Celebrating 50 Years of the VCLT: An Introduction

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The Vienna Convention on the Law of Treaties (***VCLT***) was adopted and opened for signature on May 23, 1969, and entered into force on January 27, 1980. In the fifty years since the VCLT was opened for signature, it 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) recognize parts of the VCLT as a restatement of customary international law.

This year marks the VCLT's golden jubilee. In commemoration, we are devoting this week on the *Kluwer Arbitration Blog* to the VCLT's history, evolution, and future. Today, we start with an introduction to the VCLT's history and development, followed by an overview of its content, legacy, and achievements. We then conclude with a brief preview of the posts you will see throughout this week as part of this commemorative series.

The VCLT: Its History and Development

Following World War II, the customary international law rules relevant to the negotiation, validity, and interpretation of treaties had grown to become a fairly

comprehensive body of rules. In 1949, the International Law Commission (***ILC***) of the United Nations, at its first session, identified the law of treaties as a high priority topic. The ILC's approach and effort is well-documented in the UN's Audiovisual Library of International Law, which includes a series of preparatory documents and photographs providing a snapshot into the various meetings of the ILC which ultimately led to the VCLT. But even this documentation simplifies the complexity and magnitude of the task faced by the ILC.

The Commission appointed four successive Special Rapporteurs for the topic: J. L. Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice and Sir Humphrey Waldock, 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.

Despite this focus, the path to the VCLT was not direct. As noted in the report of the ILC's eleventh session in June 1959 – ten years into its work – the ILC's Special Rapporteur envisaged that its work might culminate in "a code of a general character", rather than one or more international conventions:

> *"the Rapporteur believes that any codification of the law of treaties, such as the Commission is called upon to carry out, should take the form of a code and not of a draft convention. There are two reasons for this. First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based". (Report of the ILC on the work of its eleventh session (1959), A/4169, ¶ 18)*

This approach was premised on the view that "the *law* of treaties is not itself

dependent on treaty, but is part of general customary international law". (*Id.*, emphasis in original).

Yet, the decision as to the ultimate form of its output only crystallised with the work of the last Special Rapporteur, Sir Humphrey Waldock. Appointed in 1961, Sir Humphrey focused on preparing draft articles which could serve as a basis for an international convention. (Report of the ILC on the work of its fourteenth session (1962), A/5209) The ILC limited the scope of its draft articles to treaties concluded between States. That is to say, the ILC carved out treaties between States and other subjects of international law (*e.g.*, international organizations). It also decided not to deal with international agreements not in written form.

Over the next five years Sir Humphrey generated six reports. By 1966, the ILC submitted to the UN General Assembly a final draft set of articles, with a mandate to convene a convention, in Vienna, on the subject. The Vienna Convention was duly convened during 1968 and 1969. As noted in the UN's Audiovisual Library of International Law, the VCLT was the "last great codification conference" that employed a majority-rules voting method. Its "achievement was helped by two circumstances. On the one hand, the customary law covering the more technical side of treaty-making was, except for minor details, practically undisputed. In respect of the potentially more controversial chapter concerning the termination of treaties, on the other hand, many States had achieved a moderate position by balancing, in view of unknown future eventualities, the wish to escape a treaty obligation against the wish to have it kept".

The VCLT: Its Content, Legacy, and Achievements

Today, the VCLT applies to 'treaties', which are defined in Article 2(1)(a) as "international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". It is non-retroactive and only applies to treaties concluded after its entry into force (27 January 1980 for original parties). Even if the VCLT does not apply (for example, because the instrument in question is not a 'treaty' within the meaning of Article 2, or because it is a treaty concluded prior to the VCLT's entry into force), many provisions of the VCLT are accepted by States to reflect customary international

law.

As finalised, the VCLT addresses a range of topics that are fundamental to the law of treaties. It incorporates rules related to: the conclusion and entry into force of treaties (Part II); the observance, application and interpretation of treaties (Part III); the amendment and modification of treaties (Part IV); and the invalidity, termination and suspension of the operation of treaties (Part V), amongst others.

The VCLT has been influential for courts and tribunals in a range of contexts. This week's series of posts focuses primarily on how the VCLT has informed investment tribunals in their interpretation and application of investment treaties.

