modification of treaties (Arts 39 to 41), and also Article 5 (which provides that the Vienna Convention does not override relevant rules of an international organisation). So if the Vienna Rules interpretative process is not conducted in coordination with other rules contained in the Vienna Convention there is the potential for an incorrect or distorted application of the applicable law.

A. Article 31(1)

I will start assessing the problems associated with the Vienna Rules by looking at the Convention's primary rule of treaty interpretation: Article 31(1) of the Vienna Convention. It provides

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Embedded in this first paragraph of the Vienna Rules are four key elements that must be taken into account when a treaty is interpreted: good faith, ordinary meaning, the context of the terms subject to interpretation and the object and purpose of the treaty.

While it is uncontroversial that Art 31(1) does not articulate an order of importance or hierarchy among these four elements, the accepted approach to Art 31 is that *the focus* of the mandated interpretative exercise in Art 31 *is the text* of the treaty subject to interpretation. As the ICJ unequivocally stated in *Libya v Chad*, "*Interpretation must be based above all on the text of a treaty*". This statement implies that the ordinary meaning, the context, and the object and purpose should by and large be derived by the text of that treaty and not external factors. In the words of the ILC "*the text must be presumed to be the authentic expression of the intentions of the parties*". In adopting this text-based approach, the Vienna Rules drafters determined that wide-ranging searches for the intentions of the parties was not to be considered a part of the Vienna Rules interpretative exercise.

Ordinary meaning

The first issue I raise about Article 31(1) is that the meaning of "ordinary meaning", and how it may be ascertained, is not articulated.

Many questions arise from this unqualified language –

If there is more than one ordinary meaning, how should one meaning be chosen over another?

Are meanings presented in dictionaries to be taken as applicable ordinary meanings?

Is it helpful to refer to a dictionary when a scientific or legal term of art is to be interpreted? As Professor Zac Douglas has commented "*The cult of the dictionary in interpretation leads to the erosion of settled meanings for international legal concepts and, instead, fixates upon the lowest common denominator of meaning generated by sterile linguistic analysis of treaty terms*".

McLachlan, Shore and Weiniger have critiqued that the ordinary meaning analysis may simply result in the generation of synonyms.

Another unaddressed question is, whose ordinary meaning must it be? Must the meaning be ordinary to the interpreter? Or should the interpreter look at what is ordinary on the basis of a reasonably informed third party, a specialist in ISDS, or a diplomat or treaty negotiator?

Should the ordinary meaning be assessed on the meaning prevalent at the time of the dispute or the time the treaty was drafted?

Should the ordinary meaning of substantive terms, e.g. "fair and equitable treatment", depend on the rules of interpretation or should they follow accepted jurisprudence on the meaning and scope of this concept?

Article 31(1) does not provide explicit answers to these questions. Does this assist consistency in treaty interpretation? I would say it *does not* as the absence of guidance in the Vienna Rules gives a wide-ranging and unguided discretion to interpreters. The likelihood of inconsistencies in treaty interpretation between tribunals therefore increases.

I have raised many questions here about the meaning of an ordinary meaning. Within the time provided, I will offer some answers to these questions later in my address.

C. Article 31(3)(c)

3. There shall be taken into account, together with the context:

...

(c) any relevant rules of international law applicable in the relations between the parties.

Who are the parties referred to in that provision? Is it all the parties to the treaty subject to interpretation or only the parties to the dispute?

For example, can relevant rules of international law be EU law in an Energy Charter Treaty dispute between an EU investor and an EU host state, even if all parties to the ECT are not members of the EU?

To illustrate the ambiguity in Art 31(3)(c), I asked (on 3 May 2023) ChatGPT "What is the meaning of "parties" in Article 31(3)(c) of the Vienna Convention on the Law of Treaties?"

The Chat GPT response, after it provided a few background paragraphs, was:

Therefore, the term "parties" in Article 31(3)(c) of the Vienna Convention on the Law of Treaties refers specifically to the states that have signed and ratified the treaty, and whose rights and obligations are governed by the treaty.

