Rules of Interpretation and Investment Arbitration - CEMEX v. Venezuela, ICSID Case No. ARB/08/15

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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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CHAPTER 2
Rules of Interpretation and Investment Arbitration

CEMEX v. Venezuela, ICSID Case No. ARB/08/15

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I. INTRODUCTION

Legal interpretation is a methodology that seeks to bring out the true meaning of a text. To apply a legal rule stemming from a contract, a law or a treaty is to interpret it in a certain way. It is fair to say that any legal order - whether domestic or international - has canons of legal interpretation.

In the international legal order, most of the canons of interpretation have been codified in the Vienna Convention on the Law of Treaties (hereafter the “VCLT”) under Articles 31, 32 and 33. Through the process of codification, the VCLT has facilitated a more objective and systematic approach to legal interpretation.²

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The VCLT rules of interpretation establish a step-by-step method aimed at identifying the ordinary meaning of the text and the original intent behind a given treaty provision. In the context of international adjudication, an important aspect of this question is the order in which the aforementioned rules should be applied.

The starting point of treaty interpretation is expressed in Article 31:

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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

When interpreting a treaty in accordance with Article 31, courts and tribunals give priority to the text of the treaty taking into consideration the following aids to interpretation: inter alia, context, object and purpose, subsequent agreements and State practice. As such, no doctrine of restrictive or extensive interpretation of the text of the treaty should prevail.4 The various interpretation aids listed in Article 31 should be viewed as “an integral whole, the constituent elements of which cannot be separated.”5 They are equally valuable and not ranked in any order of importance. This means that “a term may be implied only when it is clear beyond peradventure, from the overall text of the relevant instrument, its negotiating history or its actual implementation by the parties, that all Contracting States would have had no hesitation to include that term.”6

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4. Austrian Airlines v. The Slovak Republic, UNCITRAL, Final Award (9 October 2009) (Kaufmann-Kohler, Brower, Trapl), ¶¶ 119-121; Mondex International Ltd. v. United States of America, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) (Stephen, Crawford, Schwebel), ¶ 43.
5. Case concerning the Auditing Accounts between the Kingdom of The Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands v. France), Permanent Court of Arbitration, Award (12 March 2004), 25 RIAA 267, ¶ 62 ("The rule of interpretation under Article 31 of the VCLT should be viewed as forming an integral whole, the constituent elements of which cannot be separated ... all the elements of the general rule of interpretation provide the basis for establishing the common will and intention of the parties by objective and rational means.").
When the textual analysis is insufficient to resolve an ambiguity as to the true meaning of the text, recourse to the supplementary means of interpretation is permissible. Article 32 provides:

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.

Article 32 can also be used to confirm the result attained after applying Article 31. In all events, however, the interpretation aids of Article 32 shall be applied after Article 31.  

Multilingual treaties may add to the complexity of the interpretation process because "more than being a simple composite of texts in different languages, a treaty must transcend the sum of its parts in the name of unity." This search for unity is the approach adopted in Article 33:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

When the ambiguity as to meaning cannot be overcome, Article 33 operates as a tool to reconcile the texts and preference should be given to the clearest text.

The VCLT codification of the canons of interpretation is not to be understood as exhaustive. On several occasions, the International Court of Justice ("ICJ") has

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7. Paul Reuter, Introduction to the Law of Treaties, 97, ¶ 145 (2d ed., Kegan Paul International 1995) ("It is from these elements [Article 31], since they primarily incorporate the parties' intention, that the meaning of the treaty should normally be derived. Recourse to supplementary means of interpretation (article 32) ... is only admissible at a later stage, either to confirm the results of the interpretation or to avoid reaching ambiguous or manifestly absurd or unreasonable results on the sole basis of the primary elements."). See also Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment (3 February 1994), I.C.J. Reports 1994, ¶ 41.
8. Alain Papaux & Rémi Samson, "Article 33, Interpretation of treaties authenticated in two or more languages" in Corten & Klein (eds.), supra n.3, 869.
recognized the customary nature of Articles 31 and 32 of the VCLT. Investment tribunals have done the same. In investment disputes, the customary nature of the rules of interpretation has one noteworthy consequence for arbitrators given that “an international judicial organ ... is deemed to take judicial notice of international law.” Therefore, the rules of interpretation of customary international law are not optional for tribunals, but are in fact binding and relevant to investment disputes inasmuch as the dispute raises an issue of interpretation.

