Kluwer Arbitration Blog

The Mutually Reinforcing Relationship between the VCLT & ISDS: A Roundtable hosted by the Permanent Court of Arbitration

Edward Cheston, Sarthak Malhotra (Permanent Court of Arbitration) · Friday, December 2nd, 2022

In the last two decades, the Permanent Court of Arbitration's (PCA) overall docket has seen a rapid growth in mixed arbitrations between States and private parties. Today, over 180 arbitrations are currently pending before PCA tribunals, of which more than 100 are investor-State disputes brought under bilateral and multilateral investment treaties and national investment laws.

In just a short time working at the PCA, one grows accustomed to the great significance that the Vienna Convention on the Law of the Treaties (VCLT) has on the work of PCA-supported arbitral tribunals. It seemed fitting, therefore, that the PCA hosted a launch of the recently-published book, edited by Esmé Shirlow and Kiran Nasir Gore, titled *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future*, through a day-long series of roundtable discussions led by the Book's contributing authors and attended by individuals at the PCA's headquarters in The Hague and online. The event was opened through an address by PCA Secretary-General Marcin Czepelak and bookended by introductory and concluding remarks by the Book's editors, Esmé Shirlow and Kiran Nasir Gore. This post provides an overview of several of the key themes examined during the day's discussions.

The VCLT & ISDS – A Reinforcing Relationship

The day's first session focussed on the existence of a "reinforcing relationship" between the VCLT and investor-State dispute settlement (ISDS), examining on the role of the VCLT in investor-State disputes and the ways in which invocation of the VCLT's rules by arbitral tribunals contributes to the strength and development of ISDS and international investment law.

To begin, Anna Crevon-Tarassova and Barton Legum presented their research in the Book on VCLT Article 33, which governs the interpretation of treaties authenticated in two or more languages. Crevon-Tarassova first described the curious work of three separate arbitral tribunals constituted under the Turkey-Turkmenistan bilateral investment treaty ('BIT'). Each of the three tribunals was tasked with untangling an ambiguity between the English and Russian versions of the same BIT provision. However, despite all employing the VCLT Article 33, the three tribunals reached quite different conclusions. As was pointed out in the ensuing discussions, this contradiction in the three decisions suggests that treaty interpretation undertaken by independent

arbitral tribunals may not produce harmonious results when cases, albeit brought pursuant to the same treaties, involve differing factual circumstances.

Next, Legum led a fascinating discussion of the policy considerations underpinning VCLT Article 33. The Mexico-Slovak Republic BIT, Legum explained, is authenticated in Slovak and Spanish. However, no member of either State's delegation spoke the other's respective language during their negotiations, which were instead conducted solely in English. Legum noted that the VCLT appropriately gives weight to authenticated texts that are produced, presumably by translators, from negotiation discussions taking place in a different language. In the example given, Article 33 places weight on the Slovak and Spanish versions of the BIT. For Legum, these are the versions which, one must assume, best embody the treaty provisions that the Mexican and Slovak governments understood and sought to ratify.

Malgosia Fitzmaurice and Agnes Rydberg next introduced some of the analysis in their chapter, which covers among other things VCLT Article 28's rule against retroactivity in the application of treaties. They explained that arbitral tribunals have been presented with a range of unique problems relating to the scope of VCLT Article 28. Ordinarily, Article 28 states that parties are not bound by acts and facts that predate a treaty's entry into force, but complexity arises when what were originally pre-treaty disputes continue indefinitely (or, indeed, at least past the treaty's entry into force). Specifically, the case of *Berkowitz v. Costa Rica* was raised, wherein the tribunal determined that pre-treaty facts may be treated as circumstantial evidence to bolster claims based on post-treaty events. This sort of arbitral finding serves to strengthen established international law rules, such as the ILC's Articles on State Responsibility, and other international jurisprudence, such as the *Liechenstein v. Germany* case.

For the final segment of the first session, Michael Waibel spoke to his and Esmé Shirlow's research on the role of past decisions under a "sliding scale approach" to interpretation pursuant to VCLT Article 32 (indeed, elements of this research have been published on the Kluwer Arbitration Blog previously, as part of the VCLT Golden Jubilee series which inspired the Book). Waibel noted that, whilst prior arbitral decisions are sometimes thought to hold little precedential weight, investor-State tribunals frequently make reference to prior decisions. Waibel connected this practice to the VCLT's interpretive rules, in the sense that prior arbitral awards might be relied on by a tribunal as a source of interpretive guidance when undertaking a VCLT Article 32 analysis. As Waibel pointed out, this may have the effect of reifying the VCLT's rules, by promoting consistent decision-making and/or uniformity in treaty interpretation across BITs.

The VCLT & ISDS – A Restraining Relationship

The next session focused on the ways in which the VCLT's rules restrain or regulate the approaches of investor-State tribunals and/or treaty parties in protecting foreign investment.