Indeed, the VCLT has informed the deliberations of numerous investment tribunals. Investment tribunals have repeatedly recognised that the VCLT rules on treaty interpretation in Articles 31-33 reflect customary international law. Investment tribunals have also recognised that other provisions of the VCLT reflect customary international law, including the Article 26 principle of *pacta sunt servanda*, the Article 28 principle of non-retroactivity, and the principles on third party rights/obligations in Articles 34 to 36. Investment tribunals have similarly referred to the VCLT when determining the impact of purported reservations to investment treaties. Tribunals confronted with the interaction between investment treaties and the treaties of the European Community have also drawn on the VCLT (particularly Articles 30 and 59) for guidance.

The importance of the VCLT to investment arbitration has been a recurring topic of coverage on the Blog. Many past posts have considered how investment tribunals have used the VCLT in response to both technical issues and matters relevant to broader debates. As these posts have pointed out, the VCLT has often played a pivotal role in the resolution of a range of issues. This includes, *inter alia*:

- the validity of intra-EU BITs in light of Article 59 of the VCLT and the autonomy of EU law,
- the appropriate resolution of disputes involving more than one applicable investment treaty and the implications for arbitration procedure in light of Article 30 of the VCLT,
- the continued operation (and future termination) of intra-EU BITs or of 'first generation' treaties (including of Poland and the Netherlands) in light of Article 54 of the VCLT,

- the amendment of investment treaties in light of Articles 11 and 39 of the VCLT,
- the relevance of the VCLT to interpreting joint interpretive statements under BITs, particularly in light of concerns about potential abuse of such statements by treaty parties, and
- the importance of Article 31(3)(c) of the VCLT to respond to issues of fragmentation.

A Preview Into Our VCLT Series

Each day this week, a different contributor will spotlight an aspect of the VCLT's enduring nature, exploring uses of the VCLT in the reasoning and decision-making of tribunals resolving disputes through international arbitration. Reflecting the importance of the VCLT to treaty interpretation, many of the posts in the series focus on uses of the VCLT (and its underlying principles) to the interpretation of investment treaties.

First, in Tuesday's post, Dr Roberto Castro de Figueiredo will explore the relevance of the VCLT to the ICSID Convention's notion of "investment" and the so-called *Salini* test. Dr Castro de Figueiredo's analysis will elucidate the risks of misinterpretation and misapplication of the VCLT's principles.

Next, we will have two posts which examine issues of temporal interpretation. On Wednesday, Dr Mary Mitsi will provide a preview of the methodology and research encapsulated in her new book, *The Decision-Making Process of Investor-State Arbitration Tribunals*. In particular, Dr Mitsi will consider the interpretive tools provided by the VCLT and investment arbitration precedent to explore this emerging and specialised practice. On Thursday, Dr Julian Wyatt will explore how investment tribunals have used the principle of contemporaneity in treaty interpretation. Dr Wyatt's post emphasises an important cross-cutting issue associated with the VCLT and treaty interpretation, highlighting how the same principles of treaty interpretation might be used by different international courts and tribunals in quite distinct ways.

On Friday, Dr Esmé Shirlow and Professor Michael Waibel will examine how tribunals have approached defining and regulating the use of 'supplementary means' of interpretation under Article 32 of the VCLT. The post identifies some key

challenges associated with using such materials in the interpretation of investment treaties and offers a framework to better regulate their use.

These posts will be followed by two further posts during the weekend which examine uses of the VCLT in associated contexts. On Saturday, Deyan Draguiev will explore lessons learned through the recent *Vattenfall* decision on jurisdiction. Mr Draguiev will conclude that this decision, and the *Achmea* saga more broadly, provide a prime example of the need to apply the interpretive guidance of Article 31 of the VCLT to ensure the consistent reading of a treaty. Last but not least, on Sunday, Marike Paulsson will examine the interaction of the VCLT with the New York Convention. In particular, Ms Paulsson will emphasise the obligation of national court judges to properly interpret and apply treaties, rather than following their own "hunches", which may risk breaching a State's treaty obligations.

We hope this series will highlight the consistent invocation of the VCLT in the interpretation and application of investment treaty law. This demonstrates that, despite certain trials, the VCLT has been able to withstand and offer solutions to some of the very many major challenges facing the past, present, and future of this field.

We look forward to you joining us in this celebration!

To see our full series of posts celebrating the 50th jubilee anniversary of the Vienna Convention on the Law of Treaties, click here.