Other canons of interpretation may find application such as, for example, the effectiveness principle. Similarly, the application of canons of interpretation may not be limited to conventional instruments. This is because it is not only treaties that are capable of binding States at the international level. For instance, the ICJ has recognized that “declarations made by way of unilateral acts may have the effect of creating legal obligations.” Therefore, as shown by the CEMEX v. Venezuela case, the “normal canons of interpretation” equally apply to other legal instruments.

10. Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment (3 February 1994), I.C.J. Reports 1994, ¶ 41 (“The Court would recall that, in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.”). See also LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, ¶ 99; Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment (17 December 2002), I.C.J. Reports 2002, ¶ 37. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (21 June 1971), I.C.J. Reports 1971, ¶ 94. The uncertainty surrounding the customary status of Art. 33 stems from a heterogeneous case law analysis of which will be left aside. See Papaux & Samson, supra n.8, 872.


12. See Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment (25 July 1974), I.C.J. Reports 1974, ¶ 18. See also Phoenix v. Czech Republic, supra n.11, ¶ 78 (“It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention’s jurisdictional requirements as well as those of the BIT cannot be read and interpreted in isolation from public international law, and its general principles.”).

13. Yasseen, supra n.2, at 71 (“La règle générale d’interprétation implique des procédés qu’elle ne mentionne pas expressément mais qui se situe dans le cadre de cette règle. C’est le cas surtout du procédé de l’effet utile.”).

14. Case Concerning Nuclear Tests (Australia v. France), Judgment (20 December 1974), I.C.J. Reports 1974, ¶ 34 (“When it is the intention of the State making the declaration that it should become bound according to its terms, that intentions confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding .....”). See also Legal Status of Eastern Greenland, Judgment of 1933, P.C.I.J., Series A/B. No. 53, 71 (“It considers it beyond all dispute that “a reply of this nature given by the Ministry for Foreign Affairs on behalf of his government ... is binding upon the country to which the Minister belongs””).

15. Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Preliminary Objections, Judgment (26 May 1961), I.C.J. Reports 1961, 19 (“In so doing, the Court must apply its normal canons of interpretation, the first of which, according to the established jurisprudence of the Court, is that words are to be interpreted according to their natural and ordinary meaning in the context in which they occur”).
This is directly relevant in the context of investment arbitration. A treaty provision is one possible basis on which an ICSID tribunal can exercise jurisdiction. However, this is not the only basis. There is a growing body of State practice in adopting domestic investment laws that are framed in the same way as BITs. In addition to granting substantive rights to the investor, they also contain a unilateral offer to ICSID arbitration. ICSID tribunals may hesitate as to the method of interpretation when “the State’s consent to arbitration is not contained in a treaty to be interpreted according to the Vienna Convention on the Law of Treaties of 23 May 1969, but in a unilateral offer made by that State in one form or another.”

With these considerations in mind and against the background of the CEMEX v. Venezuela Decision on Jurisdiction, the purpose of this article is to illustrate that the canons of interpretation are also pertinent to the interpretation of BIT provisions and unilateral acts of States (II) and that a prudential use of interpretation rules by investment tribunals helps to strengthen confidence in the arbitration system and ensure legal certainty (III).

II. THE INTERNATIONAL LAW RULES OF INTERPRETATION IN LIGHT OF THE CEMEX v. VENEZUELA CASE

A. The CEMEX v. Venezuela Case

In the CEMEX v. Venezuela case, the Tribunal was asked to determine whether Article 22 of Venezuela’s Foreign Investment Law of 1999 containing a compulsory ICSID arbitration clause could be used to establish a State’s consent “in general and in advance” to ICSID arbitration, including when a treaty did not contain a compulsory jurisdiction provision. Applying the relevant canons of interpretation, the Tribunal


18. CEMEX v. Venezuela, supra n.1, ¶ 77.

19. Ibid.

20. Venezuela’s Investment Promotion and Protection Law of October 1999, Official Gazette No. 5.390, published on 22 October 1999, Art. 22: “Disputes arising between an international investor whose country of origin has in effect with Venezuela a treaty or agreement on the promotion and protection of investments, or disputes to which the provisions of the Convention Establishing the Multilateral Investment Guarantee Agency (OMG–MIGA) or the Convention on the Settlement of Investment Disputes between States and national of other States (ICSID) are applicable, shall be submitted to international arbitration according to the terms of the respective treaty or agreement, if it so provides, without prejudice to the possibility of making use, when appropriate, of the dispute resolution means provided for under the Venezuelan legislation in effect.”
concluded that the interpretation of Venezuela’s domestic legislation offering compulsory jurisdiction to arbitral tribunals was not an autonomous source of jurisdiction from which a State’s consent could be implied.

