

INTERPRETATION OF AMBIGUOUS PROVISIONS OF INTERNATIONAL INVESTMENT TREATIES AUTHENTICATED IN TWO OR MORE LANGUAGES

Filip BALCERZAK, abogado, LL.M.,¹
Faculty of Law, Adam Mickiewicz University
ul. Św. Marcin 90, 61-809 Poznań, Poland
balcerzak@icam.es

Abstract: The presented article identifies and offers solutions to problems related to interpretation of international investment treaties, which have been authenticated in two or more languages. It focuses on situations when the provisions of investment treaties cause interpretational doubts because their wording is not identical in the official languages of the particular treaty. The scope of the analysis is narrowed down to the provisions concerning the jurisdiction of tribunals, which is justified due to practical implications of jurisdictional considerations in the course of arbitral proceedings. The first part of the article explains relevant applicable general principles of treaty interpretation as expressed in the 1969 Vienna Convention on the Law of Treaties. The second part is a case study, which analyses the problems faced by tribunals in the *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia* and *Daimler v. Argentina* cases. The conclusions presented in the article may serve as a tool in the practice of investor – state arbitration, when implementation of specific provisions of international investment treaties occurs in the course of arbitral proceedings.

Key words: International investment law, investment arbitration, investor – state arbitration, jurisdictional clause, investment treaties, BIT, treaties authenticated in two or more languages, treaty interpretation, official language of a treaty, Vienna Convention on the Law of Treaties, case study, *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia*, *Daimler v. Argentina*

INTERPRETACJA NIEJEDNOZNACZNYCH POSTANOWIEŃ MIĘDZYNARODOWYCH TRAKTATÓW O OCHRONIE I WSPIERANIU INWESTYCJI SPORZĄDZONYCH W DWÓCH LUB WIĘCEJ JĘZYKACH

Abstrakt: W artykule poruszono problematykę interpretacji międzynarodowych traktatów o popieraniu i ochronie inwestycji, które zostały sporządzone w dwóch lub więcej językach. Treść traktatów o popieraniu i ochronie inwestycji powoduje wątpliwości interpretacyjne, ponieważ brzmienie poszczególnych postanowień tychże traktatów w dwóch lub więcej językach, w których zostały sporządzone, nie jest identyczne. Zakres analizy artykułu został zawężony do postanowień dotyczących jurysdykcji trybunałów arbitrażowych, co jest uzasadnione doniosłością tych kwestii z perspektywy przebiegu postępowania arbitrażowego. W pierwszej części artykułu wyjaśniono zasady interpretacji traktatów prawa międzynarodowego uregulowane w Konwencji wiedeńskiej o prawie traktatów z 1969 r. Druga część artykułu stanowi analizę przypadków, w których poruszana problematyka była przedmiotem analizy trybunałów arbitrażowych, na przykładzie spraw *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia* oraz *Daimler v. Argentina*. Wnioski wysunięte w artykule mogą być wykorzystane przy stosowaniu postanowień traktatów o popieraniu i ochronie w praktyce postępowań arbitrażowych na linii inwestor – państwo.

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Słowa kluczowe: Międzynarodowe prawo inwestycyjne, arbitraż inwestycyjny, arbitraż na linii inwestor – państwo, klauzula jurysdykcyjna, traktaty o ochronie i wspieraniu inwestycji, traktaty sporządzone w dwóch lub więcej językach, interpretacja traktatów, oficjalny język traktatu, Konwencja wiedeńska o prawie traktatów, analiza przypadków, *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia*, *Daimler v. Argentina*

Introduction

Investment treaties are treaties of public international law, which are concluded between states. Although typically investment treaties are concluded between two contracting states, there are also multilateral investment treaties (see for example the North American Free Trade Agreement or the Energy Charter Treaty). However, in the present article references to Bilateral Investment Treaties (“BITs”) also include multilateral treaties, despite the linguistic reservation related to this simplification.