I asked the Bing Chatbot function the same question (on the same day). The response I received was:

According to one view, the correct meaning of 'the parties' in Article 31(3)© of the Vienna Convention on the Law of Treaties is the two or more parties to a specific dispute¹. Is there anything else you would like to know?

Learn more: [1. cambridge.org](#) [2. iilj.org](#) [3. lup.lub.lu.se](#) [4. papers.ssrn.com](#)

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I then asked, "What is another view on the meaning of "parties" in Article 31(3)(c) of the Vienna Convention?"

Bing unfortunately responded:

I'm sorry, but I don't have any information on other views on the meaning of "parties" in Article 31(3)© of the Vienna Convention on the Law of Treaties. Is there anything else you would like to know?

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This disparity in responses between Chatbots illustrates the difficulty in finding a consistent meaning in Art 31(3)(c).

D. Recourse to Article 32

Article 32 provides:

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

What is clear is that this provision is subordinate to Article 31 given the effect of the modal verb "may". In the view of the ILC, Article 32 constituted "*an exception to the rule that the ordinary meaning of the terms must prevail*" and that it is an exception that "*must be strictly limited*". And according to its terms, Article 32 may only be used **to determine** a meaning if the application of Art 31 produces a meaning that is ambiguous, obscure or results in a manifestly absurd or unreasonable outcome.

I raise three issues in relation to Article 32 today.

The first is that "supplementary means of interpretation" was left by the drafters as an open-ended term. Without more guidance, there is more chance that subjective preferences as to what are supplementary means may creep into the interpretative process.

The second issue arises when recourse to Article 32 is made **to confirm** the ordinary meaning as determined under Article 31 and preparatory work contradicts the ordinary meaning. Judge Schwebel is well known for his view that preparatory work may be used to correct rather than confirm the clear meaning of a treaty provision.

However I don't see this approach as consistent with the language of Article 32. It seems to me that the Vienna Rules are clear – an Article 31 finding that a term has a reasonable ordinary meaning can only be **confirmed** under Article 32. Such a reasonable ordinary meaning cannot give rise to the use of Article 32 to determine another meaning that overrides the initial Article 31 finding.

However, potentially, in extreme circumstances, if it is *absolutely clear* from the preparatory work or supplementary means that the Art 31(1) ordinary meaning is incorrect, and subject to further examination on the issue, I would suggest that the notion of good faith expressed in Article 31(1) may be enlivened and in these exceptional circumstances, good faith under Article 31 requires that the Article 31(1) meaning be reassessed in light of the contradictory material that is before the interpreter.

Judge Brower also raises an interesting point about article 32. He says resort to it to *confirm* an ordinary meaning found through Art 31 is "*an utterly unnecessary step, as what is clear is clear and need not be bolstered*". Judge Brower argues that after a tribunal finds a reasonable ordinary meaning under Art 31, good faith requires a tribunal to stop the interpretation process and not proceed to Art 32 to confirm that meaning. I don't believe that the interpretative process should be so strict. Tribunals need to have the discretion to justify their decision through whatever legitimate means they see fit, and if the quality of the decision is improved by confirmation of an Article 31 interpretation by way of supplementary means, that has a valid place within the framework of Vienna Rules. This option to provide a more in-depth or comprehensive analysis of an interpretation (and not just to stop once Article 31 finds a reasonable interpretation) is all the more pertinent given the context of the public nature and the legitimacy criticisms that are levelled at investment treaty arbitration.

E. Asymmetry in access and use of the preparatory work

In investor-State arbitration, when a treaty under which a claim is made needs interpreting, frequently the respondent state but not the claimant has access to the preparatory work of that treaty. Often this means that the state has a large degree of unilateral control over this part of the evidence.

As such, the references to preparatory work in investor state arbitration needs reassessment because in theory, a respondent state may hold back producing preparatory work.

I have represented a claimant in one particular case in which the preparatory work was requested by the claimant. The response of the respondent state was to say that no preparatory work existed. We had reasons to believe that preparatory work did indeed exist. We requested the claimant's home state to provide this material but the state was uncooperative. Ultimately, we researched the archives of the home state and found relevant material that helped the tribunal decide in favour of our interpretation of the relevant treaty over the respondent state's interpretation.