The CELEX v. Venezuela case is interesting since it illustrates that the approach to the interpretation of unilateral declarations is analogous to that applicable to treaty interpretation and to the role played by other canons of interpretation not codified in the VCLT, such as the *effet utile* principle, as explained below.

**B. The International Canons of Interpretation Applied to Unilateral Declarations of States**

With respect to the method of interpretation applicable to domestic investments laws, qualified as unilateral acts under international law, supra, the Tribunal in the CELEX v. Venezuela Decision on Jurisdiction applied the canons of treaty interpretation by analogy, stating that: “[a]lthough the law of treaties as codified by the Vienna Convention on the Law of Treaties is not relevant in the interpretation of unilateral declarations, the provisions of the Vienna Convention may ‘apply analogously to the extent compatible with the *sui generis* character’ of such declarations.” Consequently, the canons of interpretation initially meant to be applied to a traditional State-to-State relationship can be extended and are useful in the interpretation of legal instruments other than inter-State treaties.

Article 25 of the ICSID Convention requires consent in writing from the parties to the dispute. Three ways may establish “consent in writing”: (i) a direct agreement between the foreign investor and the host State by way of a compromissory clause, (ii) a treaty provision, or (iii) a unilateral offer to arbitrate by way of domestic law. It is important to recollect that consent to ICSID arbitration consists of two layers. The ratification of the ICSID Convention alone is not enough to establish consent for a specific dispute and does not satisfy the requirement of Article 25. In general, it is the second layer of consent - consent to submit a specific dispute to arbitration - that may

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21. CELEX v. Venezuela, supra n.1, ¶ 79. (“Unilateral acts by which a State consents to ICSID jurisdiction are standing offers made by a sovereign State to foreign investors under the ICSID Convention. Such offers could be incorporated into domestic legislation or not. But, whatever may be their form, they must be interpreted according to the ICSID Convention and to the principles of international law governing unilateral declarations of States.”)

22. Ibid., ¶ 89.


24. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 25 (18 March 1965), 575 U.N.T.S. 159: “(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”


be the subject of interpretation. When such consent is expressed in a unilateral declaration by way of domestic legislation, it adds to the complexity of interpretation. As the Tribunal noted in *CEMEX v. Venezuela*, “ICSID case law on that point is rare and lacks consistency.”

The Tribunal scrutinized the text of the Respondent’s domestic legislation and recalled that in interpreting unilateral declarations, the greatest care is required: “for a State to commit itself through treaties creating reciprocal obligations is one thing; to commit itself unilaterally without counterpart is another.” In this respect, the Tribunal applied a well-established principle of international law according to which consent cannot be altered or presumed. For the Tribunal, this principle had two consequences for the methods of interpretation of unilateral declarations.

First, in light of the jurisprudence of the ICJ, the Tribunal recalled that “a sovereign State’s interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues.” Thus, the respondent’s interpretation of its domestic legislation granting consent is irrelevant to determining whether the tribunal has jurisdiction over the investment dispute.

Secondly, a tribunal’s interpretation of unilateral declarations of consent will differ according to the context in which the declaration took place. A State’s declaration “formulated in the framework and on the basis of a treaty” or “other declaration made by States in the exercise of their freedom to act on the international plane” are deemed to constitute a State’s consent under international law when there is no ambiguity as to their meaning.

A distinction has to be drawn between unilateral declarations made outside or within the framework of a treaty, since “the regime relating to the interpretation” of those declarations “is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties” and such declaration “must be interpreted as it stands, having regard to the words actually used.” Here, the Tribunal intended to single out the unilateral nature of the legislation and to distinguish the canons of interpretation applicable to treaties to those applied to unilateral declarations of States. It noted that when unilateral declarations are not made within

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34. *Ibid.*, ¶ 83 (“rules of interpretation are, however, somewhat different when, as in the present case, unilateral declarations are formulated in the framework of a treaty and on the basis of such a treaty”); *See also Nuclear Tests (New Zealand v. France)*, Judgment (20 December 1974), I.C.J. Reports 1974, 472-473, ¶ 47.
the framework of a treaty "the utmost caution is required when deciding whether or not those declarations create such (international) obligations."35

In other words, the Tribunal considered that the sui generis character of such declaration must be taken into account to avoid presuming State’s consent to arbitration in advance “without any limitation and reciprocity”36 as it would constitute an infringement on the State’s sovereignty contrary to the requirements of Article 25 of the ICSID Convention.