Although the importance of BITs and the arbitral proceedings based on them is commonly undervalued in the perception of public opinion, the ongoing development of international investment law is a fact. Whilst in 1996 only 38 investor-state arbitration cases were registered in the International Centre for Settlement of Investment Disputes (referred to as the “ICSID”), in June 2012 the number had reached 390 (The ICSID Caseload – Statistics 2012, 7). If one remembers that not all investor – state arbitrations are administered by the ICSID, the number of publicly known cases at the end of 2011 amounted to 450 (IIA Issues Note 2012, 1). There are currently more than 3000 BITs in force worldwide (World Investment Report 2013, 101), which may give ground for potential disputes in the future.

The growing number of arbitral proceedings based on BITs raises numerous innovatory legal issues, not present in previous proceedings. Among many other legal issues present in international investment law and investor – state arbitration, some of them are related to linguistic aspects of the underlying BITs. The present article analyses the situation when there are interpretative doubts arising from the wording of a BIT which has been authenticated in two or more languages.

The methodology is based on the analysis of wording of international treaties and of available arbitral awards and the literature on the subject. Part of the article is descriptive in nature. The aim of this part is to present international investment law to the reader and then to illustrate the problems related the interpretation of ambiguous provisions of BITs in two or more languages within the general framework of international investment law. Subsequently, the article contains a general analysis of the legal norms expressed in the 1969 Vienna Convention on the Law of Treaties. It further becomes a case study. It goes beyond the black letter of law and refers to the relevant case law, illustrative for the problems related to the subject of the article. It analyses the case law by applying relevant principles of treaty interpretation to the problems encountered by the arbitral tribunals in the cases relevant to the subject. Therefore, it might be used as a tool in practice, when implementing specific provisions of international investment treaties in the course of future arbitral proceedings.

Brief introduction to BITs

One of the basic characteristics of BITs is that they create the possibility that investors, understood to be private subjects, file law suits against host states (states on the territory of which investments are made), understood to be sovereign states, in arbitral proceedings, which are binding. BITs incorporate a dispute resolution method known between private parties, i.e. arbitration. Not only do arbitral awards bind the parties to the proceedings, but also in the case that the losing party is not willing to pay the compensation awarded therein, they may serve as a basis of enforcement proceedings conducted in the vast majority of jurisdictions around the world.

Arbitration is based on consent of the parties (Dugan, Wallace, Rubins, Sabahi, 2008, 219). The host states – the contracting states to the BIT which is the basis for particular proceedings – give their consent to arbitration in advance, already at the moment when they conclude the BIT. It is the consent intended for the future and given towards a specified group of subjects, who are not described individually, but by their features, such as the nationality or the status of being an “investor” within the meaning of the BIT and international investment law.

Although they are not well known to the general public, there is no doubt that arbitral cases are important for states and, indirectly, for their citizens. The example of *CME v. Czech Republic* case might be noted, in which the compensation awarded to be paid by the host state was approximately 270 million US dollars plus interest (*CME v. the Czech Republic*, 2003, 161). This amount was comparable to the annual budget of the Ministry of Health of the respondent state (Green, 2003, W1). Another example is *Occidental v. Ecuador* case, in which the respondent state was ordered to pay compensation in the amount exceeding 1 billion 700 million US dollars (*Occidental Petroleum v. Ecuador*, 2012, para. 876).

Linguistic aspects of investment arbitration

BITs are instruments of public international law. It is common practice that they are concluded between the contracting states in two or more languages. It is not a surprise that contracting states wish to conclude treaties in their official languages. Thus, if the official languages of contracting states are different, a natural solution is that the treaty may be concluded in at least two languages, i.e. in each official language of each contracting state.

In some situations, a treaty may be concluded in even more languages, when the contracting states decide that a neutral language, typically a language commonly used in the type of relations governed by the negotiated treaty, will be decisive in case of divergences between the authentic texts of the treaty. An example of such solution in the realm of international investment law can be found in the BIT concluded between Cyprus and Poland, which in its art. 13.3. establishes:

„[...] Done and signed in Warsaw on the 4th June 1992 in two originals in the Polish, Greek and English languages, all texts being equally authentic. In case of disagreement as regards the interpretation of the text, the English version will prevail.”