This case has similarities to the circumstances that unfolded in *Pope & Talbot v Canada*. The NAFTA tribunal in that case invited Canada to indicate whether preparatory work existed in relation to a particular interpretation of NAFTA. Canada responded that no such preparatory work existed. However, such material was produced in another NAFTA arbitration. In the light of this revelation the tribunal again asked Canada for this information. The response of Canada to this request was to produce approximately 1500 pages of documents containing 40 different drafts of the provision subject to interpretation.

I now turn to the three solutions I propose to overcome the problems associated with lack of detail in the Vienna Rules.

IV. Solutions

A. Amendment of the Vienna Convention?

I will not spend much time on this issue. The chances of a Vienna Convention revision are unlikely in the short to mid future. Renegotiating multilateral treaties these days is a difficult task – take for example, the difficulties encountered in modernising the Energy Charter Treaty. In this context, renegotiation of the VC cannot be a likely solution, at least in the short to mid-term.

B. Interpretation Schedule

The application of the Vienna Rules is usually not limited to Article 31(1). It requires extensive analysis and inquiry *and* all four paragraphs of Article 31 must be treated as an integrated whole.

But often we do not see awards carrying out a detailed interpretative analysis that is consistent with the Vienna Rules. Most tribunals find sufficiency in applying selected elements of Article 31. In my book on treaty interpretation, I examined 258 ISDS awards and decisions. I found that 53 % of them referred to Article 31(1), 19% referred to Article 31(2), 5 % to Art 31(3) and 2 % to Art 31(4), and 26% referred to Art 32. On a high-level view, roughly half of the awards did not refer to Article 31, and nearly 75% did not make reference to Article 32. This survey was undertaken in 2008 so the figures have to be considered with that year in mind. However, a bright side of the survey was that the frequency of awards or decisions referring to the Vienna Rules was increasing, and I believe from the case law that emerges almost on a daily basis that this upward trend in the use of the Vienna Rules continues.

But still we need to address the criticism that tribunals selectively apply the Vienna Rules or do not apply them at all. One device in an arbitrator's toolkit would be an interpretation schedule that I set out in the PowerPoint slide on the screen.

Interpretation Schedule concerning [<i>treaty provision to be interpreted</i>]					
VCLT element	Claimant submission on interpretation	Respondent reply	Claimant rebuttal	Respondent sur-rebuttal	Tribunal comment/decision
Article 31(1)					
Ordinary meaning					
Context					
Object and purpose					

Good faith					
Article 31(2)					
Preamble					
Annex					
Agreement made between all parties relating to the treaty connected to the conclusion of the treaty					
Instrument made by one or more parties in connection with the conclusion of the treaty					
Article 31(3)					
Subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions					
Subsequent practice in the application of the treaty establishing an agreement between the parties regarding its interpretation					
Relevant rules of international law applicable in the relations between the parties					
Article 31(3)					
Special meaning intended by parties					
Article 32					
Preparatory work					

Circumstances of treaty's completion					
Other supplementary means of interpretation					
Meaning resulting from Article 31 application is ambiguous or obscure					

One means of implementing this Schedule is for it to be included in the proceedings in much the same way as a Redfern Schedule is incorporated into the procedural framework of an arbitration.

Initially, when the Schedule is unfamiliar to parties, tribunals may have to persuade the parties as to its advantages. In this context, its main attraction is that it will help to ensure that parties address all the applicable criteria in the Vienna Rules and not just some of them. And it does this in a systematic process that promotes efficiency – e.g. all the pleadings by all parties in relation to a given interpretation will be easily accessible in an orderly and comprehensive document. On a more high-level view, the Schedule will promote uniformity in the pleading process for treaty interpretation issues across different tribunals. Another important feature of the Schedule is that it will help promote accuracy – as it will serve to reduce interpretations that omit or fail to properly consider relevant Vienna Rules criteria.