The Tribunal added that, when interpreting unilateral declarations made outside the framework of a treaty, "a restrictive interpretation is called for."37 It is in this respect that a limitation of the analogy with the rules of treaty interpretation becomes apparent since the latter do not require a liberal, restrictive or theological approach. The Tribunal’s adoption of a sui generis interpretation of Venezuela’s domestic arbitration clause might well stem from the following distinction: "[b]y signing on to arbitration in a BIT, one state party signs off on its immunity from suit in favour of a vast number of ... investors of the other State party. In the context of domestic legislation, the number of such potential claimants is generally not restrained ..., with the consequence that any foreign investor may take that State to arbitration."38

This reasoning seems to be in line with the International Law Commission’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations. Principle 7 provides that "[a] unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner."39

As can be seen, the specificity of a unilateral act granting consent was taken into account, which departs from the classical interpretative approach.40

Still, as shown by the CEMEX v. Venezuela case, the choice of a certain method of interpretation -either liberal, textual or restrictive - may be insufficient to overcome a difficulty as to the interpretation of a State’s intent. The presence of an ambiguity in the text of the Respondent’s domestic legislation led the CEMEX Tribunal to the conclusion that it could not infer a State’s consent to ICSID jurisdiction “in general and in advance.” Such consent exists or does not exist and cannot be based on presumptions.

35. CEMEX v. Venezuela, supra n.1, ¶ 82.
36. Ibid., ¶ 115.
37. Ibid., ¶ 82.
38. Andreeva, supra n.23, at 138.
40. Laurent Lévy and Fabrice Robert-Tissot, L’interprétation arbitrale, 4 Revue de l’arbitrage 923 (2013), ("l’interprétation … n’a aucune raison de se faire de manière restrictive, large ou libérale elle doit s’accomplir en vue d’établir la volonté commune des États contractants en vertu du principe pacta sunt servanda").
Here lies the analogy with the regime applicable to the interpretation of unilateral declarations of States made in the framework of Article 36(2) of the ICJ Statute used by the Tribunal to determine the State’s intention behind the declaration.⁴¹

To get around the difficulty raised by the interpretation of States’ intent behind its unilateral acts, the Tribunal analyzed the Respondent’s domestic legislation against another well-established principle of interpretation in international law: the effet utile principle.

C. **Effet Utile and the Interpretation of Unilateral Declarations**

In order to determine whether the Respondent’s domestic legislation could be construed as an autonomous source of jurisdiction, the CEMEX Tribunal reverted to another canon of interpretation often used in the context of treaty interpretation, namely the effet utile principle.

The effet utile principle, although well-established in jurisprudence, is not codified in the VCLT’s general rule of interpretation.⁴² However, as shown by the CEMEX v. Venezuela case, this does not mean that tribunals are prevented from having recourse to it when they may see fit. Often invoked against the party who seeks a restrictive interpretation, the effet utile principle can be brought into play to improve - without altering - the result of a restrictive interpretation.⁴³ Answering the Claimant’s argument, the CEMEX Tribunal relied on the case law of the ICJ that held - in the context of treaty interpretation - that “the principle of effectiveness ... has an important role in the law of treaties,”⁴⁴ as well as on arbitral awards that have recognized that “[i]t is a cardinal rule of the interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless.”⁴⁵

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⁴¹ CEMEX v. Venezuela, supra n.1, ¶ 110.

⁴² Yasseen, supra n.2, 74. (“Sa suppression a para même préférable ... pour éviter le risque qu’un article de ce genre, entendu dans un sens excessif puisse être invoqué en faveur d’une interprétation extensive. En conclusion, il est possible de dire que la règle générale d’interprétation qu’énonce l’article 31 de la Convention de Vienne implique le principe ... dans son acceptation raisonnable.”)

⁴³ Ibid., 72 (“Il est surtout invoqué contre la partie qui réclame une interprétation restrictive. Il peut ainsi être considéré comme une garantie contre une interprétation restrictive sans toutefois justifier une interprétation extensive.”)