A decision to choose a third language to be the prevailing one in case of divergences in the interpretation may be justified by various factors. For example it might be a response to situations such as those when (i) the languages are not commonly known in the other contracting state (official languages of the contracting states are not commonly known outside of the borders of these states) or when (ii) none of the contracting states agrees to recognise the supremacy of the other state's language.

BITs can be subject to interpretation by a whole group of different interpreters. For example they can be interpreted by a legal consultant providing services for one of the parties, an arbitrator deciding the case, a common citizen of a contracting state, who wishes to understand the nature of international obligations undertaken by his home state in the BIT etc. As observed above, it is not uncommon for a BIT to be authenticated in two or more languages. If this is the situation, the question arises as to how should an interpreter of such BIT – regardless of to which type of interpreter he belongs and what is the final purpose of the interpretation process – approach the issue of the interpretation of such treaty. In the context of BITs it is not only an academic question. The answer given to this question in the course of arbitral proceedings based on a BIT may have an impact on the final outcome of these proceedings, and as a result on the decision whether compensation is to be paid, and if so – in what amount.

General rules of treaty interpretation

BITs are treaties of public international law and as such, they must be interpreted in accordance with the principles of public international law. Thus, generally they should be interpreted in accordance with the rules expressed in articles 31, 32 and 33 of the 1969 Vienna Convention on the Law of Treaties (referred to as the “Vienna Convention”). The importance of the Vienna Convention cannot be underestimated, as it “would apply in interpreting a BIT even if the State contracting parties were not parties to the Vienna Convention as they reflect customary international law” (Weiniger, 2006, 254).

It is observed that in general there are three basic methods of treaty interpretation in public international law: (i) objective approach towards the interpretation, i.e. interpretation based on the real text of the treaties and the words used therein, (ii) subjective approach towards the interpretation, i.e. interpretation based on intention of the contracting states, and (iii) the broad approach towards the interpretation, based on the purpose and the aim of the treaty as a basis for interpreting the meaning of specific provisions. Articles 31, 32 and 33 of the Vienna Convention to a certain extent adopt all three approaches listed above (Shaw, 2006, 539).

The plurality of authentic texts of an international treaty is always an important factor in its interpretation and it may not be ignored. In general, the existence of authentic texts in two or more languages can either (i) complicate the interpretation, being an additional source of ambiguity or obscurity in the terms of the treaty, or (ii) facilitate the interpretation, being helpful when the meaning of terms is ambiguous in one language, but it is clear as to the intentions of the parties in the another language (Yearbook, 1967, 225).

The existence of a plurality of the authentic texts of an international treaty introduces in its interpretation a new element, that is a comparison of the authentic texts

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of the treaties (Yearbook, 1967, 225). Although there is no express directive, which obliges an interpreter to always compare the authentic texts of the treaty at hand, if there is a difference or a dispute over interpretation presented to a court or to a tribunal, “comparison of texts is likely to be essential” (Gardiner, 2008, 360). There are various possible scenarios when a term of a treaty can be ambiguous or obscure: (i) it is so in all the authentic texts of the particular treaty, (ii) one or more texts of the treaty are clear, but another text (or texts) is (or are) ambiguous, or (iii) apparently the authentic texts seem not to have exactly the same meaning.

Of the listed provisions of the Vienna Convention, it is the article 33 which regulates the interpretation of treaties authenticated in two or more languages. It reads as follows:

- “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.”

Paragraphs 1 and 2 of the article 33 of the Vienna Convention should be read together. They regulate the significance of the choice of the contracting states concerning the authentic texts of the treaties. Paragraph 1 of the referred provision regulates situations when treaties provide that in the event of divergence between the texts, a chosen text is to prevail over the texts in other languages. Such situation is not uncommon and is visible at the example of the invoked BIT Poland – Cyprus. Paragraph 2 clearly states that if the choice referred to in the paragraph 1 has not been made by the contracting states, none of the authentic texts of the treaty prevails over the other language versions.

Paragraph 3 of the article 33 of the Vienna Convention introduces a presumption that the terms of the treaty have the same meaning in each authentic text. It is referred to as the principle of the “unity” of the treaty, according to which both (or all) the authentic texts express the terms of the agreement between the contracting states. However, they remain language versions of one document only, which remains the one treaty concluded between the parties. There exists one set of terms accepted by the parties to the treaty and one common intention with respect to those terms, agreed by them and expressed by the adopted wording of the treaty.