As the slide before you shows, the first column of this Schedule will list all the elements contained in Article 31 and 32. The tribunal will request each party to input their submissions into the relevant cells, e.g. what do they submit is the ordinary meaning of the term, and how is this ordinary meaning determined, is there a context that influences the interpretation, etc. If witness statements or evidence relates to a specific element, the relevant paragraph or exhibit number must be provided in the relevant cell. Obviously, only those cells that are relevant or in respect of which there is relevant material need be completed.

The party that proposes the interpretation starts the process by completing the first column, and thereafter the responding party has the

opportunity to make comments or submit relevant information. The table provides for another round of submissions. However, this second round may be optional.

Once the Schedule is completed as far as possible by the parties, it will provide the tribunal with a one-stop resource that contains an extensive overview of all the interpretative considerations required under the Vienna Rules.

While this proposal is inspired by the Redfern Schedule, I am aware that completed Redfern Schedules are criticised for their length. Prolixity is less likely to be a problem in Interpretation Schedules because it is expected that in most interpretations, many of the responsive cells in the table may not be relevant or if there is substantial argument involved in relation to one row, this may be done through separate pleadings that may be attached to the table.

My initial view is that this table may not be helpful to interpret substantive provisions such as "fair and equitable treatment" or "expropriation". These terms often need extensive references to case law that may not suit the tabular form of the proposed schedule.

C. Interpretation Guidelines

The second solution that I propose is for the formulation of guidelines that put flesh on the Vienna Rules, with the specific purpose of aiding treaty interpreters in investor state disputes. The ultimate end-product would resemble a succinct and practical guidebook on how to apply the Vienna Rules. Ideally, the interpretation guidelines would be similar to the IBA Guidelines on the Taking of Evidence, and it will be used to provide non-mandatory, and practical, guidance.

The ISDS-specific nature of the guidelines may give rise to criticisms on grounds, for example, that the Vienna Convention was intended to apply to all treaties and that to formulate guidelines only for ISDS encourages the fragmentation of international law. These observations have merit but at this moment in time, there is a pressing need for more clarity in the application of the Vienna Rules in investor-State arbitration and the unique issues raised in this field. If ISDS centric guidelines prove to be helpful, perhaps other versions may be produced

concerning the application of the Vienna Rules in other disciplines that frequently require the interpretation of treaties, such as international human rights law or international environmental law.

I will briefly mention nine suggestions today as to content of the guidelines. At the outset, I note that in order to be acceptable to the different stakeholders in investment arbitration, a wide-ranging consultation process will be needed and the body entrusted to draft the guidelines also needs to be inclusive and diverse.

My first suggestion is that the guide should explain that the four criteria in Article 31(1) – that is good faith, ordinary meaning, context and the treaty's object and purpose – have no hierarchy, but nonetheless, the text is the starting point and considered to be the authentic expression of the intentions of the parties. For this first guideline, it will be beneficial to draw an interpreter's attention to the ICJ's observation in *Libya v Chad* (as I mentioned earlier) that '*interpretation must be based above all upon the text of the treaty.*'

Ordinary meaning

Second, the guidelines need to outline how to ascertain the ordinary meaning of a term. For example, are dictionaries the best way to do this? To me, the answer to this question is that while dictionary meanings may sometimes be helpful, dictionaries should not alone give rise to an ordinary meaning, especially when the context of the term subject to interpretation must be considered.

My third point relates to perspective – whose ordinary meaning does the interpretation need to adopt? In *Aguas del Tunari v Bolivia* – the tribunal held that the ordinary meaning should be determined from the perspective of negotiators of the BIT. In my view, this perspective may not be appropriate – especially with BITs that grant rights to third parties who are not diplomats or international lawyers. My suggestion is that the interpretation should be from the perspective of a reasonably informed person. This is a more inclusive approach that is necessary in investor-State arbitration where numerous non-State actors may be impacted.

Obviously there will be different opinions on the ordinary meaning criterion. Those different opinions need to be discussed and debated by the drafters of the guidelines. If it is too difficult to arrive at a consensus, majority and minority views may potentially be included. Subsequent revisions of the guidelines would indicate any changes to this consensus.

