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Regime Interaction in Investment Arbitration: Looking Forward, Looking Back on the Vienna Convention on the Law of Treaties as a Disciplining Force in International Investment Disputes

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In 2011, in an article titled ‘W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law’, Professor Stephan Schill [reflected](#) on the prior decade of scholarly and practical developments in international investment law (**IIL**). He referred to the boom in specialised scholarship and the more than 400 investor-State disputes then in existence as reasons to reflect on the status of the field.

Today, a further decade later and at the dawn of a new year, his words and efforts seem even more poignant. The quantity and quality of IIL [scholarship](#) has continued to dramatically grow, which is unsurprising with more than 1,100 investor-State disputes now [recorded](#) by UNCTAD – a figure that is current as of December 2020 and reflects that **more than half** of the recorded disputes came into existence after Schill’s article was published.

Each newly registered dispute presents a fresh opportunity to question whether the investor-State dispute settlement (**ISDS**) system remains fit for purpose – as both a system and a mechanism. Indeed, as presaged in a [post](#) by Maria José Alarcon and Sebastian King last week, the field is at a crossroads. Many of its criticisms are actively under debate at ICSID as part of its [Rule Amendment Project](#). A parallel and broader initiative for modernisation and reform continues through [UNCITRAL Working Group III](#), where the discussion has now turned to [establishment](#) of a standing first instance and appellate multilateral investment court, with full-time judges, as a solution to the risk of fragmentation of the discipline.

A common impetus for these efforts is the concern articulated by the International Law Commission of the United Nations (**ILC**) in its [2006 report](#), ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (**ILC 2006 Report**). In his [2011 article](#), Schill examined the ILC 2006 Report and focused on fragmentation within IIL, a phenomenon that is not monolithic. There is fragmentation that arises out of [regime interaction](#), where each of the various public international law disciplines (such as trade law, human rights law,

and law of the sea) progresses, grows, and dovetails with one another. There is also fragmentation that emerges from the interaction of the multitude of instruments, approaches, and piecemeal decisions within each of these defined disciplines. The ILC 2006 Report sought to examine both categories of 'conflict' to present avenues for harmonisation and systemic integration.

While these forward-looking efforts are crucial to maintenance of a [transnationalist](#) approach to the international legal order, it is also worthwhile to reflect on the existing public international law toolkit. Accordingly, this post shines the spotlight on the [Vienna Convention on the Law of Treaties \(VCLT\)](#) as a disciplining force in ISDS. It argues that the VCLT, as demonstrated through the path to its preparation, and its text, evidences that the ILC foresaw the risk of fragmentation and the VCLT's rules of interpretation, in particular Articles 31 and 32, provide an effective means for harmonisation and systemic integration in IIL.

The Post-World War II International Legal Order: The Winding Road To the VCLT

Following World War II, the international community crafted a new worldview. Driven by a philosophy of [transnationalism](#), States designed a modern framework for international relations.¹⁾ They collectively agreed to no longer tolerate unilateral tactics and instead adopted transnational rules, derived from multilateral and bilateral agreements, systems of global trade, established international norms, and decisions by international tribunals.²⁾ Key institutions emerging from this new legal order included the United Nations, the World Trade Organisation, and various international courts and tribunals. Decades later, this transnational system is the backbone of our international law toolkit. It informs approaches to international affairs, human rights, foreign policy, business transactions, and related disputes. ISDS mechanisms, embodied in more than 3,300 independent bilateral and multilateral investment agreements (collectively, international investment agreements, **IIAs**), form a part of this transnationalist system.

As discussed in a [prior post](#) co-authored with Dr Esmé Shirlow, at its first session in 1949 the ILC identified the law of treaties as a high priority topic. At that time, the customary international law rules relevant to the negotiation, validity, and interpretation of treaties had grown to become a fairly comprehensive body of rules and it seemed opportune to codify these rules. The ILC appointed [four successive Special Rapporteurs](#) for the topic and kept the topic of the law of treaties on its agenda from 1949 through to 1966. In its sessions, the ILC considered the Special Rapporteurs' research and work product, information provided by governments, and documents prepared by the United Nations Secretariat.