Judge Charles N. Brower and Devin Bray introduced their chapter in the Book, which focuses on competing theories of treaty interpretation and the application of Articles 31 and 32 of the VCLT by investor-State tribunals. Bray explained that the approach of investor-State tribunals to treaty interpretation could be classified into two principal styles. The first was termed the "hierarchical approach", whereby a tribunal would first apply VCLT Article 31, and only resort to VCLT Article 32 if the meaning of the provision under scrutiny remained unclear. The second, by contrast, was

titled the “crucible approach” and envisaged dealing with both VCLT Articles 31 and 32 together. Bray added that the “hierarchical approach” may serve as the more predictable of the two, and lies the closest to the VCLT drafters’ intentions as expressed in Articles 31 and 32.

The discussion continued with Judge Brower’s insightful historical analysis of the VCLT. He explained that the division between Articles 31 and 32 was not necessarily a logical decision by the VCLT drafters since it was a result of a compromise between the advocates of the so-called ‘intentional school’ (personified by Sir Hersch Lauterpacht) and the advocates of ‘textualist’ school (represented by Sir Gerald Fitzmaurice). On the “crucible approach” of treaty interpretation, Judge Brower explained that this approach was a result of counsel in international arbitration cases incorporating every possible argument on treaty interpretation into their memorials, thus presenting Articles 31 and 32 holistically. He concluded by highlighting that the VCLT has not been a success in promoting a uniform approach to treaty interpretation.

Next, Aikaterini Florou addressed the possible evolution of the VCLT’s interpretive tools. Florou discussed how the VCLT’s tools could be deployed to secure interpretive consistency and enhanced multilateralism in investment law – key goals of current ISDS reform efforts. She also raised the *Tokios Tokelés v. Ukraine* award, wherein the tribunal looked into third-party international investment agreements (‘IIAs’) to interpret the scope of protected ‘investors’ under the disputed BIT. From this point, Florou hypothesised that ‘cross-treaty interpretation’ may help deepen multilateralization in international investment law, a regime that is frequently subject to allegations of fragmentation. Florou discussed at length the proposed Multilateral Investment Court (‘MIC’), and particularly the possibility that the MIC may be empowered to consult non-disputing parties on interpretative issues of systemic importance. Finally, Florou also proposed that a provision may be added to the MIC statute allowing the MIC’s consistent decisions to qualify as ‘subsequent practice’ under VCLT Article 31.

The VCLT & ISDS – A Relationship of Replacement?

The final session focused on how IIAs, and the approaches of investor-state tribunals, may be diverging from the approaches to treaty law established in the VCLT (for example through *lex specialis*) or from the approaches to treaty law adopted by other international courts and tribunals.

First, Ashwita Ambast discussed how States and tribunals utilize bespoke regimes and special rules such as interpretative maxims in the interpretation process under Articles 31 and 32 of the VCLT. Ambast highlighted four areas in which *lex specialis* may be said to exist in the realm of ISDS: (i) the territorial application of treaties; (ii) rules of priority between treaties in instances of conflict; (iii) the rules of interpretation in VCLT Articles 31-33; and (iv) the termination or amendment of treaties. Noting the all-important question mark in the session title “A Relationship of Replacement?”, Ms Ambast left the audience with the question of whether special rules in these four areas are indeed deviating from the VCLT framework, or whether this is more reflective on the VCLT’s in-built flexibility.

Next, Dirk Pulkowski explained that a number of rules in IIAs perceived to be ‘special’ in nature are best understood as the States’ attempts to ‘clarify’ the application of VCLT framework to IIAs. Pulkowski then described that the VCLT had exerted a unifying force for treaty practice in the IIAs despite the adoption of many ‘special rules’ that differ from the general VCLT framework. In

support, he noted that the concept of 'supplementary means of interpretation' in Article 32 of the VCLT confirmed the VCLT's unifying force. He concluded by providing the round table participants food for thought that the international law could be used as the grammar to unify different legal regimes.

The last speaker of the round table, Dimitrios Papageorgiou, offered insights from his chapter – co-authored with Wesley Pydiamah, Julien Fouret and Athina Fouchard – into the application of Article 29 of the VCLT by investor-state tribunals. He began by briefly exploring the treaty practice on territorial application by illustrating the United Kingdom's treaty practice. He pointed out that many UK BITs allowed the protection under the BIT to be extended to the UK overseas territories (e.g., the British Virgin Islands and the Cayman Islands) and the crown dependencies (e.g., Isle of Man) through diplomatic exchanges of notes. Lastly, Papageorgiou discussed the cases of *Sanum v. Laos* and *Menzies v. Senegal* to underscore the interpretative complexities that the arbitral tribunals may face while determining an IIA's territorial application.

Conclusion

The VCLT is one of the most important treaties in international law. As ISDS has developed into one of the busiest sites of international litigation, it is perhaps no surprise that significant emphasis has been placed on the VCLT to assist with the interpretative issues arising in such cases (over 350 investor-State decisions of various forms containing references to the VCLT are included in an appendix to the Book). What is a continual surprise, however, is the complexity of the legal and policy debates that spring from the issue of treaty interpretation. This blog post has covered a number of such debates that took place during the PCA-hosted roundtable, but the Book's chapters contain many other important ideas which will no doubt continue to shape our understanding of the law of treaties in the ISDS field.

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