Thus, according to the principle expressed in the article 33 paragraph 3 of the Vienna Convention, when applying a treaty an interpreter must look for a common meaning of the texts and for the meaning intended by the parties to be attached to the terms included by them in the treaty. The existence of two or more authentic texts of the treaty justifies neither simple preference of one of these texts to another, nor discarding

the normal means of resolving an ambiguity or obscurity on the basis of the general principles of treaty interpretation. By recourse to the normal means of interpretation, efforts should be made in order to reconcile the texts and to look for the intention of the parties behind the words.

The presumption that the terms of the treaty are intended to have the same meaning in each of its authentic text (paragraph 3 of article 33 of the Vienna Convention), together with the principle of the equal authority of authentic texts (paragraphs 1 and 2 of article 33 of the Vienna Convention) guarantee that the unity of the treaty is observed. Effort should be made to find a common meaning of the interpreted provisions.

Despite these efforts, a comparison of the interpreted provision in both (or all) authentic texts of the treaty may disclose a difference of meaning, which leads to a conclusion that the authentic texts cannot be presumed have the same meaning. In such situations, paragraph 4 of article 33 of the Vienna Convention applies. According to it, if the application of the general rules of treaty interpretation – which are expressed in articles 31² and 32³ of the Vienna Convention – does not remove the difference of meaning in the terms used in the authentic texts of the treaty, the interpreter is entitled to adopt the meaning “which best reconciles” the conflicting texts, having regard to the object and purpose of the treaty.

When looking for the object and purpose of the treaty – as is required under article 33 paragraph 4 of the Vienna Convention – recourse to the “original language” of the treaty may result helpful. By this term it is understood the language in which the treaty was negotiated, drawn up or firstly drafted (Gardiner, 2008, 366).

² “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. 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.”

³ “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.”

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Obviously, the mechanism established in article 33 paragraph 4 of the Vienna Convention does not exclude the possibility that the outcome of the interpretation of the provision of the treaty is that the meaning of the interpreted provision is the meaning which is clear in one of the authentic texts. Such an outcome is perfectly acceptable and it is not contrary to the directive that the interpreter should not simply prefer one authentic text to another (Gardiner, 2008, 375).

Practical significance of linguistic aspects of BITs

A difference of meaning of provisions authenticated in two or more languages can cause interpretative problems at various stages of arbitral proceedings based on BITs. However, the practical importance of this issue appears to be the most visible when analysing the scope of “consent to arbitrate” given by states. In other words, it is especially visible at the jurisdictional stage of the arbitral proceedings, when the arbitral tribunal decides whether it has authority to hear the case at hand.

The jurisdiction of the arbitral tribunals may be understood as the power to decide the case. The basis for the jurisdiction is consent of the parties (Dugan, Wallace, Rubins, Sabahi, 2008, 219). Without the consent to arbitrate, no arbitral tribunal may have jurisdiction at all. If any tribunal renders an award without having jurisdiction, or exceeding its scope, subsequent recognition and enforceability of the award may be denied (Born, 2009, 201-202), or it may be annulled under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

When the respondent state invokes objections to jurisdiction of the tribunal hearing the case, it is necessary to interpret the “jurisdictional clause” included in the BIT, that is the clause of the BIT on the basis of which the proceedings are commenced which contains the states’ consent to arbitrate. At this stage, if there are differences between the authentic texts of the BIT, they may not be ignored.

The *Kilic Insaat v. Turkmenistan* case provides an example of such situation. The case was conducted on the basis of the BIT concluded between Turkey and Turkmenistan. In that case, the tribunal issued a decision, the sole purpose of which was to determine: (i) the number of authentic versions of the BIT at hand, (ii) accurate translations into English of any authentic version(s) of the BIT (to the extent there are authentic version(s) of the BIT in languages other than English), and (iii) the meaning and effect of article VII.2 of the BIT, which regulated the issue of jurisdiction (*Kilic Insaat v. Turkmenistan* 2012, para. 1.19.).