Object and purpose

Fourth, the guidelines should outline acceptable ways to determine the object and purpose of a treaty, particularly of investment treaties.

They should caution against determining an object and purpose solely on the preamble. They should also address how to apply the object and purpose criteria in relation to treaties that have more than one object and purpose. This is especially important in investment treaties whose purpose is typically both to promote investment as well as to encourage the economic development of the host state.

Good faith

Fifth, to assist treaty interpreters, the guidelines should provide an explanation of the concept of good faith. I suggest a starting point would be Judge Brower's definition in *Daimler v Argentina*: where he referred to good faith as encapsulating "*well-established principles such as effet utile, honesty, fairness and reasonableness in interpreting a treaty, protection of legitimate expectations, avoidance of abuse of rights, and, as the ILC noted in its Draft Articles on the Law of Treaties, the fundamental principle of pacta sunt servanda*".

Other arbitral awards

Sixth, the guidelines need also to demonstrate how the Vienna Rules permits awards and decisions of other arbitral tribunals to be taken into account in the interpretation. This is potentially done through a wide-ranging role given to context in Art 31(1), relevant rules of international law under Article 31(3)(c) or supplementary means under Art 32. If the drafters of the guidelines can agree on one of these avenues as being

the best method of referring to determinations of other arbitral tribunals, that would help make the interpretative system more consistent across different tribunals.

However, in considering the use of other arbitral awards, it would be well worth stressing what Judge Greenwood once noted – interpretation concerns what your treaty means rather than what another tribunal has said what another treaty means.

Article 31(3)(c)

Seventh, the very open-textured nature of Art 31(3)(c) would benefit from an explanation as to what "rules of international law" may fall within the scope of this provision. Rules of customary international law obviously fall within this provision. However, I do not believe all maxims can easily find a place within Article 31(3)(c). Some, such as the *lex specialis* maxim, will. Others, such as rules requiring either an expansive or restrictive interpretation, may not.

Additionally, Art 31(3)(c) allows only those rules that "*are applicable in the relations between the parties*" and it is important that some clarity be given to this phrase. As I have discussed earlier, guidance is needed as to whether Art 31(3)(c) relates to rules applicable to the *parties to the dispute* or must they also be applicable to all the *parties to the treaty* that is subject to interpretation.

Article 32

My eighth point is that treaty interpreters would benefit from an understanding of what is meant by "*supplementary means of interpretation*", in addition to preparatory work and the circumstances of a treaty's conclusion.

For example, I propose that the guidelines should adopt the approach in *HICEE v Slovak Republic*, in which documents prepared for a domestic ratification process were considered not to be 'preparatory work', but nonetheless a type of 'supplementary means' of interpretation contemplated by Article 32. This is particularly so where an investor is not able to access the preparatory materials of a treaty.

Ninth, the issue relating to the access asymmetry between an investor and the respondent State should also be addressed in the guidelines with balanced provisions that attempt to level the playing field.

One guideline proposal could be that if a respondent State refuses to provide claimant-requested preparatory material, the tribunal – under its obligation to make a good faith interpretation – should be able to request that the respondent state to coordinate with the investor's home state and submit all material that is relevant, including materials relating to the ratification of a treaty. If such materials are not produced, and the claimant is able to legitimately discover any relevant preparatory work, the guidelines should indicate that the tribunal is able to consider drawing appropriate adverse inferences.

These are outlines of a number of proposals for the guidelines. Obviously, many more will need to be considered and drafted. The guidelines may not only inform the tribunal but also counsel in formulating their arguments.

D. Enhancing wisdom in interpretation

My third and final solution relates less to law and more to the science of decision making. It aims at creating conditions that will make treaty interpreters wiser when they are performing interpretative tasks.

Without doubt, everyone here today is wise. Nonetheless, scientific research is starting to show that we can be trained or taught to be wiser when making certain decisions. So while the application of the correct international law on treaty interpretation is paramount, the quality of treaty interpretations may be enhanced by increasing the wisdom of arbitrators as they undertake their interpretative tasks.