However, despite its significance in treaty interpretation, the Tribunal stated that the *effet utile* principle is unhelpful in interpreting a State’s unilateral declaration offering to submit a dispute to arbitration. It said that “even if the principle of *effet utile* were applicable to unilateral declarations, this would not help in the interpretation of Article 22.” Such an interpretation “implies that Venezuela could in the future prefer consenting to ICSID jurisdiction ... without any limitation and reciprocity” and would mean presuming a State’s consent contrary to the requirements of Article 25 of the ICSID Convention. To avoid this result, the Tribunal accorded primacy to the intention criteria by analyzing the context, the purpose and the circumstances of the adoption of the domestic legislation and concluded that “such an intention has not been established.”

In light of the case law of the ICJ, it excluded the *effet utile* principle because “[it] does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible. Thus, in a number of cases, the International Court of Justice, when interpreting agreements or treaties, has given a very limited effect to the text it had to construe.”

In the context of international arbitration, for a tribunal to give limited effect to the text of domestic legislation represents the other side of the same interpretation coin: if the host State cannot use its own legislation to deprive the investor of the rights conferred by a treaty, an investor cannot inversely use the host State’s domestic legislation to create rights that do not exist under a treaty. This highlights that a prudent approach to the interpretation of the applicable legal instruments is critical to preserving the balance between State and investor rights and, more generally, in contributing to legal certainty.

III. THE CONTRIBUTION OF THE CEMEX V. VENEZUELA DECISION TO THE DEVELOPMENT OF INVESTMENT LAW

The *Cemex v. Venezuela* Decision was not the first award interpreting Venezuela’s Foreign Investments Law of 1999 as it was preceded by the *Mobil Corp v. Venezuela* decision. Moreover, since it was followed by the *Tidewater v. Venezuela* decision, it was not the last either. In those three cases, the legal characterization of Article 22 determined the governing rules of interpretation. The central issue was whether a unilateral offer to arbitration contained in Article 22 could be construed as creating a binding unilateral commitment at the international level? If so, according to which rules?

49. *Interpretation of Peace Treaties (Second Phase)*, Advisory Opinion (18 July 1950), *I.C.J. Reports* 1950, p. 229. (“The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provision for the settlement of disputes in the Peace treaties a meaning which, as stated above, would be contrary to their letter and spirit.”)
To determine the governing rules of interpretation, the three cases distinguished whether the unilateral declaration of consent was made within the framework of a treaty or not.\textsuperscript{51} Having determined the "\textit{sui generis character}"\textsuperscript{52} of the rules of interpretation for the specific category of unilateral acts made within the framework of a treaty, the tribunals all concluded that Article 22 could not be construed as constituting a State’s consent to ICSID arbitration in general and in advance.\textsuperscript{53}

To reach this conclusion, the tribunals excluded the applicability of the ILC Guiding Principles Applicable to Unilateral Declarations Capable of Creating Legal Obligations and specified that their interpretation should be governed by "the approach set out by the International Court of Justice when interpreting declarations of acceptance of the Court’s jurisdiction"\textsuperscript{54} and that priority should be given to the words actually used.

In a more straightforward way than in \textit{Cemex v. Venezuela} and \textit{Mobil Corp v. Venezuela}, the Tidewater tribunal dismissed the applicability of the ILC’s Guiding Principles stating that: "a national law which is intended to have some effects on the international plane might be subject to the restrictive interpretation provided for in the ILC Unilateral Declaration Principles, but this does not apply to a national law which is adopted in the framework of an international treaty ... These unilateral acts are neither to be interpreted according to the rules of the VCLT, nor according to the rules stated in the ILC Unilateral Declaration Principles; they have their own rules of interpretation."\textsuperscript{55}

\textbf{IV. CONCLUSION}

As has been explained, the canons of interpretation as codified, find application in respect of both BITs and national legislation adopted within the framework of a BIT. In so doing, they play a number of functions for international arbitration.

\textsuperscript{51} See \textit{Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd. y Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela}, ICSID Case No. ARB/07/27, Decision on Jurisdiction (10 June 2010) (Guillaume, Kaufmann-Kohler, El-Koshy) ¶ 90, 96 [hereinafter \textit{Mobil v. Venezuela}] ("Rules of interpretation are however somewhat different when, in the present case, unilateral acts are formulated in the framework and on the basis of a treaty, such as the ICSID Convention ... Although the law of treaties as codified in the Vienna Convention is not relevant in the interpretation of unilateral acts, the provisions of that Convention may "apply analogously to the extent compatible with the sui generis character" of unilateral acts."). \textit{See also Tidewater Inc. y otros v. Bolivarian Republic of Venezuela}, ICSID Case No. ARB/10/5, Decision on Jurisdiction (8 February 2013) (McLachlan, Rigo Sureda, Stern), ¶ 96 [hereinafter \textit{Tidewater v. Venezuela}] ("These unilateral acts are neither to be interpreted according to the rules of the VCLT, nor according to the rules stated in the ILC Unilateral Declaration Principles; they have their own rules of interpretation").

