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International Law Weekend 2022: Interactions between Investment Law and the Vienna Convention on the Law of Treaties ("VCLT")

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International Law Weekend ("ILW"), held at Fordham Law School in New York City between October 20-22, 2022, celebrated the centennial anniversary of the American Branch of the International Law Association with a program entitled "The Next 100 Years of International Law." It brought together a wide variety of engaging panels and events to explore current debates about the future of public and private international law. Among the many discussions at ILW that focused on issues relevant to international arbitration practitioners, a key thematic thread that emerged is the ongoing importance of the VCLT to international law and investor-State arbitration.

The Continued Role of the VCLT in Investor-State Arbitration

While in recent years, investment treaty drafters have sought to create increasingly comprehensive agreements, many bilateral and multilateral investment treaties still leave space for interpretation on critical questions. With many, if not all, of its articles now being widely accepted as reflecting customary international law, the VCLT remains one of the most commonly used jurisprudential tools for arbitrators and counsel alike. This post focuses on two panels highlighting the VCLT's historic and future significance in the field of international investment law and related dispute resolution.

The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future

One of the most well-attended panels at ILW was "The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future." This panel drew inspiration from an important new book on the subject, *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution, and Future*, which showcases the ongoing legal debates concerning the VCLT as a tool for investment tribunals and its future role in the development of the investor-State dispute resolution system. The book, divided into four parts, addresses four distinct topics related to the VCLT and investment law: (i) the application of the VCLT in

investor-State disputes (in particular, Articles 31 through 33); (ii) issues related to the creation and application of treaties, and the VCLT's role in resolving them; (iii) the current debates in investor-State arbitration and the solutions provided by the VCLT; and (iv) the future of investor-State arbitration and the VCLT's role in it.

The panel was moderated by Diora Ziyaeva (Counsel, Dentons US LLP) and included as panelists the book's editors, Prof. Kiran Nasir Gore (Professorial Lecturer in Law, George Washington University Law School; Independent Counsel & Arbitrator) and Prof. Esmé Shirlow (Associate Professor, Australian National University) as well as two of the book's contributors, Shani Friedman (PhD Candidate and Research Fellow, Law Faculty, the Hebrew University of Jerusalem) and Dr. Michele Potestà (Partner, Lévy Kaufmann-Kohler).

Prof. Shirlow discussed the findings in the Appendix to the book, which summarizes the references to the VCLT in over 350 procedural orders, decisions and awards. The Appendix demonstrates not only that tribunals frequently reference the VCLT (in particular, Articles 31 through 33). The VCLT is applied not only as a matter of treaty law; parts of the VCLT reflect customary international law as applied to investment law instruments signed before the VCLT's existence and to treaties between parties that are not party to the VCLT. The enduring significance of the VCLT in investor-State disputes is thus apparent, with tribunals regularly turning to certain provisions for guidance on various challenges in different contexts.

The panelists also highlighted the role that the VCLT can play in ongoing efforts to reform the investor-State system. Prof. Gore drew on the book's contents to discuss the future of this field and the critical moment now arising for investor-State disputes in light of ongoing reform initiatives. The VCLT, as a unifying mechanism, can guide drafters of new procedural rules and substantive agreements. As a well-settled interpretive instrument, the VCLT can assist drafters in achieving greater coherence and predictability—a key consideration for those concerned about fragmentation both within international investment law and in public international law more broadly. In particular, as decisions and awards cross-reference each other and the VCLT, the resulting jurisprudence should produce a deeper understanding of the applicability of the VCLT and lead to a more harmonized approach.

Apart from its general importance to investor-State arbitration, the VCLT has a key role to play in many of the specific debates that most vex the field of investor-State arbitration at present. For example, Dr. Potestà explained that the VCLT might provide avenues for reform of the investor-State dispute resolution system. He described his view that Article 41 of the VCLT—which concerns the modification of multilateral treaties between certain parties only—provides an avenue for certain Contracting Parties to the ICSID Convention to amend its existing framework. His innovative proposal is premised on the idea that Article 41 could permit Contracting Parties to replace the existing annulment process with an appeal mechanism. According to Dr. Potestà, such an amendment would be possible, as nothing in the ICSID Convention prohibits it, non-participating States would not be affected by the modification (since when an ICSID Contracting State does not agree to a modification, it simply remains bound by the existing framework—in this case, the annulment procedure), and it is consistent with the object and purpose of the Convention.

Similarly, the VCLT has been at the heart of debates over intra-EU investor-State arbitration. As Ms. Friedman noted during the panel, Member States of the European Union have repeatedly relied on Articles 30 and 59 of the VCLT in their objections to the jurisdiction of investor-State tribunals post-*Achmea*. She built upon her book contribution to explain that investor-State tribunals have

repeatedly relied on these same Articles to reject such objections. Even the rare tribunal to have taken a different view, *Green Power v. Spain* devoted 140 paragraphs of its award to the interpretation of the Energy Charter Treaty based on the VCLT's Article 31, whatever the ultimate merits of that unique interpretation may have been.

Practicum on Human Rights

Debates framed by the VCLT also continue to surround questions of environmental and human rights claims and the jurisdiction of arbitral tribunals over such claims. The "Practicum on Human Rights" at ILW, taking the form of a mock hearing, illustrated the complexities of advancing and defending against such claims. Preeti Bhagnani (Partner at White & Case LLP) argued for the Claimant and Jennifer Haworth McCandless (Partner at Sidley Austin LLP) represented Respondent, while the mock tribunal included Michael Nolan (Independent Arbitrator, Arbitration Chambers), Mahnaz Malik (Barrister and Arbitrator, Twenty Essex) and Michael J. Stepek (Partner, Winston & Strawn LLP).

The Practicum involved counterclaims by the Respondent concerning the Claimant's violations of indigenous rights and pollution of water sources, stated in response to State allegations that the Claimants' employees committed human rights violations. The implied question at the core of the exchange was whether such claims truly "related to" an investment so as to fall within the tribunal's adjudicatory purview. Through mock opening arguments and mock tribunal deliberations, the Practicum illustrated that a tribunal in like circumstances may well turn to the VCLT to assess the arguments. When similar human rights (or even environmental) claims arise, tribunals will often be left to decide such questions—and, to do that, they will need to interpret the terms found in the treaties.

More generally, one of the major challenges that international investment tribunals have faced in recent years has been the harmonization of State's divergent treaty obligations. On the one hand, investment treaties require States to protect foreign investment. On the other hand, States also have legal obligations under international human rights law, which may, in some instances, collide with their investment treaty commitments.

It is not always straightforward, however, how these distinct obligations should relate to one another. For example, the Inter-American Court of Human Rights in *Sawhoyamaxa Indigenous Community v. Paraguay* held that the enforcement of "commercial" treaties (likely a reference to an investment treaty) "should always be compatible" with multilateral human rights agreements. Investment tribunals, in turn, have sometimes emphasized investment protections, rather than human rights, in cases where both were in play. Here too, the VCLT may provide a set of tools for tribunals grappling with such issues.

Conclusion

While the investment treaty landscape may change, and while drafters of new treaties may clarify some of the existing ambiguities, there is no indication that the VCLT will become any less relevant. It continues to be a legal instrument that guides arbitrators, counsel and States alike in the interpretation, application and termination of treaties.

See prior International Law Weekend coverage here.

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