The approach of the arbitral tribunal towards the interpretation of the BIT authenticated in more than one language was in accordance with article 33 paragraph 1 and article 33 paragraph 2 of the Vienna Convention. The tribunal needed to identify what were the authentic texts of the BIT. The doubts of the tribunal were well justified, as the authentic English version of the BIT provided that the Treaty was “*DONE at Ashghbat on the day of May 2, 1992 in two authentic copies in Russian and English*”, whilst the authentic Russian version of the BIT provided that the treaty was “*Executed on May 2, 1992 in two authentic copies in Turkish, Turkmen, English and Russian languages*” (as translated into English in the copy of the arbitral award, see *Kilic Insaat v. Turkmenistan* 2012, para. 2.8.).

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The tribunal decided that English and Russian were authentic texts of the BIT. It did not agree with the argument that the Turkish and/or Turkmen versions were authentic texts of the BIT as well, together with the English and Russian texts. The tribunal's reasoning was based on the fact that there was no evidence of the existence of the Turkish and/or Turkmen texts of the BIT and that the respondent was unable to produce signed copies of either the Turkish or the Turkmen versions of the BIT.

The determination of which were the authentic versions of the BIT was important for the interpretation of article VII.2 of the BIT. This provision was the "jurisdictional clause", which contained the basis of jurisdiction of the arbitral tribunal in the case. Its interpretation was crucial to determine the jurisdiction of the tribunal. English version of article VII.2. of the BIT provided that:

"If these disputes (sic) cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to [arbitration] provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year" (Kilic Insaat v. Turkmenistan 2012, para. 2.10).

At the same time, the Russian version of the BIT, translated literally into English provided that:

"If the referenced conflicts cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the conflict may be submitted at investors choice to [arbitration] on the condition that, if the concerned investor submitted the conflict to the court of the Party that is a Party to the conflict, and a final arbitral award on compensation of damages has not been rendered within one year" (Kilic Insaat v. Turkmenistan 2012, para. 2.11).

The problem was whether the requirement to refer the dispute to local courts before submitting it to arbitration was optional, or mandatory. The Russian version of the BIT was clear as to the mandatory nature of this requirement. However, the English version was ambiguous and allowed for both interpretations. Thus, potential existence of additional authentic texts of the BIT could have a crucial result for the analysis. However, their existence was not proved and the tribunal continued its analysis on another basis.

Although the tribunal did not refer expressly to article 33 paragraph 4 of the Vienna Convention in the relevant passage, nevertheless it applied this provision in an implied – but correct – way. It interpreted the jurisdictional clause of the BIT by applying articles 31 and 32 of the Vienna Convention, i.e. by applying the general rules of interpretation. By using supplementary means of interpretation regulated in article 32 of the Vienna Convention, the tribunal referred to the circumstances surrounding conclusion of the BIT and on that basis decided that the local court requirement was obligatory (Kilic Insaat v. Turkmenistan 2012, paras. 9.18 – 9.23).

As a result, there was no need to "reconcile" the text of art. VII.2. of the BIT within the meaning of article 33 paragraph 4 of the Vienna Convention. However, it

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seems that if it had been done, in this particular case the final outcome would have been the same. If one version of the BIT is clear, and the second one is ambiguous in the sense that it allows both interpretations, the Tribunal would have easily agreed to reconcile texts as having the meaning allowed by both versions. Thus, the final conclusion reached by the Tribunal was the same as the effect of “reconciliation” of both versions would have been.

Berschader v. Russia case is another example when the language versions of the BIT were analysed by the arbitral tribunal in the context of the scope of jurisdiction of the tribunal. The proceedings in that case were based on the BIT concluded between Russia and Belgium, which had been authenticated in two texts – Russian and French.

As already observed, the power of the tribunal to decide the case depends on the valid consent of the parties. In the context of BITs, one of crucial element when determining the scope of the consent is to determine what is understood to be an “investment” protected under the BIT and thus, what is the scope of the consent to arbitrate given by the states.