\textsuperscript{52} \textit{Tidewater v. Venezuela}, supra n.51, ¶ 97. See also \textit{Mobil v. Venezuela}, supra n.51, ¶ 90.


\textsuperscript{54} \textit{Tidewater v. Venezuela}, supra n.51, ¶ 102. See also \textit{Cemex v. Venezuela}, supra n.51, ¶ 84 ("Those rules have been fixed by the International Court of Justice in a long series of cases, when interpreting unilateral declarations of compulsory jurisdiction made under Article 36(2) of its Statute.") and \textit{Mobil v. Venezuela}, supra n.51, ¶ 111.

\textsuperscript{55} \textit{Tidewater v. Venezuela}, supra n.51, ¶¶ 91, 96. See also, \textit{Mobil v. Venezuela}, supra n.51, ¶ 90.
It is worth recalling that jurisdictional matters in ICSID cases often revolve around interpretation. That being said, several factors contribute to exacerbate legal insecurity all of which revert to the need of a watchful use of the international rules of interpretation.

It is sometimes argued that the disparity of approaches to treaty interpretation has somehow contributed to undermining confidence in the international arbitration system.\(^{56}\) Nevertheless, the canons of interpretation as codified by the VCLT are central legal tools in a similar way to the international law rules on State responsibility for wrongful acts. Both represent cornerstones in investment arbitration that need to be correctly understood and applied by investments tribunals. The *CEMEX v. Venezuela* Decision illustrates a number of issues in this respect.

First, the importance of rules of interpretation is exemplified by the growing overlap between legal orders (domestic, regional and international) and the diversity of legal instruments capable of creating obligations at the international level.

Second, in the specific context of arbitration, consistency in the application of the international canons of interpretation is of significant importance given that tribunals are judges of their own competence and, absent a judicial review, a flawed decision can lead to far-reaching implications within the arbitration system as a whole. Paul Reuter observed that:

> The primacy of the text, especially in international law, is the cardinal rule for any interpretation. It may be that in other legal systems, where the legislative and judicial processes are fully regulated by the authority of the State and not by the free consent of the parties, the courts are deemed competent to make a text say what it does not say or even the opposite of what it says. But such interpretation, which are sometimes described as teleological, are indissociable from the fact that recourse to the courts is mandatory ... and that it is moreover controlled by an effective legislature whose action may if necessary check its bolder undertakings.\(^{57}\)

Third, a tribunal’s duty to properly reason its decisions and follow a methodological interpretation\(^{58}\) is reinforced by the growing demand for transparency, including the opening of the dispute settlement process to “third parties” and the possibility to submit *amicus curiae*. Those third parties may want to provide their own interpretation of a legal provision. Moreover, they may be impacted by a tribunal’s interpretation of a specific legal instrument. As a result of the greater number of actors involved in a dispute, the greater is the need for tribunals to justify their legal reasoning. This explains why prudent use of the rules of interpretation by tribunals not only helps to pursue the objective of transparency, but also contributes to promoting legal certainty.


\(^{57}\) Reuter, *supra* n.7, ¶¶ 141-143.

\(^{58}\) It should be recalled in this respect that Art. 48(3) of the ICSID Convention imposes an obligation on the Tribunal to “state the reasons upon which (the award) is based.” This obligation to motivate an award cannot be waived by the parties.
Chapter 2: Rules of Interpretation and Investment Arbitration

In *Glamis Gold Ltd v. US*, the tribunal correctly noted that:

All tribunals are to provide reasons for their awards and this requirement is owed to private and public authorities alike. In the Tribunal’s view, however, it is particularly important that the State Parties receive reasons that are detailed and persuasive for three reasons. First, States are complex organizations composed of multiple branches of government that interact with the people of the State. An award adverse to a State requires compliance with the particular award and such compliance politically may require both governmental and public faith in the integrity of the process of arbitration. ... Third, a minimum level of faith in the system is maintained by the mechanism for the possible annulment of awards.59

Lastly, another contributing factor to legal uncertainty is the ever-increasing risk of conflicts of interpretation between sets of norms and principles within international law. The rules of interpretation in international law play an important role in preventing and resolving such conflicts.

59. *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (6 June 2009) (Young, Caron, Hubbard), ¶ 8.