It was only under Sir Humphrey Waldock's leadership that it was determined that the best way forward would involve draft articles capable of serving as a basis for an international convention. His six reports enabled the Commission in 1966 to submit a final draft to the UN General Assembly and to recommend that the Assembly convene

an international conference to conclude a convention on the subject. The [Vienna Conference on the Law of Treaties](#) was thus held from 26 March to 24 May 1968 and 9 April to 22 May 1969. As a result, the [VCLT](#) was adopted and opened for signature on May 23, 1969, and entered into force on January 27, 1980.

The VCLT's Universal Rules of Interpretation

In the intervening decades, the VCLT has become universally regarded as one of the most important instruments of treaty law. It has been [ratified by 116 States](#) and even some non-ratifying States (such as the United States) recognise parts of the VCLT as a restatement of customary international law. Along these lines, the VCLT offers solutions to modern concerns over the fragmentation. With respect to interpretation, Article 31 sets out the so-called 'general rule of interpretation', while Article 32 provides for 'supplementary means of interpretation' and allows reference to an IIA's *travaux préparatoires* and the 'circumstances of its conclusion'.

In the ILC 2006 Report, the VCLT, and in particular its interpretive rules, are presented as a centralised tool for legal interpretation, legal reasoning, and systemic relationships. In the face of regime interaction and 'conflict', these tools provide a common baseline:

'articles 31 and 32 of the VCLT are always applicable unless specifically set aside by other principles of interpretation. This has been affirmed by practically all existing international law-applying bodies'. ([2006 ILC Report](#), pp. 92-93)

Indeed, VCLT Articles 31 and 32 are commonly employed as core interpretive tools in ISDS cases. For example, in *HOCHTIEF Aktiengesellschaft v. Argentine Republic*, the arbitral tribunal matter-of-factly noted that interpretation of the applicable treaty 'must be conducted in accordance with the law of treaties ... and in particular in Articles 31-33 of the VCLT, which are familiar to all involved in investment arbitration' ([Decision on Jurisdiction](#), 24 October 2011, para. 26). Similarly, Professor Brigitte Stern noted in her dissenting opinion in *Yukos Capital v. Russia* that '[t]he rules of interpretation of an international treaty are well known and embodied in Article 31 of the VCLT' ([Dissenting Opinion of Professor Brigitte Stern](#), 18 January 2017, para. 14).

Yet, this baseline does not automatically result in uniform understanding or application of the VCLT's interpretive rules. For example, in *Eskosol v. Italy*, the arbitral tribunal explained that 'VCLT Article 31(3)(a) is not [...] a trump card to allow States to offer new interpretations of old treaty language, simply to override unpopular treaty interpretations based on the plain meaning of the terms actually used'. ([Decision on Italy's Request for Immediate Termination](#), 7 May 2019, para. 223) Meanwhile, Judge Charles Brower has [advocated](#) in various settings, including in his dissenting opinions, for a hierarchical approach to employing the VCLT's Articles 31 and 32. Thus, even with common interpretive tools, the risk of fragmentation remains. Some of these challenges and opportunities were explored in a previous [series](#) on the

Blog. A [post](#) by Dr Esmé Shirlow and Professor Michael Waibel focused on the practical difficulties associated with ascertaining the existence of *travaux préparatoires* and regulating its production in arbitral proceedings per VCLT Article 32. Similarly, a [post](#) by Dr Julian Wyatt explored how investment tribunals have used the principle of contemporaneity in treaty interpretation. Of special relevance to concerns about fragmentation, he highlighted how the same principles of treaty interpretation might be used by different international courts and tribunals in quite distinct ways.

W(h)ither Harmonisation and Systemic Integration?

Despite these tensions, as reflected in its [2006 Report](#), the ILC remains resolute that the VCLT and its interpretive tools are the north star to address fragmentation and conflict in public international law:

‘most of the VCLT - at least its customary law parts - including above all articles 31 and 32 - automatically, and without incorporation, is a part of the regime: indeed, it is only by virtue of the VCLT that the regime may be identified as such and delimited against the rest of international law’.
([2006 ILC Report](#), p. 94)

It is therefore not surprising that a solution for harmonisation and systemic integration can also be found within the VCLT. Article 31(3)(c), in particular, provides that a further interpretive vehicle is to draw upon ‘any relevant rules of international law applicable in the relations between the parties’. As such, Article 31(3)(c) offers an opportunity to reconcile the various interpretive techniques explored in the [2006 ILC Report](#) (eg *lex specialis*; *lex posterior*; or *lex superior*). Application of each - and whether it is the correct mode for a particular circumstance - is dependent on what is considered ‘relevant’ to that specific circumstance.