The crucial question to determine the jurisdiction of the tribunal in this particular case was whether a financial contribution to the construction of a building for the Russian Supreme Court qualifies as an “investment” under the applicable BIT. The Russian term, used for “investment” in the Russian authentic version of the BIT was narrower than the French term, used in the French authentic version of the BIT. The tribunal observed that:

“Firstly, the Tribunal finds ample evidence amongst Russian-English legal and economic dictionaries for translating the term *kapiralovlozhenie* as “investment” and the term *vlozhit* as “to invest”. Secondly, it is possible to point to a large number of BITs concluded by the Respondent where Russian and English are the authentic languages of the Treaty and where the term *kapitalovozhenie* is translated as “investment” and *vlozhit* is translated as “to invest”. It is thus clear that, while those terms may sometimes be used in the Russian language in the more limited sense of “contributions to the charter capital of a joint venture”, they are in fact also frequently used in a broader sense corresponding exactly to the English terms “investment” and “invest” (*Berschader v. Russia*, 2006, para. 109).

The tribunal added:

“Furthermore, regard must be had to the French version of the Treaty which, as set out in the Protocol, is equally as authoritative as the Russian version. The French text uses the words *investissement* and *investir*. With respect to these French terms, there can be no doubt but that their ordinary meaning is identical to that of the English words “investment” and “to invest”. Therefore, and for the reasons set out above, the Tribunal finds that the Respondent's objections on this point must fail” (*Berschader v. Russia*, 2006, para. 110).

It is not clear on what basis did the tribunal refer to English definitions. The Tribunal did not explain the legal basis of “pointing to a large number of BITs concluded by the Respondent where Russian and English are the authentic languages”. It may be assumed that the legal basis for this step was article 33 paragraph 4 of the Vienna Convention,

which refers to general rules of interpretation, amongst which one can find article 31 paragraph 3 point b⁴.

However, it seems that the tribunal misapplied the above rule. “Subsequent practice” relates to the application of the particular international treaty, here the BIT Russia – Belgium. It does not refer to the practice between the states related to all the other international treaties.

The correct approach to solve the problem, which arose in the *Berschader v. Russia* case seems to be offered by the application of article 31 paragraph 1 of the Vienna Convention,⁵ as a result of the referral from article 33 paragraph 4 of the Vienna Convention. In the analysis conducted by the tribunal one may see a conclusion that the terms used in the Russian authentic version of the BIT corresponds to the intention of the contracting states, as it is the ordinary meaning of the terms in both official languages. Thus, there was no need for applying the “reconciliation” under article 33 paragraph 4 of the Vienna Convention, but were it applied, it would have led to the same outcome.

The issue of authentic texts of the BIT arose also in the *Daimler v. Argentina* case. It was conducted under the BIT concluded between Argentina and Germany. The two authentic texts of the BIT were Spanish and German, although the working language of the arbitral tribunal was English.

In this case the scope of jurisdiction was conditioned upon application of the Most Favored Nation clause. This standard of protection guarantees that the states – parties to the BIT – shall not accord investments in their respective territories by nationals or companies of the other contracting state treatment less favourable than the treatment accorded investments of companies or investments of nationals or companies of any third state.

The application of the Most Favored Nation clause is conditioned, among other requirements, upon existence of an “investment”, a “treatment” and the qualifier that it must be “in the territory” of the host state. The problem faced by the tribunal in the *Daimler v. Argentina* case was whether the qualifier referred to the term “treatment”, or to the term “investment”. In this context the tribunal observed:

“English translation misconstrues the qualifier “in its territory” by attaching it to the word “investments” rather than to the word “treatment”. The mistake is perhaps understandable, as the translation was prepared primarily from the German original, which [...] arguably renders the intended reference point of the phrase “in its territory” uncertain. By contrast, Articles 3(1) and 3(2) of the Spanish text both clearly attach the phrase “in its territory” to the word “treatment” (*Daimler v. Argentina*, 2012, footnote 394).

Differently from the awards rendered in *Kilic Insaat v. Turkmenistan* and in *Berschader v. Russia* cases, the tribunal in *Daimler v. Argentina* case expressly referred to the Vienna Convention:

⁴ “There shall be taken into account, together with the context any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

⁵ “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.”