The view that one is wise or not and there is little one can do to change one's wisdom is being challenged by new research in psychology and behavioural science. A very readable but still extensive survey of the field is set out in Professor Grossmann's paper "Wisdom and How to

Cultivate It". I highly recommend that as a starting point if you are interested in this field.

Some of the characteristics of wisdom that Professor Grossmann has identified include

- (i) intellectual humility or recognition of the limits of one's own knowledge,
- (ii) appreciation of different perspectives,
- (iii) recognition that things change over time, and
- (iv) the ability to integrate different opinions.

From my layman's viewpoint, I can see that all these characteristics could potentially contribute to wiser interpretations, and which in turn would contribute to the reduction of the interpreter's personal bias, albeit often unconscious, in that process.

One of the main points developed out of the current research is that the more detached you are, the more unbiased your decision will be. In scientific terms, the adoption of an ego-decentric perspective to a problem can augment wise thinking.

Various strategies have been identified that assist to create this type of detachment. These include using third-person language (e.g. asking oneself "what would Jack or Jane think?") rather than first-person language such as asking "what do I think?". Another technique is to imagine yourself sitting on a cloud, looking down at yourself making a decision. A third method is to adopt the role of a teacher or mentor and picture yourself explaining the problem to a 12-year old.

To extend the third-person language technique to treaty interpretation, when interpreting a treaty, one could ask "what would the International Court of Justice think about this?" Or "how would the ICJ go about interpreting this provision?" While this approach in treaty interpretation is yet to be scientifically studied, I have used this approach a number of times and do feel more detachment from my personal views. At least that is what I think is happening to my decision-making process. I would be interested to hear feedback from

any of you who may wish to try this technique. For example, did you feel that you entered or at least moved towards an ego-decentric state that made your interpretative skills more objective?

I know this solution of mine may be totally outside of the box for many. But we need to think outside the box as a way of constantly improving investment treaty law and practice. It will not be a simple fix and it will not happen overnight. That is why I consider this is a long-term goal, which will need the commissioning of research by psychologists to identify the conditions or techniques that promote more detachment in treaty interpretation and the development of training to implement the findings with a view to producing better and wiser interpreters.

VI. Conclusion

The Vienna Rules are not the problem. They are themselves a solution. But like all solutions, their application needs to be monitored and improved to ensure they continue to be effective in practice and adapt to novel circumstances.

My general conclusion is that we will not be saying goodnight to the Vienna Rules. There will certainly be no hard exit.

Before I finish, I need to make a qualification to my introductory observation. I said there that I can see a day when treaties will be able to answer questions as to their meaning. What I purposely did not do in my opening was to touch on the standard or quality of the answer that would be generated by a smart AI treaty.

Can the AI generated treaty interpretation be authoritative? We have seen today that AI can give you different answers depending on what Chatbot you use. While AI still has flaws, it will keep improving and competing with human generated answers. Humans need to take up that challenge seriously and in the field of treaty interpretation, a more concerted effort needs to be made to improve how humans interpret treaties.

I am optimistic that more considered interpretations will result through the guidelines and the interpretation schedule I have proposed today and that interpreters – made wiser through ego-decentric training – will assist humans to be the most authoritative interpreters of treaties in the future.

Finally, I would like to leave you with what I asked ChatGPT (on 5 May 2023):

RO Are Articles 31 and 32 of the Vienna Convention on the Law of Treaties suitable for investor-state treaty arbitrations?

The concluding part of the response I received was:

Therefore, these provisions can be useful in investor-state treaty arbitrations as they provide a framework for interpreting the provisions of the treaty, taking into account the context and purpose of the treaty, as well as the supplementary means of interpretation. However, it is important to note that investor-state treaty arbitrations may involve specific issues that may require additional guidance or specialized rules for their interpretation.

So there you have it. ChatGPT says that the Vienna Rules need additional guidance or specialised rules. I suppose that leaves it up to us humans to decide whether the Vienna Rules need to be modernised or improved in this way. Whatever that decision is, I hope that I have raised issues this evening to enrich the thought processes that underly that decision, and perhaps help make that decision more fully informed and wiser.

Thank you.