In the ISDS context, this means that the question is not whether a specific rule, custom, or terms of an IIA would ever be irrelevant, but rather ‘whether a rule’s speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule depended on such aspects as the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system’ ([2006 ILC Report](#), p. 207). As such, harmonisation can be achieved without rendering any instrument of public international law irrelevant. To the contrary, the ‘norm that will be set aside will remain as it were “in the background”, continuing to influence the interpretation and application of the norm to which priority has been given’. (*Id.*) This is an especially useful framework for concerns arising from regime interaction.

Even more, this approach has special relevance to the ISDS regime. The latest debates on fragmentation arise out of the now more than 1,100 investment disputes in existence and different approaches to and interpretations applied where the same or

similar IIAs and/or the same or similar facts are issue. Indeed, stakeholders' interest in the establishment of a multilateral investment court, appellate mechanism, and a standing roster of full-time arbitrators is primarily driven by demands for coherence and harmonisation. While such innovations may be fruitful for the goals of legitimacy and transparency, it is important to bear in mind that even that body would draw upon the existing public international law toolkit. As discussed by Dr Mary Mitsi in a [prior post](#), ISDS tribunals must always engage in the interpretive process, which involves first identifying norms and then applying them. This is the case no matter how those tribunals are constituted, even if comprised of full-time judges under the umbrella of a permanent multilateral investment court. This concern was also expressed by Professor José E Alvarez in a [keynote address](#) at the International Trade Administration's (ITA's) March 2021 virtual conference.

Concluding Remarks

While there are no easy solutions to the challenge of regime interaction and fragmentation in public international law, the optimistic view is that this challenge exists primarily because the transnationalist approach to the international legal order has been successful. Continued growth, especially within the ISDS regime - which includes a multitude of instruments, stakeholders, and decisions - is a signal that the system continues to react to the needs of the global community in an effort to serve those needs in a seemingly effective manner. Within this context, as advocated by the ILC and numerous ISDS tribunals, the VCLT's interpretive tools, especially its Article 31(3)(c), remain instructive and offer a solution to the 'systemic' objective, allowing decisionmakers to downplay 'conflict' and read relevant materials holistically to achieve harmonisation and systemic integration.

The importance of the VCLT to investment arbitration is the focus of the forthcoming book *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future*, Dr Esmé Shirlow and Kiran Nasir Gore (eds) (Kluwer, mid 2022).

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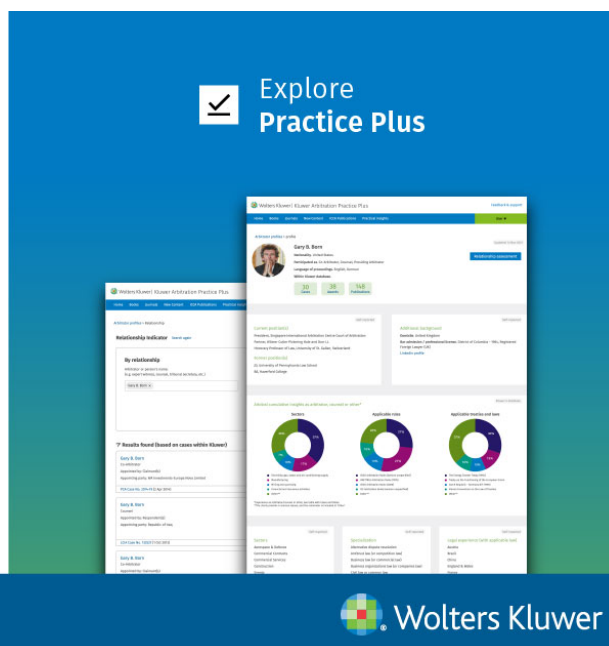
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References

↑ 1 See generally Barry E. Carter, [Making Progress in International Institutions and Law](#), in *PROGRESS IN INTERNATIONAL LAW* 51-68 (Russell A. Miller & Rebecca M. Bratspies ed., 2008).

↑ 2 See generally Myres S. McDougal & Florentino P. Feliciano, [International Coercion and World Public Order: The General Principles of the Law of War](#), 67 *YALE L.J.* 771 (1958). See also Thomas G. Weiss, [The United Nations: Before, During and After 1945](#), 91 *INT'L AFF.* 1221, 1226-29 (2015).

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