“Since [...] both the Spanish and German versions of the text are equally “binding” or “authentic”, this minor inconsistency is easily resolved by Article 33(3) of that Vienna Convention, according to which the terms of a treaty are presumed to have the same meaning in each authentic text. In case of difference, Article 33(4) directs that the meaning which “best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”.”

The tribunal followed:

“Applying these rules to the present discrepancy: since the Spanish text is clear as to the proper placement of the qualifier “in its territory” while the German text leaves the question open, the interpretation given by the Spanish text must be preferred” (*Daimler v. Argentina*, 2012, footnote 394).

The mere application of the article 33 of the Vienna Convention and the final decision reached by the tribunal are correct in the circumstances of the case. However, it seems that the tribunal to a certain degree misapplied the Vienna Convention. Although article 33 paragraph 3 of the Vienna Convention introduces the presumption that the authentic texts have the same meaning, still - the meaning must be interpreted by application of the general rules of treaty interpretation. The meaning may not be simply reached by the tribunal by stating that “one version is clear”. One must look for the common intention of the parties behind the words – and sometimes it may be that a clear provision must be interpreted differently from that, which initially seems to emerge from its literal wording. The issue in *Daimler v. Argentina* concerned application of the Most Favored Nation clause to the jurisdictional provisions of the BIT. It remains one of the most controversial topics in investor – state arbitrations and in international investment law. Thus, it is not surprising that even the proper application of general rules of treaty interpretation could not have led to a final determination of which approach is the correct one. As a result, the application of the rule of reconciliation provided in article 33 paragraph 4 of the Vienna Convention was justified. However, the Tribunal simply stated that one version is clear while the other is not, which led it to the decision that the clear version shall prevail over the ambiguous one. Therefore, the tribunal ignored that article 33 paragraph 4 of the Vienna Convention relates the reconciliations of authentic texts “to the object and purpose of the treaty”. Despite that, although the tribunal did not apply the mechanism to the full extent, it reached conclusions justified in the circumstances of the case.

Concluding remarks

The potential interpretative problems arising from those situations when the BITs have been authenticated in two or more languages do occur in practice of international investment law. This may be seen at the examples of awards rendered in *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia* and *Daimler v. Argentina* cases. In the context of investment arbitration this issue is especially visible at the jurisdictional stage of the proceedings.

These considerations are not purely academic. Decisions made by tribunals in investor – state arbitrations have direct influence on the final outcomes of disputes. If the

tribunals decide that they lack jurisdiction, the case is dismissed and the respondent can neither be found liable for a breach of the BIT nor ordered to pay compensation. If the tribunal decides otherwise, the proceedings enter the merits stage, which may end up in an award ordering the respondent state to pay compensation, in some cases in significant amounts.

The analysis contained in the article shows that international law developed a mechanism which offers solutions to the potential problems related to the differences in meaning between the authentic versions of the BITs. They are expressed in article 33, read together with articles 31 and 32 of the Vienna Convention. All authentic texts of the BIT are equally authoritative – unless the contracting states decided that one of the versions prevails in case of divergence – and are presumed to have the same meaning. If the comparison of the authentic texts discloses a difference of meaning, they must be interpreted in accordance with the general principles of treaty interpretation, as regulated in articles 31 and 32 of the Vienna Convention. Only if it does not remove the difference of meaning revealed by comparison of authentic texts, the tribunal should choose the meaning which best reconciles all the authentic texts, but having regard to the object and purpose of the BIT.

From the analysis of *Kilic Insaat v. Turkmenistan*, *Berschader v. Russia* and *Daimler v. Argentina* cases it emerges that when facing the issues related to interpretation of BITs authenticated in two or more languages, the tribunals in investment arbitration do not always properly apply the Vienna Convention. This creates a risk of rendering incorrect decisions, which could be contrary to the established rules of treaty interpretation. Despite the above, in the analysed cases the arbitral tribunals rendered decisions which were correct in the circumstances of the cases. What is even more significant, if these arbitral tribunals would have properly applied the rules established in the Vienna Convention, they would have rendered the same decisions on the interpretation of the authentic texts of the BITs.

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